

Regulatory Responsibility

Notes for remarks to Canadian Institute for the Administration of Justice

By Alan Nymark

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Introduction

Let me first say what a pleasure it is to be here today talking about regulatory matters as one of the fundamental pillars of good governance in modern society. There are too few such fora in this day and age. We are constantly bombarded with an ideological and business view of regulation born of neoclassical and neoliberal traditions which gets very little serious scrutiny in legislatures or from the media.

The great failures of poor regulatory systems since the turn of the millennium in the housing and financial sectors in the U.S. and the E.U for example, have caused untold hardship for hundreds of millions if not billions of people due to the worst recession since the 1930's. The failure of governments globally to act on the basis of a global consensus of the scientific community that the risks of failing to take immediate and forceful action to moderate climate change may well result in catastrophic consequences within a generation.

So the debate over the role of regulation in society is not some boring backwater of public policy. It strikes at the heart of what kind of society we are and the society we want for generations to follow.

I Regulatory System is at Risk

The first point I want to underline is that the system within which this drama plays out is , if not broken, is seriously at risk. Perhaps to over-generalize:

- Ideology too often trumps evidence
- Morality and social justice lose out to efficiency
- Business has an inside seat of influence
- Economics loses to the market
- Regulators are starved for resources , and
- Civil Society is ignored if not demonized.

These are not small issues. Given time constraints, perhaps we can pick up on some of these themes in the discussion period. However let me at least posit that in many jurisdictions these shortfalls are seriously affecting the public trust. The work of the Pew Centre and Ekos document this decline in public trust and the link to the shift from public to private interests in public policy. Whether in the fields of health and safety, financial soundness , sustainability or growth and competitiveness, we are seeing the public expressing less confidence in governments' ability to solve long term systemic issues. Regulatory governance has to accept its share of responsibility for this decline in public trust ; and, to tell the public what it plans to do about it.

II The Public Trust and Regulatory Dogma

My second point is more a matter of execution.

I am a fan of the Danish filmmaker Lars Von Trier. He created a style of filmmaking in the mid nineteen nineties called Dogme 95. Essentially he captured the essence of filmmaking, reduced the "rules" or "conventions" to a minimum and let filmmakers create within those constraints. Good technique perhaps in filmmaking, not so much in guarding the public good. Having canvassed OECD countries to compare regulatory regimes, a colleague Jessica Edge and I drew 10 operating principles for modern regulatory systems which one might call Dogme 2012.

We developed these principles at some length in a paper for The School of Public Policy and Administration at Carleton University:

1. Regulatory programs must be broad in scope and a priority at the highest levels of government.
2. Regulation should be results oriented, effective and respond quickly to new issues and emerging concerns.
3. Regulation must be cost-efficient.
4. Regulators must take into account potential risks and their possible unintended impacts.
5. Regulation must avoid duplication and inconsistency intra and inter-jurisdictionally
6. Regulation must consider the international context
7. Regulation must be transparent and involve meaningful input from stakeholders.
8. Regulations must be regularly and systematically reviewed.

9. There must be an adequate number of regulatory staff with sufficient training and expertise.
10. The choice of regulatory instrument is critical and should be transparently assessed.

Easily said, more difficult in execution. I would suggest we might gain consensus around such a list of operational principles. But do we have any idea where we stand in Canada on how well we perform against each of these principles ? We certainly have had our share of reports and task forces on the issue of regulatory reform, especially from the perspective of streamlining and red tape reduction. In this context, I would highlight a very positive effort called World Class Regulator at Environment Canada to strengthen the process to select, develop and implement regulatory instruments . This project has just begun reporting out on their website this summer. Perhaps it would be helpful if we had an independent assessment of measurable performance and a transparent accountability framework which is regularly reported out and debated in legislatures and parliaments.

The OECD has produced over the last 20 years three sets of common principles for regulatory systems among its membership. Having declared performance to be "I'm all right Jack " just before the financial crash in 2007, the OECD has just released an update of their principles in 2012. While maintaining a strong neoclassical framework it broadens the purposes of regulation beyond a market-based competitive framework and calls for greater monitoring, transparency and accountability as well as a "whole of government" approach. My colleague Dr. Tamara Krawchenko at the Regulatory Governance Initiative at Carleton has done a good job of comparing Canadian regulatory performance against this new set of OECD principles. As they

are just hot off the press, it will be interesting to see how jurisdictions in Canada and elsewhere adjust their regulatory systems to meet this proposed new international framework.

Before I leave my second point, let me emphasize three elements of these principles which I think in Canada are, in my judgment, contributing to a growing lack of public trust:

1. Evidence-based decision-making. The quality of analysis around instrument choice, effectiveness and cost/benefit should be the foundation of good regulation. Without major improvement in our analytical capacity and transparency around evidence, we are playing into the hands of ideology-based decisions and blurring of the public interest. This debate over the value of evidence was stormy in the Bush administration and there are clearly signs of it tainting the regulatory environment in Canada. Allan Gregg has recently presented a brilliant analysis of this "assault on reason" in many jurisdictions and the implications for democracy.
2. It is the public good at stake here. Narrow, private or regional and sectoral interests often have powerful voices to influence the policy and regulatory processes. Consultation and engagement is not seen as a priority in many jurisdictions, more a matter of lip-service than conviction and innovation. Public trust and confidence in governmental institutions demands respect for due process, openness, engagement and a laser-like identification with the public good, while considering the private interests at stake.

3. These are complex issues. They require a professional cadre of public servants who are attracted, trained and retained to conduct research, analysis and public consultations and of course legal drafting in which the public can have confidence. The knowledge base of our regulatory system is at risk. Our universities could help more. I am talking about the larger standing of a critical segment of our public service which in many jurisdictions would appear to be under siege rather than celebrated. Where do we stand in this regard especially in this era of fiscal restraint? Do we have a robust plan to strengthen our regulatory community ? How do we measure that ?

III Well-being and the public trust

My third and final point is the nature and design of the decision-making process itself and its impact on public trust. We are all aware that to pursue a long list of priorities is a recipe for confusion and lack of progress. On the other hand, to pursue a particular priority such as efficiency or cost minimization to the exclusion of others or in an overly narrow context risks winning the battle but losing the war. These are lessons well rehearsed in the field of policy development. I believe our approach to regulatory governance would benefit from a similar process of situating regulatory matters more firmly within the array of public policy instruments and in a real world context as seen by the public. The public interest is often broadly based and related to the concept of well-being. Too often our analysis is tied to traditional income related measures. Ben Bernanke has raised this issue in three important speeches in the last two years reminding us that that even in neo-classical economics, public welfare is much broader than income. Increasingly alternative measures of well-being are becoming available and reliable.

David Cameron is looking at how to integrate this thinking on well-being into British public administration.

To capture the benefits of regulation a more comprehensive approach is worth exploring. I have two suggestions:

1. A government's strategic objectives, whether social, economic, environmental or security should be more explicitly and holistically taken into account in designing and implementing regulations and be more explicitly tied to the concept of economic welfare as well as social justice and morality ; and
2. Integrated decision-making as a specific methodology should be encouraged as a means for example, to simultaneously optimize regulatory approaches to inequality and growth.

To sum up, in many jurisdictions, regulatory governance has failed to keep up with the demands of modern society and there is grave danger this is becoming a significant contributor to the decline in public trust in governance more generally. The political and media interest in regulation is too often focused on the costs and not the benefits of regulation. And regulators are too often operating within an inappropriately narrow context to effectively protect the public good and are too often not equipped or supported in the conduct of their responsibilities.

I believe greater focus on the benefits of regulation and renewed support for our regulators would contribute greatly to public trust and strengthen our democracy.