



DEATH BY 130,000 CUTS:

Improving Canada's Regulatory
Competitiveness

May 2018



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INTRODUCTION

The long list of federal regulations in Canada includes the National Capital Commission (NCC) Traffic and Property Regulations.

In 2016, those regulations were the basis for which the Crown Corporation shut down a lemonade stand operated by seven- and five-year-old sisters on NCC property in Ottawa. Their transgression: the girls had failed to acquire a \$1,500-per-day permit from the NCC. The incident garnered Canada-wide media coverage and the NCC quickly apologized and backtracked, allowing the children to resume selling lemonade the next weekend. To avoid similar incidents, the NCC developed a special permit for the following summer that would allow kids to sell lemonade or other goods on specific NCC property during nine Sundays. The new permit had 15 requirements, including but not limited to a requirement for bilingual signage, stand size restrictions, adherence to municipal and provincial health and safety regulations, an indemnification clause, and reporting of all revenues to the NCC. The strange episode highlighted an unfortunate reality. Of all the

skills needed to do business in Canada—for large multinational corporations and budding entrepreneurs alike—perhaps the most important is learning to navigate government regulations and bureaucracy.

While there is no measure of the total number of regulations across all levels of government faced by Canadian businesses, there are figures that help illustrate the extent of regulation in the economy. In 2015, the federal government reported that there are 131,754 federal requirements that impose an administrative burden on businesses. This is an increase from 129,860 in 2014, the first year the federal government started collecting this data from regulators.¹ If that number seems imposing, the former chief economic analyst at Statistics Canada observed that Ontario has more than 380,000 regulations on the books.²

Well-designed and well-implemented regulations are one of the governing tools used to help preserve the well-being of citizens and the environment. These rules permeate all aspects of business activity to the point that Canada and other developed countries'

¹ Treasury Board Secretariat, 2015-16 Annual Report: Reducing Regulatory Administrative Burden and Improving Service Predictability (Ottawa: Government of Canada, 2016).

² Phillip Cross, "Ontario's staggering 380,000 regulations are warping the way business runs," National Post, May 3, 2016.

economic orthodoxy can be described as regulated capitalism. For businesses, a stable, rules-based economy can help maintain market integrity, certainty and protection for investment and business operations. However, Canada's complex network of overlapping regulations from all levels of government has created a costly and uncertain environment in which to operate a business. Onerous compliance costs along with inefficient and unpredictable regulatory processes divert business resources away from more productive activities. This is especially true for small businesses, which lack the specialized and dedicated compliance resources of larger firms.

In recent years, federal, provincial and territorial governments have initiated regulatory policy reforms. Individually, these efforts have improved certain processes and reduced some administrative burden. Collectively, these improvements have been outpaced by the increasing number and complexity of new regulations. This escalation has reduced the productivity and competitiveness of Canadian firms while making Canada less attractive to foreign investment.



*"In 2015, the federal government reported that there are **131,754 federal requirements** that impose an administrative burden on businesses."*

The good news is that the solutions to Canada's regulatory problems are within the government's control. A concerted federal effort to modernize Canada's regulatory frameworks can improve environmental, social and economic protections while increasing investment, growth and the number of jobs for Canadians. What follows is an assessment of Canada's regulatory shortcomings, as well as recommendations on how governments and business can work together to fix them.



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THE COSTS OF REGULATION

Regulations are the rules issued by an executive authority or regulatory agency of a government that have the force of law.

Canadian companies are subject to regulations enabled by federal and provincial laws, with regulatory development

and enforcement delegated to hundreds of different regulatory authorities. The independence of these authorities varies, from self-governing and independent agencies to line departments headed by government ministers. Organisation for Economic Co-operation and Development (OECD) work has classified three general types of regulation:³

***Economic regulation** is intended to improve the efficiency of markets in delivering goods and services. It can include government-imposed restrictions on firm decisions over prices, quantity, service and entry and exit.*



***Social regulation** is intended to protect the well-being and rights of society at large. It can include protection of the environment, health and safety in the workplace, protection of the rights of workers, and protection of consumers from fraudulent or incompetent behavior by sellers.*



***Administrative regulation** relates to general government management of the operation of the public and private sectors. It can include regulations relating to taxes, business operations, distribution systems, health care administration and intellectual property rights.*



³ OECD Directorate for Science, Technology and Industry, Regulatory Reform and Innovation (OECD, n.d.).

Regulations impose costs on businesses that affect their behaviour, including capital investment, productivity and innovation. They also result in opportunity costs by focusing employees' time on administrative paperwork and other compliance tasks. As summarized in a report commissioned by the United Kingdom's Department of Innovation and Skills, these costs shape the economy in profound ways:

...the relationship between regulation and growth is complex. Regulations can have a positive impact on growth by removing certain market failures and improving economic efficiency. Regulations can have a negative impact on growth by creating substantial compliance costs, undesirable market distortions or unintended consequences. The overall impact of regulation on growth depends on which effect is larger and this can vary depending on particular circumstances.⁴



"Inefficient processes and poorly conceived regulations result in less business creation, expansion, investment and innovation, and fewer economic opportunities for Canadians. We need better processes and well-designed regulations to help minimize the costs to business while improving public health and safety benefits."

Perrin Beatty, President and CEO, Canadian Chamber of Commerce

⁴ Frontier Economics, *The Impact of Regulation on Growth* (London: Department of Business, Innovation and Skills, 2012).



While economic models can measure or predict the impacts of individual regulations, it is much more difficult to measure the aggregate and unintended effects of all regulations on businesses and the economy. In the United States, a 2016 study from the Mercatus Center estimated the economic effects of federal regulations on 22 industries from 1977 to 2012. The study found that, on a net basis, cumulated regulations slowed the growth of the entire U.S. economy by an average of 0.8% per year. The study also found that if regulatory burden in the United States was held constant at the levels observed in 1980, the U.S. economy would be nearly 25% larger. In other words, the growth of regulation since 1980 has cost the United States roughly \$4 trillion in GDP (nearly \$13,000 per person) in 2012.⁵ While the study does not account for the positive benefits of regulations, it does demonstrate their powerful impacts on growth.

The differing levels of regulatory intervention between countries can significantly influence their economic growth relative to one another. One OECD working paper examining 23 industries in 18 countries concluded that regulatory differences explain a significant part of inter-country variances in innovation and productivity, both of which are key drivers of long-term competitiveness.⁶ These findings are reinforced by other international and economic analyses and literature that demonstrate the downward pressure regulation creates on economic growth.

⁵ Bentley Coffey, Patrick McLaughlin and Pietro Peretto, *The Cumulative Cost of Regulations* (Arlington, VA: Mercatus Center, George Mason University, 2016).

⁶ Stefano Scarpetta and Thierry Tresselt, *Productivity and Convergence in a Panel of OECD Industries: Do Regulations and Institutions Matter?* (Paris: OECD Publishing, 2002).



CANADA'S COMPETITIVE POSITION

How does Canada's regulatory environment compare to other countries?

The Global Competitiveness Index is an annual exercise by the World Economic Forum to track the performance of 137 countries on 12 pillars of competitiveness (measured by productivity improvements). In the 2017–2018 index, Canada ranks 14th overall. While that could be considered an enviable position, it is less impressive considering Canada ranked as high as ninth in 2009–2010—and governments have invested significant policy and fiscal resources into improving Canada's low productivity growth over the past two decades.

In the 2017–2018 index, Canada performs well in a number of sub-categories, including labour market efficiency, quality of education and the soundness of Canadian banks. One area of clear weakness is the sub-category of burden of government regulation, in which Canada ranks 38th. Canada is bested in this category by developed economies including Germany (7th) and the United States (12th), and developing markets including China (18th) and India (20th). Canada's high burden of government regulation compared to other countries is reinforced by a survey of business leaders for the Global Competitiveness



"Canada's high burden of government regulation compared to other countries is reinforced by a survey of business leaders for the Global Competitiveness Index that identified 'inefficient government bureaucracy' as the single most problematic factor for doing business in Canada"

Index that identified "inefficient government bureaucracy" as the single most problematic factor for doing business in Canada.⁷

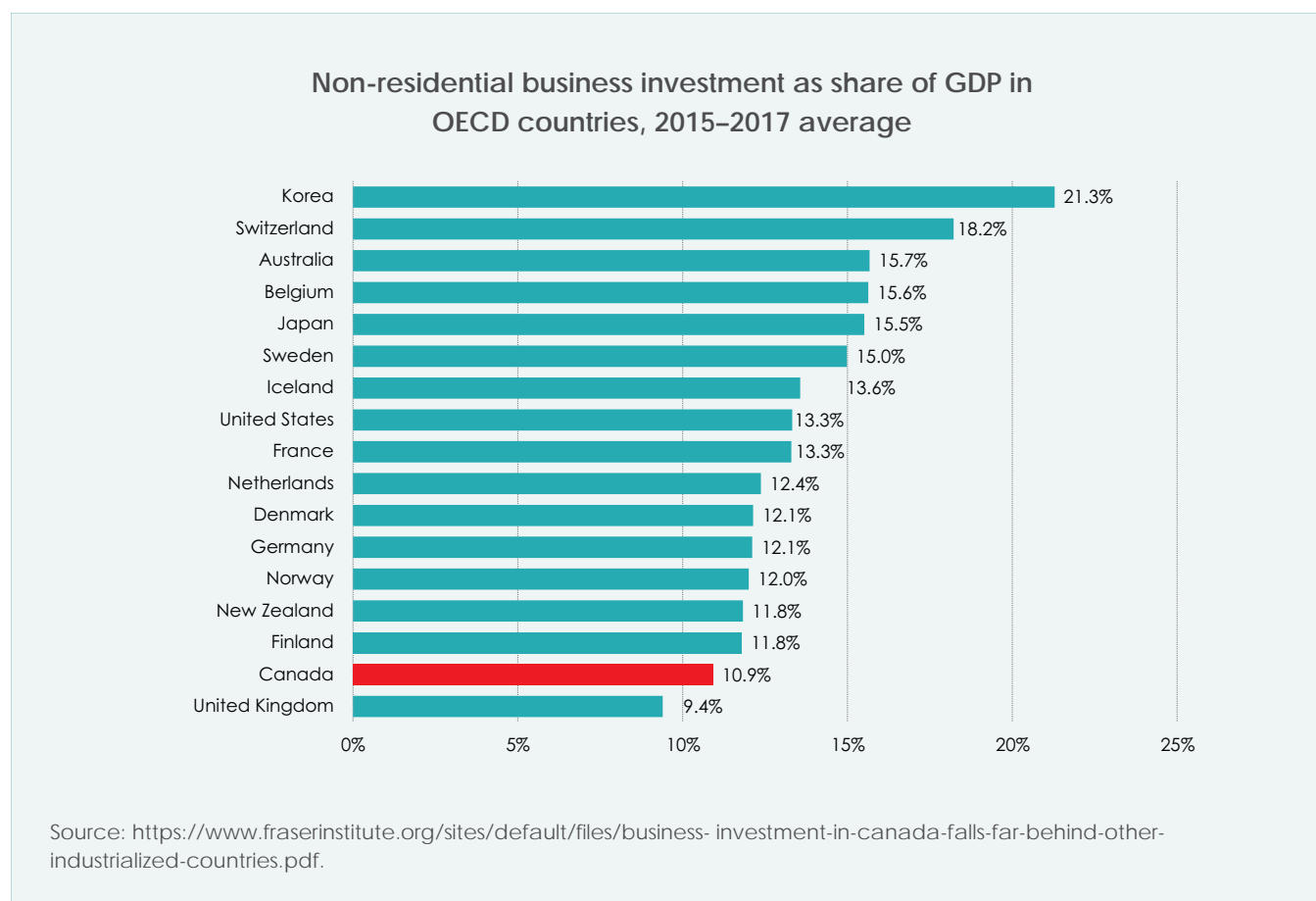
Canada's rankings in the Global Competitiveness Index are consistent with findings by the World Bank's Doing Business project, which measures business regulations and enforcement that apply to small- and

⁷ "Global Competitiveness Index 2017-2018, Country/Economy Profile, Canada," World Economic Forum, 2017 (accessed Nov. 2017).

medium-sized companies. In 2018, Canada ranked 18th out of 190 OECD economies, driven by high rankings in the ease of starting a business (2nd) and protecting minority investors (8th). Canada's ranking was pulled down by low rankings in the categories of dealing with construction permits (54th) and trading across borders (46th). Despite having efficient border processing times between Canada and the United States, Canada's poor ranking for trading across borders comes from high documentary compliance costs (obtaining, preparing and submitting documents for

border, customs and inspection procedures), which are nearly five times higher than the average of high-income OECD countries.⁸

Canada's middling performance vis-à-vis its peers is worrying in the context of financial headwinds facing the country. Between 2015 and 2017, business investment in Canada as a share of GDP stood at 15th out of 17 OECD economies.⁹ In 2017, direct investment in Canada amounted to \$33.8 billion, the lowest level of investment since 2010 and a decline of 18% since 2014.¹⁰



8 World Bank Group, *Doing Business 2018 – Economy Profile: Canada* (World Bank Group, 2018).

9 Philip Cross, *Business Investment in Canada Falls Behind Other Industrialized Countries* (Fraser Institute, 2017).

10 "Canada's Balance of International Payments, Fourth Quarter 2017," Statistics Canada, Mar. 2018.

This weakening of investment comes at a particularly dangerous time for Canada. As an export-dependent country next door to the largest economy in the world, the cost of doing business in Canada relative to the United States is an important factor in Canadian firms' competitiveness. In 2018, the United States enacted significant corporate tax reductions that are expected to increase GDP growth between 0.5% and 0.75% in 2018 and 2019, respectively.¹¹ Additionally, the United States has established regulatory reform task forces in all federal departments and agencies, which are meant to review all regulations and consider whether to repeal, replace or modify those that are ineffective, inhibit job creation or have costs that exceed their benefits. This effort is being supported by the introduction of a "two-for-one" rule requiring two federal regulations be eliminated for every new one that is introduced. The combined effect of these tax and regulatory changes are increasing the appeal of setting up or expanding business in the United States instead of Canada.



"In an increasingly integrated and highly competitive global economy, multinational corporations have more options than ever about where to invest capital, set up head offices and locate their workforces. If Canada cannot provide a more reliable regulatory environment, new investment and job creation that would have taken place in Canada will happen elsewhere."

¹¹ Organisation for Economic Co-operation and Development, Interim Economic Outlook (OECD, 2018).

Canada is not alone in grappling with its regulatory competitiveness. Many developed economies, having enacted taxation and trade policies to drive competitiveness, are now looking toward regulatory reforms to generate more economic growth. It is a recognition that in an increasingly integrated and highly competitive global economy, multinational corporations have more options than ever about where to invest capital, set up head offices and locate their workforces. If Canada cannot provide a more reliable regulatory environment, new investment and job creation that would have taken place in Canada will happen elsewhere.

Canadians have seen this transpire in recent years as a number of large energy and pipeline projects have been cancelled due to regulatory uncertainty. In early 2018, David McKay, President of the Royal Bank of Canada, reminded political leaders of some of the short- and long-term consequences of Canada's regulatory systems. He urged the federal government to curb the "significant" investment exodus from Canada to the United States, noting that the exodus is likely to be followed by losing the next generation of talent and intellectual property to our largest trading partner.¹² These concerns are being echoed by business leaders across Canada who want improvements to the performance and perception of Canada's regulatory environment to increase investment in this country.



"We're having to look at Canada quite hard. The cumulative impact of regulation and higher taxation than other jurisdictions is making Canada a more difficult jurisdiction to allocate capital in."

Steve Williams, President and CEO, Suncor Energy¹³

¹² Canadian Press, "Investor cash leaving Canada for U.S. 'in real time,' RBC warns," Huffington Post Canada, Apr. 2, 2018.

¹³ Geoffrey Morgan, "Suncor to shun major energy projects amid Canada's 'difficult' regulatory environment," National Post, Feb. 8, 2018.



WHY IS CANADA FALLING BEHIND?

Canada's regulatory systems have a history of good governance, strong institutions, science-based systems, and consultation with stakeholders and Canadians.

Despite these strengths, the advantages of these systems are becoming less apparent.

Regulatory overlap

Canada's constitution, various laws, memorandums of understanding and other agreements separate the legal and regulatory jurisdictions between levels of government. Provincial, federal and territorial governments also cooperate through several different forums to reduce overlap and clarify responsibilities. Despite these dividing lines, business must frequently contend with overlapping regulations in areas of shared jurisdiction. These problems are exacerbated when one government infringes on another's jurisdiction for policy, political or other motivations.



For example, recent federal changes in environmental and energy policy through the National Energy Board (NEB) are increasing jurisdictional uncertainty. Provinces have jurisdiction over the management and development of their natural resources, which includes evaluating oil and gas projects within their borders based on their upstream (extraction and production) environmental impacts. At the federal level, the NEB regulates the construction and operation of interprovincial and international pipelines. In the past, consistent with federal jurisdiction, the NEB has considered greenhouse gas (GHG) emissions associated with construction and operation of a pipeline as part of a project evaluation. In 2016, the federal government amended the mandate of the NEB, requiring it to assess upstream GHG emissions in the evaluation of pipeline projects. Effectively, after a crude oil project has received provincial approval (based on its upstream emissions), the federal government can now use those same considerations to reject a pipeline that would help get the oil from that project to markets.

As a 2016 C.D Howe Institute report observed, it is not clear how upstream emissions are connected to the federal jurisdiction over interprovincial and international pipelines. Considering upstream GHG emissions in the NEB evaluation of pipelines may exceed the constitutional scope of federal environmental review and intrude into provincial jurisdiction. The report also noted that, in the past, the Supreme Court of Canada has emphasized that federal environmental assessment should not be a “Trojan horse” for the federal government to inject itself into general industrial regulation, which is a provincial responsibility.¹⁴ Jurisdictional uncertainty is becoming increasingly common due to the federal government’s introduction of other environmental regulations, which are increasing costs and uncertainty for investors in large energy projects.

The combined effect of these tax and regulatory changes are increasing the appeal of setting up or expanding a business in the United States instead of Canada.



¹⁴ Grant Bishop and Benjamin Dachis, *The National Energy Board’s Limits in Assessing Upstream Greenhouse Gas Emissions* (C.D. Howe Institute, 2016).

Uranium mining

Saskatchewan is home to the only active uranium mines and mills in Canada. Mining in Canada is governed by provincial regulation, with the exception of uranium mines, which are regulated and licensed federally as “nuclear facilities” by the Canadian Nuclear Safety Commission (CNSC). The CNSC regulations focus on health, safety, security and the environment, and ensuring Canada meets its international obligations on the use of nuclear materials.¹⁵ At the same time, the Government of Saskatchewan has its own acts and regulations to standardize the health, safety and environmental aspects of the mining and milling of uranium. In addition to CNSC and Saskatchewan regulations, uranium mines are regulated under Environment Canada’s Metal Mining Effluent Regulations. Consequently, operators of these mines have a high volume of overlapping reporting requirements to both levels of government, increasing costs in what is already one of the most highly regulated industries in the country.

Interprovincial regulatory differences

Canada’s biggest self-imposed constraint on economic growth is the massive number of regulatory differences between provinces. Over decades of regulation making, provinces and territories have introduced differing rules and standards in a wide range of policy areas within their jurisdictions. As a result, businesses operating across Canada must contend with a tyranny of small variances—different sets of rules and processes for the same economic

activities in each province. This fragmentation between provinces makes up most of what is defined as Canada’s interprovincial trade barriers, which are estimated to reduce Canada’s GDP by \$50 to \$130 billion every year.¹⁶

Interprovincial regulatory misalignment extends into almost every sector. It includes differences in areas such as trucking and transportation standards, food packaging and labelling standards, and professional certifications and securities regulation. One

¹⁵ “Uranium Mines and Mills,” Canadian Nuclear Safety Commission, 2017 (accessed Jan. 2018).

¹⁶ David Tkachuk and Joseph Day, *Tear Down These Walls: Dismantling Canada’s Internal Trade Barriers* (Ottawa: The Standing Senate Committee on Banking, Trade and Commerce, 2016).

example that plagues Canadian farmers is that each province establishes its own framework for regulating the sale, use, transportation, storage and disposal of pesticides. Ontario and Quebec also restrict agricultural uses of some federally approved pesticides, even though these products have undergone a rigorous science-based approval process focused on the protection of human health and the environment. These restrictions only serve to put farmers at a competitive disadvantage to their counterparts in other parts of Canada, as well as internationally.

While there can be legitimate public interest reasons to have conflicting regulations in different parts of the country, many of these differences remain only for political, protectionist or other parochial reasons. They create unnecessary complexity for companies seeking to expand or invest in Canada while increasing costs for consumers. The lack of common rules and standards also makes it difficult for Canada to pursue regulatory alignment with other countries.

Reducing interprovincial trade barriers is a public policy issue that has had strong business and apparent government support for decades. Unfortunately, this consensus has resulted in little progress by governments in actually eliminating these regulatory differences. In 2017, federal, provincial and territorial governments ratified the Canadian Free Trade Agreement (CFTA), a new internal trade deal meant to resolve interprovincial



“Eliminating interprovincial regulatory barriers to trade is one of the most powerful actions our governments could take to increase long-term growth and prosperity in Canada. The benefits to businesses and consumers in Ontario and across the country would be significant.”

Rocco Rossi, President & CEO of the Ontario Chamber of Commerce

trade inertia. The CFTA includes a Regulatory Reconciliation and Cooperation Table (RCT), which aims to improve regulatory cooperation between provinces through greater harmonization or mutual recognition of regulations.

While governments have labelled the CFTA the most ambitious trade deal to ever cover Canada, nearly a year after its ratification, no interprovincial regulatory differences have been eliminated. One of the most powerful actions governments could take to improve Canada's investment climate would be to make swift and meaningful progress in reducing interprovincial regulatory differences through the RCT. Doing so would demonstrate to businesses and investors that this internal trade agreement will succeed where others have failed.

International regulatory differences

Through the negotiation of bilateral and multilateral free trade agreements, Canadian companies and citizens have benefited considerably from the country's efforts to reduce tariffs on goods that it buys from and sells to other countries. Many of the remaining barriers to international trade faced by Canadian companies are

non-tariff or technical barriers: differing regulatory standards that make it difficult to do business in other countries. As detailed in the Canadian Chamber of Commerce's 2016 report, *Canada's Next Top Trade Barrier: Taking International Regulatory Cooperation Seriously*, these non-tariff barriers to trade have increased significantly over the past decade. At the same time, international regulatory cooperation remains very much in its nascent stages.

The high level of economic integration between Canada and the United States makes regulatory differences between the two countries especially costly. Since 2011, Canada and the United States have participated in the Regulatory Cooperation Council (RCC), a joint initiative to bring together regulators on both sides of the border, foster greater alignment and reduce the duplicity of their regulatory systems. More recently, Canada and the European Union included a regulatory cooperation chapter in the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) that forms a Regulatory Cooperation Forum to meet annually to help identify areas for cooperation and to facilitate discussions between Canadian and European Union regulatory authorities.¹⁷

17 "Text of the Comprehensive Economic and Trade Agreement," Global Affairs Canada (accessed Nov. 2017).



While regulatory cooperation between Canada and the United States has resulted in some meaningful outcomes, overall progress has been slow. The regulatory processes required to achieve these outcomes are time consuming and resource intensive. In addition, the RCC must contend with a natural resistance from regulators to moving away from status-quo standards based on their own regulatory processes and judgment.

There are many areas where Canada should not align with other countries. For instance, in certain sectors the European Union has very interventionist regulatory regimes that would be economically damaging for Canada to move toward. In other sectors, such as nuclear, alignment is not feasible from a technical standpoint. Canada has a long history of cooperation with the Canadian Nuclear Safety Commission (CNSC), the International Atomic Energy Agency and other nuclear regulators. Still, Canada must maintain

differing regulatory requirements due to its use of heavy-water, CANDU-based nuclear technology, unlike the European and light-water technology used in other countries.

However, in many cases, the rationale for international regulatory divergence is unclear. Different rules or processes create unnecessary supply-chain inefficiencies and add costs for exporting companies. It is especially problematic for businesses when governments introduce new rules that diverge from those of trading partners when there is an opportunity to avoid creating new differences altogether.

One example of a potential new regulatory divergence is Health Canada's front-of-package (FOP) nutritional food labelling initiative. The minister of health has committed to introduce FOP nutritional labels with warnings to consumers for foods that are high in sugars, sodium or saturated fat (with "high" being defined as more than 15% of an individual's daily recommended value). Health

Canada estimates that approximately half of all food products on Canadian shelves would require an FOP label if the policy were to have taken effect in February 2018.¹⁸ In 2009, the United States Food and Drug Administration (FDA) started pursuing FOP labelling. The FDA informed U.S. food manufacturers that if a voluntary industry action did not result in a common, credible approach to FOP labelling, it would use regulations to

develop FOP standards.¹⁹ In response, the Grocery Manufacturers Association and Food Marketing Institute launched the Facts Up Front initiative, a voluntary labelling system that provides key nutrition on the front of food and beverage packaging. As it appears on products in Canadian grocery stores, the Facts Up Front label is recognizable to many Canadians.

United States Facts Up Front FOP label



Proposed Health Canada nutrition symbols



¹⁸ Kelsey Johnson, "Health Canada unveils proposed new food labels," iPolitics, Feb. 9, 2018.

¹⁹ "Guidance for Industry: Letter Regarding Point of Purchase Food Labelling," U.S. Food & Drug Administration, Oct. 2009.

Since the introduction of the Facts Up Front initiative, other countries have implemented or are considering FOP labelling. In 2014, Chile was the first country to introduce mandatory FOP labelling regulations. At the 2015 and 2016 meetings of the World Trade Organization Committee on Technical Barriers to Trade, Canada expressed concern that the Chilean regulations deviated from international standards, were not based on science and were more trade restrictive than necessary, encouraging Chile to consider a less trade-restrictive alternative.²⁰ Other countries have echoed concerns about the potential for inconsistency between country-specific labels, which could create confusion for consumers and new technical barriers to trade. As a result, the Codex Alimentarius Commission (a joint commission established by the United Nations Food and Agriculture Organization and the World Health Organization) is currently developing global principles to underpin FOP labelling.²¹

Despite the existence of a successful, recognizable, voluntary initiative in the United States, Canada is proposing “made in Canada” regulations that are inconsistent with our largest trading partner. By moving Canadian regulations forward in the absence of global principles that are still under development, Canada is at risk of introducing a new barrier to trade with not just the United States, but with all of its trading partners.

Federal commitments to improve business competitiveness through international regulatory alignment are undermined by the development of new non-tariff barriers to trade. Canada must be more ambitious in dismantling existing barriers and ensuring new regulatory fragmentation is not introduced. This requires a shift in how governments design new regulations. Instead of asking whether Canada *should* align with trading partners, regulators must start by asking if there any justifiable reasons that Canada *should not*.

20 “Committee on Technical Barriers to Trade – Minutes of the Meeting of 15-16 June 2016,” World Trade Organization, 2016.

21 Health Canada, *Toward Front-of-Package Nutrition Labels for Canadians: Consultation Document* (Ottawa: Health Canada, 2016).

Cumulative regulatory burden

The increasing number and complexity of provincial, national and international rules have significant cumulative impacts on businesses. These impacts are compounded for firms operating across multiple jurisdictions that must contend with a patchwork of regulatory regimes with unique compliance and reporting requirements. The consequences of cumulative burden are described in a Delsys Research Group paper that was prepared for the federal Red Tape Reduction Commission:

The unintended and unanticipated costs of adding another regulation to an already cluttered and complex regulatory landscape characterized by cumulative burden and asymmetric regulation can include higher company and industry costs, lower consumer demand, reduced innovation and competitiveness, and the misallocation of scarce management time and other overhead resources in order to understand and comply with the rules, regulations and operational processes of multiple regulators that are often inconsistent and “asymmetric.”

Although each individual set of regulatory requirements may be distinct and eminently justifiable from a public policy and cost-benefit perspective, the cumulative burden resulting from the aggregation of

regulatory requirements over time diverts the scarce resources (time, money, knowledge and expertise) of businesses... The more they spend to cope with the cumulative burden of multiple regulatory requirements, the less they have available for their “day job” of serving their business customers and final consumers and competing with rivals in Canada and other countries.²²

Recognizing the problem of regulatory accumulation, federal and provincial governments have tried to reduce administrative burden on companies. Federal efforts include the Paperwork Burden Reduction Initiative, launched in 2004, and the Red Tape Reduction Action Plan, launched in 2012. As part of the Red Tape Reduction Action Plan, the federal government introduced a “one-for-one” rule as a Treasury Board directive, which in 2015 was enshrined in legislation. Under the rule, when a new or amended regulation increases the administrative burden on businesses, regulators are required to offset—from their existing regulations—an equal amount of administrative burden cost on business.²³ In 2013, the Red Tape Reduction Action Plan also established a regulatory advisory committee of four business representatives mandated to review the government’s progress on systemic regulatory reforms. The committee was disbanded by the new federal government after it was elected in 2015.

²² Derek Ireland and Eric Milligan, Cumulative Burden and Asymmetric Regulation (Delsys Research Group, 2013).

²³ “One-for-One Rule,” Government of Canada, 2016 (accessed Dec. 2017).

The roots of the federal one-for-one rule can be traced back to British Columbia. In 2001, the Government of British Columbia set a target to reduce its number of regulatory requirements by one-third over three years. It established a baseline measurement of all the regulatory requirements in the province and required that two regulatory requirements be removed for every one that was added. The initiative resulted in a 36% reduction in

requirements by 2004 and a 43% reduction by 2015. The province now has a one-for-one requirement in place to maintain the existing reductions.²⁴ Following British Columbia's example, the Government of Manitoba passed the Regulatory Accountability Act in 2017, which imposes a two-for-one reduction requirement until 2021, followed by a one-for-one requirement afterwards.²⁵

Danish Business Authority Business Forum for Better Regulation

In 2012, the Government of Denmark launched the Business Forum for Better Regulation to identify areas where companies experience the greatest burdens and to propose simplifications. Members of the forum include industry and labour organizations, businesses, and professionals with expertise in simplification. The forum meets three times a year to identify and submit simplifications to the government, which can include changing rules, introducing new processes or shortening processing times. Proposals from the forum to the government are subject to a "comply or explain" principle under which the government must either implement the proposed initiatives or justify why it will not implement them. As of October 2016, 603 proposals were sent to the government, of which 191 were fully and 189 partially implemented. The cumulated annual burden reduction for Danish businesses as a result of some of these simplifications has been estimated at DKK \$790 million DKK (CAD \$168 million).²⁶ By comparison, over roughly the same time period, Canada's federal one-for-one rule has resulted in CAD \$30 million in administrative burden relief.²⁷

24 Regulatory Reform BC, Achieving a Modern Regulatory Environment, Fourth Annual Report 2014/15 (British Columbia: Government of British Columbia, 2015).

25 "Bill 22, The Regulatory Accountability Act," Legislative Assembly of Manitoba, 2017.

26 "Pilot Database on stakeholder engagement practices in regulatory policy, Business Forum for Better Regulation (Denmark)," Organisation for Economic Co-operation and Development, 2016.

27 Treasury Board Secretariat, 2015-16 Annual Report: Reducing Regulatory Administrative Burden and Improving Service Predictability (Ottawa: Government of Canada, 2016).

The difficulty of accurately measuring cumulative regulatory compliance costs presents a challenge to reducing overall burden. As management guru Peter Drucker opined, “If you can’t measure it, you can’t improve it.” In 2014, the federal government established the Administrative Burden Baseline (ABB), which requires federal departments to establish a baseline count of requirements and regulations that impose administrative burden on business, and to update and report on them annually.²⁸ In 2015, the total number of federal requirements was 131,754.

While the ABB provides insight into the total number of federal requirements, it does not measure the intensity of individual requirements, nor does it capture the administrative burden generated through legislation or other policy requirements for businesses. ABB data is also unable to measure the number of requirements impacting specific sectors.

One tool that provides a broader look at all regulations across different industries is the RegData Project from the Mercatus Center

Requirements that impose administrative burden on business



Source: Government of Canada, 2017 Administrative Burden Baseline counts.

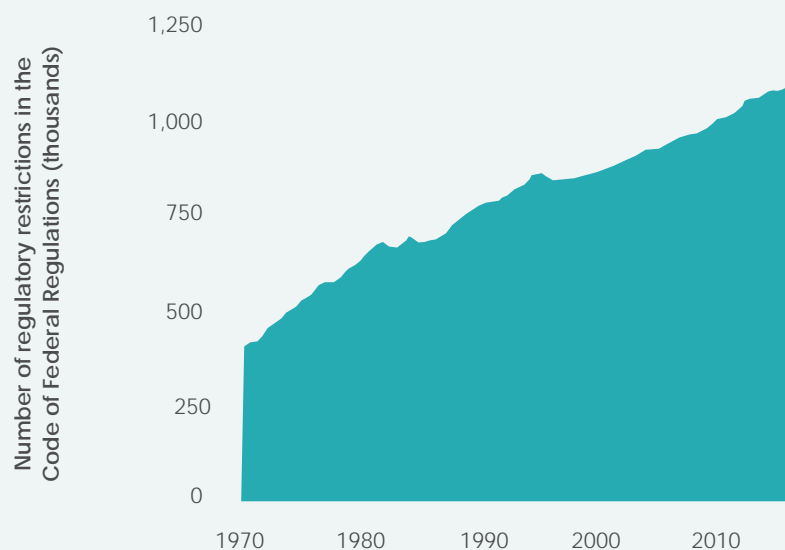
²⁸ “Administrative Burden Baseline,” Government of Canada, 2016 (accessed Nov. 2017).

in the United States. RegData is an open source platform that uses machine learning to count the number of regulatory restrictions in regulatory texts. It can be used to produce data on the total number of restrictions by each department or agency, as well as the industries targeted by those restrictions. RegData has been used to measure the growth in federal United States regulations from 1970 to 2016. Now, it is developing state-level regulatory data, which will provide a more comprehensive portrait of regulatory growth in the United States.²⁹ While RegData does not quantify the impacts of these regulations, measuring accumulation over time across jurisdictions and sectors is a powerful measurement tool. More investment

in efforts like RegData is needed in Canada to better understand changes in its regulatory environment across different industries and levels of government. Improved data will increase the ability of those both inside and outside of government to design and validate policies that control and reduce administrative burden.

Both businesses and regulators can confront resource problems when there are multiple regulatory and policy processes underway at the same time. For instance, in early 2018, Canadian energy companies are dealing with the introduction of national carbon pricing and concurrent regulatory initiatives as part of the Pan-Canadian Framework on Clean

Accumulation of federal regulatory restrictions in the United States, 1970–2016



Source: Patrick McLaughlin and Oliver Sherouse, *RegData 3.0*, www.quantgov.org.

29 Patrick McLaughlin and Oliver Sherouse, “QuantGov—A Policy Analytics Platform,” QuantGov, 2017 (accessed Jan. 2017).

Growth and Climate Change. This includes new methane, clean fuel standard and diesel generation regulations. The government has also introduced legislation to replace the Canadian Environmental Assessment Act (2012) with the Impact Assessment Act, and the replacement of the NEB with the Canadian Energy Regulator. The amount of analyses, submissions, consultations, working groups and other forums creates capacity constraints for stakeholders and regulators alike. It increases the likelihood of making regulatory decisions without a complete understanding of their impacts.

Over time, regulatory complexity and accumulation can also erode the effectiveness of regulators, creating overlapping functions, inefficient structures and other problems. Regulators can be tasked with administering a broadening collection of regulations without sufficient resources. This leads to a decrease in service standards, including delayed inspection, enforcement, approvals and other regulatory functions. These inefficiencies can impede innovation and trade opportunities for Canadian companies.

Canada's Pest Management Regulatory Agency

The Pest Management Regulatory Agency (PMRA) is a body within Health Canada that is responsible for regulating all pesticides in Canada. PMRA scientifically evaluates products to ensure that they do not pose unacceptable health or environmental risks. To ensure all pest control products are regulated based on the most-current science, the Pest Control Products Act mandates that all registered pesticides undergo full re-evaluation at least every 15 years. The Act also includes provisions for special reviews that are triggered when there are reasonable grounds to believe that the health or environmental risk of a product is unacceptable. Special reviews are also triggered when an OECD member country prohibits the use of a product for health or environmental reasons. These special reviews generally take between two and four years to complete.

PMRA currently has more than one hundred re-evaluations underway, with an additional 369 expected over the next 10 years. As of early 2018 there were 23 special reviews in progress, with many more anticipated as the European Union implements a stricter regulatory approach that will result in up to 75 products being withdrawn from the its market. To continue to incent registration of pesticides in Canada, product and project-approval processes need to be predictable, efficient and informed with the best-available science. The PMRA is not currently positioned to undertake this growing workload, though Canadian

farmers depend on these reviews so they can access the crop protection products they need to remain competitive. It is especially vital in the highly integrated North American agri-food market where Canada and the United States are often each other's most important competitor, and where margins are thin. Delays in new product approvals and post-approval evaluation processes can result in compressed timelines and insufficient consultation of stakeholders. This leads to increased investment costs and ultimately restricts product availability for Canadian farmers—putting them at a competitive disadvantage compared with their U.S. peers.

Additionally, while it does not yet have a formal trade mandate, PMRA's specialized expertise is crucial to growing and sustaining Canadian exports of agricultural products. The PMRA establishes maximum residue levels (MRLs) of pesticides for each approved crop-pesticide combination to verify proper use. In the past few years, MRLs have also become internationally recognized trade standards. PMRA expertise in both setting and defending MRLs is now an essential element of trade facilitation that will help Canada meet its \$75 billion agriculture and agri-food annual export goal by 2025. This requires active PMRA participation in international standard-setting forums and direct engagement with Canada's international trading partners to foster collaboration on science policy and the establishment of MRLs internationally. PMRA's specialized, scientific knowledge and expertise is also key to assisting in resolving market access irritants and issues related to MRLs, as well as to addressing pesticide MRL-related inquiries from the World Trade Organization. All of these activities require people and operating resources for travel, which the PRMA does not currently have. As a result, PMRA is relegated to an ad hoc fire-fighting role and has become a bottleneck to economic growth for Canada's agricultural companies.

Reducing regulatory burden does not require the reduction of necessary protections. It requires governments to work with businesses to find more efficient ways to achieve public policy objectives. For regulators, more efficient

processes will have the benefit of freeing up resources to focus on the continued modernization and alignment of regulatory frameworks.

Alberta Energy Regulator

The Alberta Energy Regulator (AER) has regulatory responsibility for the entire lifecycle of upstream energy resource development in that province. The regulator must approve project applications for all energy resource activities, which amounts to more than 40,000 applications each year. These applications include everything from requests to access a parcel of land, approvals to drill wells and requests for water use. Each application is handled individually, even though many are for the same project or development.³⁰ Individual applications have created a large administrative burden for industry and considerable inefficiencies within the regulator.

In 2014, the AER started pilot testing an integrated decision approach (IDA) for regulatory approvals in the upstream oil and gas sector. Through IDA, the regulator has started accepting a single process and application for consultation, environmental assessment and stakeholder engagement, encompassing multiple activities for energy project development. Following successful pilots, AER will be implementing IDA across all energy approvals. Industry has expressed support for expansion of IDA as one that will increase investment certainty by eliminating redundancies and streamlining regulatory approvals for energy projects, while continuing to achieve social and environmental outcomes.³¹ In an industry facing significant regulatory challenges, IDA is an encouraging attempt to make provincial regulatory approvals more coherent and efficient.

³⁰ Alberta Energy Regulator, *One Application, One Review, One Decision: A Single-Window Approach to Energy Development* (AER, 2015).

³¹ Canadian Association of Petroleum Producers, *A Competitive Policy and Regulatory Framework for Alberta's Upstream Oil and Natural Gas Industry* (CAPP, 2017).

Regulator mandates

Many of the Canadian regulators focused on health, social or environmental protections are not mandated to consider the country's economic and business competitiveness. Because of this, numerous decisions that affect competitiveness do not include appropriate consideration for economic and business impacts. Economic competitiveness and regulatory protections are not an either/or proposition, yet regulatory exercises often result in the creation of new self-imposed regulatory barriers to growth for Canadian firms.

For instance, the mandate of Health Canada is appropriately focused on the protection of human health. However, its expertise is also critical to facilitating and supporting trade and innovation for Canadian agri-businesses. How Health Canada's Pest Management Regulatory Agency (PMRA) regulates pesticide approvals and re-evaluations strongly influences agriculture innovation and competitiveness. While health and safety must remain PMRA's number one priority, decisions about which pest-control products to approve and discontinue should not be made without considering and mitigating the impacts to economic competitiveness. However, PMRA has removed pesticide products from the market for which there are no alternatives currently available, while U.S. farmers continue to have access to those same products.³² Canada and the United States are both internationally recognized as having competent science-based regulatory systems



³² Dennis Prouse, A National Food Strategy for Canada (Croplife Canada, 2017).

and there should not be divergence between the tools available to the farmers in these two countries.

Health Canada's FOP labelling initiative is at risk of introducing another regulatory obstacle to agri-business competitiveness. Despite industry requests for consistency with trading partners, the department is continuing to pursue a "made-in Canada" approach. If economic impacts were given more consideration by the department, it is possible that an approach more responsive to business

input—and more consistent with the United States or emerging global principles—would be considered to achieve desired health outcomes.

The United Kingdom has also grappled with the problem of non-economic regulators that regard the promotion of economic growth as subordinate to their core mandates. In a 2013 consultation paper, the Better Regulation Delivery Office in the UK Department for Business, Innovation & Skills reported:

There is a strong body of evidence that suggests that non-economic regulators are not consistently achieving both protection and prosperity in the way they operate. In practice, this means that they are not always seeing businesses as entities that they need to work with in a sustained manner and therefore not always having due regard to economic concerns in the course of regulating. For some regulators, supporting growth remains at best a secondary concern as it is not currently a statutory duty for them. Establishment, in statute, of a clear objective to have regard to growth would remove the uncertainty over whether regulators are able to take account of such considerations.³³

33 Better Regulation Delivery Office, Consultation Paper: Non-economic Regulators: Duty to Have Regard to Growth (United Kingdom: Department for Business, Innovation & Skills, 2013).

The UK Parliament took action to address this issue in its Deregulation Act 2015. The law includes a growth duty provision that gives ministers the ability to impose a requirement on regulators to consider the desirability of promoting economic growth and of ensuring that any regulatory action they take is necessary and proportionate. The measure came into effect in March 2017 and is not a blanket measure—it includes flexibility for ministers to apply the order to specific functions of regulatory bodies.³⁴ The UK legislation provides a template for how Canada can inject economic competitiveness considerations into the mandates of its health-, safety- and environment-focused regulators.

Inconsistent regulatory processes

Federal regulators are guided by standards, policies and best practices set out by the Treasury Board Secretariat (TBS). As a central agency, TBS is responsible for regulatory policy and oversight, advancing and promoting regulatory cooperation, and supporting regulatory approvals by Cabinet, including

the Treasury Board Cabinet Committee.³⁵ Policy requirements are set out in the *Cabinet Directive on Regulatory Management*, which directs federal departments and agencies to apply good regulatory practices for all stages of the regulatory lifecycle, including the planning, development, implementation, evaluation and review of regulations.³⁶

When introducing or amending a regulation, regulators must assess the impacts of their regulatory proposals based on a number of factors. These include impacts on health, safety and security, the environment, as well as costs (or savings) to governments, businesses and Canadians. This cost-benefit analysis is a central feature of regulatory processes. Cost-benefit calculations are summarized in a regulatory impact analysis statement (RIAS). The RIAS will also describe the issues that a regulation is intended to address and why government intervention is required. A common regulatory problem faced by stakeholders is the inconsistent application of these rules and processes, including the development of cost-benefit analyses.

³⁴ Department for Business, Energy & Industrial Strategy, *Growth Duty: Statutory Guidance* (United Kingdom: Department for Business, Energy & Industrial Strategy, 2017).

³⁵ "Federal Regulatory Management," Government of Canada, 2017 (accessed Jan. 2018).

³⁶ "About the Cabinet Directive on Regulatory Management," Government of Canada, 2014 (accessed Dec. 2017).

Patented Medicine Prices Review Board regulations

The Patented Medicine Prices Review Board (PMPRB) is an independent, quasi-judicial body created by the federal government to regulate the ceiling prices for all patented drug products sold in Canada. In May 2017, the minister of health announced that the government would amend PMPRB regulations with the objective of lowering what it judged to be “unacceptably high drug costs.”³⁷ In the summer of 2017, the government launched consultations with stakeholders, which led to the pre-publication of regulations in Canada Gazette, Part I, in December 2017.

During the consultation period, industry groups expressed concerns about the need for new regulations and cautioned that Health Canada’s proposed approach to patented medicines would have negative impacts on industry employment, competitiveness, R&D investment and the availability of new drugs in Canada. Industry also provided recommendations to Health Canada on amendments to the proposed regulations that would mitigate some of these impacts. After hearing industry concerns and recommendations, Health Canada published draft regulations in December that were nearly identical to the approach first proposed in May, and provided no explanation for how industry recommendations were considered or why they were rejected.

According to industry, the cost-benefit analysis in the draft regulations understates the negative impact of the proposed changes to drug manufacturers. It also overstates the potential benefits to Canada. The lack of consideration of industry analysis is one indication that the process has not satisfied the department’s obligations under Treasury Board guidelines, which require extensive consultation with impacted stakeholders to fully understand the impacts of regulations before they are implemented.³⁸

Healthy tension and disagreement between regulators and regulated communities will always exist. Still, the PMPRB regulations illustrate a common challenge for businesses navigating regulatory processes. When regulators make decisions that have negative economic and business impacts in order to achieve social, environmental or other benefits, it is a reasonable expectation for regulated businesses and governments to work together to identify the true costs of the regulatory options.

It is common for business to participate in regulatory processes where it appears that a final regulatory approach has been determined before discussions with industry. In these cases, consultations are not a genuine attempt to better understand business impacts or consider alternative approaches. The consultation documents, questionnaires and analyses can be designed to justify a premeditated regulatory decision instead of identifying an optimal approach. In the case of patented medicines, this reality is reflected by the fact that departmental analysis has been unchanged, despite significant divergence and intervention from industry.

³⁷ “Remarks from the Honourable Jane Philpott, Minister of Health to the Economic Club of Canada,” Health Canada, May 2017.

³⁸ Innovative Medicines Canada, Submission – Canada Gazette, Part I – Regulations Amending the Patented Medicines Regulations (Ottawa: Innovative Medicines Canada, 2018).

In some cases, regulators sidestep processes such as RIAS by using other regulatory tools like guidance documents, which are not subject to the same processes as regulations themselves. One example is the CNSC, an independent body that regulates nuclear facilities in Canada through its act and regulations, and by licensing nuclear facilities. As parts of its licensing process, the CNSC issues regulatory documents that *“...may contain practical guidance and suggestions to licensees and applicants on how to meet the CNSC’s regulatory requirements. Such guidance may include, but is not limited to, information on possible approaches to the design of nuclear facilities, the design and implementation of required management*

*and operational programs, and forms for applying for licenses or reporting information to the Commission.”*³⁹ Over time, Canada’s heavily regulated nuclear industry has seen these regulatory documents become increasingly prescriptive in nature. In effect, instead of providing guidance, the regulatory documents are used as de facto regulation, introducing new requirements without the same level of scrutiny as a new regulation. If the requirements in these documents were subject to regular regulatory processes, they would require greater industry consultation, the development of a robust cost-benefit analysis and adherence to the federal one-for-one rule.⁴⁰

Ontario Energy Board

The Ontario Energy Board (OEB) is Ontario’s energy regulator. It sets the rules for energy companies in the province, establishes energy rates and licenses energy companies. A 2011 audit from the Auditor General of Ontario identified a number of operational problems with the OEB, including within its regulatory functions. As of late 2017, many of those challenges continue to exist, with utilities raising concerns about their interactions with the OEB. These concerns include a lack of transparency, increasing regulatory burden, concerns with timeliness, insufficient cost-benefit analysis and a lack of outcome-based approaches to regulation. In late 2017, the Ontario government announced it was launching a review of the regulator to consider the role and mandate of the OEB and examine best practices from other jurisdictions. The review will be led by a panel that is expected to report back to the provincial government by the end of 2018. To be considered a success, the review will need to tackle the extremely high regulatory compliance costs imposed on Ontario utilities compared with those in other provinces.

39 “Regulatory Framework Overview,” Canadian Nuclear Safety Commission, 2014 (accessed Dec. 2017).

40 Peter Poruks, Canadian Nuclear Association Comments on DIS-14-02, Modernizing the CNSC’s Regulations, (Ottawa: Canadian Nuclear Association, May 29, 2015).

In 2017, TBS initiated consultations with business and other stakeholders as part of a review of the Cabinet Directive on Regulatory Management. It reported that a majority of stakeholders indicated that departments and agencies do not always undertake a thorough cost-benefit analysis and that the approach to this analysis is not consistent.⁴¹ In many cases, businesses are not seeking different regulatory processes; they are just asking that existing regulatory guidelines be properly followed. When stakeholders recognize that proper regulatory processes are not being followed, they should have access to formal avenues of appeal with central agencies.

To address these same challenges, the United Kingdom created the Regulatory Policy Committee (RPC): an independent, expert advisory committee with Cabinet-level clearance to scrutinize the quality of analysis and evidence used by departments in their assessments of the impacts of regulatory interventions. The RPC has the dual benefit of providing ministers with advice on the evidence being presented to support their decisions while giving business and other stakeholders confidence that there is an independent, high-quality scrutiny of regulator analysis and claims.⁴² Improving the credibility of Canada's regulatory systems will require central agencies to find new ways of improving the departmental and political oversight of regulatory analyses.

Inconsistent regulatory consultations

Transparent and efficient consultation processes are critical to ensuring stakeholder, investor and public confidence in regulatory decisions. Regulators need outside and industry expertise to understand policy issues, evaluate options and design the most cost-effective regulatory tools. Some of Canada's most problematic regulatory consultations have been for recent environmental approval processes for major energy projects and pipelines. As consultations and public hearings for these projects have become more open and accessible, many organizations opposed to the existence of Canada's energy industry have taken advantage of them. What used to be a technical exercise with experts, officials and affected citizens focused on project safety has turned into a politicized battleground for policy debates regarding climate change and Canada's role as an energy exporter.

41 "What We Heard: Online Consultation on the Draft Cabinet Directive on Regulation," Treasury Board Secretariat of Canada, 2018.

42 Regulatory Policy Committee, Corporate Report 2017 (United Kingdom: Regulatory Policy Committee, 2017).

National Energy Board

Created by the federal government in 1959, the National Energy Board (NEB) is an independent federal agency that regulates pipelines that cross inter-provincial or international boundaries. This includes more than 73,000 km of inter-provincial and international pipelines within Canada. Annually, 1.3 billion barrels of oil move through NEB regulated pipelines, with 99.999% of oil moved safely.⁴³

Of late, the NEB has found itself in the crosshairs of Canada's environmental and climate change debates. The NEB's core mandate is to regulate the construction and operation of international pipelines. In recent years, organizations who oppose the development of Canada's energy resources have demanded that the regulator evaluate projects based on broader policy issues such as climate change and Indigenous rights. The NEB has itself stated that public consultation processes have become challenged by the high number of participants who expect to be heard on policy- or system-level issues, such as climate change. The regulator has also acknowledged that project-based hearings are not the best place to debate matters of broad energy policy that are outside of the NEB's project-specific mandate.⁴⁴

In 2012, the government introduced a legislative amendment requiring a standing test to determine eligibility for participation in NEB public hearings. A standing test means that only those who are directly affected and have relevant information or expertise can provide comments on project environmental assessments. In February 2018, the new federal government introduced legislation to overhaul the NEB and replace it with the Canadian Energy Regulator (CER). One of the changes in the CER legislation includes removal of the standing test. If not implemented correctly, removal of the test may make these processes more susceptible to being taken advantage of by organizations whose only interest is to try and delay them. Canada has some of the strongest environmental standards for energy development and transmission in the world. It is incumbent on the federal government to leverage those standards into transparent, coordinated, efficient, evidence-based project reviews.

⁴³ Natural Resources Canada, Key Facts on Canada's Pipelines (Ottawa: Natural Resources Canada, 2016).

⁴⁴ "National Energy Board Technical Briefing for the NEB Modernization Expert Panel," National Energy Board, 2016.

The intense political debate around energy project approvals has paralyzed governments and regulators. Those opposed to major projects have accused regulators of being captured by industry interests, which can result in regulators distancing themselves from industry experts. Governments and regulators have also lengthened consultations, moving to seemingly open-ended exercises that can prevent controversial decisions from being made altogether. In effect, these “non-decisions” are a decision by delay. In the absence of a clear yes or no after an extended period, investors have withdrawn from projects to limit their financial downside and move capital to lower-risk opportunities.

Decision by delay was the outcome of TransCanada’s Energy East Project, where the proponent cited existing and future delays in the regulatory processes as a reason for not moving ahead with the cross-Canada pipeline. Energy East is just one of several delayed or abandoned pipeline projects. A 2017 C.D Howe analysis found that, in comparison with producers in the United States, pipeline delays are by far the largest individual competitiveness burden on Canadian energy producers, accounting for a lower net price of \$5 per Canadian barrel of oil.⁴⁵

A Fraser Institute report on the impacts of regulatory delays on British Columbia’s liquefied natural gas industry found that regulatory delays will have resulted in \$22.5 billion of foregone export revenue by 2020, increasing to \$24.8 billion by 2025.⁴⁶ The report summarized the divergent incentives faced by investors and regulators:

Unlike investors and others in the private sector, regulators typically do not bear the economic costs of delay, which can be summarized as the economic benefits of investments and other activities forgone during the regulatory approval process, and perhaps after it if economic conditions prove less remunerative due to the delays. Moreover, regulators themselves can have incentives to impose delays greater than those necessary to effect appropriate safeguards for community interests.⁴⁷

45 Benjamin Dachis, *Death by a Thousand Cuts? Western Canada’s Oil and Natural Gas Policy Competitiveness Scorecard* (Toronto: C.D. Howe Institute, 2017).

46 Ibid.

47 Benjamin Zycher and Kenneth Green, *LNG Exports From British Columbia: The Cost of Regulatory Delay* (Fraser Institute, 2015).

Because of reduced competitiveness resulting from regulatory problems and United States policy changes, the Bank of Canada has forecasted that investment in Canada’s energy sector— which accounts of approximately 20% of business investment in Canada—will decrease in 2018 and remain flat afterwards.⁴⁸ Decision by delay is not an acceptable status quo if Canada wants to re-establish its investment reputation for large energy and infrastructure projects. More predictable and efficient processes are necessary to restore investor confidence in Canada. Achieving consensus for large projects is unlikely and is an unrealistic goal for governments.



“Decision by delay is not an acceptable status quo if Canada wants to re-establish its investment reputation for large energy and infrastructure projects. More predictable and efficient processes are necessary to restore investor confidence in Canada.”

Regulator independence

The delegation of regulatory activities to independent agencies or commissions is often a condition for effective regulation. Both the public and investors need confidence that regulatory decisions are objective, impartial and not subject to political whims or other manipulation. However, as Canada has seen, independence does not always guarantee immunity from political influence.

In the absence of a clear yes or no after an extended period, investors have withdrawn from projects to limit their financial downside and move capital to lower-risk opportunities.



⁴⁸ Governing Council of the Bank of Canada, Monetary Policy Report April 2018 (Ottawa: Bank of Canada, 2018).

Electricity rate regulation

In Canada, provincial regulators have jurisdiction over electricity generation, transmission within their own borders, distribution and market structure. While the policy and legal structures are different in each province, they are generally regulated as public utilities through independent provincial regulators that set or approve electricity rates, seeking to balance the interests of consumers and utilities.

In 2016, BC Hydro applied to the provincial regulator, the British Columbia Utilities Commission (BCUC), for three years of electricity rate increases, including a 3% increase in 2018, based on a 10-year rate plan announced in 2013. In November 2017, British Columbia's minister of energy announced that the newly elected provincial government would be cancelling the rate hike set for April 1, 2018, and ordered BC Hydro to apply for a rate freeze.

In early 2018, the BCUC overruled the government decision and kept the 3% rate increase in place for 2018. In its ruling, the BCUC stated that "...a utility is entitled to recovery of its prudently incurred expenditures and utility owners are entitled to a fair return on its invested capital. These costs should be reflected in rates to customers who benefit in that period and must not be deferred to future periods in the absence of a statutory or regulatory justification."⁴⁹ It noted that even with a 3% increase, BC Hydro would not be able to fully recover its forecast revenue requirement. By attempting to overrule a quasi-independent regulatory authority for lower rates, the government would have simply pushed costs onto future ratepayers.

These challenges are not unique to British Columbia. In the fall of 2017, the Government of Ontario passed legislation that moved some rate setting power away from the Ontario Energy Board (OEB) to the minister of energy. This shifts some future rate decisions from a cost-based decision by the regulator to a political decision by the government. While electricity rates always attract attention from consumers and their elected representatives, energy utilities must be able to recover their operational and long-term capital costs.

While the independence of energy regulators is in flux, these bodies are not immune from criticism themselves. Utilities often report that rate application processes can be overly complex and lengthy, making it difficult to recover costs for much-needed innovation and infrastructure investments. Efficient rate setting practices are necessary so that electrical utilities can invest the nearly \$300 billion between 2010–2030 that the Conference Board of Canada estimates will be required to maintain Canada's existing electricity assets and meet market growth.⁵⁰

49 "British Columbia Hydro and Power Authority F2017 to F2019 Revenue Requirements Application," British Columbia Utilities Commission, 2018.

50 "Investment of More Than \$15 Billion Annually Would Meet Future Electricity Needs," Conference Board of Canada, Apr. 2011.

In general, good separation between regulatory agencies and government will often result in consistent outcomes. In the absence of independence or the perception of independence, outcomes can become more inconsistent if a regulator is continually looking over its shoulder. In addition to politically sensitive issues such as electricity rate regulation, other regulators such as the NEB have seen their independence threatened. Governments can improve investor confidence in Canada by ensuring that independent regulators maintain appropriate separation from political decision-making and are not independent in name only.

Regulating in an era of accelerating technological change

As the accelerating pace of innovation and technological development disrupts markets, it is also disrupting regulators' ability to establish and enforce rules for those markets. As seen recently with Uber, Airbnb and other digital platforms, businesses are bringing new technologies to the market before existing regulation can accept it. Regulators and governments are no longer the gatekeepers of expert information, forcing them to collaborate with industry members who are more nimble, connected and competent to remain relevant. The reality is that as much as governments are preparing for advancements in areas such as big data, artificial intelligence, autonomous vehicles, blockchain and nanotechnology, no one can predict with much certainty where these developments are going and how they will affect Canadians.



Canada's biotechnology industry

Canada has set an ambitious goal of growing its agri-food exports from \$55 to \$75 billion annually by 2025. Innovation in agricultural biotechnology—the development of new technology, products and processes—must be a driving force if Canada is to meet this target. In this innovative ecosystem, developments such as herbicide-tolerant canola have increased yields per hectare by 12%: approximately 8 million tonnes of annual production for Canadian farmers between 2006 and 2013.⁵¹

As one of the most closely regulated industries in the world, rapid technological change in the biotechnology sector relies on efficient regulatory processes. In 2000, the federal government funded the Canadian Regulatory System for Biotechnology (CRSB), an initiative that provided \$218 million in funding to six federal departments over seven years. The CRSB was initiated after the government recognized the need to invest in building the efficiency and effectiveness of the federal regulatory system for biotechnology products.⁵² Evaluations of the CRSB determined that the initiative had an important role in improving the international recognition of Canada's regulatory system and of the country as a biotechnology leader.⁵³

Since the end of the of the CRSB initiative, there is concern that Canada's biotechnology regulatory ecosystem has lost some of its advantages. In 2017, industry stated that there has been little progress in improving the regulatory efficiency at Health Canada and the Canadian Food Inspection Agency, and long approval timelines are delaying new products from coming to market or altogether reducing industry innovation.⁵⁴ The current approval processes for new products in Canada is generally much longer and more difficult than in the United States.⁵⁵

Despite Canada's science-based approach to biotechnology regulation, the challenges embedded in its regulatory frameworks are causing a drag on innovation and investment. They are also discouraging the use of cutting-edge innovations among small- and medium-sized companies and public researchers. Canada can restore its competitive advantages in this sector by re-investing in more predictable, transparent and efficient regulatory frameworks. Modernizing the delivery of these regulatory programs is critical to avoiding a reduction in innovative activities and causing Canada to fall behind the United States and other OECD countries.

51 Canola Council of Canada, Canadian Canola Biotechnology (Winnipeg: Canola Council of Canada, 2017).

52 "2007-2008 Estimates – Report on Plans and Priorities," Innovation, Science and Economic Development Canada, 2013 (accessed November, 2017).

53 Health Canada, Interdepartmental Summative Evaluation of the Canadian Regulatory System for Biotechnology (Ottawa: Health Canada, 2008).



54 Dennis Prouse, A National Food Strategy for Canada (Croplife Canada, Sept. 2017).

55 Industrial Bioproducts Value Chain Roundtable, Innovation in Agriculture: Canadian Industrial Bioproducts Industry – Priorities and Recommendations (IBVCRT, 2017).

In the past, governments have relied primarily on prescriptive regulatory frameworks, where regulators can set requirements and prescribe the manner in which the requirements should be met. Prescriptive approaches are low-risk and reassuring for regulators; they know exactly what they are requiring and how businesses will achieve it. A 2017 Mowat Centre report, *Regulating Disruption*, describes this predilection noting that, "*Governments in Canada, as in many peer jurisdictions, have a preference for command and control regulatory approaches that often leave little discretion or judgement to the regulated community. Strict, prescriptive requirements are well-suited to minimizing risk but pay little heed to compliance costs or to incentivizing innovative behaviour.*"

One example of prescriptive approaches slowing the pace of innovation is in the oil sands industry, where rigid regulatory requirements prevent companies from easily introducing cleaner technology or practices. Companies become locked into a path-dependent innovation system where new technology or cleaner substituting alternatives do not get used because it is much easier to implement technology that has already been tested and approved.⁵⁶ Regulatory hurdles are so high that firms don't want to be the first to introduce a new technology, but there is a race to be second.

Prescriptive frameworks can stimulate innovation when regulatory pathways, information requirements and associated costs are clearly articulated. In the absence of clarity, it is challenging to drive investment given the uncertainty of total cost and time to market. For some industries, non-prescriptive regulatory approaches, including the use of risk- and outcome-based regulations, can improve health, safety and environmental outcomes while reducing compliance burden.





For some industries, non-prescriptive regulatory approaches, including the use of risk- and outcome-based regulations, can improve health, safety and environmental outcomes while reducing compliance burden.

⁵⁶ Experience Nduagu, Alpha Sow, Evar Umeozor and Dinara Millington, *Economic Potential and Efficiencies of Oil Sands Operations: Processes and Technologies* (Calgary: Canadian Energy Research Institute, 2017).

Risk or systems-based approaches prioritize regulatory activities where the risk of non-compliance is the highest. Focusing on high-risk activities uses regulator resources more effectively while lowering the compliance burdens for low-risk businesses/activities. Risk-based regulation can be particularly effective for some complex, highly regulated industries where it is impractical for regulators to monitor and enforce such a high number of requirements. For example, most developed countries follow aviation standards set out by the International Civil Aviation Organization. Aviation standards have improved safety and simplified burden by moving from prescriptive- and compliance-based regulations to risk-management systems that proactively manage risks through the identification and control of existing or emerging safety issues.

Outcome-based approaches put an emphasis on a performance standard or measurable outcome without constraining how companies can achieve compliance. This kind of regulation provides more opportunities for businesses to identify cost-effective solutions and to adjust to new scientific and technological developments. Fuel efficiency standards are an example of outcome-based regulation as developed countries set fuel economy targets on a fleet-wide basis for auto manufacturers. This provides firms full flexibility to research, develop and invest in new and differing technologies to meet those standards.



There is an opportunity for federal and provincial governments to modernize Canada's regulatory systems and turn them into a competitive strength instead of a weakness.



Governments go to great lengths to encourage innovation, including multi-billion dollar investments in grants and tax incentives. However, a far more powerful and underutilized tool is a streamlined and predictable

regulatory environment. The need for modern regulatory frameworks was identified in the December 2017 recommendations of the federal minister of finance's Economic Advisory Council:

The regulatory approach of the Government of Canada needs to evolve to better fit an economy where innovation and change are the norm. Regulation has to be agile and adaptive enough to address the ways that innovative companies will continuously rewrite the rules of competition, ensuring sufficient oversight to protect the public interest without posing obstacles to innovation. Ideally, Canada's regulatory environment should act as a catalyst for new products and business models, especially in promising industries such as life sciences, financial technology (fintech), and agri-food. Regulation also must be predictable, efficient, and consistent, so it is not a barrier to business investment, innovation, and ultimately, economic growth. To drive these changes, we recommend establishing a dedicated Expert Panel on Regulatory Agility.⁵⁷

The 2018 federal budget took a tentative step in this direction, committing \$11.5 million for the government to “pursue a regulatory reform agenda focused on supporting innovation and business investment” by making regulatory systems more “agile, transparent and responsive.”⁵⁸ The investment is a step in the right direction—but the federal

government must be more ambitious. There is an opportunity for the government to engage with business on Canada's overall regulatory environment, and to re-evaluate a number of Canada's regulatory tools to develop processes that work better for regulators, businesses and all Canadians.

57 Advisory Council on Economic Growth, Investing in a Resilient Canadian Economy (Advisory Council on Economic Growth, 2017).

58 Department of Finance Canada, Equality + Growth: A Strong Middle Class (Ottawa: Government of Canada, 2018).



A CALL TO ACTION

In today's global economy, investors have a myriad of options to find the highest possible rate of return.

While Canada has traditionally been a reliable investment destination, declining foreign investment has revealed that some of the past advantages of investing in Canada no longer exist. This problem is exacerbated by the fact that Canada's biggest trading partner and competitor has enacted significant corporate tax reductions and initiated major regulatory reforms to stimulate business growth and investment.

One of the federal government's responses to declining foreign investment has been to create Invest in Canada, a new investment promotion agency set up to help foreign investors navigate dealings with Canada's federal, provincial, territorial and municipal governments using a single "concierge-like" window. While Invest in Canada is a useful tool, it falls short in ambition. A more sustainable solution to Canada's complex investment environment is simply to make that environment less complex. One way to do this is to make Canada's regulatory systems more efficient and coherent.

Canada has had some past success with regulatory improvements. British Columbia led the most ambitious and successful burden reduction exercise in Canadian history. Federal initiatives such as the one-for-one rule, the Regulatory Cooperation Council and the continued evolution of federal regulatory directives have offered valuable lessons. Despite these initiatives, the continued growth in the complexity, inconsistency and unpredictability of Canada's regulatory systems remains a self-imposed barrier to growth.

There is an opportunity for federal and provincial governments to modernize Canada's regulatory systems and turn them into a competitive strength instead of a weakness. It will require a renewed effort to improve how governments regulate while reducing overall regulatory burden, duplication and misalignment. The success of broad-based regulatory reform will depend on a new partnership built on strong political leadership, regulator buy-in and business collaboration.



RECOMMENDATIONS

While these recommendations focus on the federal government, the principles apply to regulators at all levels of government who must work together to implement efficient, modern regulatory frameworks that balance the absolute need to protect without sacrificing economic growth and prosperity.

Recommendation one: Establish a government–business regulatory competitiveness working group

The federal government should immediately convene a regulatory competitiveness working group co-chaired by a senior federal and a senior business representative. The working group’s purpose would be to help restore business confidence in Canada’s investment climate by developing crosscutting solutions to improve Canada’s regulatory competitiveness.

The working group’s first responsibility would be to develop a regulatory competitiveness action plan with the following components:

Mechanisms to reduce cumulative burden and accelerate regulatory simplification

New instruments are required to reduce overall regulatory burden and drive individual regulatory improvements in departments and agencies. Options to reduce cumulative burden could include increasing the scope of the one-for-one rule to achieve a net reduction in outdated federal regulations.

For regulator-specific improvements, a permanent stakeholder–advisory body similar to the Danish Business Authority could be established to provide proposals to departments and agencies who must “comply or explain” in response.

Measures to enhance regulatory competitiveness and accountability across government

The federal government’s regulatory management regime requires changes to overcome the slow pace of regulatory improvements as well as the inconsistent application of regulatory directives and best practices. The government could enhance Treasury Board’s oversight role by establishing a new Cabinet Committee for Regulatory Affairs. A more ambitious proposal could be to split the president of the Treasury Board into two Cabinet positions, separating fiscal and regulatory oversight to provide more political leadership and responsibility for regulatory competitiveness.

Tools to measure and track overall regulatory burden

Canada must attempt to quantify cumulative regulatory burden and its costs from all levels of government. There is an opportunity to build on the Administrative Burden Baseline by considering innovative approaches in other jurisdictions (much like the RegData Project in the United States). Canadians and stakeholders would also benefit from a single portal to track the progress of regulatory reduction and alignment initiatives along with individual regulatory activities.

Recommendation two: Give regulators economic growth and competitiveness mandates

The federal government should add economic competitiveness and innovation considerations to the mandates of health, safety, environmental and other regulators who are not giving sufficient consideration to economic and business impacts when making decisions. This could be implemented similar to the UK growth duty, which provides discretion on which specific regulatory functions economic mandates should apply to and provides certainty that regulators should not be expected to pursue economic growth at the expense of necessary protections.

Recommendation three: Increase federal leadership eliminating interprovincial trade barriers

Since the announcement of the Canadian Free Trade Agreement, federal and provincial governments have said little about how the new Regulatory Reconciliation and Cooperation Table will function, which regulations will be harmonized first and how quickly the new body will drive alignment. The prime minister and premiers must ensure that the new body sets clear goals, timelines and accountability for interprovincial regulatory harmonization.

Recommendation four: Rebuild stakeholder confidence in cost-benefit analysis

The Treasury Board must improve the government-wide quality of inconsistent departmental and agency analysis supporting regulatory proposals before they are submitted for Cabinet approval. Options could include establishing an independent review panel—similar to the UK Regulatory Policy Committee—that would support Treasury Board officials in evidence evaluation. Stakeholders should also have a formal avenue of appeal to central agencies when they believe that departments and agencies are not accurate in their analysis or are otherwise not fulfilling their regulatory obligations.

Recommendation five: Improve regulatory consultations

Before determining regulatory approaches, departments and agencies should engage earlier with stakeholders to develop a common understanding of underlying policy objectives and consider alternatives to regulation. If a regulatory approach is selected, departments and agencies should work with stakeholders on instrument design, and issue preliminary analysis and outlining instructions for input in advance of publishing draft regulations.

For project-based consultations, especially for large energy projects, Canadian regulators must ensure that consultations are project-focused, not policy-focused, while remaining transparent, evidence-based and time-limited. The integrity of these processes requires that organizations or individuals seeking to debate broader issues or delay decisions do not undermine consultations.

Recommendation six: Increase efforts to modernize individual regulatory frameworks

Departments and agencies should direct more resources toward implementing best practices and simplifying existing regulatory frameworks. Canada needs to ensure that regulations are reflective of current economic realities and adaptable to rapidly evolving markets. This could include a move toward more risk- or outcome-based regulations where appropriate. Regulators should also consider building sunset or review provisions into regulations to ensure that new regulations have their cost-benefit, relevance and effectiveness reviewed on a regular basis.

Recommendation seven: Increase international alignment, especially in new areas of regulation

Improved international regulator-to-regulator collaboration can ensure Canadian businesses are not put at a disadvantage in the global economy by “made-in-Canada” regulatory solutions. As a default starting point, and when it is in Canada’s interest, new regulations should be developed in alignment with United States or international standards. In instances where regulators are pursuing Canada-specific standards, the costs and business impacts of doing so should be quantified in the regulatory analysis. Canada should also seek to integrate greater regulatory cooperation into its free trade agreements.





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