



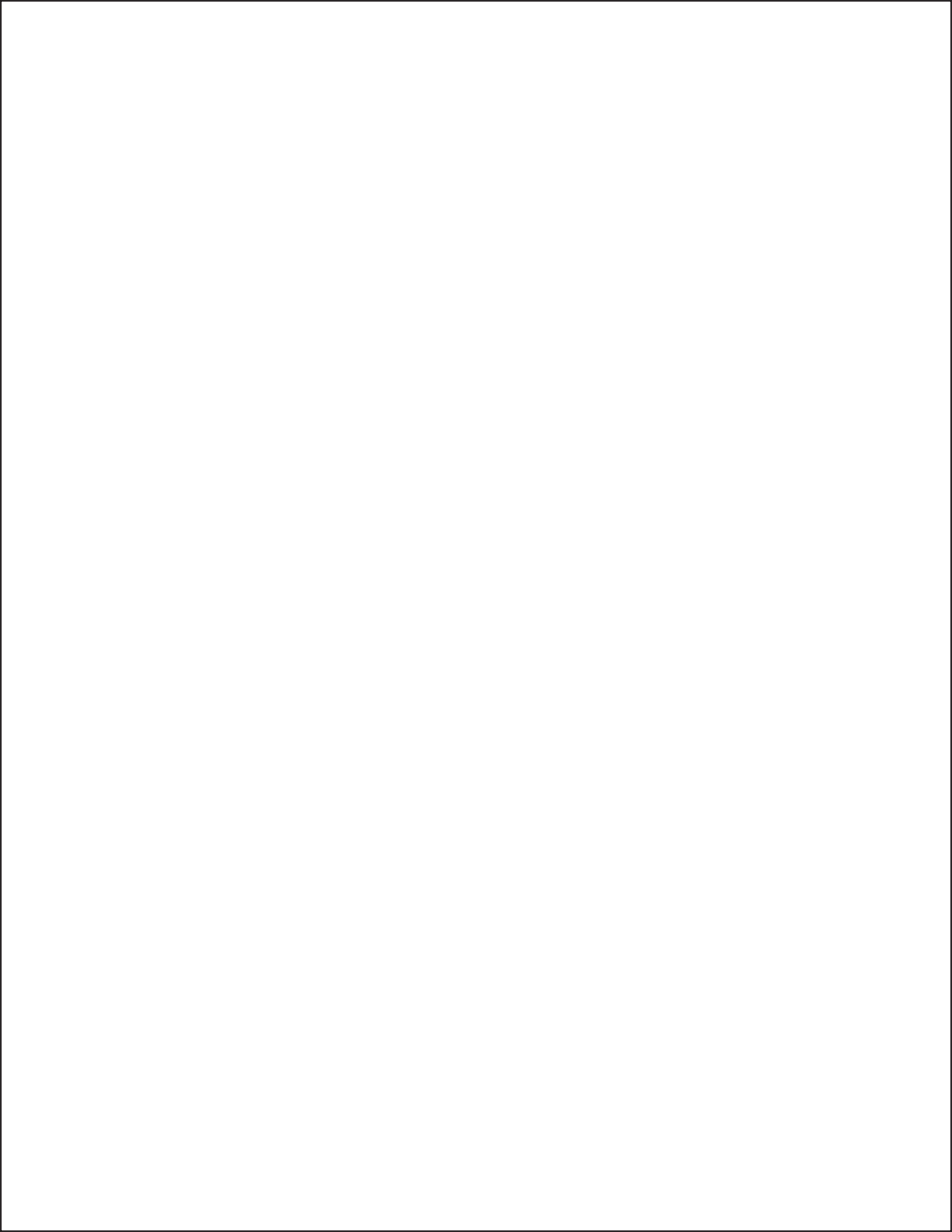
Canadian Nuclear  
Safety Commission

Commission canadienne  
de sûreté nucléaire

*Regulatory Independence: Law, Practice and Perception -*  
**A Report to the Canadian Nuclear Safety Commission**

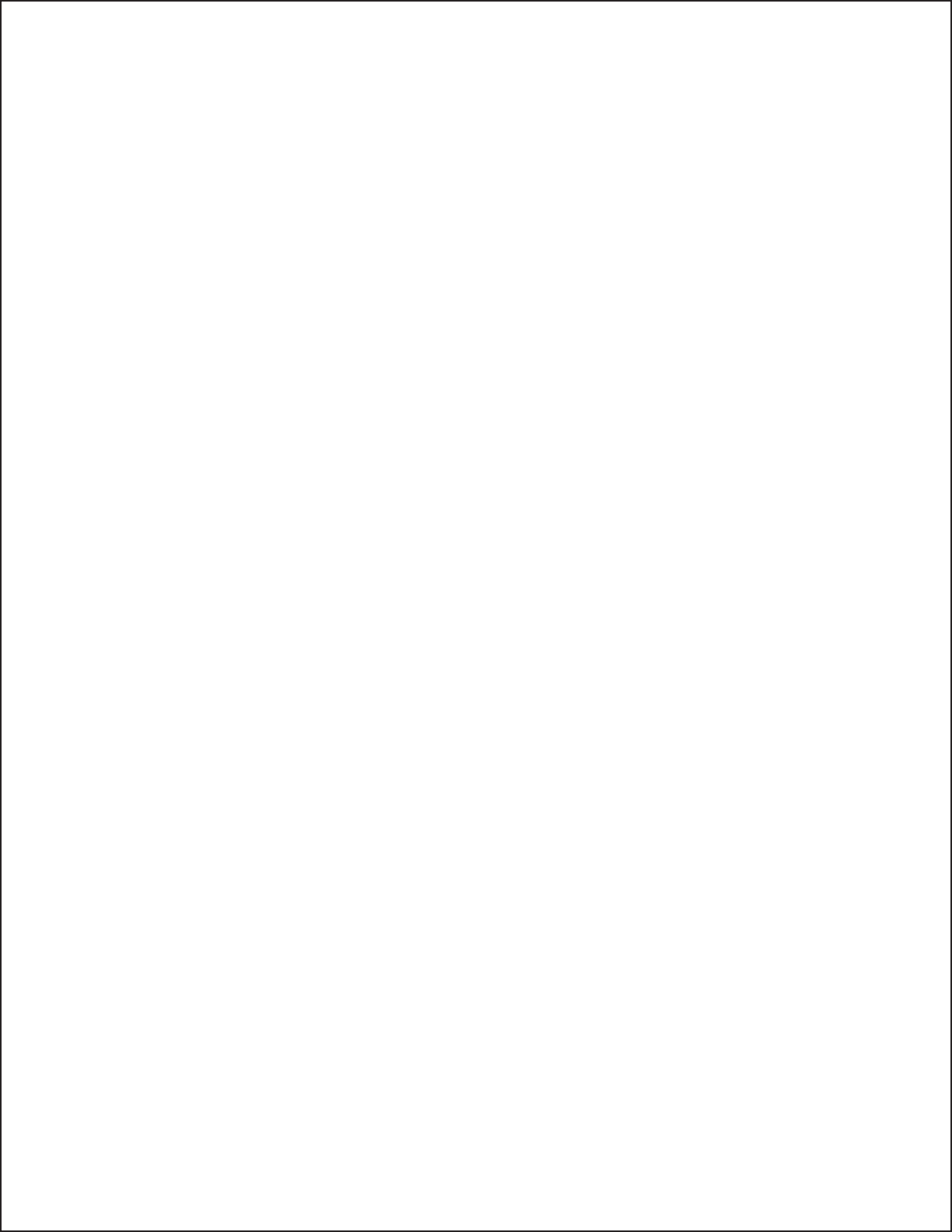


August 2007



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## President's Introduction

This study was carried out by the Institute On Governance (IOG) on behalf of the Canadian Nuclear Safety Commission (CNSC) to provide an independent perspective, from a respected third-party organization with expertise on public sector governance, on the role and importance of regulatory independence in the administration of Canada's nuclear regulatory regime. The study was commissioned as part of the CNSC's ongoing efforts to assure transparency and good governance in the nuclear regulatory regime.

The report from the IOG explores the legal and practical aspects of being an independent regulator, and how the legal framework established under the *Nuclear Safety and Control Act* and the CNSC's practices interact to promote public understanding of the CNSC as an independent regulator and confidence that regulatory decisions are free of undue influence. The final report explores the meanings of governance and regulatory independence as they relate to a variety of industries throughout the world, examines the CNSC's legal framework, organizational structure and stakeholder relationships, and offers several conclusions and recommendations.

As the IOG's report does not sufficiently define regulatory independence, the CNSC has provided a complementary note on the notion of regulatory independence from a legal perspective.

The CNSC hopes that this study will be of interest to other government departments and agencies with regulatory responsibilities, to central agencies having an oversight role on behalf of the government or Parliament, such as the Privy Council Office, the Treasury Board Secretariat and the Office of the Auditor General, and to our partners in the Natural Resources portfolio with whom we deal on a regular basis. The report may also be of interest to my colleagues on the Heads of Federal Administrative Tribunal Forum, which I am honoured to chair, and to my colleagues on the Canadian Council of Administrative Tribunals.

Linda J. Keen, M.Sc.  
President and Chief Executive Officer







## Canadian Nuclear Safety Commission Management Response

The Canadian Nuclear Safety Commission's (CNSC) Executive Committee (the Committee), having received and reviewed the Institute On Governance's (IOG) final report entitled *Regulatory Independence: Law, Practice and Perception* accepts the report. The Committee notes that the report presents a perspective on the concept of regulatory independence by linking the principles of good governance (legitimacy and voice; direction; performance; accountability; fairness) and the responsibilities given to independent regulators to serve the public good by making complex decisions affecting health and safety, security, environmental protection, monopoly control, consumer protection, market failure, and labour relations.

The Committee notes that, while useful as a high-level view linking the issues of governance and regulatory independence, the report does not (nor does it purport to) provide a comprehensive legal analysis of the way in which the *Nuclear Safety and Control Act* and regulatory and administrative law combine to provide for the Commission's regulatory independence. Nor does the report address some of the characteristics specific to administrative tribunals.

The Committee also notes that the report would also benefit from further reflection on related issues, such as the impartiality of persons that are members of tribunals or working for independent regulators, the need for flexibility on the part of tribunals so that they can carry out their work as expeditiously as possible.

Finally, the Committee takes note of the IOG's recommendations regarding the documentation of best practices, internal communications, and stakeholder engagement. Initiatives in these areas are already underway as part of the Integrated Improvement Initiatives (I3P), the development of an Internal Strategic Communications Plan, and an enhanced focus on outreach. The CNSC is committed to continuous improvement in these areas, as part of its efforts to become one of the best nuclear regulators in the world.

The Committee thanks the Regulatory Affairs Division of the Regulatory Affairs Branch and the Institute on Governance for their work on this file and notes that targeted studies on areas of importance, including follow up on matters of governance and independence is within the responsibility of the Regulatory Affairs Branch.

Jason K. Cameron  
Secretary to the Executive Committee





## CNSC Independence – Legal Perspective

The following summary analysis of the notion of administrative tribunal independence is meant to be complementary to the Institute on Governance Report on Regulatory Independence (attached), which focused more on accountability and good governance considerations, and less on the legal perspective of tribunal independence.

### Introduction

The notion of the “independence” of a regulatory body such as the Canadian Nuclear Safety Commission (CNSC) relates, from a legal perspective, to two broad ideas: **institutional independence** and **adjudicative independence**. Both aspects of independence relate to the ultimate goal of independence, which is decision-making that is unbiased and impartial.

The CNSC’s enabling legislation, the *Nuclear Safety and Control Act* (S.C. 1997, c.9), which sets out the intention that Parliament had for the CNSC’s independence when it created it and structured its membership, their tenure and remuneration, and sets out the functions for the CNSC to perform. The CNSC is accountable to Parliament with regard to its task to implement Canadian government policy to regulate the nuclear industry in a manner to protect health, safety and the environment. The CNSC is also called upon to make robust and impartial decisions in its licensing and regulatory functions, a task for which it has been granted a significant and adequate degree of institutional independence.

### Institutional Independence

Institutional independence refers to the objective guarantees that the status of the decision-maker, vis-à-vis its relationship with others, shows it to be free of influence that could be seen to cast doubt on the impartiality of its decisions.

The Supreme Court of Canada has indicated that the institutional independence required of the judiciary in Canada for constitutional law reasons is not the same as what the law requires of an administrative tribunal<sup>1</sup>. Rather, in the case of an administrative tribunal, it is for Parliament or the legislature to determine what functions a tribunal should serve, and the enabling statute must be read as a whole to determine what Parliament intended, including what Parliament intended in terms of independence. Where a statute is silent or ambiguous with respect to that intention, the principles of natural justice and procedural fairness, as developed in the common law, will assist in the determination of the required institutional independence.

In examining the *Nuclear Safety and Control Act*, one finds that the CNSC has a sizeable policy function, both in terms of implementing the statutory licensing scheme set up by Parliament in the Act, as well as disseminating objective scientific information to the public. At the same time, it has a

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<sup>1</sup> *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* [2001] 2 S.C.R. 781.

number of ‘court-like’ functions assigned to it by Parliament that require it to act in a quasi-judicial manner, such as its designation as a court of record. In its licensing functions, the CNSC does not adjudicate private law disputes between parties, but it does conduct hearings in accordance with the requirements of procedural fairness and in the public interest.

Parliament has provided for the appointment of members to fixed terms “during good behaviour”, meaning that members are only removable for cause. In addition to security of terms, members have security of fixed remuneration, not subject to performance on the tribunal. This may be considered to have placed the Commission on a relatively independent footing, as opposed to an appointment “at pleasure” by the executive, which would show considerably less institutional independence. As well, while Parliament has allowed for general policy direction to be exercised by the Governor in Council with respect to the objects of the CNSC, this does not authorize executive control over the CNSC’s decision-making functions or the exercise of its discretion in its quasi-judicial function.

## **Adjudicative Independence**

Adjudicative independence refers to the ability of an individual decision-maker to decide a matter impartially. Essentially, this means the decision-maker must have the freedom to decide without improper influence or interference which could taint a decision with a reasonable apprehension of bias. It also means that an affected party has a right to expect that an impartial decision-maker will deal with the matter without undue influence.

In the context of avoiding a reasonable apprehension of bias, with regard to individual decision-makers’ adjudicative independence, the CNSC’s processes reflect efforts to ensure that individual members may successfully avoid concerns of undue influence, extraneous considerations or unfair interests. For example, the role of the CNSC’s staff regarding the CNSC’s licensing function is to provide advice and recommendations. This process ensures that all information on which the CNSC may base its decisions is made available to the affected parties, so that they can know the case to meet and have the opportunity to make representations with respect to the information.

The issue of adjudicative independence could also arise in the context of efforts made to ensure consistency of decision-making among tribunal members. In such a case, the Supreme Court of Canada has indicated that such measures are permitted so long as three rules are respected: (i) the consultation is not imposed by a superior level of authority within the administrative hierarchy, (ii) the consultation is limited to questions of law and policy, and (iii) the decision-makers remain free to make all decisions on their own. So long as deliberations are conducted in a way that respects these principles, the independence of the individual decision-makers is respected.

For the CNSC, individual impartiality and decision-making independence may be seen to be respected adequately by its practices and by the way it conducts its deliberations in a way that respects the institutional consultation guidelines provided by the jurisprudence.

## **Conclusion**

With regard to the legal requirements of institutional independence, it is our view that the CNSC has the requisite indicia of independence, such that generally speaking, its decisions would not likely be successfully challenged on the basis of lack of guarantees that could be argued to be applicable.

As well, regarding decision-making or adjudicative independence, the CNSC has in place the structures, and is governed by the principles, that provide adequate assurance of the impartiality of their decision-making in a general sense.

Consequently, with regard to the legal requirements of independence, the CNSC was granted by Parliament a degree of institutional independence with which it can exercise its statutory function of licensing, without improper interference or influence, and in accordance with the evidence before it.

Linda J. Keen, M.Sc.  
President  
Canadian Nuclear Safety Commission



# Regulatory Independence: Law, Practice and Perception – A Report to the Canadian Nuclear Safety Commission by the Institute On Governance

March 31, 2007

*This document is based on research conducted by the Institute On Governance and does not necessarily reflect the views of the Canadian Nuclear Safety Commission.*

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*Canadian Nuclear Safety Commission  
Regulatory Independence: Law, Practice and Perception*

**Introduction**

***Background***

The mission of the Canadian Nuclear Safety Commission (CNSC) is to regulate the use of nuclear energy and materials to protect health, safety, security and the environment and to respect Canada's international commitments on the peaceful use of nuclear energy. The CNSC is an independent agency of the Government of Canada. The Commission functions as a quasi-judicial administrative tribunal, setting regulatory policy, making independent decisions on the licensing of nuclear-related activities in Canada, and establishing legally-binding regulations on matters related to health, safety, security and environmental issues affecting the Canadian nuclear industry.

The Commission is supported by scientific, technical and other professional staff that provides advice and recommendations to the Commission on licensing matters, assures compliance with regulatory requirements, and carries out the decisions of the Commission.<sup>1</sup>

Parliament's intentions with respect to the establishment of the CNSC as an independent quasi-judicial administrative tribunal, with clear responsibilities and powers for licensing and regulating nuclear facilities and nuclear activities in Canada, are set out in the *Nuclear Safety and Control Act (NSCA)*. As an administrative tribunal, the Commission's powers also need to be understood in the broader context of administrative law.

It is important to note that the *NSCA* does not define "regulatory independence" or, in fact, contain any reference to "independent" or "independence". It begs the questions, therefore, "Independent in what? Independent from whom? Independent how?" While such questions can be answered through a careful review of the *NSCA* and relevant administrative law, in practice, the public and other stakeholders do not approach the question of the meaning of regulatory independence this way. Rather, they come to understand what regulatory independence means in both legal and practical terms by seeing how the CNSC carries out its regulatory responsibilities on a day-to-day basis.

This study seeks, therefore, to look at the following three issues together: (1) how regulatory independence is provided for in law; (2) how the CNSC carries out its regulatory responsibilities and exercises its licensing powers in the context of the powers and constraints provided for in the *NSCA* and administrative law; and (3) how the law and the CNSC's practice interact to promote the public's understanding and acceptance of the CNSC as an independent regulator. In summary, this study is about good governance at the CNSC: how it exercises its powers; how it maintains its independence while giving stakeholders voice, and how it is held accountable.

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<sup>1</sup> In this study, the terms "Commission" and "CNSC staff" (or "staff") are used to distinguish between the seven-member tribunal and professional and other staff engaged to support the tribunal, respectively. The term "CNSC" is used when referring generally to the Canadian Nuclear Safety Commission as an organization.



## ***Paper Organization***

This paper is organized into four parts. Part I explores the meanings of governance and regulatory independence as they relate to a variety of sectors across the world. Based on the work of the Institute On Governance and a literature review, it gives a broad perspective on good governance and of the characteristics and challenges that are common to independent regulators. Observations in this section do not necessarily relate specifically to the CNSC, but serve to deepen the general understanding of what it means to practice good governance and to be an independent regulator. Following this general backgrounder on governance and regulatory independence, the paper turns its focus to the CNSC, drawing on key CNSC documents and interviews with CNSC staff. Part II examines the legal framework that provides for regulatory independence at the CNSC. Part III looks at the practice of CNSC independence from stakeholders and the Commission's independence from CNSC staff. Finally, Part IV offers some conclusions and recommendations.

## **Part I – Good Governance and Regulatory Independence**

### ***Good Governance***

The Institute On Governance defines governance as the process whereby societies or organizations make their important decisions, determine who has voice, who is engaged in the process and how account is rendered. The United Nations Development Programme (UNDP *Governance and Sustainable Human Development 1997*) put forward a set of principles that, with slight variations, appears in much literature, including work by the Institute On Governance.<sup>2</sup> These principles are not only about the results of power but about how well power is exercised. According to this approach, good governance exists where those in positions of power are perceived to have acquired their power *legitimately*, and there is appropriate *voice* accorded to those whose interests are affected by decisions. Further, the exercise of power results in a sense of overall *direction* that serves as a guide to action. Performance is a third criterion: governance should result in *performance* that is responsive to the interests of citizens or stakeholders. In addition, good governance demands *accountability* between those in positions of power and those whose interests they are to serve. Accountability cannot be effective unless there is *transparency* and *openness* in the conduct of the work being done. And, finally, governance should be *fair*, which implies conformity to the rule of law and the principle of equity.

The table below maps the five principles of good governance identified by the Institute On Governance to the set of principles set forward by the UNDP *Governance and Sustainable Human Development 1997*.

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<sup>2</sup> IOG Policy Brief No. 15: Principles for Good Governance in the 21st Century, by John Graham, Bruce Amos and Tim Plumptre.

*Institute On Governance Five Principles of Good Governance*

<b>The Five Good Governance Principles</b>	<i>The UNDP Principles and related UNDP text on which they are based</i>
<b>1. Legitimacy and Voice</b>	<p><b>Participation</b> – all men and women should have a voice in decision-making, either directly or through legitimate intermediate institutions that represent their intention. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively.</p> <p><b>Consensus orientation</b> – good governance mediates differing interests to reach a broad consensus on what is in the best interest of the group and, where possible, on policies and procedures.</p>
<b>2. Direction</b>	<p><b>Strategic vision</b> – leaders and the public have a broad and long-term perspective on good governance and human development, along with a sense of what is needed for such development. There is also an understanding of the historical, cultural and social complexities in which that perspective is grounded.</p>
<b>3. Performance</b>	<p><b>Responsiveness</b> – institutions and processes try to serve all stakeholders.</p> <p><b>Effectiveness and efficiency</b> – processes and institutions produce results that meet needs while making the best use of resources.</p>
<b>4. Accountability</b>	<p><b>Accountability</b> – decision-makers in government, the private sector and civil society organizations are accountable to the public, as well as to institutional stakeholders. This accountability differs depending on the organizations and whether the decision is internal or external.</p> <p><b>Transparency</b> – transparency is built on the free flow of information. Processes, institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them.</p>
<b>5. Fairness</b>	<p><b>Equity</b> – all men and women have opportunities to improve or maintain their well being.</p> <p><b>Rule of Law</b> – legal frameworks should be fair and enforced impartially, particularly the laws on human rights.</p>

In exploring these principles it is important to note two points. First of all, it is not enough to meet only some of the principles; all of the principles need to be present, to at least some degree,

to ensure good governance. Second, there can be friction or tension between the principles. For example, demands for increased accountability, and the resources required to achieve this, may work against goals for improved performance, as more time spent writing reports means less time delivering a program. This example is not provided to suggest that accountability is not important but rather to illustrate the need to recognize the inherent conflicts within the principles, and the importance of finding balance among them.

### ***The Meaning of Regulatory Independence***

Independent regulators have a distinct position and role within society and within the sphere of governance. They are creatures of governments, established to serve a public purpose, yet with a very high degree of independence from governments when it comes to regulatory decision-making. As such, these institutions have a unique set of challenges in practicing regulatory independence and in meeting the principles of good governance.

The IOG conducted a literature search to identify key documents which explored the concept of regulatory independence. Ten articles and reports, including several articles provided by CNSC, were reviewed. Although the nuclear industry was the main focus of the literature review, documents relating to independent regulation in the telecommunications, financial, and electricity industries were also explored to gain a better perspective of the concept of regulatory independence in terms of the regulator's role, independence, and governance challenges.

#### **The Independent Regulator's Role**

The role played by independent regulators is unique. Set apart from conventional government structure, with enormous responsibilities to the public at large and frequently to multi-national industries as well, they regulate sectors that are complex and that have significant societal impact on matters such as health and safety, security, environmental protection, monopoly control, labour relations, consumer protection, and market failure.

Officially, as observed by one advisory group, regulators have three basic functions:

- (1) to develop and enact a set of appropriate, comprehensive and sound regulations; (2) to verify compliance with such regulations; and (3) in the event of a departure from licensing conditions, malpractice or wrongdoing by those persons/organizations under regulatory oversight, to enforce the established regulation by imposing the appropriate corrective measures.<sup>3</sup>

However, independent regulators also serve an informal mediatory role with the public, and provide an effective mechanism for taking difficult but necessary decisions in the public interest. Ultimately, they exist to serve in the public interest, and they must balance their official, legal role as tribunals with the realities and expectations of industry and non-industry stakeholders, ethics, and values. Just as promoting compliance is key to regulating industry, so maintaining

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<sup>3</sup> Independence in Regulatory Decision Making INSAG-17, International Atomic Energy Agency, p.1.

credibility is crucial to the independent regulator's relationship with the public. Credibility, in turn, depends on the public's perception of how the regulator carries out its responsibilities.

### Elements of Independence

To function as an independent authority, the regulator must have certain characteristics which clearly establish its "independence". The documents surveyed pointed to several elements, including: (1) a legally entrenched mandate; (2) independence from government and industry stakeholders; and (3) adequate resources.

**1) Legal Framework:** An independent regulatory body needs to have a legal framework that clearly establishes its mandate, including objectives and powers. While the scope of powers allotted to regulating authorities varies across industries and countries, they generally lie in rule making, rule application and litigation.

**2) Independence from government and industry stakeholders:** In order to function as an effective independent authority, there must be clear separation of the regulatory body from government and industry interests. The ability to make legally-binding decisions regarding the licensing and regulation of companies and persons involved in the industry without unwarranted external influences is crucial to the independence of the regulator. This should be provided for in the regulator's enabling legislation, and appropriate mechanisms and guidelines need to be in place. Most experts also felt that the regulator should be separated from the government's general policy making activities, and from the government's activities related to promotion of the industry.

**3) Adequate Resources:** A regulatory body's mandate cannot be executed separately and independently without the required resources. The literature surveyed was unanimous in the view that regulators should have adequate and stable funding for all regulatory activities, with a high degree of autonomy in deciding how the budget is to be allocated.

### Key Challenges

In practice, the position of the independent regulator is a delicate one and the study identified many governance challenges. Regulators should be proactive in monitoring these issues, which typically involve either external interference or internal challenges related to effective and efficient operation and management.

Whether they be political interests, public stakeholder interests, or industrial interests, pressure from external forces can be a challenge to the neutrality and effectiveness of the independent regulator. While integration of the regulatory body into the overall public service is often done in a way that keeps competing influences to a minimum, it is difficult to avoid some overlap, and concrete steps have to be in place to avoid interference. In addition, government typically has at least some control of budget and the appointment/dismissal of senior regulatory officials, and could use this power to influence decisions.

Public stakeholders, including non-governmental organizations (NGOs), communities and individuals, may not have the legislated powers that government has, but can still exert considerable influence on the regulator if the proper safeguard mechanisms are not in place. Measures must be taken to ensure that contact between decision-makers and interested members of the public is appropriately managed, particularly when specific licensing issues are at play.

Industry interference can come in many forms. In one study it was noted that “deregulation of the electricity market in some national programs has increased industry pressure to reduce costs, and this has increased the pressure to reduce the regulatory burden”.<sup>4</sup> Other concerns include the movement of staff between the regulatory body and industry, and the “capture” of regulatory staff by industry via future prospects of lucrative employment<sup>5</sup>. There is also the ongoing challenge of safeguarding the independence of the regulator while at the same time maintaining a relationship of trust and cooperation with the licensee.

With regards to internal governance, many regulatory agencies continue to face a wide range of issues, including: lack of clear objectives and criteria; insufficient competence and objectivity; limited access to technical expertise and information; potentially compromising interests and behaviour; insufficient funding; and an overdependence on individual decision makers. These are complex issues, which often overlap and need to be dealt with in a comprehensive manner. The following section on good practices deals with many of the internal challenges that confront independent regulatory bodies.

## Good Practices

The literature surveyed provided an array of good practices and measures that can promote the performance of an independent regulatory body, and underlined the importance of having a comprehensive legal framework governing the regulatory activities and their associated objectives, principles and values. Fostering a “regulatory culture”, supported by clear guidelines, mechanisms and processes also emerged as being critical to the independent regulator’s success, particularly in matters related to four areas: (1) staff; (2) funding; (3) accountability; and (4) stakeholder relations.

**1) Staff:** Crucial to the effectiveness of a regulatory body is its ability to make truly independent decisions, and staff integrity and neutrality must be safeguarded. Many experts recommend establishing a code of conduct on ethical rules and restrictions. There should be rules regarding conflicts of interest during and post employment. Rules should be in place to ensure that regulatory employees avoid certain activities, disclose activities, divest or resign from positions that present conflicts, and recuse themselves from certain areas of regulatory work. Staff should not be allowed to have financial interests in the regulated industry and personnel practices should be transparent. To ensure continuity and adherence to ethical codes of conduct, they need to be clearly documented and integrated into staff training and culture.

Recruiting and retaining competent staff is another ongoing challenge that independent regulatory bodies need to address. Typically, they operate in sectors that demand high levels of

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<sup>4</sup> Some Thoughts on Concepts Fundamental to the Delivery of Nuclear Safety Regulation, INRA, p. 4.

<sup>5</sup> Independent Regulatory Authorities in Europe, by Anders Larsen, Eval Moll Sorensen and Ole Jess Olsen, p. 10.

expertise and specialization and they need to be able to compete with industry, which can often pay more than governments.

The literature also points to the appointment of the senior regulatory official as a key factor in safeguarding the independence of the regulatory body and promoting its overall good governance. Recommended practices include: clearly defined competencies; fixed terms for appointments; strict rules for dismissal; and appointment procedures that involve multiple parties.

**2) Funding:** How the regulatory body is funded can greatly affect its decision-making process. A legal framework is needed to establish clear financing mechanisms that protect both the integrity of the decision-making process and the autonomy of the independent regulator. Funding processes should exclude those parts of the government with interests in promoting the related industry, and should bring legitimate financial needs of the regulatory body to the attention of political decision-makers at the highest level. While it was acknowledged that no direct funding should come from fines collected from licensees<sup>6</sup>, some experts recommend having a stable source of funding outside of government (e.g. by licensee fees) as a means of enhancing the regulator's autonomy<sup>7</sup>. Others argue that funding mechanisms that rely on licence fees paid to the regulator are problematic since a regulator's capacity to recruit and retain qualified staff may be compromised as a result of uncertainties in funding. However, all experts agree that independent regulators should have a high level of autonomy in allocating funding.

**3) Accountability:** The high degree of autonomy accorded to the independent regulator must be balanced by the manner in which it is held accountable –to government, to industry, and to the general public. It is recommended that regulators have a direct reporting line to the highest levels of government, parliament or safety authorities and that appropriate auditing mechanisms be put in place. Strict transparency and traceability guidelines and mechanisms are also needed. Transparency in decision-making should be practised with stakeholders as well, with decisions of the independent regulator being documented and made public, accompanied by clear explanations of the reasoning underpinning the decisions. Effective review or appeal mechanisms for decisions taken by the independent regulator must be in place.

**4) Relations with Stakeholders:** While the regulator has an obligation to maintain its independence and objectivity, every effort should be made to encourage the cooperation and compliance of the operator. Predictability and consistency in the decision-making process is very important to the operator, and legislation should be clear in specifying objectives for licensees. In addition, balance is needed in the relationship between the regulator and operator, so that both the regulator's independence and the operator's trust and openness are preserved. In one presentation on independent regulation the following three step procedure was recommended: (1) regulator defines clear, precise, detailed safety requirements; (2) the operator develops solutions on his own; (3) the regulator checks and approves the operator's solutions.<sup>8</sup>

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<sup>6</sup> Independence in Regulatory Decision Making INSAG-17, IAEA, p.7.

<sup>7</sup> Independent Regulatory Authorities in Europe, by Anders Larsen, Eval Moll Sorensen and Ole Jess Olsen, p. 10.

<sup>8</sup> Independence and Regulatory Effectiveness, Effective Nuclear Regulatory Systems Conference, by W. Renneberg, p. 47.

To foster credibility and stability in their sectors, and to ensure that all affected interests have a voice in the decision-making process, regulatory bodies also need to provide opportunities for open dialogue with public stakeholders. Appropriate mechanisms need to be established for external professional dialogue and consultation with licensees, independent experts and the general public.

### Effective Regulatory Governance

The perspectives and measures of “success” of independent regulating bodies inevitably differ across industries and countries. Each sector and country has its own history and pressures, and industry and regulation have evolved accordingly. The independence of regulatory bodies was acknowledged in the literature as “a cornerstone of good regulatory governance”<sup>9</sup>. The study also highlighted the importance of safeguarding the integrity of this independence with the major good governance principles discussed earlier in the paper - principles of legitimacy and voice; direction; performance; accountability; and fairness.

- **Legitimacy and Voice:** Regulators need to be seen as having acquired their power legitimately, and a voice should be accorded to those whose interests are affected by their decisions.
- **Direction:** Regulation does not happen in a vacuum, and regulators need to have a broad and long-term perspective of the industry they are regulating, including the related social complexities and the public they serve.
- **Performance:** Regulators should be responsive to the interests of citizens and stakeholders. Effectiveness and efficiency should be promoted so that processes and institutions produce results that meet needs while making the best use of resources.
- **Accountability:** Independent regulatory bodies should be held accountable to those whose interest they serve, including government, industry and the public at large. Accountability is only effective if there is transparency and openness in the conduct of regulatory duties.
- **Fairness:** Legal requirements should be fair and enforced impartially.

By applying these good governance principles, independent regulators can achieve independence not only in law, but also in practice and perception.

## **Part II – The Manner in which the *Nuclear Safety and Control Act* Provides for Regulatory Independence and Good Governance**

As mentioned earlier, independent regulators have a distinct position and role within society. A creation of government designed to serve a public purpose, yet with a very high degree of independence from its creator when it comes to regulatory decision-making, these institutions have a unique set of challenges in practising regulatory independence and in meeting the principles of good governance.

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<sup>9</sup> Financial Regulators Need Independence, Finance and Development Magazine, December 2002, Vol.39 No. 4.

It is worth noting at this point that there is a broad spectrum for independence from government, ranging from government line departments, such as the Ministry of Natural Resources, through to organizations completely independent from the government of the day, such as “Officers of Parliament.” These latter offices, which may also be referred to as “Agents of Parliament,” are set up to carry out work for Parliament (the duties are assigned by statute) and are responsible directly to Parliament. Generally speaking, the appointment of such officers, which include the Auditor General and the Office of the Chief Electoral Officer, is done by Parliament, and these “Agents of Parliament” often play a role in providing oversight to government activities.

In contrast, the CNSC reports to Parliament through a Minister, and the appointment of the President and CEO is within the purview of the Governor in Council. As such, while the CNSC is highly independent from government in its regulatory role, it is somewhat less independent from government than Officers of Parliament. However, this lesser degree of independence is appropriate given that the CNSC mandate is focused on regulation, and regulation is a function of government – not Parliament.

The *Nuclear Safety and Control Act (NSCA)* is the primary legal tool established by Parliament to ensure that the need for independence is balanced with the need for accountability in the CNSC. The *NSCA* supports all of the principles of good governance. It addresses the roles, responsibilities, powers and accountabilities of the Commission and of the inspectors and designated officers appointed by the Commission. With the exception of the powers reserved for the Governor in Council or Minister discussed below, the *NSCA* provides powers to the Commission alone.<sup>10</sup> Because of the significant powers invested in the Commission, its independence and ability to remain impartial is crucial to the success of the CNSC’s work and its overarching goal of serving the public interest.

It is also important to note that where enabling legislation does not expressly provide for regulatory independence, regulators need to rely on the principles of administrative law.

### ***Strategic Direction***

The *Nuclear Safety and Control Act (NSCA)* establishes the Canadian Nuclear Safety Commission as an agent of the Government of Canada. Under the *NSCA*, the CNSC's mandate involves four major areas:

- regulation of the development, production and use of nuclear energy in Canada;
- regulation of the production, possession, use and transport of nuclear substances, and the production, possession and use of prescribed equipment and prescribed information;
- achieving conformity with measures of control and international obligations respecting the peaceful uses of nuclear energy and nuclear materials to which Canada has agreed; and

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<sup>10</sup> See, for example, sections 15 (By-laws), 16 (powers to employ staff), 17 (power to contract), 20 (powers as a court of record), 21 (powers to carry out its mandate), 24-25 (powers to license), 28 (power to designate analysts), 29 (powers to designate inspectors), 37 (powers to designate officers), 44 (powers to make regulations), etc.



- dissemination of scientific, technical and regulatory information concerning the activities of the CNSC, and the effects on the environment and on the health and safety of persons of the development, production, possession, transport and use of nuclear substances.

This mandate provides the CNSC with the *direction* required by good governance. That said, the government is able to issue to the Commission directives of general application on broad policy matters (*NSCA* section 19), which has the potential to limit and/or change the scope of the CNSC's work.

### ***Legitimacy and Voice***

The *NSCA* addresses this issue from several perspectives. For example, while Commission members do not require, when they join the CNSC, specific nuclear knowledge or experience, they are informed citizens who have the ability to understand and ask questions to applicants and CNSC staff on the nature and impact of nuclear facilities. They also have credibility, as they are recognized specialists in their fields of endeavour, in the areas of science, geology, engineering, health or business (but not nuclear). In addition, the *NSCA* requires that a member of the Commission not engage in any activity, or have an interest in a business, or accept or engage in any office or employment that is inconsistent with the member's duties (section 11(1)). With respect to voice, the Commission must hold public hearings on all licensing issues (section 40(5)), ensuring that the stakeholders have an opportunity to be heard by the Commission.

### ***Performance***

The *NSCA* has a number of sections that address and encourage good performance and independence in operations and decision-making on the part of the CNSC. First, the Commission may make by-laws with respect to the management and conduct of its affairs and to meet its objectives and carry out its duties under the Act (section 15).

Second, the Commission, as a court of record, may summon and examine witnesses, inspect records, and enforce orders, among other powers (section 20). The President also has the power to establish a panel of the Commission, consisting of one or more members. Such panels may exercise or perform any or all of the powers, duties and functions of the Commission, with the exception of creating by-laws or regulations or reviewing a decision or order of the Commission (section 22).

Third, the Commission may appoint and employ its own staff (with the necessary expertise), and, with the approval of Treasury Board, may establish the terms and conditions of their employment (section 16).

### ***Accountability***

Balancing the need for accountability with the need to ensure independence is challenging. The *NSCA* has a number of provisions to maintain the independence of the CNSC in regulation-

making, while at the same time ensuring the accountability of the CNSC to Parliament, and through Parliament, to Canadians.

First, there are a number of mechanisms set out in the *NSCA* to ensure effective accountability and transparency in the work of the CNSC. For example, the decisions of the Commission must be based on the evidence presented at hearings, although legal rules of evidence do not apply and Commission members may also take “official notice” of other information that is relevant to their decision-making. Decisions of the Commission may be subject to judicial review by the federal courts. In addition, while the Commission may designate inspectors and designated officers with specific delegated authorities (sections 29 and 37, respectively), the orders of inspectors and designated officers are subject to review by the Commission, and the Commission has the power to amend, replace or revoke such orders.

While the accountability and transparency measures listed above are undertaken independent of government, the government does maintain some broad powers to influence the work of the CNSC, powers that are necessary to ensure transparency and accountability. The *NSCA* requires the CNSC to comply with Treasury Board policies, directives, and reporting requirements, including the *Financial Administration Act* (section 67). In addition, the Governor in Council has the powers under the *Nuclear Safety and Control Act* to approve regulations made by the Commission (section 44, paragraph 1), and to appoint, on good behaviour, and to remove, for cause, permanent and temporary Commission members, including the President (section 10).

The *NSCA* also requires that the President report to the Minister, when requested by the Minister, on the general administration and management of the CNSC (section 12(4)), that the Commission, within four months of each fiscal year, submit to the Minister a report of the activities of the Commission under the *NSCA* for that year, and that the Minister present this report to Parliament (section 72).

### ***Fairness***

Finally, the *NSCA* does address the governance principle of fairness. For example, proposed regulations must be published in the *Canada Gazette*. Publication in the *Gazette* provides all stakeholders with an opportunity to comment on proposed regulations. In addition, the *Statutory Instruments Act* requires that the Regulatory Impact Analysis Statement (RIAS), which accompanies all publications of proposed or final regulations in the *Gazette*, be provided to persons who wish to make representations to the Commission on the proposed regulation. (section 44). There are also a number of provisions designed to ensure that licensees are dealt with in a fair and impartial manner.

While the *NSCA* is the enabling legislation for the CNSC, the CNSC is also subject to other legislation and regulations that have a public interest element to them. These pieces of legislation address the issue of fairness to all Canadians, including the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, and the *Access to Information Act*.

### **Part III – Best Practices and Challenges in Relations between CNSC and its Stakeholders, and in Relations within the CNSC**

While *the Nuclear Safety and Control Act* provides a strong legal framework for regulatory independence and good governance, it is also important to explore how the CNSC works within this legal framework to develop and implement policies and practices that reflect its independence. It is to the subject of practice and perception that this paper now turns.

The *Nuclear Safety and Control Act* clearly defines CNSC as an independent regulatory body. However, what does this mean in practice? Independence does not mean isolation. In fact, good governance requires that stakeholders have a voice. A regulator therefore must engage with its stakeholders, both in the sharing of information and in consultations around new regulations, in order to remain effective. And it must do so in a way that prohibits undue influence from any stakeholder, ensuring that decisions of the CNSC, whether from designated officers or the Commission, are impartial. The relationship between an independent regulator and its stakeholders is by its very nature a complex one, where the need to provide opportunities for voice must be balanced against the need to maintain independence in decision-making and to achieve the good governance principles of fairness, transparency and accountability.

#### ***CNSC Stakeholders***

The stakeholders of the Canadian Nuclear Safety Commission can be broken into three main categories: (1) government; (2) licensees and (3) intervenors. Within each of these categories are a number of sub-groups, each with its own set of attributes that contribute to its particular relationship with the CNSC. An understanding of CNSC's stakeholders, including the characteristics of each group that bring them together and/or set them apart, is needed to ensure that all stakeholders are treated fairly, have suitable opportunities to be heard, and that appropriate mechanisms to ensure accountability, transparency and independence are in place. A stakeholder map can be found in Annex A.

#### **CNSC and Government**

CNSC's level of engagement with stakeholders within the government varies widely, from relatively frequent communication with Natural Resources Canada (NRCan), to very limited engagement with many line departments and provincial governments.

The Canadian Nuclear Safety Commission reports to Parliament through the Minister of Natural Resources. Neither the Minister nor the Governor in Council has a role in CNSC's decision-making or the power of appeal. Decision-making powers related to nuclear regulation in Canada rest solely with the Commission. The Minister, however, is responsible for signing off on reports to Parliament, for approving recommendations to the government regarding regulations made under the *NCSA*, and for signing off on Treasury Board submissions. The Minister also answers questions in the House of Commons related to CNSC's activities. This situation creates a fine line that the Minister must walk: he/she must not interfere in the activities of the CNSC yet at the same time must be able to answer questions in Parliament.

Natural Resources Canada (NRCan) is responsible for coordinating certain issues on behalf of the department's portfolio. However, while the CNSC may provide input to portfolio-wide initiatives, the CNSC is not accountable to NRCan. Rather, NRCan must respect the CNSC's role as an independent regulator, and the CNSC's separate relationship with the Minister. As such, CNSC needs to nurture and maintain a good relationship with NRCan, while at the same time maintaining its independence. It is also important to recognize that NRCan has its own expertise in-house and its own areas of responsibility that touch on economic regulation of the nuclear industry (including the *Nuclear Liability Act* and the *Nuclear Fuel Waste Management Act*).

The CNSC is subject to the *Financial Administration Act* (FAA), and is listed in schedules II and V of the *FAA*. CNSC's reporting relationship to Treasury Board (TB) is in all areas of management that fall under the mandate of Treasury Board, except for the area of human resource management, as CNSC is a separate employer under its Act. The CNSC is therefore subject to all TB policies and regulations in the areas of finance, administration, contracting for services, real property, information management (IM) and IT and common services. The CNSC's procurement authority for goods is delegated by the Minister of Public Works and Government Services, which also dictates policies in the area of real property. The CNSC is subject to government-wide policies in a number of other areas, such as records management (National Archives), international treaties (DFAIT) and receives its legal services from Justice Canada.

CNSC's annual Main Estimates are subject to TB approval before being tabled in Parliament by the President of Treasury Board.

In terms of human resource management, the CNSC is a separate employer under the *Nuclear Safety and Control Act*. As such, it is not subject to the *Public Service Employment Act* and sets its own conditions and policies for employment. The CNSC is, however, subject to certain provisions of the *Public Service Labour Relations Act*.

The CNSC also exercises some responsibilities that come to it from other federal legislation. In particular, the CNSC is responsible for undertaking environmental assessments associated with nuclear projects, in accordance with the requirements of the *Canadian Environmental Assessment Act* (CEAA). CNSC staff may, from time to time, seek advice from the CEA Agency in fulfilling CNSC's obligations under the *CEAA*. The Commission tribunal has the responsibility for determining that a project will not cause significant adverse environmental effects prior to issuing a licence.

The CNSC's relationships with other line departments and organizations in the federal government, including Environment Canada, Health Canada, Transport Canada, Human Resources and Skills Development Canada and the National Research Council, are somewhat limited, and tend to focus on regulatory matters where there are common interests. Under the Government of Canada Regulatory Policy, the CNSC must work with other government departments and agencies. Working together, however, does not divest any of the parties from responsibility or liability.

Finally, CNSC works with provincial governments, in particular the governments of Quebec, Ontario, Saskatchewan and New Brunswick, where large nuclear facilities are located. Although nuclear regulations are exclusively federal, the provinces have jurisdiction over areas such as off-site emergency preparedness, evacuation procedures, and environmental protection, and issues concerning potential overlap in these areas of responsibility arise from time to time. It is therefore very important for CNSC to establish good working relationships with provincial regulators, including clear guidelines about who is doing what, and effective communication lines with provincial governments to ensure a common understanding of roles and responsibilities.

### CNSC and Licensees

Licensees include power generators, universities, hospitals, cancer clinics, crown corporations and federal, provincial and municipal departments and agencies, among others. CNSC's relationship with licensees is a structured one, designating CNSC as the regulator, with the licensee having no choice but to apply for a license and comply with the regulations.

There are significant differences between licensees. For example, some licensees are profit driven (e.g. Ontario Power Generation), while others are non-profit (hospitals, for example). Generally speaking, larger licensees do not have capacity issues, though the degree or breadth of engagement in nuclear activities may vary. Some relationships are seen as more politically sensitive, such as those involving crown corporations or other federal departments. All departments and agencies of federal and provincial governments, including their Crown corporations, are subject to the *NSCA*, and CNSC regulates such Crown corporations in the same manner as any other licensee. Nonetheless, the CNSC has to be particularly careful in its relations with Crown corporations, such as Atomic Energy Canada Limited (AECL), whose mandates include the development or use of nuclear power or nuclear substances, because the different roles of regulator and regulatee often leads to different points of view. While the CNSC reports to Parliament, both CNSC and AECL are agents of the federal government and both connect to government through the Minister of Natural Resources.

Another potentially sensitive issue for CNSC is the role that licensing fees play with regards to its funding. Licensing fees from industry cover approximately 65% of CNSC's funding. However, it is not always understood by licensees, non-governmental organizations (NGOs) and/or the public at large that fees are paid to the Consolidated Revenue Fund (ie. to the government), and that they are not a source of funds for the CNSC. If the fee collection system is not communicated well to stakeholders, it could lead to perceptions that licensees have a greater voice because they fund the CNSC, i.e. perceptions of unequal voice, and, in turn, to questions around the independence of the system.

The Operations Branch of the CNSC has primary responsibility for relations with licensees. Given the inevitable tension between the CNSC's regulatory focus on health and safety, and the licensees' desire to pursue economic objectives, the relationship between the Commission and staff and licensees needs to be carefully managed to ensure voice, performance, transparency and

fairness. The Operations staff act on decisions made by the Commission as defined in the *Nuclear Safety and Control Act*.

Staff of the Operations branch assess submissions from licensees, make recommendations to the Commission and are responsible for ensuring compliance, through inspection and enforcement processes and procedures. It is the Commission, however, who makes the actual decisions on matters of licensing. The Commission does designate some decision-making power for less significant categories of licenses to senior staff in Operations Branch. The relationship between CNSC and a licensee is multi-faceted. Licensees are responsible for ensuring compliance with licence conditions and regulations. However, the CNSC plays an important role in ensuring licensees fully understand requirements, through the production of regulatory documents and through regular interactions to promote compliance.

### CNSC and Intervenors

Intervenors are a diverse group of individuals and groups who have an interest in the nuclear industry and its impact. They may be either anti or pro-nuclear.

Individual members of the public who intervene at hearings generally have limited resources to prepare for hearings, and may or may not be directly affected by decisions of the Commission. This is often a significant impediment to their capacity to intervene effectively in licence hearings held by the Commission.

The range of public interest groups who interact with the CNSC varies widely. At one end of the spectrum are large, formally incorporated non-profit organizations (such as Greenpeace or the Sierra Club) that are knowledgeable, well-resourced and organized, and media-savvy. These organizations are generally focused on nuclear energy at the provincial, national and/or international level. At the other end of the spectrum are smaller, local or regional non-profit or community groups whose focus is normally more narrow or specific to a particular licensed facility. They are generally anti-nuclear, with limited financial and human resources, and have a personal commitment to the issue. They may or may not be well-informed on the issue and/or the hearing process, and may bring forward issues that do not fall within the mandate of the CNSC.

Aboriginal groups bring to the CNSC a unique relationship and history with the federal government, and different cultural, environmental, economic and social perspectives on nuclear issues. Working with Aboriginal communities and/or their political representatives requires a solid understanding and respect of the history and cultures of the affected communities, and their past and current relationship to the federal government. To effectively engage Aboriginal communities, sufficient time and resources are needed to take account of their consensus-based decision-making and more holistic approach to issues.

When engaging Aboriginal people, it is also important to have a clear idea of the complex legal factors at play. For example, Section 35 of the Constitution Act 1982 recognizes existing “Aboriginal treaty rights”, and the Supreme Court, in numerous judgements involving First Nations, Inuit and Métis, has set down principles for how these rights might be affected.

Supreme Court of Canada judgements are also critical in establishing principles and guidelines for defining the relationship between governments and Aboriginal peoples. The Canadian Environmental Assessment Agency has extensive experience in engaging Aboriginal peoples and could be a useful resource for CNSC.

There are also a number of Canadian pro-nuclear interest groups. These groups, which represent industry and/or labour, are better resourced and knowledgeable of nuclear technology and nuclear issues, and play a strong advocacy role. Often their interest in the nuclear industry has a strong economic component. These groups are also directly affected by decisions of the CNSC.

#### CNSC and the International Community

Finally, the CNSC is engaged internationally. The CNSC is an active contributor to the programs and activities of the International Atomic Energy Agency (IAEA). The CNSC also engages with other major nuclear regulators as part of the International Nuclear Regulators Association (INRA). The CNSC also works closely with a number of countries with whom Canada has bilateral agreements to control the use of nuclear technology. Given that nuclear events in one country, such as Three Mile Island and Chernobyl, can have significant international repercussions, other countries have an interest in the CNSC's activities related to managing risks. These international stakeholders are also a good source of information for CNSC on emerging risks and best practices in nuclear regulation; however, any decisions taken regarding regulatory standards by one of these stakeholders are not legally binding to Canada. It is up to the CNSC to make the ultimate decision as to whether or not new developments will be incorporated into Canada's regulations.

It is also worth noting that nuclear regulators in other countries may have different mandates and associated governance structures and processes. In some cases, mandates include an implicit support for nuclear power and the use of nuclear technologies, and economic interests are taken into consideration. This is in stark contrast to the Canadian context, where CNSC's responsibility lies solely in the regulation of nuclear energy.

#### ***The Commission's Relationship with CNSC Staff***

The Commission is a quasi-judicial tribunal, comprised of up to seven members, with the power to make licensing decisions based on its mandate. Selected from outside of the industry – which is unusual for tribunals – the members of the Commission have varied backgrounds. Highly educated, and accomplished in many different fields, they represent the public in general. The appointment of Commission members is the responsibility of the Governor in Council. Despite being Governor in Council appointments, Commission members are independent of government in their decision-making. Decisions of the Commission must be based on evidence, expertise, and scientifically sound analysis.

To safeguard the integrity of the Commission's role as an independent decision-maker, contact between the Commission and CNSC staff occurs through the Secretariat. The Secretariat provides direct support to the Commission outside of the public hearing process, including organizing hearings, receiving submissions with recommendations, drafting record of

proceedings and providing technical briefings. It is the interface between the Commission and CNSC staff.

CNSC staff is the primary point of contact with most stakeholders. The CNSC operates and delivers on the CNSC's mandate, including training, regulation of the licensee and implementation of the Commission's decisions. The Commission relies on staff's knowledge and expertise, and the capacity of staff to provide objective scientific, technical and regulatory information is essential to the Commission's decision-making process. Staff, with the exception of the Secretariat and the President and CEO, has limited interaction with the Commission outside of hearings, and such interaction is managed by the Secretariat to ensure the integrity of the Commission as an independent tribunal is not compromised.

### ***Best Practices***

The CNSC has taken many steps to ensure that regulatory independence is not just a function of law, but is also put into practice throughout the CNSC. It is through these day-to-day practices that regulatory independence is demonstrated to stakeholders and perceptions around CNSC and regulatory independence are formed. Persons interviewed as part of this study identified a range of best practices that protect, encourage and promote regulatory independence. Some of these best practices are highlighted below.

#### Legitimacy and Voice

For CNSC to be effective in its work, it must be considered legitimate by those it serves and those who have an interest in its work. For this reason, protecting the legitimacy of the CNSC, which is closely linked to protecting its independence, is key to its success. A range of best practices have been developed at the CNSC to ensure that the legitimacy (and perceived legitimacy) of the CNSC is maintained in relation to four key areas: (1) independence from intervenors and licensees; (2) independence from government; (3) stakeholder voice; and (4) within the Commission.

**1) Independence from Intervenors and Licensees:** To ensure that intervenors and licensees do not have undue influence on the Commission's decision-making process, the President/CEO position is managed closely. For example, once hearings related to a licensing matter are announced, the President will refuse to meet or accept calls from licensees or intervenors until a decision on the licence application has been rendered; any interaction with the licensee is then through the Executive Vice-President of Operations. The President and CEO also follows clear procedures around meetings and phone calls, never meeting with licensees or intervenors alone, and making notes to file with respect to such meetings. If something is said in an informal setting, the President and CEO writes back to the individual to document the issue(s).

**2) Independence from Government:** Protecting legitimacy and independence is not tied solely to relations with intervenors and licensees; independence from government must also be maintained. Informing other departments on CNSC's regulatory independence is therefore an important activity. To address this concern, the Chief of Staff speaks with staff of key Ministers and other appointed officials early in their terms to inform them of CNSC's role and the nature



of the appropriate relationship with the CNSC. CNSC's Corporate Services Branch also plays a role in informing Treasury Board on the nature of their relationship. The *Handbook on Accountability for Ministers* is used by the CNSC as a tool to inform Ministers of their relationship with independent regulators.

**3) Stakeholder Voice:** The importance of stakeholders having a voice in CNSC decision-making is also crucial to its effectiveness, and the CNSC faces an ongoing challenge around perceptions in this area - in particular the belief of some that industry and/or government have a stronger voice. To ensure that intervenors can participate effectively in hearings, the CNSC has developed a number of mechanisms that provide opportunities for stakeholder input. For example, transcripts of the first day of a two-day public hearing are made available on the CNSC website shortly after the first day of the hearing. On the second day of the hearing the public can intervene, having been informed of the proceedings from the first day. The process for making changes to regulatory requirements also includes consultation with stakeholders, and provides ample opportunity for licensees and intervenors to offer their input.

Other consultative mechanisms for non-licensee stakeholders include the newly formed "NGO Regulatory Affairs Committee", which should allow CNSC to more effectively engage environmental NGOs.

**4) Within the Commission:** Finally, there are also practices within the Commission itself to ensure legitimacy and voice, including strict guidelines to ensure that there is no conflict of interest. For example, Commission members must recuse themselves from any role that might be, or might be perceived to be, in conflict with their role as a Commission member. In addition, decisions are made by the Commission as a whole, with the President only voting in the case of a tie.

#### Strategic Direction

While the mandate of the CNSC is clearly set out in the *NSCA*, CNSC needs to ensure that it is well understood and put into practice. For this reason, CNSC works to communicate its mandate clearly through the setting of priorities, the development of regulations, and in delivering on the framework.

#### Performance

The CNSC has a range of best practices to support its performance as an independent regulator. For example, there are frequent discussions among the CNSC Executive Committee, President, lawyers and Secretariat on the meaning of regulatory independence and approaches to ensure its consistent application. In addition, CNSC has a single point of contact system for relations with government to promote effective communications management: the Office of the Chief of Staff handles communication with the Minister's office; the Executive Director of Communications and Regulatory Affairs at CNSC handles the majority of communications with NRCan and Privy Council Office (PCO); and communications with Treasury Board and Finance are dealt with by Corporate Services Branch.

As an independent regulator, the CNSC is responsible for allocating its resources to address risks. The high level of risk associated with CNSC's work and decisions demands that performance standards be very high. If resources are not available, CNSC simply takes longer to complete the required work to issue licenses etc.

Within the CNSC, training and events are undertaken to ensure that all staff understand the role of CNSC as an independent regulator, and perform accordingly. For example, a "Meet and Greet" with the Executive Committee is held for all new staff, at which time the President stresses the roles and responsibilities of the Commission and the importance of an objective, independent regulator to maintaining a safe nuclear industry. There is also regular awareness raising and reinforcement of the need to maintain regulatory independence among all staff in Operations - particularly for those who have contact with licensees and intervenors.

With respect to informing the public of the Commission's roles and responsibilities as an independent regulator, the President states, at the beginning of each hearing, that the Commission is independent from the influence of governments, industry and public interest groups, and that the Members are independent of each other and of CNSC staff.

#### Accountability

As noted earlier, ensuring accountability is a key component of the NSCA. The CNSC puts accountability and transparency into practice in its relationships with stakeholders through a number of best practices. For example, the CNSC takes steps to document decisions, through 'notes to file' and formal Reasons for Decision. There are also strict, everyday transparency practices around agendas and minutes of meetings. Further, staff is hired via a rigorous selection process that addresses, among other things, security and conflict of interest issues that might influence decisions that impact on licensees and intervenors.

#### Fairness

Finally, the CNSC recognizes the importance of fairness in its practices, particularly as it relates to access to the CNSC and the ability to influence decisions. To make fairness a reality, the Commission's engagement process with intervenors is a formal process, and occurs both through written submissions and public hearings. Commission members will not visit plants when the plant's license is due in order to avoid any appearance of influence. The CNSC also undertakes outreach initiatives to educate stakeholders about the CNSC and the differing roles of staff and the Commission, so that they can better engage. Licensing decisions are not discussed at these meetings to ensure there is no undue influence on decision-making.

There are mechanisms in place to ensure that regulatory distance is maintained on-site, but it is an ongoing challenge. CNSC does not routinely rotate staff, for reasons of practicality. That said, site-based staff are not the decision-makers regarding licensing and are not the only CNSC staff members engaged in developing licensing recommendations. In addition, measures are taken to ensure that regulatory distance is maintained on-site and that CNSC inspectors are not regarded as linked to the licensee. Still, the geographic closeness of inspectors to licensees could lead to perceptions that licensees have greater influence and that the system is therefore not fair.

There are also practices in place to ensure that CNSC staff does not have undue influence on the decisions of the Commission. For example, all information provided to the Commission from CNSC staff is filtered through the Secretariat, who vets all documents to ensure that the necessary information is communicated in a neutral way, and makes them available to the public. This enables the Commission to make unbiased, factually based decisions, and limits staff -- Commission interaction between hearings. Another example relates to informing CNSC staff and others of Commission decisions. CNSC communications staff will receive advance notice that a decision is expected at a certain time, but will get no warning of the nature of the decision. Similarly, the Minister of NRCan and the licensee will receive notice of when a decision is expected, but not what the decision is. This allows CNSC staff, government and the licensee to prepare for an announcement without an opportunity to influence decision-making or impact on the fairness of the process.

The CNSC is aware that the dual role of President and CEO, in particular the knowledge and influence that is gained through being the CEO of CNSC staff, could create perceptions of unfairness in the decision-making of the Commission. For this reason a number of best practices have been implemented to address this issue. As noted earlier, once hearings related to a licensing matter are announced, the President will refuse to meet or accept calls from licensees or intervenors until a decision on the licence application has been rendered; any interaction with the licensee is then through the Executive Vice-President of Operations. In addition, the President's Chief of Staff manages the President and CEO's schedule and activities; in doing so, he is in constant communication with the Secretariat to find out what licensing issues are coming up and how this relates to the timing of public events, etc. - thereby ensuring that the hearing process is protected and that there is no opportunity to compromise or interfere with the Commission's independent decision-making.

Finally, the CNSC has a number of documents that guide its work and are used to achieve fairness. Public hearings on licensing matters are governed by the *CNSC Rules of Procedure*. Staff's interactions with both licensees and the public are guided by the CNSC's *Conflict of Interest Guidelines*.

In summary, the CNSC has put into place a range of best practices that promote the good governance principles of legitimacy and voice, strategic direction, performance, accountability and fairness, and enable CNSC to implement its mandate as an independent regulator.

### ***Challenges and Areas for Improvement***

Interviews with CNSC staff identified a number of areas where CNSC could improve its practices related to regulatory independence and good governance.

1. There are many good practices in regulatory independence; the CNSC would benefit, however, from more formal policies.
2. In the past, a number of factors, including a smaller nuclear industry, fewer expectations around transparency, the lack of a staff orientation program, and fewer consistent practices in working with stakeholders led to perceptions of less effective regulatory independence.

While significant progress has been made within the CNSC on this issue, further work could be done to ensure that all staff are fully aware of and are putting regulatory independence into practice in a consistent manner.

3. CNSC has, in the past, put more focus on communicating with licensees than with NGOs and the broader public, and this may have contributed to the perception among NGOs that the CNSC has too close a relationship with industry. Recent efforts to more effectively engage NGOs are aimed at addressing this issue.
4. There is a lack of understanding among NGOs and the broader public regarding CNSC's role as an independent regulator and its obligation to work within a set mandate. In addition, the fact that much of CNSC's work is highly technical in nature creates significant communication challenges for CNSC, and makes it difficult to get the message across that it is there to serve the interests of Canadians.
5. Outreach programs, including meetings with concerned citizens and municipal councils, are not done in a consistent manner. This presents challenges in terms of ensuring a consistent message.
6. There are no formal policies or guidelines to guide the President and CEO and staff in balancing the unique dual role of President and CEO. While there are many good practices in this area, at the moment this balancing is very much a matter of judgement on the part of senior staff, the President and CEO, and the Secretariat. More formal documentation and/or guidelines would be useful.

#### **Part IV – Conclusions and Recommendations**

The results of the literature review and interviews with key CNSC staff speak to some of the key attributes an independent regulatory body requires to effectively maintain its independence. First, an independent authority requires a legally entrenched mandate that establishes its mandate, goals, purview and powers. Second, in order to function as an effective independent authority, there must be clear separation of the regulatory body from government and industry interests. Maintaining the integrity of the regulator through appropriate mechanisms and guidelines is essential to ensure the independent authority remains insusceptible to unwarranted external influences. Third, an independent authority requires adequate resources: regulators should have adequate and stable funding for all regulatory activities, with a high degree of autonomy in deciding how the budget is to be distributed.

To achieve the required independence, and have this recognized by stakeholders, the CNSC must have and put into practice the good governance principles, including legitimacy and voice, strategic direction, performance, accountability, and fairness. Given the high degree of autonomy provided to the independent regulator, it is crucial to the independent regulator's credibility that a high level of public trust be safeguarded and legitimized. Accountability to government and Parliament as well as the general public is key. Strict transparency and traceability guidelines and mechanisms must be in place. Decisions should be made public, accompanied by clear explanations of the reasoning underpinning the decisions, and there need to be effective appeal mechanisms. Regulatory bodies must provide appropriate mechanisms for external professional dialogue and consultation with both licensees and independent experts, as

well as opportunities for two-way communication with the public that is open, fair and independent.

The Canadian Nuclear Safety Commission has developed a strong set of practices that build on and work within the legal framework provided by the *Nuclear Safety and Control Act*, and reflect the attributes of an independent regulator listed above. In particular, the CNSC:

- Ensures that stakeholders are engaged, but have no undue influence on the Commission's decisions
- Has a clear mandate for nuclear regulation;
- Holds open, public hearings;
- Has a Commission that is separate from staff and government;
- Is an organization that is accountable to Parliament through a Minister;
- Has Commission members who are informed citizens and who are recognized specialists in their fields of endeavour;
- Has a strong legal framework that supports good governance principles;
- Formally records and publishes decisions with reasoning and relevant information;
- Is sufficiently funded by government, with appropriate accountability mechanisms.

CNSC interviewees identified a number of challenges and areas for improvement in practicing regulatory independence at the CNSC. Many of these challenges were tied to consistency of practice within the CNSC and in relations with stakeholders, and to effectively communicating and engaging with stakeholders in a fair manner. The following recommendations are designed to address these key challenges:

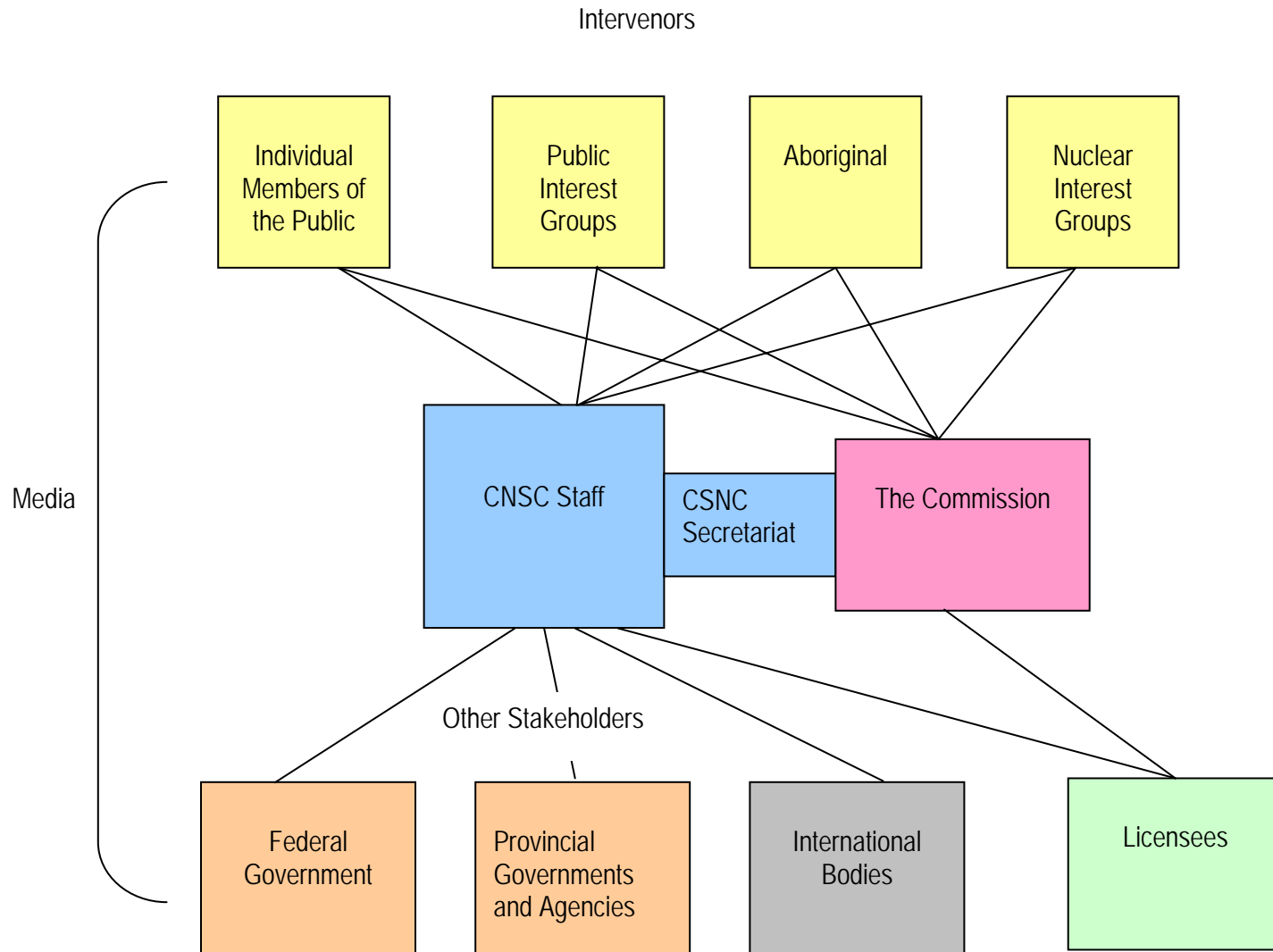
**1) Documenting Best Practices:** While interviews with key CNSC staff indicated that the CNSC has a strong repertoire of processes, procedures and best practices to ensure good governance, regulatory independence and impartiality, it was also clear that some of these are not formally documented. In order to ensure continued use of these best practices, and a consistent understanding of how regulatory independence is understood and practiced at the CNSC, the CNSC should develop a more formal set of policies, procedures and best practices.

**2) Internal Communications:** Building on the first recommendation, more needs to be done to ensure that all CNSC staff, and not just the more senior staff, have a solid understanding of regulatory independence and how it works in practice. The CNSC's orientation program for new staff, introduced 3 years ago, is a positive step forward and could be more fully utilized to ensure a better understanding of regulatory independence. The CNSC may also wish to consider other internal communications approaches, to ensure consistent messaging and understanding of independence within the CNSC and in relations with all stakeholders.

**3) Communicating with Stakeholders:** Despite the strong legal framework and many best practices within the CNSC to support independence, results of the interview process seem to indicate that NGOs and the general public do not have a good understanding of CNSC's mandate, and that some have questioned the impartiality and/or independence of the organization. To address these perception-related issues, the CNSC may wish to consider:

- focussing on this issue in its messaging and products, such as its public-domain website and publications;
- taking a more consistent approach to outreach initiatives to ensure that consistent messages are delivered on regulatory independence, and that the unique set of attributes and the challenges that each stakeholder brings to the table when engaging in CNSC processes are taken into account.

*Annex A – CNSC Stakeholders*



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