Regulatory Capture in Canadian Environmental Decision-Making

by

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Abstract

This thesis examines regulatory capture, a phenomenon that occurs when a regulator subverts their mandate from representing the public interest, to representing the interests of the industry that they regulate. Diagnosing and preventing capture is challenging as the process of capture often occurs in areas of governance where it is not illegal, and frequently overlaps with other legitimate stakeholder engagement.

Canadian environmental law is an area where regulatory capture is a significant risk due to the extensive influence of resource extraction industries, and conservation efforts may be undermined due to growth of those industries being within the legislative mandates of environmental regulators. The 2014 Mount Polley mining disaster in BC Canada was a situation where the capture of a regulator was linked with lapses in inspection, compliance, and enforcement standards, resulting in Canada's worst environmental disaster to date.

I chose to reconcile the regulatory capture literature by compiling a list of common indicia that may be considered when assessing if a regulatory body is captured or is vulnerable and at-risk of capture. The Mount Polley disaster and the audit that followed it are used to exemplify what these indicia look like before, during, and after environmental harm caused by capture. This is followed by a critical analysis of the economic theories that eventuated in the concept of capture, such as public choice theory. I contrast how regulatory capture literature has diverged from these theories over the past 60 years, specifically the question of whether capture is a risk or an inevitability. Focusing on the indicia of 'bias in decision-making' reveals that even within otherwise robust legal frameworks – specifically, the reasonable apprehension of bias test - the public interest and impartial decision-making can still be affected by the influence and pressure of industry. Throughout this analysis is the recurring problem that capture affects regulators at an institutional level, and that prevention and mitigation is critical.

Lay Summary

Companies can have vast power to influence how they are regulated. Regulatory capture occurs when this influence or pressure causes the regulator to represent the company or industry, instead of representing the public. I argue that regulatory capture is a root cause of how money can influence politics, including appointed public officials. Canadian environmental decision-making may be affected by this influence, and the Mount Polley mining disaster was an example of capture resulting in direct harm to the environment. In this thesis I argue that the risk of capture will always be an issue, so we need to consider different ways to prevent it from influencing decision-making and government institutions. I support this claim by looking at the profit motive that these companies have to shape regulation, and some of the specific ways that the law has been ineffective at dealing with capture.

Preface

This thesis is original, unpublished, independent work by the author, Maxwell Edwards.

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List of Abbreviations

AER Alberta Energy Regulator

BC British Columbia

CER Canada Energy Regulator

EPA United States Environmental Protection Agency

FCC United States Federal Communications Commission

NEB National Energy Board

OSHA United States Occupational Safety and Health Administration

SEC United States Securities and Exchange Commission

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Chapter 1: Introduction

1.1 Preserving the Public Interest

In 2014 a dam used to store waste and by-products from mining operations was breached at an open-pit mine at Mount Polley, British Columbia. The incident caused substantial damage to the nearby landscape and waterways and became one of the worst environmental disasters in Canadian history. At the time of the incident, it was the largest mining spill ever recorded.[1] The immediate causes of the breach were technical problems - a layer of unstable ground under the dam wall. While the primary responsibility for the failure is the mine's owner – the Mount Polley Mining Corporation, a wholly owned subsidiary of Imperial Metals - those problems were overlooked in the first place in part due to the regulatory environment, specifically the fact this unstable layer of till was unaccounted for and unmonitored.[2] Regulators are in theory involved at every step of the decision-making process with regard to tailings dams, from design and construction to decommissioning and reclamation. The Ministry of Energy and Mining was found to have deeply entrenched conflicts of interest, as it was the regulator responsible for monitoring, enforcement, and compliance in the mining industry yet also had the substantial mandate of developing and expanding mining operations in BC.[3] Because of these conflicts, regulation of the mine had been ineffective at nearly every level: insufficient legislative frameworks pre-disaster, failure to enforce legislation, failure to inspect and monitor the dam, lack of any charges pressed post-disaster by Provincial or Federal Ministries, and legal recourse from 3rd parties being set aside.[4] Compliance standards were both inadequate and not being enforced.

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[1] Andrew Hamilton et al, "Seasonal Turbidity Linked to Physical Dynamics in a Deep Lake Following the Catastrophic 2014 Mount Polley Mine Tailings Spill" (2020), 56:8 Water Resources Research 2.
[2] British Columbia, Auditor General of BC, *An Audit of Compliance and Enforcement of the Mining Sector* (Victoria: Auditor General, 2016), online: Province of British Columbia < https://www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Mining%20Report%20FINAL.pdf>.
[3] *Ibid* at 22.
[3] Erica Schoenberger, "Environmentally Sustainable Mining: The Case of Tailings Storage Facilities" (2016) 49 Resources Policy at 4.
[4] Dirk Meissner, Mount Polley mine disaster 5 years later; emotions, accountability unresolved (August 2019), online: CBC News < https://www.cbc.ca/news/canada/british-columbia/mount-polley-mine-disaster-5-years-later-emotions-accountability-unresolved-1.5236160>.

The public has an inherent interest in the environment, and regulators are often entrusted by the legislature to regulate corporate activity to prevent and mitigate environmental harm. This role also puts those regulators in a position to be targeted by industries who seek favourable legislation or deregulation. Regulatory bodies may be influenced to shift away from representing the public interest and towards representing the interests of those industries. This phenomenon is called regulatory capture, which may be a fundamental root cause of issues in Canadian environmental law.[5] Government regulators (both the agencies and the individuals working for those agencies) are often at-risk of this malignant issue without realizing it.

The challenge is that capture is hard to define, even harder to prevent, and there is limited recourse once capture has caused environmental harm, as in the Mount Polley disaster. Despite a growing literature on regulatory capture, the discussion about risks and consequences of captured agencies is still limited. Capture literature has been ongoing in some capacity since the 1960s, but the application of those concepts to Canadian law, and even more specifically Canadian environmental law, are still emergent.[6]

This thesis argues that regulatory agencies need to be structured on the basis that regulatory capture is an inevitable and constant risk. We will see that existing literature demonstrates that capture is a constant risk that manifests at an institutional level and requires robust and preventative protections in place. The public interest will continue to be undermined while regulators are vulnerable to the influence of industry without measures to prevent and mitigate that risk. Increasing regulators' resistance to capture can ensure that appointed regulators will better represent the public interest in their decision-making.[7]

Chapter one will provide an overview of what regulatory capture is and will set out some of the indicia of a captured agency. A review of the Mount Polley disaster will demonstrate what these

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[5] Jason Maclean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture' (2016) 29 Journal of Environmental Law and Practice" at 113.
[6] Ernesto Dal Bo, "Regulatory Capture: A Review" (2006) 22:2 Oxford Review of Economic Policy at 221.
[7] Michelle Portman, 'Regulatory Capture by Default: Offshore Exploratory Drilling for Oil and Gas' (2014) 65 *Energy Policy* at 46.

indicia look like in action, with the example further providing context with regard to the problems that can arise from the public interest not being represented by regulatory institutions. The harms seen in the Mount Polley disaster as well as the legal response will both stress the importance of prevention and mitigation. Chapter two will explore why capture occurs by looking at the economic theories that caused the phenomenon of capture to be identified, predominantly public choice theory. The application of economic principles to political decision-making will unambiguously show the financial motivators for industry to influence regulation, and furthermore how these same drivers can cause regulatory officials to forgo the public interest in their decisions. Focussing on the economic basis for capture will emphasise that it is a constant risk. Chapter three will consider how capture can exist in political and legal environments that - on paper - have safeguards against it. This will build upon the specific risks discussed in the first chapter by elaborating how those risks interact with the corresponding laws that are supposed to prevent them. Demonstrating this will involve isolating one indicator – inappropriate discretion and bias in regulatory decisions – and will critically analyse the corresponding legal response: the reasonable apprehension of bias test. This chapter highlights one of the ways that capture can exist within robust legal frameworks and without being strictly illegal, and that the mitigative and preventative controls must be flexible enough to operate in those legal grey areas. I will further consider the overlap between bias and expertise. Finally, chapter four will critically analyse and reflect upon the discussions throughout this thesis. This includes discussion of how industry can affect institutions at a structural level, considering the implications of capture as an inevitable constant risk rather than an occasional threat, and summarise some of the potential safeguards and responses to capture.

1.2 Industry Representation in Context

1.2.1 Defining Regulatory Capture

Simply put, regulatory capture occurs when a regulatory agency starts representing the interests of the industry they are supposed to be regulating.[8] This poses a threat to good governance as

[8] Michael Livermore & Richard Revesz, 'Regulatory Review, Capture, and Agency Inaction' (2013) 101:5 Georgetown Law Journal at 1340.

government agencies generally have a mandate to make decisions in the public interest and capture represents a shift away from that mandate. This paper uses Richard Posner's definition of capture, which he describes as 'the subversion of regulatory agencies by the firms they regulate'.[9] Regulatory capture is an interdisciplinary problem, analysed within political, economic, and legal disciplines. Each of these perspectives brings valuable insight to our understanding of the complex phenomenon of capture. In this section I discuss how capture can be defined, the importance of public interest representation, challenges in diagnosing capture compared to legitimate public participation in public policy decisions.

Special interest groups may try to shape regulations before they are implemented, dilute regulations that are already in place, weaken an agency's ability to enforce a regulation, and lobby to deregulate.[10] I will use Becker's definition of interest groups, where: 'individuals belong to different groups - defined by occupation, industry, income, geography, age, and other characteristics - that are assumed to use political influence to enhance the well-being of their members'.[11] As this thesis explores a phenomenon where industry undermines the public interest, 'interest groups' here will generally mean industry representatives such as lobbyists, unless specified to the contrary. This choice is intended to keep discussion of interest groups confined to the context of capture. However, as will be discussed below, capture is challenging to diagnose in part because it can operate in areas of governance where non-industry interest groups are a necessity, such as Indigenous community engagement and public consultation. The threat of compromised decision-making is a possibility at every step of the regulatory process.

This ongoing risk explains why capture is relevant even in settings where the legislature has defined the public interest narrowly and delegated a specific mandate to an agency to represent industry interests (e.g. the BC Chicken Marketing Board). Because industry influence is so

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[9] Richard Posner, 'The Concept of Regulatory Capture - A Short, Inglorious History' in Daniel Carpenter & David Moss, eds, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (New York: Cambridge University Press, 2014) at 49.
[10] Amitai Etzioni, 'The Capture Theory of Regulations – Revisited' Society (2009) 46:4 at 320.
[11] Gary Becker, 'A Theory of Competition Among Pressure Groups for Political Influence' (1983) 98:3 The Quarterly Journal of Economics at 372.

prevalent, capture can be understood as a spectrum of different relationship dynamics between industry and regulators, rather than as a binary state of being.[12] That is, corporations will always exert some level of pressure to influence regulatory decisions that are being made about them, and there is a broad spectrum of how effective they are at achieving that. Most if not all regulatory agencies display one or more of the indicia of capture. As such, it can be more productive to think about capture as a risk (and how a regulator is exposed to that risk), rather than attempting to strictly diagnose whether that regulator is captured or not.

While the definition of capture used by this thesis is generally accepted as a starting point, the definition is constantly questioned, refined and expanded. For instance, some scholars differentiate between 'systemic' capture that looks at how companies can control or impact government institutions, and 'influence' capture where industry bias manifests through an undue bias in favour of industry interests over enforcement objectives.[13] A more recent interpretation is the division of capture into 'old' and 'new' capture; old capture involves regulated firms or interest groups co-opting their regulator, and new capture involves regulators that otherwise represent the public interest but are hindered by external challenges such as budget cuts.[14] The ever-expanding literature on capture addresses, in an increasingly sophisticated way, how it can manifest in numerous ways. For instance, an industry may have more success capturing an effective regulator by lobbying and influencing the decision-makers around that regulator. In practice this may look like a former industry member in a government role cutting funding for the regulator, while other bodies are lobbied to place increased procedural requirements on the regulator that they will not have the funding to meet.

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[12] Matthew Zinn, 'Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits' (2002) 21 *Stanford Environmental Law Journal* at 107.
[13] Michael Briody & Tim Prenzler, "The Enforcement of Environmental Protection Laws in Queensland: A Case of Regulatory Capture?" (1998) 15 *Environmental and Planning Law Journal* at 55.
[14] Sydney Shapiro, *Old and New Capture* (June 2016), online: The Regulatory Review < https://www.theregreview.org/2016/06/28/shapiro-old-and-new-capture/>.

1.2.2 Diagnostic Challenges

The phenomenon of capture is intertwined with the concept of public interest. Citizens delegate the power to make legislative decisions to elected representatives, and those representatives act, or are supposed to act, in the interest of those citizens. Those elected officials typically appoint officials to regulatory agencies to make decisions about governance issues pertaining to a specific regulatory area. In law and economics this is referred to as a 'principal-agent relationship', where the elected official is the principal, who appoints the regulatory agent that in turn makes decisions on their behalf.[15] The agent has a responsibility to make informed decisions on behalf of the public, even when the public is uninformed about the subject matter of those decisions.[16] These agents are delegated authority to regulate 'in the public interest', and this authority may have a significant degree of discretion. A principal-agent problem arises when there is a conflict of interest between those parties, such as pressure by a Minister for a regulator to make a decision that would appear to benefit the Ministry (such as budget cuts) rather than the public interest.[17] It stands to reason that an agency that is for instance, dependent on industry for funding may have increased instances of principal-agent problems.

Despite the potential for agents to lack capacity due to directives of their principals, the converse may also occur. A principal may have limited means to enforce public interest representation by agent who are using their discretionary authority to represent industry. Delegated authority can involve a significant scope to define what the public interest is in the context of that regulatory body, and that discretion is generally shaped by that regulator's expertise and experience. A decision that advances the interests of industry may at face value appear to be contrary to the public interest, yet legally that agent could be well within their discretion to interpret the public interest in that matter. This may include direct input by industry in advising on the interpretation

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[15] Mark Atlas, Enforcement Principles and Environmental Agencies: Principal-Agent Relationships in a Delegated Environmental Program' (2007) 41:4 Law & Society Review at 940.
[16] David Levi-Faur, 'Regulation and Regulatory Governance' in David Levi-Faur, *Handbook on the Politics of Regulation* (Cheltenham: Edward Elgar Publishing, 2011) at 15.
[17] Steven Croley, 'Is Regulatory Capture Inevitable?' in Steven Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton: Princeton University Press, 2009) at 37.

of the regulation that would best suit them, especially in areas of governance where a 'cooperative regulation' approach is taken.[18]

Even where indicia of capture are present, it is still difficult to diagnose or identify. It exists in a space that is not inherently illegitimate in part because of the blurred lines between industry influence and public participation. Stakeholder participation is a normal and even expected part of transparent and accountable government decision-making. Public input into policy and regulatory decisions is one way that government institutions can ensure that decisions are aligned with the public interest. However, these are often the same processes that industry interest groups use to influence government decision-makers, and because capture can occur in this part of the regulatory process it means that the industry's actions are not illegal. These interest groups may even be better situated to take advantage of these participation processes than private citizens are. For instance, members of the public may face financial barriers such as taking time off of work, and paying for childcare and transportation, all to participate in a voluntary process.[19] By contrast, other parties may have a professional incentive to participate, and may have other advantages to effective participation such as knowing the professional vernacular.[20] This suggests a disparity between members of the public and interest groups (such as lobbyists) in the effectiveness of participating in a process designed for public input. This discrepancy is clear in environmental law, industry pressure groups are typically better funded and organised than environmental organizations, community groups or individual citizens.[21] Capture is challenging to diagnose until after it happens because it predominantly occurs in these spaces such as public advocacy where the pressure and influence exerted is not only lawful but often encouraged.

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[18] Michelle Pautz, 'Next-Generation Environmental Policy and the Implications for environmental Inspectors: Are Fears of Regulatory Capture Warranted?' (2010) 12 Environmental Practice at 250.
[19] Hoi Kong et al, 'Deliberative Democracy and Digital Urban Design in a Canadian City: the Case of the McGill Design Studio' in Corien Prins et al, eds, *Digital Democracy in a Globalized World* (Cheltenham, UK: Edward Elgar Publishing, 2017) at 182.
[20] *Ibid*.
[21] Kathryn Harrison, *Passing The Buck: Federalism and Canadian Environmental Policy* (Vancouver: UBC Press, 1996) at 22.

Because of the many and subtle ways in which capture can arise, it can be difficult to respond to. As we will see with Mount Polley, regulatory capture can have significant, negative impacts on the broader public interest. In practice, remedying capture is difficult, as the same industry influence that contributes to regulatory capture also works to prevent a response. [22] The more captured an agency is, the less likely it is that capture can be counteracted, as the people responsible for internal reform are the same people who are influenced by industry to such an extent that reform is required. This might indicate that legal action is one of the ways to respond to capture, yet as we will see in the Mount Polley disaster, legal recourse has its own limitations. As capture is not illegal (and most of the risks of capture are similarly within the confines of legal behaviour by corporations) it is difficult to use the law to respond to capture.[23] The affected industry may use their sway over regulatory decisions to provide defense against detection of capture, and/or raise the cost of intervening to oppose the industry influence.[24] The minimal success of legal action against capture will be expanded upon in the Mount Polley section below, but it cannot be overstated that these barriers are a reminder of the importance of preventing capture rather than attempting to rectify it or seek legal satisfaction after the harm has occurred.

1.3 Illustrating a Captured Regulator

1.3.1 Indicia to Consider During Risk Assessment

There is no comprehensive guidebook to regulatory capture that can be used to audit whether an agency is vulnerable to capture. However, there are different 'red-flags' that might indicate the vulnerability of an agency to industry pressure. I have compiled a list of some of these red-flags based on issues that are consistent across capture literature. It is worth noting that many of these are expected or even encouraged in regulatory bodies. For instance, the 'revolving door' between government and industry may contribute to the capture of a regulator, yet regulatory officials are

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[22] Maclean, *supra* note 5, at 118.

[23] Capture can be considered distinct from corruption, as the former focusses on many ways that regulators may shift their decision-making (which may be entirely legal and might not involving financial incentives) whereas the latter emphasises dishonest or fraudulent decision-making that might be unlawful and often is a result of direct bribery; (Toni Makkai & John Braithwaite, "In and Out of the Revolving Door: Making Sense of Regulatory Capture" (1992) 12 Journal of Public Policy at 11).

[24] Barry Mitnick, 'Capturing "Capture": Definition and Mechanisms' in David Levi-Faur, H*andbook on the Politics of Regulation* (Cheltenham: Edward Elgar Publishing, 2011) at 35.

frequently appointed from industry specifically because of their experience. As such the application of these indicia must remain highly contextual. A regulator is not captured solely because they have a large amount of discretion. However, having vast discretion is a consideration in the context of capture, as a captured official could potentially undermine the public interest without recourse so long as they acted within their delegated authority. Similarly, most if not all regulators are exposed to lobbyists, yet it is a significant consideration in the context of capture even if lobbying is pervasive.

The following list is not intended as a checklist for identifying captured regulators. The purpose of these indicia is to outline some of the considerations that are prevalent throughout capture literature.

Indicia pertaining to regulatory officials:

- Large amount of discretion in decision-making.
- Unchecked conflicts of interest.
- Unclear boundaries between biased decisions and decisions informed by an official's experience/expertise.
- A 'revolving door' of staff members between the agency and industry.

Indicia pertaining to institutional proximity to industry:

- Partial or total reliance on industry funding and/or campaign contributions.
- Exposure to lobbyists.

Indicia pertaining to institutional design:

- Minimal oversight.
- Design of the institution where advancement of industry is one of the mandates, especially if there are other conflicting mandates.
- Ambiguous statutory or delegated authority.
- Insufficient independence between the elected officials (such as a Minister) and the regulator.

Any one of these may not be evidence of capture alone, yet they are useful for assessing the risk of a shift away from the public interest. As discussed above, indicia such as lobbyists participating in regulatory processes or vast discretion in decision-making are not only common but are expected and even necessary. This is precisely why regulatory capture is a malignant problem, as it is the exploitation of aspects of public policy that are otherwise designed with good intentions. Reliance on industry funding is a vulnerability that can create significant conflicts of interest, yet that funding agreement may only be in place to reduce the cost to taxpayers. As with the example of interest groups abusing public participation processes, the challenge in identifying and addressing capture stems directly from its operation within otherwise lawful procedures.

The three categories are an informal taxonomy, and there is substantial overlap between each of them. When a regulator or regulatory agency displays any or multiple of the above indicia then they may be vulnerable to regulatory capture. However, much like how preventing capture is problematic because much of it is not illegal, most of the above indicators are similarly lawful and ordinary components of government decision-making processes.

First, identifying whether individual regulators have been ‘captured’ is a delicate matter. It is a significant achievement for an individual to be an authority on an industry to such an extent that an elected official appoints them to public office. Put differently, if one of the rationales for creating and populating a regulatory body is expertise, where better to find that expertise than in the industry itself? Those appointees may make decisions that advance the interests of that industry, but that is not unlawful behaviour unless there is a conflict of interest or a reasonable apprehension of bias. As we will see in chapter 2, the role of expert appointees in the process of capture means that there is rarely a ‘smoking gun’. Decision-makers may have an extensive amount of discretion when they make decisions, but that discretion is an inherent part of public policy. Similarly, as we will see in later discussion of ‘revolving door’ employment, it is not uncommon for regulators and government officials to work in the private sector after their tenure as a public servant. Former regulators will generally find work in their field of expertise, and subsequently will be in a position to leverage their relationships with current regulators and their

inside knowledge of agency processes in order to secure favourable decisions for their new organization.

Second, proximity to industry is perhaps the easiest set of indicators to identify. There are large bodies of literature both on lobbying and on the impacts that campaign contributions have on decision-making. Political candidates require a certain amount of money to operate, organise, and compete in elections,[25] and industry often assists funding and fundraising.[26] Arising from this assistance is implicitly some kind of good will, ranging from a friendlier working relationship to outright influence over policy. The flow of workers between industry and regulators is a further area exploited for policy impacts. Former regulatory officials are highly sought after by industry so that they can serve in consulting or lobbying roles. Empirical evidence from the US demonstrated that there is a close link between lobbyist pay and the connections that lobbyist had to their former office: a senatorial staffer-turned-lobbyist can expect a 24% drop in revenue when the senator they worked for leaves office.[27]

A significant consideration with regard to regulatory bodies is a reliance on the private sector for funding. If a regulatory body receives some or all of their funding from the industry that they are in charge of regulating, then there is a risk that the regulator's decision-making will be affected by that funding arrangement. While government funding still has risks - such as a mandate by a newly elected party to defund a regulator – reliance on industry funding may leave the regulator vulnerable to capture. For instance, the Alberta Energy Regulator relies 100% on industry funding,[28] and their board of directors predominantly consists of industry representatives.[29] Regulatory capture literature generally notes the difficulty in diagnosing capture as it can be a subtle process, yet Maclean notes that there is 'no such difficulty…in respect of oil and gas

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[25] George Stigler, "The Theory of Economic Regulation" (1971) 2 *The Bell Journal of Economics and Management Science* at 12.
[26] *Ibid*.
[27] Jordi Blanes I Vudak et al, "Revolving Door Lobbyists" (2012) 102:7 The American Economic Review at 3732.
[28] Alberta Energy Regulator, *Who We Are* (July 2021), online: <https://www.aer.ca/providing-information/about-the-aer/who-we-are>.
[29] DCN-JOC News Services, *New Alberta Energy Regulator board members announced*, (April 2020), Online: ConstructConnect Journal of Commerce <https://canada.constructconnect.com/joc/news/government/2020/04/new-alberta-energy-regulator-board-members-announced>.

legislation in Canada'.[30] The regulator's lack of independence has had an effect comparable to the privatization of oil and gas regulation.[31] While the regulator in theory is supposed to be at arms length from the regulated industry, it is a hard position to argue that this independence can be maintained while that agency is accountable to the industry both administratively and financially.

Finally, while capture predominantly is about the relationship between regulators and industries, it is worth considering how the institutional design of the regulator itself can be a risk. If an agency has dual functions of overseeing an industry while also expanding that industry, those directives may be at odds. For instance, the Cohen Commission on Fraser River Sockeye Salmon concluded that the Canadian Department of Fisheries and Oceans dual mandates of conserving wild salmon stocks and promoting the salmon-farming industry created a regulatory environment where it was 'inevitable that conflicts will arise'.[32]

Where industry cannot influence policymakers directly, they may look to manipulate the design of the regulator in other ways. For instance, the US Environmental Protection Agency ('EPA') had an administrator – Scott Pruitt - appointed who had previously sued the EPA a number of times, lived in a condominium owned by the wife of one of his largest donors (a coal mining lobbyist) while serving as EPA head, and has worked as a coal lobbyist since his departure from that agency.[33] It is possible that Pruitt's appointment was driven by a broader mandate of de-regulation rather than regulatory capture. However, the efforts to de-regulate appeared to be substantially driven by industry, including a March 2017 memo written by a prominent coal mining executive that was circulated directly to US Department of Energy staff, outlining

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[30] Maclean, *supra* note 5, at 118.
[31] Mohammed Dore, *Water Policy in Canada: Problems and Possible Solutions* (Springer International Publishing, 2015) at 223.
[32] Bruce Cohen, Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, *The Uncertain Future of Fraser River Sockeye – Volume 3: Recommendations – Summary - Process* (Ottawa: Minister of Public Works and Government Services Canada, 2012), online: Government of Canada < https://publications.gc.ca/site/eng/432516/publication.html> at 12.
[33] Eric Liption, Pruitt Had a $50-a-Day Condo Linked to Lobbyists. Their Client's Project Got Approved. (4 April 2018), online: The New York Times < https://www.nytimes.com/2018/04/02/climate/epa-pruitt-pipeline-apartment.html>.

requests to repeal various environmental regulations and the intention to reduce EPA staff 'at least in half'.[34] Agents within the EPA had diminished regulatory authority to represent the public interest as they faced mass layoffs, reduced budgets, and lost enforcement functions.[35] The EPA example demonstrates situations where a regulator may not directly be influenced, but manipulation of the institution itself meant the agency itself was still at risk of capture even where the regulatory officials may not have been. A parallel example in Canada was the National Energy Board ('NEB') (since replaced by the Canada Energy Regulator). The NEB was heavily criticized for potentially being captured by the Canadian oil and gas industries, predominantly due to several of the above indicia of capture being on display such as reliance on industry funding and a perception of regulators 'rubber stamping' proposals by industry.[36] Of relevance to the focus on institutions rather than individual regulatory officials is the claim that moving the headquarters of the NEB to Calgary meant that 2/3rds of the staff were replaced by former oil and gas industry employees – a change that is said to have created a 'petro culture' within the agency.[37] As with the EPA, some support for industry can arise by manipulating aspects of the decision-making process beyond attempting to influence the regulatory officials.

1.4 Unsettled Debates and Unsettling Literary Gaps

Despite the growing literature on capture, there are still ongoing debates about what it even is, especially as the discussion expands amongst legal scholars. For instance, Stigler argued that 'regulation is acquired by the industry and is designed and operated primarily for its benefit'.[38] This opinion shaped his theory of regulatory capture by considering it to be an inherent and expected part of the relationship between regulators and corporations.[39] This interpretation is a

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[34] Bryan Bowman, Captured: How the Fossil Fuel Industry Took Control of the EPA (3 April 2019), online: The Globe Post < https://theglobepost.com/2019/02/01/epa-regulatory-capture/>.
[35] Dillon Lindsey et al, "The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture" (2018) 108:2 American Journal of Public Health at 92.
[36] "C.D. Howe Institute Commentary No. 479: How to Restore Public Trust and Credibility at the National Energy Board" (May 2017) at 11, online (pdf): *C.D. Howe Institute* <https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary%20479.pdf.>.
[37] Marc Eliesen, Industry-Captured National Energy Board Urgently Needs That Overhaul Trudeau Promised < https://www.nationalobserver.com/2016/09/08/opinion/industry-captured-national-energy-board-urgently-needs-overhaul-trudeau-promised>.
[38] Stigler, supra note 25, at 3.
[39] *Ibid*.

far cry from criticizing industry for attempting to undermine government institutions or concerns about the agencies being insufficiently protected. Instead that idea of capture in economic literature tends to focus on the state as a resource for firms or industry.[40] Because early capture literature was shaped by this perspective, economists such as Stigler only considered capture harmful because firms could gain an advantage over each other in a market. For instance, if a consumer has the freedom to choose whether to travel by airplane or by train, then it may be financially viable for the train or airplane industries to influence legislation that would favour them, thus coercing or forcing the consumer to use their service rather than allowing the consumer to decide.[41] The perspectives from this earlier economics research can enhance recent research as it they are fundamentally based on the calculus of why firms seek to influence policy.

However, there has been a clear shift in the literature away from capture as an economic phenomenon and towards capture as a legal challenge and source of administrative risk.
A convincing interpretation is that of 'corrosive capture', which suggests that capture can be characterised by its deregulatory effects.[42] Early scholarship by public choice theorists discussed capture as a problem because it could be used for market manipulation, where monopolised industries could influence regulation to create high barriers to entry for new firms.[43] By contrast, more contemporary ideas of corrosive capture consider capture as a dangerous phenomenon due to the general pressure by industry to be less regulated.[44] While deregulation is not necessarily a harm, the harm in corrosive capture is due to that deregulation being representative of what industry wants, rather than what is in the public interest. Capture is harmful to the operation of government not because of deregulation, but because that deregulation is occurring due to the weakening of regulatory independence. This hypothesis was supported by Lei et al when modelling regulatory capacity in environmental law, as their models predicted that greenhouse

[40] Stigler, supra note 25, at 3.
[41] *Ibid*, at 10.
[42] Daniel Carpenter, 'Corrosive Capture? The Dueling Forces of Autonomy and Industry Influence in FDA Pharmaceutical Regulation' in Daniel Carpenter & David Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (New York: Cambridge University Press, 2014) at 152.
[43] *Ibid*, at 153.
[44] *Ibid*.

gas emissions were less likely to be limited effectively where regulatory capture was present as the agency would loses its capacity to govern.[45]

This paper uses Posner's definition that capture is the subversion of power between regulators and the industry that they regulate, but there is a caveat. Posner does not consider a regulator captured just because they implement legislation that is intended to serve industry's private interests, as he disagrees that an agency can be captured if advancement of industry interests is one of the functions of the agency. Posner excludes this category of regulation from his definition as in those matters the legislature has already ensured that the meaning of the public interest is promoting that industry. I argue that legislation advancing the interests of industry is not necessarily a product of capture, but it also cannot be ruled out as an indicator. As shown in the Cohen Commission into Salmon example and elaborated upon in the discussion of Mount Polley, there are regulatory agencies that suffer from institutional design problems where the mandate is to both regulate and expand an industry. Posner's understanding of capture is that there must be an implied conflict in order for there to be capture, as the industry must have waged 'war on the regulatory agency and won the war, turning the agency into their vassal'.[46] Yet we can also see instances where there was no conflict with the regulator because the industry influence had occurred far earlier in the process when the public interest was being interpreted.

1.5 The Mount Polley Mining Disaster: Capture in Action

The impacts of capture can be hard to measure. While it is easy to conceptualize how bribery or outright corruption undermine the public interest, regulatory capture is harder to visualize. It is diffuse and systemic, arising from the cumulative impacts of regulator-industry interactions over time. Yet this cumulation is toxic and can result in significant harms. The Mount Polley Mining Disaster is an incident that demonstrates the kinds of tangible harms that regulatory capture can cause. While multiple regulators had jurisdiction over different aspects of the mine, this chapter will mostly focus on the Ministry of Energy and Mines. The Mount Polley disaster and the audit

[45] Ping Lei, Qi Huang & Dayi He, 'Determinants and Welfare of the Environmental Regulatory Stringency Before and After Regulatory Capture' (2017) 166 *Journal of Cleaner Production* at 113.
[46] Posner, *supra* note 9, at 49.

that followed it provide examples of how to diagnose captured agencies, the tangible harms that can arise from lawful processes such as campaign contributions, the issues that arise from familiarity between industry and regulator employees at all levels, and the importance of evaluating regulator structure and institutional design with regard to risk of capture.

1.5.1 Overview and Impacts of the Mount Polley Incident

The Mount Polley mine is owned by Mount Polley Mining Corporation, a subsidiary of Imperial Metals. The mine is located in the BC Interior near the town of Likely. On August 4th, 2014, a tailings dam collapsed, sending 24 million cubic metres of mining waste into nearby Polley Lake.[47] The majority of the waste then flowed downstream, ending up in Quesnel lake.
The main physical issue was a foundation failure of one of the embankments of a tailings pond. The breach has been attributed to several factors, including: a layer of till beneath the dam that had been unaccounted for in construction and monitoring, incorrect placement of the piezometers used to measure the water pressure, and insufficient embankments to support the dam.[48] The impacts of the disaster have been extensive and ongoing. The natural landscape of the areas and the local communities were affected by the tailings spill that is still being cleaned up. Indigenous communities have voiced concerns about lack of information about the spill, and a distrust of the limited information which has been provided by the government.[49] They have experienced a decrease in traditional land use activities, altered dietary patterns due to discontinuation of fishing in affected waterways, and ongoing emotional stress.[50] Geophysical surveys following the incident tracked the flow of the released tailings, including contamination of fish stocks as well as water level increases that would ensure more accumulated contaminants would be released bi-annually.[51] Five years after the disaster the Soda Creek Band and the Williams Lake Band both report a reluctance to hunt wildlife in the area due to concerns about contaminated

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[47] Meissner, *supra* note 4.
[48] Schoenberger, *supra* note 3, at 125.
[49] Janis Shandro, Laura Jokinen, Alison Stockwell, Francesco Mazzei, & Mirko Winkler, "Risks and Impacts to First Nation Health and the Mount Polley Mine Tailings Dam Failure" (2017) 12:2 at 90.
[50] *Ibid,* at 92.
[51] Ellen Petticrew et al, "The Impact of a Catastrophic Mine Tailings Impoundment Spill Into One of North America's Largest Fjord Lakes: Quesnel Lake, British Columbia, Canada" (2015) 42:9 Geophysical Research Letters at 3355.

meat as well as dwindling moose population due to habitat loss.[52] By 2017 the BC government had paid $40 million for remediation and clean-up of the Mount Polley site, consisting of a $23.6 million tax credit and $15.5 million of direct remediation costs.[53]

1.5.2 Auditing the Mount Polley Disaster: A Regulatory Capture Checklist

Research highlighting positive examples of tailings dam containment demonstrates that the difference between success and failure is social and political, rather than strictly technical.[54] For instance, an example where these political influences had a positive impact on regulation was the McLaughlin mine in California. The mine's location surrounded by agricultural land as well as the sway of the agricultural industry on regional decision-making all culminated in a robust mitigative framework, and proactive environmental rehabilitation following the closure of the mine.[55] Every single tailings dam poses similar technical challenges. The distinguishing features are instances in which industrial influence on government decision-making led to negative outcomes such as Mount Polley.

The BC Auditor-General's post-disaster assessment primarily focussed on the regulatory context surrounding the Mount Polley disaster and how the regulator was at a high risk of capture. The Mount Polley Mine is under the purview of provincial legislation such as the *Mines Act*,[56] and the *Environmental Management Act*,[57] as well as federal legislation such as the *Fisheries Act*.[58] The regulators gather information and ensure compliance with both the physical infrastructure and managerial requirements of the mines through inspections, monitoring, and audits. When is an incident, the federal and BC governments both are responsible for investigating the offender

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[52] Laurie Hamelin, 'This isn't finished': 5 years after the Mount Polley disaster, still no charges (July 2019), online: APTN News <https://www.aptnnews.ca/national-news/this-isnt-finished-5-years-after-the-mount-polley-disaster-still-no-charges/>.
[53] Carol Linnitt, Cost of Abandoned, Contaminated Mine Sites in B.C. $508 Million, Up 83 Percent Since 2014 (June 2016), online: The Narwhal < https://thenarwhal.ca/cost-abandoned-contaminated-mine-sites-508-million-up-83-cent-2014/>.
[54] Schoenberger, *supra* note 3, at 127.
[55] *Ibid* at 122.
[56] *Mines Act, RSBC 1996, c 293.*
[57] *Environmental Management Act* [SBC 2003] c 53.
[58] *Fisheries Act* (R.S.C., 1985, c. F-14).

under their respective legislation, and, where appropriate, charging and prosecuting the offender. Parallel to that is the possibility of public prosecutions by private individuals or organisations if the government is unable or unwilling to charge.[59] The primary regulator for the Mount Polley site is the Ministry of Energy and Mines (as of this paper it is the Ministry of Energy, Mines and Low Carbon Innovation). This Ministry is responsible for all compliance, monitoring, and enforcement of the Mount Polley site. The Ministry of the Environment also plays a role in regulation, principally through the *Environmental Management Act*.[60]

The BC Auditor-General's report that followed the disaster, 'An Audit of Compliance and Enforcement of the Mining Sector' ('the Audit'), is a detailed inquest that has the purpose of establishing the decision-making context that led to the tailings dam breach.[61] The mandate of the Audit was to find the root causes of the disaster and to make recommendations for stronger regulatory oversight to ensure better environmental protection. This approach to the disaster was to consider 'why' such an issue could occur rather than focussing on the technical issues. One of the main findings of the Audit was that the 'why' stemmed back to the conflicting mandates of the Ministry of Energy and Mining, as they were expected to both promote ecological conservation as well as expand an industry that is 'unavoidably environmentally disruptive'.[62] This internal conflict was one of the areas where the Ministry was vulnerable to industry influence, and eventually capture.

Arising from the Audit's findings was the Auditor-General's declaration that the Ministry of Energy and Mines 'is at high risk of regulatory capture'.[63] The audit included a table setting out indicators of a potentially captured regulatory body, seen in Table 1 below.

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[59] This only exists in theory because of the BC provincial practice of always staying the charge rather than dismissing it (British Columbia Prosecution Service, *Crown Counsel Policy Manual – Private Prosecutions* (March 2018), online: British Columbia Prosecution Service < Private https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/pri-1.pdf>).
[60] Supra note 57, at c 53.
[61] Auditor General of BC, *supra* note 2.
[62] Schoenberger, *supra* note 3, at 119.
[63] Auditor General of BC, *supra* note 2, at 22.

Table 1 'Regulatory Capture' (reformatted from the table on page 44 of The Audit):[64]

Regulatory capture occurs when the regulator, created to act in the public interest, instead serves the interests of industry. Possible signs of regulatory capture can include:	The regulator is located within the agency responsible for promoting the economic interests of the industry.
	In agency publications, environmental protection is merely one goal alongside others such as economic development.
	The regulator has a low level of prosecution activity.
	The legislation applying to the regulator gives the regulator wide discretion to act.
	The regulator's budget and resources are not comparable with those in the industry.
	The regulator shows a marked preference for giving informal recommendations and advice, which are not properly recorded.
	There is a high shift of enforcement officers from the agency to the industry, where they are able to earn significantly more than they did working as enforcement officers.

[64] Auditor General of BC, *supra* note 2 at 44.

	Regulatory work often takes place in isolated regional communities, and there is frequent social collaboration between industry and the regulator.

This set of recommendations is not a comprehensive list of indicators of capture, but it represents the prominent factors that could have been recognised prior to the Mount Polley disaster. The Auditor-General identified several indicators in the Mount Polley disaster that recur in regulatory capture literature. These indicators effectively describe and concisely summarise how capture is a complex institutional phenomenon. The indicia set out earlier in this chapter were informed in part by this list, though not all of them were included. For instance, a regulator may demonstrate a preference to giving informal recommendations and advice, and while this may suggest a risk of capture, it would be challenging to identify proactively as this information was only found after an extensive post-disaster investigation.

1.5.3 Dual Themes Raised by the Audit

Much like the list of capture indicia earlier in this chapter, the factors listed in the above table can be loosely grouped into, first, proximity between the regulator and the mining industry, and second, the institutional design issues within the Ministry. For the purposes of this section I have set aside the first category of indicia from earlier in this chapter – regulatory officials – as the indicia set out by the Audit are more specific to the circumstances of the Mount Polley context than this thesis' broader groupings.

First, the day-to-day informal interactions between the regulators and the mining staff is an important consideration because of the cumulative effect where large-scale harms result from small daily decisions. Capture can become ubiquitous in an industry is through ordinary professional relationships and friendships. A challenge in describing regulatory capture is that it can fit on a broad spectrum: on one end it could be conceptualized as a highly coordinated conspiracy to undermine democratic processes, and on the other end it is small decisions made by professionals with ongoing working relationships in the course of usual business.

For instance, in the 2021 Texas Power Crisis the Texas Public Utility Commission displayed some indicators of capture, including: the commission disbanding its enforcement arm, firing its independent monitor without replacing them, and the fact that the commission is chaired by a previous director of a utilities company and a former lobbyist prior to that.[65] Abrupt structural changes that reduce oversight such as disbanding the enforcement function of a regulator can appear much more nefarious and as a more obvious red-flag that a regulator has been captured. I would suggest that it is just as important to consider the consequences of the daily decisions made by the leadership of that regulator that consisted of former industry senior employees who had previously specialised in lobbying for less regulation by that same regulator. Those individuals also would have deep-rooted personal connections to people they worked with in that industry, which is rarely covered by conflict-of-interest policies considering it is that same industry experience that makes those employees qualified to work for the regulators. Industry-wide efforts to shape regulation are not mutually exclusive with casual influence via personal relationships, and that the obvious presence of one does not preclude the more subtle impacts of another.

Where the Audit refers to 'frequent social collaboration between industry and the regulator' it is this sort of interaction that can lead to regulatory decision-making that favours industry. Regulators and industry representatives can see a lot of each other in their daily work and may spend more time working together than with their coworkers. These professional relationships can have an effect on the decision-making of both parties; the Audit's flagging of 'preference for giving informal recommendations and advice' is often result of these types of relationships. To revisit the core principle of a regulator representing industry interests over the public interest, some of the protocols expected of government agencies such as extensive documentation and monitoring records are to prevent this sort of informality from seeping into decision-making. It is also worth noting that while the Audit considers this in isolated regional communities, it is not

[65] Justin Miller, The Texas Public Utility Commission's Revolving Door Between Industry and Regulator (July 2017), online: NY Post <https://www.texasobserver.org/the-texas-public-utility-commissions-revolving-door-between-industry-and-regulator/>.

limited to those contexts; this sort of familiarity can occur anywhere in small or highly specialised industries where there is a limited number of experts.

Friendliness between industry and regulators goes hand in hand with the high turnover of enforcement officers from the department to the industry. Industry representatives may consider regulators for positions within the industry on the basis of their expertise about the industry in addition to their familiarity with the industry liaisons who they regularly are in contact with. This concept is frequently referred to as the 'revolving door' between industry and government, and while it is not an inherently bad thing it is one of the frequent causes of capture.[66] For the regulator this can be an appealing offer where the private sector offers a competitive salary if not a drastically higher offer. For the industry or company this has the additional boon of the regulator being familiar with the other members of the regulatory agency as well as its internal processes. There has been extensive empirical evidence demonstrating that 'access to serving officials is a scarce asset that commands a premium in the market for lobbying services'.[67] This revolving door between government and the private sector at the core of a substantial portion of the literature on lobbying due to this value brought by hiring former regulators, and the ability for those former regulators to affect decision-making to favour their respective industry.[68] It should be noted that this does not just apply to regulatory officials, but also staff within regulatory agencies. For instance, even friendliness between industry officials and regulatory inspectors can impede the objectivity of inspections.[69]

The Auditor-General flagged institutional design as a second theme to consider. This theme was at the forefront of the Audit, with the first indicator in Table 1 pointing out that the dual functions of the Ministry of Energy and Mines in both promoting mining as well as enforcing mining was a substantial root cause of the disaster. The severity of this is reflected in the paper's

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[66] William Gormley, "A Test of the Revolving Door Hypothesis at the FCC" (1979) 23:4 American Journal of Political Science at 666.
[67] Vudak et al, *supra* note 27, at 3745.
[68] Sounman Hong & Take Kyu Kim, "Regulatory Capture in Agency Performance Evaluation: Industry Versus Revolving-Door Lobbying" (2017) 171 Public Choice at 170.
[69] Briody & Prenzler, supra note 13, at 66.

'overall recommendation' being the detachment of the mining compliance and enforcement functions from the Ministry of Energy and Mines.[70] This indicates both the inherent conflict that comes into play when regulators are required to make policy decisions that might directly counter other mandates held by their own agency, as well as the subsequent inefficacy of inspections and enforcements.

When considering the problems associated with conflicting mandates at an institutional level, one only needs to look as far as budgeting. When the mining regulators in charge of budgeting are also responsible for expanding mining operations, then they are put in a compromised position where there are mutually exclusive choices between their conflicting mandates. Providing an ample budget to compliance and enforcement arms of the regulator could theoretically interfere with their ability to expand the BC mining industry. Similarly, when regulatory funding is inadequate then there is a risk that agency staff will not be sufficiently supported.[71] The unfortunate reality is that whether it was by design or due to severe underfunding, mining enforcement and compliance obligations were not fulfilled by the Ministry of Energy and Mines.

It is worth noting that one of the apparent problems in the Mount Polley example was that multiple key regulator positions were left unfilled. The 'geothermal manager' position within the Ministry of Energy and Mines was left unfilled for over 3 years from 2009-2011, following the departure of the previous manager. The Geotechnical Inspector position was also left unfilled from 2010- 2012.[72] Because these positions were both unfilled, there were no geotechnical inspections at Mount Polley in 2009, 2010, and 2011.[73] The Audit noted that annual inspections

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[70] Auditor General of BC, *supra* note 2, at 11.
[71] Auditor General of BC, *supra* note 2, at 63.
[72] British Columbia, Independent Expert Engineering Investigation and Review Panel, *Report on Mount Polley Tailings Storage Facility Breach* (BC, 2015), online: Mount Polley Independent Expert Investigation and Review Report<https://www.mountpolleyreviewpanel.ca/sites/default/files/report/ReportonMountPolleyTailingsStorageFacilityBreach.pdf> at 112.
[73] British Columbia, Independent Expert Engineering Investigation and Review Panel, *Report on Mount Polley Tailings Storage Facility Breach* (BC, 2015), online: Mount Polley Independent Expert

would not have found the flaw in the foundation layer, but they could have identified that the tailings dam was not built or operated to the recommended design.[74] Unfilled positions can be part of business-as-usual. However, if we apply here Shapiro's 'new capture' model where an agency can be captured due to peripheral factors such as budget cuts, then the unfilled senior positions within the Ministry could be interpreted as an impact of capture.[75]

Agency employees may also be replaced by former lobbyists or outsourced workers who are more sympathetic to the 'expansion of industry' mandate than that of enforcement.[76] One study suggested that this was an inherent part of the staff turnover within regulatory agency's generally; Makkai and Braithwaite's empirical research identified two behaviours amongst Australian nursing home inspectors: those who had previously worked in the industry at a senior level were 'less tough' on the industry, and those who were 'more tough' on the industry were more likely to have shorter careers at that agency than those who were 'softer' on the industry. While the data appeared to be for the purpose of exploring the revolving door phenomenon, it was suggested that the data was more indicative of a general trend of regulators being more likely stay on as employees for longer if they have stronger feelings of empathising or identifying with the industry they are regulating.[77] This calls back to the idea that capture can occur on a broad spectrum of extremity and how it may be through smaller frequent decisions rather than the regulator existing 'under the hegemony of the private interests'.[78]

1.5.4 Legal Recourse and Lack Thereof

Using the law to respond to capture can fruitless because the actual act of capturing an agency is not necessarily unlawful. The legal response to the Mount Polley disaster exemplifies the

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Investigation and Review Report<https://www.mountpolleyreviewpanel.ca/sites/default/files/report/ReportonMountPolleyTailingsStorageFacilityBreach.pdf> at 114.
[74] Auditor General of BC, *supra* note 2, at 9.
[75] Shapiro, *supra* note 14.
[76] Coral Davenport, Counseled by Industry, Not Staff, E.P.A. Chief Is Off To A Blazing Start (July 2017), online: NY Post <https://www.nytimes.com/2017/07/01/us/politics/trump-epa-chief-pruitt-regulations-climate-change.html>.
[77] Makkai & Braithwaite, *supra* note 23, at 77.
[78] *Ibid*.

importance of preventing and mitigating the risk of capture, rather than relying on legal remedies. Criminal charges were raised under BC and Federal legislation by an Indigenous community leader and an environmental non-profit, respectively. In both matters the Crown adopted and then stayed the charges. Despite the harms in this matter - the worst mining disaster in Canadian history and the public interest being significantly undermined - there were no criminal prosecutions. Public confidence in regulators and in the judicial system erodes when the public lacks a means of bringing offenders to court.[79] In a matter where the harm caused by the offenders is the public interest has been undermined, the lack of pathways to legal recourse stands out. While institutional design and theoretical questions about the role of government may make for productive law reform debate, they do not provide satisfaction for those who seek justice in court for the harms caused by capture.

Frustration both among local residents and environmentalists after the disaster was largely due to a lack of legal recourse. The BC government had three years to press criminal charges against the Mount Polley Mining Corporation under the *Mines Act*,[80] and the *Environmental Management Act*,[81] but in December 2015 the BC Chief Inspector of Mines declared that there was 'insufficient evidence of a contravention' of BC law.[82] As a result of the province's failure to prosecute, former chief of the Xat'sull First Nation Soda Creek Band (and acting chief at the time of the spill) Bev Sellars laid charges against the Mount Polley Mining Corporation. The 15 charges were adopted by the BC government, and then were all subsequently stayed.[83] When charges are 'stayed' they are discontinued, though there is a possibility of restarting proceedings within a year, which did not happen in this case. The cited reason for staying the proceedings

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[79] Carol Linnitt, Federal Government Seeks to Quash Lawsuit Against Mount Polley and B.C. Government Before Evidence Heard (January 2017), online: The Narwhal <https://thenarwhal.ca/federal-government-seeks-quash-lawsuit-against-mount-polley-and-b-c-government-evidence-heard/>.
[80] *Supra* note 56, at s 36.6.
[81] *Supra* note 57, at c 53.
[82] Mark Hume, Non-profit Group Pursues Legal Action Over Mount Polley Mine Disaster (October 2016) online: The Globe and Mail < https://www.theglobeandmail.com/news/british-columbia/non-profit-group-pursues-legal-action-over-mount-polley-mine-disaster/article32406543/>.
[83] West Coast Environmental Law, Mount Polley Disaster Escapes BC Law Because of Government Policy on Private Prosecutions (February 2018) online: West Coast Environmental Law <https://www.wcel.org/blog/mount-polley-disaster-escapes-bc-law-because-government-policy-private-prosecutions>.

was that Sellars' case did not meet the standard for approval of charges.[84] The Charge Assessment Standard in BC is a two-part test: whether likelihood of conviction is substantial, and if so, whether prosecuting the matter is in the public interest.[85] The decision to stay proceedings has been criticized due to the implication that – despite the unprecedented harm caused by the disaster – a conviction would not have been likely, or that the high probability of a conviction would not have been in the public interest.

Concurrent with the charges set by Bev Sellars was a second legal action under Federal legislation. The non-profit organization MiningWatch Canada filed charges in July 2016 under the *Fisheries Act* with regard to the lack of legal action taken by the Federal and Provincial governments.[86] As with the Provincial proceedings, the Federal government adopted and stayed the charges shortly before the March 2017 court date. The Federal Government similarly did not pursue charges for summary offences under the *Fisheries Act*,[87] and the five-year limitation period has lapsed.[88] Indictable charges under the *Fisheries Act* do not have these limitation periods,[89] but, at the time of writing, charges have not been pursued.

The attempts by Bev Sellars and MiningWatch highlight that the frameworks for addressing environmental issues are too weak to prosecute significant matters.[90] However, one of the recurring issues with regulatory capture is that it is rarely illegal. Industry has a consistent motive to affect or limit regulation, but the processes through which this may occur are strictly unlawful. Despite the Audit finding that the Ministry of Energy and Mines demonstrated multiple signs of being captured such as a steep decline in prosecution activity, there was not a sufficient link to

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[84] British Columbia, BC Prosecution Service, *BC Prosecution Service Directs Stay of Proceedings of Mt. Polley Mines Private Prosecution* (BC: January 2018), online: BC Prosecution Service < https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/media-statements/2018/18-02-sop-mt-polley-mines.pdf >.
[85] British Columbia, BC Prosecution Service, *Crown Counsel Policy Manual* (British Columbia, 2021), online: British Columbia Prosecution Service < https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-charge-assessment-guidelines.pdf> p 3.
[86] *Supra* note 58.
[87] *Ibid*, s 82.
[88] Meissner, *supra* note 4.
[89] *Supra* note 58.
[90] West Coast Environmental Law, *supra* note 83.

connect the process of capture to the harmful outcomes. Prevention and mitigation of the risks that might give rise to capture are paramount, as legal recourse for harms caused by capture cannot be relied upon.

1.5.5 Campaign Contributions: Mere Attempts at Influence, or Coordinated Capture

While this paper uses the Ministry of Energy and Mines as an example of a captured regulatory agency, the intention is not to single out specific members of that agency, but rather to identify the structural, institutional features of capture and the possibilities of systemic reform. Nevertheless, since capture often plays out through specific inter-personal interactions, I briefly highlight specific examples of individuals attempting to influence regulation on behalf of the mining industry. The Mount Polley Mining Corporation is a wholly owned subsidiary of Imperial Metals. The year before the Mount Polley disaster, the controlling shareholder of Imperial Metals had organised a private fundraiser for the BC Liberal re-election, singularly raising 10% of the party's total campaign contributions that year.[91] That shareholder Murray Edwards had historically donated heavily in the BC Liberal party, as did companies he was involved in. For instance, Edwards is the founder and CEO of oil exploration company Canadian Natural Resources, which donated $197,000 to the BC Liberal party between 2002 and 2017, nearly matching the $200,000 donated by Imperial Metals in that same period.[92] Edwards is only singled out here for his executive positions in companies relevant to the Mount Polley disaster and is only one part of much deeper financial ties between the BC mining industry and the BC Provincial government. Between 2005 and 2015 mining companies donated $4.7 million to the BC Liberal party, an amount that raised concerns about the potential impact on how the mining industry is regulated.[93]

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[91] Tyee Staff, Christy Clark's Club: Big Donors and Rainmakers (May 2017) online: The Tyee < https://thetyee.ca/Opinion/2017/05/08/Clark-Club-Big-Donors-Rainmakers/>.

[92] For donations from companies that Edwards either chairs or is a majority shareholder of, see keyword searches 'Canadian Natural Resources Ltd' 'Imperial Metals Corp', 'Mount Polley Mining Corp' and 'Ensign Drilling Partnership' (Elections BC, *Financial Reports and Political Contributions System*, online: Elections BC < https://contributions.electionsbc.gov.bc.ca/pcs/>).

[93] Francis Plourde, Tara Carnabm and Maryse Zeidler, Millions in political donations prompt call for review of B.C. mining regulations (April 2017) online: CBC News < https://www.cbc.ca/news/canada/british-columbia/millions-in-political-donations-prompt-call-for-review-of-b-c-mining-regulations-1.4058998>.

Although campaign contributions did not cause the Mount Polley disaster, they are one piece of information that provides some context to a multifaceted problem. Monetary gifts from industry to regulators are an extremely relevant consideration to consider when building that context. Financial ties between industry into government can be an indicator that there is a vulnerability to capture. The relationship between the mining industry and regulators is important for analysing both the norms of regulatory behaviour and the broader culture that can lead to capture.

1.6 Chapter Conclusion

Representation of the public interest is at the core of regulation. When regulators are captured by industry, they shift away from public interest decision-making. Capture is challenging to diagnose as it exploits individual regulators, the relationship between the agency and the industry, and affects the agency at an institutional level. The Mount Polley disaster shows the practical implications of a shift away from the public interest as well as many indicia of capture in action. The problems with a legal response to capture indicate that prevention and mitigation are more effective than remediation. The economic drivers behind regulatory capture warrant closer examination both to establish the constancy of capture as a risk as well as expanding the understanding of how fundamental tenets of government decision-making can be undermined by industry.

Chapter 2: Public Choice Theory - Using Economics to Understand Politics

2.1 Introduction

At a theoretical level regulatory capture is a devastating concept. It implies that corporations are so powerful that they can undermine a core premise of the state: that elected officials and their appointed agents are supposed to represent the public interest. We might expect certain industries to resist regulation that affects them, but can we expect them to hold such sway, financial or otherwise, that they can subvert the power dynamic between them and the institutions that might have been designed specifically to keep their power in check? Building upon the indicia of capture and what they looked like in action in the Mount Polley disaster, this chapter will explore the 'why' – why does capture occur, why does industry have a motive to influence their regulator, and why might members of that regulator end up misusing their delegated authority.

Public choice theory is a body of literature from economics that developed to explore these questions. This theory attempts to reconcile economic principles with political actions by interpreting regulatory decisions using economic concepts. 'Public choice' refers to political decisions made on behalf of the public, and the different factors that affect how and why they are made. Despite regulators having delegated authority to make public interest decisions, a public choice approach assumes that the decision-maker will act out of self interest.[94] Each decision under this model can be influenced by things such as their department's budget, their career, the impact on how much authority they or their ministry will have, pressure from industry, or pressure from their minister. Public choice researchers focus especially on the role of interest groups (industry or otherwise) who seek to expand their wealth by influencing regulation.

This chapter will examine the economic theories that caused the phenomenon of capture to be identified. Exploring these economic concepts will affirm that capture is an ongoing and recurring threat, and that discussion about regulatory capture as well as any potential reform must reflect that it is a constant risk. A literature review of public choice theory will establish the

[94] George Boyne, *Public Choice Theory and Local Government*, 1st ed (London: Macmillan press, 1998) at 64.

economic principles that can be used to explain why regulatory capture occurs. An overview of the different variations such as median-voter theory, rational choice and rational actor theories as well as concepts such as rent-seeking behaviour and externalities will explain why regulatory capture occurs.

2.2 Public Choice Foundations: Conflicting and Complementary Theories

2.2.1 Median Voter Theory and Rational Choice

The 1950s was the start of a political theory renaissance. Research into committees, regulators, and political candidates had formed around median voter theory, the idea that in a majority rules voting system the candidate most preferred by the median voter will be elected.[95] This argument was eventually expanded as scholars applied the model to other types of voting systems, as well as different types of political institutions. This discussion gradually began to shift away from the concept that voters are participants in a democratic process, and towards the idea that voters are consumers.[96]

Despite the popularity of the median voter theory, there were immediately challenges. There was a presupposition that decision-makers would act out of self interest, and that this self interest would drive them to make decisions that would best represent the median voter to maximize their chances at re-election.[97] However, this assumption that decision-makers would act in their own re-election interest was not conducive to regulatory environments where the decision-maker was appointed, because they could make decisions somewhat independently of public support.[98] A consequence of this limitation was the emergence of 'rational choice theory'; the idea that individuals generally make decisions that further their own self-interest.[99] A broad reading of rational choice theory was that all individuals are self-interested when it comes to policy, and

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[95] Duncan Black, "On the Rationale of Group Decision-Making" in Kenneth Arrow & Gerard Debrau, eds, *Landmark Papers in General Equilibrium Theory, Social Choice and Welfare*, 1st ed (Cheltenham: Elgar Reference Collection, 2001) at 569.
[96] Robert Tollison, "Public Choice and Legislation" (1988) 74:2 Va L Rev at 340.
[97] Pierre Lemieux, "The Public Choice Revolution" (2004) 27 Regulation at 24.
[98] Peter Aranson & Peter Ordeshook, "Regulation, Redistribution, and Public Choice" (1981) 37 Public Choice at 72.
[99] Zachary Gubler, "Public Choice Theory and the Private Securities Market" (2013) 91 NC L Rev at 768.

that this holds true whether the individual is acting as a voter, an elected representative, or an appointed regulator.[100] Rational choice may have taken the core self-interest premise of median-voter theory and expanded it to all government decision-makers, but it still did not account for the role of external factors shaping that self-interest such as lobbyists, advocacy groups, and industry. In the context of regulatory capture it can appear detrimental to assume that the entire system of delegated public interest authority is undermined by self-interested decision - makers.[101] Yet 'so many problems in the field seem to become clearer and more interesting' when considering the role of regulatory officials from the perspective of an industry representative.[102]

Median voter theory and rational choice theory both faced a similar question: what are the drivers behind government decision-makers? Answering this question led to the single most important development in public choice literature, Buchanan and Tullock's '*The Calculus of Consent*'.[103] Their research built upon the previous decade's debate and formulated a new methodology that was built around the actions and motives of individuals, rather than on traditional political theory. Under this new model, regulations were not seen as collective decisions made through direct representation, but rather were the reconciliation of various self interests through a process of trade and exchange. Bureaucrats and elected representatives were to be considered as individuals attempting to maximise wealth, power, job security, and efficiency, all traits resembling an entity seeking to advance its position in a market.[104] This view of 'politics as exchange' was an attempt to differentiate between politics as an institution that seeks to optimise public good, and political decision-makers as one part of an exchange with the 'optimal' state being an equilibrium between the decision-makers and the interest group it is engaged with.[105] The timeline of public choice theory can be demarked by before and after *The*

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[100] Lemieux, *supra* note 97, at 22.
[101] Paul Stephan, "Barbarians Inside the Gate: Public Choice Theory and International Economic Law" (1995) 10:2 Am U J Int'l & Pol'y at 745.
[102] *Ibid*, at 767.
[103] James Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, (Ann Arbor: University of Michigan Press, 1965).
[104] Boyne, *supra* note 94, at 15.
[105] Geoffrey Brennan, "Politics-as-exchange and The Calculus of Consent" (2012) 142:3 Public Choice at 357.

Calculus of Consent; research into median voter theory and rational choice theory were now supplemented by public choice debate, and new conversations such as interest-group theory.

2.2.2 Interest-Group Theory

The discourse that followed *The Calculus of Consent* was a driving force behind Stigler's introduction of regulatory capture, framed at the time as interest group theory, and discovering when and why groups of like-minded individuals organise to use 'use the state for its purposes'.[106] While interest group theory is not the same thing as regulatory capture, the emergence of the theory was one of major developments in the timeline of regulatory capture literature as economists tried to rationalise and explain the relationship between industry and regulators.[107] Interest group theory operated on a basic premise: individuals and groups of individuals will be the most organised and/or well funded influencers of regulation, if that regulation can give them a benefit greater than however much it cost to organise.[108]

Under this theory, interest groups and government interact similar to how agents do in a supply/demand model. The suppliers are the interest groups who actively look for opportunities to influence regulation, but only where those opportunities would be cost effective. For example, if the regulation would cost the interest group x/year, then the cost of influencing that regulation would need to be less than x. Following this logic, if the cost of fighting a regulatory change is higher than the cost they would pay under the regulation, then that interest group would be much less likely to dedicate resources to fighting it. The demand in this situation is from those who actively are pushing for legislative changes. As a subsection of public choice theory, the focus of interest-group theory is on the relationships between industry and government. The utility of examining this relationship with an economic lens is that public choice theorists could assign supply and demand roles to industry and government, use modelling to determine the

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[106] Stigler, *supra* note 25, at 4.
[107] One of the foremost contributors to interest group theory was Gary Becker, who won the Nobel Prize in Economics in 1992 for his research on the extension of economic analysis to nonmarket behaviour such as political decision-making. Stigler had also won the Nobel Prize in Economics 10 years prior for his contributions to the study of market processes, including his early theory of regulatory capture, as did Buchanan in 1986.
[108] Tollison, *supra* note 96, at 341.

equilibrium price between supply and demand, and then extrapolate and predict rent-seeking behaviour based on those models.[109]

The term 'rents' in economics generally refers to monopoly rents, a payment made to 'producers in markets that are artificially restricted'.[110] A recurring concept in public choice literature is rent-seeking, which in this context is 'efforts to create monopolies' with the intention of collecting rents.[111] In interest group theory, public officials are 'brokers' who pair those who want legislative change, such as a lobby group, with those who do not have the financial incentive to fight it, such as a competing firm or the public.[112] In exchange the public official would collect rents such as campaign contributions for access to their 'monopoly' on regulation.

For example, a firm might lobby a regulator to prevent new firms from operating in their market, and the regulator would act as a broker identifying firms to target that would find fighting the regulation to be cost-ineffective. The official in turn receives some sort of benefit. Elected officials may receive campaign contributions, indirect political support, or a job in that industry for after their role in government is finished.[113] Regulators and bureaucrats who are not elected may seek benefits that are focused on their department, such as an increase in budget, mitigation of risk, minimising uncertainty, and increased power to set a public policy agenda.[114]

While a regulated industry is often the interest group, the term is not restrictive; labor unions, professional societies, lobbies, and private groups of citizens can all be considered interest groups under that model. According to interest group theory, individuals form special interest groups and dominate political processes. They can then procure legislation for themselves or push for deregulation, even contrary to the wishes of a majority, as they are potentially more

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[109] Stephan, *supra* note 101, at 746.
[110] Armen Alchian, "Rent" in Matias Vernago, Esteban Caldentey, & Barkley Rosser, eds, *The New Palgrave Dictionary of Economics*, 3rd ed (London: Palgrave Macmillan, 2018) at 120.
[111] Gordon Tullock, "Rent Seeking" in Matias Vernago, Esteban Caldentey, & Barkley Rosser, eds, *The New Palgrave Dictionary of Economics*, 3rd ed (London: Palgrave Macmillan, 2018) at 120.
[112] Tollison, *supra* note 96, at 343.
[113] Jonathan Macey, "Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism" (1990) 76:2 Va L Rev at 269.
[114] Dennis Mueller, *Public Choice III* (Cambridge: Cambridge University Press, 2003) at 360.

organised than the majority is.[115] Under a public choice model, a well funded or organised majority can bid for wealth transfers or rents even if that is something the majority strictly opposes.[116] Buchanan and Tullock went so far as to describe the role of these groups as 'inevitable, if not desirable', and their ability to influence regulation better than a legislator who selflessly pursues the public interest.[117] This sentiment reflects a common argument throughout public choice literature that industries are so effective at organizing and are so well funded, that regulation is only an inefficiency in the process of eventual free-market economics. This argument is probably driven by political ideology, yet it is still a conclusion frequently reached within interest group theory and public choice theory.

There are some concerns that interest group theory underestimates the capacity for individuals to care about political issues and the effect that social or political movements have on the usual supply/demand model. Pressman critiques public choice literature for failing to account for common political situations: rent-seeking behaviour models cannot rationalise a politician making decisions based on their legacy, their public image, their constituents, their campaign promises, their regulatory duties, and so on.[118] This example is based on the idea that regulators and politicians 'are human beings who sometimes act selfishly to the detriment of others and sometimes act in the national interest because they know it is the right thing to do'.[119] Where the rational choice theory suggests that government decision-makers will act in their own interest, Pressman raises a simple yet strong alternative suggestion that economic modelling in this instance does not account for human beings making economically-irrational or inconsistent decisions every day.

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[115] Dorothy Brown, "The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions" (1996) 74 Wash U L Q at 179.
[116] *Ibid*, at 180.
[117] It is a common sentiment in public choice literature that a well-funded and organized industry interest group can influence regulation better than an altruistic public official, and that this may even be preferable. Although the theory of regulatory capture arose from public choice theory, one of the key differences is that public choice theorists argue that regulatory officials are an inefficiency preventing markets from regulating themselves, whereas regulatory capture literature focusses on fortifying regulators and making them more resistant to pressure and influence industry. Buchanan & Tullock, *supra* note 103, at 283.
[118] Steven Pressman, "What Is Wrong with Public Choice" (2004) 27 Journal of Post Keynesian Economics at 9.
[119] *Ibid*, at 9.

There is evidence that a well-informed majority that has reached some consensus around an issue can still have less sway over policy making than a well funded interest group.[120] However, if the decision-maker is ideologically unified with that majority then there is an even higher likelihood of the decision-maker's self interest in that outcome outweighing the value of a bid made by industry.[121] Conversely the political marketplace can still see politicians and regulators attempting to maximise wealth for their agency and for an interest group, even if not 'inherently self-interested in some personalized sense'.[122] Perhaps a succinct way of considering these different interactions is the warning by Sunstein that interest-group theory should be applied with caution, as there can be too much complexity in decision-making processes to assess causation of all political and regulatory outcomes.[123]

2.2.3 Public Choice Definitions

One of the main benefits of public choice theory is the ability to view certain aspects of policy in a different light in doctrinal legal research; rather than interpreting and understanding legal and regulatory decisions, an economic lens offers an external perspective on how those decisions are made. However, it is worth clarifying the definition of public choice theory as there are arguably two different definitions that have drastically different scopes. The first is to consider public choice theory as a way of conceptualising the different roles that individuals play in public policy decision-making and regulating. This conceptualisation considers government decision-makers, voters, and interest groups to all be akin to agents operating in a 'political market', and that public policy decisions are commodities to be purchased by any group that has the organisation and funding to make a bid.[124] The second definition is much broader: that public choice theory is any economic analysis of political decision-making and political behaviour. Mueller suggests a compromise, where public choice theory is 'the economic study of nonmarket

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[120] Brown, *supra* note 115, at 214.
[121] *Ibid*.
[122] James Buchanan & Robert Tollison, *The Theory of Public Choice – II*, 1st ed (Ann Arbor: University of Michigan Press, 1984) at 383.
[123] Cass Sunstein, "Against Interest-Group Theory: A Comment on Peltzman, "The Political Economy of the Decline of American Public Education"" (1993) 36 The Journal of law & Economics at 379.
[124] Lemieux, *supra* note 97, at 22.

decision-making, or simply the application of economics to political science'.[125] Then inherent in that study are all of the various modes such as rational choice, supply/demand market evaluations and so on.

Consider the Mount Polley disaster as an example of how these definitions differ. Under a strict application of public choice theory, the Ministry of Energy and Mines would be a rent-seeking broker, seeking 'rents' such as campaign contributions in exchange for access to the monopoly that the Ministry has over regulation. In that brokerage capacity, the Ministry would pair the BC mining industry or a specific firm such as Imperial Metals with parties who would be unwilling or unable to resist the change, in this case the public. In exchange for the rents, the Ministry would repeal regulations over the BC mining industry or a specific mining site, or, if captured, they may make internal changes such as firing enforcement staff with no intention of replacing them. The detriment would be to the public, who are no longer being represented by the Ministry despite that regulator having a legislative mandate to uphold the public interest. Applying the broader definition is much more flexible. For instance, a rational choice theory may be applied, and the actions of the regulatory officials would be considered in the context of their personal motivations. Alternatively, this broad approach could look at the financial benefit that is gained from advancing the mining industry in BC, and contrast that with the opportunity cost of increasing mine inspection rates and improving penalties for non-compliance.

This difference in definitions can cause a discrepancy. On the one hand, there is an insistence by public choice scholars that the theory is simply a methodology and a broad interdisciplinary way of approaching political theory, a sentiment that maps on to the second, broader, definition. However much of the literature does also operate on a fixed set of premises that are carried over from economics. While public choice may be a framework used to answer political questions, the further that framework has developed the more assumptions the theory begins to rely upon. After 50 years of public choice theorists building upon the initial research, a divide has emerged between those who focus on the self-interest of actors in the political process, and those who

[125] Mueller, *supra* note 114, at 1.

focus on politics as a market with the associated implications of competition and efficiency.[126] For example, Dietrich and List suggest that despite rational choice theory being based on regulators making choices, there is an assumption by rational choice theorists that those choices will be based on how that regulator can derive the most benefit from selling policy to industry.[127] While the assumption of self-interest can be a convenient constant in economic modelling, it has 'in practice led to an over-individualised ("a-social") view of human behaviour' in the application of economic principles to public policy discussion.[128]

2.3 Economic Theories and Political Realities

2.3.1 Rent-Seeking Behaviour and Externalities

When an exchange between an interest group and a regulator has an unintended impact on a third party, that impact is referred to as an 'externality'.[129] A positive externality could be planting a tree for shade which incidentally provides an aesthetic benefit for your neighbours, while a negative externality may be planting a tree for shade that blocks your neighbour's view and lowers their property value.[130] Much of the discussion about externalities in public choice theory is around ways to assign value to externalities; there has been some literature modelling ways to assign corporations monetary costs associated with negative externalities such as environmental harm.[131] For example, when companies take their own gains and losses into account in their decision-making, then regulation should intervene to ensure that externalities are accounted for.[132]

A substantial portion of the literature discussing externalities is in the context of rents. Rent-seeking behaviour is an attempt to obtain wealth without offering anything in return.[133] A

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[126] Mueller, *supra* note 114, at 384.
[127] Franz Dietrich & Christian List, "A Reason-Based Theory of Rational Choice" (2013) 47 Noûs at 104.
[128] Frans Van Winden, "On the Economic Theory of Interest Groups: Towards a Group Frame of Reference in Political Economics" (1999) 100: Public Choice at 2.
[129] Mueller, *supra* note 114, at 25.
[130] *Ibid*.
[131] Aranson & Ordeshook, *supra* note 98, at 83.
[132] Maria Rosa Borges, "Regulation and Regulatory Capture" (Paper delivered at the XIV International Colloquium, Cape Town, 10 May 2017) at 4.
[133] Mueller, *supra* note 114, at 333.

company paying a lobbyist to influence a decision that might give that company a subsidy is the act of seeking a rent, which in this case is furthering their position in their market without offering anything in exchange besides the costs of influencing the decision (such as hiring the lobbyist or campaign contributions).[134] The idea of rent-seeking behaviour closely resembles the earliest works in interest-group theory; if public choice is a supply and demand model of exchange, rents are often the result being sought by the parties as a low-cost means of increasing wealth. Rent-seeking behaviour is generally considered harmful to a market as there as increased cost with no reciprocation, and that cost can often end up being taken on by the general public even if it is not socially approved.[135]

While the Buchanan and Tullock era of public choice literature laid conceptual foundations, much of the contemporary scholarship revolves around analysing political decisions to look for rent-seeking behaviour, and then determining how significant the externalities are. In a political market, externalities can result in inequitable outcomes if a company lobbies for an advantage over other firms or creates barriers to entry for new firms. An externality that caused some environmental harm was the obtaining of exemptions during the phasing out of chlorofluorocarbons (CFCs). The Montreal Protocol is considered to be one of the most successful environmental treaties of all time in part due to its unprecedented support. However, part of the support came from the CFC industry, and arose out of lobbying efforts that had them receive 'critical use exemptions' that allowed extensive use far into the phasing out period, yielding profits estimated to be billions of dollars, despite CFC manufacturers outside of the US not receiving the same volume of exemptions.[136]

2.3.2 Keeping Public Choice in Context

One of the dangers of relying too heavily on analysis of rent-seeking behaviour, and indeed of all public choice theory, is that many core ideals get lost in the process or disregarded entirely. As

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[134] *Ibid*, at 384.
[135] Ann Krueger, 'The Political Economy of the Rent-Seeking Society" (1974) 64:3 The American Economic Review at 302.
[136] Richard Revesz, "Federalism and Environmental Regulation: A Public Choice Analysis" (2001) 115:2 Harv.L.Rev. at 572.

Russell noted in his application of public choice theory to collective decision-making models: 'To read the bulk of the empirical public choice literature, one would never think that issues such as the Vietnam War, the environment, and crime in the streets were of any interest to voters'.[137] Taking Russell's observation to heart, careful consideration is required when approaching public choice literature as a reliance on economic analysis can end up excluding the broader context that a process is occurring in. This is a lesson that is applicable to regulatory capture, as public choice literature is an excellent tool for understanding how industries and regulators interact, but it is limited when applying that understanding to the other social and legal aspects of capture.[138] Predictive economic modelling can give accurate assessments of political situations, but can fail to explain actions that are prompted by the mobilisation of the public interest. For instance, a focus on predicting interest group activity may not account for litigation to increase air quality standards despite that behaviour not being related to wealth expansion or market behaviour.[139]

Public choice literature frequently uses the US Securities and Exchange Commission ('SEC') as a case study, and as such it makes for a useful example of how public choice scholarship can lose credence when applied without considering external factors. The SEC regulates financial markets that are filled with well-funded and well-organised stakeholders who push for deregulation, and the complexity of financial instruments often means that regulators are either former or future members of those industries.[140] Recall from above that public choice theory generally posits that regulators try to expand the scope of the 'rents' collected, either through increasing regulation or by fighting for regulatory control of certain issues from other agencies. Public choice theory would predict that under conventional conditions this rent-seeking behaviour would occur as it would further the position of the regulator in the political market. In

[137] Clifford Russell, *Collective Decision Making: Applications from Public Choice Theory*, 1st ed (New York: RFF Press, 2013) at 54.
[138] An example of this limitation is the reliance by public choice theorists on the basic premise of rational choice theory. There is great utility in using public choice theory to understand regulatory capture, but it is certainly possible to consider instances of capture where the decision-maker is an altruistic well-intentioned public official whose agency is captured despite their best efforts.
[139] Croley, *supra* note 17, at 243.
[140] Gubler, *supra* note 99, at 748.

other words, that the rents sought by the SEC would imply continuous efforts to increase its budget, size, or jurisdiction.

One public choice analysis of the SEC by Gubler suggested that the growth of the unregulated private securities market in the US has steadily and rapidly expanded, which represents a de facto decrease in the jurisdiction that the SEC has over securities. The argument is that the proportional decrease in authority was implicitly approved by the SEC,[141] and that this situation was a rare exception to public choice theory's use as a predictive tool. However, this approach may lack context. Indeed, Gubler used public choice theory as a starting point and then argued that the SEC's inactivity with regard to private securities is an exception. This approach does not consider a number of external factors. For instance, if one takes a cynical approach and holds that the SEC was a captured regulator who exhibited rent-seeking behaviour, then deregulation (or lack of growth in the face of a growing deregulated market) would not mutually exclusive with that rent-seeking. One could argue that an influx of former Wall Street employees being appointed to senior agenda-setting roles affected day-to-day decision-making of the SEC.[142] One could further argue that these changes coincided with a 62% decline in fines imposed and illegal profits ordered to be returned over the first 20 months of that presidency.[143]

Conversely, taking a more sympathetic view of the SEC might consider that the organization is fulfilling their legislative obligations to the best of their ability, they may be subject to a mandate of deregulation from the executive branch, which occurred in 2017 when the Trump administration asked the US Congress for four consecutive years to eliminate the $50 million SEC reserve fund.[144] The SEC has been criticized for outsourcing some of its enforcement functions, but arguably this is a symptom of broader funding cuts.[145] Additionally, though

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[141] *Ibid*, at 751.
[142] James Cox & Randall Thomas, "Revolving Elites: The Unexplored Risk of Capturing the SEC" (2019) 107 Geo.L.J. at 885.
[143] Laureen Snider, "Beyond Trump: Neoliberal Capitalism and the Abolition of Corporate Crime" (2020) 1:2 Journal of White Collar and Corporate Crime" at 88.
[144] Bill Flook, *White House, SEC Diverge on Reserve Fund Use* (February 2020), online: Thomson Reuters < https://tax.thomsonreuters.com/news/white-house-sec-diverge-on-reserve-fund-use/>.
[145] Victor Razon, "Replacing the SEC's Whistleblower Program: The Efficacy of a Qui Tam Framework in Securities Enforcement: (2018) 47:2 Public Contract Law Journal at 356.

Gubler's work was published in 2013, a more recent development has seen the SEC attempt to increase its regulatory authority by defining cryptocurrency offerings as securities.[146] The intention here is not to pick apart Gubler's observations about the private securities market using examples that occurred far after his analysis. However, his paper serves as an interesting example of an otherwise robust public choice interpretation of regulatory behaviour that lacks context.

2.3.3 Statutory Interpretation as an Economic Process

A further question is how public choice scholars theorize the role of an independent judiciary. Landes and Posner argue that an independent judiciary is not only acceptable in the supply/demand approach to politics but can even encourage it.[147] If an interest group seeks to influence legislation, the incentive would be diminished if they knew that the legislation would be repealed or changed by the next government, or if the judiciary stopped enforcing it. The time consuming, expensive, and complex process of altering legislation can make the former process challenging. Under public choice theory this would put a greater amount of risk on rent-seeking behaviour as there would not be an assurance that the investment would last beyond the tenure of a certain regulator or political administration. Landes and Posner suggest that statutory interpretation minimises the risk: when legislation is interpreted based on its purpose and intent, it is arguably assurance that the legislation will continue to be enforced.

In an outright rejection of normative legal theory, the role of the judiciary through this lens is not to 'enforce the moral law or ideals of neutrality, justice, or fairness; they enforce the "deals" made by effective interest groups with earlier legislatures'.[148] The theory of durable, assured legislation is considered to be a core tenet of public choice theory and other economic theories of legislation, as it provides the necessary continuity and risk mitigation that an investor in

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[146] Reuters, Let us regulate 'wild west' of cryptocurrency, SEC chair urges (August 2021), online: < https://www.theguardian.com/technology/2021/aug/03/cryptocurrency-sec-regulation>.
[147] William Landes & Richard Posner, "Independent Judiciary in an Interest-Group Perspective' (1975) 18:3 The Journal of Law 7 Economics at 878.
[148] Landes & Posner, *supra* note 147, at 894.

legislation would expect.[149] Where regulatory decision-making is seen as a supply/demand curve by public choice theorists, Landes and Posner hypothesised that the judiciary by design is a tool used for utility maximisation.

These claims are as cynical as they are bold, and they beg the question of how judges in their capacity as decision-makers should be seen in this process. Epstein argued in his economic analysis of the US judiciary argued that judges are less likely to be susceptible to the 'self interests' posed by economic theory.[150] Judges can have significant amounts of political power, yet that power is somewhat isolated and contained from the 'gain, loss, and influence' that public choice suggests bureaucrats and elected officials engage in.[151] Judges may still operate out of self interest, yet the scope of their authority and the safeguards in place to prevent an abuse of power is sufficient to ensuring that the self interest does not operate in the same way that it does for government decision-makers. More broadly the checks and balances such as a separation of powers are in place to prevent the most egregious acts of self interest by actors in the political process.[152] Alternatively, we could apply Pressman's argument about regulators and elected officials to judges; that is, some decisions are made based on self-interest and others are made based on a broader public interest.[153]

Eskridge attempts to reconcile the above approaches to statutory interpretation by suggesting that judges consider legislation for 'what it is becoming, not what it was originally'.[154] This approach defies the idea that courts operate completely in a vacuum, and instead considers the more normative approach that legislative intent is continuously changing as the political, economic, ethical, and social contexts change.[155] Rather than legislation being a direct result of rent-seeking behaviour with courts only interested in continuity of the original intent, it could instead be

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[149] Tollison, *supra* note 96, at 347.
[150] Richard Epstein, "The Independence of Judges: The Uses and Limitations of Public Choice Theory" (1990) 3 BYU L Rev at 836.
[151] *Ibid*.
[152] *Ibid*, at 829.
[153] Pressman, *supra* note 118, at 9.
[154] William Eskridge, "Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation" (1988) 74:2 Symposium on the Theory of Public Choice at 338.
[155] George Glos, "The Normative Theory of Law" (1969) 11 William & Mary Law Review at 167.

suggested that a) legislators may draft legislation that is genuinely based on a desire to do the right thing (or at least the popular thing), and b) interpretation of legislation does change over time to reflect societal changes, and in a common law system it is the court's role to interpret progressively. As Eskridge observes, regulations and the driving factors behind them can be incredibly complex. Public choice can be an insightful methodology for asking complex questions, rather than a deterministic means of providing narrow answers.[156]

Eskridge's approach is convincing, striking a balance between normative legal theory and Pressman's rejection of rational choice theory.[157] Landes and Posner's utility maximisation perspective of the judiciary is an interesting contribution to public choice literature, but it should be considered more as a thought experiment to quantify different elements of governance rather than as political theory gospel. The empirical data relied upon by Landes and Posner was based solely on the number of US congressional acts that had been held unconstitutional,[158] an approach that is very limited. The purpose of public choice theory is to look at political problems from an economic perspective, and examples such as this appear find a political behaviour and then justify it with an economic explanation, rather than using economic principles to think about that behaviour in a different and more nuanced way.

2.4 The Divergence of Public Choice and Regulatory Capture

Public choice theory frequently involves regulatory capture. Yet it is perhaps more accurate to say that public choice assumes that the process of regulatory capture is inevitable, but without considering the legal, moral, or social implications of that process. Regulatory capture is conceptualised as a shift away from public interest, which has strong ramifications with regard to the role of the state and the nature of delegated authority in a democratic society. Although public choice theory generally includes capture as a constant, it is more of a descriptive tool for discussing how regulators and industry interact. After all, adopting the strict definition of public

[156] Eskridge, *supra* note 154, at 337.
[157] Pressman, *supra* note 118, at 9.
[158] Landes & Posner, *supra* note 147, at 896.

choice discussed earlier in this chapter involves regulatory bodies selling 'private uses of economy-wide regulations' to the industry or interest group willing to pay the rents.[159]

Weidenbaum wrote, when he was an economic advisor to President Reagan, that US governmental agencies such as the EPA, Occupational Safety and Health Administration ('OSHA'), and Federal Communications Commission ('FCC') all had such broad purviews that no industry could influence their decision-making.[160] Yet this argument was used as part of a broader justification to reduce funding to those organizations, and, like much of public choice literature, the potential vulnerability of regulators was still presented as a problem posed by the presence of regulation.

Taking the vulnerability of regulators into account in analysis of policy decisions is one of the highlights of public choice theory that lends itself well to regulatory capture analysis. However, an emphasis on vulnerability can have negative connotations about the role of regulators. For instance, a regulatory official making decisions based on their industry job prospects is an example of rent-seeking behaviour that result in negative externalities.[161] Public choice theorists may view that regulator as a rent-seeking broker functioning as an inefficiency in the process. When regulators are viewed as an inefficient part of a capitalist machine then it inevitably leads to economic papers subtly or outright suggesting ways to remove the inefficiency. Where an elected official is in support of passing legislation that affects an interest group, that interest group considers the official to be an inefficient broker. Subsequently there is an incentive for that group to organise and fund an opposing candidate in the next election to remove the inefficiency.[162] If the regulator is an appointed official rather than elected, then there may be pressure by the industry group to either fund an opponent to person in charge of regulatory body appointees, or to influence that person to replace the 'inefficient' party.

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[159] Aranson & Ordeshook, *supra* note 98, at 83.
[160] Murray Weidenbaum, *Business, Government, and the Public* 1st ed (New Jersey, Prentice-Hall, 1977).
[161] Elie Appelbaum & Eliakim Katz, "Transfer Seeking and Avoidance: On the Full Social Costs of Rent Seeking" (1986) 48 Public Choice at 175.
[162] Tollison, *supra* note 96, at 344.

To return to Weidenbaum's suggestion that regulators are too big to influence, his argument was dismissive of the impact that interest-groups could have on regulatory agencies while simultaneously arguing that those agencies had too much authority. Two examples Aranson and Ordeshook used to reject this argument were the interest-group involvement in EPA drafting of the Clean Air Act, as well as Unions lobbying for stringent OSHA regulations.[163] Both examples were framed around the harmfulness and inefficiencies of regulation itself, with the involvement of interest groups being a contributing part of why those regulations were harmful. Public choice literature frequently posits either Weidenbaum's suggestion that regulators are too big for industry to effectively influence their decision-making, or Aransan and Ordeshook's approach where interest groups encourage regulation too often and that public participation in regulation is just regulators trying to create rents for themselves.[164] Many papers share this approach: the use of public choice theory to discuss the inefficiency or ineffectiveness of a regulator due to the influence industry has on them, and then using those defects as an example of why there should be less regulation or no regulator. Consideration of this approach 'highlights the tension between the American commitment to majority rule…and a simultaneous commitment to individual freedom'.[165]

2.5 Chapter Conclusion

Despite regulatory capture arising from public choice theory, the areas of literature have developed separately. Because of this divergence, revisiting early public choice theory concepts can still inform recent developments in capture literature. One idea that stands out through both bodies of literature is the idea that industry has a constant incentive to affect how they are regulated, and that subsequently there is always going to be a risk of regulatory capture. Public choice theory may see capture itself as inevitability, but I would consider this from a socio-legal perspective as a warning to regulators. In other words, public choice theory tells us that capture occurs because the market demands it. This simple yet significant information explains why

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[163] Aranson & Ordeshook, *supra* note 98, at 83.
[164] *Ibid*, at 88.
[165] Jerry Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law*, 1st ed (New Haven: Yale University Press, 1997) at 51.

capture occurs, and in doing so helps explain why regulatory officials may end up making decisions that are not in the public interest. A nuanced understanding of how these motivations may change over time can inform our understanding of indicia of capture that pertain to individual regulators. Building upon this enables a critical analysis of the safeguards that are necessitated by such a risk. The next chapter will isolate one of those safeguards – the reasonable apprehension of bias test – to look at how captured regulators may not be sufficiently covered by the legal test that is in place to prevent that indicator of capture from occurring.

Chapter 3: The Reasonable Apprehension of Bias Test

3.1 Introduction

This thesis has considered what regulatory capture is and why it occurs, yet throughout these discussions one recurring question is how industry can exert such influence within legal frameworks that are supposed to be ensuring impartial decisions-making. To answer this question, I expand upon select indicia set out in chapter one such as excessive discretion in regulatory decision-making, and unclear boundaries between expertise and bias. Although these indicia are among the ways that capture can manifest or reveal itself, these indicia do have a corresponding legal instrument to control them in Canadian public law: the reasonable apprehension of bias test.

This chapter will review how the reasonable apprehension of bias test works and will consider the extent to which it is suitable for preventing and responding to a problem such as capture. The analysis will demonstrate how capture can coexist with otherwise robust legal frameworks. To a broader extent it will show how instances of capture are not always strictly illegal as they manipulate or undermine pre-existing power structures.

This chapter will provide an overview of the reasonable apprehension of bias test and, through a close read of the relevant caselaw, will discuss what evidence of bias must be marshalled in order to meet the legal test. I will argue that the bias test's focus on procedural fairness is ill-suited to providing legal recourse where public officials are captured. Following that, I describe how the bias test operates on a sliding scale of stringency depending on whether the decision-making body carries out adjudicative or policy-based functions. In theory this gives the bias test flexibility to adapt to a wide range of circumstances, but in practice has led to inconsistent applications of the test, and considerable leeway for regulatory bodies in the middle of the scale that have a wide range of functions. Lastly, I will consider the necessity for regulatory officials to be experts in their field, and the risk of capture in spaces where there is an overlap between bias and expertise.

3.2 The Bias Test in Action: Reasonably Apprehensive

3.2.1 Application and Operation of the Test

This section will discuss the reasonable apprehension of bias test and the different factors that courts have found may give rise to a reasonable apprehension. This includes the different ways that decision-makers may be involved in a matter prior to making a decision about it, personal relationships between decision-makers and parties in a decision, public statements by officials about their stance on a decision, or other personal or professional interests in the matter.

The reasonable apprehension of bias has arisen through Canadian common law, and is typically not codified in legislation, beyond a general requirement of impartiality. The test is 'what would an informed person, viewing the matter realistically and practically - conclude'.[166] The test is flexible because the perception of bias can arise in many different factual scenarios, which necessitates a standard that is responsive to a wide variety of contexts. When a court determines that the test is met, the decision affected by the bias can be quashed (cancelled) because it was made in an unfair manner.[167]

The reasonable apprehension of bias test is used for both judicial and regulatory impartiality. The test is modified when applied to administrative decision-makers, as the level of independence expected is based on the legislative authority granted to the judicial or regulatory institution.[168] Theoretically the bias test is applicable to public policy decisions, but in practice this is uncommon due to the broader authority that these decision-makers have for making policy decisions. Public policy institutions such as municipalities are subject to the 'closed-mind' test, a parallel standard that developed as procedural fairness issues arose in contexts where the decision-makers were not making adjudicative decisions.[169] The closed-mind test assesses the

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[166] *Committee for Justice and Liberty et al v National Energy Board et al* [1978] 1 SCR 369 at para 372.
[167] Issues of bias in administrative law are distinct from conflicts of interest, and the latter has Federal legislation codifying it. The purpose of this chapter is to conduct an analysis of the bias test in the context of regulatory capture, and as such the scope of this exercise does not include conflicts of interest. It is worth noting here as some of the potential limitations to the bias test, such as indirect financial interests in the outcome of a decision, may have recourse under conflict of interest legislation; Conflict of Interest Act (S.C. 2006, c.9, s.2).
[168] *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)* 2001 SCC 52, [2001] 2 SCR 781 at para 20.
[169] *Capelli v Hamilton Wentworth (Catholic School Board)*, 2017 ONSC 5442 (Div Ct) at para 66.

state of mind of the decision-maker at the time of the decision, by determining whether their 'mind [is] so closed that any submissions would be futile'.[170] For instance, if the decision-maker had made public statements declaring their stance on an upcoming hearing, the closed-mind test would only be met if there was an 'expression of a final opinion on the matter, which cannot be dislodged'.[171]

There are three key features of the reasonable apprehension of bias test. First, it is a flexible test takes into account the specific context of the case.[172] Second, it is an objective test that determines bias by assessing whether a reasonable person would find real or perceived bias.[173] Third, the test takes a practical approach that permits subjectivity in the actions of decision-makers, so long as they act within the bounds of their legislative or delegated authority.

Impermissible bias is a flexible threshold that recognises the difficulty and to a certain extent impossibility of totally removing bias from decision-making. Many parties to a decision who feel wronged may be inclined to think the decision-maker was biased. The bias test is an objective test, as it considers the perception of bias from the perspective of a 'reasonable person', as distinct from the litigant. This objectivity is considered with regard to the circumstances of the conduct, as a means of acknowledging different external factors such as 'the prevalence of racism or gender bias in a particular community'.[174] For instance, in *Baker v. Canada (Minister of Citizenship and Immigration),* an immigration officer's decision to uphold a deportation order was held to demonstrate a reasonable apprehension of bias, in part because the officer's actions occurred in the context of a country that 'shows the importance of immigration, and…shows the benefits of having a diversity of people whose origins are in a multitude of places around the world'.[175]

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[170] *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 SCR 623 (Nfld).
[171] *Old St Boniface Residents Association Inc v Winnipeg (City)* [1990] 3 SCR 1170 (Man) at para 1197.
[172] *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25.
[173] *Lippé v. Charest* (1991), 5 C.R.R. (2d) 31 (SCC) at para 69.
[174] *R. v. S. (R. D.),* [1997] 3 S.C.R. 484 at para 111.
[175] [1999] 2 SCR 817 at para 47.

A recurring theme in the jurisprudence of the bias test is that justice must not only be done, but must also be seen to be done. In this context the famous maxim means that it is not about whether bias can be proven in the state of mind of the decision-maker, but that the important question is whether there is even an appearance of bias. As such, the bias alleged can be real and/or perceived. As the Supreme Court noted in *Lippé v. Charest*,[176] decision-makers must appear to be impartial, with impartiality indicating a lack of real or perceived bias. For instance, a decision-maker with a personal stake in a matter may in fact be capable of deciding impartially, but if there is a reasonable *apprehension* that the personal stake could affect impartiality then the test would be met.

Within administrative law there is a notable difference between bias and subjectivity, as 'bias' in the colloquial sense might be displayed by decision-makers frequently. However, this is not impermissible bias unless it meets the reasonable apprehension test. The purpose of the test is to uphold procedural fairness, which in many cases limits the bias test to determining whether the decision-maker acted within the authority they are granted by legislation or their Ministry. Though the terms are used interchangeably, 'permissible bias' is generally the same as subjectivity in the context of this discussion. Government officials have different personalities, expertise, and personal and professional experiences that all may shape the official's mindset in each decision. The purpose of the test is not to identify and disqualify all subjectivity nor is it to examine the state of mind of the decision-maker, but rather to determine impermissible biases in the context of the decision being made.[177] Some forms of bias can be automatically considered to be impermissible bias, such as the adjudicator having a direct stake in the outcome of proceedings they are residing over, such as financial interest in the outcome.

The Canadian common law approach to defining reasonable persons in the context of the bias test is based on the expectation of specific biases that arise from the decision-maker's 'words or

[176] (1991), 5 C.R.R. (2d) 31 (SCC) at para 69.
[177] Gus Van Harten et al, eds, *Administrative Law: Cases, Text, and Materials*, 7th ed (Toronto: Emond, 2015) at 439.

conduct'.[178] There is no set definition of what knowledge should be attributed to a reasonable person in the bias test, but rather that the person would be 'reasonably informed' enough to examine the relationship between a party to a decision and the decision-maker. This is as distinct from the reasonable person being 'the losing parties or the unduly suspicious'.[179] The consequence of the courts interpreting 'reasonable person' in this manner has led to a focus on the relationships that might give rise to real or perceived bias, rather than whether the reasonable informed observer perceives bias generally.[180]

3.2.2 Institutional Bias: Could Adjudicative Independence be a Potential Standard for Litigating Captured Regulators?

One aspect of the bias test that is particularly relevant to regulatory capture is institutional bias. Institutional bias is still based on principles of procedural fairness, but the case law generally is based around questions of institutional independence. One of the leading institutional bias cases actually pre-dated the reasonable apprehension of bias test, prior to the appeal of that case. In *International Woodworkers of America, Local 2-69 v Consolidated-Bathurst Packaging Ltd*,[181] a packaging plant closed without informing the union that the employees belonged to. The union applied to the Ontario Labour Relations Board for relief. The labour board held a hearing with three members. After that hearing but before rendering a judgment, the labour board held a 'full board meeting' to discuss matters of policy, including topics such as how the decision might affect labour relations. The issue was whether this violated principles of natural justice, as the board members might hear evidence that had been obtained and presented extraneously without the knowledge of the parties, might be influenced by board members who had not heard the evidence. It was held that the board meeting was valid as discussion at that meeting was limited to policy implications relating to the board itself. This raised interesting implications with regard to enforcement, as there is minimal transparency about external meetings in some contexts. For instance, institutions such as tribunals do not have an obligation to disclose meetings or whether

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[178] *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484.
[179] *Kozak v Canada (Minister of Citizenship and Immigration)* (2006) FCA 124, [2006] 4 FCR 377 at para 54.
[180] Lorne Sossin, 'An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law' (2002) 27(2) *Queen's Law Journal* 5.
[181] (1983) 5 CLRBR / (1990) 1 SCR 282 (Ont.).

certain cases were discussed at meetings. Even in *International Woodworkers of America, Local 2-69 v Consolidated-Bathurst Packaging Ltd* it was noted that the packaging plant management on heard about the full board meeting because their lawyer overheard it at the board offices.[182] On appeal the bias test was considered briefly, but the court held that the danger that these meetings may 'fetter the judicial independence of panel members' was not sufficient to meet the test.[183]

A similar yet distinct interpretation of institutional bias considers the interaction between the institution and any other organization or people that they may be beholden to. The *Valente v. R* test for adjudicative independence determined that there were three factors to consider: security of tenure, financial security, and institutional independence.[184] *Canadian Pacific Ltd. v Matsqui Indian Band* discussed the *Valente* factors in the context of a tribunal that had close ties to the Matsqui Band.[185] In that matter, First Nations bands had been granted authority to adopt their own tax bylaws. The Matsqui Indian Band adopted a bylaw that created a tax assessment revision office. Rail company Canadian Pacific received a notice of assessment from the band, and they asked the Federal Court for a judicial review of the assessment rather than appealing to the band's appeal tribunal. The court of appeal applied the *Valente* factors and determined that a reasonable person would perceive that the tax appeal tribunals to not be independent from the bands, as they relied on the band for funding, the tribunal members did not have security of tenure, and the tribunal members needed to decide between the interests of the band and external stakeholders.[186]

Regulatory capture has interesting implications for the standards for institutional bias. For instance, the *Valente* principles in the context of a regulator that has a public policy-making primary function. That regulator may not be held to the same legal standard that an adjudicative body is, but the idea that external funding and security of tenure – whether from the executive

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[182] (1983) 5 CLRBR / (1990) 1 SCR 282 (Ont.).
[183] *International Woodworkers of America, Local 2-69 v Consolidated-Bathurst Packaging Ltd* (1990) 1 SCR 282 (Ont.).
[184] [1985] 2 SCR 673 at para 20.
[185] (1995) 1 SCR 3.
[186] *Canadian Pacific Ltd. v Matsqui Indian Band* (1995) 1 SCR 3 at para 95.

branch or from industry – may influence decision-making or give rise to a perception of dependency is just as relevant. However, a notable omission is that institutional bias for the purposes of the bias test focusses on the independence of the institution. Conversely, bias by a captured regulator might not contravene independence standards or may not be constrained by them depending on the functions of that institution. A greater concern is that theoretically a regulatory body might make decisions that consistently favour the industry they are regulating, yet this would not be impermissible bias for the purposes of the bias test. Furthermore, this would only be an issue for regulators that are covered by the independence standards in the first place, if the decisions were made in the context of a tribunal or adjudicative function.

Similarly, if a regulator is captured and decisions consistently benefit the industry they regulate, there may not be any bias found if the decision-making is favouring the entire industry rather than a specific company that has an interest in the outcome of the decision. The risk of regulatory capture raises the question of whether the bias test needs to be interpreted more broadly to account for a potential loss of impartiality. One could argue that natural justice is violated in that hypothetical situation as the public interest is no longer being considered in the decision-making process. Evidently this would be a challenging argument, so long as the subjective decisions made by the decision-maker are within their legislative mandate. To a greater extent it is worth questioning whether the bias test is the best legal instrument to be using to prevent and account for institutional bias, or whether that would be more effectively done through legislative or institutional changes rather than a legal response.

Smaller regulatory bodies who do not have security of tenure or financial independence may be more susceptible to making biased decisions due to pressure from their Minister or even from lobbyists, lawyers, and advocacy groups.[187] For instance, a regulator who is appointed by a Minister to an oversight body may not have job security to prevent them from being dismissed for making a decision that the Minister or government disagrees with, even if that decision is

[187] Lorne Sossin, 'From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion' (2005) 55(3) *University of Toronto Law Journal* at 439.

made within the regulator's appropriate discretion.[188] Gonthier J raised this concern in *2747-3174 Quebec Inc v Quebec (Regie des permis d'alcool)*, suggesting that a reasonable observer might perceive bias, possibly (but not necessarily) of a specific decision-maker, but in the mandate of the actual decision-making body. [189]

3.2.3 What Evidence is Required to Establish a Reasonable Apprehension?

The bias test is worded flexibly enough that in theory it can be used in a wide range of contexts. In practice, bias tends to manifest in a limited number of ways. Walking through the common law in this area is necessary for understanding what bias looks like when it arises. One of the ways that an apprehension of bias can arise is if there is a direct or indirect association between a party and a decision-maker. Not all prior associations are off limits, as most regulators are expected to have experience and expertise in their area of governance. As a result, there is a presumption of at least some prior association with parties that come before that board.[190] Nevertheless, familiarity between the parties can give rise to a reasonable apprehension of bias. For instance, in *United Enterprises Ltd v Saskatchewan (Liquor and Gaming Licensing Commission*,[191] the bias test was met because there was friendship displayed between a regulatory official and one of the parties to a decision. In that matter Baynton J held that friendship is not a requirement for finding a reasonable apprehension of bias, but rather familiarity could be sufficient for an appearance of bias.[192] Furthermore, if familiarity between a decision-maker and a party to a decision is identified across multiple hearings or decisions, the cumulative effect of that familiarity can also be perceived as bias.[193] However, some familiarity across multiple decisions is expected, as repeat dealings between a regulator and members of an industry might a routine part of the regulator's job.[194]

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[188] Lorne Sossin, 'The Puzzle of Independence for Administrative Bodies' (2008) 26 *National Journal of Constitutional Law* 20.
[189] [1996] 3 SCR 919.
[190] *Marques v Dylex Ltd* (1977), 81 DLR (4th) 554 (Ont Div Ct).
[191] [1997] 3 WWR 497, 150 Sask R 119 (QB).
[192] Ibid at para 35.
[193] *Pelletier v Canada (Attorney General)* (2008) FC 803, 84 Admin LR (4th) 1, 333 FTR 190.
[194] *Brosseau v. Alberta Securities Commission* [1989] 1 SCR 301.

The types of bias found in the case law predominantly involve bias arising from personal and professional relationships between decision-makers and parties to a decision. For instance, if a decision is made that affects businesses of a small industry, and the decision-maker is a member of that industry (which is not unlikely for officials who are regulating small markets), then a reasonable person will understand the reality of a highly specialized field comprised of a small number of people.[195] The bias test is flexible so that procedural fairness is assured even in small industries where current members of that market are serving as regulatory officials, despite there potentially being direct business competition between a decision-maker and a party to a decision. The leading definition for the reasonable apprehension of bias test comes from *Committee for Justice and Liberty v. Canada (National Energy Board)*.[196] In that matter a member of the National Energy Board was responsible for reviewing competing proposals for a pipeline project. That board member had also contributed to one of the proposals through participation in a study group, which had the purpose of exploring the feasibility of that pipeline. The board member's prior involvement in the matter was found to have constituted impermissible bias. Laskin CJ noted that even if the substance of the proposal had changed between the drafting and the review process, or even if the board member had consulted on the proposal in a different area of expertise, nevertheless there still would be a reasonable apprehension of bias. This bias would arise because irrespective of contribution to the proposal, the board member would still have been intimately familiar with the financial viability of the project. The board member's contributions to the proposal did exceed that level of familiarity as he had developed and approved parts of the proposal that he would later be assessing in his capacity as a board member.

A straightforward example that reinforced the focus on prior involvement was *Province of New Brunswick v Comeau*.[197] A ministerial decision was successfully appealed because it had been based on an investigation conducted by the same person who had also approved the findings and results of that investigation. The involvement of that person throughout the investigative process

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[195] *Gedge v Hearing Aid Practitioners Board*, 2011 NLCA 50 at para 34.
[196] [1978] 1 SCR 369.
[197] 2013 NBCA 41.

meant that they could not be in a position to make decisions based on the result of the investigation without appearing biased. The court emphasised the importance of separating investigators and decision-makers so that 'a high degree of procedural fairness' can be assured.[198] As the investigator had made a decision based on the result of the investigation they conducted, the decision met the reasonable apprehension of bias test. Interestingly, the separation of investigation and regulator functions parallels the Audit findings from the Mount Polley disaster, where it was suggested that a similar gap was needed between the decision-making and enforcement arms of the regulator to ensure that the enforcement arm could fulfil their function independently.

Although *Committee for Justice and Liberty v. Canada (National Energy Board)* successfully articulated the bias standard, it may have had implications with regard to corporate influence over regulatory boards. The court's reasons made it clear that the prior involvement of the board member in the research group was a procedural fairness problem, as the board member had a vested interest in seeing the proposal succeed. Yet this focus on prior involvement was considered an issue primarily due to the potential for perceived bias by competing parties who had submitted applications. Yet if we apply concepts from regulatory capture to this scenario, the issue may be that a board member is biased in favour of the natural gas industry and exceedingly likely to allow the project to occur at all, rather than the bias arising from favouritism of one proposal over another. This implication was reinforced in *United Enterprises Ltd v Saskatchewan (Liquor and Gaming Licensing Commission* as it was specified that familiarity between the decision-maker and a party to the decision was an issue, but only because that familiarity was extended to one party and not to all.[199] This again indicates that the role of the law in determining bias is limited to ensuring procedural fairness for all parties to a proceeding, and has not developed in a way that accounts for institutional biases.

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[198] *Province of New Brunswick v Comeau* 2013 NBCA 41 at para 30.
[199] *United Enterprises Ltd. v. Saskatchewan (Liquor and Gaming Licensing Commission)*, 1996 CanLII 7202 (SK QB).

Another factor that can give rise to real or perceived bias is if the official has a pecuniary or material interest in the outcome of a decision. However, if the benefit gained is not direct then it may be insufficient for meeting the test. In *Energy Probe v Canada (Atomic Energy Control Board),*[200] the eponymous regulator was challenged over its decision to renew a nuclear plant license on the basis that one of the board members was the president of a company that sold nuclear plant components and belonged to multiple nuclear energy advocacy groups.[201] It was held that the bias test was not met in that matter as the pecuniary interest was not direct as at the time of the hearing.[202] Upon appeal the decision was upheld, with Marceau J noting that 'the only rational requirements are that the benefit come from the decision itself and that it be a likely enough effect to 'colour' the case in [the observer's] eyes'.[203]

If regulatory capture occurs when a regulator shifts away from the public interest and towards representing interest, then cases like *Energy Probe v Canada (Atomic Energy Control Board)* may suggest limitations in how the bias test might respond to capture. In this matter, an industry executive was working as a regulator of that industry while participating in industry advocacy groups, but the bias test is limited to procedural fairness, which in this context was determined based on whether the decision-maker directly financially benefitted from the outcome. The bias test is similarly not generally applicable if the regulatory body financially benefits indirectly from the outcome, as the Supreme Court of Canada held in *Pearlman v Manitoba Law Society Judicial Committee* that a board would not have any inherent institutional bias in decisions even if the regulatory body might financially gain from the decision.[204] A caveat is that in *Pearlman v Manitoba Law Society Judicial Committee* the financial benefit from a finding of guilt was not substantial, as it only recouped the expenses incurred during the investigation. As this amount was approximately 0.04% of the law society's revenue, this case is somewhat contained to the facts of the case as it is unclear whether a more significant financial gain would affect whether that gain could give rise to a reasonable apprehension of bias.

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[200] (1984) 8 DLR (4th) 735 (FCTD).
[201] *Energy Probe v Canada (Atomic Energy Control Board)* (1984) 8 DLR (4th) 735 (FCTD).
[202] *Ibid,* at para 20.
[203] *Ibid,* at para 25.
[204] [1991] 2 SCR 869 (Man).

As the bias test is flexible so that it may be applied in different regulatory environments, a similar judgment was made in the context of a board of inquiry in *Large v Stratford (City)*.[205] The initial inquiry involved a police officer appealing the city policy that officers must retire at age 60. A Board Chair in that inquiry had made a public statement about the value of bona fide occupational requirements as an element of human rights law, and he made those statements in his capacity as president of the Canadian Association of University Teachers. The timing of the statement was after the inquiry had released the decision that the mandatory retirement age was not justified as a bona fide occupational requirement, but before compensation had been resolved. On appeal the employer argued that the Board Chair's statements raised a reasonable apprehension of bias. The court held that this did not meet the test, as board members are generally selected for their experience and understanding of the rights being regulated, and 'to exclude everyone who ever expressed a view … [on those rights] would exclude those best qualified to adjudicate fairly and knowledgably in a sensitive area of public policy'.[206]

In theory, giving minimal weight to prior statements should prevent posturing by decision-makers, though in practice it may result in difficulties in proving bias, so long as the decision-maker followed procedure. This risk is somewhat offset by the caveat that comments made cumulatively throughout the decision-making process can give rise to an apprehension of bias.[207] However this approach also focusses solely on the actions of the decision-maker while making the decision, rather than considering statements by them before or after the process. Similarly, the timing of statements relative to the hearing/decision date can be more important than the content of those statements, as public comments made by a decision-maker indicating that the they had pre-judged the matter far before the decision may not be as significant as the same comments made during the hearing process.[208]

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[205] (1992), 9 OR (3d) 104 (Div Ct).
[206] *Large v Stratford (City)* (1992), 9 OR (3d) 104 (Div Ct).
[207] *Pelletier v Canada (Attorney General)* (2008) FC 803, 84 Admin LR (4th) 1, 333 FTR 190.
[208] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 SCR 623.

A decision-maker is afforded much more leeway under the bias test if they are making public policy decisions, or if they are making technical decisions based heavily on their expertise. A regulator in those circumstances needs to rely on their experiences and expertise. There is an expectation of some inherent bias in those contexts, so the focus shifts towards ensuring procedural fairness. The Supreme Court held that a duty of impartiality did not apply to a Minister who had been exercising his discretion within the confines of his statutory authority.[209] The court held that as long as he followed the procedural requirements set out in the applicable statute, a level of impartiality similar to that of the courts was not necessary.[210]

3.3 A Tipped Scale: The Spectrum from Judiciary to Municipality

One of the central features of the reasonable apprehension of bias test is the scale set out in *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*.[211] A provincial utility service was having an executive pay increase reviewed by a utility regulatory board. A commissioner on that board - Andy Wells - had previously been elected as a municipal councillor on the platform of consumer advocacy. Wells made strongly worded public statements to the press both before and during the hearing, opining the 'unconscionable' nature of the raise. The appellant argued that these statements and interviews gave rise to a reasonable apprehension of bias. The Supreme Court held that 'at the investigative stage, the "closed-mind" test was applicable. Once matters proceeded to a hearing, a higher standard had to be applied.'[212]As such, the way that bias is determined in each matter depends upon the 'nature and function' of that particular institution.[213]

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[209] *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624.
[210] *Ibid.*
[211] [1992] 1 SCR 623.
[212] *Ibid.*
[213] *Ibid.*

Over time this has been interpreted as a scale. On one end are members of adjudicative tribunals and courts, who must conduct themselves in accordance with a high standard of impartiality. Because of this limited scope, the bias test is applied strictly to those officials. On the other end of the scale are elected officials who are expected or even encouraged to display some subjectivity in their decision-making. For instance, if an administrative board is conducting an investigation, 'a wide licence must be given to board members to make public comment',[214] whereas judges rarely if ever comment on cases likely to come before them.

In between these two extremes are various oversight committees, regulatory bodies, boards, administrative agencies, and quasi-judicial organizations. Although the law tends to be clear about how the bias test is applied to the ends of the scale, those in the middle do not have the same clarity. As the determination of bias depends upon 'the characterization of the decision-maker's function',[215] a challenge of the test is determining where on the scale the regulatory body would be, and in turn this leads to inconsistent applications of the test.

The scale has arisen as a way of thinking about how strictly the test should be applied in a given context. The parties to a judicial or adjudicative proceeding have an expectation that the decision-maker will be impartial and will strictly adhere to procedure. Conversely, an elected official may be expected to vocalise their personal stances on issues, such as a municipal councillor making a public statement about their thoughts on a decision prior to the process because that stance was a part of their election platform. It stands to reason that a standard from one end of the spectrum would be inappropriate if applied to the other.

The judicial end of the scale is defined by bodies that have adjudicative functions. Impartiality in these institutions arises from judicial independence, both in terms of independence of the institution from the government, but also in the independence of decision-makers from parties in a decision. This includes any constraints, pressures, and limitations placed on the decision-

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[214] *Ibid.*
[215] *Idziak v. Canada (Minister of Justice)* [1992] 3 SCR 631 at para 56.

makers by the executive branch.[216] There is a close link between the independence of judicial officials and impartiality, though the Supreme Court has noted that 'they are nevertheless separate and distinct values or requirements'.[217] There is an expectation that judges should be able to make their decisions without the influence of any 'government, pressure group, [or] individual'.[218] As with the previously mentioned concern that a lack of job security may influence decision-making, there is similarly a concern that if judges and adjudicators are beholden to government for things like renumeration then their independence would be questioned. To revisit the concept from *United Enterprises Ltd v Saskatchewan (Liquor and Gaming Licensing Commission)* that familiarity to a party is only an issue if that familiarity is not extended equally to each party. Bodies have adjudication as their primary function are held to a much higher standard where any overly positive or negative relationship with any party to the proceedings may amount to bias.

As with the risk that a lack of job security may influence decision-making, regulators being beholden to the executive branch which appoints them parallels the earlier discussion in this thesis about reliance on industry funding. A consistent concern throughout the common law bias test is the concern that regulators may end up compromising their decision-making if they have minimal job security or if their pay comes from a Minister rather than being independently funded. For instance, *Committee for Justice and Liberty v. Canada (National Energy Board)* is the landmark case for the bias test, a matter that involved the now-defunct National Energy Board which relied entirely on industry funding.[219] If funding from an employer increases the risk of biased decision-making, then it is not a stretch to suggest that the principle would still apply if the source of the funding was from industry rather than a Ministry. If anything, corporate funding could potentially come with more stipulations and strings attached than government funding might.

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[216] Lorne Sossin, 'Judicial Appointment, Democratic Aspiration and the Culture of Accountability' (2008) 58 *University of New Brunswick law* Journal at 17.
[217] *Valente v. R* [1985] 2 SCR 673 at para 15.
[218] *R v Beauregard,* [1986] 2 SCR 56 at para 21.
[219] *Supra* note 36.

To take the connection between judicial independence and reliance on industry funding one step further, it is important to consider the same problem at the other end of the scale. The bias test is applied much less strictly to agencies that have elected officials or do not have adjudication as their sole or primary function. Public policy has vastly more room for subjectivity in decision-making as decision-makers must grapple with multiple, and often competing, interests and objectives in making decisions with broad societal implications. Adjudicative bodies are expected to be independent because they have high standards of impartiality, yet if a tribunal has a reliance on Ministerial funding there is a concern that this arrangement might influence decision-making. However, this same concern for influence on decision-making is relevant irrespective of where the funding comes from, and a public policy institutions that have far less scrutiny for bias may be subject to the exact same concerns with less legal recourse.

Additionally, these agencies may be at even higher risk of compromised decision-making capacity if they have a reliance on industry funding, again with diminished legal recourse compared to adjudicative bodies. The bias test does little to prevent regulators on this end of the scale from making decisions that are biased towards the industry they are regulating, as those decisions may be outside of the scope of the bias test.

The application of the bias test to public policy organizations has been inconsistent. Specifically, agencies that have some adjudicative functions but are predominantly focussed on public policy creation and enforcement. In theory each regulatory body could have its functions assessed on a case-by-case basis, but in practice a alternative applications of the bias test have arisen for these agencies. For instance, an academic who was denied tenure argued that members of the tenure committee had already determined the outcome of the application prior to the process.[220] Despite that pre-judgment being proven true in that matter, it was still determined that this did not give rise to a reasonable apprehension of bias. The reasoning was that members of the committee would have known and/or worked with the applicant prior to the committee hearing, and that it would have been unavoidable for them to form opinions as to his tenure suitability. This matter

[220] *Paine v University of Toronto* (1981) 131 DLR (3d) 325 (Ont. CA).

shows how a body that is placed in the middle of the scale might have the bias test applied in a way where key elements of establishing bias (such as pre-judgment) are discounted due to the unique circumstances of that organisation.

A matter that best exemplifies the unique applications of the bias test is *Old St Boniface Residents Association Inc v Winnipeg (City)*.[221] The decision-maker that was subject of the bias test in this matter was permitted a degree of pre-judgment. A municipal councillor had represented Winnipeg in discussions with developers about a building proposal. He had previously appeared as an advocate for the project at council finance committee meetings, and the result of his advocacy was the proposal's approval by the committee. During a re-election that occurred during the decision-making process the councillor did not disclose his previous advocacy role. It was found that the councillor's prior involvement in the matter did not give rise to a reasonable apprehension of bias, as the court was convinced that the councillor still had an open mind concerning the decision.

The 'open mind' commentary gave rise to a separate alternative legal instrument that is closely linked to (but separate from) the reasonable apprehension of bias test. This instrument is the 'closed-mind' test, which is a standard that can be met by establishing that the official did not have an open mind about the outcome of the decision prior to the decision-making process. This is arguably a much higher threshold to meet than establishing a reasonable apprehension of bias, as *Old St Boniface Residents Association Inc v Winnipeg (City)* and *Paine v University of Toronto*[222] had already explicitly approved of a degree of pre-judgment. The threshold is a high one as an applicant would need to establish that the decision-maker had a completely closed-mind about the outcome of the matter. This is a nearly impossible standard to meet, as in *Old St Boniface Residents Association Inc v Winnipeg (City)* the prior advocacy for the proposal by the councillor was still not considered to fulfil that test as the court found he still had an open mind about some aspects of the decision such as zoning.

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[221] [1990] 3 SCR 1170 (Man).
[222] (1981) 131 DLR (3d) 325 (Ont. CA).

The reasoning for this higher threshold was that municipal bodies have lesser procedural fairness standards, as an elected official may have debated an issue prior to their election or even had their stance on an issue as part of their campaign platform. Elements of the reasonable apprehension of bias that are used to establish bias - such as prior statements by the decision-maker - are then given little weight in reviews of municipal matters, as those prior statements are permitted and even expected. On this end of the scale the bias test is all but abandoned, as a decision-maker explicitly opposing or supporting an outcome of the decision before, during, and after a matter is not sufficient to establishing bias for the purposes of the test.

The closed-mind test was was discussed in *Save Richmond Farmland Society v. Richmond (Township),*[223] with commentary about the 'political realities' of bias prevention. In that matter, a municipal official had been elected after campaigning on a platform that included developing farmland into residential areas. A bylaw was introduced that would re-zone that land to residential, and the councillor publicly stated that he would 'not change his mind regardless of what was said at the public hearings'. The councillor had also made statements stating that it would take 'something significant' to change how he voted. The appeal was dismissed as it was found that these statements did not meet the closed-mind test. The minority judgment suggested that decision-makers may feel pressured into paying 'lip service' to an issue if there is a risk that prior statements may be considered for or against them the bias test. This potentially could be harmful as decision-makers might be reluctant to speak candidly.[224]

It could be argued that the closed-mind test serves an important role by providing recourse for parties who felt that there had been a breach of procedural fairness by a municipality or public policy-making organization. However, the shift from the bias test's question of how a 'reasonable person' would perceive bias is a notably different standard from the closed-mind test

[223] [1990] 3 S.C.R. 1213.
[224] *Ibid.*

analyzing the state of mind of the decision-maker. As the latter is only applied in situations where that decision-maker has broader decision-making authority, the closed-mind test is a difficult threshold to meet. This limitation has been paralleled in cases about standard of review. In *Catalyst Paper Corp. v. North Cowichan (District)* the court discussed situations when judicial review can set aside a municipal decision role of judicial review of municipal decision was discussed.[225] The court held that municipal officials may be limited by their legislative authority, but 'the power of the courts to set aside municipal bylaws is a narrow one'.[226]

The interesting case of *Beavorford v Thorhild (County No 7)* involved a combination of tests.[227] In that matter a municipal councillor opposed a proposed quarry in his municipality and had voted in a municipal committee against granting a permit for the quarry. The councillor also posted his opposition on Facebook, and supported legislation that would ban quarrying in the area.[228] The court first assessed whether the comments made by the councillor met the closed-mind test. In applying the closed-mind test the court asked whether 'a reasonable person, knowledgeable of the facts, and having thought the matter through' would conclude that the councillor had a settled opinion.[229] Then, on the basis that impartiality has attitudinal and behaviour aspects, the court decided 'the traditional reasonable apprehension of bias test should apply'.[230] To summarize this approach, the court elaborated that 'The lack of confidence of an open mind in the face of a clearly adverse attitude reflected in a history of adverse behaviour is, in our view, sufficient in this case to find that a reasonable and informed person who thought the matter through would have a reasonable apprehension of bias'.[231]

This is a unique interpretation of the bias tests, though certainly inconsistent with the rest of the case law. The closed-mind test was appropriate for this context as the decision-maker was a municipal official. However, in *Old St Boniface Residents Association Inc v Winnipeg (City)* the

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[225] *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 SCR 5.
[226] *Ibid*, at para 9.
[227] 2013 ABCA 6.
[228] *Beavorford v Thorhild (County No 7)*, 2013 ABCA 6.
[229] *Ibid*, at para 25.
[230] *Ibid*, at para 26.
[231] *Ibid*, at para 30.

court determined that it was the court's role to decide whether the decision-maker was open minded, as opposed to using a reasonable person standard.[232] While one could argue that the closed-mind test is an extension of the bias test for municipal contexts rather than a separate test,[233] it is clear that the reasonable apprehension of bias test and the reasonable person standard should not have been applied to this municipal context. Much like the judicial review discussion in *Catalyst Paper Corp. v. North Cowichan (District)*,[234] the inconsistency with applying judicial bias standards to municipal contexts is that the substance of the decision becomes the topic of contention rather than whether procedural fairness was the issue.

As long as the municipal decision was made within the confines of the official's legislative authority, if 'the decision to be taken is discretionary … elected officials are entitled to do so. That is part of the normal process of politics in a democracy. It is not "bias"'.[235]

3.4 The Blurred Line Between Bias vs Expertise

The last risk with the bias test in the context of regulatory capture is the blurred lines between expertise and bias. Regulators may be appointed on the basis of their expertise and professional experience about the subject matter that they would be regulating. The premise supporting this appointment process is that regulatory bodies require well-informed decision-makers, who are well-versed in the subject matter that their agency regulates. The information required to be well-informed may be technical, and often requires experience working in that industry. One of the challenges in applying the reasonable apprehension of bias test is understanding the nuanced difference between a repeatedly biased (and potentially captured) regulator, and an official who is making decisions based on their expertise.

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[232] [1990] 3 SCR 1170 (Man) at 1197.
[233] For a detailed exploration of whether the closed-mind test is an aspect of the bias test or whether it is a separate standard, refer to Laverne Jacobs, "New Issues in Administrative Law Bias: Reviewing for Bias in Discretionary Contexts", Judicial Education Seminar on *Procedural Fairness in Administrative Decision-making* organized by the Canadian Institute for the Administration of Justice; (Ottawa, June 2005) Invited Paper and Presentation. (Available online: <https://webcache.googleusercontent.com/search?q=cache:pDOdyE2L6SkJ:https://ciaj-icaj.ca/wp-content/uploads/documents/import/JT/2005/Jacobs.pdf%3Fid%3D527%261496283382+&cd=1&hl=en&ct=clnk&gl=ca&client=firefox-b-d> at 8.
[234] 2012 SCC 2 (CanLII), [2012] 1 SCR 5.
[235] *Seanic Canada Inc v St John's (City)* 2016 NLCA 42 at para 53.

Canadian jurisprudence has some literature about bias amongst expert witnesses, but little about expert decision-makers. Regulatory bodies that are highly specialised tend to require decision-makers who are specialists in that area. The narrower the area of expertise, the smaller the pool of available professionals. This is a reality of niche industries where regulators may be drawn from a small pool of active participants in that market, and even still participate in that market. Expert regulators in small industries are granted leeway for some subjectivity that would not be allowed in comparable organizations that regulate more populous industries.[236]

The difficulty in differentiating between expertise and bias was raised in *EA Manning Ltd v Ontario Securities Commission*.[237] Specifically, that expert tribunals are expected to have 'special knowledge of matters' and that there is a presumption, in the absence of contrary evidence, that the decision-makers will be impartial.[238] The presumption of impartiality echoes back to the chapter 1 discussion of the role of regulators as representatives of the public interest. The presumption may even be more a matter of ethics than law, as a duty of impartiality would imply that biased decision-making is inherently unethical.[239]

However, oversight over regulatory decisions is necessary for situations where decision-makers are not impartial, and the reasonable apprehension of bias test is one of the primary ways that wronged parties have for recourse. A presumption of impartiality could also, in theory, prevent excessive questioning of the integrity of decision-makers. A disproportionately strong focus on bias in in every matter might affect the public's confidence in decision-making institutions. However, if there is minimal oversight then that may negatively influence public confidence in those institutions even further. To a greater extent, if the risk of capture is truly so constant and prevalent (as this thesis argues), then attempts to diagnose capture inherently call the presumption of impartiality into question. There must be sufficient oversight both to ensure that

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[236] *Gedge v Hearing Aid Practitioners Board*, 2011 NLCA 50 at para 34.
[237] (1995), 23 OR (3d) 257, 125 DLR (4th) 305 (CA).
[238] *EA Manning Ltd v Ontario Securities Commission (1995), 23 OR (3d) 257, 125 DLR (4th) 305 (CA).*
[239] Lorne Sossin and Charles Smith, 'Hard Choices and Soft law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* at 877.

the public interest is represented, and even further to ensure public confidence that decisions are not being made based on discretion and technical expertise, rather than social consensus.[240]

A problem like regulatory capture mirrors concerns of public confidence. If oversight over regulators is ineffective, then how can that oversight prevent and mitigate a more malicious and potentially coordinated threat such as capture? For instance, if a regulatory body relies on industry for funding, and regulatory officials are exclusively selected based on their experience working in that industry, then those officials are vulnerable to capture at best or complicit at worst. [241] Even where a decision-maker is not an expert there is an assumption that some biases will be present due to the life experiences and general opinions of the decision-maker; this is implied in the 'reasonable' aspect of the test.[242] In this context it could be argued that the bias test is poorly suited to preventing or addressing regulatory capture.

There is an important caveat to the concerns of capture: if a decision-maker goes beyond advocacy to the point of acting as a de facto advocate for a party to an issue that they are residing over, then that can give rise to a reasonable apprehension of bias.[243] In *Great Atlantic & Pacific Co of Canada v Ontario (Human Rights Commission)* a human rights advocate, Professor Backhouse, was involved in an outstanding complaint to the Ontario Human Rights Commission.[244] Several years later, while that complaint was still outstanding and unresolved, Backhouse was serving on the Board of Inquiry under that same commission, to oversee a complaint that involved a similar issue to the outstanding complaint she was a part of. The court held that this met the reasonable apprehension of bias test as Backhouse's public advocacy in conjuncture with her outstanding complaint meant that the official 'descended personally, as a

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[240] Lorne Sossin, 'The Politics of Discretion: Toward a Critical Theory of Public Administration' (1993) 36 *Canadian Public Administration* at 390.
[241] Lorne Sossin, Designing Administrative Justice (November 1, 2016). Available at SSRN: https://ssrn.com/abstract=2892153 at 2.
[242] *Howard Johnson Inn v Saskatchewan Human Rights Tribunal* (2011) SKCA 110.
[243] *Great Atlantic & Pacific Co of Canada v Ontario (Human Rights Commission)* (1993), 13 OR (3d) 824, 109 DLR (4th) 214, 12 Admin LR (2d) 267 (Div Ct).
[244] (1993), 13 OR (3d) 824, 109 DLR (4th) 214, 12 Admin LR (2d) 267 (Div Ct).

party, into the very arena over which she has been appointed to preside in relation to the very same issues she has to decide'.[245]

Lastly, but of considerable importance, even if it is proven that there is a real or perceived bias, the consequences of that finding are limited. If an applicant successfully proves that there was a reasonable apprehension of bias, the outcome is that the biased decision is set aside. There are no punitive measures to the regulator, and the repercussions to a decision-maker who repeatedly makes biased decisions are simply those decisions no longer being in effect. In the context of regulatory capture, the risk for both a captured decision-maker operating within this framework and the industry influencing them remains low.

3.5 Conclusion

The reasonable apprehension of bias test is not a broken legal instrument. However, there are facets of the test that are ill-prepared for a problem such as capture. Specifically, the unwillingness to regulate institutional bias, the inconsistent application of the test to regulatory agencies, and the unclear line between bias and expertise. The bias test has created a legal environment where captured agencies may demonstrate bias in favour of the industry that they regulate without legal oversight. Regulators require enough expertise that in the bias test they may have the same freedoms exercised by municipal officials, despite their functions potentially including or predominantly being adjudicative. Subjectivity will always be present in regulatory officials due to personal and professional relationships and experiences. Yet irrespective of those permissible biases there are limitations to the test, such as the gaps where there might be otherwise be impermissible bias but the test is not applicable due to a lack of procedural fairness issues, such as in public policy. The lingering question is whether this is a deficiency in the test that should be accounted for, or whether it is the role of a common-law legal instrument at all to mitigate such a problem. To a greater extent, the purpose of singling out the reasonable

[245] *Great Atlantic & Pacific Co of Canada v Ontario (Human Rights Commission)* (1993), 13 OR (3d) 824, 109 DLR (4th) 214, 12 Admin LR (2d) 267 (Div Ct).

apprehension of bias test is to demonstrate how even one of the indicia of capture may operate openly within the area of law that on paper is preventing it.

Chapter 4: Beyond Capture

4.1 Reflecting Upon the Indicia: Recommendations and Next Steps

The first broad recommendation I would make is to place greater influence on prevention and mitigation of industrial influence, rather than attempting to 'de-capture' regulators. Prevention and mitigation are best served when reviewing the structures of institutions, both financially and organizationally within the government. Different indicia from chapter 1 may be addressed by legislation tailored to them, yet an industry influencing an institution's structure overrides any other safeguards. For instance, seeking legal recourse for a harm caused by capture is futile if the industry had previously exerted enough influence over the regulator to pass or revoke regulation that limits the liability of members of that industry.[246] As such some of the best ways to prevent capture may be to review how a regulatory agency is structured, such as the extent of their delegated authority, where their funding comes from, and how independent from each other different functions of the agency are. This includes a careful consideration of whether the institution has functions that are potentially at odds with each other, was we saw with the Ministry of Energy and Mines' dual responsibilities in the Mount Polley Disaster. With regard to that authority, it is worth remembering that independent regulatory agencies are responsible for exercising the authority they are granted by the legislature through their Minister, rather than being beholden directly to their Minister.[247] Reviewing organizational structure may find instances where regulators are subject to new-capture due to their Minister being influenced by industry.

The second recommendation is to continue researching capture by expanding the literature into a wider range of institutional settings. Growing the literature on capture helps ask how firms interact with regulators in a wider variety of institutional settings. Examining regulatory capture in different regulatory contexts will increase our understanding of the ways that companies and government interact. For instance, having a broader understanding of capture in different

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[246] Etzioni, *supra* note 10, at 322.
[247] Janisch Hudson, "The Relationship Between Governments and Independent Regulatory Agencies Will We Ever Get It Right?" (2012) 49:4 *Alberta Law Review* at 819.

jurisdictions can facilitate analysis of how local firms influence policy compared to multinational ones, and what regulators and agencies should anticipate arising from those differences.[248]

The third recommendation is to create legislative solutions that would make regulators resistant to capture. Minimising the impact of corporate influence on government decision-making is not as simple as deciding to have more or less oversight, but rather we need regulations and regulators that are capture-resistant if they are to represent the public interest.[249] An example of an area that could be revised with the goal of capture-resistance is lobbying. In 2008, Canada introduced a five-year period where designated public office holders were prohibited from working as lobbyists. However, that former public office holder may still be employed by a corporation as a lobbyist or may work as an independent consultant, so long as lobbying does not amount to a 'significant part' of their employment, with significant in this context being defined as around 20%.[250] Furthermore there are minimal requirements for public officials to keep records of their contact with lobbyists unless the communications were made orally, initiated by the lobbyist, and planned in advance.[251] Tightening legislation such as the *Lobbying Act* (R.S.C., 1985, c. 44 (4th Supp.)) could directly make regulators more resistant to industry influence by limiting the access of interest groups and former employees, and may minimize the role of the revolving-door between government and industry. The example of lobbying regulation is highlighted not because it is necessarily the most urgent or important of areas to address, but rather that it is indicative of how impactful a few key changes made with capture-resistance in mind could be. The question of how best to accomplish this remains open ended, and perhaps legislative changes would be less effective than implementing organizational capture-resistance assessments.

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[248] Michael Hadani, Jonathan Doh & Marguerite Schneider, "Corporate Political Activity and Regulatory Capture: How Some Companies Blunt the Knife of Socially Oriented Investor Activism" (2018) 44:5 Journal of Management at 2084.
[249] Etzioni, *supra* note 10, at 319.
[250] Awanish Sinha et al, Lobbying Commissioner Recommends Significant Changes To Canada's Federal Lobbyist Registration Rules (June 2021), online: Mccarthy Tetrault, < https://www.mccarthy.ca/en/insights/articles/lobbying-commissioner-recommends-significant-changes-canadas-federal-lobbyist-registration-rules >.
[251] *Lobbyists Registration Regulations* (SOR/2008-116) s 9.

4.2 Alternative Theories of Regulatory Behaviour

4.2.1 Why Can't We Be Friends? Collaborative Regulation

Although it is a substantial area of research in its own right, 'collaborative governance' or collaborative regulation offers the idea that stakeholders can work together to determine the best way they should be regulated – these stakeholders generally include the regulator.[252] For instance, Pautz argues that environmental inspectors would be more resistant to capture if they worked collaboratively with management of the sites they inspect, as they would become more well-informed about sites from a holistic perspective, rather than focussing solely on their testing criteria.[253]

Environmental inspectors interviewed in a different jurisdiction provided an alternative perspective. In BC, forestry inspectors cited a lack of trust between industry and the regulator as a reason why collaboration was not a popular idea, along with challenges in accurately evaluating risk and defining measurable policy targets when creating policies with industry input.[254] Collaboration between regulators and industry would not necessarily create barriers to capture, as examples such as oil and gas regulation in Canada have exemplified the environmental harm that can arise from industry having the capacity to draft its own amendments to environmental legislation.[255] Considering collaboration as a means of combatting capture could be an interesting argument, though a risk is that 'cooperation can become collusion and goals can be lost in salving the abrasions of the regulatory process'.[256]

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[252] Neta Sher-Hadar et al, *Collaborative Governance: Theory and Lessons from Israel* (New York: Palgrave Macmillan, 2021) at 11.
[253] Michelle Pautz, "Environmental Reviews & Case Studies: Next-Generation Environmental Policy and the Implications for Environmental Inspectors: Are Fears of Regulatory Capture Warranted?" (2010) 12:3 *Environmental Practice* at 253.
[254] George Hoberg, Leah Malkinson and Laura Kozak, "Barriers to Innovation in Response to Regulatory Reform: Performance Based Forest Practices Regulation in British Columbia" (2016) 62 *Forest Policy and Economics* at 6.
[255] Jason Maclean, "Regulatory Capture and the Role of Academics in Public Policymaking: Lessons From Canada's Environmental Regulatory Review Process" (2019) 52 UBC Law Review at 502.
[256] Zinn, *supra* note 12, at 83.

4.2.2 Regulatory Lifecycle theory

Regulatory life-cycle theory was developed to answer the questions of how regulators are affected as the influence of an industry grows over time, and how constraints on industry are affected by this change in influence.[257] The regulatory life-cycle theory proposes that there is an aging process to every regulatory agency: a 'youth' phase where regulations strongly represented the public interest at the time, and a 'maturity' phase that sees an increase in bureaucracy and shift away from the initial regulatory objectives, and subsequently closer ties with the industry they are regulating.[258]

An interesting facet of life-cycle theory is that regulatory decision-makers are treated more sympathetically in discussions about industry influence. Several of the indicia of capture set out in chapter 1 of this thesis suggest situations where the integrity of decision-makers is compromised, including the bias test which was discussed at length. The life-cycle theory shifts some of the focus away from regulatory officials and towards the 'bureaucracies' who administrate the agencies.

Posner argues that the fixed sequence of stages in life-cycle theory misses out on more dynamic analysis of how institutions are often continuously resisting the constant pressure by industry.[259] In other words, even where life-cycle theory is correct about the different stages of institutional growth, the rise in bureaucracy does not inherently equate to an increased likelihood of capture. Rather the life-cycle interpretation dismisses the many regulatory agencies who are constantly in conflict with the industry they regulate. An increase in organisational or political resources by the regulator if anything could make it easier to prevent influence by industry due to regulatory officials having less autonomy to use their discretion in a way that would breach procedural fairness.[260]

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[257] David Martimort, "The Life Cycle of Regulatory Agencies: Dynamic Capture and Transaction Costs" (1999) 66:4 The Review of Economic Studies at 929.
[258] Marver Bernstein, *Regulating Business by Independent Commission* (Princeton: Princeton University Press, 1955) at 74.
[259] Posner, *supra* note 9, at 54.
[260] Posner, *supra* note 9, at 51.

An alternative interpretation of the life-cycle theory is that capture does not inherently arise at a bureaucratic level, but rather it can occur over time at any level of regulation. Makkai and Braithwaite conducted an empirical study that hypothesised that health care regulatory inspectors in Australia were increasingly more likely to be captured the longer they worked as inspectors.[261] This data supports the extensive literature on the revolving door between industry and government. The implication is that the way regulators change over time is not so clear-cut as Bernstein's analogy of a regulatory body maturing like a human, but rather that proximity to industry at any level is more likely to affect decision-making as time progresses.

4.2.3 Dominance of Neo-Liberal Perspectives in Public Choice Literature

While public choice theory and regulatory lifecycle theory both discuss capture as an inevitability, an alternative consideration is that this inevitability is due to underlying biases in those areas of literature. A substantial portion of the contributions to the literature are either dismissive of the impacts of capture, assume that capture is not a problem because it is so inevitable, or that capture is a positive thing as it contributes to deregulation and smaller government.

The anti-regulation angle that was prevalent in early capture literature was not incidental. The discussion of capture in Stigler and his cohort's works was predominantly based on challenging the US post-WWII welfare state and 'assumptions of government agencies as benevolent regulators'.[262] By emphasising the role of interest group influence on government decision-making and putting instances of ineffectual governance under a magnifying glass, public choice theorists could point to government as an expensive inefficiency to the inevitable state of markets regulating themselves.

[261] Makkai & Braithwaite, *supra* note 23, at 11.
[262] Portman, *supra* note 7, at 38.

This rhetoric is mirrored in political debates regularly, as something of a self-fulfilling cycle: politicians who seek to reduce the size of government could make decisions that reduce the capacity of a regulatory body to govern effectively. Then if a problem or incident arises due to the limited capacity of that regulator, then that is used as a catalyst for removing regulatory authority. If we think of this process as 'new capture' then it can provide context to the actions of regulatory environments such as the US EPA during the Trump administration. Regulatory bodies may be de-funded, which leads to an inability to fulfill all of their responsibilities, which then may come across as the regulators being captured, which in turns leads to further defunding or loss of delegated authority. Wood et al suggest that throughout the 19902 and 2000s in Canada, public choice theorists provided support for neo-liberalism (an ideology of social and economic governance driven by free-market ideals and reduction of regulation and government spending)[263] in Canada specifically because of the potential for privatization of public goods and management of public services in the name of avoiding agency capture and rent-seeking.[264]

In a more meta-sense, economists are just as vulnerable to influence by industry as regulators are. Theoretically the influence of industry could extend to economics literature, including public choice scholarship. It would be dismissive of decades of public choice theory to assume this about the whole field, but it is possible that at least some literature that downplays the role of capture may be in part due to industry influencing that research.[265] It is beyond the scope of this thesis to tackle questions about how big government should be and how much authority regulators should have. As with the above example of the US EPA during the Trump administration, it can be challenging to separate regulatory capture from ideologies that push for free-market economics or deregulation irrespective of the influence of industry. However, it is worth approaching some public choice literature with skepticism, as it is not uncommon to see

[263] Vaughan Higgins & Wendy Larner, "Introduction: Assembling Neoliberalism: in Vaughan Higgins and Wendy Larner, eds, *Assembling Neoliberalism: Expertise, Practices, Subjects* (New York: Palgrave Macmillan, 2017) at 1.
[264] Stepan Wood, Georgia Tanner and Benjamin Richardson, 'What Ever Happened to Canadian Environmental Law' (2010) 37(4) *Ecology Law Quarterly* at 1021.
[265] Luigi Zingales,'Preventing Economists' Capture' in Daniel Carpenter & David Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (New York: Cambridge University Press, 2014) at 124.

deregulation encouraged on the basis of a regulatory failure, even where that failure was a result of insufficient oversight or a vulnerability to regulatory capture.

Aside from aspects of the literature that encourages capture, there are also areas where its impact is heavily downplayed. Despite the empirical evidence discussed above that shows situations where regulatory staff are likely favour industry over time, other papers in revolving door literature still disagree that capture is the cause of -or contributes to - this phenomenon. For instance, Zheng suggests that the actions of regulators who would be considered captured are actually not captured, but rather are finding ways to maximize the market demand for their post-government job.[266] This argument is not entirely convincing, as it seems to dismiss capture by focussing on one phenomenon that is not mutually exclusive with capture. One of the reasons that industry influence can be so problematic to deal with is that it can involve the willingness of regulatory officials. Those officials may be seeking favour with their potential post-government employers, but this is not evidence against capture; rather this is an example of how corporate influence on decision-making may occur through incentives and lobbying rather than as a hostile takeover. The difference was considered in chapter 1 in the discussion of old capture compared to new capture, where the former is closer to companies bringing their regulators onto their side and petitioning for deregulation of oversight, whereas the latter may involve forcing the regulator's actions through a targeting of their budget or attempted corruption of their Minister.

This is not to say that any dismissal of capture is without merit. Gordon and Hafer suggest that there are limitations to the plausibility of regulatory capture; industry influence on regulators can occur with significant consequences, yet we also cannot dismiss the complexity of regulatory infrastructure, the individuals in those agencies who may have competing or conflicting motivations, and the various power dynamics that occur both within those agencies and between the regulator and industry.[267]

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[266] Wenton Zheng, "The Revolving Door" (2015) 90:3 The Notre Dame Law Review at 1269.
[267] Sanford Gordon & Catherine Hafer, 'Conditional Forbearance as an Alternative to Capture – Evidence From Coal Mine Safety Regulation' in Daniel Carpenter & David Moss, eds, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (New York: Cambridge University Press, 2014) at 153.

Despite the prevalence of industry influence discussed throughout this thesis, I would reject the argument from public choice theory and regulatory life-cycle theory that capture is an inevitability. Rather I would posit that it is the attempts at capture that are inevitable. So long as there is a financial motive for companies to affect how they are regulated, they will continue to try. Yet to assume that they will succeed dismisses the complexity of regulatory environments and gives little credit to the many regulatory officials who make procedurally fair and uninfluenced decisions every day. Perceiving attempts at capture as a constant is good because it allows for a healthy caution. If anything, knowing that there is a constant risk can ensure that the risk of capture is taken into consideration when structuring new regulatory bodies and reorganising pre-existing ones.

4.3 Bias and Access to Justice

One of the challenges posed by capture is that even concerned and well-informed citizens are not likely to bring forward legal action in relation to it. This is not something unique to capture as people are generally unlikely to try to overturn decisions that they are not a party to, both due to the time requirements and the cost. Yet this has further implications than access to justice, as the inaccessibility of processes such as the bias test means that those processes inherently favour those who can afford to participate. As regulatory capture is predominantly driven by corporate influence, the companies that strive to capture their regulators may also be the only ones who have the resources to participate in any appeals against decisions that had favoured their interests.

The bias test is entirely based in common-law, and as a result each matter involving an application of the test is highly contextual. This favours clever and well-resourced lawyers – such as those who corporations can afford - who can manipulate that context. This has been observed in the environmental policy sphere, where few people have the time, money, education, skills, and informational access to track environmental policies in their entirety, including how

standards are set or how they are enforced.[268] For instance, if a party to a decision perceives bias by the regulator who demonstrated signs of capture, that party would need to determine whether they have the time and resources to litigate. If they did litigate, they would face the barriers to proving a reasonable apprehension of bias (and potentially institutional bias at that) set out in capture 3 of this thesis. In that litigation the party may be facing a team of lawyers who are backed by the company or industry favoured in the decision, who may consider funding litigation to be mere cost of business to protect the greater amount of money or regulatory influence that they might gain as a result of the initial decision.

An example of the inaccessibility of legal recourse is the interactions between property developers and municipal councillors in BC. Citizens who have attempted to appeal property development application approvals have found many of the hallmarks of capture. In Langford BC there are accusations that Municipal staff work directly with developers on their proposals to ensure their success when the proposals are presented to the Council's regulatory body, the Planning, Zoning and Affordable Housing Committee.[269] Where proposals are de facto pre-approved by the regulator prior to the application process, the results are brief hearings followed by immediate development. This expedited process and potential breach of procedural fairness can lead to irreversible environmental damage if the allocated land is clear-cut before members of the community can successfully appeal to the municipality. A similar problem arises in other regulatory contexts, as jurisdictions such as the Ontario Divisional Court are reluctant to intervene in administrative matters prior to the completion of proceedings.[270] Parties who intend to argue that there had been a reasonable apprehension of bias must wait until after the decision is made, which in some matters may be too late to prevent the harm that the biased decision would cause.

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[268] Portman, *supra* note 7, at 38.
[269] Judith Lavoie, Are Developers Calling the Shots in Langford? (January 2020), online: Focus On Victoria < https://www.focusonvictoria.ca/reporting/are-developers-calling-the-shots-in-langford-r1/>.
[270] Auditor General of BC, *supra* note 2, at 6.

An example of this from the Mount Polley disaster might be the decline in inspections of closed mines by the Ministry of Energy and Mines.[271] The reduction was justified due a policy change stating that inspections would occur 'from time to time as practical'.[272] People living near a closed mining site may not be aware if the site was not inspected for multiple years, or that the Ministry's inspection policy had changed. Those individuals would be directly affected by an incident caused by a problem that had been overlooked due to a lack of inspections (such as what occurred with the active Mount Polley site). Yet they would not have insider knowledge that the regulator had been captured, nor is it likely that they would have the resources to try to hold the regulator accountable. Increasing transparency in regulatory processes may increase the ways that non-industry stakeholders can engage with those processes.

[271] *Ibid*, at 56.
[272] *Ibid*.

Chapter 5: Conclusion

The Mount Polley disaster demonstrates, that the impact of pressure and influence by industry upon regulators can have devastating impacts. It is just as pertinent of a concern in small communities where regulatory officials and industry representatives interact on a daily basis, as it is relevant in ideologically driven high-level discussions of macroeconomic principles. The intention of this thesis is not to provide a simple explanation for capture or a comprehensive list of potential solutions, but rather to demonstrate how even in a specific area of governance in one country - Canadian environmental law - the problem of regulatory capture can be so intricately ingrained in many aspects of society. In 2017 the BC Ministry of Environment granted a permit to the Mount Polley mine to discharge tailings directly into Quesnel Lake, even as that body of water was still undergoing remediation from the tailings spill.[273] Mining operations at that site have been suspended as at May 2019, though there are plans to re-open the site in late 2021.[274]

Analysis and diagnosis of capture is highly contextual. Recent legal research has generally disagreed with the early public choice literature that predicted capture to be an inevitable and important part of the regulatory process. However, there is incredible utility to applying economic principles to political theory – after all, public choice theory paved the way for the growing body of research that has arisen about regulatory capture. The recurring notion in public choice that capture is a constant should be considered not as an encouragement, but rather as an anticipation of the *risk* of capture. The limitations of legal frameworks such as the reasonable apprehension of bias test are not necessarily the best ways to prevent capture, but the influence and pressure that industry can have over decision-makers should certainly be a consideration in the application of those legal tests. A focus on prevention and mitigation of capture at an institutional level may also limit the reliance by wronged stakeholders on inconsistent legal recourse.

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[273] Carol Linnitt, B.C. Quietly Grants Mount Polley Mine Permit to Pipe Mine Waste Directly Into Quesnel Lake (April 2017), online: The Narwhal <https://thenarwhal.ca/b-c-quietly-grants-mount-polley-mine-permit-pipe-mine-waste-directly-quesnel-lake/>.
[274] Don Parsons, Industrial Update 2021: Future Bright at Mount Polley Mining Corporation (March 2021), online: < https://www.wltribune.com/news/industrial-update-2021-future-bright-at-mount-polley-mining-corporation/>.

This thesis contributes to the scholarship on regulatory capture by providing a perspective of how it has affected Canadian environmental law, building upon the previous contributions by Jason Maclean.[275] Although there is an extensive literature on the Canadian public law reasonable apprehension of bias test, this paper extends that literature by considering how the history and development of the test interacts with the growing understanding of captured decision-makers. My list of indicia for capture is not a comprehensive list, but as a compilation of the more frequently discussed considerations of capture that historically have been somewhat scattered across different areas of literature, it could be used as a rudimentary checklist for risk-assessment purposes. Potentially this may be used as the basis for a 'capture resistance assessment' or similar tool to determine how vulnerable a regulatory body is - structurally or legally - to capture.

A limitation encountered throughout research was a lack of empirical evidence, specifically interviews with public officials and regulators. It is possible that some of the complex challenges posed by capture have simple preventative measures or remediation that is forthcoming, or conversely are logistically difficult to implement in ways that this thesis did not anticipate. There may be theoretical issues that are unproblematic in practice, or problems alluded to briefly in this thesis that are more important than the brevity would indicate. Future research on regulatory capture generally should be encouraged to conduct interviews with current or former public officials, specifically appointed regulators who serve on regulatory bodies that has public policy-making as its primary function.

The growing momentum behind capture literature may appear discouraging as a growing list of captured agencies is added to the literature. However, addressing capture is ultimately not about hindering industry, but rather about protecting the public interest. Diagnosing capture in a wider range of regulatory contexts can broaden the understanding of how capture affects decision-making. In light of these developments, public awareness of the phenomenon of capture can

[275] Maclean, *supra* note 5; Maclean, *supra* note 255.

similarly grow, increasing the possibilities for those outside of academic and regulatory spheres to understand how the public interest can be affected by industry.

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