Goal-Based Standards, Meta-regulation and Tripartism in Arctic Shipping: What Prospects in Canadian Waters?

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Abstract

This chapter looks at alternative forms of regulation of Arctic shipping. Traditional prescriptive regulatory concepts have many problems. These include, inter alia, a lack of flexibility in a technologically vibrant environment, a rigid and minimalist response by regulatees and a reactive approach by regulators, economic inefficiency, imbalanced expertise, barriers to open markets, problems with transparency and accountability, and regulator capture. An alternative approach would be meta-regulation, which is essentially modified self-regulation monitored by regulators. Another concept, utilized by the International Maritime Organization (IMO), is goal-based standards, wherein regulators set basic end-goals and allow regulatees to develop rules that are designed to reach those goals. While most Canadian rules governing Arctic shipping are still prescriptive in nature, the adoption of numerous IMO conventions gives some prospect for the development of a more goal-based or flexible regulatory system. Input and consideration of the interests of impacted Indigenous communities is another key concern. The concept of tripartism, in which "third party" interests are included in the regulatory development process, has the advantage of adding a further knowledge base and of making the interests of impacted communities part of a more flexible and inclusive regulatory system.

Keywords

prescriptive regulation – polar – Inuit – marine – deregulation – Arctic shipping
1 Introduction and Overview

The polar waters of the Arctic region have witnessed an unprecedented growth in commercial shipping over the last several decades.\(^1\) The steady decline in the extent of multiyear sea ice has culminated in virtually ice-free passage through the Northern Sea Route (over Siberia) and parts of the Northwest Passage in the Canadian Archipelago for short periods in the late summer navigation season in recent years. As a result, the volume of traffic in terms of the number of distinct vessels transiting Arctic waters, as well as the number of transits made by single vessels, has multiplied substantially since 2010.\(^2\) Regulation of this traffic in the territorial waters, contiguous zone and exclusive economic zone (EEZ) of individual States and the high seas is governed by national laws and aspects of certain international conventions otherwise applicable to worldwide commercial vessel traffic generally. However, the unique geographic, oceanographic and climatological conditions encountered in the polar region beg for unique regulatory schemes tailored for this environment. Further, many Arctic hazards are little known or understood except by a handful of regional operators and more than 90 percent of the Arctic

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1 The terms ‘polar’ and ‘Arctic’ are used throughout this and other chapters of this work. They can be but are not necessarily referencing the same area or waters, depending upon the context and the document referenced. A primary distinction of course is that ‘polar’ can refer to waters in both the Arctic and Antarctic regions, as the Polar Code itself is to apply in both, whereas ‘Arctic’ is limited to lands and waters above the Arctic Circle at roughly 66 degrees, 30 minutes north latitude, often generally termed the area around the North Pole. Even the definition of the northern Polar region in the Polar Code includes a map which for purposes of application of the Code provisions dips into waters south of the Arctic Circle in some locales, where ‘polar’ climate conditions exist. Statutes and conventions often contain a definition where needed. This chapter addresses solely the Canadian Arctic and where specific legislation or international convention does not define terms, the term ‘Arctic’ will be used as it is applied in specific laws and to Canadian waters above the Arctic Circle plus other waters included in the Polar Code definition, while ‘polar,’ where not a term of art in specific laws, will be used for waters where polar climatological conditions exist. In addressing general conditions in these waters the two terms are used interchangeably.

region remains uncharted. Commercial navigation in this new environment thus presents unique regulatory problems.

Given the unique issues faced by vessels and their crews operating in the polar environment, it is clear that at least some aspects of the regulations must be developed beyond the regulatory regimes in place for vessels operating in the rest of the world. The three principal subjects for such vessel regulation are safety for crew and passengers, protection of the marine environment, and governance of qualifications and standards for personnel operating commercial vessels.

In the territorial sea and EEZ of Canada, as in most developed maritime nations, regulation of commercial traffic is governed by both national laws (and in some cases supplemented by state or provincial laws) as well as international conventions. The latter are often referentially incorporated into national law, added as annexes or through enactment, in whole or part. Such is the case in Canada. This chapter includes a very brief review of current applicable international conventions and regulations as well as Canadian federal statutory and regulatory law governing commercial shipping in its Arctic waters and all waters subject to Canadian jurisdiction.

The nature of regulation is at the core of this chapter. As modern States began to develop regulations governing a myriad of subjects, the general approach was prescriptive in nature. That means that domestic legislation and most aspects of international conventions set forth detailed affirmative requirements for regulatees to follow. This approach has been termed ‘classical prescriptive’ or ‘command and control regulation.’

Commencing in the late 1970s political leaders, jurists, legal theoreticians and economists, among others, began to promote a movement to deregulation. The concept of ‘deregulation’ is not a particular method of regulation or

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5 See in particular the numerous international maritime conventions incorporated into Canadian law in the Marine Liability Act, SC 2001, c 6.

6 There are several works discussing this concept, see particularly, Malcolm K. Sparrow, The Regulatory Craft (Washington: Brookings Institution Press, 2000); Robert Baldwin, Martin Cave and Martin Lodge, Understanding Regulation (Oxford: Oxford University Press, 2012).
theory. As used here and in the literature cited, it is simply describing the general movement away from highly prescriptive, command and control forms of regulation to something allowing more flexibility and autonomy, that is, pure self-regulation, meta-regulation or something else, as will be discussed in more detail below. Many problems were identified with traditional prescriptive regulation, and the reaction was generally towards an effort to reduce or even eliminate what were seen to be overly burdensome regulations on many industries. Among political leaders, those most often associated with the push for deregulation in the English-speaking world were President Ronald Reagan and Prime Minister Margaret Thatcher. Such political leaders and many jurists and academics were looking for alternatives to the prescriptive regulatory State/method, either from a firm belief in the most flexible alternatives, or to head off what they worried would be too extreme a move away from prescriptive regulation towards complete self-regulation. Since the financial crisis of 2008, and perhaps reinforced by more recent events related to the COVID-19 pandemic, there has been a reversal by many governments of the move to deregulation back towards more strict regulation, or perhaps better said, an expansion of prescriptive regulations and heavier State involvement in many industries. The Economist recently labelled this “the new interventionism.”

For regulation of commercial vessels, especially in the unique polar conditions, a return to strict prescriptive concepts for many subjects is likely unsatisfactory. Much more flexibility in regulation is probably necessary, especially allowing reliance upon the greater knowledge and experience of the companies and individuals working in the Arctic and subject to such regulation. Participation in the development of regulations should include not only vessel owners and operators, and the industries relying upon their services, but also inhabitants of the Arctic region who are increasingly reliant upon commercial vessels for their supply and services, stand to benefit from the growth of resource development, and are impacted by the increased vessel traffic. Many of these local inhabitants are Indigenous peoples with a long history of living and working in the Arctic environment, and thus offer a potential wealth of knowledge and experience to contribute to development of regulations. The search for alternatives to strict command and control regulation should apply well beyond the Arctic region to vessel operations worldwide, and the use of these concepts in the new polar environment may serve as a model for future vessel regulation elsewhere.

This chapter will summarize the principal problems identified with prescriptive or command and control regulation. Not all of those who see problems with prescriptive regulation, however, are in favour of complete deregulation (or self-regulation). A number of alternatives somewhere between strict command and control regulation and complete deregulation (‘no rules’) have been developed in the last decades. One concept that may find application in the maritime environment, particularly for Arctic shipping, is that of ‘meta-regulation,’ which this chapter will focus on in more detail.

A concept that could be a part of meta-regulation, tripartism, is considered, as it has to date not appeared in the context of maritime regulation internationally, much less in Canada. Tripartism may have a particularly important application for regulation of Canadian Arctic shipping because it takes into account the interests of communities most impacted by shipping, namely, the Indigenous communities that make up more than half of the total population living in the Canadian Arctic. Only by involving those Indigenous communities can regulators and the regulated industries develop a proper balance of interests benefiting all concerned. Commercial shipping would obtain the input of experience and knowledge of local inhabitants (Indigenous and otherwise) with lifelong experience in the Arctic environment, and communities both dependent upon Arctic shipping economically and impacted by the positive aspects of increased transport and communication and the negative environmental effects would have a voice in the development of regulations.

2 Problems with Traditional Prescriptive Regulation

To understand the importance of exploring an alternative mode of regulation to that which has been applied almost uniformly over the last century, one must identify the most salient problems stemming from classical prescriptive or command and control regulation (CPR). The problems identified are particularly relevant when discussing the unique circumstances of Arctic shipping.

A lack of flexibility in a technologically vibrant environment has been highlighted as one of the principal concerns with CPR. This prompts Sparrow to

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10 Most of the research and sources for this section were assembled and are part of an unpublished paper written by this author in partial fulfillment of the requirements for a PhD, Phillip A. Buhler, A Spectral Change in Theory Between Prescriptive and Self-Regulation: A Literature Review Focused on Non-Prescriptive Concepts (submitted to the Schulich School of Law, Dalhousie University, Canada, 2019), 3–15.
11 Sparrow (n 6), pp. 22–23.
call for “regulatory versatility.” Sparrow believes that the promotion of dynamic mechanisms to enhance regulatory craftsmanship and innovation are a vital necessity. Particularly noteworthy in industries that are rapidly moving forward with technology is the fact, as critics note, that CPR can prevent experimentation and reduce the ability of a business to keep up with the pace of new technology. Heavily prescriptive regulations produce unnecessarily complex and inflexible rules that prevent the regulatees from taking flexible approaches to quickly respond to ever changing environments. Critics argue that the CPR approach has evolved to such an extent that it produces “a counterproductive regulatory overload” and even prevents potential new entrants into a field because they cannot break through this regulatory barrier. In the unique environment of Arctic shipping, vessel operators need to have the flexibility to develop new design and construction technologies and operating criteria in response to new geophysical and environmental conditions that they discover as their vessels move deeper into uncharted waters.

Another problem with CPR has been termed the “check the box” response of regulatees. The burden of rules has created what some term “rule following automatons,” with regulatees adopting “checklist style approaches to compliance,” which reduces further incentives for innovative behaviour in favour of a behaviour protecting the regulatee from myriad violations by only strictly complying with the regulatory environment. In other words, regulatees are discouraged from going “beyond minimum standards.” For a maritime industry that should have every encouragement to pursue innovative strategies to address the unique environment it will be facing, this result is disturbing.

Another problem with CPR is the economic inefficiency of strict rules, strongly encouraging a cost-benefit analysis for both regulatees and regulators, particularly where the latter lack the resources to pursue and enforce extensive

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12 Id., 27.
13 Id., 89.
17 Decker (n 14), p. 10.
18 Id., 11.
19 Id., 21.
20 Gunningham and Sinclair (n 16), p. 45.
strict regulations.\textsuperscript{21} This lack of resources can even cause regulators to take an unreasonably strict legalistic approach to enforcement and produce unnecessarily complex and inflexible rules that are overbroad and strangle enterprise and competition.\textsuperscript{22} The cost-benefit analysis of burdensome regulations has been a center point of many studies.\textsuperscript{23} The financial burden on both regulators and regulatees is widely acknowledged. This writer in his years representing shipowners and operators with regulatory problems has often heard from both industry and regulators that they do not have the resources to respond adequately to some regulatory demands or to enforce many of the regulations under their writ. In the Arctic, where the expertise of regulators can be particularly limited, the cost of developing and enforcing detailed regulations on every possible issue of concern could be prohibitive.

Another key problem is the imbalance of expertise between regulators and regulatees. In Canada as elsewhere, some regulators would readily admit that they have little to no knowledge of vessel operating conditions in Arctic waters, and only vessel operators with long experience in polar waters would know how to respond to many issues. This ‘knowledge gap’ can exist even for regulators (and operators) with extensive experience with vessels in non-polar waters, since extreme temperatures, sea ice conditions, long periods of darkness and vast areas of uncharted waters are just some of the issues not normally encountered in many other areas of navigable waters. Many regulators even lack the expertise to know what to ask in order to develop regulations.\textsuperscript{24} Command and control regulation “requires regulators to have comprehensive and accurate knowledge of the workings and capacity of industry.”\textsuperscript{25} In the unique Arctic environment, it is difficult for national government regulators to have acquired comprehensive knowledge in all areas of concern.\textsuperscript{26} Because of this, “regulators are likely to find themselves at a significant information disadvantage compared to the industries that they oversee.”\textsuperscript{27} With this problem,
the idea of bringing in the special knowledge of Indigenous persons and other Arctic residents who have lived and worked in the environment suggests a way to fill the knowledge gap.

Highly prescriptive regulation can also be a barrier to open markets and interoperability. As various international agreements in recent years have sought to promote open markets and interoperability between nations and their economies, an effort must be made to avoid disruption. The importance of encouraging foreign shipping to call at Canadian ports, and in future facilitating international commerce transiting the Arctic regions, makes this issue as important as any for seeking an alternative to heavily prescriptive regulation.

Transparency and accountability are other problems identified with traditional prescriptive regulation. With every prescriptive regulation, questions have been raised about both the accountability of the regulators and their transparency, particularly in an international setting. This issue is likely to come to the fore due to the emotionally and politically charged nature of the developing Arctic, particularly environmental impacts and the interests of Indigenous peoples. Many global interest groups, and the public at large, already have a stake in how the polar regions will be governed in the coming decades.

Closely related to the problem of transparency and accountability is the concern for capture and corruption. Regulator ‘capture’ can occur when the relationship between a regulator and regulatee becomes so close that it results in the pursuit of the regulated enterprise’s own interest rather than that of the public. Command and control regulation can be subject to political manipulation and capture by interest groups with great power and influence, which can be detrimental to the policies themselves and those who the policies are designed to protect. In fact, “regulators themselves may succumb to self-interested behaviour, variously being captured by the very industries...

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29 Baldwin, Cove and Lodge (n 6), pp. 338–340.
30 See in particular the participation at the International Maritime Organization (IMO) of environmental groups as observers, and their submissions relative to various environmental conventions. The participation of both environmental and Indigenous advocacy groups in the development of Canadian domestic legislation is commonly reported.
31 Baldwin, Cove and Lodge (n 6), p. 107; Ayres and Braithwaite (n 7), pp. 71–73.
32 Gunningham and Sinclair (n 16), p. 46.
they purport to regulate or engaging in rent seeking, whereby the regulatory bureaucracy seeks to extend its own interests at the expense of the public.**33**

Prescriptive regulation can also become ‘reactive regulation.’ Arguably a variation on the check the box regulatory approach, reactive regulation means that the process of development becomes so regimented that it has no flexibility to seek avoidance of a problem, but rather will cause the creation of regulations only after a problem occurs, rather than encouraging pre-emptive or anticipatory rules. Regulators may merely respond to events as they occur,**34** as is in the case of some major International Maritime Organization (**IMO**) conventions, which were drafted and accepted only in response to major maritime catastrophes. The most well-known examples include the International Convention for Safety of Life at Sea (**SOLAS**), in response to the sinking of **RMS Titanic**, subsequently amended and supplemented in response to later vessel losses, and the International Convention for the Prevention of Pollution from Ships, drafted in response to the **Torrey Canyon** oil spill in the English Channel in 1968, amended in part after the **Amoco Cadiz** oil spill in 1978.

These enumerated problems make it clear that in a dynamic and still not fully understood environment like the Arctic, an alternative to traditional strict prescriptive or command and control regulation must be found. That alternative may likely be in the approach of meta-regulation.

3 **Defining Meta-regulation**35

To understand meta-regulation, one has to begin near the self-regulation end of a spectrum of regulatory concepts that runs from, at one end, classical prescriptive regulation or CPR all the way to the concept of self-regulation. Non-regulation is a step beyond this spectrum, the complete lack of any regulation, which is essentially theoretical, except perhaps to some who promote ‘deregulation.’ The rather simple idea of self-regulation, wherein regulatee industries take over their own governance, is still a rare concept in practice, if not in theory. Pure self-regulation has been addressed by, among others, John Braithwaite and Ian Ayers in their seminal work **Responsive Regulation**36 and

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33 Id.
34 Sparrow (n 6), pp. 181–184.
35 Part of the research and formulation of this section was developed by this author for his unpublished paper (n 10).
36 Ayres and Braithwaite (n 7).
Neil Gunningham, and Cary Coglianese and Evan Mendelson in their essays in Baldwin’s *Oxford Handbook of Regulation*.37

In fact, one of the best approaches to understanding meta-regulation is to understand the distinction between meta and self-regulation as set forth by Gunningham, and Coglianese and Mendelson. Gunningham describes meta-regulation as an “enforcement model which, like smart regulation, also seeks to identify a ‘surrogate regulator’ and to minimize the hands-on enforcement role of the state,” which is “far more than passive compliance monitoring – actively challenging the enterprise to demonstrate that its systems work in practice.”38 Coglianese and Mendelson, in a separate essay, view self-regulation as “unconstrained freedom,” the opposite of conventional prescriptive regulation in the regulatory pyramid they developed.39 Meta-regulation, by contrast, includes “the state’s oversight of self-regulatory arrangements,” and also includes the concept of “regulating the regulators” and, more broadly, any kind of regulatory monitoring by entities other than the regulatees themselves.40 In the maritime realm, this would include non-governmental regulator surrogates such as classification societies (addressed *infra*).

Coglianese and Mendelson illustrate their distinction by creating a “regulatory pyramid”, with four levels of regulatory discretion. “Unconstrained freedom” (no regulation) is the widest, on the bottom, then rising in order self-regulation, meta-regulation and “conventional regulation” on the narrow top.41 This pyramid gives far more emphasis to what should be considered just one end of a long spectrum, as there are a host of regulatory variants apart from CPR that leave more control with regulators and less autonomy with regulatees. For instance, goal-based standards (discussed *infra*) leave the establishment of goals or guidelines with the regulator, thus do not go quite as far as pure self-regulation, and other concepts such as standards-based or principles-based regulation again leave the establishment of some requirements and parameters with regulators.42 Clearly, meta-regulation is the last stop before pure self-regulation.

At its core, meta-regulation sets guidance for regulatees which otherwise are encouraged to govern themselves. In old English law, the term ‘meta’ was

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37 Neil Gunningham, “Enforcement and Compliance Strategies,” in Baldwin *et al.* (eds.,) (n 27); Coglianese and Mendelson (n 27).
38 Gunningham (n 37), p. 135.
39 Coglianese and Mendelson (n 27), p. 152.
40 Id., 147–148.
41 Id., 152.
42 Sunstein (n 15), pp. 964–965.
used to denote landmarks or boundary lines,\textsuperscript{43} providing a logical moderate interpretation of meta-regulation as a form of boundary or guidance to a self-governing regulatee. Some legal authorities argue that meta-regulation is something less than what has been termed outcome-based regulation or performance standards, distinguishing this from regulatory commands firmly setting out a means or ends.\textsuperscript{44} As Coglianese and Mendelson summarize, “meta-regulation focuses very much on outside regulators but also incorporates the insight from self-regulation that targets themselves can be sources of their own constraint.”\textsuperscript{45} They go on to explain that “meta-regulation seeks to address some of the drawbacks of a purely self-regulatory approach ... self-regulation almost always stems from meta-regulation in a very broad sense.”\textsuperscript{46}

Ayers and Braithwaite use the term “enforced self-regulation,” defined as a method whereby regulatees write the rules which are then ratified by the public and can be publicly enforced (see the discussion of the concept of tripartism infra).\textsuperscript{47} They view meta-regulation as “private rules publicly enforced” or “enforced self-regulation,” which is different from the concept of “co-regulation.”\textsuperscript{48} They consider the advantages of meta-regulation as follows: (1) rules are tailored to match the company; (2) rules can be adjusted more quickly to changing business environments; (3) the flexibility of meta-regulation fosters regulatory innovation; (4) rules can be made by the company with more knowledge and its resources are more comprehensive; (5) companies are more committed to rules they write themselves, and cannot turn over the responsibility to governments; (6) the concept reduces the volume of rules required, with only one, company drafted rulebook; (7) the business bears the cost of enforcing its own regulations; (8) the regulatee can catch more offenders with internal expert audits; (9) offenders are disciplined in a larger proportion of cases; (10) it is easier for prosecutors to get convictions; and (11) meta-regulation follows the compliance path of least corporate resistance since the corporation made the rules.\textsuperscript{49}

Other authors seem to view the application of meta-regulation as a concept following on a natural development among regulatees, which for a host of self-beneficial reasons are seeking ways to better govern themselves. Julia Black posits that

\begin{footnotesize}
\begin{enumerate}
  \item Coglianese and Mendelson (n 27), p. 150.
  \item Id.
  \item Id., 161.
  \item Ayres and Braithwaite (n 7), p. 6.
  \item Id., 101.
  \item Id., 110–115.
\end{enumerate}
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\textsuperscript{44} Coglianese and Mendelson (n 27), p. 150.
\textsuperscript{45} Id.
\textsuperscript{46} Id., 161.
\textsuperscript{47} Ayres and Braithwaite (n 7), p. 6.
\textsuperscript{48} Id., 101.
\textsuperscript{49} Id., 110–115.
governments do not ... have a monopoly on regulation and that regulation is occurring within and between other social actors, for example large organizations, collective associations, technical committees, professions, etc., all without the government's involvement or indeed formal approval: there is "regulation in many rooms."\footnote{50}

Writing in 2001, Black recognizes that third parties have been playing a role in regulation and notes that "the regulation of self-regulation is the new challenge" in the era of "post-regulatory regulation of self-regulation."\footnote{51} Black's concept is simply that regulation should not be "state-centered," and since governments often have insufficient knowledge and "inappropriate and unsophisticated" methods to approach regulation, it is necessary for the businesses to be as self-regulatory as possible.\footnote{52} Black focuses on the "asymmetry (of knowledge) between regulator and regulated," since governments cannot know as much about a business as the business itself, and "no single actor has all the knowledge required to solve complex, diverse, and dynamic problems, and no single actor has the overview necessary to employ all the instruments needed to make regulation effective."\footnote{53} These observations and one potential solution will be addressed below under the discussion on tripartism.

The proponents of meta-regulation or controlled self-regulation address most of the problems identified by those who initially sought alternatives to strict prescriptive regulation in the era of deregulation. One other important concept for meta-regulation as it can be applied in the maritime world, and to Arctic shipping in particular, is addressed by Cristie Ford who places emphasis on the need for 'learning' and regulatory learning resources in meta-regulation.\footnote{54} Ford considers that meta-regulation, as a version of process-oriented regulation, "inhabits an even more indeterminate space" than other forms of "enforced self-regulation."\footnote{55} Therefore, in her view meta-regulation focuses on learning, rather than knowing. That is, it focuses on determining whether the systems and controls being used are designed to both

\footnotesize{\footnote{51} Id., 104–105.} 
\footnotesize{\footnote{52} Id., 106.} 
\footnotesize{\footnote{53} Id., 107.} 
\footnotesize{\footnote{55} Id., 590, 592.}
generate and respond to ongoing learning, thereby improving outcomes as measured by reference to a high-level set of principles.\(^56\)

Sharon Gilad believes that meta-regulation “directly confronts what the regulator does not know and tries to build learning systems to work with it.”\(^57\) Ford, Braithwaite\(^58\) and others put emphasis on “embedding learning paradigms and building systematic learning processes into regulatory architecture.”\(^59\) Ford and Affolder posit that “meta-regulation and new governance envision learning both at the regulator level, and at the regulatee level, and an energetic feedback loop between them.”\(^60\) In developing regulations for Arctic shipping, the importance of learning, sharing and cooperation in the development of regulations is paramount, considering the many environmental and technological unknowns.

It must also be noted that in the wake of the financial crisis of 2008 and the ensuing severe introspection concerning the application of meta-regulation in the financial industry, not all criticism of regulation has focused upon the shortcomings of regulators. Some authorities, while acknowledging the strengths inherent in meta-regulation, have also identified the “incompetence or ineptitude of the regulated firms” and note the shortcomings that have only been exacerbated by the “regulatory inertia of regulators,” holding that even meta-regulation “can lead to regulatory capture.”\(^61\) This has been noted as an issue with classification societies, which can become beholden to the vessel owners they purport to monitor and regulate, or to ‘flag of convenience’ States, which themselves can be lax with enforcement of major maritime conventions such as SOLAS in order to attract vessel owner registrants.\(^62\) This problem of


\(^{57}\) Gilad (n 56), p. 486; Ford (n 54), p. 592.

\(^{58}\) Ford refers to Braithwaite’s more recent writings than those otherwise cited in this chapter.


\(^{60}\) Id., 466.


flag State control (or lax control) and reliance upon third party ‘surrogates,’ in turn stems from the fact that the IMO “has no enforcement powers and does not directly monitor the performance of its member states.”63 This spotlights a distinction between regulation under the auspices of the IMO and that of national governments. This problem also dovetails into the discussion above about learning and shared learning processes between regulators and regulatees in order to address the limitations of knowledge in the polar regions. Another critic in the post-financial crisis era, taking a cynical view of efforts at deregulation, from an openly anti-capitalist approach, has argued that “meta-regulatory structures are as much about regulating regulation as they are about regulating non-regulation – that is, defining areas where regulation is permissible or, to use familiar language, efficient, as well as areas where it is not.”64

The concept of meta-regulation does not mean the same thing to all people, nor are the benefits, or detriments, to the concept agreed upon by all authorities. At most, meta-regulation, as it is generally understood across industries, means some variable of encouraging regulatees to both make the rules for themselves and self-enforce, while preserving a given amount of oversight by government regulators and, increasingly, with oversight or at least input by impacted third parties.

4 The Current Nature of Maritime Regulation in Canadian Arctic Waters

The regulation of commercial vessel traffic in Canadian waters, including the Arctic, involves national legislation65 and regulations promulgated pursuant to national law and international law and conventions. Canada’s legal regime for the Arctic is noteworthy in the global arena for being one of the most comprehensive and also one of the earliest to adopt regulation specifically to Arctic waters. It is therefore not surprising that much of the current Canadian Arctic regulatory regime is prescriptive in nature, perhaps in part because its foundations were developed prior to the trend towards deregulatory or self-regulatory concepts. This raises concern about how feasible it would be

63 Karahalios (n 62), p. 19.
65 Some Canadian legislation addresses maritime traffic in all waters and all vessels under Canadian jurisdiction, some is directed exclusively to the Arctic.
to shift the regime towards alternatives such as meta-regulation. A brief overview of some aspects of regulation in the Arctic follows; consult chapters by Bartenstein and Chircop for a complete review of Canadian legislation and regulation.

The most comprehensive statute governing shipping in Canada is the *Canada Shipping Act, 2001* (CSA 2001). The CSA 2001 is one of the bases for regulations promulgated concerning construction, design, equipment and operations of vessels in Canadian waters, and/or governing vessels registered in Canada. However, the Act contains no specific provisions governing Arctic waters. Provisions address, *inter alia*, maritime personnel (Part III), vessel safety (Part IV), including aspects of construction of vessels, vessel traffic services or zones (Part V), response to incidents, accidents and casualties (Part VI), and pollution prevention and response under the Department of Transport and the Department of Fisheries and Oceans (Parts VIII and IX). These sections of the CSA 2001 mandate specific actions to be followed by parties governed under the statute and are of a traditional prescriptive nature.

Canada became the first Arctic nation to adopt comprehensive domestic legislation, before any international conventions addressed the Arctic, directed exclusively to pollution prevention in Arctic waters. The *Arctic Waters Pollution Prevention Act* (AWPPA) was enacted in its original form in 1970. The current version of the AWPPA contains provisions governing waste disposal in Arctic waters, recovery of costs and penalties, control over construction of industrial works in Arctic waters, detailed regulation of Shipping Safety Control Zones and regulation of vessel traffic in Arctic waters, with both civil and criminal penalties available. The language of the AWPPA, again, is prescriptive.

Based upon the AWPPA and the CSA 2001, several comprehensive regulations directed exclusively to Arctic waters have been promulgated and are the most comprehensive and innovative of any regulatory regime created by any Arctic nation to govern shipping prior to the International Code for Ships Operating in Polar Waters (the Polar Code). The *Arctic Shipping Safety and Pollution
Prevention Regulations (ASSPPR)\textsuperscript{71} contain a comprehensive system governing most aspects of vessel operations in the Arctic. First and foremost, the ASSPPR incorporate by reference the requirements of the new SOLAS Chapter XIV. The ASSPPR contains provisions mandating the terms and conditions for the use of an ice navigator, vessels operating in low air temperatures and a separate Part II governing pollution prevention measures, which adopt the Polar Code changes to MARPOL and detailed prescriptive regulations for waste disposal, prevention of oil pollution, control of pollution by noxious liquid substances in bulk, and vessel sewage and garbage disposal.

The control of vessel traffic in Arctic waters is also the subject of further regulations promulgated under the AWPPA.\textsuperscript{72} Even prior to the Polar Code additions to SOLAS and MARPOL, Canada had already established the NORDREG system through the Northern Canada Vessel Traffic Services Zone Regulations.\textsuperscript{73}

Interestingly, there is one piece of maritime legislation, predating most of the enumerated regulations and some of the statutory provisions and conventions, which takes a different tack to what has been summarized above. The Marine Transportation Security Act (MTSA)\textsuperscript{74} includes a section governing the development of security rules for vessels and marine facilities that potentially allows industry to create their own procedures and rules to best achieve the goals of transportation security contemplated in the Act. Section 7 of the MTSA provides that “the Minister may formulate measures respecting the security of marine transportation, including measures containing provisions that may be included in the regulations,” and may also “require or authorize the operator of a vessel or marine facility to carry out the security measures, and the measures may apply instead of or in addition to any provision of the regulations.”\textsuperscript{75} Further, under a section entitled “Security Rules,” the regulation provides that “(t)he purpose of this section is to allow operators of vessels and marine facilities to formulate and operate under security rules as an alternative to security measures required or authorized by the Minister.”\textsuperscript{76}

\textsuperscript{71}SOR/2017-286. These regulations were promulgated following the Polar Code.

\textsuperscript{72}Shipping Safety Control Zones Order, CRC c 356.

\textsuperscript{73}SOR 2010-127.

\textsuperscript{74}SC 1994, c 40.

\textsuperscript{75}Id., ss 7(1) and (2).

\textsuperscript{76}Id., s 10(1).
of a vessel or marine facility may formulate rules respecting any matter relating to the security of the vessel or facility and the operator may submit the rules to the Minister for approval.” It appears that these short provisions in the MTSA may be one of the few, if not the only, provisions in current Canadian maritime legislation (the MTSA is the statutory implementation of the International Ship and Port Security Code) that unequivocally defer, in whole or in part, to a regulatee (operator of a vessel or marine facility) the discretion to develop their own rules, subject only to the approval of the regulator. This is classic meta-regulation.

5 Potential Path towards Meta-Regulation in the Canadian Arctic: The IMO and Goal-based Standards

The preceding review of Canadian statutes and regulations promulgated for regulation of Arctic shipping, and for that matter shipping in Canadian waters generally, does not evince significant adoption of what is understood to be meta-regulation, and certainly no preference for self-regulation. Apart from some of the academic writings cited earlier in this chapter, there seems to be no significant judicial or academic discussion on meta-regulation in Canada. Is there any prospect that Canadian legislators or regulators would consider some sort of meta-regulatory formula for at least some of the aspects of regulation governing Arctic waters? Indeed, is there a reasonable avenue open through existing laws that could lead eventually to a move in this direction?

Some encouragement may be found through Canada’s adoption of numerous international maritime conventions and acceptance of international norms reflected therein. Canada is a signatory to five fundamental international maritime conventions which have become universal and are to be considered traditional maritime regulatory documents. These are the International Convention on Load Lines, the Convention on International Regulations for Preventing Collisions at Sea, SOLAS, the International Convention for the Prevention of Pollution from Ships 1973/1978 (MARPOL), and the International Convention on Standards of Training, Certification and Watchkeeping

77 Id., s 10(2).
78 5 April, 1966 (in force 21 July 1968), 640 UNTS 133.
80 SOLAS (n 4).
81 MARPOL (n 4).
for Seafarers (STCW). These amendments brought the first adoption by tacit acceptance in Canada of an international instrument containing provisions that are both prescriptive and of a non-mandatory level of ‘guidance.’ Indeed, Canada’s openness to a host of maritime conventions indicates perhaps some consideration for alternative approaches to regulation of maritime commerce. This is most notable in comparison with Canada’s southern neighbour, the United States, which as of this writing has still failed to ratify a number of the modern conventions, including the United Nations Convention on the Law of the Sea.

Canada is a party to most significant maritime conventions in force. Therefore, one can reasonably hope that Canada will likewise follow on the general consensus of the IMO with regard to the approach to future maritime regulation. The IMO introduced an alternative to traditional prescriptive regulation for at least a limited aspect of maritime regulation when it gave consideration and eventually adopted the concept of goal-based standards (GBS). In 2002, the concept was formally introduced to the IMO by two ship-owning and flag States, Greece and the Bahamas, in the Marine Safety Committee (MSC) and the IMO Council when they proposed the use of GBS to regulate vessel construction standards.

The IMO has since outlined the basic concept of GBS as (1) broad and overarching standards that vessels are required to meet, (2) a level of achievement of the standards as required by the IMO or government authorities and their designated agents, (3) “clear, demonstrable, verifiable, long-standing, implementable and achievable” standards, and (4) rules specific and not subject to “differing interpretations,” with (5) these principles “to

82 STCW (n 4).
83 Polar Code (n 70). See STCW Code s B-V/g: ‘Guidance regarding training of masters and officers for ships operating in polar waters’.
84 The author has been involved with maritime organizations in the United States that continue to make efforts to obtain US Senate ratification of the United Nations Convention on the Law of the Sea (LOSC), 10 December 1982 (in force 16 November 1994), 1833 UNTS 3. There is no logical explanation for why the LOSC has not been formally adopted by the United States, a signatory thereto, considering that interests in all quarters, from the US Coast Guard and US Navy to private vessel owners and operators, even cargo interests and labour groups are supportive of its ratification.
be applicable to all goal-based standards developed by IMO.”

Early on in the discussion of the use of GBS, the IMO set out five basic principles: (1) GBS standards to represent “the top tiers of the framework, against which the ship safety should be verified,” (2) “goals are not intended to set prescriptive requirements or to give specific solutions,” (3) goals are to ensure that a “properly operated and maintained ship remains safe,” (4) goals are to be achieved by compliance with technical standards or alternative solutions, and (5) requirements of national organizations or administrations must demonstrate compliance with GBS. The IMO went on to include GBS in its strategic plan for the period of 2004–2010. Finally, in 2010 the IMO formally adopted the International Goal-Based Ship Construction Standards for Bulk Carriers and Oil Tankers.

The work of the IMO on GBS went on hand-in-hand with work on the related concept of formal safety assessment (FSA), including the establishment of a joint MSC/Marine Environment Protection Committee (MEPC) working group on FSA. The use of FSA added another layer of evaluation to set standards for GBS. In brief, at the IMO, GBS “in general are considered to be rules for rules,” with separate SOLAS requirements in order to meet functional requirements. Even though GBS has been adopted by the IMO for vessel construction standards, and may potentially be utilized for other regulatory fields, it has been criticized, particularly in the run up to its adoption. Some have argued that GBS is based upon a risk analysis that threatens to cover over many safety issues that would then remain unaddressed. In other words, some appear concerned that setting overarching goals will cause some safety problems to be ignored or overlooked. This school of thought basically does not trust industry at the national level to adequately create or enforce sufficient regulations, unlike an overarching government bureaucracy under CPR. In the end, the IMO

87 The Bahamas, Greece and IACS, Goal-Based New Ship Construction Standards, IMO Doc MSC 78/6/2 (5 February 2004), para 5.
89 MSC 87/287 (20 May 2010).
did adopt the Generic Guidelines for Developing IMO Goal-based Standards in 2010, which were amended in 2015 and again in July 2019.\footnote{IMO Doc MSC.1/Circ.1394/rev.1 (12 June 2015); IMO Doc MSC.1/Circ.1394/rev.2 (8 July 2019).}

Goal-based standards are probably not pure meta-regulation as conceived by those formulating the concept. However, GBS is certainly far removed from detailed prescriptive regulations as traditionally understood, and as illustrated by some of Canada’s current Arctic regulations, including part of the detailed ASSPPR. Establishing a set of parameters or ‘goals’ is a significant step away from detailed and unalterable bullet point regulations. As earlier considered, the most plausible development of meta-regulation is a system whereby the regulatees develop their own rules subject to review and approval by the regulators who keep certain goals in mind. This is a further step away from prescriptive regulation than found with GBS. GBS arguably confines the regulatees to developing their rules and procedures within pre-defined strictures of the goals set by the regulator. For maritime operations in the Arctic, reaching a system of meta-regulation would mean that the vessel operators and others would also define the goals they wish to reach as well as the procedures and rules to get there. These would all be subject to final approval or overview by the regulator, but it would be hoped that the regulator would not in the first instance put any restrictions upon the regulatees as to either goals or methods, subject to final approval.

One must be reminded, however, that even in the IMO the concept of GBS has so far been restricted formally to the rather narrow arena of vessel construction. Most certainly vessel construction is critical for both vessel safety (SOLAS) and the prevention of marine pollution (MARPOL, etc.). Therefore, the application of GBS arguably reaches further and broader in the maritime regulatory field than one would first consider. In addition, the Polar Code,\footnote{Polar Code (n 70).} containing both mandatory provisions and ‘guidance,’ is arguably partially grounded in the concept of GBS. Part I-A of the Polar Code contains the mandatory safety provisions (as amendments to SOLAS), while Part I-B is entitled “Additional guidance regarding the provisions of the Introduction and Part I-A”. Canada and perhaps some other nations have, or will, adopt the provisions of Part I-B as additional mandatory (prescriptive) elements under their domestic laws. Others will utilize them merely as helpful guidelines. The same goes with Part II-A (mandatory environmental provisions) and Part II-B (additional guidance), the latter also adopted in Canada as mandatory provisions. The Polar Code non-mandatory sections, however, do not quite rise to formal GBS, as they are merely recommendations, not formally-set goals. This means that Canada has converted Sections I-B and II-B of the Polar Code into strong
prescriptive requirements, moving away from using them as a goal-setting parameter. In sum, the formal reach of GBS beyond vessel construction standards has not been adopted yet in international conventions or arguably in Canadian legislation, and maritime nations may not yet be on the verge of a significant shift to meta-regulation.

6 Putting the Third Leg on the Stool: Could the Application of the Doctrine of Tripartism Protect the Interests of Impacted Communities and Also Provide Critical Expertise for Regulators and Regulatees?

The concept of tripartism was developed by Ayres and Braithwaite in the early 1990s, and set forth in detail in their foundational book *Responsive Regulation*.96 According to the concept of tripartism, regulatory development and application should not be merely an exercise between regulators (government) and regulatees (industries and firms), but should include third party entities such as non-governmental organizations (NGOs), public interest groups, industry associations and even outside experts.97 Ayers and Braithwaite focused particularly on the risk of agency capture or the ‘defection’ of both regulators (movement to punitive enforcement) and regulatees (law evasion and ‘gaming the system’) from their ideal of the cooperative pyramid.98 The concern was that regulators and regulatees can become too close, particularly when regulation moves to some sort of cooperative model, and this concern is often expressed by consumers and public interest groups.99 Put another way, a good goal in theory is cooperation of regulators and regulatees for the benefit of all, including the affected ‘public’ and non-parties. In practice such cooperation can evolve into capture, defection, evasion and other negative outcomes if the parties do not act with all good intention. Thus, affected interests may need to be involved at some level to oversee the relationship, although even then these third parties cannot be given such power as to interfere with the rightful autonomy of the regulatees. That preserved ‘autonomy’ is needed to allow the regulatees to properly and efficiently function, as explained above in this chapter.

96 Ayres and Braithwaite (n 7). Tripartism is explained in great detail in Chapter 111 of this work, pp. 54–100.

97 Id., 54–98. A summary of tripartism is also contained in this author’s unpublished paper (n 10), pp. 23–24.

98 Ayres and Braithwaite (n 7), pp. 54–55.

99 Id., 56.
Ayers and Braithwaite’s proposed solution of tripartism is to bring in concerned third parties who would be provided with all information available to the regulator, and perhaps even invited to participate in negotiations between regulators and regulatees, allowing them to monitor the results of regulations and have standing to sue the regulator if it fails in its duties.\footnote{Id., 57.} This assumes that participating third parties will be provided with information sufficient to monitor the outcomes in a non-prescriptive regulatory system, such as meta-regulation, where rules promulgated by the regulatee are approved by the regulator.\footnote{See id., 71–74.} Of note, the problem with expertise is not necessarily addressed, and the details of determining the suitability of a third party participant would have to be carefully considered.

In developing the concept of tripartism, Ayers and Braithwaite recognized that even this model has its potential problems. They identified the problem of the “zealous public interest group”, and the related issue of fourth party “capture” of public interest groups (mainly political).\footnote{Id., 75–76.} This plausible scenario would mean that regulatee interests with enough power and political muscle could seek control of the supposedly independent third party interests and direct them for their own benefit, in essence using them as a type of Trojan Horse to in turn capture the regulator, the very scenario that tripartism is designed to prevent. Ayers and Braithwaite posited one solution to this potential problem, the concept of “empowerment theory” wherein any regulatory system utilizing tripartism would have to work out a “communitarian tripartism” where a balance could be reached between the three interest centers to help offset any improper actions by a single actor.\footnote{Id., 81–86.}

Tripartism has great promise as a method to design future regulatory systems in the Arctic. Given the relatively limited number of actors on all sides, a regulatory system utilizing meta-regulation in conjunction with tripartism is feasible. Canadian regulators in the Arctic, facing limits to resources as well as knowledge, must look to the participation of regulatees to address the myriad unique issues in that environment. The number of vessels entering or transiting the Canadian Arctic, as well as the expected growth in facilities, is still rather limited, and involves a relatively small number of discreet players, although it is growing significantly. These industries certainly have the most knowledge about the conditions in which they operate, as well as the equipment and personnel involved. Further, the third parties impacted by Arctic shipping are easy to identify.

\footnotesize{\par
100 Id., 57.
101 See id., 71–74.
102 Id., 75–76.
103 Id., 81–86.
}
The human population of the Canadian Arctic is small, but roughly half of that population is made up of persons living in Indigenous Inuit communities. Inuit have inhabited this region for about a millennium, and have passed down their knowledge and experience from generation to generation. Non-Inuit who live and make their livelihoods in the Canadian Arctic likewise are assumed to have gained the knowledge necessary to survive in this environment. It is plausible that these inhabitants have in many respects a similar knowledge of the environment in which they live and work as do the regulated industries which operate there. Furthermore, the inhabitants of the Canadian Arctic rely upon shipping to provide essential goods and services to their communities and as a primary source of communication with the rest of Canada and the world. Inuit in particular are directly impacted by Arctic shipping, not only positively but also negatively in the event of increased air and water pollution and disturbance or dislocation of wildlife upon which they rely for subsistence and cultural purposes. These closely intertwined dependencies are more magnified in the Arctic than in many other areas of the world, since there are few if any alternatives to the services provided by shipping in this remote area.

Given the above, a regulatory system utilizing the concept of tripartism to bring in Arctic communities, particularly the Inuit, is critical to any successful, and respectful, regulation of shipping as the area opens up more every year. It is submitted that neither regulators nor regulatees can adequately develop rules and procedures for Arctic operations without the input of knowledge from Inuit and other long-time Arctic residents, the 'learning' element in meta-regulation described above. Any such requirement should also comport with Canadian law and policy encouraging consultation, respect and coordination with Indigenous communities when developing laws and regulations that impact them.

How can tripartism be incorporated into maritime regulation in the Canadian Arctic? As with proposals to move towards non-prescriptive regulation discussed above, guidance may be found with the IMO. Non-State party actors play an important role in the development of IMO instruments. While full membership in the IMO is restricted to sovereign States, the IMO has also accepted a great number of non-State parties in a consultative status.

Rule 2 of the Rules and Guidelines for Consultative Status of Non-Governmental International Organizations with the International Maritime Organization\textsuperscript{104} sets out the “purposes of consultative status” that include

\textsuperscript{104} IMO Resolution A.1144(31) (4 December 2019) [Consultative Status Rules]. The text of the rules was originally adopted on 13 April 1961, and amended several times, including the addition of guidelines in 2012, with the most recent amendments made in 2019. See also
“to enable IMO to obtain information or expert advice” from organizations
“representing large groups whose activities have an important and direct bear-
ing on the work of the IMO to express their points of view to it.” Rule 3 like-
wise sets out that to be granted consultative status an NGO must be able to
“contribute new expertise to IMO.” The purposes behind admitting NGOs to
consultative or observer status at the IMO in many ways match precisely the
purposes given by the developers of the concept of tripartism for including
interested third parties in the regulatory milieu.

The type of non-State actors with consultative status at the IMO are in two
broad categories: (1) inter-governmental organizations (including some other
UN agencies) and (2) NGOs covering a vast array of organizations representing
everything from shipping industry interests to maritime labor and technical
organizations to environmental protection groups to trade organizations. It
is the latter category to which we must look. As of 2014 there were some 77
NGOs with consultative (observer) status at the IMO,105 and as of this writing
in August 2022, there were 85 international non-governmental organizations
with consultative status and 66 intergovernmental organizations with observer
status.106 NGOs “lobby and participate, without the right of voting, in the IMO
conferences as non-governmental organizations.”107

The IMO has admitted to provisional consultative status, for the first time,
an organization representing the interests of Inuit in Canada and neighbour-
ings States after a long application process. The Inuit Circumpolar Council
(ICC) is an organization representing the interests of Indigenous Arctic com-
nunities in Canada, the United States, Greenland (Denmark) and Russia.108 At
the Extraordinary Session of the IMO Council (CES 34), held in November 2021,
the ICC’s application to obtain consultative status at the IMO was granted on
a provisional basis.109

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105 Md Saiful Karim, Prevention of Pollution of the Marine Environment from Vessels (Cham: Springer, 2015), 20.
The potential impact and influence of the ICC on IMO regulatory formation is illustrated in submissions made on behalf of the ICC prior to its acceptance as a consultative party. In support of a ban on heavy fuel oil (HFO) in the Arctic (with some qualifications), and under IMO procedures, the ICC’s position was presented to the MEPC Subcommittee on Pollution Prevention and Response (PRP) at its December 2019 meeting through a submission with other consultative parties. Now that the ICC is a consultative member, it can be expected to present its own submissions to IMO committees.

Observation of the importance of the ICC participation at the IMO, and its impact upon future policies and regulations, may give some guidance as to how Canada can advance participation by these impacted communities as it approaches new methods for Arctic shipping meta-regulation. Under the IMO’s Consultative Status Rules, Rule 7 sets forth the “privileges conferred by consultative status,” which include the right to receive provisional and meeting documents, the right to submit documents for items on IMO committee agendas, the right to have an observer at plenary meetings of the Assembly and, upon invitation, at meetings of committees, and the right to receive texts of resolutions adopted by the Assembly and various committees.

An example of potential movement in Canada to a form of tripartism is seen in the development of low-impact shipping corridors in Arctic waters. This is being created in close consultation and cooperation with Inuit communities, especially with the authorities in Nunavut, where the most important corridors are located. See the chapters in this volume by Dawson and Song, and Lalonde and Bankes.

The extent of ‘authority’ that a third-party participant is granted in regulatory processes must remain to be carefully considered, perhaps on a case-by-case basis. No assumption should be made that the ‘third leg of the stool’ must be as strong as the other two (government regulators and regulatee industries). The nature of the proposed regulations, extent of coverage and public policy considerations must be analyzed in each case. The design of a tripartism system requires further extensive study. It is symptomatic of the emerging nature of this concept, even after some thirty years since it was first proposed, that very little detail of the mechanics of such a system have been worked out. Maritime regulation, particularly in the Arctic, could be one its first major test grounds.

\[\text{Shipping Issues,} \text{ Press Release, 9 November 2021, https://www.inuitcircumpolar.com/news/inuit-voices-to-be-heard-at-imo-on-critical-shipping-issues/}. \text{ The ICC’s provisional status is to be reviewed in no more than two years.}\]


\[\text{Consultative Status Rules (n 104).}\]
Conclusion

Despite little history of the use of meta-regulation or GBS for maritime governance in Canada, and a so-far limited use globally, necessity is likely the driver to promote a shift from classic prescriptive regulation in the years ahead. The many problems encountered with prescriptive regulation are if anything magnified in the Arctic. The polar regions present the most challenging environment on Earth for the operation of any vessel, and the rapid evolution of technology to deal with the high risks must not be fettered by any unnecessarily complex and binding regulations and bureaucratic delays. Regulatees must be encouraged to make the maximum effort to study risks and innovate with solutions beyond what they may be required to do. This applies equally to regulators who must think outside the box, and be willing to give latitude to maritime operators to do the same. Regulators in the Arctic have limited resources, both assets and personnel, not to mention budgetary limits common to most governments, and must husband these limited resources. Regulatees also have limits, but their operations in the Arctic give them an advantage of knowledge and situated assets. A better system to foster sharing of these assets and encouraging their most cost-effective use is of benefit to all interested parties and would be best realized through a system based upon meta-regulation.

Many persons with knowledge and experience in the Arctic would agree that vessel owners and operators, other Arctic industry players, and certainly members of Arctic communities, have far more expertise and experience operating in the region. No thorough regulatory system for Arctic shipping can be developed without the participation of these parties, and everything must be done to seek their cooperation, and indeed their lead, in future developments. Qualifications can be put in place to ensure transparency and accountability, and avoid regulatory capture, particularly if a third participating group is permitted to give their input and review proposed rules and procedures through the application of some form and extent of tripartism. The freedom provided to regulatees to develop their own rules subject to oversight by regulators and third parties should not only eliminate most of these concerns, but should strongly encourage all involved to approach regulation of Arctic shipping in a proactive rather than reactive way, hopefully avoiding major incidents rather than responding to them and hashing out yet more rules in their wake. What is needed is recognition of common ground and interests and a basic trust that everyone involved really has the same ultimate goals.