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THE ATOMIC ENERGY CONTROL BOARD - A PERSPECTIVE

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ABSTRACT

The author analyses certain aspects of the Atomic Energy Control Board's relationships with Cabinet, the Minister, Government officials, the licensees and the public. He notes how some of the relationships would have been modified by the Nuclear Control and Administration Act proposed in 1977.

RÉSUMÉ

L'auteur analyse certains aspects des rapports de la Commission de contrôle de l'énergie atomique avec le Cabinet, le Ministre, les Ministères fédéraux et provinciaux, les détenteurs de permis et le grand public. Il y décrit les modifications qu'aurait apportées le projet de loi de 1977 sur le contrôle et l'administration nucléaires.

The Agreement of May 30, 1980 between the Board and myself stipulated that I was to address four topics:

a) the Board's relationship with the public

b) the Board as an independent regulatory body and its relationship with the Minister of the Crown to whom it reports

c) relationship with those being regulated

d) existing regulatory practices and procedures of the Board.

The second task of this report was to make a recommendation "concerning the feasibility of an eventual in-depth study of the Board's role and regulatory process in order to improve it if found necessary."

In preparing this report, it is important to outline what it does or does not attempt and the information upon which it is based. I have not attempted a comprehensive analysis or evaluation of the AECB, its history or its current practices. I have examined some basic documentation such as the Doern study and especially statements made by the current President of the Board and his predecessor, which have provided both a focus for identifying some of the principal current concerns of the Board as a regulatory agency, as well

as providing information on some of the Board's responses to such concerns.

This report will be primarily future-oriented and will make a basic assumption that some version of the Nuclear Control and Administration Act will be re-introduced. Such an assumption is crucial to the approach adopted in the report, which is not historical but which seeks to address issues that the Board currently faces that are relevant to the proposed legislation. It is possible, of course, that new legislation will not be forthcoming and the Board will be required to face these issues within the context of the existing statute. In such an event, some of the issues could be addressed while others will require statutory amendments.

Given the preceding, instead of addressing the four topics as outlined, they will be reorganized in the following manner:

a) the Board as an independent regulatory agency;

b) the Board's relationships with its publics (original topics a & c)

Finally, rather than commenting on the "existing regulatory practices and procedures of the Board" it was thought to be more valuable if this report addressed some major concerns that the Board will probably have to face in the transition from the original AEC Act to the proposed NCA Act.

1. The Board as an Independent Regulatory Agency

The present AECB does not, in any of the conventional meanings of the term as it is applied in Canada, possess the independent status of agencies such as the CRTC, CTC or NEB. Its "dependent" status results from the following provisions:

a) Tenure of Members

Under S.4(2) the Board members, including the President, hold office "during pleasure". Members of independent agencies have a judicial like status and can only be removed prior to the end of their term for "cause" or in the absence of "good behaviour".

b) Licensing Powers

The Board's existing powers to license substances and facilities are provided not by statute but by regulations made under S.9. Presumably, since these regulations require Governor in Council approval, they could be amended to make licensing decisions subject to Cabinet approval as well. The AECB, then, could be placed in a situation like that of FIRA, an advisory body on decisions.

c) Directive Power

S.7 requires that the Board "comply with any general or special direction given by the Minister with reference to the carrying out of its purposes." This omnibus directive power, which does not require public disclosure of any directive, effectively, if the designated Minister chooses to exercise it as such, gives the Minister overall power to control the Board in any and every significant aspect of its work.

d) Information Dissemination

S.8(d) subjects the Board's dissemination of information to the approval of the Minister. Regulation 26 presumably reflects the position of the Minister on such dissemination.

e) Not Binding on Crown

According to Jennekins (AECB 1125, p. 6) commentary on Bill C-14, the present Act does not bind the Crown. (I must admit to some confusion, however, on this in that while this may be true, S.10(7) presumably does not exempt crown corporations from regulations made under S.9). In effect, this non-binding situation, effectively limits the independence of the Board by removing crown corporations from its mandate.

The proposed NCA Act will give the Nuclear Control Board enhanced independent status but it is important to note that in one very important respect the Board will not have the independence of agencies such as the CRTC or CTC. Its independence will be enhanced in relation to items b), c), d) and e) above:

- the NCB's licensing powers will now be in the Act not in regulations (although subject to an appeal to Cabinet, on which see below).
- there will still be a directive power but any directive will be public and most importantly will be limited to "policy directives".
- disclosure of information will be at the Board's discretion without ministerial control.
- the NCA Act will be binding on the Crown, federally and provincially, with the exception of national defence.

The proposed Act, however, does not give the Nuclear Control Board independence insofar as the tenure of its members are concerned and this is disturbing. According to S.7 members are simply appointed "to hold office for a term not exceeding

five years." I would suggest that the independence of Board members is not adequately safeguarded by this section. Members of the CTC and CRTC hold office during "good behaviour" and can only be removed for "cause". NEB members are even more protected in that they can only be removed for cause "upon address of the Senate and House of Commons." I do not know the rationale behind the failure to protect the tenure of the members of the NCB but given that, irrespective of the powers of any regulatory agency, a judicial-like security of tenure has been a benchmark of independent agencies in Canada, its omission in C-14 should be of concern.

There are three other aspects of the proposed Act that merit comment insofar as they relate to the status of the Board as an independent agency. They are

i. the directive power
ii. the Cabinet appeal power
iii. relationships between the Board and federal departments and provincial governments and agencies.

With respect to the directive power, proposals for inclusion of such a provision have become very common in the past five or six years. At the time of the LeClair Committee and the drafting of C-14, there were proposals to include such a power in amendments to the National Transportation Act and in the proposed Telecommunications Act. No one seriously disputes the right of the Government to provide policy direction

to independent regulatory agencies. There has been considerable debate, however, over how such direction should be provided. Most importantly, the concern has been that policy formulation will take place in secret, in negotiations between departmental bureaucrats and affected interests with the probability that both the expertise of the agency and the full range of affected parties will be excluded. The Lambert Royal Commission, the Economic Council of Canada and the Law Reform Commission have all argued, in the words of the latter (Independent Administrative Agencies, p. 85) that "to be fair to the agencies, Parliament and the general public, there need to be improvements made in the process of issuing directions." Accordingly, all have endorsed recommendations that "prior to the issuance of a policy direction to an independent agency, the Government should refer the matter to the agency, which may request public submissions thereon and shall make a public report within ninety days or such longer period as the Government may specify, and further, such directions should be published in the Canada Gazette and tabled in the House of Commons." (ibid.) In addition, it has been argued that Parliament should have some role such as by way of a negative or positive resolution in authorizing the directive.

The need for such a provision governing directives is directly germane to the NCB. The proposed Act does not include

a detailed statement of policy objectives; indeed they are called "objects", unlike the statements of policy in the NTA and in the Broadcasting Act and the proposed Telecommunications Act. It would seem all the more imperative, given that the Government, by including the provision, apparently envisages a need to issue "policy directives", that the Board, and the public it is to protect, have some say in the process of giving such direction. It might be of some interest to note that the Minister of Communications in the Conservative Government acting, in part, on advice from the CRTC had proposed that the draft Telecommunications Act be revised to incorporate a parliamentary role in the directive process recommended above.

The issue of the Board's independence and the directive power, and process, are tied to the provision found in S.57 that permits the Cabinet, on petition or its own initiative, to "confirm, vary or rescind in whole or in part" an order or decision of the Board. Much attention has been directed of late to the need for, and the legitimacy of, "political appeals" if the Cabinet also has the power to issue policy directives plus the power to control policy by way of approving agency regulations. It should be noted that the Lambert Commission, the Economic Council and the Law Reform Commission recommended the abolition of appeals if a directive power is given to the Cabinet. The Conservative Government, in the

communications field, recognized the legitimacy of such an argument but rather than doing away completely with a Cabinet appeal was prepared to restrict Cabinet's action to sending back for reconsideration an agency decision. Again, it should be noted here that the CRTC were active in attempting to persuade the Minister of Communications to adopt this measure. In discussions on redrafting the proposed Nuclear Control and Administration Act, the AECB might consider advancing similar arguments on the grounds that their adoption will strengthen the independence of the Nuclear Control Board without reducing its accountability.

The third point relating to the NCB as an independent agency concerns larger questions about the relations between regulation and promotion and between the Board and federal and provincial departments and agencies. The close tie that exists today between regulation and promotion will not disappear, at least in some perceptions, with assigning the regulatory role to a more independent body responsible to one minister, and the promotional role to another minister. The linkages between the two roles have been too close for too long. A determined and demonstrative regulatory Board will be necessary to weaken, if not remove, such perceptions. Whether it has been in communications, transportation, energy in general or nuclear energy in particular, there has always been a close link between regulation and promotion whether the regulatory

statutes required it or not. It was often taken for granted. This has been particularly true when public enterprises have been involved. Even when statutes have been changed to break the link, it has persisted and not only in the public's mind(s) but in regulators'. The CTC's handling of Air Canada's purchase of Nordair can be cited as an example where a regulator could not break the historical mold or link. Although the Air Canada statute had been amended to remove its "special status" before the CTC, for some, indeed the majority of the CTC's Air Transport Committee, the fact that it was Air Canada involved blinded the Commissioners to considerations that would have been relevant if it had been another airline involved.

In breaking the link between regulation and protection, there may be some problems for the Board found in the NCA Act. Section 20, for example, states that "the objects of the Board are (a) to regulate, control and supervise the development, production, possession and use of nuclear energy..." but S.61 states that "the Minister is responsible for regulating and shall engage in commercial and promotional activities in relation to nuclear energy...." (emphasis added). I am not certain where the dividing line is between the responsibilities of the Board and Minister.

There are two other provisions that bother me. In S.21, the Board is instructed, in exercising its powers, "to take into account health, safety, security and environmental

standards established by or on the recommendation of other departments or agencies of government." In S.56, the Board is authorized to make regulations "recognizing standards established by or on recommendation of other departments and agencies of government". Such provisions, indeed requirements, raise questions about how the Board is "to take into account" or "recognize" such standards. Will it be on the "record"? Will it be public? What if such standards are "contaminated" by commercial considerations? Related to this concern is the fact that S.25(2) allows the Board to "enter into agreements with any person or with any department or agency of the Government of Canada or of any province on matters related to the objects of the Board". Will such agreements be made public and subject to scrutiny? What controls will exist?

There are no simple answers to the questions raised above. Standards of other agents cannot be ignored completely, nor can the need for intergovernmental and intradepartmental agreements be denied. My point is simply that the line between regulation and promotion is exceedingly difficult to draw, especially given the tradition of nuclear regulation in Canada, as in the U.S. prior to 1974, and the Board should not assume that just because the statute draws such a line that ends the problem. It clearly will not and, in fact, the

Act as drafted suggests several "quagmires" which will have to be carefully circumvented.

A final point on the relationships between the proposed Board and departments and governments in general pertains to any advisory role that it may assume. The AECB has long had an advisory role as one of its basic responsibilities. The issue of independent regulatory agencies acting as advisors to governments or ministers is one that has recently received attention, particularly with regard to the NEB, which has a statutory advisory role. It has been argued, and, I believe it is fair to say, the NEB has come to accept this point, that the role of board as confidential advisor can result in a conflict of interest for the board as impartial, public regulator. This will be no less valid for the proposed Nuclear Control Board and, given the tensions that exist over the use of nuclear power in general and the mix of commercial and regulatory responsibilities within <u>one</u> government, the Board will have to be extremely cautious less it undermine its regulatory role.

2. The Board's Relationships with its Publics

For a variety of reasons that need not concern us, it is generally agreed that until recently the nuclear regulatory process in Canada has been a fairly "closed" one both in terms

of the participants and the information disclosed. The change to a more open process, A.T. Prince called it the "democratization" of the regulatory process, will be a fundamental break with the past that will consequently require a great deal of thought and care to provide for both an effective regulatory process where the interests of all legitimate participants are respected and, equally important, a regulatory process that is perceived by participants to be meaningful and open.

A. Regulatory Hearings

The current act does not provide for public hearings by the Board on licensing or other matters. The proposed NCA Act will provide for both mandatory and discretionary hearings, the former for the issuance of licences and the latter for other matters within the Board's jurisdiction. It is clear from comments by both the present and past President of the AECB that great emphasis is being placed on the public hearing process as a means of opening up the nuclear regulatory process to a wider mix of "publics" than have heretofore participated in the process. Opening up the process is perceived to be crucial to establishing the credibility of the process. It is useful to distinguish between three aspects of the hearing process: the nature of the hearings, the participants and the procedures. We will discuss these in turn.

1. Nature of the Public Hearings

Under the proposed Act, the Board is required to hold hearings only for the issuance of a licence. Most notably, the Board is not required to hold a hearing for the amendment, renewal, suspension or revocation of a licence. For such matters, the Board is authorized to prescribe a procedure by regulation for handling them. I believe that, in terms of the concern for opening the process and for dealing with the hostile environment that confronts questions of nuclear power, it is imperative that, except for the most pro forma proceedings of this kind, public hearings should be held. When an agency must consider suspending, or revoking a licence, it would appear that the factors which necessitate such a regulatory disciplinary action are those which give rise to popular concerns about the use of nuclear power. To consider holding a hearing for the granting of a licence but not the suspension or revocation would be tantamount to waving a red flag in front of anti-nuclear "bulls". It could undermine the Board's credibility.

The proposed Act emphasizes, as part of opening up the process, the requirement for public hearings on licensing. I would suggest that it is equally crucial that the Board consider the importance of holding what may be called "policy" or "issue" public hearings: The proposed NCA Act only specifies the "objects" of the Board; it does not indicate precisely, or indeed generally, the considerations that are relevant to

decisions on "the preservation of the health and safety" or protecting the environment. Policies will need to be developed to give meaning and substance to these provisions to guide Board members in their licensing decisions. The Board, unless it is to follow a narrow case by case approach, will have to enunciate goals and objectives which they can invoke as criteria in their decision-making. What does preservation of health and safety mean? How is the environment to be protected? Policy or "issue" hearings would be an appropriate way to handle such questions. Such hearings have been held by the CTC, CRTC and NEB to great effect and have done much to encourage successful relationships between the agencies and the publics affected by their regulatory powers.

The Board might also consider holding one of its first policy hearings on procedures and practices that it will employ in its public hearings. The CRTC, when jurisdiction for telecommunications was transferred to it, issued a position paper outlining how the Commission proposed to regulate telecommunications. This paper was widely distributed, and, after sufficient time for study, was the subject of a public hearing at which almost all the principal participants were in attendance. Following the hearing, the CRTC issued a decision which outlined the procedures and practices it would follow in hearings.

2. The Participants

The present AECB regulatory process has been subject to criticism because of the limited range of participants. One of the purposes of the new legislation is to open up this range to a wider group of legitimate participants. The proposed Act is silent on the question of who may participate. I would recommend that the Board follow the procedure proposed by the Law Reform Commission which is to develop a descriptive listing of the various interests and groups, i.e. the constituency or clientele, of the Board. The Board would then use this list to build up a mailing list of participants which it would inform of public hearings and other proceedings. However the Board approaches this issue, it is crucial that it not take a narrow view of who is entitled to participate for such an action will surely call into question the Board's desire for public participation.

Procedures:

The proposed Act provides for public notification in the Canada Gazette and, where applicable, in local newspapers of licence applications and public hearings. This is a good start but it must be seen as the minimum. The Board can actively encourage participation by employing the list of potential participants discussed above to inform them of relevant proceedings and to encourage their interventions.

One of the central questions that must be addressed is how to conduct the public hearings. Here, I think it is imperative that the Board consider innovating. Personally, I do not believe that adversarial, trial-like proceedings are appropriate or necessary for the technical matters associated with nuclear power. The Board should emphasize the need for wide participation but in an informal, non-adversarial manner, although it is doubtful, given the hostility, that adversarial proceedings can be completely avoided. The Board should consider the option, employed by the CRTC in broadcasting, of not allowing cross-examination. It should also consider employing panels or "bunching" of witnesses. In nuclear energy proceedings, as in many such proceedings the issue is not one of truth. Court-room proceedings, therefore, are neither appropriate or necessary. There are alternatives involving "expanded notice" and information distribution that are more appropriate and effective.

I understand that in the planning stages for C-14, the possibility of informal, town-hall meetings was considered as an adjunct to the hearing process. This is a worthy suggestion inasmuch as I believe the holding of such meetings might do much to dissuade potential critics of nuclear energy from insisting upon rigid, trial-like proceedings. If the "people" are to be heard, they can hardly insist that they be heard only through a "mouthpiece".

Finally, in terms of procedures, I notice that the proposed Act is silent about the question of funding of public interest groups. I do not think the issue can be avoided and I would recommend for the Board's consideration the practice employed by the CRTC and several provincial agencies of awarding costs to groups who make significant contributions to hearings charged to licence applicants. If one wants informed, responsible participation, the cost of providing such participation must be recognized. This is not an argument for paying for everyone who wants to participate but for the Board to introduce a system to facilitate responsible participation. In the long run, I believe, funding such participation establishes the credibility of the process more than any other single factor.

B. Regulatory Information

"Access to sufficient, truthful and meaningful information", in the words of A.T. Prince, is crucial if there is to be a "democratization" of the nuclear regulatory process. Hitherto, the AECB has been hampered by its statute and regulations in making such information available. The proposed NCA Act will ameliorate the information flow considerably. In the first place, the proposed Board will have expressly, as one of its objects "to act as a source of information for the public on health, safety and environmental matters related to

nuclear energy, " (S.20(b)) and "shall provide for the dissemination "of such information (S.27).

In performing its responsibilities to disseminate information, I think it crucial that the Board not assume simply a passive role, not simply provide access to information. I think it should actively disseminate information on applications, regulations or other primary responsibilities of the Board. In this respect the employment of the Canada Gazette and newspaper notices is at best a minimum and at worst will not satisfy the objective of informing the public.

The Board, as mentioned earlier, can build up a mailing list of interested parties and send them relevant and timely information. The CRTC has been very active in this regard. In the case of applications which entail a considerable volume of information, the Board can employ not only its proposed regional offices but significant regional offices of applicants. The CRTC requires applicants to keep a set of relevant documents in their main offices for public scrutiny.

The proposed NCA Act reverses the present practice of not releasing information by making everything available unless applicants can persuade the Board of the necessity of keeping selected information confidential. In principle this, I believe, is the right approach and has come to be the

general norm, although there continue to be exceptions. Problems may develop, however, in that the Act does not provide for a requirement that the public be informed of, and offered an opportunity to challenge the need for, any limitation on disclosure. As the Act reads it appears to be a matter solely between the Board and the applicant. I think a case can be made that applicants should publicly defend the need for confidentiality as part of the hearing process and permitting other participants to challenge such arguments as are advanced. The CRTC has followed this practice as have several provincial utility boards, such as those in Alberta, Nova Scotia and Newfoundland. The Board might consider adopting this practice by way of its regulations on procedures.

A basic point that is not provided for explicitly in the Act but can be handled by way of regulation involves not the dissemination of information but the provision of adequate time to analyse available information involving either hearings or regulations. In a court case involving the CRTC several years ago, Chief Justice Jackett of the Federal Court of Appeal stated that

> To be such a public hearing..., it would, in my view, have had to be arranged in such a way as to provide members of the public with a reasonable opportunity to know the subject matter of the hearing, and what it involved from the point of view of the public, in

> sufficient time to decide whether or not to exercise their statutory right of presentation and prepare themselves for the task of presentation if they decided to make a presentation.

This statement reflects a basic principle, namely to have time available for preparation. In developing its procedures for the provision of information, the Board would be well advised to incorporate this principle.

3. The Transition from the AECB to the NCB

> In forcing a move, after more than three decades, from a professionally-open regulatory process to a democratically-open one, the new legislation presents both a tremendous challenge and a marvellous opportunity.
>
> A.T. Prince
> May 1978 (AECB 1123)

> The enactment of Bill C-14 will have a significant impact on the regulatory process, the nuclear industry and the general public. It will result in increased openness and greater visibility of the regulatory agency and should enable the further development of public confidence in the effectiveness of regulatory programs. There can be no doubt as to the magnitude of the task to be accomplished. However, the benefits to be achieved will provide ample incentive to meet the challenge.
>
> J.A. Jennekins
> June 1978 (AECB 1125)

These two comments reflect the prevalent perception of the historic nature of C-14 and the challenge it will pose for the Nuclear Control Board. This Board will be established in a potentially/probably hostile environment. In such an environment it can be assumed that, given the transformation of the regulatory process, neither the industry nor the public

groups and individuals who join the process can be expected to show much trust in one another's motives or methods of operating. For too long there has been too large a gap between them and far too little communication across the gap. The NCB will face a tremendous challenge in attempting to bridge that gap and to establish meaningful, effective communication to ensure that there is a legitimate and effective nuclear regulatory process. It can be expected that both sets of participants will be wary and sceptical about the new regulatory agency and process. How the Board responds to such scepticism and suspicion will be instrumental in determining its effectiveness as a regulator.

In the preceding pages, I have discussed a number of specific items and issues that the Board will have to tackle in the future. Although such items as hearings, information disclosure, etc. are important, I think there is an even more basic, i.e. strategic, issue the AECB must face as it prepares for C-14's enactment. That issue is the transition to the new regulatory system.

I believe that the Board will have to be very aggressive in establishing its credibility and the legitimacy of the new system. I have read many of the Board personnel's commentaries on the new act and respect the obvious good intentions. But, to invoke the cliché, good intentions will not be enough. I

think the Board should be actively planning for the transition.

The unfortunate example of the U.S. Nuclear Regulatory Commission should be used as an instructive example for the AECB. A recent report with which, I am sure, the Board is familiar, reviewed the first 5 years of the NRC and was not very positive (GAO, "The Nuclear Regulatory Commission: More Aggressive Leadership Needed" (Jan. 15, 1980, EMD-80-17). The report argued that the "Commission must establish a foundation of public and industry confidence" and that "the most important step necessary to establish that foundation is for the Nuclear Regulatory Commissioners to provide the leadership and direction in nuclear regulation which they have failed to provide in the past." Whether the assessment of the NRC is valid need not concern us. The prescriptions, however, are as valid for the AECB/NCB as it is for the U.S. NRC.

The GAO Report encourages the NRC to establish measurable regulatory goals, objectives and systems for measuring performance. The NRC should attempt to define clearly its roles and relationships with other participants, particularly departmental and other agencies. It should be identifying actions and resources needed to assume an active rather than passive regulatory role. It should be preparing policy statements about the scope, direction and priorities of its various programs. It should strive to translate its statutory goals

and objects into workable plans. It should formulate coherent policies as guides to aid adjudication and regulation-making.

I believe the AECB as it prepares for C-14 should study and where appropriate set in motion plans to implement similar recommendations. I think it crucial that the Board be very energetic, and be seen to be, immediately upon proclamation of C-14 (or its equivalent). The actions of the CRTC when it assumed responsibility for telecommunications provide an ideal model that the Board should consider following. The CRTC within months issued a public statement outlining proposed procedures and practices for telecommunications, provided ample time for study and then called a public hearing to receive representations. After that hearing it issued a decision on its procedures.

Given that procedures for hearings and information disclosure will be central to the success of the proposed NCB, I believe that the AECB should begin work on a comparable policy statement for release soon after proclamation. I also believe that the Board should identify what it perceives to be one or two of the key areas of its new mandate, health or environment, for example, and consider "policy" or "issue" hearings. Again working papers would be required prior to any hearings.

The transition period from the AECB to the NCB will be, I believe, the most important period in establishing the environment and the working relationships for participants in the new regulatory process. If the Board is to shape this environment and direct the relationships in ways that will be conducive to, and supportive of, a regulatory process which will be able to deal with current and anticipated regulatory issues in a manner which is deemed to be legitimate by all participants, the transition period must be carefully planned and managed.

Conclusion:

My final task was to make "a recommendation concerning the feasibility of an eventual in-depth study of the Board's role and regulatory process in order to improve it if found necessary." Given the assumption that the NCA Act will be introduced in the near future, I do not believe that such a study is necessary or appropriate. Rather, I believe that the Board must plan for the future, especially, as indicated, the immediate transition period. Such planning must analyse the basic responsibilities and roles of the participants in the proposed process and assess the resources that will be necessary so that those responsibilities and roles can be effectively performed. Such planning will build and incorporate the experience of the AECB but must also be imaginative and flexible in going beyond such experience by drawing on, and

adopting regulatory practices and procedures, of other agencies in Canada and elsewhere. By building and borrowing, it is possible that the Board can develop a regulatory system that will satisfactorily respond to both the demands and the challenge of the new legislation.