The Governance of Railway Safety in Canada

A Report to the Railway Safety Act Review Advisory Panel

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The Governance of Railway Safety in Canada:
A Report to the Railway Safety Act Review
Advisory Panel

Executive Summary

This report is one of a number of studies commissioned during the summer of 2007 to support the work of the Railway Safety Act Review Advisory Panel. The Terms of Reference state that “This study will examine how federal and provincial roles and responsibilities for rail safety are exercised in Canada. The study will identify any issues with respect to the governance regime and recommend possible solutions.”

Governance in a broad sense is the process whereby organizations make significant decisions, and determine whom they involve in the process and how they render account. In this case, within the framework of the Railway Safety Act and other relevant legislation, how are the roles of the various players defined, how do the players interact, how are decisions made and implemented, who is accountable for what to whom, and how well do the arrangements serve the objectives set out in the Act?

The study was based primarily on a series of interviews with representatives of the railway industry, unions, provinces, and the federal departments and agencies involved in railway safety. In addition, we reviewed submissions to the Panel, research studies commissioned for the Review, and other appropriate documents.

After providing context on railway safety and the industry in Canada, the paper outlines the points of view of those we interviewed. It then provides an analysis of the principal issues and offers our assessment and recommendations regarding the governance structure of railway safety in Canada. This summary provides only the highlights of issues and recommendations. Full recommendations are gathered in Annex D.

Context

Canada’s railways have undergone a massive transformation in the past 20 years. The move to deregulate transportation services has allowed the national railways to close some lines and to transfer thousands of kilometres of track to short line railways, many of which come under provincial jurisdiction. Between 1996 and 2005, railway employment declined by 25 per cent but the number of carloads increased by 67 per cent. Trains grew longer and heavier and the major railway companies prospered.

The Railway Safety Act (RSA), which came into force in 1989, created a new approach to railway safety. The Act made railway companies responsible and accountable for the safety of their own operations, while giving the regulator the power to protect public and employee safety and the environment. It gave a major role to the railway industry in the development of operating rules for approval by the Minister. The rule process was intended to be quicker and more flexible than the creation of formal regulations.
In the past few years there have been suggestions that employees and infrastructure are being pushed too hard by railway operations. Derailments involving loss of life, environmental damage and impacts on local communities have led to calls for action to improve safety. Meanwhile, Transport Canada is perceived to have instituted a more directive approach to rule-making; some see this as a retreat from the collaborative spirit of the RSA while others see it as a needed redressing of the balance.

**Provincial Roles in Railway Safety**

Provincial rail safety regimes are harmonized with the national Railway Safety Act through three types of arrangement:

- Quebec and Saskatchewan use a consultation model, choosing the manner in which the various provisions of their own safety regimes will reflect the RSA system.

- British Columbia, Alberta, Manitoba, New Brunswick and Nova Scotia incorporate RSA provisions, regulations and rules into their systems under provincial Acts.

- Ontario utilizes the federal rail safety system through an agreement which permits Transport Canada to inspect the railways and take most enforcement actions directly.

**The Interviews**

The general view was that the standard of railway safety in Canada is good but could be better. The mainline derailments of the past few years were seen to represent a troubling problem that needs to be addressed.

Most of those we talked to favoured the cooperative, performance-based approach to railway safety embodied in the *Railway Safety Act*, but a minority would prefer a return to a stronger, more prescriptive role for Transport Canada.

Many suggested that the rail safety system needs to be governed in a more open, transparent and consultative way – and that it needs to be more attentive to issues of public safety and the environment. They saw a need for the approach of Transport Canada to become more consistent with the collaborative spirit of the *Railway Safety Act*.

Railway industry people saw the principles of the *Railway Safety Act* as sound but were concerned about the ways in which the Act is now applied by Transport Canada. They are looking for a more open, consistent and accountable process.

Unions generally called for Transport Canada to play a more directive role in the development and application of safety rules, to listen more attentively to their safety-related concerns and to take necessary follow-up action with railway companies.

Provincial attitudes to the current federal-provincial relationship varied considerably. All were in favour of a harmonized approach and all wanted federal input to their own safety efforts. But there were wide differences in satisfaction with current working relations. All provinces said that serious railway accidents, regardless of whether the railway is federally or provincially regulated, impact directly on the provincial government. All said
that they want to be consulted in the formulation of rules, as these may have a considerable impact on the railways under their jurisdiction.

The Transport Canada people were concerned about getting the right balance between industry-led rule-making and the assertion of the Department’s responsibility for safety.

**Issues and Recommendations**

**A. Improving the Government/Railway Relationship**

The *Railway Safety Act* is founded on the concept of a strong and cooperative relationship between government and the railways in the pursuit of safety, with each responsible for doing what it can do best. Making the relationship between the regulator and the railway operators work properly requires clearly defined and mutually understood roles and responsibilities, as well as openness, trust and respect on both sides.

**Issue 1: Achieving the Cooperative Spirit of the Railway Safety Act**

*How to develop a more open, transparent, respectful and trusting relationship between the railway industry and government in the cooperative spirit of the Railway Safety Act.*

Our conclusion was that this is not a matter for statutory change or reinforcement; the Act is clear on the fundamentals. We consider that the Department needs to take the initiative and recommend that Transport Canada, if it is to be respected and trusted as a partner with the railways in an open, collaborative regulatory process of the kind set out in the *Railway Safety Act*, comport itself accordingly.

**B. Strengthening the Rule-making Process**

The *Railway Safety Act* seeks to identify and manage safety issues by allowing industry to lead the process of rule-making, with the regulator holding the power of approval. Despite the reservations we heard, we start from the premise that rule-making has proved overall to be successful and constitutes a key feature of the RSA approach.

**Issue 2: Creating a More Transparent and Open Decision Process**

*How to improve the transparency and openness of the Transport Canada decision process, to ensure that it is explicitly evidence-based, and to preserve the flexibility and other advantages of an industry-led rule development process.*

We recommend that the *Railway Safety Act* be amended to provide for increased transparency in decision-making on proposed or potential railway safety rules by imposing on the Department an obligation to explain its decisions. This would reinforce the RSA and make the concepts of collaboration and participation meaningful.

**Issue 3. Clarifying and Expanding Consultation**

*How to revise and clarify the requirements for consultation in rule-making to ensure that railways, unions and provinces (and possibly other interested parties) have opportunities at key stages to provide input to railway company rule-making and related Transport Canada decision-making.*

We recommend that the essential place of the unions and the provinces in the rule-making and rail safety regime be affirmed and a requirement for meaningful and timely
consultation with them be established. This could be done by an amendment to the RSA, new regulations under the Act or a protocol developed by Transport Canada.

**Issue 4: Reviving the Rail Safety Consultative Committee (RSCC)**

*How to revive the RSCC and make it work effectively (or whether to cancel it entirely).*

We concluded that the RSCC should be revived and used as a significant element of the consultative process. We recommend that the RSCC become a smaller, more tightly-focused body, meeting regularly as a key mechanism for discussion of safety issues.

**Issue 5: Improving the Drafting of Rules**

*How to improve the quality and consistency of rules without losing the advantages of what is intended to be a streamlined approach.*

We recommend that Transport Canada make arrangements to have draft rules scrutinized by competent regulatory lawyers to ensure that they meet acceptable standards of clarity and consistency with the existing regulatory regime.

**C. Enhancing the Effectiveness of Transport Canada**

**Issue 6: Enhancing the Capacity of Transport Canada Rail Safety**

*How to acquire the financial and human resources to build the capacity of Transport Canada in NHQ and Regions to manage a modern safety system.*

We offer recommendations intended to remedy the current and anticipated shortage of experienced and skilled people within the Rail Safety Directorate and regional offices of Transport Canada to manage a modern safety system, including provision of inspection services to provincially regulated railways.

**Issue 7: Strengthening the Risk Assessment/Management Approach**

*How to move the railway safety system towards a stronger emphasis on risk assessment and risk management.*

We recommend that high priority be given to recruiting and developing the analytical and management skills necessary for a modern risk-based safety management system.

**Issue 8: Improving Oversight and Auditing**

*How to ensure that Transport Canada audit and oversight of safety management systems (SMSs) reflect the best practices of transportation safety and the appropriate professional auditing standards.*

We recommend that Transport Canada review audit practice by the Railway Safety Directorate to this end; we understand that such work is already under way.

**Issue 9: Providing Effective Functional Direction to Regions**

*How Transport Canada can provide clear and effective direction to ensure consistent application of safety policy across Canada, while allowing its regional offices flexibility to adapt to the requirements of different railway operations, and the vagaries of geography, economics and provincial policy.*
We concluded that there was a need for greater communication and consultation in both directions. We recommend that the Railway Safety Directorate more fully assert its existing responsibility to provide functional direction to regions, allowing a reasonable degree of leeway within the framework but holding them accountable for any regionally-based variation from national policy.

**Issue 10: Rationalizing the Powers of Railway Safety Inspectors**

*How to regularize and clarify the delegation of power to Railway Safety Inspectors while preserving their role in dealing with critical safety issues.*

Regarding the accountability of Railway Safety Inspectors, it was suggested that the way in which their powers are defined directly in the *RSA*, rather than being delegated via the Minister and senior officials creates problems. There were also concerns about the consistency with which the powers are exercised across Canada.

We recommend that Transport Canada address this situation by seeking legal advice on whether the RSA should be amended. We also recommend that Transport Canada develop a framework of national policy and guidelines for Railway Safety Inspectors.

**Issue 11: Avoiding Unnecessary Delays in the Regulatory Process**

*How to deal with long delays in some regulatory processes.*

While recognizing that policy process may require years for the many conflicting interests to be heard and addressed, we recommend that Transport Canada take steps to ensure that it is delivering the regulations for which it is responsible in a timely fashion.

**D. Clarifying Roles and Relationships of Federal Players**

**Issue 12: Redefining Roles for Data Collection and Analysis**

*Whether there is a need to change the respective responsibilities of Transport Canada and the Transportation Safety Board with regard to data collection and analysis.*

We recommend that Transport Canada create its own data collection and analysis center for the purposes of effective oversight and regulation of safety management systems (SMS), and that, to the extent possible, Transport Canada and the TSB harmonize their data requirements. Also, that Transport Canada collect data in a more regular manner and share the results of data analysis more fully and freely.

**Issue 13: Clarifying Roles in Applying the Canada Labour Code**

*Whether there a need to clarify or adjust responsibilities between Transport Canada and Human Resources and Social Development Canada) with respect to application of the Canada Labour Code Part II, or to extend the role of Transport Canada in this area to include non-operating railway personnel (e.g., track maintenance crews).*

We recommend that Transport Canada Rail Safety Branch and HRSDC Labour Program be asked to review their arrangements in consultation with the relevant unions and railway companies and make any necessary changes to ensure full and appropriate coverage of railway workers, both on-board and off-board trains.
**Issue 14. Whether to Replace the CTA Certificate of Fitness**

Whether to shift from the current Certificate of Fitness system for federally regulated railways to an Operating Licence approach that would require safety-related reviews and inspections and that could result in license suspensions in case of serious violations.

Our view is that the lack of a requirement for a substantive review of the safety management plans of a new railway represents a potentially significant gap in the safety system. We were less convinced that replacing the Certificate of Fitness approach would add greatly to the regulator’s ability to improve safety in Canada’s railways.

We recommend that Transport Canada adopt a policy of conducting a thorough review of the Safety Management System of any new railway, prior to approving the start of operations under the SMS Regulations.

**E. Improving Federal-Provincial Cooperation**

**Issue 15: Making Diverse Provincial Rail Safety Arrangements Work**

Whether the current variation in arrangements between provinces detracts from the effective harmonization of federal and provincial railway safety responsibilities, and if so, what can be done to improve the situation.

We recommend that rather than seeking to improve the harmonization of railway safety through changes in federal-provincial arrangements, the Panel focus on how Transport Canada can make the existing arrangements work more effectively.

**Issue 16: Improving the Federal-Provincial Working Relationship**

How to ensure that the needs and concerns of provincial regulators are taken adequately into account and addressed by Transport Canada.

We recommend that Transport Canada institute regular consultations with provinces on all matters to do with rail safety affecting provincially-regulated railways and that the Federal-Provincial Working Group on Railway Safety (FPWGRS) be used more deliberately as an information-sharing and consultative forum.

**F. Protecting the Public Interest and the Environment**

**Issue 17: Fulfilling the Commitment to Public Safety and the Environment**

How best to ensure that the RSA commitment to “promote and provide for the safety of the public and ... the protection of ... the environment” (s.3) is effectively addressed.

There were suggestions that the RSA might be made more explicit in this area. We did not see a need for a new and separate initiative on these matters. Rather, we recommend that Transport Canada give explicit priority to public safety and protection of the environment in its implementation of the RSA and undertake consultations on the matter, including through a revived Railway Safety Consultative Committee.

**Conclusion**

To address the governance issues identified in this study, the companies and the regulator, together with other concerned parties such as the provinces and the unions,
need a shared understanding of their roles, responsibilities and desired relationships under the *Railway Safety Act*. 
The Governance of Railway Safety in Canada: A Report to the Railway Safety Review Panel

1. Introduction

In December 2006, the government announced the launching of the Railway Safety Act Review to improve railway safety in Canada and promote a safety culture within the railway industry while preserving and strengthening the vital role this industry plays in the Canadian economy. The Minister of Transport, Infrastructure and Communities established a four-member Railway Safety Act Review Advisory Panel to conduct independent study and analysis, undertake consultations, and prepare a report with findings and recommendations.

As part of its Review process, the Advisory Panel has commissioned a number of independent studies of key subjects to complement public consultations. These studies address subjects ranging from the overall legislative framework, through aspects of the system such as safety management systems, to a case study of the development of one particular set of operating rules. Our paper seeks to address a crucial aspect of railway safety: how the system is governed.

The purpose of this study is set out in the Terms of Reference, key portions of which are included as Annex A to this paper: “This study will examine how federal and provincial roles and responsibilities for rail safety are exercised in Canada. The study will identify any issues with respect to the governance regime and recommend possible solutions.”

Governance in a broad sense is the process whereby organizations, or interacting groups of organizations, make significant decisions, and determine whom they involve in the process and how they render account.1 In other words, within a certain framework (in this case the Railway Safety Act and other relevant legislation), how are the roles of the various players defined (explicitly or otherwise), how do the players interact, how are decisions made and implemented, who is accountable for what to whom, and how well do the arrangements serve the objectives set out in the Act?

Thus this paper is not about the substantive issues of railway safety per se, but about how those issues are addressed by the safety system and its players.

The basis for the study was a series of interviews conducted during the summer of 2007 with representatives of the railway industry, unions, provinces, and the federal departments and agencies involved in railway safety. A full list of those interviewed is included as Annex B, while Annex C provides the questions used in the discussions. We also reviewed relevant portions of submissions to the Panel and draft versions of the other research studies commissioned for the Review, in addition to various pieces of legislation, regulations, policies, etc. of federal and provincial governments.

The remainder of the paper is structured as follows:

**Section 2** provides context on railway safety and the recent evolution of the railway industry in Canada.

**Section 3** provides a brief overview of the Canadian safety regime and its players.

**Section 4** summarizes the main points of view in relation to safety and its governance expressed by those we interviewed.

**Section 5** identifies the principal issues, presents our assessment of the governance structure of railway safety in Canada, and provides recommendations for addressing the issues.

**Section 6** offers a brief conclusion.

For easy reference, the recommendations of this study are gathered in Annex D.
2. The Rail Safety Context

Canada’s railways have undergone a massive transformation in the past 20 years. Their business had been evolving for decades, but regulation under the old Railway Act inhibited structural change. Finally, as part of a long-term trend to deregulation of transportation, the Canada Transportation Act of 1996 facilitated a major restructuring that was already under way. It allowed the national railways to close some lines and to transfer thousands of kilometres of track to short line railways, many of which came under provincial jurisdiction.

Between 1996 and 2005, railway employment declined by 25 per cent but the number of carloads originating from Canadian railways increased by 67 per cent. Trains grew longer and heavier and the major railway companies prospered.

Today there are approximately 90 railways operating in Canada under federal or provincial jurisdiction, but only two, Canadian National (CN) and Canadian Pacific (CP), are national carriers.

The Railway Safety Act (RSA) came into force in 1989 as part of the policy shift to deregulate the Canadian transportation system. Under the RSA, Transport Canada was given responsibility for overseeing railway safety, while subsequently the Canadian Transportation Agency and the Transportation Safety Board were re-established under separate Acts to address, respectively, the economic regulation dimension and accident investigation responsibilities for the full range of transportation services.

The basic principle introduced by the RSA was that railway companies must be responsible and accountable for the safety of their own operations, while the regulator must have the power to protect public and employee safety and the environment. A key provision of the Act reflecting this principle gave a major role to the railway industry in the development of operating rules that could be legally recognized through approval by the Minister of Transport. Such rules were adaptable to the needs of different railways and could be developed far more quickly than regulations, the formal analytical and consultative processes which often took years to complete.

Provisions of the RSA called for a review after five years, and this was undertaken in 1994. After further internal review, the Act was amended in 1999. Among the more important changes at that time were provisions for railways to implement safety management systems and for the greater involvement in the rule-making process of relevant associations and organizations. In particular, the important role played by unions and others in the achievement of railway safety was recognized by giving them a consultative opportunity in the rule-making process. Concurrently, the primary emphasis of Transport Canada with respect to compliance monitoring shifted from direct inspection to auditing the implementation of company safety management systems.

By 2002, the RSA was well established and railway safety systems seemed to be developing steadily. Two major issues emerged about this time, however. First, as noted

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above, the railway industry was undergoing a major transformation in search of operating efficiency and enhanced profitability. Many outside the companies were concerned that both employees and infrastructure were being pushed too hard by new types of operation. Moreover, one of the two national carriers – CN – was generally perceived by many to be taking a new, more legalistic and less collaborative approach to relations with the regulator. In the same period, there were several major derailments involving loss of life, significant environmental damage and high profile impacts on local communities. These led to calls for something to be done about railway safety, even though, by some measures, overall accident rates were down.

Second, the Transport Canada Rail Safety Directorate was undergoing both reorganization and restaffing at senior levels as a result of the retirement of many of those who had created the RSA approach. New management, apparently seeing problems in the way the system was operating, reversed some key decisions arrived at through the cooperative process and instituted a more directive approach to rule-making in certain areas. In the eyes of many industry observers, what happened in the period from about 2002 to the present day reflects a partial retreat by the Department from the collaborative spirit of the RSA and a return to something of the more prescriptive regulatory approach of a previous era. Others, however, see it as a needed redressing of the balance.

This is the context in which the current review of the RSA was launched.
3. The Rail Safety Regime – Players and Roles

Federal Departments and Agencies

Transport Canada (TC)
The Rail Safety Directorate is responsible for developing and implementing policies, regulations and services, including overall administration of the Railway Safety Act. Of particular importance for our current study in this regard is its management of operating rules developed and applied by the railway industry.

The Transportation of Dangerous Goods Directorate administers the Transportation of Dangerous Goods Act, which applies to all modes of transport throughout Canada. The Act governs the containment, handling, offering for transport, and transporting of dangerous goods.

The Surface Branches in Transport Canada’s Regional and District Offices are responsible, under the functional guidance of the national directorates, for railway safety and the transport of dangerous goods. Their services include inspections and audits under the respective acts, emergency response planning, and public information and education. These offices are the primary point of contact on federal railway regulation for provincial transportation authorities.

The Railway Relocation and Crossing Act, administered by the Rail Safety Directorate, is intended to facilitate relocation of railway lines or re-routing of railway traffic in urban areas, and may therefore have safety implications.

Transport Canada Rail Safety at the regional and district level provides inspection services to provinces on a contractual basis.

Canadian Transportation Safety Board (TSB)
The independent Transportation Safety Board (TSB) was created under the Canadian Transportation Accident Investigation and Safety Board Act to advance safety by conducting accident investigations for the full range of transportation modes under federal jurisdiction.

The TSB:

- conducts independent investigations, including public inquiries, into selected transportation occurrences, makes findings as to their causes and contributing factors; and identifies safety deficiencies;
- makes recommendations designed to eliminate or reduce any such safety deficiencies; and
- reports publicly on its investigations and related findings.

The TSB also provides services and advice to provincial authorities with respect to accidents and incidents on railways under their jurisdiction.
TSB Regulations require that accidents and incidents be reported to the Board. The resulting statistics are published in monthly and annual reports.

**Canadian Transportation Agency (CTA)**

The Canadian Transportation Agency (CTA) was created by the *Canada Transportation Act* in 1996 to deal with issues of economic regulation, market-entry and dispute resolution for the whole spectrum of transport modes. The CTA is an independent, quasi-judicial administrative tribunal reporting to Parliament through the Minister of Transport. The CTA has regulatory powers over economic matters such as licensing, cost apportionment, and competitive access.

While it has a limited role in railway safety, the CTA is responsible for issuing the Certificate of Fitness required for the operation of a railway under federal jurisdiction. The CTA also addresses various issues relating to level crossings and right of access for owners of land adjoining railways, areas of potential safety concern.

**Human Resources and Social Development (HRSDC) – Labour Program**

Part II of the *Canada Labour Code* (CLC II) relates to occupational health and safety and seeks to reduce workplace injuries and accidents. The Code applies to federally regulated workplaces, including interprovincial and international railways.

The Labour Program of HRSDC enforces CLC II and the Canada Occupational Health and Safety (COHS) Regulations for off-board employees such as those performing track maintenance and car and locomotive repairs. For on-board employees, CLC II and the On Board Train Occupational Health and Safety Regulations are delegated to Transport Canada Rail Safety for enforcement under a memorandum of understanding between the two departments.

**Other Federal Players and Roles**

Fisheries and Oceans Canada is responsible for administering the *Navigable Waters Protection Act*, as well as the *Fisheries Act*. These Acts come into play in connection with railway safety issues related to navigation or the environment.

Environment Canada is responsible for the *Canadian Environmental Protection Act, 1999*, which concerns “pollution prevention and the protection of the environment and human health in order to contribute to sustainable development.” The department may therefore be involved in safety-related issues involving spills or other environmental incidents.

**Provincial Roles in Railway Safety**

Railways have traditionally been viewed as an area of primarily federal jurisdiction, but the spin-off of track by the major carriers in the 1990s led to the creation of many short lines that, because they operated within a single province, fell within provincial jurisdiction. Accordingly, over the next decade those provinces with railways – that is, all except Newfoundland and PEI – took steps to create the legislation necessary for railway regulation and to link their regimes to the federal *Railway Safety Act*. 

*The Governance of Railway Safety in Canada*
As part of this effort, a federal-provincial working group was established in 1994 to support harmonization of federal and provincial regulation of railways under their respective jurisdictions. Subsequently, under the Federal-Provincial Regulatory Regimes Harmonization Project, the Council of Deputy Ministers of Transport agreed to create joint databases on regulatory requirements and on accidents and incidents. It also established principles of federal-provincial consultation on regulations.

From these efforts there emerged three basic types of federal-provincial arrangements for the harmonization of railway safety.

- Quebec and Saskatchewan operate on a consultation model, under which they choose the manner in which the various provisions of their own safety regimes will reflect the RSA system. Saskatchewan, for example, uses a combination of powers in its Act and guidelines to regulate shortlines, and does not use regulations as such.

- British Columbia, Alberta, Manitoba, New Brunswick and Nova Scotia incorporate RSA provisions, regulations and rules into their own regulatory systems under provincial Acts, generally through regulatory means. They also contract inspections to Transport Canada.

- Ontario describes itself as the province which most fully utilizes the federal rail safety system in order to avoid duplication of effort. A federal-provincial agreement under the Ontario *Shortline Railways Act, 1995* specifically stipulates that federal services will be provided in accordance with the federal regulatory regime. The agreement further permits Transport Canada to inspect the railways under Ontario jurisdiction and take most enforcement actions directly. The Ontario Northland Railway (ONR) is an exception and is essentially self-regulating.  

### Railways

In total there are approximately 32 federally regulated railways in Canada. These operate under a certificate of fitness issued by the CTA and are subject to the *Railway Safety Act*.

The two national railways, Canadian National and Canadian Pacific, account for about 75% of the total 48,000 km of track. VIA Rail operates passenger services using its own locomotives and cars over tracks owned by CN and CP, as well as various short lines and some of its own track. Other federally regulated railways include those that cross provincial or international borders, including extensions into Canada of U.S. railways.

Provincially regulated railways total over 50 and include shortlines (mostly spun off from the national carriers in the past 15 years), as well as industrial railways, recreational lines, and commuter rail operations.

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3 The Ontario Northland Railway is governed by the *Ontario Northland Transportation Commission Act*, The commission in turn reports to the Ministry of Northern Development and Mines of Ontario. The Act does not provide for safety regulations, so railway management adopts safety criteria from various sources, such as CN and CP operating instructions and TC safety standards. Consequently, while it has a defined safety policy, the ONR has no independent safety review or audit process.
The Railway Association of Canada (RAC) represents some 60 Canadian railways. Members include freight, tourist, commuter, and intercity operations. The RAC seeks to promote the safety, viability, and growth of the railway industry within Canada.

**Unions**

Unions have since the 19th century played an important role in railway safety. Canadian railway workers are represented by four main trade unions:

- The Teamsters Canada Rail Conference (TCRC) was created in 2004 from the Brotherhood of Locomotive Engineers. Conductor, trainmen and yardmen subsequently joined the TCRC, as did maintenance workers and traffic controllers, for a total of approximately 10,000 members.

- United Steelworkers represents some 3200 CN track workers plus a range of workers at other railways.

- The United Transportation Union (UTU) represents some 2800 conductors and yard workers at CN.

- The largest private sector union in Canada, the CAW (Canadian Auto Workers) has a total of 11,500 members in the rail transportation sector working for CP, CN, VIA and ONR in a wide range of jobs, including maintenance, ticket sales, clerical and on-board services.
4. What We Heard in the Interviews

**Overall**

Nearly everyone we talked to had a broadly similar view of railway safety in Canada – that it is relatively good (some said very good), but it could be better. In particular, there was a general view that the mainline derailments of the past few years represent a troubling problem that needs to be addressed. And many people mentioned the record of one railway company – Canadian National – in this context.

There was widespread concern that, while the total number of accidents may be declining, the number of accidents with severe consequences for the safety of the public, employees and/or the environment is growing. The Wabamun Lake accident was often mentioned in this regard.

Longer, heavier freight trains and increasing volumes of traffic were seen as imposing greater stresses on track; there was considerable concern that not enough is being done systematically to monitor and maintain the railway infrastructure.

Another common (but not universal) view was that companies are operating with fewer and fewer employees and that those employees are being pushed hard in all areas of railway operation. We were frequently told that much expertise has been lost in the consolidations and downsizing of the last decade, with the Cheakamus accident repeatedly cited as an example.

Most of those we talked to favoured the cooperative, performance-based approach to railway safety embodied in the *Railway Safety Act*, but a significant minority expressed serious doubts and indicated that they would prefer at least a partial return to a stronger, more prescriptive role for Transport Canada as the regulator.

All of these views have implications for the governance of railway safety. Many people suggested that the rail safety system needs to be governed in a more open, transparent and consultative way – and that it needs to be more attentive to issues of public safety and the environment. There were calls for more effective use of existing consultative mechanisms, such as the Railway Safety Consultative Committee and the Federal-Provincial Working Group on Railway Safety. Many people saw a need for stronger oversight and/or expertise on the part of Transport Canada, whether they supported the current RSA philosophy or were looking for a return to a more prescriptive regulatory approach. And many saw a need for Transport Canada to change its approach to railway safety to be more consistent with the collaborative spirit of the *Railway Safety Act*.

**From the Railway Industry**

The railway industry people we talked to, including representatives of CN, CP, VIA Rail and the Railway Association of Canada, indicated that while competitive pressures make it imperative that Canada’s railways continually increase the efficiency of their operations, safety is and must always be a corporate priority.
All clearly supported the industry-led rule-making approach of the *Railway Safety Act*, arguing that those who run the railways are in the best position to understand how to do so more safely. They saw rules as generally preferable to regulations in most situations, not only because rules can address the particular circumstances of each railway, but also because they can be developed and amended much more expeditiously. They offered examples where major sets of rules had been thoroughly overhauled in little over a year by contrast with regulatory processes that are still incomplete after more than a decade.

There were, however, major concerns about the manner in which Transport Canada has in recent years been managing the process and applying the rule-making provisions of the *Act*. They saw the Department as excessively directive in its approach to industry rule-making, not ready to discuss issues and explore possibilities before issuing a ruling, and inclined to impose costly conditions on the implementation of rules without discussion.

In short, the railway industry people saw the principles of the *Railway Safety Act* as sound but they were concerned about the ways in which the *Act* is now used and their own role interpreted. They were looking to Transport Canada for what they described as a more open, consistent and accountable process, in line with the spirit of the *RSA*.

**From the Unions**

The unions indicated that safety issues have always been a large part of their *raison d’être* and that they would like to play a bigger role in the rule-making process. However, no clear consensus emerged in the interviews about how this might be done. Unions stressed the important role currently played by their representation on health and safety committees, but some said they would need additional resources from government to play a more active role in the formulation of rules.

An important consideration is that there are four main unions involved in Canada’s railway system, with interlocking jurisdictions for various types of workers and with potentially different interests. Moreover, each union must accommodate the varying interests of their own locals and try to arrive at a national position, at least with respect to the major railways. As well, the unions share with the railways a tension between economic and safety considerations, in that their members may be tempted to cut corners in response to pressure to get the train rolling or because their job or income may be affected.

We heard from some unions strong views about the need for Transport Canada to play a more directive role in the development and application of rules. We also heard that Transport Canada was not sufficiently open to reports by unions alleging failures on the part of the railways to follow existing rules and regulations.

**From the Provinces**

There were several common themes in what we heard from all or most of the provincial representatives, though provincial approaches to the regulation of safety and their attitudes to the current federal-provincial relationship varied considerably.

All were in favour of a harmonized arrangement for the management of safety-related matters pertaining to railways under federal jurisdiction and those within provincial areas.
of responsibility. And all wanted federal input to their own safety efforts, including financial assistance, particularly in the area of crossing upgrades. But there were wide differences when it came to the nature of the federal-provincial arrangements themselves, and varying degrees of satisfaction with the current support received from Transport Canada. Some provinces are ready to engage closely in rail safety issues and to devote significant resources to this area, whereas others, while they care a great deal about the effectiveness of the rail safety system, would prefer minimal direct involvement.

All provinces, however, say that serious railway accidents, regardless of whether the railway is federally or provincially regulated, impact directly on the provincial government. People look to the province first when it comes to matters of public safety and environmental protection. Hence accidents like those at Wabamun Lake and Cheakamus, which cause major spills into lakes or rivers, and derailments that involve dangerous goods in populated areas, are a matter of intense public and provincial interest and raise concerns about working relationships between the provincial authorities and both Transport Canada and the major railways.

Several said that the rules and regulations under the Railway Safety Act that are provided by Ottawa for adoption by provinces are not always well aligned with the realities of short lines, tourist operations and other railways under provincial jurisdiction, many of which have limited resources and a precarious economic situation. For example, some of the staffing requirements developed for mainline railways are not necessary and can be excessively costly for small operations. Likewise, many of the rules are redundant for industrial rail operations that may not even use locomotives. Some said that Transport Canada had not been helpful in addressing such issues and that harmonization had fallen well short of expectations in this area, but others were more positive.

An issue of concern on which virtually all provinces commented was that they are not consulted in the formulation of rules, even though these may have a considerable impact on the railways under their jurisdiction. Rather, they are simply informed when rules have been approved. All would like to see this changed as part of a more consultative overall approach. Several are looking for more use of the Federal-Provincial Working Group on Rail Safety, while others mentioned the need to involve other stakeholders at the local and municipal level and mentioned revival of the Railway Safety Consultative Committee as a possible mechanism.

The whole area of crossing safety is a matter of great concern to provinces; it affects most railways, whether under federal or provincial jurisdiction. One set of issues in this area relates to federal grants for the upgrading of crossings under section 12 of the Railway Safety Act, as well as the possibility of reintroducing grants for grade separation under section 13. Although we cannot discuss such funding issues in this study, there is a link to governance issues in that provinces suggested that long delays experienced in completing new crossing regulations (RTD 10) are at least in part attributable to federal inability to meet the anticipated cost of implementation.

**From the Federal Players**

It is hard to generalise about the various views of the key Transport Canada people to whom we talked, but one could say that they were all concerned about getting the right
balance between industry-led rule-making and the assertion of the Department’s responsibility for safety. There was a sense on the part of some that perhaps the industry had been given too free a role in earlier years and that now was the time to tighten the reins to a certain extent; views varied on how tight they should be. There were also concerns, and varying views, about how best to achieve consistency in the interpretation and application of rules and policies across regions.

Finally, lack of resources, both financial and human, to carry out the Transport Canada rail safety mandate was a matter of widespread concern within the Department and elsewhere. There was a general sense that the ability of Transport Canada to create and manage an effective railway safety regime is limited by a shortage of the right people (and the financial resources to support them). Replacing those who are retiring and getting people with the right skills, experience and attitudes to deal effectively with new approaches such as safety management systems and risk management is seen as a critical and difficult challenge.

What we heard from the other federal players (CTA, TSB, Environment Canada, HRSDC-Labour Canada) shed important light on matters of rail safety governance, but could be summed up for now by saying that these institutions appear to know their roles and how to play them. There were a few areas in which clarification or adjustment might be considered, such as the responsibilities of TSB and TC for gathering and analyzing operational and accident-related data or the respective roles of CTA and TC in permitting the start-up of a new railway under a Certificate of Fitness; these matters are discussed below.⁴

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⁴ On data issues, see page 38. On the Certificate of Fitness issue, see page 41.
5. Findings of the Study: Issues and Recommendations

Within the framework of the Railway Safety Act and other relevant legislation, questions of governance in rail safety are rooted in the roles and responsibilities – both real and perceived – of the different players in the rulemaking process. But getting the roles clear is only the start of the matter. Governance is also about:

- how people and institutions work together;
- how they communicate with one another;
- the processes through which they make decisions; and,
- what they are entitled to expect of one another, both as a matter of course and when problems arise.

This section of the report first seeks to identify, from our interviews and reading, the key issues that pertain to the governance of railway safety in Canada. We underline the term “governance” because much of the discussion feeding into this report was, inevitably, about the substantive issues of railway safety. It was important for us to understand these issues as the context for questions of governance, but addressing them directly was not part of our specific task.

Rather, our job was to draw from the wealth of material available to us through interviews and reading one particular set of issues to help the RSA Review Panel in formulating its advice on making Canadian railways safer. We are confident that the substantive issues we heard about have been amply reported in the other studies commissioned for the Review, in the many submissions made by interested parties, and in the hearings held by the Panel across Canada. We have sifted through the available material to identify the governance issues at stake in each case. For example, the study of Work/Rest Rules undertaken by one of our colleagues is valuable for this study not so much for the light it sheds on the safety issues and rules themselves but for its insights into the roles, relationships and processes of rule-making and their evolution over time.

Of course, we did hear many comments relating directly to the governance of railway safety, though few of those to whom we spoke used that term. Rather, interviewees offered their views on how the processes have worked (or not), on how different players (notably Transport Canada, the railway companies, unions and provinces) have participated in specific areas and issues of railway safety, and on the problems and possibilities they saw in striving to make the system work better for the benefit of all involved, as well as the general public and the environment.

This section is structured around six main themes that emerged from our discussions:

A. Improving the government/railway relationship

B. Strengthening the rule-making process

C. Enhancing the effectiveness of Transport Canada

D. Clarifying roles and relationships of federal players

E. Improving federal-provincial cooperation

F. Protecting the public interest and the environment

Under the themes, we have identified a number of more specific issues. These include several questions that were posed explicitly in the terms of reference for this study (see Annex A, page 51). For each issue, we offer analysis and a recommendation.

A. Improving the Government/Railway Relationship

The Railway Safety Act is founded on the concept of a strong and cooperative relationship between government and the railways in the pursuit of safety, with each responsible for doing what it can do best. Indeed, Section 3 of the Act establishes as an objective “to recognize the responsibility of railway companies in ensuring the safety of their operations.” Yet the Minister of Transport retains the responsibility, set out in the Canadian Transportation Agency Act, to create a “transportation network that … meets the highest practicable safety standards.”

Making the relationship between the regulator and the railway operators work properly requires clearly defined and mutually understood roles and responsibilities, as well as a fair degree of openness, trust and respect on both sides. In various interviews we heard concerns about all these matters.

The concepts at the heart of the Act – namely collaboration and participation – are particularly important. This is the letter and essential spirit of the Act and it appears to have been, generally speaking, the way in which both the regulator and the companies approached their roles and responsibilities when the statute was first proclaimed.

Starting in 1989, the companies and the RAC seem to have operated on the assumption, generally justified, that Transport Canada was a participant in their consultative process and that it would normally be willing to endorse rules that emerged from the RAC-led rule-making forum. Accordingly, the industry itself responded by acting in a relatively open and collaborative way. We heard repeatedly in our interviews, however, that the last few years have seen, at least in some areas, a reversal of this collaborative trend.

Transport Canada is perceived to have adopted a more rigid, less consultative and more directive approach to the development and enforcement of rules, regulations and policies. At the same time, some parts of the railway industry are seen to have retreated from the open and transparent relationship that had been gradually evolving. To be specific, the view was expressed by many of our interviewees that CN in particular has in recent years adopted a more “bottom-line” approach to railway operations, and has become more closed and legalistic in its dealings with Transport Canada on matters of rail safety.

The combined effect of these two not-unrelated trends is seen as a reversal of previous progress towards making the open and consultative philosophy of the RSA a reality.

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7 Or at a minimum, would be willing to explain its reasons for its decisions, and would give the companies a reasonable degree of warning when its view differed from that of the RAC roundtable.
Issue 1: Achieving the Cooperative Spirit of the Railway Safety Act

How to develop a more open, transparent, respectful and trusting relationship between the railway industry and government in the cooperative spirit of the Railway Safety Act.

What many participants believe is needed in the relationship between the railway industry and Transport Canada is a greater degree of mutual respect, openness and cooperation on both sides.

Indeed, some interviewees said that some of the most serious current problems in the governance of rail safety today are due to Transport Canada’s backing off from the spirit of the RSA and instead seeking to reassert a tougher, more unilateral, prescriptive approach to the railways. Departmental staff, it is said, should consult more and listen with greater attention to the major railways and the Railway Association of Canada (RAC). It is also suggested that roles and responsibilities on both sides, as well as the mechanisms of cooperation, need to be reviewed and clarified, possibly through revisions to the RSA.

The RAC submission to the Panel, for example, says about the objective of collaboration that “the most essential element of this collaboration involves the working relationship between the railways and Transport Canada. It seems that TC often feels it is exempt from collaboration…. Transport Canada’s collaborative role [needs to be] reinforced in the Act and in TC policy…. Safety issues and related regulatory requirements need to be addressed within a framework of transparency, risk-management and justifiable decision-making.”

While admitting that it takes two to make a relationship work, most people we talked to consider that it is incumbent on the Department to take the initiative to improve relations.

Analysis and Recommendation

In recent years, the complaint has been made from several sides that Transport Canada no longer sees itself as a partner in the safety business but rather as purely a regulator, deciding on rules and regulations at a distance from those it regulates. Whether or not this complaint is entirely justified, there is certainly a perception that the role of the regulator as envisaged in the Act is not the role currently being played by the Department and its officials.

If the rule-making regime set out in the Railway Safety Act is to function effectively, the roles defined in the Act must be reflected in a clear and shared understanding by all parties of how those roles are to be implemented in practice.

At bottom, this is a matter of clear communication – reinforced in practical, day-to-day dealings – about what each side is entitled to expect from the other by way of advance warning, rules of the game for rule-making, attitudes to the use of sections 19 and 31 of the Act, approaches to the implementation of the Safety Management Systems regime, and generally what is expected of the companies in relation to the provisions of the Act.

But no less importantly, it is also a matter of attitude. If the regulator does not approach its responsibilities in the spirit of the Act but rather chooses to apply its provisions in a

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manner inconsistent with that spirit, no amount of regular communication or consultation will do much good. Thus a necessary condition of Transport Canada fulfilling the role expected of it is that the Department undertake to behave in a manner that reflects a true commitment to collaboration, consultation, and respect for the industry role in rule-making and regulation.

We do not see this as a matter for statutory change or reinforcement. The Act is clear on the fundamentals.

**Recommendation 1:**

That Transport Canada, if it is to be respected and trusted as a partner with the railways in an open, collaborative regulatory process of the kind set out in the *Railway Safety Act*, comport itself accordingly.

**B. Strengthening the Rule-making Process**

A key feature of the *Railway Safety Act* is that it seeks to identify and manage safety issues by transferring part of the regulatory responsibility from government to industry. It does this by allowing industry to lead the process of rule-making, with the regulator holding the power of final approval of the resulting rules.

Nearly all the people we talked to acknowledged that the use of a system of rules, as opposed to more formally created regulations, offers flexibility and efficiency by taking advantage of the experience and expertise of the railway companies and other participants in the rule-making process. Despite various reservations about how the current system is actually working, the majority of our interviewees considered that the introduction of industry-led rule-making under the *Railway Safety Act* had been beneficial. Indeed, most would say that it is the only way to regulate effectively in a modern transportation system.

A few people, however, wanted to scrap or seriously limit the use of rules and revert to traditional, prescriptive regulation. They expressed fundamental concerns about the very idea of “having the industry create its own rules.”

Those who favoured industry-led rule making saw it as the key element of a more modern, realistic and effective approach to safety in the railway industry. They argued that, in the end, only the industry itself (i.e., management with input from unions) can bring about safe operations, and that industry rule-making dovetails with the Safety Management System (SMS) philosophy because it has the potential to reflect the expert knowledge and interests of those most directly concerned with rail safety – the companies and the workers. As will be discussed, however, there were many concerns about how well the varied points of view are actually reflected in practice.

An opinion expressed in some of our interviews and in submissions to the Panel is that Transport Canada has in recent years used the rule-making provisions of the *RSA* inappropriately. It is claimed that by imposing conditions on the approval of industry-

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9 We put this in quotation marks because we do not believe that it is an accurate description of a properly operating rule-based system with adequate checks and balances. Like Silverstone, we see rule-making as “co-regulation” rather than “self-regulation.”

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initiated rules (under s. 20) and by closely specifying the desired outcome when requiring
the development of rules by industry (under s.19), Transport Canada is sometimes
steering the development of rules to an unreasonable extent and thereby distorting the
process.

For some we talked to, a case that did much to define the changing attitude and approach
of Transport Canada to the rule-making process involved the development of Work/Rest
Rules.10 Through a collaborative process involving unions and railways that began in the
early 1990s and culminated in 2002, a set of rules and guidelines was developed and
approved by Transport Canada. In 2003, however, a sudden turn-around by Transport
Canada, with little consultation, affected some key provisions of the rules. This was seen
by some to have undermined the entire cooperative approach.

Despite the reservations we heard, we start from the premise that rule-making has proved
overall to be successful and constitutes a key feature of the RSA approach.11 The relevant
governance issues at stake today in rail safety concern how to make it more so by
improving the process to achieve greater transparency and openness. The first of the
issues relates to the Transport Canada approach to initiating and approving rules.

**Issue 2: Creating a More Transparent and Open Decision Process**

*How to improve the transparency and openness of the Transport Canada decision
process, to ensure that it is explicitly evidence-based, and to preserve the flexibility and
other advantages of an industry-led rule development process.*

As noted above, a significant concern of those in and related to the railway industry is the
manner in which Transport Canada makes its decisions about initiating rule-making,
approving rules prepared by industry, and possibly imposing conditions on the
application of those rules. These questions are bound up with that of how Transport
Canada uses the rule-making process as part of its overall management of the rail safety
system. We heard a number of times, for example, that the recent practice of Transport
Canada in this area amounted to “regulation without the RIAS” – in other words,
achieving the effect of regulation without the safeguards of that process, notably the
requirement for a Regulatory Impact Analysis Statement.

The railways and RAC generally consider that the climate of consultation by Transport
Canada, within which rules are developed and approved under Sections 19 and 20 of the
RSA, has deteriorated in recent years. They accuse Transport Canada of a lack of
openness about its own review and approval processes, so that consultation occurs only in
the initial stages of rule making. They say that Transport Canada should explain its
thinking at each stage and listen carefully to the responses of the railways and other
players. They are particularly concerned about the lack of consultation prior to the
imposition by Transport Canada of terms and conditions on the approval of railway-

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10 “The Development of Work/Rest Rules for Railway Operating Employees: A Case Study Prepared for
11 See “Legislative and Institutional Framework for Railway Safety in Canada,” Deana Silverstone, July
2007, section 4.3 for a discussion of the Transport Canada experience with rule-making.
developed rules, considering the major impact these conditions can have on operating costs. They call for changes in the RSA to define better consultation requirements. 12

While railways, unions and provinces all would like to be more fully consulted in the rule-making process, the point here is that the Transport Canada decision process should be, and be seen to be, more open and evidence-based. The information and analysis which goes into decisions on rules should be available to those who might wish to comment, as it must be when regulations are under consideration. And the rationale behind the decision should be made more explicit. Not doing so could be seen as opening Transport Canada to suggestions of either an inadequately evidence-based process or inappropriate criteria.

Analysis and Recommendation

Recommendation 2:

That the Railway Safety Act be amended to provide for increased transparency in decision-making on proposed or potential railway safety rules by imposing on the Department an obligation to explain its decisions:

- to require the specific development of rules under s.19, or
- to reject, vary or impose conditions on rules that have been developed through the rule-making process, or
- to impose rules on the companies.

The explanation should demonstrate that potential impacts have been adequately considered in arriving at the decision.

The point here is not to hamstring the regulator, but rather to reinforce in practice the philosophical basis of the RSA and to make the concepts of collaboration and participation meaningful.

Issue 3. Clarifying and Expanding Consultation

How to revise and clarify the requirements for consultation in rule-making to ensure that railways, unions and provinces (and possibly other interested parties) have opportunities at key stages to provide input to railway company rule-making and related Transport Canada decision-making.

A major area of concern about the rule-making process relates to the nature and extent of consultation beyond the Transport Canada/railway industry relationship.

Unions, while not necessarily in favour of the current rule-making process, say that at the very least they should have better input, rather than simply a one-shot opportunity to provide a reaction to rules developed by the railway company or RAC. Many others, including some provinces, said that the input of unions to the safety process is particularly valuable and should be encouraged and fully considered by railway companies and Transport Canada.

12 Based on RAC submission to the RSA Review Panel, February 2007, particularly Industry Recommendations, Item 3, plus interviews with railways and RAC.
As discussed in more detail later (page 44), provinces are concerned that they are not consulted about rules that may have a major impact on railways under their jurisdiction. Rather, they are simply informed after the rules are approved.

**Analysis and Recommendation**

We heard that the provisions in the RSA concerning consultation are insufficiently precise. There is no doubt that the RSA is committed in principle to the idea of consultation; its second objective is “to encourage the collaboration and participation of interested parties in improving railway safety” (s. 3(b)). The problem seems to be that to fulfil the spirit of the Act consultation with parties having a direct stake in the outcome would have to happen in the earlier stages of conception and drafting of rules. Instead of early and adequate discussion, however, there is only, at best, an opportunity for those consulted to respond to the completed rules or the decisions about them.

Here we do see some room for possible statutory change, if only to reinforce the obligations of the regulator with respect to the interests in the safety regime of parties such as unions and provinces. For example, the RSA could be amended to clarify the right of the unions to have input to the rule development process, and not simply be recipients of pro forma consultation at one point along the way. Likewise, the Act could specifically mention the role of provinces and the need for their interests to be taken into account in rule-making.

Should such amendments to the Act not be feasible, similar changes could be made through regulation or by administrative action on the part of Transport Canada, but neither approach would be as definitive as a clear statement in the RSA.

We should make clear that in recommending a more open and consultative approach to including the views of parties other than the railway companies, we are not suggesting that they necessarily have a place at the rule-making table. Rather, we believe that two kinds of change are necessary: first, the attitude of Transport Canada and the railway industry should become more open and responsive to input; and, second, mechanisms should be created (or made to work) to provide the opportunities for input and discussion before and during rule-making, not just after the fact.\(^\text{13}\) To ensure that change happens, we propose the following:

**Recommendation 3:**

- That the essential place of the unions and the provinces in the rule-making and rail safety regime, and a requirement for meaningful and timely consultation with them in the rule-making process, be affirmed by either an amendment to the RSA or new regulations under the Act.
- That, in the absence of statutory change, Transport Canada develop a protocol stating explicitly the obligations of the regulator and the railway companies to consult with the unions, the provinces and other interested parties.

\(^\text{13}\) The Railway Safety Consultative Committee could, if it were functional, go a long way towards providing a mechanism for input on rule-making from a wide range of interested parties (see next recommendation). Likewise, an effective Federal-Provincial Working Group on Rail Safety was mentioned by provinces as a possible means of addressing their concerns (see page 44).
parties as part of the rule-making process. Such a protocol could be the focus of an early meeting of the Railway Safety Consultative Committee.

**Issue 4: Reviving the Rail Safety Consultative Committee (RSCC)**

*How to revive the RSCC and make it work effectively (or whether to cancel it entirely).*

There were many references in our interviews to the apparent demise of the RSCC and the desirability of its revival. The Committee was considered to have been an important part of the consultative process in earlier years, offering a way to bring the principal parties together with a wider range of stakeholders.

The Committee has not met since 2001, and although a meeting of the Executive Committee was held in January 2006 to discuss the future of the RSCC, no further action appeared to have been taken as of the summer of 2007.

The Committee “provides a forum for open communication between Transport Canada and their stakeholders on railway safety and environmental issues, informs parties including railway companies, railway labour unions, other government bodies and representatives of the public, and establishes action priorities for the development of regulations and rules.”\(^{14}\) The membership as currently defined includes railway companies and the RAC, federal departments, provinces, unions non-governmental organizations and others.

It is generally agreed that there were problems in the operation of the Committee. These were attributed in part to an excessively broad membership list (135 at last count!) and lack of tight meeting management (allowing certain members or issues to dominate the agenda).

All who mentioned the RSCC suggested that it should be revived and used as a significant element of the consultative process. Many suggested changes in its operation to overcome the previous problems.

**Analysis and Recommendation**

As noted above, the Railway Safety Consultative Committee has not met in over six years. While there are doubtless several reasons for this, some of them obviously stem from a membership that was too large and an apparent failure by the RSCC to operate in a manner that served the interests of its members. Recent efforts by the Executive Committee to make membership more inclusive appear only to have exacerbated the problem of excessive numbers.

We note that in other areas of Transport Canada, such advisory or consultative committees are established through regulations under the appropriate Act. This provides a suitable balance of certainty and flexibility. One example is the Canadian Aviation Regulations Advisory Committee. We also note that such committees normally have a structure of supporting technical committees that allow detailed issues to be addressed while keeping the agenda of the main committee workable.

\(^{14}\) Transport Canada website.

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There is clearly a need for a consultative committee at the center of this fundamentally collaborative railway safety regime. But the current RSCC does not meet the need.

**Recommendation 4:**

That Transport Canada take steps to revive the RSCC as a smaller and more tightly-focused body, meeting regularly and serving as the key mechanism for discussion of:

- future directions in rail safety, rule-making and regulation;
- policy issues of concern to the regulator and the regulated community;
- problems and issues of common concern, outside the formal rule-making process;
- general information-sharing and confidence building.

The reconstituted RSCC should be supported, as before, by Transport Canada’s Rail Safety Directorate.

Consideration should also be given to including the requirement in regulations under the *RSA* for regular meetings of the RSCC and possibly for the creation of technical supporting committees.

**Issue 5: Improving the Drafting of Rules**

*How to improve the quality and consistency of rules without losing the advantages of what is intended to be a streamlined approach.*

We heard various comments about the need to improve the quality and consistency of rules drafted under the provisions of the RSA. Clarity of wording and avoidance of ambiguity is an area of concern, as is consistency among various rules and with the legislation and regulations. These are matters that should be resolved definitively and therefore require legal advice. However, because rules under the *RSA* (unlike regulations) are not statutory instruments, there is no requirement that their substance be reviewed by the Department of Justice prior to approval by the Minister. Instead, they receive only a cursory review to ensure that they conform to procedural requirements of s. 19 and/or 20 of the *Act*, as well as to general drafting conventions.\(^\text{15}\)

A number of those we talked to suggested that all rules should be reviewed rigorously and substantively by Department of Justice lawyers, to ensure that they are appropriately written, within the scope of the *RSA* and regulations, clear enough to be enforceable, etc. They also suggested that this should be done at the stage of drafting, rather than just before approval, to allow for constructive input by Justice into the process.

Others, however, felt that introducing such a requirement could so delay the process as to largely negate one of the main advantages of rule-making. Lengthy hold-ups in Justice reviews of regulations under the *RSA* were cited to indicate that it would be impractical to impose a similar requirement on the rule-making process.

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\(^{15}\) See Silverstone, Section 4.8.2.
It was noted by some we talked to that training and/or coaching is sometimes provided to those involved in rule-drafting; this was seen as very helpful and something to be expanded, regardless of whether the legal review rules was to be strengthened.

**Analysis and Recommendation**

The challenge here is to combine the virtues of collaborative rule-making by railway operators and union representatives with the requirement for clarity and consistency in the rules that emerge from the process. The objective would be to avoid the kinds of unnecessary misunderstandings that characterized the Work/Rest Rules situation of a few years ago (see page 24); for example, the use of explanatory guidelines that do not themselves have regulatory force could be avoided by suitable drafting.16

We understand the concerns about possibly slowing down the rule-making process, but we still believe it would be desirable to have draft rules reviewed by lawyers with the appropriate expertise to ensure legal clarity and overall consistency within the regulatory regime. If the Department of Justice cannot supply in a timely fashion the services of lawyers with the appropriate skills, Transport Canada should be permitted to hire outside counsel for this review purpose.

Another approach worth considering is the recommendation offered by Silverstone that a “Rules Expert” position or team be created within the Transport Canada Rail Safety Directorate.17 This role would be staffed with at least one person who had the required legal skills to review draft rules.

**Recommendation 5:**

That Transport Canada make arrangements to have draft rules scrutinized by competent regulatory lawyers to ensure that they meet acceptable standards of clarity and consistency with the existing regulatory regime.

We would also add that efforts to provide training and guidance for those involved in drafting of rules should be supported as fully as possible.

There is a separate issue with respect to the consistency of application of rules. This relates to the need for clear functional direction from Transport Canada headquarters and is addressed on page 33 below.

**C. Enhancing the Effectiveness of Transport Canada**

As the national regulator of railway safety in Canada, Transport Canada Rail Safety Directorate was the focus of many comments, positive and negative, concerning the effectiveness of the current regime. There was general concern expressed in our interviews, and in many of the submissions, about:

- the role played by the Rail Safety Directorate of Transport Canada and the Surface Branches in the Regions;

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16 A key question in the Work/Rest Rules case was whether the interpretation of the rules could be made dependent on examples given in an accompanying guidance document. This example of how unresolved issues in the structure and drafting of rules can lead to serious disagreement when it comes to implementation points to the need for expert legal advice in the drafting process.

17 Silverstone, paragraph 281.
the level of resources and capacity of these organizations; and,
their attitudes and approaches to rail safety issues.

While specific views on what needs to be done differed considerably, everyone, including Transport Canada people, is looking for change. In broad terms, the needed change in Transport Canada can be characterized as:

- stronger capacity to manage a modern performance-based rail safety system;
- a more open, transparent, evidence-based approach;
- more effective oversight and auditing functions;
- stronger functional guidance to regions;
- clearer delegation of powers to Railway Safety Inspectors; and,
- a regulatory process that moves at a reasonable pace.

Each of these constitutes an issue to be addressed below.

**Issue 6: Enhancing the Capacity of Transport Canada Rail Safety**

*How to acquire the financial and human resources to build the capacity of Transport Canada in NHQ and Regions to manage a modern safety system.*

The first issue, recognized by everyone, concerns the maintenance and reinforcement of Transport Canada’s capacity to manage a modern railway safety system.

The problem is basically one of inadequate financial and human resources. It is compounded by the rapid loss of experienced people through retirement and other causes that is a fact of life across the federal Public Service. Moreover, we heard that some of the efforts to fill rail safety roles in both NHQ and regions had led to the use of people with limited relevant experience and some who might be occupying developmental positions on their way to other responsibilities. The view was that rail safety is a complex and serious matter that requires substantive expertise and staffing for the long term.

Moreover, the need is not just to find or train people to provide the traditional skills and knowledge of rail safety management; rather, new types of expertise are needed for the evidence-based, risk-management approach of a modern safety management system.

**Analysis and Recommendation**

The consistent message from our interviews, supported by comments in some of the other studies, was that Transport Canada is at best overstretched and at worst seriously under-resourced to carry out its responsibilities in the area of railway safety.

Addressing this problem will take time and a considerable amount of money. The kinds of skills that are required for the effective operation of the railway safety regime by Transport Canada are not easily found. Moreover, the Department already faces a problem of renewal to deal with expected retirements.

What is required to adequately resource the railway safety function in this environment is, first and foremost, a government decision to provide the required additional resources.

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On this basis, Transport Canada can plan for the creation of new capacity and renewal of its staff and expertise.

**Recommendation 6:**

That, if the government is prepared to provide the necessary resources to renew and expand railway safety capacity in Transport Canada, the Department:

- Develop a three-to-five year human resources plan for the renewal of staff and expertise in the Rail Safety Directorate and regional offices, with particular emphasis on recruiting and developing the skills required for a modern performance-based safety management system;

- Develop a related plan to ensure adequate provision of inspection and other services in the regions, and thereby to serve the support needs of provinces, pursuant to harmonization arrangements with the federal government; and

- Make a commitment to rethink its approach to inspection, audit and investigation, in order that the skills and time of the inspectors and other professional personnel in Transport Canada are appropriately allocated to meet the safety needs of the industry and the public under a performance-based safety regime.

**Issue 7: Strengthening the Risk Assessment/Management Approach**

*How to move the railway safety system towards a stronger emphasis on risk assessment and risk management.*

Throughout our discussions with many of the players, and in our reading of other studies prepared for the Panel we found a consistent emphasis on addressing safety through assessment and management of risk. In many cases, this was seen as an integral part of the whole performance-based approach on which the RSA is based.

A number of provinces, for example, called on Transport Canada to apply its limited resources, such as track inspectors, where they are likely to have greatest impact in terms of reducing risk. They rejected the notion of a uniform approach across geographic areas, railways, etc., and suggested that a more complex set of factors be taken into account in planning to prevent accidents and limit their consequences. Thus, they said, highest priority should be given to safety measures in areas where railways run close to environmentally sensitive features such as rivers and where the capacity to respond is limited (e.g., in remote locations).

To achieve this, a considerably more sophisticated approach would be needed and there were suggestions that Transport Canada currently lacks the analytical and management capacity to implement a thoroughly risk-based approach. As noted above, acquiring the necessary human resources in both NHQ and regions will be a real challenge.

In particular, risk assessment and impact analysis forms an increasingly important part of the rule-making process. We were told that Transport Canada should devote greater
resources to such work and, as part of a more open approach to approvals, should share the results in explaining its decisions.\(^{18}\)

**Analysis and Recommendation**

The need for a stronger emphasis on risk assessment and risk management was recognized by nearly everyone we talked to within Transport Canada and among the other players. As discussed under the previous issue, the principal barrier appears to be the lack of sufficient human resources with the necessary skills and understandings within the Rail Safety Directorate and regions of the Department.

**Recommendation 7:**

*That high priority be given to recruiting and developing, within the Rail Safety Directorate of Transport Canada and the Surface branches of Regions, the analytical and management skills necessary for a modern risk-based safety management system.*

**Issue 8: Improving Oversight and Auditing**

*How to ensure that Transport Canada audit and oversight of safety management systems (SMSs) reflect the best practices of transportation safety and the appropriate professional auditing standards.*

The railway industry and others were critical of the way in which Transport Canada oversees and periodically audits the safety management systems (SMSs) required of every railway under federal jurisdiction (and many under provincial regimes).

There were a number of criticisms of the approach taken by Transport Canada to SMS audits, which was seen to fall short of accepted standards and practices for the transportation sector. Railways suggested that audit criteria should be published, a draft audit report should be shared with them for discussion and they should have a chance to respond to its findings. The companies indicate that in some key audits these things were not done. They also commented that Transport Canada fails to differentiate adequately between inspection and audit functions.

We also heard from a wide range of people outside the industry that the general level of oversight of the railway system by Transport Canada is inadequate. This perception may, however, be based on older views of government inspection as the only real way to ensure safety. We also heard criticisms that the audit function and its follow-up are not sufficiently rigorous to identify problems and ensure compliance by companies with required actions.

**Analysis and Recommendation**

Responding to the comments about Transport Canada auditing is essentially a management task, and may require appropriate strengthening of audit capability in the directorate. It is not a matter for statutory or, as far as we can see, policy change. We understand that efforts are already under way within Transport Canada to strengthen the approach and that expertise in the Marine and Aeronautical sectors of Transport Canada can be brought to bear on the needs of railway safety.

\(^{18}\) See earlier discussion of the rule-making process (starting on page 23).
Recommendation 8:

That Transport Canada ensure that audit practice by the Railway Safety Directorate meets the professional standards of public sector audit, as understood by the competent federal authorities, as well as the specialized requirements of transportation safety audits, as conducted by the Marine and Aviation services of Transport Canada.

With respect to concerns about Transport Canada oversight, we believe these are best addressed by a general and concerted effort to build a modern safety management system with the human resources and will to make it work. In short, the answer is not more inspectors or a return to earlier prescriptive approaches, but a stronger commitment to the principles of the RSA.

Issue 9: Providing Effective Functional Direction to Regions

How Transport Canada can provide clear and effective direction to ensure consistent application of safety policy across Canada, while allowing its regional offices flexibility to adapt to the requirements of different railway operations, and the vagaries of geography, economics and provincial policy.

We heard a good deal from interviewees about issues of inconsistency in the interpretation and enforcement of rules, regulations and policies across Canada.

A considerable number of interviewees felt that the five regions of Transport Canada should receive stronger guidance from Ottawa on the interpretation and application of policies, rules and regulations. They commented that the different regions tend to develop their own versions of safety policy. They were also concerned that regions pursue compliance in different ways, and with different levels of rigour. For example, some seem more ready than others to undertake prosecutions under the Railway Safety Act.

On the other side of the question, we also heard arguments that it is important for regions to have a substantial degree of flexibility in applying the rules to the very different circumstances found across Canada. No one called for a totally unitary railway safety system run from Ottawa – all recognized that it was essential to have the safety regime delivered by regions that are appropriately empowered and resourced and that can see how rules and regulations need to be applied for optimum results.

Everyone recognized the tension between the need for central guidance to ensure consistency and the regional need for room to act appropriately in varying circumstances. How to resolve this tension was a matter of disagreement.

Analysis and Recommendation

The suggestion was made a number of times that the regulation of federal railways, and especially the national carriers, would be both easier and more consistent if it were carried out under the direct line authority of Ottawa. The argument was made that this is the way the Marine and Air sectors of Transport Canada operate. Such an approach would have those in regions responsible for oversight of the regulatory regime reporting directly to NHQ.
We are not convinced that such a drastic step is required in order to achieve what people are looking for. Rather, we believe that the answer to the problem lies in developing working arrangements and relationships that can satisfy both the requirement for clear lines of authority and that for clear policy direction to personnel in the field.

The basic issue at stake here is the classic balance between line and functional authority as it bears on the regional operations of a federal department. Almost invariably, regional managers in any decentralized organization have to deal with both these kinds of reporting relationships. There is no *a priori* way to settle the matter in a particular case and certainly not through a purely structural solution. Experience shows that over-centralization leads to rigidity in program application, while too much regional autonomy and flexibility can lead to serious inconsistencies in how programs are delivered across the country.

The challenge for Transport Canada Rail Safety is to define clearly, and implement effectively, a system that establishes the right balance between the need for:

a) a clear set of rules and principles that are developed and implemented by companies and enforced by the regulator in a similar fashion across Canada; and

b) these rules to be applied and enforced in a way that is appropriately respectful of the significant variations in geographical, economic, political and other circumstances in the different regions of the country.

What we are recommending is neither new nor unique to Transport Canada Rail Safety. It boils down to making the current arrangement work, rather than seeking a structural solution that would only create a new set of problems.

**Recommendation 9:**

a. That Transport Canada NHQ (i.e., the Railway Safety Directorate) more fully assert its existing responsibility to provide functional direction to regions. To this end, it should:
   - be equipped and empowered to develop a framework of clear policy guidance on matters of rail safety rules and regulations;
   - provide such guidance to the regional offices on a regular basis; and
   - hold regional managers accountable for their actions within that framework.

b. That, in accordance with existing expectations, regions be allowed to manage with a reasonable degree of leeway within the framework of policy and rules provided by NHQ, but that they be held accountable by the Railway Safety Directorate for any regionally-based variation from national policy.

Striking the proper balance between the authority of headquarters and that of the regional offices requires, above all, clear and regular communication – in both directions. NHQ must listen as well as direct, and regions must take an active part in the dialogue. It is not appropriate for regions to be left to develop their own interpretations of what is meant under the Act, or the regulations or rules issued pursuant to it, or operating rules of...
national railways. Nor, however, should NHQ develop policies, rules or regulations without consulting affected regions.

**Issue 10: Rationalizing the Powers of Railway Safety Inspectors**

*How to regularize and clarify the delegation of power to Railway Safety Inspectors while preserving their role in dealing with critical safety issues.*

In our discussions we heard a number of comments about the powers of Railway Safety Inspectors (RSIs). Some thought the inspectors were not sufficiently accountable, but others welcomed their ability to act quickly and autonomously in response to a safety issue. We also heard indirectly about suggestions that the powers of RSIs may clash with those of the DG Rail safety. Many regional as well as NHQ officers are designated as RSIs.

Under s. 28 of the *RSA*, inspectors are given power to gather information, enter premises, collect evidence, etc. Under s.31 they are given the power to issue notices and emergency orders where they believe line works, railway equipment, crossings, vehicles, pose a threat to safe operation. While RSIs can act autonomously, the Minister can review confirm, alter or revoke an RSI s.31 order. Note that RSI powers are not delegated by the Minister but RSI appointments are made on the Minister’s behalf by the DG Rail safety.

In addition, s.32 and s.33 of the *RSA* give the Minister powers to order the removal or modification of non-compliant railway works and to issue emergency directives for up to six months. These powers are delegated to the DG Rail Safety.

We found minimal support for the notion that “rogue inspectors” pose a significant problem in the railway safety system. There were occasional expressions of concern by interviewees that the powers of safety inspectors might have been used inappropriately in a particular case, but most of the people we talked to considered that this had seldom occurred and that mechanisms exist within the Act to take corrective action.

Indeed, few people outside the Department had thought about the role of RSIs in terms of delegation of powers. Their concerns were typically more related to whether Transport Canada has the resources to provide railway inspectors when required, and whether there are sufficient inspectors to cover the vast geographic areas for which regional offices are responsible. A further concern was whether having identified a problem and issued an order, the RSI (or Transport Canada more broadly) has the necessary enforcement tools to ensure compliance.

We understand that within Transport Canada, there are some concerns about the potential for jurisdictional overlap between railway inspectors in regions and headquarters.\(^{19}\) We did not hear such views directly, however.

**Analysis and Recommendation**

It was reported to us that problems occasionally have arisen in cases where an inspector is perceived to have exercised his authority in a manner that is inconsistent with practice

\(^{19}\) Silverstone suggests that a clearer division of powers, in which regions exercised s.31 (RSI) powers, while NHQ used only s.32 and s.33 powers might be more appropriate (paras 358-360).

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elsewhere in the country, or at odds with what is deemed appropriate, either by the 
affected company or by his or her superiors in the region or in Ottawa.

Under the RSA, the Railway Safety Inspectors designated by the Minister are given 
authority directly under the Act. This is not the usual arrangement under which powers 
are given by legislation to a Minister, who in turn delegates them to officials within the 
Department. But nor is it unique. There a several examples in federal legislation where 
powers are granted in a similar way, including to Immigration officials.

Nevertheless, the argument can be made that Railway Safety Inspectors should receive 
their authority by the normal departmental delegations from the Minister of Transport via 
the Deputy Minister and other officials. We suggest that legal advice be obtained on this 
matter, and depending on the outcome, changes in the Act be considered.

More pressing, however, is the need to provide a uniform context within which the RSIs 
must exercise their powers, however those are provided. While it is essential to preserve 
the authority of the inspector to issues notices ordering a variance in operating 
procedures, or even a halt in operations, in order to address pressing safety issues on the 
spot, this authority should be exercised within a consistent national framework of policy 
and guidelines. This does not appear to be the case at present.

Recommendation 10:

a. That legal advice be sought as to whether the RSA should be amended to 
provide that the authority of the inspector derives from that of the Minister 
through the normal delegation of authorities from the Deputy Minister and 
on down.

b. That regardless of the outcome, Transport Canada Rail Safety Directorate 
develop a framework of national policy and guidelines for the exercise of 
Railway Safety Inspector powers and ensure that it is communicated and 
followed.

This, it seems to us, will preserve the immediate powers of the inspector to address 
pressing safety issues while respecting the legitimate authority of the Department to 
ensure consistency in the enforcement of the rules and to address any potential misuse of 
that authority.

Issue 11: Avoiding Unnecessary Delays in the Regulatory Process

How to deal with long delays in some regulatory processes.

We heard repeated references to the delays that can occur in developing and approving 
regulations concerning safety-related issues. The problem is particularly acute when the 
issues are complex and there are many stakeholders with conflicting interests, as is the 
case for the example most frequently cited, the Crossing Regulations (RTD 10). These 
have been under development for over 10 years or more. While, according to provincial 
representatives who raised this issue, they have been virtually complete for at least two 
years, the regulations have still not been introduced. It was suggested that a major 
obstacle in this case may be the significant cost of implementing these regulations.
More generally, there were calls for Transport Canada to review the regulatory process in light of a general trend to streamlined regulation.

**Analysis and Recommendation**

The fact that it has taken many years for some regulations to be developed was seen by some people as evidence that Transport Canada is unable or unwilling to regulate effectively or in a timely fashion. We have seen no evidence that would suggest such a strong conclusion. Indeed, we recognize that it can take a great deal of time to consult all of the various interests in a complex regulatory situation. To the extent, however, that the process is prolonged by lack of resources or by procedural problems, Transport Canada should do all it can to correct the situation.

If it is true that the potential cost of implementing the Crossing Regulations has made the Department reluctant to complete the process, we believe that the problem should be addressed directly, rather than simply being deferred. We heard suggestions that lower cost solutions could be developed which, while not optimal, would be a significant improvement over the simple warning signs that currently exist at many crossings.

If certain regulations have taken too long, it is surely the obligation of the industry, the provinces or the concerned public to draw this to the attention of the Minister. The Deputy and his officials will then take the necessary steps to move the process forward. Any more "systemic" solution to the alleged problem of excessively slow pace would create more problems than it would solve.

**Recommendation 11:**

That Transport Canada take steps to ensure that it is delivering the regulations for which it is responsible in a timely fashion, and in particular:

- take note of the concerns of stakeholders with respect to the pace of the regulation process in certain instances;
- make any necessary and prudent investments in policy and legal capacity to speed the process; and
- deal directly and in an open, consultative fashion with any underlying issues such as the cost of implementation.
D. Clarifying Roles and Relationships of Federal Players

Issue 12: Redefining Roles for Data Collection and Analysis

Whether there is a need to change the respective responsibilities of Transport Canada and the Transportation Safety Board with regard to data collection and analysis.

One of the issues we were specifically asked to consider in this study concerns responsibilities for the collection and analysis of railway accident and incident data. Under current arrangements, this is primarily the domain of the Transportation Safety Board, yet it has profound importance for Transport Canada in its RSA role of managing a performance-based safety regime for Canada’s railways. Obviously, while TSB and Transport Canada share an interest in many of the types of data that are, or could be, collected, their respective responsibilities mean that they have significantly different information needs.

As we found in the interviews, the issue of data collection and analysis is one on which many people from provinces and the railway industry have strong views. It is also a matter raised in several of the Review studies.20 The problem was often described as a lack of coordination between the TSB and Transport Canada.

With respect to redundancy in the gathering of information, some provinces, said that more or less the same information must be submitted three times: (a) to the TSB; (b) to Transport Canada; and finally (c) to provincial authorities. One province even noted that similar information had to be submitted to the U.S. parent of a local short line. Provinces pointed out that it was not a matter of simply submitting copies of the same information to several different places. Rather, each of the organizations requiring information on accidents, incidents and operating conditions has different requirements, definitions and formats. Clearly, they said, something needs to be done to clarify and simplify reporting requirements.

A further complaint, mainly from the railways, about Transport Canada’s requirements for data was that they not only duplicate some of those of the TSB but they are largely ad hoc. Those who provide data to the Department would like to have regular reporting arrangements; they indicated, for example, that they would have no problem supplying predefined data on a regular quarterly basis. What they find frustrating is the unexpected and urgent requests they receive from Transport Canada for data they may already have submitted to the TSB months before.

While interviewees appreciated that the requirements of the TSB and those of Transport Canada were necessarily different, because of their fundamentally different roles in safety, there was also a sentiment that more could be done to develop a single standard for data reporting, so that both agencies could glean from a single report the data they required for their respective purposes. At the very least, they would like to see that data requirements be coordinated and consistent as far as possible.

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Even more important, there were views that Transport Canada was not gathering the *appropriate* data to give an accurate picture of rail safety, or to oversee and regulate Safety Management Systems. These concerns are discussed in detail in other studies.  

Certainly both provinces and industry would like to see a process instituted for reviewing and coordinating data requirements, one in which they could participate fully.

There were also complaints that the various authorities are not sufficiently transparent and open in managing the data or in sharing the results of their analyses. In particular, provinces complained that even though they go to considerable trouble to submit data on accidents and incidents to federal authorities, the resulting reports do not include provincial statistics; this hinders provincial officials in accounting for the safety record of the railways under their jurisdiction.

More specific concerns expressed in our interviews:

- For provincially-regulated short lines, the requirement for information on minor incidents and accidents is said to be so detailed as to make it virtually impossible for provincial authorities to ever close a file.  
  
- Railways were concerned that, without adequate protection, data they supply might be used against them in prosecutions or lawsuits. While it has an impact on the gathering of accurate data, this is more an issue of trust within the larger relationship between TC and the private sector.

- There were widespread assertions that the traditions of the two major railways with respect to providing data are so different as to make the data they submit very difficult to compare. This is clearly an important issue to be worked out in a consultative process of overhauling the railway safety data system.

**Analysis and Recommendation**

A study by SMS Aviation Safety for the RSA Review Panel provides a detailed analysis of the frustrations of the industry with the Department’s apparent inability to approach SMS regulation in the proper spirit – i.e., as a matter of business-related safety *performance* rather than simply safety *process*.

One of the conclusions from that SMS Aviation Safety study is that there is a need for Transport Canada to gather and analyze safety-related data and information from across Canada, on a consistent basis. Only if the Department has access to comprehensive data sets, plus the capacity to understand that information, to share it and to develop policy on the basis of it, will the appropriate SMS oversight and regulation be possible.

The question of the respective roles of Transport Canada and the TSB with respect to safety-related data collection and analysis is not a simple one. Each agency has its own distinct requirements for data – the TSB with respect to accident occurrences for its

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22 This was part of a more general concern that rules and regulations coming from Ottawa are not well adapted to the needs of smaller railways.

23 One of the two railways was seen as having long had a “liberal” approach to the provision of information, while the other was considered to be more “sparing” in submitting incident data.
accident investigation purposes, and Transport Canada for performance data on what companies are doing and what accidents and incidents they are experiencing, for its SMS and other regulatory purposes. Inevitably there will be substantial areas of overlap that need to be resolved by the two organizations working together and listening carefully to the other interested parties.

Taking all these considerations into account, and bearing in mind as well the frustrations voiced by the operators with respect to inconsistency in data requirements and reporting demands, we offer the following recommendations:

**Recommendation 12:**

a. That Transport Canada create its own data collection and analysis center for the purposes of effective oversight and regulation of safety management systems (SMS).

b. That, to the extent possible, Transport Canada and the TSB harmonize their data requirements, to ensure that the needs of both institutions are met with as little unnecessary duplication or confusion as possible for reporting entities and stakeholders.

c. That Transport Canada, after consultation with stakeholders, implement a regular timetable for data reporting that enables the companies to provide information periodically, in a way that meets the needs of the regulator and imposes no unnecessary burdens on the reporting entities. *Ad hoc* demands for information, or requests unaccompanied by reasons, should be kept to a minimum.

d. That data requirements be based on principles developed through consultation with the companies and the provinces, and that the results of data analysis be much more fully and freely shared.

**Issue 13: Clarifying Roles in Applying the Canada Labour Code**

*Whether there is a need to clarify or adjust responsibilities between Transport Canada and Human Resources and Social Development Canada (HRSDC-Labour Program) with respect to application of the Canada Labour Code Part II, or to extend the role of Transport Canada in this area to include non-operating railway personnel (e.g., track maintenance crews).*

For On-Board employees, Part II of the *Canada Labour Code (CLC II)* and the associated *On-Board Trains Occupational Health and Safety Regulations* are enforced by Transport Canada Rail Safety under authority delegated by HRSDC. By contrast, for Off-Board employees of federally regulated railways, such as those performing track maintenance and car and locomotive repairs, *CLC II* and the *Canada Occupational Health and Safety (COHS) Regulations* are enforced by the HRSDC Labour Program.

According to HRSDC, separating these employees into Off-Board and On-Board groups has not been difficult, as the respective roles are described in a Memorandum of Understanding (MOU) between the Labour Program and Transport Canada. Both departments see the arrangement as working well.
There were suggestions from unions and some provinces, however, that the current division of responsibilities creates uncertainties and gaps in coverage. It was suggested, for example, that responsibilities would be clarified if consolidated by extending the role of Transport Canada to include off-board railway personnel (e.g., track maintenance crews).

**Analysis and Recommendation**

We were not able to investigate this issue further, and therefore cannot assess the validity of the concerns we heard regarding the current division of responsibilities between Transport Canada and HRSDC. Hence, there is insufficient evidence available to us to justify any conclusion that a specific change of authorities, delegated or otherwise, is required at this time.

While more than one union expressed the view that the interests of members were not being properly protected under the current arrangement, we heard other views that the present system works quite well in practice, and that no change is warranted. It seems to us that this is an opportune time for the two departments to explore the issues between them and with the principal stakeholders.

**Recommendation 13:**

That Transport Canada Rail Safety Branch and HRSDC Labour Program be asked to review their arrangements for administration of Part II of the *Canada Labour Code* in consultation with the relevant unions and railway companies and make any necessary changes to ensure full and appropriate coverage of railway workers, both on-board and off-board trains.

**Issue 14. Whether to Replace the CTA Certificate of Fitness**

*Whether to shift from the current Certificate of Fitness (COF) system for licensing federally regulated railways to an Operating Licence (OL) approach that would require safety-related reviews and inspections and that could result in license suspensions in case of serious violations.*

We were asked by the Review Panel to consider in governance terms the issue of safety management, and specifically the fact that the certificates of fitness (COF) to operate a railway, issued by the Canadian Transportation Agency, are not based directly on capability or safety consideration but essentially reflect the adequacy of the railway’s financial arrangements and insurance coverage.

There is a Transport Canada safety connection in this process but it is very limited. Under the *SMS Regulations*, an initial Safety Management System must be submitted at least 60 days in advance of start-up and only when it is accepted by Transport Canada can the COF be issued by the CTA.

This initial SMS provides the basis for Transport Canada’s subsequent oversight of the safety of the railway’s operations. There is no requirement, however, for Transport Canada to approve the SMS in terms of effectiveness; all that is done is to ensure that a plan meeting the letter of the Regulations is in place.²⁴ Indeed, Transport Canada

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normally does not look in depth at the SMS plan until the time comes for a safety audit, often not until several years later.

The main alternative to the current COF approach would be to adopt the model of an operating certificate or licence that would be issued by Transport Canada (not the CTA) on the basis of inspections related to certain safety-related requirements. Such a licence could be refused or subsequently withdrawn on safety grounds, much as is done with aviation services. Indeed, a number of the provinces use the operating licence approach for railways under their jurisdiction.

Only a few of our interviewees had anything to say on this issue. Those who did pointed out that it mainly affects new (or revived) railways. They also noted that provinces generally use the Operating Licence approach, as do the Marine and Air sectors of Transport Canada. However, the issue was not seen as a high priority in itself; rather it was suggested as one element in a larger overhaul of the whole safety management approach.

We note that Silverstone’s Framework Study addresses these issues and offers recommendations. The Framework Study also points to certain problems of jurisdictional definition, related to the issuance of a certificate of fitness. In effect, the issuance of a COF by the CTA represents a decision that the railway in question is under federal jurisdiction. But there are certain inconsistencies between the jurisdictional definition used in the RSA and that in the CTA Act. While we did not encounter this precise problem in our interviews, we did hear various comments about the need for greater clarity in the determination of jurisdiction between federal and provincial governments.

Analysis and Recommendation

The current system under which the CTA issues a Certificate of Fitness for a new railway clearly has little impact either way on safety. Essentially the COF simply indicates that the railway is under federal jurisdiction, has a certain financial capacity to operate, and has obtained appropriate insurance coverage. This is in keeping with the economic mandate of the CTA.

The SMS Regulations do require, however, that before operations can start a railway must have in place a Safety Management System. The problem is that up to now only a cursory review of the SMS has been conducted by Transport Canada at this stage. Not until inspections are done and an audit of the railway’s SMS is conducted, probably some years later, is there any true oversight of safety issues for that railway.

While this was not described as a major issue by many of those we talked to, our view is that this represents a potentially significant gap in the safety system. The problem could be addressed relatively simply, without a need for legislative or regulatory change, if Transport Canada were simply to adopt a policy of reviewing in a substantive manner the safety rules for a new railway, before signing off to allow operations to begin.

See section 2.


26 Ibid, Section 2.2 and Recommendations 1 and 2.
Whether the current pro forma CTA Certificate of Fitness should give way to an Operating Licence issued by Transport Canada is less clear. Such an approach is used for other modes of transport regulated by the federal government and by most provinces for railways under their jurisdiction. Yet we did not hear many convincing arguments that the power to refuse to issue a licence, or to revoke it in case of major problems, would add greatly to the regulator’s ability to improve safety in Canada’s railways. On balance, therefore, we concluded that there was no pressing need to change the current arrangement.

Recommendation 14:

That Transport Canada adopt a policy of conducting a thorough review of the Safety Management System of any new railway, prior to approving the start of operations under the SMS Regulations.

E. Improving Federal-Provincial Cooperation

There are three basic types of federal-provincial arrangements for the harmonization of railway safety in the eight provinces that have railways:

- Quebec and Saskatchewan operate on a consultation model, under which they choose the manner in which the various provisions of their own safety regimes will reflect the RSA system. Saskatchewan, for example, uses a combination of powers in its act and guidelines to regulate shortlines, and does not use regulations as such.

- British Columbia, Alberta, Manitoba, New Brunswick and Nova Scotia incorporate by reference RSA provisions, regulations and rules into their own regulatory systems under provincial acts. They also contract inspections to Transport Canada.

- Ontario describes itself as the province which most fully utilizes the federal rail safety system in order to avoid duplication of effort. The province essentially delegates its safety responsibilities to Transport Canada (with the exception of Ontario Northland Railway which is separately regulated by the province).

It is important to note that all provinces favoured a harmonized approach to railway safety for railways under provincial jurisdiction. The issues raised by interviewees concerned how best to make it work.

Issue 15: Making Diverse Provincial Rail Safety Arrangements Work

Whether the current variation in arrangements between provinces detracts from the effective harmonization of federal and provincial railway safety responsibilities, and if so, what can be done to improve the situation.

The panel asked specifically that we examine federal-provincial cooperation on railway safety regulation, management, and oversight under the RSA. The first question is whether the current variation in arrangements causes problems from a governance standpoint.
Analysis and Recommendation

We did not hear any views directly on this matter from those we interviewed, but it was clear from some of the provincial interviews that provinces have definite views on how such jurisdictional divisions and relationships should be addressed. In other words, the current arrangements generally reflect careful thought on their part.

Arrangements for railway safety in the provinces are, indeed, a patchwork, with formal agreements in some cases and not others, and with significantly different approaches to involvement on the part of individual provinces. As outlined earlier (REF), there are three basic models for the provincial harmonization with the federal rail safety regime, and there are significant difference between provinces within those models.

We were indeed struck in our interviews by the differences in provincial arrangements, as well as by the varying provincial attitudes and approaches to safety issues. We did not, however, find that these differing arrangements in themselves necessarily reduced the effectiveness of rail safety management across Canada. They certainly do add a dimension of complexity for Transport Canada in dealing with provincial authorities. But such variation is a commonly seen feature of federal-provincial relations in Canada and officials in other areas of the Government of Canada have learned to work around it. Past experience has shown that it is seldom possible to accommodate the typically wide range of provincial views and preferences in any given area within a single model.

It is important to note that we are not talking here about variations in substantive safety rules and standards – these do matter and there has been a considerable effort by federal and provincial authorities to identify and correct them.

Nor are we saying that the form of federal-provincial arrangements doesn’t matter – it certainly matters to provinces. Rather, we suggest that safety can be successfully managed through a variety of different arrangements and that standardising arrangements among the provinces would not necessarily improve safety, even if it were feasible.

Recommendation 15:

That rather than seeking to improve the harmonization of railway safety through changes in federal-provincial arrangements, the Panel focus on how Transport Canada can make the existing arrangements work more effectively.

Issue 16: Improving the Federal-Provincial Working Relationship

How to ensure that the needs and concerns of provincial regulators are taken adequately into account and addressed by Transport Canada.

A key governance question in this area concerns the working relationships between federal and provincial agencies under the respective rail safety arrangements. Among the provincial representatives we talked to there were wide differences in views about the relationship with Transport Canada, from entirely satisfactory to “non-existent.” Keeping in mind that most working contacts for the provinces are with regional and district offices, while policy flows from NHQ, it appears from what we heard that Transport

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27 And we observed that the provinces themselves are not particularly aware of how other provinces manage railway safety.

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Canada could do more in some areas to develop an open and co-operative arrangement with the provinces that have railways.

While all provinces favour the principle of harmonization between federal and provincial regimes, some expressed disappointment at the way specific arrangements had worked out. They criticized Transport Canada for not paying enough attention to provincial concerns and points of view. It appeared to them that Transport Canada had little or no interest in the specific requirements of short lines, tourist operations, commuter railways and the like that fall under their jurisdiction. Consequently, the rules that come from Ottawa often seem excessively onerous for the smaller railways. Other provinces did not necessarily share this view; some found Transport Canada quite supportive and saw the problem as less Transport Canada’s fault than a result of the two big railways’ dominance of rule-making in the RAC Rules Committee.

Most provinces agreed that they want to see a considerably more open and consultative approach by Transport Canada to the making of rules. They complained that frequently there was no consultation or even advance notice about matters that can have major financial and other implications for provinces, the railways under their jurisdiction and the municipalities that are affected. They did not consider it adequate simply to be informed after the fact that new or amended rules have been approved.

On the making of regulations, there were comments from provinces that 90 days notice and 10 days to respond is far too little, especially when the overall process may take years; on important issues they want to be consulted a year or so in advance and believe this is realistic.\(^{28}\)

Several provinces called for more effective use by Transport Canada of the Federal-Provincial Working Group on Railway Safety (FPWGRS). They saw this group, which has only recently been revived after several years of inactivity, as part of the solution to a more consultative relationship on matters of policy and rule-making and felt it should be involved in more issues and at an earlier stage. Some also mentioned that they hoped to see the Railway Safety Consultative Committee (RSCC) revived after several years without a meeting and noted that the new membership list includes provincial representatives.\(^{29}\)

The federal-provincial working relationship in the area of dangerous goods was reported in all cases to be fully satisfactory, except for a need to clarify roles and responsibilities identified in one case.

In all cases, the provincial representatives reported good working relations with CTA and TSB. Cooperation with CTA mainly concerns railway crossing issues and was described as important to resolving issues involving private land owners, as railway company records are often incomplete. As well, the CTA role in allocating costs of crossing upgrades was mentioned frequently. Concerns in such cases were not with the CTA but with the level of financial contribution by Transport Canada and the railways.

\(^{28}\) See also the discussion of delays in regulatory processes under Issue 11 (page 36).

\(^{29}\) See discussion of reviving the RSCC under Issue 4 (page 27).
TSB is called in by provinces to investigate accidents, and this arrangement apparently works well, despite the absence of formal agreements. In addition, there were several comments from provinces that TSB is very helpful on rail safety matters of various kinds.

There were concerns on the part of nearly all provinces, however, about the respective roles of the TSB and Transport Canada in relation to the definition, collection, analysis and sharing of data on accidents, incidents and operations. This issue has been discussed earlier (see page 38). Briefly, the provinces have the following concerns:

- Lack of coordination by TSB and Transport Canada on their data requirements.
- Doubts about the adequacy and appropriateness of the data being gathered.
- Complaints that federal reports do not reflect data on provincial railways.

From the governance perspective, the point here is that provinces want to be listened to about all aspects of data collection and sharing, as they do on many other safety issues.

Provinces also typically have views on how the federal rail safety regime is structured and managed for the railways under its jurisdiction. They are generally very much in favour of the transition to safety management systems (SMS). We heard from a number of provinces, however, that SMS provisions that are relevant for CP or CN may have minimal application for a rural shortline or an industrial yard. Provinces want opportunities to discuss such matters.

Several expressed concerns about the effectiveness of oversight exercised by Transport Canada through inspections and audits. They remarked that Transport Canada lacks the necessary human resources and tools to identify and pursue violations and to ensure compliance. In particular, several commented that current maximum fines, while massive for a typical shortline are simply a minor cost of doing business for CP and CN.

Issues surrounding railway crossings and grade separations are a matter of great concern to all provinces. In particular, the lack of federal funding to upgrade crossings on provincially regulated railways was raised by several. In particular, New Brunswick points out that VIA Rail runs most of its distance through the province on shortline track, which is not eligible under current rules for federal crossing upgrade grants.

In this connection, provinces also commented on delays in implementing federal Crossing Regulations (RTD 10), which they believe to be related to the very substantial costs that will result for Transport Canada, provincial and local authorities and railways. They also point out that although not technically obligated to apply the regulations to provincial lines, there will be strong pressures for them to do so.30

Analysis and Recommendation

The need for effective communication and consultation applies not just to the relationship between the regulator and the operating companies, but equally to the relationship between the federal and provincial regulatory authorities. As noted above, the provinces are generally happy to work as partners in a larger nationally harmonized regulatory regime for rail safety, provided they are consulted on changes in advance, and are able to get from Transport Canada the information, advance warning, technical assistance, and

30 See discussion under Issue 11 (page 36).
active cooperation which they had expected when they made their respective arrangements with the Department after the passage of the RSA.

Nova Scotia, for example, has stated that it “has not always felt it has been an effective participant in the regulatory decision-making process”[^31]. It has expressed its concerns about a consultation process that “has been at best sporadic and at times limited to a notification process rather than a consultative process.”[^32] Similar views were expressed in one way or another by other provinces, all of whom recognize the importance of harmony between the provincial and federal regulatory regimes, and none of whom have the resources to operate an entirely independent regulatory system for the short lines that fall under their jurisdiction.

It is this failure to match statutory responsibilities with clear, shared expectations that seems to be at the root of some of the current difficulties between Transport Canada and its provincial counterparts[^33].

**Recommendation 16:**

   a. That Transport Canada institute regular consultations with provinces on all matters to do with rail safety affecting provincially-regulated railways. The Department should also consider including such a requirement in regulations (see Recommendation 1). Such consultation is especially important in advance of proposed rule changes.

   b. That the Federal-Provincial Working Group on Railway Safety (FPWGRS) be used more deliberately as an information-sharing and consultative forum.

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**F. Protecting the Public Interest and the Environment**

**Issue 17: Fulfilling the Commitment to Public Safety and the Environment**

*How best to ensure that the RSA commitment to “promote and provide for the safety of the public and ...the protection of ... the environment” (s.3) is effectively addressed.*

We heard from a number of provinces and others, and noted in some of the studies prepared for the panel, that there are concerns about whether the public interest, particularly with respect to safety, and protection of the environment are given high enough priorities in managing rail safety as a whole.[^34]

They suggested that railways may sometimes place more emphasis on facilitating their own operations than on protecting public safety and convenience or the environment. There were suggestions, for example, that in some accidents, the railway involved could have done more to limit environmental damage but was preoccupied with restoring its own operations.[^35]

[^32]: Ibid.
[^33]: We remind readers, however, that provincial satisfaction with federal-provincial relations varied widely.
[^34]: E.g., *A Study of the Environmental Implications of Rail Transport in Canada*, Benoit and Associates.
[^35]: CN witnesses strongly denied such suggestions in relation to the Wabamun Lake accident when appearing before the Standing Committee on Transport, Infrastructure and Communities in April 2007.
We also heard about serious inconveniences caused to local residents and businesses when trains block crossings for periods far longer than the five-minute maximum allowed by regulations; in some cases, it was said, public safety is compromised by emergency vehicles such as ambulances and fire trucks being delayed. There were also complaints about the speed of trains in urban areas (an increasing issue as those areas expand to envelop more and more mainline track) and the risk to people and the environment from spills of dangerous goods in derailments. Finally, in risks to the public, it was noted that the great majority of all railway fatalities result from crossing accidents and trespassing.\(^{36}\)

As noted in the previous section, provincial officials talked about the need for a special emphasis on risk management for public safety and environmental protection. They suggested that more might be done to coordinate federal and provincial emergency measures and to develop stronger plans to deal with spills and other hazards. It should, however, be noted that most comments on cooperation in this area were positive.

**Analysis and Recommendation**

The point made by most commentators was not so much that the railway companies are to blame for the observed problems as that the entire railway safety system and its participants need to give more attention to public safety and environmental protection.

There is no doubt that the RSA is intended to address these matters, as the first explicit objective of the *Act* is “to promote and provide for the safety of the public and personnel and the protection of property and the environment.” (s. 3 (a)). Despite this, some of those we talked to said that the Act might be made more explicit or that Transport Canada might increase its oversight efforts in this area.

It seems to us that the objectives of the *Railway Safety Act* already set out reasonably clearly the requirement to address public safety and the environment. While arguments might be made for detail changes in wording to give these matter still greater emphasis, we are not convinced that change is the legislation is required.

Nor do we see a need for a new and separate initiative on these matters. Rather, we believe that well designed and implemented measures to strengthen railway safety will achieve what is needed.

**Recommendation 17:**

That the Transport Canada Rail Safety Directorate give explicit priority to public safety and protection of the environment in its implementation of the RSA and that the Department undertake specific consultations on this matter with key players including the railway companies, RAC, unions, and provinces, and that the issue be addressed by a revived Railway Safety Consultative Committee.

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\(^{36}\)“Together, fatalities and serious injuries as a result of crossing and trespasser accidents have accounted for 91% of all railway accident fatalities and serious injuries since 1996.” *The State of Rail Safety in Canada*, CPCS Transcom Ltd, July 2007.
6. Conclusion

The forty interviews that form the basis of this study, together with the submissions made to the Review Panel, show that governance issues actually underlie many of the concerns expressed by participants in the present review of Canada's railway safety system. By the term “governance” we are referring, as noted at the beginning of this report, not just to formal mechanisms for decision-making, but rather to the complex network of practices, attitudes and relationships that together make up the governance environment for rail safety in Canada.

Our review has led us to conclude that there are problems to be resolved in all these dimensions of the governance equation for rail safety. In addressing those problems in this report, we have paid particular attention to four questions contained in the terms of reference for this governance study. There, the Review Panel asked:

- Are the roles of the players in the rail safety governance universe clearly defined and complementary?
- Are there gaps or overlaps in responsibilities or responses?
- How well do the players cooperate, consult, inform?
- What are the principal problems of governance?

The issues identified in this study, and the recommendations offered have attempted to address these concerns. It will be apparent to the reader that there is neither a single problem at stake here, nor a single or simple solution.

Rather, what is required is a better understanding by the players in the railway safety regime of their respective roles and how they are intended to relate to one another under the Railway Safety Act. If the companies and the regulator, together with other concerned parties such as the provinces and the unions, can reach a shared understanding of roles, responsibilities and desired relationships, they will be well on the way to addressing the governance issues uncovered in the course of this study.

Jim Mitchell and Nigel Chippindale

The Governance of Railway Safety in Canada
Annex A: Terms of Reference for this Study

The following is an extract from the “Terms of Reference for a Study Pertaining to the Governance of Rail Safety in Canada,” issued by the Rail Safety Act Review Secretariat.

2. Objective

This study will examine how federal and provincial roles and responsibilities for rail safety are exercised in Canada. The study will identify any issues with respect to the governance regime and recommend possible solutions. There are a number of players involved in governing rail safety in Canada including, Transport Canada, the Transportation Safety Board, the Canadian Transportation Agency, VIA Rail (a Crown corporation), provinces, municipalities and the railway industry.

Provincial governments have responsibility for regulating intra-provincial railways. Most provinces adopt RSA rules under a Memorandum of Understanding (MOU) with the federal government and individual companies and in some cases federal inspectors perform inspections on a cost recovery basis for the provincial government.

Municipalities have significant roles to play in funding and design of rail crossings, land use planning on lands adjacent to railway lines and installations, as well as managing rail transit services. The study will identify the issues that have arisen in this complex environment and recommend mechanisms to address them. Among other things, the study will provide an assessment of how well this structure provides for good governance of rail safety in Canada; whether there are overlaps of authority, inefficiencies, or gaps; and whether it provides adequate oversight and controls to facilitate rail safety.

3. Scope of Work

The Consultant will prepare a report covering the following elements:

3.1 Roles, Responsibilities and Accountabilities (10%)

A description of federal, provincial, municipal and private sector roles, responsibilities and accountabilities pertaining to rail safety matters in Canada and how these are exercised. At minimum, Transport Canada, the Canadian Transportation Safety Board, Canadian Transportation Agency, VIA Rail, provinces, territories, municipalities and private sector rail companies will be covered.

3.2 Legislative and Regulatory Framework (20%)

A brief description of the legislative and regulatory framework governing rail safety in Canada involving the parties described in item 1 above. At minimum, the Railway Safety Act, Canadian Transportation Accident Investigation and Safety Board Act, Canada Transportation Act, Transportation of Dangerous Goods Act, and the Canada Labour Code (Part II) will be included. Memoranda of understanding and/or agreements between provinces and the federal government/rail industry for oversight and enforcement of safety rules will also be described.

The Governance of Railway Safety in Canada
3.3 Working Relationships (50%)
The working relationships among the key players will be outlined and assessed. The study will identify any issues that have arisen in this complex environment and recommend possible mechanisms to address them. Issues to be addressed include:

- responsibility of the Canadian Transportation Agency for issuing certificates of fitness to operate a railway that are not associated with safety while Transport Canada relies on a submission of a safety management plan from the railway (is this sufficient for good governance?);
- responsibilities for collection of railway accident and incident data and analysis, which is primarily the domain of the Transportation Safety Board (is this sufficient for good governance?);
- federal-provincial cooperation on railway safety regulation, management, and oversight under the RSA (Not all provinces have MOUs with Transport Canada. Does this patchwork cause problems from a governance standpoint?);
- delegation of power to rail safety inspectors (do rail inspectors have greater powers than other federal inspectors and is this cause for concern?);
- consistency of RSA enforcement across the country (does the organizational structure of Transport Canada and the Rail Safety Directorate contribute to the perception of inconsistent enforcement?); and
- industry-led rule making under the RSA (is this an efficient and effective method of creating rules?).

3.4 Assessment of the Governance Structure (15%)
An assessment will be provided of the overall governance structure, its strengths and weaknesses and identifying overlaps, gaps, ambiguities or inefficiencies in the structure.

3.5 Observations and Recommendations for Improvements (5%)
Observations and recommendations for improvements to the governance structure including the advantages and disadvantages of the recommended changes will be discussed.
Annex B: List of Persons Interviewed

Federal Departments and Agencies

Transport Canada
Luc Bourdon, Director General, Rail Safety, Safety and Security Group
John Read, Director General, Transportation of Dangerous Goods, Safety and Security Group
John Mills, Regional Director, Surface, Pacific Region, Transport Canada

Canadian Transportation Agency
Ian Spear, Director, Canadian Transportation Agency, Rail Infrastructure Directorate
Paul Lacoste, Manager, Engineering & Environmental Services, Rail Infrastructure Directorate,

Transportation Safety Board of Canada
Gerard McDonald, Executive Director, Transportation Safety Board of Canada
Ian Naish, Director, Investigations Rail/Pipeline, Investigations Operations directorate,
Transportation Safety Board of Canada

Environment Canada
Tom Foote, Director, Environmental Emergencies, Environment Canada

HRSDC
Todd Campbell, A/Program Advisor, HRSDC-Labour Program (written comments)

Railway Companies and Railway Association

CP Rail
Faye Ackermans, General Manager, Corporate Safety and Regulatory Affairs, CP Rail, Calgary
Robert Smith, Manager, Regulatory Affairs, CP Rail, Calgary

CN Rail
Jean Patenaude, Assistant General Counsel, Legal Affairs, CN Rail, Montreal
Don Watts, Senior Manager, Regulatory Affairs, CN Rail
Sam Berrada, Director, Safety and Occupational Health, CN Rail

Via Rail Canada
John Marginson, Chief Operating Officer, VIA Rail Canada
Karl Coffen, Director, Stakeholder Relations, VIA Rail Canada
Mike Regimbal, Senior Advisor, Operations, Via Rail Canada

Railway Association of Canada
Mike Lowenger, Vice-President, Operations and Regulatory Affairs, RAC
Kevin McKinnon, Director Regulatory Affairs and Policy Liaison, RAC
Gérald Gauthier, Director, Industry Liaison, Public and Corporate Affairs, RAC

Unions

United Transportation Union
Tim Secord, Legislative Director, United Transportation Union
Don Anderson, Alternate Canadian Legislative Director, United Transportation Union

The Governance of Railway Safety in Canada
**Teamsters Canada Rail Conference**
Mike Wheten, National Legislative Director, Teamsters Canada Rail Conference

**United Steelworkers**
Ken Neumann, National Director, United Steelworkers, Toronto

**Canadian Auto Workers**
Brian McDonagh, National Representative, CAW, Vancouver

**Provinces**

**British Columbia**
Kirk Rockerbie, Manager, Transportation Policy, BC Ministry of Transportation
Eric Samuelson, Special Projects Officer – Railways, BC Safety Authority
Allan Lowe, Special Projects Officer – Railways, BC Safety Authority

**Alberta**
Shaun Hammond, ADM, Transportation & Safety Services Division, Alberta Infrastructure and Transportation
Bob Clyne, Manager, Rail Safety, Alberta Infrastructure and Transportation

**Saskatchewan**
Kim Graybiel, Director, Intergovernmental Issues, Transportation Policy, Saskatchewan Highways and Transportation
Ed Zsombor, Director, HIRS, Rail Services, Saskatchewan Highways and Transportation
Brent Orb, Rail Projects Manager, HIRS: Rail Services, Saskatchewan Highways and Transportation

**Manitoba**
Connie van Rosmalen, Policy Consultant, Policy and Service Development Branch, Manitoba Infrastructure and Transportation
Reg Wightman, Training and Development Officer, Motor Carrier Safety and Regulation Division, Manitoba Infrastructure and Transportation

**Ontario**
Bill Raney, A/Director, Modal Policy and Partnerships, Ontario Ministry of Transportation
Andy Elliott, Ontario Ministry of Transportation

**New Brunswick**
Robb Francis, Policy Branch, New Brunswick Department of Transportation

**Nova Scotia**
Brian Gallivan, Director, Policy and Planning, Transportation and Public Works, Nova Scotia
Stephen Newson, Planning & Development Officer, Transportation & Public Works, Nova Scotia

**Quebec**
Alain Bérubé, Sécurité en transports, Ministère des transports du Québec, Canada
Annex C: Questions for Interviewees

A Study of the Governance of Railway Safety in Canada

Questions for Discussion

Broad Areas (for all interviewees)

Please outline your experience in the field of railway safety, as well as your current role and that of your organization (i.e., agency, level of government, industry, etc.).

1. What are the main issues in rail safety from your point of view? What is at stake?

2. How does your organization relate to the other principal players in rail safety in Canada (federal agencies, provincial authorities, industry, unions, etc.). How would you characterize the various working relationships among the players?
   a. How do the various federal departments and agencies work together? Are their roles clear and complementary?
   b. How does the federal-provincial (and municipal) relationship work in this field?
   c. Are the roles of rail companies appropriately defined and carried out?
   d. Do the unions play an appropriate part in railway safety?

3. How do you see the state of rail safety in Canada generally and in your area of responsibility in particular? Is there a discernable trend? Is managing rail safety getting easier and more effective or less so?

4. How should the approach to rail safety in Canada change in the years ahead?

5. What specific changes do you want to see in legislation, regulations, and working relationships? In particular, do you see a need for changes in the *Railway Safety Act*?

6. Are there other comments you would like to offer regarding rail safety in Canada?

Some Specific Areas for Discussion (as appropriate)

**Safety related responsibilities**: Canadian Transportation Agency and Transport Canada.

**Data collection and analysis**: responsibilities of the Transportation Safety Board and others for collection and analysis of railway accident and incident data, role of Transport Canada.

**Federal-provincial cooperation**: on railway safety regulation, management, and oversight under the *RSA*. Memoranda of understanding with Transport Canada.

**Safety inspectors**: delegation of power to federal rail safety inspectors under *RSA*.

**Consistent enforcement**: consistency of *RSA* enforcement across the country.

**Industry role in rule-making**: an efficient and effective method of creating rules?
Annex D: Consolidated List of Recommendations

Improving the Government/Railway Relationship

Recommendation 1: Achieving the Cooperative Spirit of the Railway Safety Act

That Transport Canada, if it is to be respected and trusted as a partner with the railways in an open, collaborative regulatory process of the kind set out in the Railway Safety Act, comport itself accordingly.

Strengthening the Rule-making Process

Recommendation 2: Creating a More Transparent and Open Decision Process

That the Railway Safety Act be amended to provide for increased transparency in decision-making on proposed or potential railway safety rules by imposing on the Department an obligation to explain its decisions:

- to require the specific development of rules under s.19, or
- to reject, vary or impose conditions on rules that have been developed through the rule-making process, or
- to impose rules on the companies.

The explanation should demonstrate that potential impacts have been adequately considered in arriving at the decision.

Recommendation 3: Clarifying and Expanding Consultation

a. That the essential place of the unions and the provinces in the rule-making and rail safety regime, and a requirement for meaningful and timely consultation with them in the rule-making process, be affirmed by either an amendment to the RSA or new regulations under the Act.

b. That, in the absence of statutory change, Transport Canada develop a protocol stating explicitly the obligations of the regulator and the railway companies to consult with the unions, the provinces and other interested parties as part of the rule-making process. Such a protocol could be the focus of an early meeting of the Railway Safety Consultative Committee.

Recommendation 4: Reviving the Rail Safety Consultative Committee

That Transport Canada take steps to revive the RSCC as a smaller and more tightly-focused body, meeting regularly and serving as the key mechanism for discussion of:

- future directions in rail safety, rule-making and regulation;
- policy issues of concern to the regulator and the regulated community;
- problems and issues of common concern, outside the formal rule-making process;
• general information-sharing and confidence building.

The reconstituted RSCC should be supported, as before, by Transport Canada’s Rail Safety Directorate.

Consideration should also be given to including the requirement in regulations under the RSA for regular meetings of the RSCC and possibly for the creation of technical supporting committees.

**Recommendation 5: Improving the Drafting of Rules**

That Transport Canada make arrangements to have draft rules scrutinized by competent regulatory lawyers to ensure that they meet acceptable standards of clarity and consistency with the existing regulatory regime.

**Enhancing the Effectiveness of Transport Canada**

**Recommendation 6: Enhancing the Capacity of Transport Canada Rail Safety**

That, if the government is prepared to provide the necessary resources to renew and expand railway safety capacity in Transport Canada, the Department:

• Develop a three-to-five year human resources plan for the renewal of staff and expertise in the Rail Safety Directorate and regional offices, with particular emphasis on recruiting and developing the skills required for a modern performance-based safety management system;

• Develop a related plan to ensure adequate provision of inspection and other services in the regions, and thereby to serve the support needs of provinces, pursuant to harmonization arrangements with the federal government; and

• Make a commitment to rethink its approach to inspection, audit and investigation, in order that the skills and time of the inspectors and other professional personnel in Transport Canada are appropriately allocated to meet the safety needs of the industry and the public under a performance-based safety regime.

**Recommendation 7: Strengthening the Risk Assessment/Management Approach**

That high priority be given to recruiting and developing, within the Rail Safety Directorate of Transport Canada and the Surface branches of Regions, the analytical and management skills necessary for a modern risk-based safety management system.

**Recommendation 8: Improving Oversight and Auditing**

That Transport Canada ensure that audit practice by the Railway Safety Directorate meets the professional standards of public sector audit, as understood by the competent federal authorities, as well as the specialized requirements of transportation safety audits, as conducted by the Marine and Aviation services of Transport Canada.
Recommendation 9: Providing Effective Functional Direction to Regions

a. That Transport Canada NHQ (i.e., the Railway Safety Directorate) more fully assert its existing responsibility to provide functional direction to regions. To this end, it should:

- be equipped and empowered to develop a framework of clear policy guidance on matters of rail safety rules and regulations;
- provide such guidance to the regional offices on a regular basis; and
- hold regional managers accountable for their actions within that framework.

b. That, in accordance with existing expectations, regions be allowed to manage with a reasonable degree of leeway within the framework of policy and rules provided by NHQ, but that they be held accountable by the Railway Safety Directorate for any regionally-based variation from national policy.

Recommendation 10: Rationalizing the Powers of Railway Safety Inspectors

a. That legal advice be sought as to whether the RSA should be amended to provide that the authority of the inspector derives from that of the Minister through the normal delegation of authorities from the Deputy Minister and on down.

b. That, regardless of the outcome, Transport Canada Rail safety Directorate develop a framework of national policy and guidelines for the exercise of Railway Safety Inspector powers and ensure that it is communicated and followed.

Recommendation 11: Avoiding Unnecessary Delays in the Regulatory Process

That Transport Canada take steps to ensure that it is delivering the regulations for which it is responsible in a timely fashion, and in particular:

- Take note of the concerns of stakeholders with respect to the pace of the regulation process in certain instances;
- Make any necessary and prudent investments in policy and legal capacity to speed the process; and
- Deal directly and in an open, consultative fashion with any underlying issues such as the cost of implementation.

Clarifying Roles and Relationships of Federal Players

Recommendation 12: Redefining Roles for Data Collection and Analysis

a. That Transport Canada create its own data collection and analysis center for the purposes of effective oversight and regulation of safety management systems (SMS).
b. That, to the extent possible, Transport Canada and the TSB harmonize their data requirements, to ensure that the needs of both institutions are met with as little unnecessary duplication or confusion as possible for reporting entities and stakeholders.

c. That Transport Canada, after consultation with stakeholders, implement a regular timetable for data reporting that enables the companies to provide information periodically, in a way that meets the needs of the regulator and imposes no unnecessary burdens on the reporting entities. Ad hoc demands for information, or requests unaccompanied by reasons, should be kept to a minimum.

d. That data requirements be based on principles developed through consultation with the companies and the provinces, and that the results of data analysis be much more fully and freely shared.

**Recommendation 13: Clarifying Roles in Applying the Canada Labour Code**

That Transport Canada Rail Safety Branch and HRSDC Labour Program be asked to review their arrangements for administration of Part II of the *Canada Labour Code* in consultation with the relevant unions and railway companies and make any necessary changes to ensure full and appropriate coverage of railway workers, both on-board and off-board trains.

**Recommendation 14: Whether to Replace the CTA Certificate of Fitness**

That Transport Canada adopt a policy of conducting a thorough review of the Safety Management System of any new railway, prior to approving the start of operations under the SMS Regulations.

**Improving Federal-Provincial Cooperation**

**Recommendation 15: Making Diverse Provincial Rail Safety Arrangements Work**

That rather than seeking to improve the harmonization of railway safety through changes in federal-provincial arrangements, the Panel focus on how Transport Canada can make the existing arrangements work more effectively.

**Recommendation 16: Improving the Federal-Provincial Working Relationship**

a. That Transport Canada institute regular consultations with provinces on all matters to do with rail safety affecting provincially-regulated railways. The Department should also consider including such a requirement in regulations (see Recommendation 1). Such consultation is especially important in advance of proposed rule changes.

b. That the Federal-Provincial Working Group on Railway Safety (FPWGRS) be used more deliberately as an information-sharing and consultative forum.


Protecting the Public Interest and the Environment

Recommendation 17: Fulfilling the Commitment to Public Safety and the Environment

That the Transport Canada Rail Safety Directorate give explicit priority to public safety and protection of the environment in its implementation of the RSA and that the Department undertake specific consultations on this matter with key players including the railway companies, RAC, unions, and provinces, and that the issue be addressed by a revived Railway Safety Consultative Committee.
Annex E: Selected Bibliography

Research Studies Commissioned by the Panel


Submissions to the Panel – Provinces


Submissions to the Panel – Other


Teamsters Canada Rail Conference, submissions by provincial and local representatives (Manitoba, Vancouver, Coquitlam, New Brunswick) and individuals

United Transportation Union, submissions by representatives (BC, Western Canada)


Transportation Safety Board of Canada, Opening Remarks to the Railway Safety Act Review panel by Wendy A. Tadros, Chair, April 2, 2007

**Other Documents and Sources**


Transport Canada, documents on the Rail Safety Consultative Committee and Executive Committee, including membership list and reports on meetings, from website

Transport Canada Information Notes: History of the RSA; Listing of Canadian Railway Companies; Responding To Railway Accidents; Review of the Transportation of Dangerous Goods Act, 1992; Arrangements with Provincial Railways.


Transportation Safety Board of Canada reports on selected accidents

Public documents and website items by Transport Canada, Transportation Safety Board of Canada, Canadian Transportation Authority and other federal players in rail safety

Standing Committee on Transport, Infrastructure and Communities, Hansard reports of hearings on railway safety, April 2007

Documents available on the internet concerning provincial railway safety regimes

Documents available on the internet on union web sites concerning union roles in railway safety

Canadian National, *CN Corporate Governance Manual*, Environment, Safety and Security Committee