



Promoting Tribunal Neutrality in an Integrated Regulatory Model

Roundtable Discussion

Lisa Thiele

**Senior General Counsel, Canadian
Nuclear Safety Commission**

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nuclearsafety.gc.ca

Context



- **Tribunal neutrality:**
 - impartiality – how to ensure a disinterested arbiter?
 - fair process does not look exactly the same in every tribunal
 - tribunal independence is not judicial independence
- **Integrated regulatory model:**
 - Regulating an industry may require multiple functions – policy, investigation, prosecution, adjudication
 - May involve a smaller – or specific – community of regulated and of stakeholders
 - How to ensure separation of function
 - Need to demonstrate neutrality and lack of bias

Canadian Nuclear Safety Commission



- Regulates the use of nuclear energy and substances to protect health, safety, national security and the environment
- Implements Canada's international commitments on the peaceful uses of nuclear energy
- Disseminates objective scientific, technical and regulatory information to the public



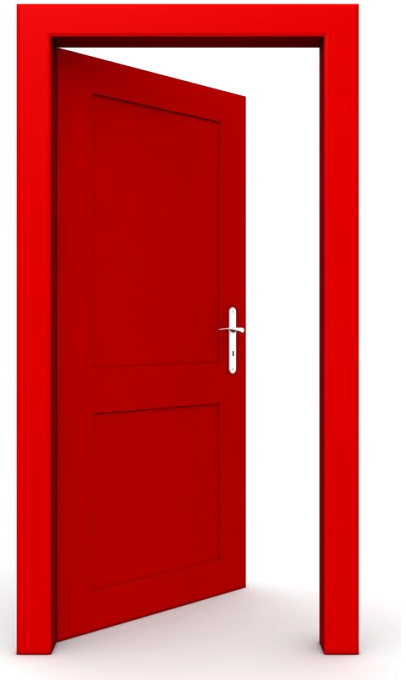
Canada's nuclear regulator



Canadian Nuclear Safety Commission

CNSC outward interactions:

- With Parliament/government – it develops the law to govern the industry
- With regulated community – who must comply with regulatory decisions
- With international entities/peers – in a uniquely international framework
- With Canadians – the ultimate beneficiaries of a regulated industry, who merit a robust regulator



Regulator neutrality is key to all these interactions

Canadian Nuclear Safety Commission



➤ **Commission:**

- up to 7 permanent members
- Members have diverse experience/expertise; appointed for fixed term, with fixed remuneration, on good behaviour
- One permanent member named as President/CEO
- President is full-time, other members are part-time

➤ **Commission decision-making:**

- licensing of major facilities – public hearing process
- enforcement – licensing, emergency orders
- review/appeal – of compliance/enforcement decisions – licensing, orders, administrative monetary penalties (AMPs)
- decisions subject only to judicial review by Federal Court

CNSC Organization



The CNSC has a staff organization of over 850 employees:

- HQ in Ottawa, 4 site offices at power reactor sites, 1 site office at Chalk River Laboratories, 4 CNSC regional offices
- Roughly 2,500 licences to administer
- Compliance verification, inspection, enforcement activities
- Maintenance of Commission's regulatory framework (11 sets of regulations, regulatory documents, guides etc.) – recommendations to Commission, which makes regulations



Other CNSC Decision-Makers



➤ **Inspectors** (s.29, NSCA)

– designated by Commission, power to inspect, to make order for “any measure the inspector considers necessary to protect the environment, or the health and safety of persons or to maintain national security or compliance with international obligations”

➤ **Designated officers (DOs)** (s.37, NSCA)

– designated by Commission, power to, *inter alia*, make certain licensing decisions, review inspector orders, issue orders, impose (AMPs)

Institutional Review and Appeal



NSCA provides for institutional review/appeal:

- DOs must report to Commission on their licensing, orders, decisions (s.37(5))
- Mandatory review of orders – DOs review inspector orders; Commission reviews DO orders
- Appeals (licensing and orders) – to Commission from DO decisions (s.43(1))
- Redetermination – on application or on Commission's own initiative
- AMP review – by Commission if DO-issued (s.65.12)



These steps occur before judicial review by Federal Court

How does the Commission Demonstrate Its Neutrality?



- Transparency – public hearings, court of record, reasons
- Informal, non-adversarial process – applicant/licensee is the only “party”; intervenor participation is encouraged and supported
- Hearings often in host communities; participant funding
- CNSC staff participation in licensing hearings – structured, public:
“The Commission ... may permit or require officers and employees of the Commission to participate in a proceeding under these Rules in such manner, including presenting information and submissions orally or in writing, questioning participants and responding to questions and submissions, as will enable the Commission ... to determine the matter in a fair, informal and expeditious manner.” (s.2(2), CNSC Rules of Procedure)

International Peer Review of Nuclear Regulator



Convention on Nuclear Safety, article 8:

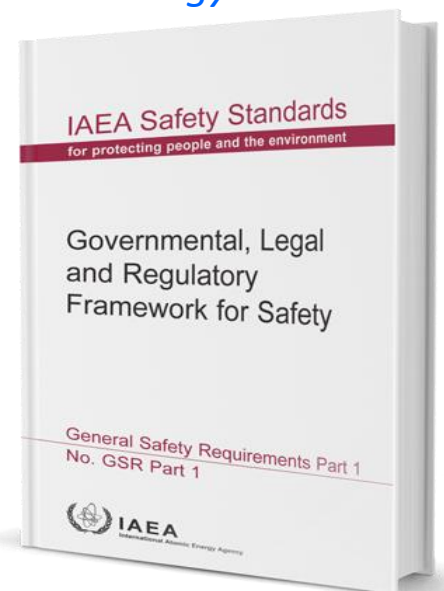
- 1. Each Contracting Party shall establish or designate a regulatory body entrusted with the implementation of the legislative and regulatory framework referred to in Article 7, and provided with adequate authority, competence and financial and human resources to fulfil its assigned responsibilities.*
- 2. Each Contracting Party shall take the appropriate steps to ensure an effective separation between the functions of the regulatory body and those of any other body or organization concerned with the promotion or utilization of nuclear energy.*

➤ IAEA Integrated Regulatory Review Service (IRRS) missions

international peer review against standards

➤ OECD/Nuclear Energy Agency

Characteristics of an Effective Nuclear Regulator



Institutional Governance (1)



Measures to ensure neutrality – institutional separation between the Commission and its staff:

- analysis and recommendations of staff are provided to the Commission in public proceedings, on the record
- Commission Secretariat is liaison between Commission and all others – CNSC staff, the regulated, intervenors
- Commission members (except President) are part-time, attend for public hearings and meetings, make adjudicative and legislative decisions – not involved in day-to-day management of staff organization



Institutional governance (2)

- Where Commission is sitting in review / appeal / redetermination, in practice the matter is generally treated *de novo*
- President votes in Commission decisions only in the event of a tie (NSCA s.23(1))
- A panel of the Commission may not review a decision or order of the Commission
- Only the whole Commission may make regulations



Institutional Governance (3)

Measures to ensure neutrality and fair process for internal CNSC decision-makers:

- Processes to conduct “opportunity to be heard”: *“as informally and expeditiously as the circumstances and considerations of fairness permit”*
- Commission designation of DOs – training program, ongoing development, community of practice
- DO designation of inspectors – formal training program
- Statutory decision-making (licensing, orders, reviews, AMPs) is outside the organization’s reporting structure
- Decision-makers can always access in-house legal services

Some Issues For Discussion



What is “regulatory capture” and how do regulators avoid it?

- Transparent hearing and decision; accountability to legislatures
- Ongoing awareness, training and peer review

How to deal with a familiar cadre of participants?

- Transparent decision-making
- Insistence on formal informality – roles, structure

How do participants know that a process is fair?

- Responsive reasons for decision
- Meaningful potential for internal appeal; then judicial review

How to prevent potential conflicts within a regulator?

- Impartiality vs. loyalty? ethical, not legal standard (higher)
- Judicious interaction with the industry being regulated



Canadian Nuclear
Safety Commission

Commission canadienne
de sûreté nucléaire

Questions?

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