# Institutionalizing Regulatory Capture as Regulatory Practice

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## Introduction

"Regulatory capture" can characterized through the existence of very close operational relationships between regulatory agencies and regulated entities, the sharing of policy goals and objectives, the favouring of the interests of regulatees, and the regular exchange of personnel between regulatory agencies and regulated firms. One of the most striking features of the past quarter century has been the extent to which what might in the past been called "regulatory capture" has been embedded or normalized into the practices and operational models of regulatory agencies at the federal and provincial levels in Canada.

The regulatory functions of governments traditionally have been understood as a distanced relationship between regulators, who set standards, conduct inspections, and carry out enforcement measures in the public interest, and regulated entities, who are assumed to largely act in their own economic self-interest. These may be private firms or even public agencies who are engaged in activities that may pose risks to the environment, or public or worker health and safety, or engage in practices that constitute fraud, harm consumers or interfere with fair competition in the marketplace.

The past 25 years have seen widespread instances of outright deregulation in Canada, where the rules that applied to regulated activities were significantly weakened, or removed.[1] The models for much of what remains of the regulatory functions of the state, under various labels of "smart,"[2] "responsive",[3] and "reflexive"[4] regulation, have placed increasing emphasis on the notion of "partnerships" between regulatory agencies and the industries whose operations they are to oversee. These arrangements have involved the delegation of significant portions of regulatory agency functions to the regulated entities themselves, including front-line compliance inspections, technical assessments and approvals, information gathering, and in some cases *de facto* setting of standards and policies. In effect, what in the past might have been described as evidence of "regulatory capture" has been incorporated into widespread regulatory practice in Canada.

Many of the concepts that have underlain these directions are embedded in the mainstream literatures on the regulatory functions of governments and public administration, and within the senior levels of public services.[5] Despite a series of high-profile failures and disasters involving these types of 'captured' or 'partnered' regulatory models, including the 2013 Lac-Megantic rail disaster[6] and the Boeing 737Max[7] aircraft debacle internationally, they remain at the core of Canadian governments' approaches to their regulatory functions, even among nominally progressive administrations. The

following chapter argues that different paths forward need to be found, ones that better balance the interests of the public and those of regulated entities.

**The emergence of 'captured' regulatory models.**

The classical vision of the role of public interest regulators operating at arm's length from those whose activities they were to oversee was always something of a caricature in the Canadian regulatory experience. Rather, in most fields of economic[8] and public goods regulation,[9] these processes were characterized by forms of "bipartite bargaining" between governments and regulated firms.[10] Where regulatory standards and requirements existed at all, they were typically the product of closed-door negotiations between the governments and the affected economic interests. In strongly unionized environments organized labour might have some influence, but for the most part non-economic interests and voices were excluded from the processes of policy formulation, decision-making and implementation.

These dynamics produced high risks of regulatory capture. The risks were particularly present in areas with strong technical dimensions, where there might be deeply shared visions and goals between regulators and regulated industries. Regulatory agency and industry staff might also have common educational backgrounds. As discussed in detail in Chapter XX,[11] the nuclear industry in Canada is often cited as a textbook case of regulatory capture. There, the original regulatory body, the Atomic Energy Control Board, was made of up the chief executives of the key Crown Corporations in the sector. Its successor, the Canadian Nuclear Safety Commission continues to be criticized for its close relationship to the industry and weak approach to its regulatory functions. The pursuit of a "liquidation-conversion project" to convert British Columbia's old-growth forests to monocultural tree farms by BC Ministry of Forests and the BC forest industry is often cited as another example of deeply embedded regulatory capture.[12]

Regulatory capture could take softer forms as well. The enforcement of environmental and similar legislation was subject to long-standing patterns of weak to non-existent enforcement of what rules there were at the federal level and among virtually of the provinces, well into the 1980s. Negotiation was the primary response, if any at all, to compliance issues, and prosecution by regulators seen as an option of last resort. In some fields, like environmental protection, penalties and fines were so low that even if convictions occurred, they were dismissed as part of the cost of doing business.[13]

**Pathways to Reform?**

These situations were subject to contradictory responses. On the one hand, the consistent failures of bipartite, captured governance models in areas like air and water pollution, waste management, public health, consumer protection, occupational health and safety, and land-use planning led to the emergence of new civil society organizations from the late 1960s onwards at the local, provincial and national levels.[14]

A central rationale for the establishment of these entities was to challenge the dominant, and apparently failing, bipartite governance models in their areas of interest.

The efforts of these new organizations led to significant policy reforms, including the formalization of mechanisms for public participation in governmental decision-making. These ranged from basic requirements for public notice and opportunities to comment on proposed local land-use planning decisions, to more formal provincial and federal environmental assessment processes for major projects. Those processes sometimes incorporated public hearings at which the evidence presented by proponents could be challenged and examined. Access to information legislation, widely adopted in Canada from the mid-1980s onwards, provided new access to internal governmental decision-making process. Conflict of interest rules were adopted with the intent of limiting the more egregious cases of direct business influence on governmental decision-making. Judicial decisions recognized the importance of public interest standing, allowing organizations and members of the public who were not directly affected by governmental decisions to challenge their validity on the basis of their wider public policy impacts.[15]

These types of reform are generally seen to have peaked in Canada in the mid- to late-1990s. The adoption of an *Environmental Bill of Rights* in Ontario in 1994,[16] for example, established basic requirements for public notice and opportunities to comment on potentially significant decisions, not only at the level of legislation, regulations and policies, but also individual facility and project approvals. Public rights to appeal such approvals were also established, along with mechanisms through which members of the public could request investigations of alleged violations of environmental laws, and request reviews of existing laws, policies and regulations.

At the federal level, 1999 amendments to the *Canadian Environmental Protection Act* established similar public notice and comment rights, although on a much narrower range of subjects.[17] Earlier (1995) amendments to the *Auditor General Act* created a petition process through which members of the public could request reviews of federal laws and policies.[18] At the international level, the 1998 United Nations Economic Commission for Europe (UNECE) *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* provided for similar basic rights at the national level among its parties.[19]

The story since the mid-1990s has been less hopeful. While efforts to broaden participation in policy and decision-making, and improve transparency and public accountability seemed to be reaching their peak, other agendas began to move to the political and policy forefront. Those forces would significantly reinforce the status of business interests in policy development, decision-making, and implementation, in many ways pushing processes back in the direction of captured and bipartite business-government decision making models.

The emergence of neo-conservativism, but which are more accurately described as *neo-liberal* paradigms, first in the Untied Kingdom and the United States, and then Canada, as exemplified by the early (1995-98) years of the 'Common Sense Revolution' in Ontario, the parallel the "Klein revolution" in Alberta,[20] and some aspects of the Conservative Mulroney government federally,[21] had major impacts on these dynamics. At an ideological level neo-liberal governments sought to minimize state interference with the market and spoke of maximizing individual freedom. They tended to see the market as the most efficient arbitrator of resource allocations. The role of the state was seen as being to facilitate private sector economic activity, particularly through the most efficient possible provision of the physical and legal infrastructure needed to attract investment, but little beyond that. [22]

In practice, avowedly neo-liberal governments more simply tended to favour established business interests in their policies, and to regard civil society and other voices as "special interests."[23] A strong emphasis was placed on de-regulation. This was initially focussed on economic deregulation, the privatization of government services and agencies, and movement in the direction of market models for services like transportation and energy, but quickly spread into realm of public goods regulation as well.[24]

The fiscal crises experienced in Canada at the federal and provincial levels in Canada in the mid-1990s reinforced these directions. The responses pursued by Canadian governments tended to emphasize expenditure reductions, particularly to the operational budgets of governmental agencies. In the environment and natural resources cases for example, reductions in the operating budgets of the relevant provincial departments and agencies in the range of 50-66 per cent were common. These constraints translated into major staffing reductions and corresponding losses of policy, scientific, inspection and enforcement capacity among regulatory agencies.[25]

Additional pressures emerged through the processes of trade liberalization, which themselves peaked with the adoption of the North American Free Trade Agreement (NAFTA) in 1994 and the World Trade Organization (WTO) agreements the following year. These agreements tended to regard national and sub-national (i.e. provincial) health, safety and environmental rules as potential non-tariff barriers to trade, and to place heavy burdens of proof on governments seeking to adopt standards above agreed (usually on a lowest common denominator basis) international norms. The increasing prevalence of investor-state dispute settlement provisions in regional and bilateral trade agreements, like Chapter 11 of the NAFTA, further strengthened the hand of business interests in dealing with governments, and made direct use of regulatory tools less likely.[26]

At the same time, conventional regulatory tools, particularly the role of law and regulation itself, came to be widely portrayed as inefficient in terms of administrative processes and costs, rigid, unresponsive, and as barriers to innovation. Direct

regulation by governments was itself was portrayed as spent as a policy instrument, unable to respond to new and complex emerging challenges like climate change.[27]

**The emergence of "smart" regulation**

The convergence of neo-liberal ideology, fiscal constraints and trade pressures, and intellectual hostility to the role of regulation as a policy instrument strongly influenced the approaches of Canadian government to their regulatory functions in the 1990s. In many cases, including Ontario during the 'common sense revolution' and in the midst of the "Klein revolution" in Alberta, the initial policy manifestations were outright deregulation - the simple removal or weakening of health, safety and environmental rules in favour of economic interests, often under the guise of removing "red tape."[28]

Public support for these dimensions of the behaviour of neo-liberal governments in Canada was never strong. Public opinion surveys showed consistent support for strong conventional regulatory roles on the part of governments in areas like the environment, even in the context of the fiscal crises of the 1990s.[29] Events like the May 2000 Walkteron Ontario drinking water contamination disaster, in which seven people died and more than 2800 became seriously ill, and a similar disaster in North Battleford, Saskatchewan the following year in which more than 5,000 people became ill, further undermined what public support there might have been for these sorts of outright deregulatory directions. Judicial inquiries[30] into both disasters highlighted the role of the governments involveds' ideological aversion to regulatory oversight, as well as major reductions in the budgets of the key regulatory agencies, as significant contributing factors to the disasters.

More sophisticated regulatory models began to emerge in the aftermath of these disasters. Applying new public management[31] themes the regulatory functions of governments, the "smart" regulation concept emphasized the building of partnerships with regulated entities and other non-state actors in the delivery of regulatory programs, allowing them to act as surrogates for direct governmental regulation. More specifically new regulatory models were grounded in arguments that it had become impossible for governments alone to carry out the required levels of standards development, inspection, and oversight, particularly in periods of fiscal restraint, and that non-state actors, including the regulated firms, needed to be enlisted as partners in the implementation of regulatory systems. Smart regulation models were also intended to reward industry for going beyond compliance with existing regulations. [32]

These directions were explicitly embraced by the Canadian federal government's External Advisory Committee on Smart Regulation,[33] established by the Privy Council Office (PCO) in the early 2000s, and in subsequent PCO and Treasury Board

Secretariat policies.[34] The concepts were operationalized through a series of increasingly complex regulatory management systems, and a succession of regulatory modernization and streamlining processes. These systems embedded extensive analytical (e.g. cost/benefit, international trade, and business impacts) and procedural (e.g. consultation with external, particularly business stakeholders, other levels of government (e.g. provinces) and internally with other agencies and departments) requirements around the introduction of new regulatory requirements. Their effective result has been to make the introduction of new regulatory requirements extremely costly, time-consuming and difficult.[35]

That point was reinforced by adoption of "one for one" rules for new regulatory requirements at federal[36] and provincial levels[37] which required that regulatory "burdens" be removed in proportion to any new regulatory requirements. Strikingly these types of approaches were taken by governments that would place themselves in the centre of the political spectrum, including the Liberal Wynne government in Ontario, as well as those embracing more explicitly neo-liberal or conservative philosophies, like Stephen Harper's Conservative federal government.[38]

Within existing regulatory regimes at federal level, like those around transportation safety and food and drugs, 'smart' regulatory directions were manifested in what have been termed "meta-regulatory"[39] regimes. These have emphasized the development of internal management systems by regulated entities, and the oversight of those systems by regulatory agencies, rather than direct regulation. At the provincial level, where the bulk of day-to-day regulatory oversight activities in areas like the environment, public health and safety occur, regulatory practices have emphasized a number of different models. These have included permit-by-rule systems, the use of delegated administrative authorities, and self-inspection and reporting systems. All of the models seen at the federal and provincial levels, which are discussed in detail in the following sections, emphasize "partnerships" with regulated entities, and the transfer significant analytical, oversight and monitoring functions to those actors.

*Registrations/Permit by rule*

"Registration" or "permit-by-rule" models were first adopted in Alberta,[40] during the Klein period, following approaches of some US states. It has subsequently become the core of modernizations of the environmental and natural resource management approvals processes in Saskatchewan,[41] Ontario[42] and other provinces.

Under the registration model the relevant government departments and agencies no longer actively review most applications for approvals of regulated activities under the legislation they administer. Rather, proponents simply affirm their compliance with a set of required practices and procedures by "registering" with the regulating agency before proceeding with their proposed activities.[43] Under the model, the responsibility (and cost) of assessing compliance with the relevant regulatory requirements is transferred from government officials to proponents.

The permit-by-rule model has been subject to considerable criticism from non-governmental organizations. In the case of environmental regulation, the loss of proactive assessments of potentially harmful activities, the inability of the process to address the cumulative effects of these activities, and the loss opportunities for the public to comment on proposals before they are approved and appeal the resulting decisions, have been important points of concern.[44]

*Delegated Administrative Authorities*

Delegated Administrative Authorities (DAAs) are not-for-profit corporations, usually created by statute, for the purpose of assuming the technical, safety or economic regulatory responsibilities of a previously existing government agency relation to a specific set of activities or sector. The boards of directors of DAAs are typically made up of representatives of the sectors whose activities they are to oversee, with some (a minority) members appointed by government. DAAs first emerged in the early 1990s during the Klein era in Alberta, but the model was subsequently adopted in Ontario (Technical Safety and Standards Authority (TSSA) and Electrical Safety Authority (ESA)) and British Columbia (BC Safety Authority). DAAs have been assigned responsibility for regulating a wide range of activities with significant health, safety and environmental implications, including boilers and pressure vessels, petroleum and natural gas handling and storage facilities.[45] DAAs are widely employed in relation to consumer protection regulation, including travel, real estate, new home warranties, used car sales, funeral services, condominium management and retirement homes.[46]

The DAA model has been controversial. Proponents of the model argue that it offers a more efficient mechanism for the regulatory oversight of 'mature' industries.[47] Critics of the model point out that it embeds fundamental conflicts of interest in terms of the roles of the regulator and regulated sector, that as private corporations DAAs initially escaped most of the oversight mechanisms, such as audits by Auditor-Generals and the application of freedom of information legislation that would normally apply to government agencies, and blurred lines of oversight, control, accountability and responsibility.[48] The performance of DAAs as regulators has been the subject of considerable criticism as well, particularly in the after a major propane explosion and fire at a TSSA regulated facility in Toronto in 2008.[49] In the aftermath of that event, the Ontario government adopted legislation significantly strengthening its oversight and control of DAAs.[50]

A further audit of the TSSA's performance tabled in 2018 was highly critical of the authority's performance,[51] and highlighted the continued dominance of DAA boards by industry-related interests. An October 2019 audit concluded that most public complaints about the DAA responsible for overseeing new home warranties' (Tarion) dispute resolution process were justified, and concluded the Ontario Home Builders' Association (OHBA) "had disproportionate influence over Tarion's decisions and operations."[52] The 2020 audit highlighted major issues with the Retirement Homes Regulatory Authority, Condominium Management Regulatory Authority, Condominium Authority, and

Bereavement Authority of Ontario.[53] The province has remained an enthusiastic supporter of the model for any significant new provincial regulatory functions.[54]

*Self-inspection and reporting systems*

A third model, seen in resource management at the provincial level have been self-inspection and compliance reporting regimes. Under these systems, provincially employed field inspectors have largely been withdrawn, or their numbers significantly reduced. Instead resource extraction licence-holders, such as Sustainable Forestry Licence and aggregate (gravel pits and quarries) licence holders in Ontario, are required to conduct compliance inspections of their own operations. They are then required to report on their compliance with the relevant regulations related such things as resource harvesting, road construction, protection of fish habitat and ecologically significant areas like endangered species habitat, and fire prevention. In theory the relevant ministry would follow-up with enforcement actions relation to any instances of non-compliance reported. [55] A similar compliance self-reporting system for forestry exists in Alberta.[56]

Beyond the obvious concerns related to the conflicts of interest embedded in these systems, it has been pointed out that the regimes entail significant losses of first hand information about the activities and practices of licence holders, by the relevant regulatory agencies.[57] In some cases the regimes have gone further, and delegated responsibility for the gathering and analysis of data related to resource extraction activities and needs to non-profit corporations controlled by industry associations. The Ontario Aggregate Resources Corporation (TOARC) is a prominent example of such an arrangement. TOARC also holds in trust the funds provided by aggregate operators to guarantee the remediation of pits and quarries when operations are completed. [58]

*Federal Models: Reflexive meta-regulatory regimes.*

While DAAs, registration and self-inspection systems have dominated provincial efforts at the restructuring of their environmental regulatory systems over the past two decades the federal government has taken a different approach. In situations where the federal government is the front-line safety regulator, as is the case with foods, drug and rail, air and marine transportation, it has adopted a model of management systems oversight. Under this model, regulated entities are required to develop their own strategies for protecting public safety and health in their operations and products. These strategies are then subject to approval by the relevant federal regulator. Once the plans are approved, the federal government largely relies on the regulated firms to conduct internal inspections of their own operations for compliance with their approved plans. Federal regulatory oversight and inspection is then focussed on reports generated by these internal processes rather than the actual observation of the regulated firms' activities in the field.

The model has been the subject of extensive criticism from public safety advocates, organized labour in the affected sectors, the Transportation Safety Board

and the Auditor-General of Canada. These criticisms have focussed on the loss of first-hand knowledge of operational practices on the part of federal regulators, reliance on the regulated firms themselves to establish appropriate levels safety and risk, conduct inspections and report on their own compliance to regulators, the lack of transparency with respect to the safety management plans that are developed, lack of adequate oversight capacity on the part of federal regulators, poor monitoring of outcomes, failures on the part of the regulatory agencies to adequately train their own staff on implementation of the new systems or to identify companies and facilities where risks of problems are high.[59] These criticisms have been heightened by a number of significant incidents where such systems have been in place, including the Maple Leaf Foods Listeria contamination incident in 2008 which resulted in 23 deaths,[60] the XL Foods meat contamination episode which led to a massive meat recall in 2012,[61] and most prominently the July 2013 Lac-Megantic Rail disaster in which 47 townspeople were killed,[62] as well subsequent railway and air accidents.[63]

**Paths forward (or backwards?)**

All of the models outlined above emphasize the notion of "partnerships" between regulators and regulated firms, and the delegation of a variety of functions traditionally carried out by regulators to those entities. The result can been seen as a formalization of what used to be called regulatory capture – a fusing of the perceived interests of government and regulated firms by the agencies intended to regulate their behaviour. In fact, the modern regulatory models go further, effectively erasing the normative and operational division that was understood to exist between regulators and the firms and other actors whose activities they were to oversee in the public interest.

Rather, all of these models place regulated firms in unique positions relative to governments. Effectively the state now depends on them to carry out key functions and to provide critical information around resource management, public safety and environmental protection. The overall results are "intense" operational relationships between state and regulated entities. These relationships are not shared by any other actor in the regulatory process, and put regulated firms in unique positions to influence policy formation, implementation and evaluation. The power positions of already dominant economic actors in regulated sectors are significantly strengthened in the result.[64]

Smart and partnered regulatory models have been subject to extensive critiques for these and other reasons. They have been associated with poor, and in some cases, like the Lac-Meganic disaster, catastrophic outcomes. They are seen to embed significant conflicts of interest on the part of regulated entities, and to blur lines of accountability and responsibility between state and non-state actors in the regulatory process. They carry with them an implicit breakdown of supposed separations of policy and operational functions between government. Instead private sector actors carrying operational responsibilities enter into unique opportunities to formulate and implement policy. Smart and partnered regulatory models have carried with them significant

breakdowns of information flows, and losses of first-hand knowledge of the actual operational practices of regulated entities, on the part of the regulatory agencies that are to oversee their activities. The siloing of information and activities between agencies and other actors has been significantly reinforced.[65]

Despite these breakdowns, governments have continued to pursue 'smart' regulation models. Their responses to at times major, failures have been to double down on these models rather than consider whether different regulatory approaches might offer better outcomes. These tendencies have cut across the political orientations of governments at the federal and provincial levels.

In Ontario, for example, while the DAA model was originally a product of the Harris government's neo-liberal approach to governance,[66] it was enthusiastically embraced by the succeeding Liberal governments of Dalton McGuinty and Kathleen Wynne.[67] The province continued to rely on the DAA model for new regulatory functions, most recently around retirement homes and waste management and diversion, despite the Sunrise disaster, serious problems with the Tarion Home Warranty program[68] and the identification gaps with the TSSA's operations by the Provincial Auditor. [69]

Similarly Transport Canada's response to the Lac-Meganic disaster and more recent railway accidents under both the Conservative Harper and Liberal Trudeau governments has been to deepen its commitment to the SMS-based regulatory model, rather than reconsidering its approach.[70] The Boeing MAX episode, where serious safety risks in the aircraft's design were overlooked as the US Federal Aviation Administration relied heavily on the manufacturer's own safety assessments, has led to arguments for a more independent and assertive role on the part of regulators.[71] Whether these developments will have a wider impact remains unknown.

In the meantime, even before the COVID-19 pandemic, some new provincial governments, such as that elected in Ontario in 2018, have been dropping even the pretense of acting as public interest regulators. There have been numerous instances of outright deregulation, eliminating rules and requirements in areas like climate change, industrial water pollution, protection species at risk, pesticides, environmental assessment and toxic chemicals management.[72] Moreover, in some provinces there has increasingly assertive uses of state power on behalf of economic interests. In Ontario, for example, this has been most pronounced in the re-writing of land-use planning rules in favour of developers,[73] and the direct use of ministerial authority to override local planning processes in support of development interests.[74] In the context of COVID-19, the province has proposed legislation that would effectively grant long-term care home owners and operator immunity from liability for the more than 1800 resident deaths that occurred in their facilities during first COVID-19 wave. There is strong evidence that a significant portion of those fatalities were the products neglect and poor care, rather than COVID-19 itself.[75]

## Conclusions

The evolution of the regulatory functions of governments over the past three decades has raised fundamental questions about the role of the state itself in the protection of public goods. Traditional regulatory models were grounded in the notion that there was a public interest, that was separate and had to be protected from, the private interests of regulated entities. In effect, state power needed to be deployed to protect that public interest. In contrast, modern regulatory models have emphasized the merging of public and private interests and stressed the roles of regulated entities as partners in the regulatory process itself.

This represents a major shift in the normative frame for regulatory activities on the part of the state. Within a conventional frame the merging of public and private interests carried with it significant risks of negative outcomes – "regulatory capture" within the framework of this volume – a situation that should not be permitted to occur, and around which corrective measures should be taken if it does. Instead, such relationships have been normalized as part of regulatory practice. In fact, these notions have become deeply embedded in senior management levels of government, and in parts of the academic literatures on public administration and regulatory and administrative law.[76]

The different manifestations of partnered regulatory models have shown remarkable persistence in the face of, at times, catastrophic failures. The reasons for this persistence is unclear. Weakened state capacity, making the assumption of more assertive and direct regulatory activities difficult without new revenue sources, may be a factor. At the political level there has been an unwillingness to carry through on taking more assertive approaches regulatory functions in the face of concerns on the part of regulated firms about competitiveness, and the constraints imposed by international trade rules. All of these factors have combined to undermine the perceived viability of alternative approaches.

The COVID-19 pandemic has again highlighted the importance of the functions of the governments in protecting public goods and providing core services. At the same time, the concept of a public interest that is separate from private interests needs to be reintroduced into political discourses, and the importance of there being a distance between the roles of regulator and the regulated, re-emphasized. These shifts will require strong mechanisms for transparency, accountability, independent evaluations and public reporting of outcomes and performance. Mechanisms for public participation in regulatory processes, including notice and comment requirements, rights of third-party appeal in the public interest, and decision-making by truly independent entities all need to be significantly strengthened to counteract the drift back towards bipartitism. A strengthening of the capacity of regulatory agencies will also be essential.

These types of reforms are especially important in areas were core public goods - public safety, public health, and the environment – are at stake. Even early proponents

of “smart” and partnered regulatory models have concluded that in these situations direct regulation by the state is appropriate and needed to underpin reflexive responses on the part of regulated entities.[77]

Reflexive responses, like the development of internal safety and environmental management systems on part of regulated entities are highly desirable. However, they can be achieved in ways that do not require intense operational partnerships between the regulator and regulated such as those seen in the federal “meta-regulatory” regimes in areas like transportation safety. The strengthening of legislative requirements around company officers and directors’ duties and liabilities could have similar impacts.

More distributed, partnership-based regulatory models may be appropriate for complex, distributed problems, like watershed management, that do not present direct threats to public goods, and where there are diverse constituencies of strong civil society actors able to counteract the influence of strong economic interests. However, these types of circumstances tend to be relatively rare, and still require the state to play a significant mediative role.

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[1] A prominent example would be the “Responsible Resource Development” provisions of the Harper government’s 2012 budget implementation Bill C-38, significantly weakening the provisions of the *Canadian Environmental Assessment Act, Fisheries Act* and *Navigable Waters Protection Act.* See also Winfield, M., “The Environment, ‘Responsible Resource Development’ and Evidence Based Policy-Making in Canada”, for Shaun Young ed., *Evidence Based Policy-Making in Canada* (Toronto: Oxford University Press, 2013)**.**

[2] External Advisory Committee on Smart Regulation, *Smart Regulation: A Regulatory Strategy for Canada* (Ottawa: Government of Canada, 2004).

[3] Braithwaite, John, “The essence of responsive regulation,” *UBC Law Review*. 44 (2011). 475-520.

[4] E.Brousseau, T.Dedeurwaedrere and B.Siebenhuner, *Reflexive Governance for Global Public Goods* (Cambridge MA: MIT Press, 2012).

[5] See for example, Neil Gunningham & Darren Sinclair, *Designing Smart Regulation* (Paris: OECD Forum on Sustainable Development, December 2004) online www.oecd.org/env/outreach/33947759.pdf.

[6] See B.Campbell, *The Lac-Mégantic Rail Disaster: Public Betrayal, Justice Denied* (Toronto: James Lorimer and Co., 2018).

[7] D.Schaper and S.Neuman, “FAA Clears Boeing's 737 Max To Resume Passenger Service,’ NPR, November 18, 2020. https://www.npr.org/2020/11/18/936080917/faa-gives-boeing-ok-to-resume-737-max-passenger-service.

[8] Economic regulation refers to the rules controlling prices that firms in an industry can charge, or the rules setting conditions of market entry or exit for producers

[9] Public goods regulation covers such matters as occupational health and safety, consumer protection, environmental quality, and the conservation of natural resources, which that would be threatened if left to the marketplace.

[10] G.Hoberg, “Environmental Policy; Alternative Styles,” in M.Atkinson, Ed., *Governing Canada: Institutions and Public Policy.* (Toronto: Harcourt Brace Jovanovich Canada Inc, 1993), 307-342.

[11] Theresa McClenaghan Chapter

[12] See generally J.Wilson,"Wilderness Politics in B.C.: The Business Dominated State and the Containment of Environmentalism," inW.D. Coleman and G.Skogstad, Policy Communities and Public Policy in Canada: Structural Approach(Mississauga: Copp Clark Pitman Ltd., 1990)
[13] See, for example, T.Schrecker, *The Political Economy of Environmental Hazards* (Ottawa:Law Reform Commission of Canada, 1984); I.Bernier and A.Lajoie, eds., *Consumer Protection,Environmental Law and Corporate Power* (Toronto: University of Toronto Press, 1985).
[14] See, for example, R.Paelke, "The Environmental Movement in Canada," in VanNijnatten and Boardman Canadian Environmental Policy and Politics 3rd Edition (Toronto: Oxford University Press, 2009). See also R.O'Connor The First Green Wave: Pollution Probe and the Origins of Environmental Activism in Ontario (Vancouver UBC Press, 2014).
[15] Winfield, M., *A New Era of Environmental Governance in Canada: Better Decisions Regarding Infrastructure and Resource Development Projects* (Toronto: George Cedric Metcalf Foundation, 2016).
[16] S.O. 1993, c. 28
[17] *Canadian Environmental Protection Act, 1999* (S.C. 1999, c. 33), Part II.
[18] Auditor General of Canada, *Getting Answers—A Guide to the Environmental Petitions Process*, https://www.oag-bvg.gc.ca/internet/english/pet_lp_e_930.html.
[19] https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf. Canada is a member of the UNECE, but did not sign or ratify the convention.
[20] See generally M.Lisac, *The Klein Revolution* (Edmonton: NeWest Press, 1995).
[21] K.R. Nossel, "The Mulroney Years: Transformation and Tumult," *Policy Options*, June 1, 2003. https://policyoptions.irpp.org/magazines/the-best-pms-in-the-past-50-years/the-mulroney-years-transformation-and-tumult/.
[22] On neo-liberalism and the environment, see A. Kranjc, "Whither Ontario's Environment: Neo-Conservatism and the Decline of the Ministry of the Environment," *Canadian Public Policy* 26, 1 (March 2000)<: pages?>. 111-127

[23] See, for example, The Hon.J.Oliver, Minister of Natural Resources, "An open letter from Natural Resources Minister Joe Oliver," published in the *Globe and Mail*, January 9, 2012.
[24] See, for example, Adam Tickell and Jamie A. Peck "Social regulation after Fordism:regulation theory, neo-liberalism and the global-local nexus," *Economy and Society*, 1995 24:3, 357-386, DOI: 10.1080/03085149500000015. See also, Environmental Commissioner of Ontario, *The Ontario Regulation And Policy-Making Process in A Comparative Context: Exploring The Possibilities For Reform* (Toronto: ECO, 1996), http://media.assets.eco.on.ca/archive/2015/03/1996-regulation-and-policy-making-reform.pdf.
[25] Winfield, M., "Environmental Policy and Federalism," in H. Bakvis and G. Skogstad, eds., *Canadian Federalism: Performance, Effectiveness and Legitimacy* (Toronto: Oxford University Press, 2001) 124–137.
[26] See generally International Institute for Sustainable Development (IISD) https://www.iisd.org/topics/investment-law-policy. See also Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007); Tienhaara, K. "Regulatory chill and the threat of arbitration: A view from political science," in C. Brown & K. Miles (Eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press 2011). (pp. 606-628).
[27] Gunningham, N., and D.Sinclair 1998."Designing Smart Regulation." Paris: OECD
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