

A Literature Review on
**ON REGULATORY
INDEPENDENCE IN
CANADA'S ENERGY
SYSTEMS: ORIGINS,
RATIONALE AND KEY
FEATURES**

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NOVEMBER 2020



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The author would like to thank Marisa Beck, Michael Cleland, Monica Gattinger, Rowland Harrison, Aimee Richard and George Vegh for their comments on earlier drafts of this review.

As is customary, any errors of fact or interpretation remain the sole responsibility of the author.

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POSITIVE ENERGY FINANCIAL SUPPORTERS

We would like to thank the following organizations for their financial support:

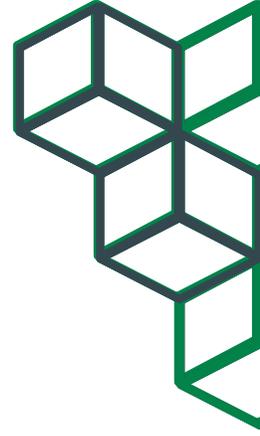
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INTRODUCTION

“It is surprising that so little attention has been paid to the principle of the independence of administrative tribunals, agencies, boards and commissions, given the role they play in the government of our society. Tribunals and agencies are the face of justice seen by the largest number of Canadians. Faith in our legal system will be shaken if the public does not have full confidence that their powers are being exercised with fairness and impartiality.”

– The Canadian Bar Association (CBA) Task Force on the Independence of Federal Administrative Tribunals and Agencies in Canada (1990)¹

Over the span of the 20th century, Canada has witnessed a growth in the number of agencies, commissions, tribunals, boards and regulators within its governmental system. These agencies and tribunals make important decisions and evaluations affecting the lives of Canadians. This includes everything from regulating large energy infrastructure projects and conducting environmental assessments, to providing Canadians with financial welfare by keeping price inflation stable, to deciding on those who need refugee protection when coming to Canada. They conduct these actions and decisions within the confines of Canada’s Westminster model of governance and, ultimately, for the public interest. Yet how independent these entities are in fulfilling their legislative mandates varies considerably from agency to agency.

As part of the University of Ottawa’s Positive Energy program, the following report reviews the literature surrounding regulatory independence in the Canadian context with a focus on energy systems. It analyzes literature on the rationale for independence, examines several important observed moments in Canadian history through the lens of independence, explores different ways to perceive, define and study regulatory independence, and identifies the different ways that the independence of a regulator can be affected.

Research on regulatory independence in Canada is multidisciplinary with works varying in format and ultimate purpose. In searching for subject material, one discovers legal articles observing jurisprudence and administrative law from such journals as the Alberta Law Review and Osgoode Hall Law Journal; current and historical case studies seen through a political science or legal lens from authors like Hudson Janisch and Lorne Sossin; as well as qualitative evaluations of individual regulators or types of regulators, such as the assessment conducted by the Institute on Governance on the Canadian Nuclear Safety Commission (CNSC). Additionally, independence is inherently tied to several other topics, including regulatory accountability and transparency. While this report’s primary focus is on the construct of independence of regulators, it is impossible to examine this concept exclusive of these other ideas. Lastly, while this review focuses on the Canadian context, research by international organizations such as the Organisation for Economic Co-operation and Development (OECD) and the International Nuclear Safety Advisory Group is examined, where appropriate (please see page 35 for a list of the review’s references).

1. Canadian Bar Association Task Force. (1990). *The Independence of Federal Administrative Tribunals and Agencies in Canada*. Canadian Bar Association, p.12



BOX 1: POSITIVE ENERGY'S RESEARCH ON ROLES AND RESPONSIBILITIES

The second three-year phase of Positive Energy (2019-2021) aims to address the following question: How can Canada, an energy-intensive federal democracy with a large resource base, build and maintain public confidence in public authorities (federal, provincial, and territorial policymakers and regulators, Indigenous governments, municipal governments and the courts) making decisions about the country's energy future in an age of climate change?

Three fundamental questions form the research and engagement agenda. How can Canada effectively overcome polarization over its energy future? What are the respective roles and responsibilities between policymakers, regulators, the courts, municipalities and Indigenous governments when it comes to decision-making about its energy future? What are the models of and limits to consensus-building on energy decisions?

Clearly articulating and strengthening roles and responsibilities between and among public authorities is one of the most pivotal but understudied factors shaping Canada's energy future in an age of climate change. Confidence of the public, investors and communities in government decision-makers – be they policymakers, regulators, courts, Indigenous governments or municipalities – is a critical success factor in Canada's ability to successfully chart its energy and emissions future. Positive Energy's research and engagement over the last five years reveals that answering two questions will be fundamental to confidence in public institutions: *Who decides? How to decide?* Positive Energy's research and engagement also underscore that two core principles should inform answers to these questions: *Informed Reform* and *Durable Balance*.

The roles and responsibilities research programme includes the following projects:

- A literature review on regulatory independence in Canada's energy systems: origins, rationales and key features
- An exploration of the evolution of regulatory independence from policymakers and the courts: who decides what, when and how?
- An examination of federal-provincial relations in Canada's energy decision-making system: how to establish functioning energy federalism for the twenty-first century?
- Interviews with municipal policymakers, provincial policymakers and regulators to understand how emerging technologies change the roles of public authorities and the ways in which the public interacts with them
- A comparative analysis of Liquefied Natural Gas success and failure in Western Australia and British Columbia to identify insights and lessons for public authorities involved in project assessment and approval
- Analyzing 'What works?': identifying and scaling-up successful innovations in energy regulatory decision-making in Canada

Each of these studies grapples with *Who Decides?* and *How to Decide?* and is anchored in the principles of *Informed Reform* and *Durable Balance*.



RATIONALE FOR INDEPENDENCE

Independence allows decision-making bodies to address case issues “on their own authentic terms.”² Bryden observes that, in the context of judicial or administrative decision-makers, possessing independence is a means to an end, not an end in itself.³ Rather, it is decision-maker impartiality that is desired and independence is the means to get there. Such impartiality provides assurance that the adjudicators will base their decisions on the evidence and the law, weighing competing claims rather than “extraneous considerations, including fear, self-interest or prejudice.”⁴

For courts, a “structural guarantee of independence” is needed for common law proceedings.⁵ This guaranteed independence allows the litigant and the public-at-large to have objective assurance that the case outcome has not been impacted or manipulated by factors tied to the adjudicator, such as their ability to have control over the proceedings or their salary. If this guarantee is not fulfilled, case outcomes cannot be rendered legally valid and the commitment to the rule of law might be cast in doubt:

“What makes a common law guarantee of structural independence distinctive is that an adjudicator who does not enjoy appropriate guarantees of independence will be deemed to be insufficiently impartial to satisfy the requirements of natural justice. Since the normal consequence of failure to meet the requirements of natural justice is the invalidity of any decision made in violation of those requirements, the practical effect of a finding that an adjudicator lacks appropriate guarantees of structural independence is that the adjudicator cannot render legally valid decisions.”⁶

While tribunals and regulators are not recognized as courts in Canadian jurisprudence, there is nevertheless a desire to insulate regulatory decisions from the political process. One of the reasons is because regulatory decisions, like court decisions, impinge on property and other private rights and have to weigh competing claims and evidence.⁷ If a regulator, through its adjudicative functions makes court-like decisions, should they not have the same guarantees for independence as the judiciary?

2. Bryden, P. (2003). Structural Independence of Administrative Tribunals in the Wake of Ocean Port. *Canadian Journal of Administrative Law & Practice*, 16, p. 3.

3. Ibid.

4. Ibid.

5. In Canada, judicial independence guarantees to court judges, such as security of tenure, financial security and administrative independence, are found in sections 96 to 100 in the *Constitution Acts of 1867 to 1982*, and section 11(d) of the *Canadian Charter of Rights and Freedoms*. Source: Department of Justice. (n.d.). *The Judiciary*. Retrieved from <https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/05.html>

6. Bryden, P. (2003). Structural Independence of Administrative Tribunals in the Wake of Ocean Port. *Canadian Journal of Administrative Law & Practice*, 16, p. 4.

7. Janisch, H. N. (1979) Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada. *Osgoode Hall Law Journal*, 17, p. 46.



Additionally, independence for regulators and tribunals is warranted based on their expertise and is needed to increase competence and efficiency of decision-making in specific, technical public policy outcomes. In general, regulation addresses market failures when there is inefficient distribution of goods and services within a particular industry.⁸ Addressing market failures is a key task for governments and public policy. Granting greater independence to regulators can enhance this role.⁹ The OECD observes specifically how granting independence to regulators can address four challenges. These challenges are harder (if not impossible) to accomplish if regulatory processes take place within government departments:

1. *Lack of commitment, time inconsistency and political uncertainty:* Regulators are less bound by pressures from users or policy makers to undertake actions like lower electricity rates at the expense of service and long-term maintenance. Their long-term mandate allows them to pursue policy outside of the electoral or economic business cycles.
2. *Lack of competitive neutrality ensuring a level playing field for all operators:* Independent regulators provide a signal to investors that there will be greater adherence and certainty to rules and procedures, less interference from political actors, and less preferential treatment of state-owned entities within the regulated sector.

Independent regulators can increase investor and public confidence through a more stable, unbiased regulatory environment.

3. *Information and expertise asymmetries:* Regulators can acquire and promote expertise and professionalism, hiring qualified staff based on merit and competence. This technical expertise can help increase efficiencies and welfare, monitor compliance and quality standards, and develop and analyze matters like accurate price-setting. Additionally, a regulator may be more inclined to consult with a more diverse range of stakeholders before making decisions, compared to government. Lastly, many Canadian regulators are not bound to public service sector salary legislation, allowing them to procure and compete with the private sector for high-quality expertise and talent.¹⁰
4. *Regulatory capture:* With greater financial independence, the regulator has the resources to carry out its mandate, minimizing capture and undue influence from industry groups, lobby organizations and government. For instance, Renneberg observes in the context of nuclear safety regulators, independence allows the regulator to make judgements and enforce actions taken on nuclear safety “without pressure from interests that may conflict” with its mandate.¹¹

8. OECD. (2016). *Being an Independent Regulator*. OECD Publishing, p.21-22. Retrieved from https://read.oecd-ilibrary.org/governance/being-an-independent-regulator_9789264255401-en#page5

9. Ibid.

10. For instance, executive officers of the Workplace Safety and Insurance Board (WSIB) in Ontario, while bound by the same ethics as the civil service under *the Public Service of Ontario Act*, are not limited by the same pay scale. Instead, WSIB executives and executives for other independent entities (such as the Independent Electricity System Operator) have more generous compensation determined through *the Broader Public Sector Executive Compensation Act 2014*.

11. Renneberg, W. (2006). *Independence and Regulatory Effectiveness, Effective Nuclear Regulatory Systems, International Conference, Moscow*. International Atomic Energy Agency, p.43. Retrieved from https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1272_web.pdf



KEY MOMENTS IN THE HISTORY OF REGULATORY INDEPENDENCE IN CANADA

THE AMERICAN MODEL AND THE BOARD OF RAILWAY COMMISSIONERS (1903)

The following describes key moments for understanding regulatory independence in the Canadian context. There are numerous moments that can describe the evolution of regulatory independence, including pivotal court decisions such as *Valente v R*¹² and *Ocean Port Hotel Ltd* (which is examined thoroughly on page 24¹³), which have helped address independence of agencies and tribunals within Canadian jurisprudence. Additionally, there are varying provincial and federal studies on the subject, such as Robert Macaulay's 1989 review of Ontario regulatory agencies;¹⁴ the 1987 Ouellette Report which examined administrative tribunals in Québec;¹⁵ or the Canadian Bar Association's 1990 Task Force Report on independent federal tribunals and agencies.¹⁶ Readers interested in a deeper analysis of Canada's history with regulatory independence may wish to consult these past works; this report and the selected moments below aim to provide a broad sense of the context in which regulators reside or have resided.

The history of administrative tribunals and regulators begins in 1851 with the regulatory functions delegated to the Railway Committee of the Privy Council, Canada's first administrative and decidedly non-independent tribunal.¹⁷ With this Committee, Janisch observes that the history of independent regulators in Canada begins with the initial rejection of the American model of independent regulation.^{18, 19} The American model of regulation is characterized by greater independence of agencies from the executive branch (compared to a department over which the president has full control); security of tenure for the agency commissioners; and broad mandates to act in the public interest. Their broad mandates in particular provide agencies the ability to develop and implement policy largely independent of Congress and the Executive Branch. Given these characteristics, such agencies have been labelled "the headless fourth branch of government."²⁰

12. *Valente v R*, 2 S.C.R. 673 (1985).

13. *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2 S.C.R. 781, at 794-95 (2001). Retrieved from <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1891/index.do>

14. Government of Ontario. (1989). *Directions: Review of Ontario's Regulatory Agencies (Overview)*. Toronto: Queen's Printer for Ontario.

15. Rapport du groupe de travail sur les tribunaux administratifs. (1987). *Les Tribunaux Administratifs : L'heure est aux décisions!* Québec: Government of Québec

16. Canadian Bar Association Task Force. (1990). *The Independence of Federal Administrative Tribunals and Agencies in Canada*. Canadian Bar Association.

17. Ibid.

18. Janisch, H. N. (1978). The Role of the Independent Regulatory Agency in Canada. *University of New Brunswick Law Journal*, 27, p.118.

19. Janisch notes that while Canada did reject the American model initially and has never really adopted the model of an independent regulatory agency, it has, at times over the decades, come closer to the model of a more independent regulator from government (Ibid).

20. Ibid, p. 88.



American regulatory agencies are more aligned with the separation of power doctrine found within the U.S. Constitution.²¹ Conversely, in Canada, it is harder to reconcile independent regulators with the hierarchical Westminster parliamentary system, in particular “its scheme for ministerial accountability.”²² Thus, while the U.S. has committed to independent regulators like the Federal Energy Regulatory Commission, greater debate has taken place in Canada in regards to the tension between parliamentary accountability and the need for independent regulators outside of political control.²³

This conflict between accountability and independence can be observed with the first debates in Canada on regulatory independence. With growing dissatisfaction around railway rate setting and regulation, a Royal Commission was established in 1886 to examine and determine a framework to set rates.²⁴ In its study, the Commission “consciously rejected the American model” and the idea of a body similar to the U.S. Interstate Commerce Commission.²⁵ Instead, the Commission opted to give authority of railway rates to a sub-committee of the cabinet, thus appealing to greater parliamentary accountability. However, issues with the sub-committee’s functionality and objectives soon arose from this model:

“In the first place, the members of the committee were not particularly familiar with railway problems and were politically vulnerable to outside influences. Secondly, the membership of the committee changed constantly making it impossible to obtain continuity in the interests represented or the views presented. Finally, the Committee sat only in Ottawa and made no specific provisions to ensure that all parties with an interest in a particular question had an opportunity to present their views.”²⁶

The issues with the sub-committee reflect common challenges found when specific, niche regulatory decisions are made exclusively by policymakers and political actors. As outlined by the OECD, these issues can be reconciled through independent regulation. Regulators can provide the necessary, multidisciplinary expertise for the policy subject; adequately insulate decisions from industry capture, yet provide procedures to hear all stakeholders’ points of view; and develop efficient regulation with the public interest in mind, outside of short-term political mandates and motives.²⁷

21. Janisch, H. (2012). *The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right?* *Alberta Law Review*, 49(4), 785 – 820.

22. Ibid.

23. Janisch, H. N. (1978). *The Role of the Independent Regulatory Agency in Canada.* *University of New Brunswick Law Journal*, 27, 83-120.

24. Canadian Pacific Consulting Services. (2014). *Evolution of Canadian Railway Economic Regulation and Industry Performance under Commercial Freedom.* Retrieved from https://www.tc.gc.ca/eng/ctareview2014/pdf/Railway_Association_of_Canada/Appendix_B_-_Evolution_of_Canadian_Rail_Regulation_and_Industry_Performance.pdf

25. Janisch, H. N. (1978). *The Role of the Independent Regulatory Agency in Canada.* *University of New Brunswick Law Journal*, 27, p.88.

26. Wright, A. R. (1963). *An Examination of the Role of the Board of Transport Commissioners for Canada as a Regulatory Agency.* *Canadian Public Administration*, 6(4), p.351.

27. OECD. (2016). *Being an Independent Regulator.* OECD Publishing. Retrieved from https://read.oecd-ilibrary.org/governance/being-an-independent-regulator_9789264255401-en#page5



In response to these issues, the McLean Royal Commission was established in 1899. Key recommendations from the Commission helped design and develop the first federal regulatory body in 1903 through the *Railway Act*: The Board of Railway Commissioners. The Board possessed many traits regularly found with independent regulators: governor-in-council (cabinet) appointed commissioners; security of tenure for the commissioners; a broad regulatory authority over railways; and finality for factual decisions within its jurisdiction.²⁸ The *Act* helped “judicialize” railway rate regulation and the Board was “granted the powers, rights and privileges of a Superior Court.”²⁹

Yet, regardless of how “judicial” the regulator appeared, the tension with political accountability and the new Commission persisted in the 1903 *Act*. This discord existed in the form of a clause that provided cabinet the right to review the Commission’s decisions. This was seen as a “fall-back type of political safety valve”, thus ensuring political accountability with the regulator.³⁰

This outcome, whereby regulators are mostly independent but with the presence of a political accountability safety valve, has been previously described by the Economic Council of Canada as the “halfway position” between independence and accountability:

“Day-to-day regulation by statutory agencies [...] requires full-time detached professionalism that can only be obtained by giving such bodies a considerable degree of autonomy. At the same time governments have not been willing to see final decision-making authority handed over to non-elected bodies. This has led to Cabinet review and appeal provisions, which have been used, albeit, somewhat sparingly.”³¹

Janisch notes that Canada held the pragmatic position where “we could have our cake and eat it too.”³²

28. Janisch, H. N. (1978). The Role of the Independent Regulatory Agency in Canada. *University of New Brunswick Law Journal*, 27, 83-120.

29. Ibid.

30. Janisch, H. (2012). The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right? *Alberta Law Review*, 49(4), p.806.

31. Ibid, p. 795.

32. Janisch, H. N. (1978). The Role of the Independent Regulatory Agency in Canada. *University of New Brunswick Law Journal*, 27, p.90.



Regulation of railway rates, and the corresponding legislation and commissioner structure would provide the basis for other, economically regulated sectors in the 20th century. This included the precursor for the National Energy Board (NEB) under the 1949 *The Pipe Lines Act*³³ and the *Telecommunications Act, 1993*.³⁴

As Canada progressed as a country through the early-to-mid 20th century, so did a number of new regulatory agencies. Many agencies formed during the Second World War remained in place at the end of the war and their numbers continued to proliferate. The 1990 Canadian Bar Association task force report observes that not only was the number of agencies increasing at both the federal and provincial levels, there was also an expansion into new subject matter that these agencies were regulating, including areas of consumer protection, human rights and the environment.

These agencies and tribunals and their decisions, once novel and narrow to Canadian life, were increasingly affecting and influencing the lives of Canadians, directly impacting citizens more so than the courts, and changing the relationship citizens had with the state. In the words of Mullan, they were becoming “a political force in the affairs of the country to an extent that would have been difficult to imagine in 1945.”³⁵

33. Lucas, A. R. (2018). The National Energy Board and Energy Infrastructure Regulation: History, Legal Authority, and Judicial Supervision. *Review of Constitutional Studies*, 23(1).

34. Janisch, H. (2012). The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right? *Alberta Law Review*, 49(4), 785 – 820.

35. Mullan, D. J. (1985). Administrative Tribunals: Their Evolution in Canada from 1945 to 1984. in I. Bernier and A. Lajoie (Eds.), *Regulations, Crown Corporations and Administrative Tribunals*. University of Toronto Press, p.161.



THE NATIONAL ENERGY BOARD (1959)

This period of proliferating regulatory agencies included the creation of the NEB in 1959. The creation of the Board would further the discussion of regulatory independence in Canada through the development of a regulator with a higher degree of autonomy and authority in decision-making than existing agencies, as well as through its controversial advisory function, an experimental responsibility that arguably clashed with the Board's independence.

The Board's inception was envisioned and developed following the Great Pipeline Debate in 1956.³⁶ The Debate surrounded the establishment of the Crown corporation (*The Northern Ontario Pipe Line Crown Corporation Act*) to build the Ontario section of a cross-Canada natural gas pipeline from Alberta to Québec. The federal government was concerned over losing financing for the project from its private sector partner if legislation for the corporation was not passed swiftly. This resulted in the government invoking closure (closing debate) on the legislation in Parliament on May 14, 1956. The Corporation was swiftly established and the pipeline successfully completed in 1958. However, the government's controversial use of closure in Parliament has been described as "one of the most famous confrontations in parliamentary history."³⁷ The move is also said to be a significant contributor to the governing Liberal's electoral defeat to John Diefenbaker's Progressive Conservatives in 1957.

The Great Pipeline Debate and calls for firmer energy regulation set the stage for the *NEB Act*. Additionally, the Liberal's 1957 Royal Commission on Canada's Economic Prospects (informally called the Gordon Commission) followed by the Conservative's 1958 Royal Commission on Energy (informally called the Borden Commission) both called for creation of a national energy authority. The latter commission in particular had a significant influence on what would become the NEB, calling for greater independence for the tribunal:

"[T]he National Energy Board shall not be [...] subject to the direction of any specific Minister otherwise than as specified in the recommendations concerning the extent of authority of the Board."³⁸

Debate on the *NEB Act* in Parliament brought to light the tension between regulatory accountability and independence. Harrison examines the contrast in statements on the Board between Prime Minister John Diefenbaker and the minister responsible for the bill at the time, Gordon Churchill.³⁹ Their differences highlight the lack of clarity and difficulties in squaring regulatory independence with ministerial accountability:

36. Lucas, A. R. (2018). The National Energy Board and Energy Infrastructure Regulation: History, Legal Authority, and Judicial Supervision. *Review of Constitutional Studies*, 23(1).

37. Ibid, p. 29.

38. Harrison, R. J. (2012-2013). The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory Independence Mean? Should We Pursue It? *Alberta Law Review*, 50(4), p.767.

39. Ibid.



Prime Minister Diefenbaker: “[The powers conferred on the Board] are spelled out and are sufficiently flexible to assure, through public hearings and through maintaining the inviolability of the board by its appointment for a period of seven years unremovable except by vote of parliament [sic], that the public interest can be and will be maintained.”⁴⁰

Minister Churchill: “Like any other body set up by parliament it will report to the cabinet and it will report through the Minister of Trade and Commerce to parliament [sic], and every action taken will be reviewed.”⁴¹

While there was confusion over independence in Parliament, the *Act* itself was clearer and openly provided greater independence for the regulator. There was no provision allowing the government to provide general policy direction to the Board; cabinet had the power to approve or reject NEB project approvals, but did not have the power to review or amend them; nor could cabinet approve a certificate if the application was rejected by the NEB. The NEB was modeled after Alberta’s established and independent Oil and Gas Commission Board (OGCB), instead of other, less independent, federal regulators like the Board of Railway Commissioners.

The OGCB was itself modeled after Texas’ railroad commission, thus, the NEB presented itself as one of the first federal regulators to authentically embrace the American model of regulatory independence. While amendments were made in 2012 to change the NEB’s procedures, such independence had previously not been granted to regulators in other sectors:

“The contrast with telecommunications regulation is striking, particularly so in recent years. While one needs to keep in mind Governor-in-Council regulations applied to the Board, as well as the substantial involvement of Ottawa in international matters, the NEB stands as a fully-fledged independent regulatory agency - something of an exception at the federal level in Canada.”⁴²

40. Harrison, R. J. (2012-2013). The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory Independence Mean? Should We Pursue It? *Alberta Law Review*, 50(4), p.768.

41. Ibid.

42. Janisch, H. (2012). The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right? *Alberta Law Review*, 49(4), p.807.



However, the advisory function of the NEB opened a new discussion on regulatory independence. The responsibility allowed the Board to study and review energy matters, reporting to the minister on matters of public interest. It also gave the minister the ability to request such studies from the Board. Such functions were said to have made the NEB a “a policy exporter, not an importer.”⁴³ A report by the Law Reform Commission of Canada reported that such a combination of agency duties damaged the independence of the Board. Firstly, the report noted that the advisory function was a difficult sell for those in the Ministry of Justice when the NEB’s legislation was initially being drafted. Additionally, the report argued that by engaging in a policy advice committee or task, Board members’ impartial adjudication could be affected by basing their decisions on unwarranted “political insights.”⁴⁴ Lastly, the report stated that with the advisory function, Board members effectively served as aides to cabinet, much like those in public service departments:

“All agree that wide-spread suspicions generated by the combination of functions, whether well-founded or not, are extremely damaging to the NEB’s credibility as an adjudicator. This in turn can reduce public as well as industry confidence in the Board and impair its ability to exercise its statutory mandate effectively.”⁴⁵

43. Janisch, H. (2012). *The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right?* *Alberta Law Review*, 49(4), p.806.

44. Lucas, A. R., and Bell, T. (1977). *The National Energy Board: Policy, Procedure and Practice*. Law Reform Commission of Canada, p.35.

45. *Ibid.*



USAGE BASED BILLING AND THE CRTC / LOSS OF INDEPENDENCE FOR FEDERAL AND PROVINCIAL REGULATORS (2007-PRESENT)

Recent analyses into regulatory independence in Canada starting in the late 2000s have observed how governments adversely impact the independence of a regulator through conventional and nonconventional means. While controversial events have engulfed regulators and governments in Canada in the past, it has typically been a regulatory agency's *decision* that is contentious, rather than the full regulatory system itself. Recent controversies from the 2000s onwards have made both politicians and the public doubt the regulatory system itself, and subsequently, the need for regulatory independence.

Most often, controversy erupts at the level of the minister through whom the regulator is accountable to the legislature. Tensions may arise between the two parties over a decision made by the regulator that is deemed controversial or undesirable to either the government, their political supporters or the general public. The minister then intervenes to alter or negate the decision made. This could be through legitimate means, such as legislative amendment or governor-in-council directive through Cabinet. It could also occur through less legitimate means, such as a minister announcing that the government would not adhere to a regulatory decision (as seen in the example below), questioning the motives of the regulator with the decision, or abruptly removing the head of the regulatory agency prior to the end of their term (as seen with the CNSC). These interventions encroach on the regulator's independence.

Additionally, how the regulator's head (such as the board chair, or commissioner) reacts to and handles both the initial concern raised by the public and policymakers, as well as the government's intervention, influences how a regulator's independence is affected.

Harrison, Janisch, and Sossin provide several provincial and federal case studies where the independence of the regulator is critically affected or altered by intervening policymakers (a list of additional case studies is included in Appendix A).⁴⁶ Sossin believes such examples of political interference highlight the fragility of the agencies' independence and that "there is little to compel Canadian governments to respect the independence of administrative agencies if they do not want to."⁴⁷

One example highlighted in the literature is Janisch's analysis of the controversy surrounding Usage Based Billing (UBB) and the tension between the federal government and the Canadian Radio-television and Telecommunications Commission (CRTC).⁴⁸ The controversy began in 2011 when the CRTC ruled in favour of UBB, a decision within the mandate and objectives of the regulator. However, this decision upset stakeholders including Internet customers and smaller Internet service providers (ISPs). Strong opposition propelled the CRTC and its decision into the political realm:

46. Harrison, R. J. (2012-2013). *The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory Independence Mean? Should We Pursue It?* *Alberta Law Review*, 50(4), 757-782; Janisch, H. (2012). *The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right?* *Alberta Law Review*, 49(4), 785 – 820; Sossin, L. (2008). *The Puzzle of Independence for Administrative Bodies.* *National Journal of Constitutional Law*, 26, 1-23.

47. Sossin, L. (2008). *The Puzzle of Independence for Administrative Bodies.* *National Journal of Constitutional Law*, 26, p.1.

48. Janisch, H. (2012). *The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right?* *Alberta Law Review*, 49(4), 785 – 820.



“Through its decision, the CRTC had upset *both* the independent ISPs *and* their highly articulate customers, thereby causing something by way of a perfect political storm. It was to be the resultant public policy tsunami that threatened to swamp the good ship ‘Independent Regulator.’”⁴⁹

The Minister of Industry, who was responsible for telecommunications, initially proceeded to formally address the CRTC and its legitimate decision, “keeping with the legal parameters within which he operated.”⁵⁰ This included examining the CRTC’s decision carefully, not taking sides in respect to the decision, and making a recommendation to cabinet on how to proceed next. A further option was having the CRTC reconsider its decision, taking into account elements of government policy on telecommunications. Since 1993, the government had authority to issue policy directives to the CRTC; however, a 2006 report observed that it had never been utilized.⁵¹ Additionally, its reconsideration authority had also rarely been used. Ultimately, the government did provide policy directives to the CRTC following the 2006 report, which was within the government’s authority.

As stakeholders began protesting the decision through petitions, the government’s tone in handling the CRTC’s decision changed. Janisch observes that the minister became more bombastic in addressing the CRTC’s decision:

“Instead, as we have seen, Minister Clement delivered an ultimatum to the CRTC warning that its decision would be scrapped if the regulator did not rescind the decision itself. The Minister then indicated that in any ‘reconsideration,’ its decision *must* be changed, thereby asserting an extra-legal power of ‘anticipatory variance.’”⁵²

This led the CRTC to reconsider its decision on UBB “of its own motion”. However, even after this announcement, the minister insisted that the decision was essentially rescinded:

“‘I’d like to be clear,’ Minister Clement told reporters, ‘regardless of the outcome of the CRTC review, under a Conservative government, this ruling will not be implemented.’”⁵³

Following the decision to review its previous decision, the government chose not to extend the current CRTC chair’s contract. Instead, it appointed a chair who was known more for his political connections and his Chamber of Commerce work than expertise in regulation.⁵⁴ The reconsideration on UBB led to a “muted compromise”, with Bell’s CEO saying that the issue of UBB had been “put to bed.”⁵⁵

49. Janisch, H. (2012). *The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right?* *Alberta Law Review*, 49(4), 785 – 820.

50. *Ibid.*, p.787.

51. *Ibid.*

52. *Ibid.*, p.801.

53. *Ibid.*, p.788.

54. *Ibid.*

55. *Ibid.*, p.803.



Janisch states that events surrounding the UBB decision showed “complete disregard for the legal regime which had been put in place through the 1993 *Telecommunications Act* to govern the roles to be played by elected politicians in Cabinet (technically, Governor in Council) and the appointed bureaucrats in the regulatory agency.”⁵⁶

While the actions of the government impacted the regulatory authority and independence of the CRTC, the actions taken (or not taken) by the regulator during the events are also important to note. These issues touch on key variables related to independence and good governance, including expertise within the regulator; transparency and accountability of its decisions; insulation from stakeholders; and an understanding of stable procedure.

Firstly, according to Janisch, the CRTC did a poor job fully articulating the rationale for its UBB decision. The decision was only four pages in length, and just four paragraphs outlined major changes in the discount rate and the impact of UBB. These “abrupt” decisions did not display the level of expertise and “longer term perspective” that an independent regulator like the CRTC should demonstrate.⁵⁷ In fact, Janisch argues that the strongest rationale provided for UBB was by the chair before a parliamentary committee, following the announcement to reconsider the decision.

Secondly, Janisch criticized how the CRTC handled the strong public and stakeholder opposition to UBB. He argues the CRTC did not do a good enough job responding to the public’s initial concerns over UBB and could have created stronger channels for discussion on the issue. Even with the political and public outcry, “the decision was largely unstructured by reference to any up-to-date, carefully thought-through analysis of the issues by the regulator.”⁵⁸

Thirdly, critics claimed that the CRTC was too close to the industry it was regulating because it was not revealing corporate information it had on file. This information would have allowed the public to understand the costs associated with their Internet fees and to understand the premises on which the CRTC based its decisions.⁵⁹ As discussed on page 21, operating without “undue influence” has been described as the core element of regulatory independence.⁶⁰

Lastly, for Janisch, how the regulator reacted to the government’s action was problematic. The CRTC could have advised cabinet to follow the established review procedures already set in the *Act*. Because the chair simply accepted the demands of the government, it set a bad precedent:

56. Janisch, H. (2012). The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right? *Alberta Law Review*, 49(4), p.786.

57. Ibid, p.799.

58. Ibid, p. 800.

59. Ibid.

60. OECD. (2016). *Being an Independent Regulator*. OECD Publishing, p.3. Retrieved from https://read.oecd-ilibrary.org/governance/being-an-independent-regulator_9789264255401-en#page5



“The CRTC instead set a very bad precedent by backing down to bullying politicians who lacked legal authority. Requiring the government to act within the confines of the law would have been preferable to any ostensible claim that the CRTC was acting on its own initiative in reconsidering its decision.”⁶¹

Janisch’s case study examines why and how the government intervened in regulatory decision-making and in the CRTC’s independence through legitimate and less legitimate means. It observes how political-regulatory tensions on an issue of public controversy led to an adverse impact on regulatory independence and the regulator’s authority to make or provide independent, expert decisions.

Additionally, the study provides a helpful examination of the role of accountability in the regulatory system. Regulatory accountability is seen as the other side of the coin of regulatory independence. Agencies possess mandates to regulate and administer in the public interest. Thus, the public does have a legitimate right to hold regulators and their members to account, ensuring that board members are faithfully fulfilling their mandate, and that the agency is operating productively and efficiently. However, as noted by the Canadian Bar Association, how precisely the regulator is held to account is important:

“[...] the principle of independence does not relieve tribunals and agencies or their members, of responsibility and an appropriate degree of accountability. What is improper is for that accountability to be *government* when it impinges upon their independent fact-finding, policy-development or decision-making functions.”⁶²
[emphasis added]

Thus, regulatory independence cannot be discussed in a vacuum and constructs such as accountability must be discussed alongside independence.

61. Janisch, H. (2012). The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right? *Alberta Law Review*, 49(4), p.801.

62. Canadian Bar Association Task Force. (1990). *The Independence of Federal Administrative Tribunals and Agencies in Canada*. Canadian Bar Association, p.119.



A NEW PARADIGM OF REGULATION EMERGES

In previous decades, political controversy led to greater independence for regulators from the political process. However, more recently, as observed with the CRTC, as well as with other regulators such as the NEB, Ontario Energy Board (OEB), Alberta Energy Regulator (AER) and CNSC, controversy surrounding a regulator has led to reduced faith in regulatory decision-making and lessened regulatory independence for agencies and tribunals. Lodge and Wegrich observed that, at the global level, after decades of regulators and regulation being embedded as a device to implement public policy, the turn of the millennium brought out greater “dis-embedding”.⁶³ Key ideas of regulation, such as the use of the private sector to operate public services and the use of independent regulators to develop rules for these actors and oversee their compliance of the rules, became “increasingly confused and contested.”⁶⁴ Additionally, in developed countries, discussions were taking place over whether economic regulation and market-based tools could adequately address new policy challenges beyond improving efficiency and competition in the sector, such as improving renewable energy investment.⁶⁵

As written by Prosser, increasingly, there has been a paradigm shift from a focus on economic regulation to other models that incorporate different disciplines and include social responsibilities and functions for the regulatory institution. Under this “regulatory vision”, regulation is not limited to areas “where there are definable market failures.”⁶⁶ Additionally, regulatory independence is not an important feature of their institutional design:

“In this vision, regulators are ‘governments in miniature’. They have responsibility for both economic and social or distributive goals, which are anyway inseparable. Secondly, regulatory independence is not the key principle of institutional design, because regulation is a collaborative enterprise between regulatory agencies and other government bodies; although there may be particular contingent reasons for creating independent agencies, their responsibilities are shared with government and other bodies and may overlap in a complex ‘regulatory space.’”⁶⁷

63. Lodge, M. and Wegrich, K. (2012). *Managing Regulation: Regulatory Analysis, Politics and Policy*. p.4. Red Globe Press.

64. *Ibid*, p.4.

65. *Ibid*.

66. Prosser T. (2010). *Introduction. In The Regulatory Enterprise: Government, Regulation and Legitimacy*. p.3. Oxford.

67. *Ibid*, p.5.



Such a regulatory vision can be observed with recent changes to regulatory systems, including the 2012 amendments to the *NEB Act*. As observed by Harrison, changes made to the NEB may not have been made with the intention to reject the regulatory independence of the NEB, but rather to reflect the changing nature of decisions with respect to energy resource development projects.⁶⁸ Decisions may now incorporate more challenging and complex considerations, and ultimately, require value judgements, not simply expert and evidence-based assessments:

“Even in the face of the best science and other information available, whether to approve major resource development projects increasingly requires that fundamental value-based choices be made by society. At the end of the day, they require a balancing of economic, environmental, and social considerations.”⁶⁹

The next section examines the different types of independence and diverse ways that independence of the regulator has been perceived by various actors in the system and by analysts.

68. Harrison, R. J. (2012-2013). The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory Independence Mean? Should We Pursue It? *Alberta Law Review*, 50(4), 757-782.

69. *Ibid*, p.778.



DIFFERENT WAYS TO LOOK AT INDEPENDENCE

TYPES OF INDEPENDENCE

What do we mean when we are referring to regulatory independence? The OECD defines the independence of regulators within the context of other actors, observing regulators as “referees” operating in a complex environment with different stakeholders in the policy arena. This includes ministries, parliaments, the regulated industry and citizens. According to the Organisation, at the core of regulatory independence is “the balance between the appropriate and undue influence that can be exercised through these interactions. . .”⁷⁰; being an independent regulator is not “simply institutional design.”⁷¹

Examining independence in relation to other actors is but one way to look at independence. As noted in this section, scholars observe different types of independence as well as other important ways to look at the independence of an agency. This includes the relationship to the judicial branch and perceptions of independence by the public, other actors, or the regulator itself. Table 1 outlines common types of independence observed in the literature on regulator/tribunal and judicial independence. Regardless of nomenclature, these types appear to revolve around similar constructs and many are closely related to one another or even overlapping.

70. OECD. (2016). *Being an Independent Regulator*. OECD Publishing, p.3. Retrieved from https://read.oecd-ilibrary.org/governance/being-an-independent-regulator_9789264255401-en#page5

71. *Ibid*, p.3.



Table 1. Independence Types and their Definitions

Independence Type	Definitions
<i>Judicial Independence</i>	<p>“... a cornerstone of the Canadian judicial system... under the Constitution, the judiciary is separate from and independent of the other two branches of government, the executive and legislature. Judicial independence guarantees that judges will be able to make decisions free of influence and based solely on fact and law.”^{72,73}</p> <p>Judicial independence is based on three components: security of tenure; financial security; and administrative independence.</p> <p>While different from the independence of regulators, scholars observe that tribunal independence is often evaluated in reference to judicial independence; Harrison observes that full independence provides a “valuable benchmark for assessing the extent of the Board’s independence.”⁷⁴</p>
<i>Administrative Independence</i>	<p>A component of judicial independence. In reference to the courts, such independence means “no one can interfere with how courts manage the legal process and exercise their judicial functions.”⁷⁵</p>
<i>Structural Independence</i>	<p>Defined as “legal guarantees that an administrative tribunal is structured in a way that enables it to operate at arm’s length from the government that created it. Such guarantees bear at least a family resemblance to the guarantees of judicial independence found [security of tenure, remuneration and administrative independence], among other places in s. 11(d) of the <i>Canadian Charter of Rights and Freedoms</i> as it has been interpreted by the courts.”⁷⁶</p> <p>Bryden uses “structural” to emphasize “the extent to which guarantees of independence are rendered objective through the structures that shape the terms and conditions under which members of administrative tribunals do their work.”⁷⁷</p>

72. Government of Canada, Department of Justice. (2016). *The Judiciary*. Retrieved from <https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/05.html>

73. Chief Justice Dickson of the Supreme Court of Canada, in *Beauregard v. Canada* (1986) defined “the generally accepted core principle of judicial independence” as the following: “the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.” *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at para. 21.

74. Harrison, R. J. (2012-2013). The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory Independence Mean? Should We Pursue It? *Alberta Law Review*, 50(4), p.762.

75. Government of Canada, Department of Justice. (2016). *The Judiciary*. Retrieved from <https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/05.html>

76. Bryden, P. (2003). Structural Independence of Administrative Tribunals in the Wake of Ocean Port. *Canadian Journal of Administrative Law & Practice*, 16, p.2.

77. *Ibid*, p.2.



Table 1. (continued)

<i>Perceived Independence</i>	References whether the public, other actors, or the regulator itself, perceive the regulator to be independent with the capacity to make its own decisions (see page 28 for further information). This could be observed through media op-eds (i.e., a <i>New York Times</i> op-ed called the NEB “an ostensibly independent regulatory agency” and the Alberta Energy Regulator “quasi-independent”). ⁷⁸
<i>Procedural Independence</i>	Independence defined “with reference to the process that is appropriate for its specific mandate and whether that process is protected from political interference, and not by whether the ultimate decision is beyond the political process.” ⁷⁹ For instance, a government imposing procedural constraints (i.e., time limits for applications) on how a tribunal fulfills its mandate may infringe on the tribunal’s procedural independence.
<i>Institutional Independence</i>	“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.” ⁸⁰
<i>Individual Independence</i>	Refers to the independence held by the individual judge or tribunal member and their decision-making process, and their ability to decide on cases impartially and without interference. For instance, “a judge must be free to act on his/her convictions, without fear of personal consequences.” ⁸¹
<i>Adjudicative Independence</i>	“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.” ⁸²

78. Leslie, J. (2014, March 30). Is Canada Tarring Itself? *The New York Times*. Retrieved from <https://www.nytimes.com/2014/03/31/opinion/is-canada-tarring-itself.html>

79. Harrison, R. J. (2012-2013). The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory Independence Mean? Should We Pursue It? *Alberta Law Review*, 50(4), p.780.

80. Institute on Governance. (2007). *Regulatory independence: Law Practice and Perception: A Report to the Canadian Nuclear Safety Commission*. Canadian Nuclear Safety Commission, p.v. Retrieved from http://publications.gc.ca/collections/collection_2008/cnsc/CC172-39-2007E.pdf

81. United Nations Office on Drugs and Crime. (n.d.). *The Main Factors Aimed at Securing Judicial Independence*. Retrieved from <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--the-main-factors-aimed-at-securing-judicial-independence.html>

82. Institute on Governance. (2007). *Regulatory independence: Law Practice and Perception: A Report to the Canadian Nuclear Safety Commission*. Canadian Nuclear Safety Commission, p.vi. Retrieved from http://publications.gc.ca/collections/collection_2008/cnsc/CC172-39-2007E.pdf



REGULATORY INDEPENDENCE IN COMPARISON TO THE COURTS AND OCEAN PORT

Scholars often analyse regulatory independence in reference to the independence granted to Canada's judicial branch. As observed in Table 1, many types of independence and their definitions refer to judicial independence and its guarantees.⁸³ For instance, Bryden notes that "structural independence", which references the legal guarantees of a tribunal to operate at arm's length from the government, has a "family resemblance to the guarantees of judicial independence. . ."⁸⁴ That is, whether the tribunal has financial security, i.e., security of remuneration for its members; administrative independence such that it can carry out its adjudicative responsibilities without improper interference; and sufficient security of tenure for its members.

However, unlike the judiciary, whose independence is the foundation for our legal system, there is no constitutional protection for the independence of regulators (except where rights guaranteed by the *Canadian Charter of Rights and Freedoms* are at stake). While there have been attempts to judicialize tribunals by policymakers, they are creatures of their statute. In making this comparison and observing regulators being outside the realm of judicial independence, many experts note that absolute independence for a regulator in a parliamentary democracy cannot exist.⁸⁵

Additionally, some state that tribunal independence is a "misnomer"⁸⁶ while others note that none of Canada's tribunals or regulators are independent, "not in law, not in fact."⁸⁷

The current jurisprudence surrounding independence and administrative tribunals is provided by the 2001 Supreme Court case, *Ocean Port Hotel Ltd. v. British Columbia*. This case endorses the principle that legislative statute takes precedence over common law principles of natural justice, including principles of independence:

"Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question."⁸⁸

83. It is observed that, in addition to the written words found in the *Constitution Acts 1867 to 1982* that support the independence of the judiciary (see footnote 5 above), constitutional conventions, which comprise an equally important part of Canada's Constitution, include the fundamental principle of judicial independence. This principle constitutes the foundation which reinforces the Rule of Law in Canada. For example, should Parliament repeal the *Supreme Court Act* and eliminate the top court, the Supreme Court of Canada itself could deem the action unconstitutional; thus, the role and jurisdiction of the Court is independent from the executive and legislative branches by convention.

84. Bryden, P. (2003). Structural Independence of Administrative Tribunals in the Wake of Ocean Port. *Canadian Journal of Administrative Law & Practice*, 16, p.2.

85. Harrison, R. J. (2014). Tribunal Independence: In Quest of a New Model. *Energy Regulation Quarterly*, 2(3). Retrieved from <https://www.energyregulationquarterly.ca/articles/tribunal-independence-in-quest-of-a-new-model#sthash.xfbKAWTy.dpbs>

86. Macauley, R. W., and Sprague, J. L. H. (2004). *Practice and Procedure Before Administrative Tribunals*. Carswell, vol 1 at 2-12.28.

87. Ellis, R. (2013). *Presentation at the CBA Annual National Administrative Law, Labour and Employment Law Conference*. Presentation, Ottawa, Canada.

88. *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2 S.C.R. 781, at 794-95 (2001). Retrieved from <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1891/index.do>



Thus, it is the role of the legislature to determine the role and structure of a tribunal, its relationship with the executive and degree of independence best suited to handle its functions.

Legal scholars have provided varying opinions surrounding *Ocean Port* and how the independence of tribunals should be observed. Prior to this ruling, regulatory independence was situated in relation to the judiciary and courts and the independence they were constitutionally granted.⁸⁹ In anticipation of the Supreme Court appeal of *Ocean Port*, Wyman argued that administrative tribunals should not be given the same constitutionally granted independence as courts. She argued that tribunals do not generally address issues upholding constitutional values, which was a primary reason for granting courts independence; and that granting tribunals independence would undermine the government's ability to create non-judicial decision-making bodies to achieve specific public policy outcomes.⁹⁰

Jacobs, while noting that some tribunals do engage in similar decision-making as the courts, given the wide array and diversity of tribunal mandates and functions in economic and social regulatory decision-making, stated that "a model of independence designed for the judiciary may not always be appropriate."⁹¹

The Canadian Bar Association's 1990 task force report further echoes this view that not all tribunals require the same degree of independence as the courts. The report states that it is tribunals' diversity and flexibility in creating varying procedures to accommodate different needs that "must be maintained if these bodies are to serve their intended purposes."⁹²

In accepting that regulators are not like the judiciary, regulatory independence should be viewed on a case-by-case basis. The degree of independence should vary based on the policy or adjudicative functions required of the regulator. In observing the inherent tension between the independence of adjudicative agencies and the necessary accountability mechanisms, and current trends in governance models, Heggie reaffirms this perspective, emphasizing that the form or structure of an agency should follow its function:

"The functions that are performed by adjudicative administrative agencies are complex, diverse and specialized. One size does not fit all. Legislative templates are a blueprint for box tickers that ignore the value of intelligent exercise of discretion in designing a successful agency."⁹³

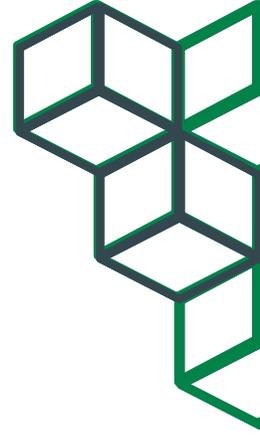
89. Wyman, K. M. (2001). The Independence of Administrative Tribunals in an Era of Ever Expansive Judicial Independence. *Canadian Journal of Administrative Law & Practice*. 14 61.

90. Ibid.

91. Jacobs, L. A. (2007). Tribunal Independence and Impartiality: Rethinking the Theory after Bell and Ocean Port Hotel – A Call for Empirical Analysis. *Dialogue Between Courts and Tribunals – Essays in Administrative Law and Justice (2001-2007)*, p.46.

92. Canadian Bar Association Task Force. (1990). *The Independence of Federal Administrative Tribunals and Agencies in Canada*. Canadian Bar Association, p.10.

93. Heggie, B. (2019). Governance of Administrative Agencies. *Energy Regulation Quarterly*, 7(3). Retrieved from <https://www.energyregulationquarterly.ca/articles/governance-of-administrative-agencies#sthash.pGa4r2xY.dpbs>



Other researchers choose to observe regulatory independence within the context of the pragmatic, day-to-day operations of the regulator itself. The OECD notes that independence “needs to be translated into practice throughout the work and life of a regulatory agency.”⁹⁴ The Institute on Governance references this idea upon examining the CNSC’s regulatory independence:

“It is important to note that the *NSCA [Nuclear Safety and Control Act]* 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.”⁹⁵

Independence should not be viewed as an end in itself, but as a means to achieve the desired public policy end. This end will vary based on several variables including the policy functions, the level of expertise, and stakeholders involved. Only by understanding the regulator’s policy ends and its “operational reality”⁹⁶ can we understand the degree of independence it possesses and how to evaluate it.

94. OECD. (2016). *Being an Independent Regulator*. OECD Publishing, p.3. Retrieved from https://read.oecd-ilibrary.org/governance/being-an-independent-regulator_9789264255401-en#page5

95. Institute on Governance. (2007). *Regulatory independence: Law Practice and Perception: A Report to the Canadian Nuclear Safety Commission*. Canadian Nuclear Safety Commission, p.1. Retrieved from http://publications.gc.ca/collections/collection_2008/cnsc/CC172-39-2007E.pdf

96. Jacobs, L. A. (2007). *Tribunal Independence and Impartiality: Rethinking the Theory after Bell and Ocean Port Hotel – A Call for Empirical Analysis. Dialogue Between Courts and Tribunals – Essays in Administrative Law and Justice (2001-2007)*, p.55.



BOX 2: QUANTIFYING REGULATORY INDEPENDENCE

As observed, most literature on regulatory independence in Canada has focused on legal studies, political historical case studies or pragmatic qualitative assessments of a regulator or type of regulator. As such, understanding regulatory independence has focused on qualitative assessments rather than quantifying independence. However, recent attempts by the OECD have tried to measure and quantify regulatory independence.⁹⁷ As part of its Product Market Regulation Survey, the international organization has measured independence and related indicators such as accountability for countries' economic regulators.⁹⁸

The OECD defines independence as “the degree to which a regulator operates independently and with no undue influence from both the political power and the regulated sectors.”⁹⁹ Independence was measured and scored based on a questionnaire of 77 close-ended questions with three sub-sectors: relationship with the executive, staff and budget. The OECD provided this questionnaire such that the economic regulators examined in each country were given an opportunity to submit joint responses with their respective ministry contact points. Answers scored on a scale from zero (most effective governance arrangement) to six (least effective governance arrangement) and equal weights were assigned to all questions and sub-questions. Scores were then aggregated to provide an overall score. Appendix B observes the governance scores for economic regulators in the energy sector in Canada and select countries.

While the questions and sub-sectors addressed have been observed in the literature to impact the independence of a regulator, the OECD acknowledges several limitations to the questionnaire in measuring governance arrangements and quantifying this variable. First, it is difficult to capture all the political, institutional and market conditions (which play a role in developing regulatory governance) in quantifiable indicators. Second, closed-ended questionnaires and their indicators may oversimplify nuanced governance arrangements. Lastly, there are issues with the study's equal weighing method, which groups components before aggregating them into a final composite. This method has limitations and can distort results. Double-counting may also occur when correlated variables are equally weighted.

Thus, while it is worth observing and reviewing the closed-ended metrics used by the OECD in evaluating regulatory independence, such a review only provides a partial view of regulatory independence.

97. Casullo, L., Durand, A., and Cavassini, F. (2019). *OECD Economics Department Working Papers No. 1564: The 2018 Indicators on the Governance of Sector Regulators – Part of the Product Market Regulation (PMR) Survey*. OECD Working Papers. Retrieved from <https://www.oecd-ilibrary.org/docserver/a0a28908-en.pdf?expires=1597942120&id=id&acname=guest&checksum=B8E7E7EC505498B0B8A5FA6553621312>

98. The OECD observed economic regulators from energy, e-communications, rail transport, air transport and water sectors. For Canada, the regulators examined were the Ontario Energy Board (energy); the CRTC (e-comms) and the Canadian Transport Agency (rail and air transport).

99. *Ibid.*, p. 22.



IS THE AGENCY PERCEIVED TO BE INDEPENDENT?

As observed in Table 1, perceived independence references whether the public, other actors, or the regulator itself, perceive the regulator to be independent with the capacity to make its own decisions. Perceived independence can most commonly be identified through media stories and public controversy surrounding a regulator.

The image of the regulator or tribunal as independent is not just a concern over media optics, however. Rather, the perception of an impartial tribunal plays an integral role in maintaining public confidence in the regulator to deliver and perform its mandate. Jacobs observes that perception of a court or tribunal's independence rests upon the test of reasonable perception, established in the 1978 Supreme Court case, *Committee for Justice and Liberty v. National Energy Board*. This test of reasonable perception sets the standard to determine if such tribunals have "sufficient independence":¹⁰⁰

"If a reasonable, well-informed person who has thought the matter through would perceive the decision-maker to be insufficiently independent or impartial, this perception is enough to render the decision invalid, regardless of whether a lack of independence or impartiality exists in fact. The test of what 'an informed person viewing the matter realistically and practically—and having thought the matter through—' would decide is used to determine if there is lack of independence or impartiality on an individual or institutional sense."¹⁰¹

Jacobs notes issues with the test. Internal details and workings of a tribunal that are determinative to inform the "well-informed person" of a tribunal's independence are not readily available in the public domain, making such a judgement difficult, if not impossible. However, the test does play a valuable role in thinking about perception of independence of an agency.

Scholars have examined regulators in reference to how legislative changes and events affect perceptions of a regulator's independence and public confidence in the regulator.¹⁰² For instance, Matthews' 2017 C.D. Howe Institute report focuses on regaining public confidence and credibility for the National Energy Board with recommendations to fix the Board's functional as well as perceived independence regarding decision-making authority for large-scale pipelines. He notes how both the government and NEB "took actions that were perceived to further undermine the energy regulator's credibility and processes."¹⁰³

100. Jacobs, L. A. (2007). *Tribunal Independence and Impartiality: Rethinking the Theory after Bell and Ocean Port Hotel – A Call for Empirical Analysis. Dialogue Between Courts and Tribunals – Essays in Administrative Law and Justice (2001-2007)*, p.63.

101. *Ibid*, p. 48.

102. Ganley, M. (2020, June 1). *Crisis of Confidence: A Leadership Scandal Threatens the Energy Regulator's Essential Work. Alberta Views*. Retrieved from <https://albertaviews.ca/crisis-of-confidence/>

103. Matthews, L. (2017). *How to Restore Public Trust and Credibility at the National Energy Board*. C.D. Howe Institute, p.4. Retrieved from https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary%20479.pdf



Additionally, Harrison in examining the 2012 NEB amendments, hypothesized how specific legislative changes would impact perceptions of the Board's independence:

“... the reconstitution of the Board as a body that makes recommendations to the ultimate decision-maker – rather than making those decisions itself – could have a subtle, indirect effect on the perception of the Board's independence. Some may believe that, as a body that makes a recommendation to the final decision-maker, the Board could be more susceptible to being influenced by what it perceives to be the likely final outcome.”¹⁰⁴

Thus, when thinking of regulatory independence, a change affecting perceptions of independence, and what the “well-informed person” may think of the independent regulator in question may be just as important as the legislative change itself.

104. Harrison, R. J. (2012-2013). The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory Independence Mean? Should We Pursue It? *Alberta Law Review*, 50(4), p.776.



FEATURES OF INDEPENDENT REGULATORS AND WAYS TO IMPACT REGULATORY INDEPENDENCE

FEATURES OF INDEPENDENT REGULATORS

As noted earlier in this review, important considerations such as the degree of independence will vary based on the policy or adjudicative functions required of the regulator and its ultimate function and mandate (or as Heggie notes, the form or structure of an agency should follow its function).¹⁰⁵ Nevertheless, many organizations and researchers identify general characteristics of a regulator that help establish its independence.

- The IOG, through its own literature review on the subject, outlines three elements among several: (1) legal framework; (2) independence from government and industry stakeholders; and (3) adequate resources.¹⁰⁶
- Berg *et al.* (an article which is a part of the IOG's literature review) describe fairly similar elements, stating that a well-functioning agency needs sufficient resources, an appropriate legal mandate and "clear agency values and operating procedures."¹⁰⁷
- The OECD, in a 2017 report, observes five "essential" dimensions that determine a regulator's *de facto* independence: "role clarity, transparency and accountability, financial independence, independence of leadership, and staff behaviour and culture of independence."¹⁰⁸

Lastly, the International Atomic Energy Agency (IAEA) examined independence of regulatory decision-making in nuclear safety. It observed key features of independence, including:

- "Insusceptibility to unwarranted external influences, but the existence of appropriate mechanisms for external professional dialogue and consultation, with both licensees and independent experts, along with appropriate mechanisms for dialogue with the public;
- Decisions taken on the basis of science and proven technology and relevant experience, accompanied by clear explanations of the reasoning underpinning the decisions;
- consistency and predictability, in relation to clear safety objectives and related legal and technical criteria;
- Transparency and traceability."¹⁰⁹

105. Heggie, B. (2019). *Governance of Administrative Agencies*. *Energy Regulation Quarterly*, 7(3). Retrieved from <https://www.energyregulationquarterly.ca/articles/governance-of-administrative-agencies#sthash.pGa4r2xY.dpbs>

106. Institute on Governance. (2007). *Regulatory independence: Law Practice and Perception: A Report to the Canadian Nuclear Safety Commission*. Canadian Nuclear Safety Commission, p.7. Retrieved from http://publications.gc.ca/collections/collection_2008/cnsc/CC172-39-2007E.pdf

107. Berg, S. V., Memon, A. N., and Skelton, R. (2008). *Designing an Independent Regulatory Commission*. Body of Knowledge on Infrastructure Regulation Retrieved from http://regulationbodyofknowledge.org/wp-content/uploads/2013/03/Berg_Designing_an_Independent.pdf

108. OECD. (2017). *Creating a Culture of Independence: Practical Guidance Against Undue Influence*. The Governance of Regulators, OECD Publishing, p.2. Retrieved from <https://www.oecd.org/gov/regulatory-policy/Culture-of-Independence-Eng-web.pdf>

109. International Nuclear Safety Advisory Group. (2003). *Independence in Regulatory Decision-Making: A report by the International Nuclear Safety Advisory Group*. International Atomic Energy Agency (IAEA), p.3. Retrieved from https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1172_web.pdf



To address challenges and achieve independence, the IAEA identified three measures to assure the regulatory agency is equipped to meet challenges to its independence:

- “The establishment of the legal framework governing regulatory activities and their associated objectives, principles and values, including the legal basis for adequate and stable financing of regulatory activities;
- The establishment and implementation of clearly defined processes for regulatory decision making;
- The establishment and implementation of a clearly defined competence management programme for the regulatory body which includes an internal management programme for human resources and provides the necessary means to secure independent scientific and technical support for the regulatory activities, with international co-operation as an important component.”¹¹⁰

110. International Nuclear Safety Advisory Group. (2003). *Independence in Regulatory Decision-Making: A report by the International Nuclear Safety Advisory Group*. International Atomic Energy Agency (IAEA), p.4. Retrieved from https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1172_web.pdf



WAYS THE GOVERNMENT CAN IMPACT REGULATORY INDEPENDENCE

Tied to these features are the different mechanisms by which regulatory independence can be impacted. The following section notes some of the different ways regulators can have their independence affected by government or other actors as examined in the literature:

The regulator's objectives and mandate: What are the explicit objectives and mandate of the regulator? Does the regulator have multiple, broad objectives or a narrow-focused mandate?

Janisch observes that, within the U.S. context, structural independence is enhanced for regulators when they are given a very broad mandate:

“For instance, the Federal Communications Commission is simply instructed to regulate in the ‘public interest’. As Davis notes, this is the practical equivalent of instructing the agency ‘Here is the problem. Deal with it’. This leaves a regulatory agency very wide scope for the formulation and implementation of policy independent of both Congress and President. Hence fears of the ‘headless fourth branch of government.’”¹¹¹

The final policy decision: Is the regulatory decision (such as approving a project or rate increase) decided by the regulator or does the regulator provide a recommendation on a policy decision to the executive branch/governor-in-council?

The regulator's decision-making process: Is the regulator able to independently act within its procedures such that

regulatory outcomes are independent of undue influence or constraint? This may be through actions such as imposed time limits on making a decision; human resource management, staff hiring and ability to maintain expertise; financial resources; or executive leadership.

Appointments and removal of the regulator's executive and board leadership: The appointments process has been well-examined in the literature, and has been a source of controversy and concern for regulators' effectiveness and independence.¹¹² This includes the extent to which such an appointment occurs as a result of political affiliation rather than expertise and merit in the sector; the transparency of the appointment process; and the process of executive removal and the security of tenure. For instance, in 1990, the National Parole Board chair stated that appointees to the Board were “dangerously inexperienced” and appointed as a reward for their loyalty to the government.¹¹³

Ability to impose directives on the regulator: the government has the authority to impose certain directives on some regulators. Directives may prioritize specific government objectives within the regulator's process and decision-making prior to beginning the regulatory process, or they may be imposed following a regulatory decision, requiring the regulator to re-consider the decision with certain criteria in mind.

The impact of directives on independence depends on the type of directive issued, specifically, whether it is an *ex post* cabinet review of individual decisions or *ex ante* general policy directions. The Law Commission of Canada and the Economic Council of Canada have both previously called for

111. Janisch, H. N. (1978). The Role of the Independent Regulatory Agency in Canada. *University of New Brunswick Law Journal*, 27, p.88.

112. Canadian Bar Association Task Force. (1990). *The Independence of Federal Administrative Tribunals and Agencies in Canada*. Canadian Bar Association.

113. Makin, K. (1990, May 9). Pork barrel appointments to parole board decried. *The Globe and Mail*.



the removal of *ex post* cabinet review of individual decisions in favour of *ex ante* directions:

“As the Council explained, this would focus political accountability where it would be a reality. Pursuing the *ex ante* format would give Ministers and their departments a forum in which to openly advance their policy concerns. It would reinforce the principles of responsible government in that the Cabinet would always eventually prevail, and then be held responsible in the legislature and at the polls. It would maintain the integrity and worth of regulatory agencies, but not at the expense of ultimate political accountability.”¹¹⁴

Additionally, issues may arise with directives due to their legal ambiguity. Janisch has previously observed the ambiguity over directives when analyzing 1977 amendments on Canadian transport and telecommunications regulation:

“... it might be well to clarify the exact legal status of directions as there is at the moment considerable confusion at the federal level as to what exactly is meant by a ‘statutory instrument’ and a ‘regulation’, let alone a ‘direction.’”¹¹⁵

Harrison and Vegh have observed similar issues surrounding the OEB and the Ontario government’s ability to issue ministerial directives.¹¹⁶ These directives can be specific, detailed and imposed retroactively. For instance, directives can require the Board “to hold, or not hold a hearing on certain matters.”¹¹⁷ Harrison observes their impact on undermining regulatory independence:

“At a minimum, in the case of the OEB, the inclusion of such provisions indicates an unwillingness on the part of government to leave the Board to determine independently the means by which the stated policy objectives are to be pursued by the Board. Overall, the scheme reflects a nod by government to independence as a principle, but not where independence might lead to results it does not like.”¹¹⁸

Advisory function of the regulator: To what extent does the regulator act in an advisory function to the executive and its respective minister? As noted earlier, when the NEB was first being debated, there was concern that its function to act in an advisory capacity to the minister would limit its credibility as an adjudicator, and thereby reduce public and institutional confidence in the Board.¹¹⁹

114. Janisch, H. (2012). The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right? *Alberta Law Review*, 49(4), p.797.

115. Janisch, H. N. (1978). The Role of the Independent Regulatory Agency in Canada. *University of New Brunswick Law Journal*, 27, p.118.

116. Harrison, R. J. (2014). Tribunal Independence: In Quest of a New Model. *Energy Regulation Quarterly*, 2(3). Retrieved from <https://www.energyregulationquarterly.ca/articles/tribunal-independence-in-quest-of-a-new-model#sthash.xfbKAWTy.dpbs>; Vegh, G. (2017). *Report on Energy Governance in Ontario: To the Ontario Energy Association and the Association of Power Producers of Ontario*. Ontario Energy Association. Retrieved from https://energyontario.ca/wp-content/uploads/2018/04/Governance_Report_to_OEA_and_APPrO.pdf

117. Harrison, R. J. (2014). Tribunal Independence: In Quest of a New Model. *Energy Regulation Quarterly*, 2(3). Retrieved from <https://www.energyregulationquarterly.ca/articles/tribunal-independence-in-quest-of-a-new-model#sthash.xfbKAWTy.dpbs>

118. Ibid.

119. Harrison, R. J. (2012-2013). The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory Independence Mean? Should We Pursue It? *Alberta Law Review*, 50(4), p.757.



CONCLUSION AND FINAL OBSERVATIONS

This review has examined literature and research surrounding regulatory independence with a focus on the Canadian energy system. It has examined the rationale for independence for regulators and described key moments in the history of regulatory independence, including the formation of the Board of Railway Commissioners and the National Energy Board. It has also outlined some of the different ways to look at independence, such as in relation to the courts and the perception of independence. Finally, the last section has outlined some of the features of independent regulators and ways in which their independence can be impacted.

In light of this review and the examined research, the author makes three final observations:

- 1. Independence is not an end in itself, but a means to achieve a regulator's functional end:** All agencies, regulators and tribunals are different; their unique mandates and regulatory functions in regards to social, economic or quasi-judicial matters are what make each one a distinct entity. While there may be a desire for a 'one-size-fits-all' approach to the level of independence granted to agencies and tribunals (similar to the independence of the judicial branch), this approach does not take into account the diverse functional nuances of the several hundreds of provincial and federal tribunals, commissions, agencies and regulators in Canada. When considering changes to decision-making processes which might affect a regulator's independence, attention must be given to the regulator's functional mandate and improving the mandate's effectiveness, as opposed to the abstract idea of greater or lesser independence.
- 2. Perception of the regulator matters:** In examining issues affecting independence, decision-makers and stakeholders must be cognisant of the perceived independence of the regulator; that is, what would the 'well-informed person' make of a regulator's independence from other stakeholders, at an individual member or institutional level. Such a test is key in determining the public acceptance and confidence of the regulator.
- 3. Independence is not a conceptual silo:** Regulatory independence cannot be discussed exclusively in isolation; any discussion on independence must include important related governance concepts such as political accountability and transparency. Additionally, any discussions of independence must contemplate *how* a regulator is independent (financial security, security of tenure, procedural independence) and *why* a regulator is independent (what can independence do to improve the public interest?).



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APPENDIX A: SELECT EXAMPLES OF CASE STUDIES EXAMINING ASPECTS OF REGULATORY INDEPENDENCE IN CANADA

Independent Agency/ Regulator/Tribunal	Year	Author	Synopsis
Elections Canada	2007/2008	Sossin ¹²⁰	<ul style="list-style-type: none"> Elections Canada CEO issued statement which interpreted new legislation; Prime Minister staunchly opposed CEO's interpretation (2007). Elections Canada prompted civic action seeking reimbursement of election expenses and criminal investigation on criminal financial irregularities under the <i>Elections Act</i> against the Conservative Party; Party sought to undermine Commission's credibility and impartiality alleging partisan motivation behind prosecutions (2008).
Canadian Military Complaints Commission	2007/2008	Sossin ¹²¹	<ul style="list-style-type: none"> Government applied to Federal Court for an injunction to bar Commission from holding public hearings on allegations that Canada turned prisoners over to Afghan security forces knowing they would be tortured. In 2009, government chose not to re-appoint chair of Commission.
Canadian Nuclear Safety Commission	2008	Sossin ¹²²	<ul style="list-style-type: none"> Commission issued regulatory safety decision, shutting down nuclear reactor. The reactor generated two-thirds of radioisotopes used for medical procedures, which caused a shortage of medical material. Government through Parliament resolved medical crisis by overriding regulatory decision, ordering the reactor to restart. Following controversial decision, the government fires the Commission president in the middle of her 5-year term.

120. Sossin, L. (2008). The Puzzle of Independence for Administrative Bodies. *National Journal of Constitutional Law*, 26, 1-23.

121. Ibid.

122. Ibid.



Independent Agency/ Regulator/Tribunal	Year	Author	Synopsis
National Energy Board	2012	Harrison ¹²³	• Analysis of the pre- and post-2012 amendments to the <i>NEB Act</i> .
Canadian Radio-television and Telecommunications Commission (CRTC)	2011	Janisch ¹²⁴	• Examination of government intervention over controversial Usage Based Billing decision by the CRTC in 2011.
BC Hydro/ BC Utilities Commission (BCUC)	2011	Janisch ¹²⁵	• Examination of then-newly elected BC government's BC Hydro efficiency review to address ratepayer electricity affordability in relation to BC Hydro's rate increase application to the BCUC.
BC Ferry Services	2012	Janisch ¹²⁶	• Examination of legislative amendments limiting rate increases for ferry routes and requiring ministerial approval for all route rate increases or changes (previously, these decisions were taken by independent BC Ferries Commissioner).
Ontario Energy Board	Mid-2000's - 2017	Vegh ¹²⁷	• Examination of the Ontario Energy Board, the Ontario Long Term Energy Plan, and use of policy directives by the provincial government.
Canadian Energy Regulator	2020	Harrison <i>et al.</i> ¹²⁸	• Analysis of the structure and independence of the new Canadian Energy Regulator.

123. Harrison, R. J. (2012-2013). The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What Does Regulatory Independence Mean? Should We Pursue It? *Alberta Law Review*, 50(4), 757-782.

124. Janisch, H. (2012). The Relationship Between Governments and Independent Regulatory Agencies: Will We Ever Get It Right? *Alberta Law Review*, 49(4), 785 – 820.

125. Ibid.

126. Ibid.

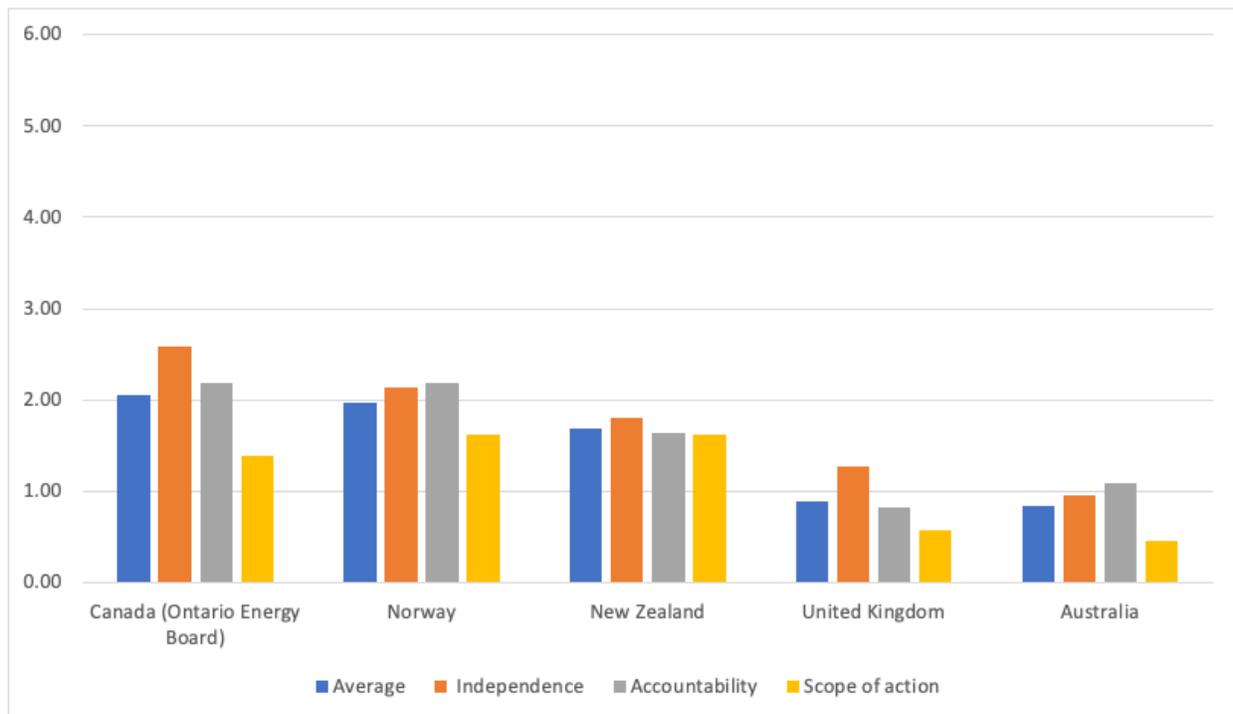
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APPENDIX B. OECD GOVERNANCE SCORES FOR CANADA AND SELECT COUNTRIES IN THE ENERGY SECTOR

(0 = most effective governance arrangement, 6 = least effective governance arrangement)¹²⁹



Note: Average refers to the average of the three scores (independence, accountability and scope of action)

¹²⁹ Casullo, L., Durand, A., and Cavassini, F. (2019). 2018 *Indicators on the Governance of Sector Regulators* [Excel Database]. OECD Working Papers. Retrieved from <https://www.oecd.org/economy/reform/indicators-of-product-market-regulation/>



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