

February 10, 2022

## **BACKGROUND – NEED FOR SEPARATION OF MINISTERIAL REPORTING BY CANADIAN NUCLEAR SAFETY COMMISSION AND ATOMIC ENERGY OF CANADA LIMITED<sup>1</sup>**

### **RECOMMENDATION**

**The nuclear safety regulator in Canada and the Crown agency Atomic Energy Control Limited should each report to a separate Minister of the Crown. This can be accomplished by naming separate responsible Ministers for each of the applicable statutes, namely the *Nuclear Safety and Control Act*, and the *Nuclear Energy Act*. No new legislation is required.**

This Backgrounder provides rationale for a change so that the nuclear safety regulator, the Canadian Nuclear Safety Commission, report to and through a separate Minister of the Crown than those agencies and departments that promote the development and use of nuclear power (Atomic Energy of Canada Limited and Natural Resources Canada). This is consistent with guidance of the International Atomic Energy Agency<sup>2</sup>, and has been recommended for many decades in trusted Canadian reviews and reports. The legislative mechanisms to appoint separate Ministers are already in place because of amendments made to the relevant pieces of legislation in 1997, but action has never since been taken to separate these Ministerial reporting relationships and functions. The consequences of continuing with the status quo in Ministerial accountability over nuclear matters will be a continuing serious lack of trust in the CNSC as a regulator<sup>3</sup> and may lead to increased risk of hazards to the public and the environment. It is in the interests of the government, the public, and the nuclear industry that this long-standing issue be corrected as quickly as possible. No new legislation is required.

### **BACKGROUND AND JUSTIFICATION**

#### **Importance of separation of responsibility and independent oversight of nuclear activities**

Investigations of many of the nuclear accidents that have occurred worldwide show that they have been enabled by a lack of clear boundaries and improper allocation of responsibility between nuclear plant operators and regulators.<sup>4, 5, 6</sup> The failure to separate the parliamentary accountability for safety

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<sup>1</sup> Abridged from a forthcoming chapter by the author, McClenaghan, Theresa “**Regulating the Nuclear Power Industry – The Need for Independence of the Regulator**”, in Campbell, Bruce, Ed. **Corporate Rules, The Real World of Business Regulation in Canada**, Lorimer Press (2022)

<sup>2</sup> IAEA General Safety Guide No. GSG-12, Organization, Management and Staffing of the Regulatory Body for Safety

<sup>3</sup> Building Common Ground. The Final Report of the Expert Panel for the Review of Environmental Assessment Processes, 2017, page 49. [https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html#\\_Toc060](https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html#_Toc060)

<sup>4</sup> Mosey, David, Nuclear Reactor Accidents, at 104 and 106 (Butterworths 1990).

<sup>5</sup> The Economist: The Fukushima disaster was not the turning point many had hoped.

<https://www.economist.com/asia/2021/03/06/the-fukushima-disaster-was-not-the-turning-point-many-had-hoped>

<sup>6</sup> Nature: Nuclear energy, ten years after Fukushima. [https://www.nature.com/articles/d41586-021-00580-4?utm\\_source=Nature+Briefing&utm\\_campaign=7de7a692f7-briefing-dy-20210305&utm\\_medium=email&utm\\_term=0\\_c9dfd39373-7de7a692f7-43796817](https://www.nature.com/articles/d41586-021-00580-4?utm_source=Nature+Briefing&utm_campaign=7de7a692f7-briefing-dy-20210305&utm_medium=email&utm_term=0_c9dfd39373-7de7a692f7-43796817)

regulation from nuclear power promotion *in legislation* was cited as a causal factor in the Fukushima accident.

### Ministerial oversight conflict

The inherent conflict between safety regulation of nuclear power and promotion of the production and use of radioactive substances is embodied in the reporting relationship between the CNSC, the Minister of Natural Resources Canada and the Parliament of Canada because the explicit requirement for promotion and utilization of nuclear power falls to that Minister by way of responsibility for the *Nuclear Energy Act*.<sup>7</sup> An alternative approach could have protection of the environment from radionuclides overseen by Environment and Climate Change Canada (ECCC).<sup>8,9</sup>

A parliamentary committee in 1988 called for this reporting relationship to be with Environment Canada.<sup>10</sup> The on-going and unresolved problem of independence in respect of the safety regulator arises from the fact that the Canadian nuclear regulator, the CNSC, reports to Parliament through the same minister as does AECL, that is through the Minister of Natural Resources. This is also contrary to the IAEA General Safety Guide<sup>1</sup>, as discussed further below.

This inherent conflict of interest in aims (protection of the public and the environment, versus promotion of the industry) had existed in legislation until the prior statute was revoked and replaced with the current legislation, the *Nuclear Safety Control Act* in 1997. At that time, the former Atomic Energy Control Board was renamed the Canadian Nuclear Safety Commission, as it remains today, and the mandate of “promotion” and “utilization” was removed and placed with Atomic Energy Canada Limited and the Minister under the *Nuclear Energy Act*. Prior legislation had also attempted to separate the Ministerial reporting relationships, but had not been passed.<sup>11,12</sup> When legislation was eventually passed in 1997 to establish the Canadian Nuclear Safety Commission in place of the former Atomic Energy Control Board, it was separated entirely from the legislation that deals with the functions of Atomic Energy of Canada Limited.<sup>13</sup> Each statute has a provision or mechanism for the GIC to name the responsible Minister.

Unfortunately, despite this former plan to separate Ministerial responsibility, governments in Canada have continued to name the same Minister, that of Natural Resources Canada, as the delegated Minister under each statute. As a result, at present both the CNSC and AECL report to Parliament through the same Minister. One could envisage the difficulty if the regulator’s report raised issues whereby one of its

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<sup>7</sup> *Nuclear Energy Act*, R.S.C. 1985, c. A-16

<sup>8</sup> Environment Canada, “Releases of radionuclides from nuclear facilities” <https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/substances-list/toxic/meeting-criteria-schedule-1/releases-radionuclides-nuclear-facilities-impact.html>

<sup>9</sup> Memorandum of Understanding between Environment Canada and CNSC <https://nuclearsafety.gc.ca/eng/acts-and-regulations/memorandums-of-understanding/mou-environment-canada.cfm>

<sup>10</sup> Standing Committee on Environment and Forestry, “High-Level Radioactive Waste in Canada: The Eleventh Hour,” 1987 (House of Commons, Canada) at 21

<sup>11</sup> Sims at 208

<sup>12</sup> Bill C-14, *Nuclear Control and Administration Act*, 3<sup>rd</sup> session, 30<sup>th</sup> parliament 1977 available at: [https://parl.canadiana.ca/view/oop.HOC\\_30\\_3\\_C2\\_C14/1590?r=0&s=1](https://parl.canadiana.ca/view/oop.HOC_30_3_C2_C14/1590?r=0&s=1)

<sup>13</sup> AECL is mandated by the *Nuclear Energy Act* RSC 1985 C. A-16, which was substantially revised in 1997 (the same year that the NSCA was revised replacing the prior *Atomic Energy Control Act*) and is akin to the part II in bill C-14 in 1977; this legislation provides for development and utilization of nuclear energy including research and patents; provides power to expropriate nuclear substances; provides for a Minister to be designated by the GIC, and provides for federal appropriations to meet its purposes.

licensees, the AECL or AECL's contractors was out of compliance with regulatory requirements, or if governmental directives over safety and nuclear promotion were at cross-purposes. Similarly, the Minister and Cabinet have respective powers to issue policy directives to the CNSC and to the AECL. Policy directives could be at cross purposes.<sup>14</sup> In theory the mandates and visions of the AECL as a developer of new nuclear technology and of the CNSC as a safety regulator should not be fully aligned. Each has a different priority and focus. The AECL states that its vision is "driving nuclear opportunity for Canada."<sup>15</sup> AECL describes its role as delivering on The Federal Nuclear Science and Technology Work Plan across fifteen departments of the Canadian federal government.<sup>16</sup> The ongoing failure to correct this issue, where the CNSC and the AECL report to the same Minister, contravenes the Convention on Nuclear Safety to which Canada is a party, which says

*"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."*<sup>17</sup>

Other bodies have recommended in the past that Ministerial oversight of nuclear regulatory functions and the nuclear development and promotion functions should be separated between different federal Ministers. The Standing Committee on Environment and Forestry recommended in 1988 that the regulator should be responsible to Environment Canada, rather than to the Department of Energy, Mines and Resources.<sup>18</sup> Similarly, the Advisory Committee on Nuclear Safety responded to a recommendation of the Ontario Nuclear Safety Review, agreeing that the AECB as it then was, and the AECL should report to Parliament through different ministers of the Crown.<sup>19</sup>

In a recent response to a Petition filed through the Commissioner of Environment and Sustainable Development, which was developed together with the Ministers of Environment and Climate Change, Foreign Affairs, Justice, Finance, and the President of the Treasury Board, then Natural Resources Minister O'Regan confirmed that the Governor in Council "has the authority to designate another Minister for the purposes of the *Nuclear Safety Control Act*. The result would be to change the Minister who is responsible to Parliament for the CNSC and through whom the CNSC's annual reports are tabled in Parliament." A corresponding change, he noted, would need to be made under the *Financial Administration Act*. His response stated that, "As with any decision respecting the machinery of government or the mandate of ministers, a decision to change the reporting relationship for a government entity would be made by the Prime Minister of Canada as per the Privy Council Office Guide for Ministers, Open and Accountable Government."<sup>20</sup>

<sup>14</sup> *Financial Accountability Act* s. 89(1); *Nuclear Safety and Control Act* s. 19(1)

<sup>15</sup> Atomic Energy of Canada Limited, "About AECL" <https://www.aecl.ca/about-aecl/>

<sup>16</sup> SMRs Road Map 2018

<sup>17</sup> Convention on Nuclear Safety, Article 8(2) <https://www.iaea.org/topics/nuclear-safety-conventions/convention-nuclear-safety> adopted June 17 1994; in force October 24, 2996

<sup>18</sup> Standing committee on Environment and Forestry, The Eleventh Hour at 21

<sup>19</sup> Advisory Committee on Nuclear Safety, Recommendations and Comments on the Report of the Ontario nuclear Safety Review, December 1988 at paragraph 5.3.6 (ACNS-15)

<sup>20</sup> Letter from Minister of Natural Resources S. O'Regan to Theresa McClenaghan and Ole Hendrickson, October 9, 2020, and enclosed Response to Petition 443. The Response also stated that the CNSC has "significant autonomy" in its budget setting process, including the "responsible revenue authority" in respect of the 70% of its approved expenditures which are funded through cost recovery from applicants, licensees and other special project sponsors. In the response, the Minister stated that the CNSC is not accountable to his department but merely reports to Parliament through the NRCan Minister. The Minister's response also advised that the Privy Council Office Guide is posted online at [https://pm.gc.ca/en/news/backgrounders/2015/11/27/open-and-accountable-government#Federal\\_Government\\_Institutions](https://pm.gc.ca/en/news/backgrounders/2015/11/27/open-and-accountable-government#Federal_Government_Institutions)

## **CONCLUSION**

There is an ongoing lack of appropriate separation of accountability between the CNSC as regulator, and the AECL and Natural Resources Canada as nuclear technology developers and promoters because they both report to (or through) the same Minister of the Crown.

Correction of this issue would be relatively easy whereby the GIC may appoint a Minister responsible for the CNSC safety regulator under the Nuclear Safety and Control Act, as a separate Minister than the one responsible for the Nuclear Energy Act and the crown corporation AECL, with its assets, liabilities and contractual relationships aimed at expanding nuclear technology. The legislative structure to do this is already in place.