FINAL REPORT ON THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK FOR RAILWAY SAFETY IN CANADA

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# LEGISLATIVE AND INSTITUTIONAL FRAMEWORK FOR RAILWAY SAFETY IN CANADA

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This research Report covers a description and an assessment of the legal and institutional framework for railway safety in Canada. Six general areas have been identified for study:

- Jurisdictional and Harmonization Issues
- “Sound Engineering Principles” As The Safety Criteria For Railway Works
- Rule Formulating
- Regulations, Exemptions
- Monitoring and Enforcement
- Appeal Mechanisms Respecting TC Rulings

Jurisdictional and Harmonization Issues

To what extent does the government regulate railways in Canada and what are the gaps in such regulation?

The government of Canada has exclusive jurisdiction over the regulation of safety of railways that fall under its jurisdiction. The provincial governments regulate railways under the jurisdiction of the provinces. Safety regulation of railways under the jurisdiction of the Parliament of Canada is governed by the Railway Safety Act (RSA), the Transportation of Dangerous Goods Act (TDGA), the Canadian Transportation Accident Investigation Safety Board Act (CTAISBA) and the Canada Labour Code (CLC). Each of these Statutes deals with different aspects of railway safety. There are four government bodies involved in the regulation of railways under federal jurisdiction: Transport Canada (TC) administering the RSA and TDGA, the Transportation Safety Board administering the CTAISBA, the Canadian Transportation Agency, or “CTA” administering the Canada Transportation Act and Human Resources Development Canada (HRDC) administering the CLC and the On Board Trains Occupational Safety and Health Regulations.

Transport Canada’s jurisdiction is dependent on whether a company has been granted a certificate of fitness (COF) by the CTA. The reason for this is because the RSA refers constantly to “railway company”, and, according to subsection 4(2) RSA, that term is defined, by the definition of “railway company” under the Canada Transportation Act, as a company having a COF. Other federal bodies having jurisdiction over railway safety do not limit themselves to the COF to trigger their jurisdiction, rather they examine more generally whether a particular railway is subject to the jurisdiction of the Parliament of Canada. As a result, Transport Canada, which administers the RSA, relies upon the CTA to make the assessment as to whether a particular railway company falls under federal jurisdiction. As to whether amendments are needed to legislation regarding the tests for federal jurisdiction, the recommended approach is to amend the RSA to provide the same criteria for determining jurisdiction as those found in the Canada Transportation Act so that TC can assess federal jurisdiction through its own legislation rather than relying on the CTA to make the assessment through its COF.

The CTA in the past has not proactively assessed companies and required them to submit an application for a COF. It has waited until a particular company has made the application on its own. This could result in a gap in jurisdiction: however, the CTA has recently taken a more proactive approach and this can be seen in the recent decision requiring the Great Canadian
Railway Tour Company to apply for a COF. It is recommended that this approach be continued by the CTA.

Harmonization, in the context of railway safety regulation in Canada, can be defined as the process by which the standards, rules, regulations and procedures that make up safety regulation of railways in Canada are made as uniform and consistent as possible a) among federally regulated railways; and b) between provincially and federally regulated railways. As the number of interfaces between different systems is multiplied, the opportunities for ambiguity and inconsistencies in the various statutory instruments, procedure and guidelines, and their application, increase and the need for harmonization becomes more evident.

The difficulty with harmonization among the various jurisdictions results mainly from rule formulation under sections 19 and 20 RSA. This is because even though rules have the force of a regulation, once approved by the Minister, they apply only to railways that are signatories to them. Also, while provincial railways who are members of the RAC may be signatories to the rules, they are not in fact subject to the RSA as they do not have a COF. (The one exception is Ontario that is subject to the RSA through an inspection and enforcement agreement made pursuant to its provincial railway legislation).

There are essentially three model of harmonization exemplified by the provincial regulatory regimes: the consultation model, (Saskatchewan and Quebec) the incorporation by reference model (Manitoba, British Columbia, New Brunswick and Nova Scotia) and the delegation model (Ontario). Ontario is the province most compatible with the federal regulatory regime.

The key to making particular rules applicable to provincially regulated railways lies in provincial legislation that not only incorporates the federal regime by reference as amended from time to time, but also, as in Ontario, provides a mechanism to permit TC to administer and enforce the federal scheme in the same manner and to the same extent as a federally regulated railway.

In fact, it is this area where further work is needed to achieve optimal harmonization: there are not necessarily gaps in safety regulation as much as there is ambiguity as to what applies in a given instance. The problem is compounded by not knowing what exemptions and amendments to rules apply in a particular case: with the exception of Ontario regulated railways, only a federally regulated railway can apply for exemptions or revisions to rules incorporated by reference under the RSA. Presumably, the relevant provincial railway legislation can allow for these, at the cost however, of yet another layer of jurisdiction added to the rule-formulating process.

SMS poses another problem in that while SMS regulations will apply either through incorporation by reference or through the provinces own SMS requirements, there is no provision in any of the federal-provincial inspection/enforcement agreements for SMS audits.

To promote harmonization, it is submitted that the most important initiatives should be administrative, through regular meetings of the Federal Provincial Working Group on Railway Safety (FPWGRS) Group and the maintaining of up-to-date data bases on the status of the rules, exemptions, and the railways to which they apply. For all harmonization issues, dialogue among
all the interested parties is key to resolving these issues and the continuation of this work is recommended. Specific changes to legislation are recommended to section 19(5.1) RSA respecting a gap created when there is a repeal of rules before the approval of new rules and there is a recommendation to change the RSA to cover this gap.

“Sound Engineering Principles” As the Safety Criteria for Railway Works

Does the term “sound engineering principles” have any meaning as the safety criteria for railway works under section 11 RSA, should it be further defined in the legislation, or if meaningless, should it be omitted from the Act entirely?

Section 11 is problematic in several respects; in particular, there is lack of guidance on the meaning of the term “sound engineering principles”. There is no case law on section 11 to provide any assistance in interpreting the meaning of the term. The recommended approach is to leave the term in the legislation and reference it to detailed standards that should be developed as soon as possible.

Regarding maintenance of engineering works, there is no general duty of care regarding maintenance of railway works. The inclusion in the RSA of such a duty might assist a prosecutor in future to prosecute a case involving poor maintenance of such a work.

Rule Formulating

Rule formulating existed before the enactment of the RSA but on a limited basis. The rule-formulating scheme set out in sections 19 and 20 RSA is an innovative regime that is unique to Canada and reflects the climate of deregulation in the rail and other modes, leading up to the enactment of the RSA in 1989.

The objectives of the Act as set out in section 3 and include “collaboration and participation of interested parties”. This objective is embodied in the statutory requirement for consultation in both sections 19 and 20 and the opportunity for relevant associations or organizations, including unions, to comment on and object to a proposed rule. However, the collaboration and participation to the extent intended by the legislation does not appear to be the practice of the parties involved.

The steps regarding industry-driven rules are set out in section 20 RSA, which refers to section 18 and 19 to complete the scheme. Basically, the railways, under section 20, can propose their own rules relating to the topics set out in section 18. In addition, the Minister of Transport can order that the railways submit rules to him under section 19. The Minister can also formulate his own rules if he rejects the railways’ proposed rules or if the railway fails to submit rules after being ordered to do so (subsection 19(7)). All rules, except those formulated by the Minister himself, involve a Ministerial approval process and all require consultation. Once a rule is approved or established by the Minister, it has the force of law (subsection 19(5.1)).

Both the GIC and Minister of Transport can allow exemptions from rules. Under subsection 22(1), the GIC can by order exempt, with terms and conditions, as it sees fit, particular railways or particular railway equipment or works from the application or a regulation or rule or any
provision of a regulation or rule. There is no procedure for applying for such an exemption and no criteria binding the GIC regarding it, in contrast to that of the Ministerial power to exempt where criteria do bind the Minister (subsection 22(7)). Under subsection 22(2), the Minister can make the same exemption, by notice. Under this provision, a railway company may apply to the Minister for the exemption and the same requirements regarding consultation under the rule-formulating provisions apply to exemptions as well (subsections 22(5) and (6)).

The Minister may grant the application for an exemption if it determines that it is in the public interest to do so and is not likely to threaten safe railway operations (subsection 22(7)). There is also an automatic temporary exemption for testing (s. 22.1) with notice requirements and the right to make objections (subsections 22(2) and (3)).

Generally, TC’s experience to date with the rule-formulating process has been good. Rule formulating under the RSA has relieved to a large degree the regulatory burden for formulating railway safety requirements that the previous legislative regime involving the Railway Act had imposed. There has been a big shift from of the regulator’s duties from regulation drafting to railway driven rule approval. TC does have several concerns with s. 19 and 20, as well as with exemptions under section 21. TC concerns can be divided into three general areas: process, manpower/resources and consultation.

Regarding the question of resources, there is no question that rule-formulating under the RSA has reduced the regulatory burden on TC, but not eliminated it. The lack of manpower and other resources is a concern to TC and this Consultant agrees that it is a significant limitation to fulfilling its role as the lead railway safety oversight and regulatory body in Canada.

It is recommended that adequate funding be given to the Rail Safety Directorate to either hire or train from within a Rules Expert (and ideally a team of experts), that will serve on the consultation body recommended below as well as offer advice at the approval level.

Another area that is lacking in both TC and in industry is training in drafting rules. Because rule formulating under the RSA is such a unique process, combining industry initiative with the force of law, there is a gap in training. In fact, not much is known about this form of drafting and this needs to be addressed. Another area where training is needed is in drafting of performance-based requirements, which are specifically mentioned in the objectives of the RSA. If such standards are to be used (and it is evident from section 3 RSA that the intention of the legislature is that they should be used), training is needed so that they are used properly, particularly, that they are enforceable.

TC is concerned that the railways’ consultation under sections 19, 20 and 21 is after the fact and bilateral, even though TC guidelines on consultation recommend that consultation be commenced early on in the drafting process. In fact, the usual process is to send the drafted rule to the unions and invite comments; the comments, the railway’s reply to the comments and any objections are all submitted with the proposed rule to TC.

Regarding the railway experience to date with the rule formulating process, over all, the railways are happy with the system; certainly they prefer it over GIC regulations, especially with respect to their own operations. There are four main concerns of the industry: a) consultation, b)
government mandated rules and government-imposed terms and conditions attached to approved rules, c) exemptions and d) provincial/federal legislative gaps not permitting provincial railways to benefit from rights under the federal regime. These latter rights relate to requests for funding of crossings and the ability of provincial railways to initiate rule-formulating and ask for exemptions.

All interested parties, including the railways and TC agree that consultation as presently conducted under the RSA is inadequate and one recommendation of this research report is that new models be examined to find a process that is meaningful to all parties.

Another issue that has been raised for discussion in this report is whether TC’s oversight role in approving rules has been adequate. TC Legal Services involvement in rule-formulating is restricted. For the most part, it comes at the approval level, and even at this level, Legal will only look at the instruments relating to the approval, i.e., the approval order and the notice of approval, to see if they conform procedurally to what is required under sections 19 and 20 RSA and with the drafting conventions applicable to these types of documents. It does not look at the content of the rules, or how they are drafted.

As a result, rules are not reviewed for such things as language, consistency with other rules covering the same matter, whether the rules are *intra vires* the RSA, subdelegation issues, whether goal oriented provisions are precise enough to enforce, and other like issues that relate to regulation drafting.

It is therefore recommended that a modified legal review of rules be undertaken by TC Legal Services that compares proposed rules with existing rules for consistency of language and form, examines the rules to see if they are *intra vires* the powers of the Minister under the RSA, establishes that are no illegal subdelegations of legislative power and deals with harmonization questions and other questions, to the extent that they are related to legal issues.

**Regulations, Exemptions**

Section 47 authorizes the GIC to make regulations generally for carrying out the purposes and provisions of the Act, including certain specified topics. In addition, there is exclusive GIC regulation-making powers over construction of crossings (s. 7.1) and over fencing, drainage, pipes, buildings and roads not part of railway works or operations but which may affect safe rail operations (s. 24). Under section 47.1, there is exclusive GIC regulation-making powers respecting safety management systems and release of pollutants into the environment. For maintenance of line works and the design, construction, alteration, operation and maintenance of railway equipment, and engineering standards governing the construction or alteration of railway works, either rules may be developed (by the industry or the Minister) or regulations may be adopted by the Government (sections 7, 18, 19 and 20).

The regulatory process is a relatively complex and formalistic process, consisting of approximately 11 stages including a cost/benefit study, review by Regulations Section Justice and blue-stamping, publication in Part II Canada Gazette, registration with the Registrar of Statutory Instruments and review by the Standing Joint Committee for the Scrutiny of Regulations. In general, it is noted by TC and industry that the regulatory process is time-
consuming. There are however, no recommendations to offer with respect to improving the problems encountered in this respect. These are difficulties inherent in the regulatory process and the solution for which is beyond the scope of this study.

Monitoring And Enforcement

Basically, monitoring and enforcement powers can be divided between the powers of Railway Safety Inspectors (RSIs) and the powers of the Minister. There is also a degree of industry self-monitoring and enforcement in the form of Safety Management System (SMS) Regulations, obliging railways to submit information on how they commit themselves to ensuring safe railway operations, including setting out safety goals and applicable safety requirements, including rules that they are bound by, how they intend to and are currently meeting, enforcing and monitoring compliance with these requirements.

Powers of RSIs

RSIs have a range of tools, both statutory and administrative, to enable them to respond to non-compliance or unsafe conditions.

Administratively, the RSI powers include issuing Letters of Non-Compliance and provision of a variety of educational and promotional activities. They have, for purposes of ensuring compliance with the RSA, regulations, emergency directives, rules, orders and security measures under the Act and statutory powers that permit them to enter places, inspect, make copies of documents, seize property, etc.

RSIs also have the power to issue notices informing the railway that certain of its line works or railway equipment pose a threat to safe railway operations (subsection 31(1)(a)). All RSIs, if they believe there is an immediate threat to safe railway operations, have the power to issue a notice of such threat and an order requiring the railway company not to use those works or equipment, or to use them subject to the RSI’s terms and conditions.

Where an order is issued under section 31 (to not use certain works, equipment, vehicles etc) the RSI must inform the Minister of such an order (subsection 31(5)). An RSI order under section 31 is appealable to the Transportation Appeal Tribunal of Canada (TATC) under section 31.1.

Powers of the Minister

The Minister’s statutory powers consist of the power to issue notice/notice and order under sections 32 and 33 RSA and powers of review of RSIs’ orders (section 31). The Minister’s administrative powers include the power to make nation-wide policies respecting compliance.

Adequacy of RSIs’ Options

The usual procedure when a violation of the RSA Act, regulations or rules has been discovered by an inspector, through inspection, audit or any other means available to him, is to use an administrative tool, the Letter of Non-Compliance. This tool is viewed as both a technique to promote compliance and to respond to non-compliance.
If there is no correction of the situation spelled out in the Letter of Non-Compliance, a notice under section 31 must be issued by an inspector if an RSI believes that a threat to safety exists. However, continued non-compliance is not considered to be enough to justify the section 31 notice: a threat must be assessed and that threat cannot be simply because of non-compliance with the Act, regulations or rules. The only recourse in this case, is prosecution. This is seen by many regional offices interviewed by the Consultant as a defect in the Act which should be remedied.

One solution would be the creation of administrative penalties, or “ticketable offences” which would allow for an alternative to prosecution of persistent non-compliance with requirements that do not amount to a threat under section 31. The Railways and other interested parties ought to be consulted on this proposal.

Other inadequacies relating to monitoring and enforcement include: problems resulting from the overlapping of powers among inspectors at the regional and HQ levels and the fact that section 31 RSA provides for four different notices/orders and if the wrong section is used, the regulator has to go back and rewrite the notice and resend it. Another inadequacy relates to the obtaining of information under section 28 RSA, with different regions getting more cooperation from the railways, depending on the interpretation given to that section by the railway’s regional office. The railways, on the other hand, feel there are security and privacy issues with respect to the obtaining of information under section 28. Finally there is a need for training in inspection and enforcement by the railways and other stakeholders having a direct interest in enforcement (such as municipalities and road crossings).

**SMS Audits**

As noted above, the SMS Regulations are a form of industry self-regulation. The way TC enforces and monitors these regulations is through SMS audits.

There are two issues of concern relating to SMSs: the first is that safety management systems are submitted to the Minister, but not approved by him or given any sort of official sanction and it is recommended that some form of approval should be looked into to evaluate the adequacy of a particular SMS. The second issue relates to the adequacy of certain information that has to be filed for new railways. If the railway is new and has no rules, it cannot identify them for purposes of an SMS. These railways should be required to submit proposed rules if no rules apply to it at the time of submitting the SMS.

**To what extent are the enforcement actions consistent across the five regions?**

The consultant asked each region how sections 28 and 31 inspector’s powers have been used and how audits have been used to enforce the SMS regulations. There were difference is enforcement action in such areas as the letter of compliance and section 31 orders; the use of section 28 information gathering powers and in the criteria used for determining the nature and number of SMS audits. These are areas that should be studied further with a view towards making enforcement action consistent across the country.
**Accident/Incident Reporting and Investigation**

Currently, RSIs do not investigate railway accident/incidents; however, the TSB, the official investigating body regarding modes of transport under federal jurisdiction, only investigates “reportable” accidents and incidents as defined in the CTAISBA. RSIs could play an important safety role in investigating railway accidents and incidents falling outside this criterion.

**Appeal Mechanisms Respecting TC Rulings**

There are two appeals of note: one respecting a section 31 order made by a RSI and the other respecting a section 32 order made by the Minister. In both these cases, the applicant must first request a review by a member of the Transportation Appeal Tribunal of Canada and can appeal that decision to the full Tribunal: subsection 31.1(1) and 32.1(1) RSA. There have been six applications for appeal to a single Panel member, but all have been withdrawn before being heard. The railways have suggested that TATC appeals be extended to include decisions not to approve a rule, decisions to approve a rule with conditions, imposition of rule-formulation under section 19 as well as to exemption decisions. In determining whether it is advisable to recommend an extension of the right to appeal to those areas suggested by the railways, the nature of the decision involved must be analyzed. In the case of a decision not to approve a rule or to approve it with conditions, the decision being made can be classified as a legislative one. This differs from currently appealable decisions under the RSA, which are administrative decisions. They involve the exercise of administrative discretion – in the case of the RSI, the decision that there is a threat or an immediate threat and the decision to, for example, issue an order to the railway to stop operations. Likewise, in the case of the Minister, his order to stop operations or modify a work is the result of the exercise of his administrative discretion.

As it is very uncommon to have an appeal to an administrative tribunal such as TATC from a legislative decision, appeals to TATC regarding Ministerial decisions not to approve a rule or to approve it with conditions and similarly from subsection 7(2) Ministerial orders (requiring the railway to formulate engineering standards) are therefore not recommended.
RECOMMENDATIONS

I. Regarding jurisdiction and Harmonization

- gaps in jurisdiction

1. It is recommended that the same jurisdictional tests as those found in the CTA Act be expressly set out in the RSA and that the COF no longer provide the jurisdictional trigger regarding application of the RSA. The COF could be mentioned “for greater certainty”, but not limit the jurisdiction of TC, as it has up to now.

- the promotion of harmonization and dealing with regulatory gaps and inconsistencies

2. The April 2001 Harmonization Report recommended that the FPWGRS meet with the CTC, TC, HRDC and TSB with respect to develop criteria to be used for determining federal jurisdiction for regulation of railway safety; although at least one meeting after 2002 of this Group took place, there do not appear to be further meetings: it is therefore recommended that a subcommittee or working group on jurisdiction be set up to meet at regular intervals; this becomes particularly important if the recommendation on clarifying the RSA’s jurisdiction over railways be adopted, under paragraph 1.

3. Harmonization in the area of railway safety in Canada has been flagged since the 1994 Review and subsequent reports and reviews have always mentioned it as a desirable objective. All provinces regulating railways appear to see its benefit in that almost all regional railway lines connect at some point with federal lines and as such, the elimination of arbitrary differences in safety requirements is generally considered a valuable and important goal. To that end, it is recommended that the mandate of the FPWGRS be continued with respect to all jurisdictional and harmonization issues and that this body meets at least twice a year to discuss these matters.

4. It is also recommended that the mandate of the FPWGRS be expanded to include consideration of all federal provincial inspection agreements and the development of common provisions and prototype agreement for purposes of implementation on a country-wide basis.

5. It is also recommended that the work of the FPWGRS on the rules data base referred to earlier not only be continued; but because of the importance of this data base to the proper functioning of the RSA rule regime, and federal-provincial regulatory harmonization, that the database be expanded to also identifying all provincial regulatory safety requirements.

6. With respect to provincial regimes, it is recommended that the power to enter into agreements with the provinces regarding any safety related matters, including inspection, should be under the RSA and taken out of the CTA Act, and that the RSA and CTA Act should be amended accordingly.
7. The April 2001 Harmonization Reports recommends that all inspection agreements with the provinces be amended to update them with the current federal requirements they intend to abide by. A matrix prepared by the Railway Safety Directorate indicates that many of these agreements have not been updated in 10 years; some are expired and the most recent date back to 2003; it is therefore recommended that the inspection agreements be reviewed as soon as possible to ensure that they are up-to-date, set out clearly which regulations, standards and rules apply and to take into account SMS audits, in accordance with the recommendation in paragraph 15.

8. It is recommended that all inspection agreements have attached to them as an annex, a list of applicable rules and regulations.

9. It is recommended that items for discussion at the FPWGRS include the study of any legislative initiatives to incorporate the federal regimes by reference (for Manitoba, British Columbia, New Brunswick and Nova Scotia) to ensure that the incorporation is done as efficiently as possible, given each of these provinces’ respective legislative mandates and also that to ensure that incorporation by reference include replacements (such as where a regulation is replaced by a rule) as it does in Manitoba.

10. It is recommended that the FPWGRS include on its agenda for discussion the issue of training of local inspectors and whether the safer way would be to use federal inspectors true for any province that uses (as in BC) or intends to use its own inspectors.

11. Because Quebec and Saskatchewan use the consultation model, an appropriate role for the FPWGRS (whose mandate it is recommended above should be continued) is to provide the forum whereby these provinces can communicate with TC and the other provinces when creating regulations, as well as approving industry rules and standards.

12. Consideration should be given to cancelling the agreement with Saskatchewan and entering into discussions with it with a view to changing its regulatory approach to be more in line with the federal regime.

13. It is recommended that the specific rules applicable to Ontario short lines should be more clearly defined within the Agreement itself.

14. No specific recommendation is made with respect to the issue of rule exemptions and amendments and the inability of provincially regulated railways to seek these at present, but it is recommended that this matter be explored by the federal and provincial participants in the FPWGRS to see if there is a legal mechanism that could allow provincial railways to apply for exemptions and amendments in cases where there is an inspection agreement that includes rule compliance as part of the inspector’s mandate.

15. It is recommended that TC implement discussions with the provinces to amend the Inspection Agreements in order to take SMS audits into account in cases where the federal SMS regulations have been incorporated by reference and in other cases, where federal
inspectors are required through the agreement to implement provincial regulations modelled on the federal regime.

16. An excellent data base has been created with respect to rules approved under the RSA. It includes whether the railway in question is a member of RAC, if it is signatory to a particular rule and whether it has applied for and received an exemption. As recommended in the April 2001 Harmonization report, Transport Canada should not only maintain a database identifying all federal regulatory safety requirements, the database should also identify all provincial regulatory safety requirements.

17. It is furthermore recommended that a process for ensuring that all interested parties, such as the railways, unions, provinces, municipalities and the TSB, are connected to the same information (the two data bases just mentioned) and can receive amendments and updates on a current and simultaneous basis.

18. With respect to the potential gap in regulation that could result through the effect of section 19 (5.1) RSA, it is recommended that the section be reworded to state that where a rule replaces a regulation, the rule will replace the regulation for those railways that are signatory to that particular rule and the regulation will remain in place for those railways not covered by the rule in question.

   o New Operators and Safety

19. It is recommended that connecting the RSA to the COF through a legislative link, specifically through adding SMS as a requirement for a COF should be looked at as an added enforcement tool against all non-compliant railways, not just new operators. To give added strength to this recommendation, consideration should be given to having an approval process for SMS.

20. It is also recommended that as an alternative or in addition to the recommendation contained in paragraph 19, that the feasibility from a resource and operational perspective be examined with regard to reinstating an operating authority for railways that have not operated over a set period of time and that this authorization be made conditional on an inspection conducted by a TC inspector that finds that the railway meets an appropriate level of safety before beginning operations.

21. It is recommended that the operating certificate recommended in paragraph 20 is the more effective mechanism to ensure compliance with RSA requirements and that while it is recommended that both mechanisms referred to in paragraphs 19 and 20 be examined, the preferred approach is that set out in paragraph 20.

II. Regarding Sound Engineering Principles

22. Appropriate definitions of the terms “engineering work”, “design”, “construction”, “professional engineer”, “evaluation” or “alteration” be drafted and inserted in the appropriate place in the RSA.
23. A general duty of maintenance of engineering works be added to section 11 RSA (and this could even be extended to include rolling stock) and placed in a more generally applicable part of the Act.

24. It is recommended that the term “sound engineering practices” be left in section 11 RSA, but that it be referenced to specific standards that will first have to be developed; this task should be undertaken by the Railway Safety Directorate as soon as possible.

III. Regarding Rule-formulating

25. It is recommended that TC Legal Services be asked to look at the question of whether a letter to TC by a railway that is not party to a particular rule, setting out its agreement to be bound by that rule is sufficient to meet the requirements of section 20 RSA and if not, whether a regulation made under section 47 RSA to this effect would be permissible under that section.

26. It is recommended that adequate funding be given to the Rail Safety Directorate to either hire or train from within a Rules Expert or a team of experts, that will provide input during the consultation process, as well as offer advice at the approval level and who will coordinate and bring in other TC experts as and when required, to meet the needs of the rule-formulating process and that this Rules Expert is in addition to current staff within the Rail Safety Directorate.

27. It is recommended that a training program in rule-formulating should be immediately developed and initiated within transport and the industry. This training should include sessions on drafting performance based requirements. Appropriate funding should be provided to TC to implement this recommendation.

28. It is recommended that a modified RIAS or some kind of cost/benefit analysis accompany every s. 19 order or government created rule under that section, that appropriate resources be given to the Rail Safety Directorate to do this and that the model for this analysis be taken from the one already recommended in TC’s applicable guidelines to accompany the railway’s proposed rule submission under section 20 RSA.

29. Alternatively, the feasibility of using s 18 regulation making powers rather than s. 19 rule-formulating powers should be further examined, especially if the above recommendation for imposing on government a modified RIAS for all section 19 orders is not accepted.

30. It is recommended that the ministerial power to impose terms and conditions under subsection 19(4) RSA on approved rules be used exceptionally and only with respect to non-substantive, procedural matters and that the policy should be that matters relating to possible imposed terms and conditions be, as a rule, resolved by dialogue and consultation before the rule reaches the approval stage and the matters form part of the rule itself.
31. The same recommendations respecting consultation that were made with respect to rule-making apply to applications for exemptions and the exemption granting process under subsections 22(2)-(7) RSA.

32. It is recommended that a new consultation model be developed based on at least a tripartite model (railway-union-TC), with other parties invited on an interest basis, that consultation begin with the development of the rule, that at least some of this consultation involve meetings in person or by conference call and that at least some of these criteria be explicitly provided for in the legislation. Different models should be examined further and a model developed that promotes collaboration and participation in rule development.

33. It is recommended that the American RSAC model should not be used as the model for consultation but should be studied along with other models in deciding on a new consultation model for rule-formulating.

34. It is recommended that the meetings of the RSCC be reinstated as soon as possible and that two items on the agenda should be a report on the progress current rules being drafted and development of a consultation model for rules.

35. It is recommended that a modified legal review of rules be undertaken by TC Legal Services that compares proposed rules with existing rules for consistency of language and form, examines the rules to see if they are intra vires the powers of the Minister under the RSA, establishes that are no illegal subdelegations of power and deals with harmonization questions and other questions, to the extent that these questions are classified as legal issues.

IV. Regarding Monitoring and Enforcement

36. It is recommended that an administrative penalty scheme be examined in the light of similar schemes for other modes and its adaptability to the rail mode assessed.

37. It is recommended that the question of appointment of powers of inspectors at the federal and regional levels, the division of these powers and the effect of the delegation of Ministerial powers regarding sections 32 and 33 RSA should be examined in detail, with the end purpose of establishing coordination among all parties concerned and a proper balance between the regions and HQ.

38. It is recommended that Section 31 be re-examined and the feasibility of combining the different notices/orders into one be studied, with criteria regarding the different situations covered by the order as part of the section 31 requirements.

39. It is recommended that a study be undertaken, perhaps by an RSCC Working Group formed for that purpose, regarding information gathering under section 28 RSA with a view towards finding a balance between the information safety requirements of the regulator and the need for protecting this information on the part of the railways.
40. It is recommended that a nation-wide policy and program be developed regarding training in enforcement and monitoring by the railways and other directly interested parties, of the kind initiated by the Pacific region for railway crossings.

41. It is recommended that a comparison of inspectors’ interpretation and application of the Letter of Non-Compliance combined with the exercise of section 31 powers be undertaken immediately on a more in-depth and detailed basis that that provided in this report, in order to establish the extent the regions apply these enforcement tools in a consistent way.

42. It is recommended that all section 31 orders be examined to see if there are areas which need to be addressed on a country and industry-wide basis, with the aim of developing appropriate rules or regulations to deal with these areas in a consistent way and uniform way.

43. It is recommended that continued efforts be made to create a consistent approach to enforcement, with TC HQ and the regions acting cooperatively and collaboratively together.

44. It is recommended that standards regarding the training of industry inspectors needs to be addressed; the development of these standards should be initiated by TC and continued on a cooperative and collaborative basis with the railways.

45. It is recommended that the possibility of extending the inspectors’ powers and training to include accident and incident investigations not covered by the TSB be examined.

46. It is recommended that with respect to new railways that a new provision be added to the SMS requirements, obliging new railways to submit proposed rules if no rules apply to it at the time of submitting the SMS.
1.0 GENERAL

1.1 Background

1. The legal and institutional framework that provides for railway safety in Canada is found in several statutes, the most important of which is the *Railway Safety Act* (RSA) and the regulations and rules made pursuant to it. Other laws that play a role include the *Canada Transportation Act* (CTA Act), the *Canadian Transportation Accident Investigation Safety Board Act* (CTAISBA), the *Canada Labour Code* (CLC) and the *Transportation of Dangerous Goods Act* (TDG Act). The various bodies regulating or having an input into the rail safety regulatory process include Transport Canada (TC), the railway companies, the Railway Association of Canada (RAC), the Association of Regional Railways of Canada (ARRC), the Canadian Transportation Agency (CTA), the Transportation Safety Board (TSB), provinces, municipalities and other relevant associations and organizations including unions.

2. Some of the important elements of this regime under the RSA are:

   - rule making by the railways either on their own initiative or following an order from the Minister and a regulation making power of the Governor in Council (GIC) that can in some cases be alternative to industry rules;

   - a triggering jurisdictional mechanism of a “certificate of fitness” (COF) issued by the CTA;

   - a statutory requirement to use “sound engineering principles” in all railway works;

   - a statutory requirement for consultation regarding industry made rules prior to their submission for TC approval;

   - the regulatory requirement for the submission of information respecting the railway’s safety management system 60 days prior to operating a railway;

   - a monitoring and enforcement regime that has enforcement by inspectors appointed under the RSA with statutory powers provided for in that Act and under the CTA Act (s. 157.1) allows for agreements with the provinces for federal inspectors to enforce provincial railway safety legislation.

3. A review of the legislative and regulatory framework and an assessment of its adequacy will necessarily involve a study of (a) the interplay among the various bodies involved in railway safety and the different pieces of legislation having a role in railway safety and any problems with such interplay, as well as (b) issues arising from the important elements of the regime under the RSA, listed above.
1.2 Scope of Work

4. Six general areas have been identified respecting the adequacy of the legislative and regulatory framework for railway safety in Canada: Each will be discussed under their respective headings. These headings and the order of this Report basically following the Terms of Reference of the Contract. The areas and issues often overlap and when they do and when another topic covers this area more specifically, the reader will be directed to the more specific discussions.

5. The six general areas, with the main break-down of the issues involved, are set out in Sections 2 - 7 of this Report as follows:

- Establishing a Complete Regulatory Authority: section 2.0
  - To what extent does the government regulate railways in Canada? (2.1)
  - What are the gaps? (2.2)
  - Does this lead to an inconsistent approach to regulating rail safety across Canada? (2.3)
  - New Operators and Safety (2.4)
  - Comments, Conclusions and Recommendations (2.5)

- Sound Engineering Practices: section 3.0
  - Is reference to such principles of any value or should it be further defined – in the Act, in regulations, in directives? (3.1)
  - Extent of Section 11 RSA (3.2)
  - Comments, Conclusions and Recommendations (3.3)

- Rule-formulating: section 4.0
  - History and General Comments (4.1)
  - Rule-formulating Process (4.2)
  - Exemptions (4.3)
  - Transport Canada Experience To Date With The Process (4.4)
  - Industry Experience To Date With The Process (4.5)
  - what is the consultation process relating to proposed rules; how has it been used and how does it compare to the US public hearing approach? (4.6)
  - Is the rule- making process effective; should the industry-led rule making be expanded or restricted in Canada? (4.7)
  - uniformity of rules and harmonization issues within the industry (4.8)
  - adequacy of Transport Canada oversight role in approving rules (4.9)
  - Rules vs. Regulations: are there situations where the better approach may be through GIC regulation rather than industry-led rules? (4.10)

- Regulations, Safety Directives, Exemptions: section 5.0
2.0 ESTABLISHING A COMPLETE REGULATORY REGIME

2.1 To what extent does the government regulate railways in Canada?

6. The government of Canada has exclusive jurisdiction over the regulation of safety of railways that fall under its jurisdiction. The provincial governments regulate railways under the jurisdiction of the provinces.

7. Safety regulation of railways under the jurisdiction of the Parliament of Canada is governed by the Railway Safety Act (RSA), the Transportation of Dangerous Goods Act (TDGA), the CTAISBA and the CLC. Each of these Statutes deals with different aspects of railway safety which can be summarized as follows:

   - The RSA sets out the legal framework for safety regulation of railways under federal jurisdiction by providing for railway driven rules and government mandated regulations that cover all aspects of railway safety, including operations and protection of railway employees, users and the public.

   - The TDGA provides particular requirements respecting the transportation of dangerous goods, including transportation of these goods by rail.

   - The CTAISBA deals with accident and incident reporting and investigation for all modes of transport under federal jurisdiction, including rail.
The CLC deals with the safety of on-board and off-board railway personnel. The safety of on-board railway personnel has been delegated back to Transport Canada by an MOU between Human Resources Development Canada (HRDC) and Transport Canada.

The CTA Act does not deal with railway safety matters per se but, through the reference in subsection 4(2) RSA to the definition of “company” in the CTA Act (defined in that Act as a railway company having a certificate of fitness), the CTA Act provides the trigger which sets off the application of the RSA. The CTA sets out the criteria respecting what constitutes a federal railway.

8. There are four government bodies involved in the regulation of railways under federal jurisdiction: TC (administering the RSA and TDGA), the Transportation Safety Board administering the CTAISBA), the Canadian Transportation Agency, or “CTA” (administering the CTA Act) and HRDC (administering the CLC and the On Board Trains Occupational Safety and Health Regulations).

2.2 What are the gaps?

9. The question of gaps in the regulations of railways in Canada has to be looked at from two different aspects: jurisdiction and harmonization.

2.2.1 Jurisdiction

10. Transport Canada’s jurisdiction is dependent on whether a company has been granted a certificate of fitness (COF) by the CTA. This has up to recently been a reactive process in that the CTA responded to companies that made applications for COFs in lieu of actively investigating certain companies and ensuring required applications were forthcoming. In a Report entitled “Federal/Provincial Regulatory Regimes Harmonization Project Report” (“the Harmonization Report”) prepared for the Council of Deputy Ministers of Transport and approved by it on April 3, 2001, this was mentioned as resulting in jurisdictional gaps. This Report states that out of 88 railways operating in Canada, 35 are Federal and 48 are provincial, (these numbers are essentially accurate although there are some changes, see below under paragraph 35) leaving five railway companies without a federal COF or a Provincial operating licences. The five mentioned in the Report were: Agency Métropolitaine de Transport (AMT), GO Transit, Ontario Northland Company (ONR), West Coast Express (WCE), and the Great Canadian Railtour Company, also know as Rocky Mountaineers Railtour Company (GCRC).

11. After the date of the April 2001 Harmonization Report, the AMT was refused a COF. The ONR, WCE and GO remain without a COF. However, CGRC has recently been granted a COF as a result of a reconsideration of its fact situation by the CTA, on a proactive basis. After issuing a Show-Cause Order to GCRC, it decided that the railway met the requirements for a railway and issued it a COF.
12. In a meeting with Ian Spears, Director General, CTA on May 7, 2007, I was told that this proactive approach was one example of how the CTA is dealing with jurisdictional questions relating to new railways. It also obtains information through informal means as to what is happening in the railway sector. Mr. Spears feels that the CTA is generally speaking on top of the situation regarding what is being acquired by whom, and what situations require closer examination by the CTA regarding whether or not a railway requiring a COF is involved.

13. Another thing mentioned by Mr. Spears was that in his view, the proliferation of new railways that was seen between the years between the enactment of the RSA in 1989 and 2002 (when the Harmonization Report was written) has levelled off. Thus the potential problem of having railways that met the definition of a railway subject to federal jurisdiction but which did not apply for either a federal or provincial operating certificate may not be as serious as it may have appeared in 2002 when it looked like the increase in the number of new regional railways could continue.

14. Of the remaining railways mentioned above, only one crosses provincial borders (ONR). The ONR is regulated by the Ontario Northland Commission except that on and off board employees are governed by the CLC and the On Board Trains Occupational Safety and Health Regulations. TC has inspectors that enforce these regulations through the administrative arrangement referred to earlier. However, the ONR does run over CN lines, so must comply with CN requirements and overall, according to TC, the ONR situation has not resulted in significant harmonization problems or any safety risks. However, the situation is not ideal from an enforcement point of view. At least one incident was pointed out to this consultant regarding ONR that had a satisfactory result but could have turned out otherwise, and may do so in the future.

15. An inspector issued an order against ONR for various safety violations. Usually any infringement of the rules or regulations is directed at CN or CP as the host railway under federal jurisdiction. In this case, ONR obeyed the order, but in fact, it could have opposed it as being ultra vires the powers of the inspector. The inspector would have had to go against it indirectly through CN or CP, not an ideal situation, where the actual offender is ONR. One solution would be to encourage the Ontario Northland Commission to enter into an inspection agreement with TC.

16. The WCE, AMT and GO Transit do not cross provincial boundaries. As noted, they are not covered by provincial railway legislation, but all of them run on either CN or CP track or both. The AMT runs on CN and CP lines and GO runs on CN track and therefore must adhere to the requirements of these two companies both of which are members of the RAC. The WCE operates completely within the province of British Columbia. Again, as in the case of ONR, any problems with AMT, GO Transit or WCE will be dealt with through CN or CP. From the point of view of harmonization, this is not an ideal situation, but it basically works.

17. Another issue regarding the question of jurisdiction relates to “forum shopping”. In the past, there have been eyebrows raised by the practice of splitting up railways that basically operated as a single unit into two entities that began and ended within a single province. The end effect of this would be for the railway operation at issue to avoid federal jurisdiction, and instead fall under provincial jurisdiction. An example of this is the Quebec Southern Railway (QSR) and Canadian
American Railroad (CDAC), both of which operate from Quebec into Maine (QSR totally within the Province of Quebec and CDAC from Quebec over the Maine-Quebec border into Maine). Both are owned by Iron Roads Railway Inc. CDAC has a federal certificate of fitness but QSR is a provincially incorporated railway and under provincial jurisdiction. Whether QSR is in actual fact a railway under federal jurisdiction would be a question for the courts to decide, unless the CTA on its own, decided to issue a “show-cause” order as it did in the case of the GCRC. However, in the absence of some obvious indication that a line was not what it was described to be by an applicant for a COF or its provincial equivalent, or in the absence of an objection (such as by a union), the CTA will not question the decision of the applicant. The same holds true for the CTA’s provincial regulatory counterparts.

18. The reason for “forum shopping” can be for a variety of reasons. At one time, federal jurisdiction was seen as more desirable because of inspection costs: under the federal regime, these are borne by the government; under the provincial scheme, if an inspection MOU is in place between the province and the federal government, the costs of the inspection are passed on to the operator. Also, insurance costs for liability and accidents may be lower for federally-regulated railways.

19. “Forum shopping” does not appear to be a significant trend. The consultant has only the one example at hand of QSR. The question really is: could this result in a safety problem respecting application of the relevant safety legislation of the federal regime and that of the province. In the case of QSR, Quebec’s safety regime models itself on the federal, although it does not incorporate it by reference. It does however, use federal inspectors pursuant to an MOU between the Quebec Government and the Government of Canada, for certain inspections. So, in practice, the requirements governing the two portions of the line in question would not differ in any significant way; and within the last 10 years or so, there does not appear to have been any problems regarding the QSR resulting from the jurisdictional split.

20. In principle, however, if the end goal is harmonization of regulatory requirements, splits such as this, instigated by the operator’s own needs and not from any safety perspective, cannot be conducive to a uniform application of safety requirements. One area where problems could occur is in the application of on-board and off-board safety. As noted, this is under the jurisdiction of the HRDC and the Canada Labour Code, although for on-board personnel, there has been a delegation of powers to TC. The HRDC jurisdiction is not triggered by a COF; it uses its own criteria for assessing whether or not a railway is federal and in the case of “forum shopping” and separate incorporation of a particular operation so as to fall under one or another jurisdiction, the HRDC will not look at whether a COF or equivalent provincial certificate has been issued. So in theory, there could be a situation where the HRDC rules that the personnel of a particular railway operation fall under its jurisdiction in its entirety, regardless of separate incorporations and operating certificates, whereas the RSA will apply to only that portion of the line covered by the COF. There could be a conflict in this case between federal and provincial labour requirements for on and off-board personnel. However, apparently, to date there have been no such problems.

21. In answer to the above-noted concerns, which have been expressed in various TC studies, and which relate to the larger, separate issue of harmonization, discussed below, TC recommended in 1994 for the creation of the Federal Provincial Working Group on Railway Safety Regulation.
which has now been changed to the Federal Provincial Working Group on Railway Safety (“FPWGRS”). The original group was chaired by the Assistant Deputy Minister, Safety and Security and met on a regular basis by teleconference. For the past few years however meetings of this group have become sporadic. The Chair is now the Director General Rail Safety.

22. In answer to the 1998 Review of the RSA, the Harmonization Report recommended that the FPWGRS be tasked to undertake a broader consultation with the CTA, TC, HRDC and TSB with respect to the criteria to be used for determining federal jurisdiction for purposes of regulation of railway safety. This recommendation was adopted and on April 23, 2002, TC officials consulted with representatives from the CTA, the TSB and HRDC to discuss the respective criteria of each body regarding the classification of a railway as under federal or provincial jurisdiction.

23. Following this meeting, a document was produced dated September 16, 2002 containing two conclusions/recommendations. The first one recommends that TC consider including a definition of “railway company” in the RSA since this would go a long way toward alleviating TC’s dependence on the Agency for determining railways under federal jurisdiction. The second recommends that TC and the CTA undertake discussions in order to develop a pro-active mechanism to ensure that new railway companies are assessed for both third party liability insurance coverage and for safety of their equipment and operation to determine if they should fall under federal jurisdiction for the purpose of the CTA and the RSA.

24. The TSB and HRDC confirmed that they did not use a COF as proof that a railway was under federal jurisdiction. Both rely on the principles set out in sections 91 and 92 of the Constitution Act 1867. The CTA uses these as well for purposes of determining whether a “railway company” falls under federal jurisdiction. Subsection 88(1) CTA Act provides that Part III of the Act (dealing with railways) applies to “all persons, railway companies and railways within the legislative authority of Parliament.” What falls under the term “legislative authority of Parliament” is set out in subsection 88(2) CTA Act. Basically, that subsection which sets out two specific situations of federal jurisdiction – US-Canada operations and railways (whether constructed under the authority of a federal or provincial Act) owned, controlled, leased or operated by a person operating a railway under federal jurisdiction – does not limit the application of section 91 and 92 of the Constitution Act. In fact, both these situations are, in any case, included in sections 91 and 92 of that Act. Up to this point, the CTA, TSB and HRDC, therefore use the same criteria, which are basically those provided in the Constitution Act.

25. The RSA appears to apply the same criteria because under section 2(2) of that Act which states that it applies in respect of transport by railway to which Part III of the CTA Act applies. However, because the RSA refers constantly to “railway company” and, according to subsection 4(2) RSA, that term is defined, in the absence of any definition in the RSA, by the definition of “railway company” under the CTA as a company having a COF, in fact, the RSA jurisdiction is limited to railway companies have a COF.

26. The issue of discrepancies in the application of jurisdiction tests relating to the four government bodies concerned has not been resolved to date. As indicated previously, the TC September 16, 2002 document puts forth two options: one an amendment to the definition of “railway company” and the other, undertaking discussions with CTA to develop a proactive
approach to ensure that new railway companies are assessed for both third part liability insurance coverage and for safety of their equipment and operation.

27. Regarding the first option, a solution to this apparent gap in jurisdiction could be to change the term “railway company” in the RSA to “railway” everywhere it appears in the RSA. The term “railway” is not defined in the RSA, but the CTA defines it as a railway under the jurisdiction of Parliament, which is not inconsistent with section 2 RSA. The tie-in to the definition of “railway company” under the CTA would be eliminated, the jurisdictional criteria contained in subsection 88(2) CTA would apply and the jurisdiction of the RSA would therefore mirror that of the CTA, as well as those of the HRDC and the TSB. Another advantage of this approach is that TC would have jurisdiction as soon as it decided that a particular operation fell within federal jurisdiction, without having to wait for COF to be issued. Any gap in jurisdiction that could occur in between the time a railway line changed ownership and the time it was issued a COF would be eliminated; in other words, TC could inspect a line before it started operations.

28. The downside to this is that the certificate of fitness tie-in gives a degree of certainty to the administrators of the RSA and at present relieved of any requirement to decide on which railways fall within federal jurisdiction. This change also requires close collaboration and coordination with CTA, to avoid contradictory decisions on the same issue. The end result of this collaboration and coordination should be that only companies with COF be subject to RSA jurisdiction. Another downside is that it may create a bigger work load for Transport Canada, although in actual fact, the number of times that a fact situation might arise that would require action of TC without a COF having been obtained could be exceptional and also, it would appear that TC is making this kind of jurisdictional evaluation right now.

29. Another downside to this solution is that while it provides a relatively “quick fix” to the problem, it is probably stretching the definition of railway under section 2 CTA to fit in complex jurisdictional requirements. From a legal drafting perspective, this is not the proper role of a definition. Substantive requirements such as the ones at issue should be made a provision of the legislation.

30. Regarding the second option, it has already been noted that since 2002, the CTA has indeed been more proactive in its jurisdictional assessment. Its recent reassessment of GCRC is an indication of its more proactive approach. The second option however also raises another issue: that of connecting the COF with the RSA by inserting in the COF requirements under the CTA, a safety requirement, such as a reference to the submission of a safety management program. This is discussed below, under the topic “New Operators and Safety”.

2.2.2 Harmonization

2.2.2.1 General

31. Harmonization, in the context of railway safety regulation in Canada, can be defined as the process by which the standards, rules, regulations and procedures that make up safety regulation of railways in Canada are made as uniform and consistent as possible a) among federally regulated railways that are members of Canada’s industry association, the Railway Association of
Canada (RAC) and non-member federally regulated railways; and b) among provincially and federally regulated railways.

32. Similar to Australia, Canada’s railways do not all operate according to the same technical and operational requirements. This in itself is not in itself a bad thing or necessarily a safety risk. In fact, it has been noted (Optimizing Harmonisation in the Australian Railway Industry, Report 114, Department of Transport and Regional Services, Australian Government, 2006) that physical standards and regulatory oversight should be tailored to reflect the variable physical conditions facing railways, such as geography and operational safety risks and commercial conditions such as cost recover, industry structure and ownership. However, to the extent that these physical commercial and operational boundaries are then overlayed with jurisdictional boundaries, the number of interfaces between different systems is multiplied and the opportunities for ambiguity and arbitrary inconsistencies in the various statutory instruments, procedure and guidelines, and their application, increase. Arbitrary differences in railway safety regulation cannot be beneficial to the proper implementation of the safety regime as a whole, for obvious reasons.

33. In Canada, another factor that provides an additional consideration relevant to the issue of gaps in regulation and harmonization is railway-driven rule formulation, an important aspect of the safety regulatory regime since the enactment of the RSA in 1989. Because the process involved in rule making relies on rule development and submission by individual railways or by the RAC, rules do not automatically apply to other railways or even, in certain circumstances, to RAC member railways. The process itself of rule-formulating will be described and discussed in further detail under section 4 below.

### 2.2.2.2 Harmonization and federally regulated railways

34. The RAC, as the main industry body that represents railway companies, is a key element in achieving the goal of harmonization both with respect to federally regulated railways and provincially regulated railways because it represents almost all federally regulated railways and many provincially regulated railways.

35. The RAC represents some 59 railways out of a total of approximately 87 that run in Canada. (The numbers fluctuate – recently Ferroequus Railway Company’s certificate has been suspended and Algoma Central Railway and Sault St. Marie Bridge Company’s COFs have been cancelled as they now are covered by CN’s certificate.) Of the 59 or so railways that it represents, 33 are federally regulated and the rest (26) are provincially regulated. Of the four remaining companies that have COFs and are not RAC members, Eastern Maine Railway Company, runs on the track of New Brunswick Southern Railway Company, which is a (provincially regulated) RAC member; two of them – International Bridge and Terminal Company and Minnesota, Dakota & Western Railway Company – basically cross two bridges linking Fort Frances with International Falls and are each less than 1k in length; the final one, Union Pacific Railway Company, runs over CP track.

36. The RAC has a blanket power of attorney for each railway member with a COF. The RAC confirms with its members that it can use this power of attorney for each rule submission by
indicating that it intends to use it and the members must let the RAC know if they wish to be
removed from a particular submission. The RAC informed me that it has never had a member
request that the RAC not use its power of attorney for rule-formulating. Until recently, only
Capital Railway in Ottawa had not provided the RAC with its blanket power of attorney and had
arranged to do its rule-formulating separately; apparently this is being reconsidered. The RAC
provides copies of all the blanket powers of attorney and a list of signatory railways when it
submits a rule for approval to TC.

37. Regarding gaps in the regulatory regime, the Harmonization Report stated that the power of
attorney relates only to railways that were members of the RAC when the rules were approved,
with the end effect that newer member companies and non-member companies are not formal
signatories to some or all of the rules. One recommendation of this Report is that the Rail Safety
Directorate, along with the RAC, create a data base indicating who was an RAC member, which
are signatories to which rules and what exemptions (to be discussed in the context of railway
rules, section 4, below) apply to each railway. Another recommendation provides that

“TC is to ensure that appropriate regulations, rules and standards are in force for all federally-
regulated companies. Railway companies that do not presently subscribe to rules under the RAC
will be expected to develop such rules or Transport Canada will take action to ensure equivalent
requirements are put in place.”

38. In fact, this exercise has been completed. TC has created a very readable and user-friendly
matrix that indicates which railways have a COF and which rules and exemptions apply to each.
It also has a system in place for updating this information. In summary, the issue as to gaps in
regulations on the federal level for railways having a COF, whether or not a member of the RAC,
seems to have been resolved for the majority railways under federal jurisdiction. It is highly
recommended that the work in question continue and that sufficient funding is provided to ensure
that this important data is kept up to date.

39. As for the RAC, at a meeting on May 17, 2007, the consultant was told that the issue
regarding which of its members is or is not a signatory to which rules has been addressed by its regulatory capture program that resulted from the Harmonization Report, that as
of today, all member railway companies are signatories to the rules presently in force and that the
RAC has the mandate to formulate all future rules for its members (except those of Capital
Railway, for the time being) in accordance with the procedure described under paragraph 36.

40. Another gap relating to harmonization of rules, mentioned in the Harmonization Report is
that relating to section 19(5.1) RSA. That section states that if a rule that replaces a regulation is
approved by the Minister, the rule will not come into effect until the corresponding regulation is
repealed. However, a rule does not automatically apply to all federally regulated railway
companies – only to those companies who are members of the RAC and signatory to the rule in
question. In 2002, there were five regulations that were on the verge of being replaced by
proposed rules that were at that time, currently under review.

41. The areas covered by the proposed rules were: Vision and Hearing, Flammable Liquid Bulk
Storage, Bells and Whistles, Lights, as well as Pipe Crossings and Wire Crossings and
Proximities. The Vision and Hearing Regulations have been repealed and replaced by the Railway Rules Governing Safety Critical Positions (TC 0-17A) and the Railway Medical Rules for Positions Critical to Safety Railway Operations (TC O 0-68). The Pipe Crossing Regulations have been repealed and replaced by the Standard Respecting Pipeline Crossings Railways (TC E-10) and the Locomotive Lights and Lamps Regulations and the Railway Engine Bell and Whistle Regulations were repealed and replaced by the Railway Locomotive Inspection and Safety Rules TC O 0-55).

42. The question of how many actual non-RAC members and railways having no connection to a RAC member railway has been discussed above: the number of non-RAC railways is now four and as noted of those four, two operate along track that is owned by an RAC member and signatory to all the rules. The remaining two operate on less than a kilometre of track. Only one RAC member formulates its own rules and this is about to change. This issue therefore also appears to have been satisfactorily addressed as it relates to federally regulated railways. The issue, however, could still arise with regard to new future railways and also to current provincial railways if the inspection or enforcement agreement between the federal and provincial government in question does not contain a provision specifically covering this issue. There is therefore a recommendation to change the RSA to cover this gap under paragraph 114.

43. The Harmonization Report also points out that SMS can be used as an effective tool for encouraging railway companies to adopt safety rules, specifically section 2(d) of the SMS regulations require railways to implement systems for identifying applicable railway safety regulations, rules, standards and orders. This consultant agrees that this is another mechanism for ensuring consistency and harmonization in application of all railway safety requirements, including those contained in rules, regardless of membership in the RAC or not. However, for this mechanism to be effective, the regulator must ensure that applicable requirements are covered by the SMS and that the railway complies with its commitment to apply those requirements. Another problem regarding the SMS process is that when a railway submits this system under the SMS regulations, it is not approved or certified (as, for example, in Australia) and therefore one has to question how reliable such a system can be before it has been assessed or audited in any way by TC. Any such assessment or audit would not take place at the beginning of operations: an audit by its nature is of systems that have been in force for a period of time. This problem this will be discussed in more detail below, under section 6 entitled “Monitoring and Enforcement”.

2.2.2.3 Harmonization and provincially regulated railways

44. The difficulty with harmonization among the various jurisdictions results mainly from industry-driven rule-formulating under sections 19 and 20 RSA. This is because even though rules have the force of a regulation once approved by the Minister (for the rule-formulating process and rules’ legal effect, see below, under section 4), they apply only to railways that are signatories to them. Also, while provincial railways (except for those regulated by Ontario) who are members of the RAC may be signatories to the rules, they are not in fact subject to the RSA as they do not have a COF. The key to making particular rules applicable to provincially regulated railways lies in the Federal-Provincial inspection/enforcement agreements and specific
provisions in these agreements that set out what is applicable to the railways under provincial jurisdiction.

45. In fact, it is this area where further work is needed to achieve optimal harmonization: there are not necessarily gaps in safety regulation as much as there is ambiguity as to what applies in a given instance.

46. To illustrate the difficulties with harmonization, the different provincial techniques for achieving harmonization with the federal system will be described in the following paragraphs.

47. There are essentially three model of harmonization exemplified by the provincial regulatory regimes: the consultation model, the incorporation by reference model and the delegation model.

**2.2.2.3.1 The Consultation Model**

48. Under the Consultation Model, Saskatchewan and Quebec have both chosen to regulate rail safety on an independent basis. Both provinces retain the inspection services of Transport Canada, on an “as needed” basis and both have an agreement with TC to this effect. Saskatchewan signed an agreement on August 14, 2003 with TC to use federal inspectors to monitor the provinces’ short lines in accordance with a “specific work plan” developed annually and amended from time to time. Saskatchewan has its own safety inspectors and has not as yet used the services of federal inspectors.

49. In order to harmonize under the consultation model federal regulations, standards and rules can be shared and used to draft and create new provincial ones. However, differences will still exist to some degree. What also becomes problematic is that amendments and revocations are not necessarily captured.

50. Saskatchewan’s regime does not harmonize with the federal regime. For example, it is more performance-based than the federal one. It gives the government broad regulatory powers, including the power to make orders to ensure the safe operation of a specific railway on any matter; it does not however provide for industry rule making. It also has created various “guides” instead of regulations or orders. Since these guides are not legislative, they are not enforceable.

51. Quebec’s model is far more harmonized with the federal model than Saskatchewan. Federal regulations, standards and rules are used as requirements of the Quebec safety regime. There are still differences and these should be the subject matter of on-going discussions to understand the reasons for any divergences with the federal regime.

52. In addition, since both these provinces have their own inspection services, an appropriate item for discussion at an FPWGRS (regarding which it is recommended under section 2.6.2) that its work continue on a regular basis) could be the development of common standards and rates of inspections. The end goal of these discussions would be to ensure that all railway companies and track are being sufficiently inspected, according to similar standards and by inspectors that have relatively similar expertise.
53. The same forum could be used to encourage those provinces using the consultation model -- Quebec and Saskatchewan -- to communicate with TC and the other provinces when creating regulations, as well as, approving industry rules and standards.

54. Consideration should be given to cancelling the agreement with Saskatchewan and entering into discussions with it with a view to changing its regulatory approach to be more in line with the federal regime.

2.2.2.3.2 The Incorporation by Reference Model

55. Manitoba, British Columbia, New Brunswick and Nova Scotia can be analyzed under the Incorporation by Reference Model. Manitoba has an Agreement with the federal government authorizing federal officers to undertake railway safety inspections; however, enforcement still remains the responsibility of the province. Inspections are to be carried out in accordance with the standards and practices of the RSA, to the extent such standards and practices are set out in the provincial regulations. The regulations adopt a substantial series of federal standards, regulations and rules as they may be amended, revised or replaced from time to time, notwithstanding the form of the new document or type of statutory instrument.

56. New Brunswick, in a regime very similar to Nova Scotia, passed the Short line Railways Act in 1994. Amendments to the General Regulation-Short line Railways Act came into effect on February 25, 2002. The regulation adopts federal requirements (regulations, rules and standards) by reference. New Brunswick has a federal-provincial agreement in place allowing federal officers to carry out the function of inspectors for provincial railway companies without the power of enforcement. Inspections are carried out in accordance with the practices and standards of the RSA as adapted by the above-noted regulation.

57. In Nova Scotia, the Railway Act of 1993 was finally proclaimed into force in 2001. Federal regulations, standards and rules that the government has chosen to apply to its provincial railways are incorporated by reference into the provincial legislation through the Railway Safety Regulations, N.S. Reg. 144/2001. TC inspects provincial lines in accordance with these requirements; they have no enforcement powers or authority. Within the Agreement, the province has adopted the list of Federal regulations, standards and rules that have been incorporated by reference. Like Manitoba, TC considers this method of incorporation by reference a good one because it both incorporates the relevant federal regime by reference and uses federal inspectors to monitor it.

58. On April 1, 2004, BC harmonized its railway safety legislation with that of the federal government by bringing the BC Railway Safety Act into force. This Act adopts by reference the technical regulations, rules and standards of the federal legislation. It also requires railway companies to submit and maintain SMSs. The legislation allows BC to delegate railway inspection and accident investigation, but to date it has not done so. No federal-provincial inspection agreement is in place and BC does its own inspecting at the moment.
59. The issue of concern regarding BC is that its new Act adopts federal requirements including SMS: how will the province ensure that its inspectors are properly trained in the areas covered by the federal regime?

60. Manitoba also uses incorporation by reference as part of its railway safety regime. The Provincial Railway Act was assented to on July 4, 2004. The Provincial Railways Fitness Criteria and Safety Regulation, amended on July 20, 2004, adopts specific federal regulatory requirements (regulations, rules and standards) by reference.

61. Manitoba has an agreement with TC for inspection services by federal inspectors. The inspections are carried out in accordance with the standards and practices of the federal RSA to the extent that such standards and practices are set out in the provincial regulations.

62. TC officials consider the Manitoba model of incorporation by reference a good one since it specifically spells out which regulations and rules that apply and it uses TC inspectors who are trained in the relevant areas to carry out the inspections. One improvement that could (and should) be made to the agreement is to have attached to it as an annex, a list of the applicable regulations and rules that apply.

63. What is important with respect to harmonization and the incorporation by reference model is that incorporation is done in a manner that captures updates. Manitoba best exemplifies this method. It is acknowledged that not all provinces have identical legislative mandates, as such each must act within the legislative authority they have been given. What is important is that safety requirements are incorporated efficiently. This is of particular importance when one considers that federal rule-formulating has replaced a number of regulations. Rules would have to be specifically adopted by the provinces under the Incorporation by Reference Model.

64. Further incorporated regulatory requirements should be updated and maintained on a current basis, one of the reasons for the lack of necessary amendments up to now has been the absence of a single reliable vehicle for keeping abreast of current federal requirements. With the new matrix developed by TC referred to above and relating to federally regulated railways, this issue should no longer be a concern. However, there should be someone, either in the province in question or TC to instigate amendments to the agreements when changes are made to requirements. Presumably, the FPWGRS could be the appropriate regulatory forum, assuming it met regularly.

2.2.2.3.3 The Delegation Model.

65. Ontario is the province most compatible with the federal regulatory regime. The Federal Provincial Agreement specifically stipulates that federal services will be provided in accordance with the federal regulatory regime as amended from time to time. The Agreement further permits Transport Canada to inspect and take most enforcement actions directly (e.g., section 31 of the RSA). However, the provincial offence provisions apply in the place of the federal ones.

66. The Ontario Shortlines Act explicitly provides that the Lieutenant Governor in Council can, by regulation, adopt by reference not only federal regulations but also rules. However, the Agreement between the Ontario Minister of Transportation and the federal Minister of Transport
is more applicable to the question of what law applies to Ontario regulated companies because the Ministers in question have signed a federal-provincial Agreement delegating inspection duties to federal inspection and setting out in the Agreement the applicable law to be applied. Section 15 of the *Ontario Shortlines Act* states that the Ontario Minister of Transportation may, by agreement, authorize anyone to enforce and administer applicable federal law, as it exists from time to time, in relation to shortline railways and shortline railway companies in the same manner and to the same extent as the law applies to railways within federal jurisdiction or in accordance with any other terms as agreed upon.

67. The Agreement in question makes it clear that regulations will apply. However, it is not clear whether federal safety rules apply and which ones, although they are generally mentioned in the agreement, which states that the regulation “shall be in the same manner and to the same extent as the regulation for safety purposes of railways within federal legislative authority, unless expressly stated otherwise under this Agreement.”

68. Also, even if the rules do apply, it has been already noted that it is difficult to know which rules apply to non-signatory railways. Therefore which rules are applicable should be spelled out in the TC- Ontario agreement or in an annex thereto.

### 2.2.2.4 Problems applicable to All Models

69. The basic problem respecting harmonization of all the various regimes, no matter what model is used, again relates to rules.

70. Rules formulated under the RSA are meant to apply to federally regulated railways and the whole rule regime must be taken into account when referring to rules. This includes exemptions and amendments. Rules can be specifically made to apply to provincial railways; any of the models referred to above can accomplish this. However with the exception of Ontario regulated railways, no one but a federally regulated railway can apply for exemptions or revisions to rules incorporated by reference under the RSA. Presumably, the relevant provincial railway legislation can allow for these, at the cost however, of yet another layer of jurisdiction added to the rule-formulating process.

71. SMS regulations will apply either through incorporation by reference or through the provinces own SMS requirements, such as in BC. However, there is no provision in any of the agreements for SMS audits. The audit is the mechanism used to monitor compliance with SMS, not inspections. This is a gap that must be addressed and a recommendation under section 2.6 has been made to this effect.

### 2.3 Does this lead to an inconsistent approach to regulating rail safety across Canada?

72. With regard to federally incorporated railways, most (but not all) inconsistencies appear to have been eliminated in the time period that has elapsed since the last railway safety review in 1998, especially with the creation of the rule data base referred to earlier. Because of this data base, TC is aware of all railways and their status as RAC members, as COF holders and as
signatories to which rules and if not an RAC member, which rules the railway in question ought to comply with.

73. This is not to say there are no inconsistencies: the case of ONR has already been mentioned and the difficulties this has caused on at least one occasion to federal inspectors in Ontario.

74. With regard to provincially regulated companies the situation is not as clear and the approach to regulating safety across Canada is to some extent, inconsistent, even though efforts have been made since the 1998 RSA Review to improve harmonization and apply a consistent approach to railway safety regulation. The lack of harmonization and consistency is partly because of different regulatory approaches and different ways to use federal safety requirements as part of the provincial framework and partly because of the federal rule-formulating process.

2.4 Are there solutions or alternatives? Are amendments needed to the RSA or other legislation?

75. If railway-driven rule-formulating is accepted as a major component of the regulatory regime, there will always be some degree of discrepancy or inconsistency between the various jurisdictions and application of the requirements in question. This is inevitable given the number of government bodies involved in the administration of different aspects of railway safety and especially in view of the multiplicity and overlay of different oversight bodies, different legislation and different legislative mandates. Added to these differences is that the very nature of rule making is to individualize safety requirements to suit particular operating and physical environments of particular railways, indeed this is one of its attractions. The only solution that would create the optimally consistent approach in railway regulation throughout Canada and the provinces would be to go back to a government-mandated regulation-making, with the provinces either incorporating the federal regulations by reference or duplicating them as their own legislation.

76. In this consultant’s view, this is not a good solution. The industry-driven rule making approach was adopted for a variety of reasons, all of which remain valid today: the desire to have flexibility in regulation, to impose more responsibility on the railways for creating and applying safety requirements, to individualize requirements to meet the specific operating and physical environment of railways, to have government intervention only where necessary, to transfer some of the regulatory burden and costs to industry, etc. In a way, the cost of these benefits is some degree of inconsistency. The solution is to try and eliminate them as much as is possible and to harmonize the different regimes and regulatory approaches as much as possible. Recommendations on how to do this are indicated below, under section 2.6 entitled “Conclusions and Recommendations”.

77. As to whether amendments are needed to legislation, it has already been indicated that with respect to the issue of jurisdiction and the criteria for determining if a railway is federally regulated or otherwise, that an amendment to the definition of “railway company” is a possible solution to putting TC in the same position as other government bodies empowered to make this decision. However, the downfalls of this approach have been mentioned, in particular the legal drafting concern over the use of a definition to accomplish this. The better view, in this
consultant’s opinion, would be to provide the same criteria for determining jurisdiction as those found in the CTA Act directly in the RSA: this is the approach recommended under section 2.6, below.

78. As to amendments that could assist the promotion of harmonization it is submitted that the most important initiatives should be administrative, through regular meetings of the FPWGRS and the maintaining of up-to-date data bases as indicated earlier. For all harmonization issues, dialogue among all the different interested bodies is key to resolving these issues and the continuation of this work is recommended below under section 2.6.

79. However, there are two specific legislative amendments respecting harmonization issues that are recommended.

80. One relates to the elimination of one potential gap in jurisdiction that has already been mentioned earlier. This is the regulatory gap that could result from the application of subsection 19 (5.1). That subsection requires that where a rule replaces a regulation, it can only come into effect when the regulation is repealed. This could result in a situation where a regulation is repealed and a railway that is not a signatory to a particular rule at the time the regulation is repealed will not be governed by any requirements in the particular area that was covered by the regulation. A solution to this potential gap would be to state that where a rule replaces a regulation, the rule will replace the regulation for those railways that are signatory to that particular rule and the regulation will remain in place for those railways not covered by the rule in question. A recommendation to this effect is made under section 2.6 below.

81. The other relates to the jurisdiction of TC to enter into inspection and any safety related agreements with the provinces. It is not a “harmonization” issue per se, but relates to it because TC-provincial agreements are an integral part of it. There is no question that TC has the jurisdiction to enter into such agreements; however, the authority to do so is not found in the RSA, but rather the CTA Act, section 157.1: this seems to be an anomaly. If amendments are being made to the RSA, this would be the time to correct it and place the authority for entering into safety-related agreements under the RSA.

82. In addition to these legislative proposals, a non-legislative, but contractual arrangement suggested by the RAC in its brief should also be considered as a means to improve provincial-federal harmonization of rule application. The RAC recommends that TC develop and put into effect a protocol enabling the provincially regulated railways subject to inspection agreements to secure exemptions, develop rules, etc. Apparently, this is possible for Ontario regulated railways under the Ontario/TC inspection Agreement and the Agreement has been used by at least one Ontario railway (Simcoe Railway) to submit its own medical rules. However, since the onus is on the provinces to adopt whatever legislative framework to implement federal safety requirements, the FPWGRS is the recommended forum to initiate such arrangements, which may well require amendments to provincial legislation.
2.5 New Operators and Safety

2.5.1 What are the baselines of safety requirements ensuring that new entrants meet minimum safety requirements before starting operations?

83. Basically, the baselines of safety requirements are: the submission of a safety management system and compliance with all regulations in force that relate to railway safety.

84. Regarding the submission of an SMS, a new railway operator must submit a safety management plan at least 60 days before operations begin: paragraph 4(2)(b) of the Railways Safety Management System Regulations (RSMSR). Since the beginning of operations can only take place if a COF is issue, there is a bit of a catch-22 situation involved: in practice, a new railway must make its own determination on whether or not it falls under federal or provincial jurisdiction. It must therefore take the risk of filing a SMS before it actually is assessed as a railway under federal jurisdiction. Presumably this is not a major issue as Ian Spears of the CTA informed this consultant that it will often be in informal discussions and meetings with a potential operator before the latter actually files its applications and questions such as whether the operation falls under federal jurisdiction would have been discussed on an informal basis. It does pose however a bit of a jurisdictional gap since the requirement for an SMS only applies to railways under federal jurisdiction.

85. The RSA defines a SMS as:

“A formal framework for integrating safety into day-to-day railway operations and includes safety goals and performance targets, risk assessments, responsibilities and authorities, rules and procedures and monitoring and evaluation processes”.

86. Section 2 of the RSMSR sets out in more detail what is required by an SMS. Such a system must include:

“(a) the railway company safety policy and annual safety performance targets and the associated safety initiatives to achieve the targets, approved by a senior company officer and communicated to employees;
(b) clear authorities, responsibilities and accountabilities for safety at all levels in the railway company;
(c) a system for involving employees and their representatives in the development and implementation of the railway company's safety management system;
(d) systems for identifying applicable
   (i) railway safety regulations, rules, standards and orders, and the procedures for demonstrating compliance with them, and
   (ii) exemptions and the procedures for demonstrating compliance with the terms or conditions specified in the notice of exemption;
(e) a process for
   (i) identifying safety issues and concerns, including those associated with human factors, third-parties and significant changes to railway operations, and
   (ii) evaluating and classifying risks by means of a risk assessment;
(f) risk control strategies;
(g) systems for accident and incident reporting, investigation, analysis and corrective action;
(h) systems for ensuring that employees and any other persons to whom the railway company grants access to its property, have appropriate skills and training and adequate supervision to ensure that they comply with all safety requirements;
(i) procedures for the collection and analysis of data for assessing the safety performance of the railway company;
(j) procedures for periodic internal safety audits, reviews by management, monitoring and evaluations of the safety management system;
(k) systems for monitoring management-approved corrective actions resulting from the systems and processes required under paragraphs (d) to (j); and
(l) consolidated documentation describing the systems for each component of the safety management system.”

87. A new railway must also comply with the regulations in force that apply to railway safety. These are:

- Ammonium Nitrate Storage Facilities Regulations
- Anhydrous Ammonia Bulk Storage Regulations
- Chlorine Tank Car Unloading Facilities Regulations
- Flammable Liquids Bulk Storage Regulations
- Handling of Carloads of Explosives on Railway Trackage Regulations
- Heating and Power Boilers Regulations
- Highway Crossing at Grade Regulations
- Highway Crossings Protective Devices Regulations
- Liquefied Petroleum Gases Bulk Storage Regulations
- Mining Near Lines of Railways Regulations
- Notice of Railway Works Regulations
- Railway Employee Qualification Standards Regulations
- Railway Prevention of Electric Sparks Regulations
- Railway Safety Appliance Standards Regulations
- Railway Safety Management System Regulations
- Service Equipment Cars Regulations
- Specification 112 and 114 Tank Cars Regulations
- Wire Crossings and Proximities Regulations

88. There are in addition to the above regulations, orders of the CTC, NTA and Railway Board of Canada (predecessor entities that regulated safety regulation prior to TC) that although obsolete, have not been repealed: however, they apply principally to CN, CP and VIA and not to new railways.

89. Rules to which the new railway is signatory, will also apply. Can a new Railway become a signatory to rules before it gets a COF? Presumably it could become a member of the RAC and signatory to the rules that were approved before it became at member since membership does not
depend on having a COF. For example, many provincially regulated railways are members and signatory to various rules.

90. There are other ways by which the rules would apply; in the SMS, the new railway must indicate “systems for identifying applicable... railway safety regulations, rules, standards and orders, and the procedures for demonstrating compliance with them”, clearly indicating that it must identify existing rules that it intends to be bound by. It does not however, need to submit rules if none exist for it, as would be the case if the new railway is not a member of the RAC or does not become signatory to rules submitted by the RAC. This is a possible gap that could be covered by a paragraph in the SMS requirements for new railways to submit proposed rules in areas not covered by regulations or by applicable rules: this matter is discussed in more detailed under section 6 below, with a recommendation for changes to SMS requirements in paragraph 422.

2.5.2 Are there sufficient mechanisms in place (legislative or administrative) to ensure that there are proper safety measures to ensure safe operations of operating railways, new railways, railways that have not operated over a period of time, or an existing railway that is purchased by another railway?

91. In reality, if a new railway runs on the track of CN or CP or in fact of any railway that is an RAC member, it will be subject to the host railway’s rules through the operating agreement between the host railway and the new operator: this could be clarified by a legislative change which would make it a condition of sale of a railway that the rules which governed the seller will apply to the buyer until the buyer submits new rules, becomes signatory to existing rules or the Minister requires rules to be submitted. However, this may be overkill because it is difficult to see that a new railway running over the tracks of CN or CP would pose a safety risk arising from the day before the sale to the day after. It is not in CN or CP’s interest in this case to have an unsafe operation over its tracks.

92. However, there could be a safety risk involved in the case of a railway that has not been used for some time, involving a sale of track to the new operator. In this case, there may be no connection between an established railway under federal jurisdiction or any jurisdiction for that matter. In this case, in this consultant’s view, the SMS would not be sufficient and an inspection prior to operation would be appropriate. This situation could be covered either legislatively or administratively. An administrative approach would allow TC maximum flexibility but may not provide inspectors with sufficient clout.

93. Another mechanism, already mentioned earlier, to ensure proper safety measures in place regarding new railways would be to connect the RSA and the CTA through the SMS framework. One of the requirements for obtaining a COF could be proof that a SMS has been submitted to TC and a commitment that the SMS will be adhered to. The mandate regarding SMS would remain with TC; if there was a violation of the SMS discovered in an audit, the TC could inform the CTA which could suspend or annul the COF. This does not resolve the question of new railways that have been inactive for a period of time and the need for an actual inspection, but does provide an added enforcement tool to TC for non-compliant railways, generally. The
consultant mentioned this proposal to Ian Spear, Acting Director Rail and Marine Branch, CTA and, as a regulator, he had no problem with it.

94. An even stronger and more drastic mechanism to ensure safety of new railways would be to reinstate the old section 216 of the Railway Act RS c. 234, s. 1 and require that the railway obtain permission to operate. Under that section the company that wished to open a railway or any portion thereof had to apply to the Canadian Transport Commission for authority to open the railway for the carriage of traffic and this application had to be accompanied by an affidavit signed by the railway’s “president, secretary, engineer or one of its directors” stating that the railway was sufficiently completed for the carriage of traffic and ready for inspection. The railway had to be inspected by the Commission’s inspecting engineer who made a report to the Commission whether or not the railway was “reasonably safe from danger to the public using the same”. If the inspecting engineer found that the railway in his opinion would be attended with danger to the public using the railway, he sent a report to the Commission which could refuse such application or order another inspection or report. Once the Commission was satisfied that the railway was safe for operations, it would then make a finding of “public convenience and necessity” which would not be relevant now, given the deregulation of market entry requirements represented by the COF.

95. The argument against this approach is that it goes back to government driven regulation of the industry, particularly with respect to market entry requirements and imposes a regulatory burden that was eliminated under the CTA Act and its predecessor Act, the National Transportation Act (NTA). However, it is submitted that this argument confuses the deregulation of the “public convenience and necessity” market entry requirement with safety requirements. The intent of deregulation either under the CTA Act and the NTA, or under the RSA was never to lower the degree of safety of railway operations, but rather to make it easier to become a railway operator by only having to obtain adequate insurance. An inspection prior to operating a railway, particularly after it has not been in operation for a while seems to be basic common sense.

96. It would be difficult to make this requirement applicable only to new railways and in principle it should apply for all railways. However, the regulatory burden could be minimized by having some kind of “grandfathering” or simplified process for railways currently in operation, with the inspections focused on railways that have not been in operation for a while. The point would be to concentrate resources on operations continued over the same lines before the change in ownership and after. The operating certificate could also be in addition to the other option outlined above, that of connecting the RSA requirement for an SMS with the COF. Also, the requirements of section 216 of the old Railway Act probably need updating as that section only mentions safety of the public and not of railway employees and omits any mention of the environment.

2.6 Conclusions and Recommendations relating to jurisdiction and harmonization

2.6.1 Regarding gaps in jurisdiction

97. It is recommended that the same the jurisdictional tests as those found in the CTA Act be expressly set out in the RSA and that the COF no longer provide the jurisdictional trigger
regarding application of the RSA. The COF could be mentioned “for greater certainty”, but not limit the jurisdiction of TC, as it has up to now.

2.6.2 Regarding the promotion of harmonization and dealing with regulatory gaps and inconsistencies

98. The April 2001 Harmonization Report recommended that the FPWGRS meet with the CTC, TC, HRDC and TSB with respect to develop criteria to be used for determining federal jurisdiction for regulation of railway safety; although at least one meeting after 2002 of this Group took place, there do not appear to be further meetings: it is therefore recommended that a subcommittee or working group on jurisdiction be set up to meet at regular intervals; this becomes particularly important if the recommendation on clarifying the RSA’s jurisdiction over railways be adopted, under paragraph 97.

99. Harmonization in the area of railway safety in Canada has been flagged since the 1994 Review and subsequent reports and reviews have always mentioned it as a desirable objective. All provinces regulating railways appear to see its benefit in that almost all regional railway lines connect at some point with federal lines and as such, the elimination of arbitrary differences in safety requirements is generally considered a valuable and important goal. To that end, it is recommended that the mandate of the FPWGRS be continued with respect to all jurisdictional and harmonization issues and that this body meets at least twice a year to discuss these matters.

100. It is also recommended that the mandate of the FPWGRS be expanded to include consideration of all federal provincial inspection agreements and the development of common provisions and prototype agreement for purposes of implementation on a country-wide basis.

101. It is also recommended that the work of the FPWGRS on the rules data base referred to earlier not only be continued; but because of the importance of this data base to the proper functioning of the RSA rule regime, and federal-provincial regulatory harmonization, that the data base be expanded to also identifying all provincial regulatory safety requirements.

102. With respect to provincial regimes, it is recommended that the power to enter into agreements with the provinces regarding any safety related matters, including inspection, should be under the RSA and taken out of the CTA Act, and that the RSA and CTA Act should be amended accordingly.

103. The April 2001 Harmonization Reports recommends that all inspection agreements with the provinces be amended to update them with the current federal requirements they intend to abide by. A matrix prepared by the Railway Safety Directorate indicates that many of these agreements have not been updated in 10 years; some are expired and the most recent date back to 2003: it is therefore recommended that the inspection agreements be reviewed as soon as possible to ensure that they are up-to-date, set out clearly which regulations, standards and rules apply and to take into account SMS audits, in accordance with the recommendation in paragraph 111.
104. It is recommended that all agreements have attached to them as an annex, a list of applicable rules and regulations.

105. It is recommended that items for discussion at the FPWGRS include the study of any legislative initiatives to incorporate the federal regimes by reference (for Manitoba, British Columbia, New Brunswick and Nova Scotia) to ensure that the incorporation is done as efficiently as possible, given each of these provinces’ respective legislative mandates and also that to ensure that incorporation by reference include replacements (such as where a regulation is replaced by a rule) as it does in Manitoba.

106. It is recommended that the FPWGRS include on its agenda for discussion the issue of training of local inspectors and whether the safer way would be to use federal inspectors true for any province that uses (as in BC) or intends to use its own inspectors.

107. Because Quebec and Saskatchewan use the consultation model, an appropriate role for the FPWGRS (whose mandate it is recommended above should be continued) is to provide the forum whereby these provinces can communicate with TC and the other provinces when creating regulations, as well as approving industry rules and standards.

108. Consideration should be given to cancelling the agreement with Saskatchewan and entering into discussions with it with a view to changing its regulatory approach to be more in line with the federal regime.

109. It is recommended that the specific rules applicable to Ontario short lines should be more clearly defined within the Agreement itself.

110. No specific recommendation is made with respect to the issue of rule exemptions and amendments and the inability of provincially regulated railways to seek these at present, but it is recommended that this matter be explored by the federal and provincial participants in the FPWGRS to see if there is a legal mechanism that could allow provincial railways to apply for exemptions and amendments in cases where there is an inspection agreement that includes rule compliance as part of the inspector’s mandate.

111. It is recommended that TC implement discussions with the provinces to amend the Agreements in order to take SMS audits into account in cases where the federal SMS regulations have been incorporated by reference and in other cases, where federal inspectors are required through the agreement to implement provincial regulations modelled on the federal regime.

112. An excellent data base has been created with respect to rules approved under the RSA. It includes whether the railway in question is a member of RAC, if it is signatory to a particular rule and whether it has applied for and received an exemption. As recommended in the April 2001 Harmonization report, Transport Canada should not only maintain a data base identifying all federal regulatory safety requirements, the data base should also identify all provincial regulatory safety requirements.
113. It is furthermore recommended that a process for ensuring that all interested parties, such as the railways, unions, provinces, municipalities and the TSB are connected to the same information (the two data bases just mentioned) and can receive amendments and updates on a current and simultaneous basis.

114. With respect to the potential gap in regulation that could result through the effect of section 19 (5.1) RSA, it is recommended that the section be reworded to state that where a rule replaces a regulation, the rule will replace the regulation for those railways that are signatory to that particular rule and the regulation will remain in place for those railways not covered by the rule in question.

2.6.3 Regarding New Operators and Safety

115. It is recommended that connecting the RSA to the COF through a legislative link, specifically through adding SMS as a requirement for a COF should be looked at as an added enforcement tool against all non-compliant railways, not just new operators. To give added strength to this recommendation, consideration should be given to having an approval process for SMS – this issue is dealt with in more detail below under section 6.0.

116. It is also recommended that as an alternative or in addition to the recommendation contained in paragraph 115, that the feasibility from a resource and operational perspective be examined with regard to reinstating an operating authority for railways that have not operated over a set period of time and that this authorization be made conditional on an inspection conducted by a TC inspector that finds that the railway meets an appropriate level of safety before beginning operations.

117. It is recommended that the operating certificate recommended in paragraph 116 is the more effective mechanism to ensure compliance with RSA requirements and that while it is recommended that both mechanisms referred to in paragraphs 115 and 116 be examined, the preferred approach is that set out in paragraph 116.

3.0 “SOUND ENGINEERING PRINCIPLES” AS THE SAFETY CRITERIA FOR RAILWAY WORKS

3.1 Is reference to such principles of any value or should it be further defined – in the Act, in regulations, in directives?

118. To assess whether these principles are of any value or should be further defined, the applicable provision of the RSA – section 11 – must be examined exactly what it applies to and also to see whether the term in question has meaning specific enough so that it can be enforced in a court of law.

3.2 The extent of S. 11 RSA

119. First of all, there is no case law on section 11. One case, that of R. v. CNR, a decision of the Supreme Court of British Columbia, dated December 7, 2005, relies on s. 11 to prosecute the
railway, except that the railway pleaded guilty to breaching this provision and therefore there was no questioning of the provision’s applicability nor any need on the prosecution’s part to present proof or meet a standard of proof respecting sound engineering principles.

120. Section 11 states

“All the engineering work relating to railway works, including design, construction, evaluation or alteration shall be done in accordance with sound engineering principles. A professional engineer shall take responsibility for the engineering work.”

121. The provision is problematic in several respects.

- The case involved a CNR wooden bridge that collapsed causing the derailment of a CNR freight train near McBride BC and the death of 3 railway employees. TC investigators found that the cause of the accident was due to inadequate maintenance of the bridge. The prosecutor had problems with charging the railway because he found no section of the RSA or regulations regarding bridge maintenance generally or specifically.

- TC investigators were left with s. 11 RSA, and ss. 124 and 148 Pt II CLC. Section 124 sets out a general duty on the employer to provide safe workplace. Section 148 sets out the penalties and punishment for a breach of the CLC.

- As to s. 11 RSA, it would appear that from a prosecution perspective, it is difficult to enforce because the term “sound engineering principles” is not defined. Because the term is vague, it is open to several interpretations, and had the railway not pleaded guilty, proof beyond a reasonable doubt (the standard in a criminal case) may have been difficult to prove. The term is vague enough to enable a railway to raise reasonable doubt by presenting a different view from the prosecution on the meaning of the term “sound engineering principles”. The TC Guideline for Engineering Work Relating to Railway Works does not set out specific standards that would permit an investigator or prosecutor to know with any certainty what this term means.

- There appears to be no standards, guidelines or other material that indicate what “sound engineering principles” are with respect to railway bridges. The only standards with respect to any “railway works” are for crossings. These are set out in draft regulations which have not as yet been passed.

- In addition, s. 11 refers to all engineering work relating to railway works: it does not define “engineering work”; nor does it define “design”, “construction”, “professional engineer”, “evaluation” or “alteration”. The matter is complicated by the fact that the Guideline in question does contain definitions of the terms “alteration”, “professional engineer”, “design” and “evaluation”, and contains an explanation of the term “engineering work” but the Guideline is not a binding instrument.

- Moreover, it is not clear that maintenance of the engineering work is included in the term “engineering work” and, as noted, the cause of the accident was found to be due to poor maintenance. There does not appear to be any general
duty in the legislation, including regulations, on the railway to maintain its
railway works and in particular, with respect to this case, its bridges.

122. Referring specifically to the issue on lack of guidance and the term “sound engineering principles”, Section 11 highlights a problem with the use of “performance-based” or “goal-oriented” provisions, of which section 11 is one example. Use of this drafting technique can provide flexibility to industry in meeting legal requirements and simplification of complex and prescription technical requirements. The trade-off however, could be a lack of clarity and precision needed by enforcers, rendering the provision virtually inapplicable. In fact, such provisions usually need a balance of both prescriptive elements and general goals for them to be able to be enforced properly. The example of section 11 points to the need for such a balance.

123. The consultant searched federal legislation for the term “sound engineering principles” and the RSA is the only Canadian Act to use this particular term; the terms: “generally accepted” and “generally recognized” “sound business practices” and “recommended practices” were also researched.

124. One statute was found that used a very similar term to the one found in s. 11 RSA. The term: “generally accepted engineering practices” is found in the Income Tax Act as follows:

"specified purpose" means... the operation of an oil or gas well for the sole purpose of testing the well or the well head and related equipment, in accordance with generally accepted engineering practices...” (emphasis added)

125. The consultant does not know how this has been interpreted or whether it has caused difficulties in enforcement. Another similar term “good oil field practices” presently found in the Canada-Newfoundland Atlantic Accord Implementation Act has resulted in no case law on the subject. However, generally speaking, such wording often raises questions of enforceability, particularly when such words are used in regulations and particularly at the level of the Standing Joint Committee on Scrutiny of Regulations, the oversight body of PCO that reviews all statutory instruments. To avoid problems at this level, it is this consultant’s experience as a legislative drafter that clients are often asked to provide either a definition of a term such as this or to submit the standards, guidelines or other material available that demonstrate what the term refers to.

126. From the foregoing, it would appear that s. 11 does not provide sufficient guidance to be successfully enforced and it should be changed. This can be done in three ways, with the first two either alternatively or together:

   o by leaving in the RSA the term “good engineering principles”, creating detailed standards for such works, such as in the case of crossings, and incorporating them by reference into s. 11 (leaving aside at this juncture, the problem of an incorporation by reference of a standard created by the same body as the one that originates the regulations) or just having them as guidance, without incorporating them by reference

   o by setting out general criteria in the RSA itself, that have to contain enough guidelines to be meaningful to the enforcer
o by deleting section 11 in the absence of any available standards or criteria, per above; the enforcer will have to rely on a general duty to construct and maintain its railway works so that they are safe to users, railway employees and the public, suggested below.

127. The recommended approach is that contained under the first bullet above. This is because it contains the least risk of being challenged since it provides the most guidance to the enforcer. Of course, having no requirement at all as under the last bullet, also contains no risk, but accomplishes nothing in terms of safety promotion, so is not considered to be a viable option.

128. Regarding maintenance, it has been noted that there is no general duty of care regarding maintenance of railway works and that the inclusion in the RSA of such a duty might assist a prosecutor in future to prosecute a case involving poor maintenance of such a work.

3.3 Conclusions and Recommendations regarding Sound Engineering Principles

129. *Appropriate definitions of the terms “engineering work”, “design”, “construction”, “professional engineer”, “evaluation” or “alteration” be drafted and inserted in the appropriate place in the RSA.*

130. *A general duty of maintenance of engineering works be added to section 11 (and this could even be extended to include rolling stock) and placed in a more generally applicable part of the Act.*

131. *It is recommended that the term “sound engineering practices” be left in section 11, but that it be referenced to specific standards that will first have to be developed; this task should be undertaken by the Railway Safety Directorate as soon as possible.*

4.0 RULE FORMULATING

4.1 History and General Comments

132. Rule-formulating existed before the enactment of the RSA but on a limited basis. Basically a railway company had the power to formulate rules regarding its own operations, the management of its own affairs and the employment and conduct of its officers and employees, but to the extent that these rules had a public input, they had to be submitted to the GIC for approval (section 233 of the Railway Act RS. c. 234). The rule-formulating scheme set out in sections 19 and 20 RSA is an innovative regime that is unique to Canada and reflects the climate of deregulation in the rail and other modes, leading up to the enactment of the RSA in 1989.

133. The RSA was enacted as a result of amendments to the *National Transportation Act 1987* that among other changes, transferred the safety regulation and investigation functions previously performed by the Canadian Transport Commission to TC. (Safety investigations were later transferred to the TSB).
133. The RSA also was intended to represent a new way of thinking regarding railway safety regulation, to address the main changes that had taken place in the rail transportation industry in recent years and to achieve the objectives of national transportation policy relating to the safety of railway operations.

134. Up to the enactment of the RSA, the Railway Act governed federal railways. This Act was designed for another era, having originated at the turn of the century when Canada’s railway system was rapidly expanding. At that time much of the system was under construction to open up new territory and to encourage settlement. Regulation was prescriptive and detailed.

135. The changes that occurred in the railway industry that had a bearing on how safety was regulated began with deregulation of the economic side of railway regulation. Abandonment and discontinuance of unprofitable railway lines was subject to less regulation and was finally completely deregulated under another series of amendments resulting in the CTA Act 1996. Class 1 Railways such as CN and CP were allowed to sell with minimum government interference, parts of their lines to newly formed regional railways, some under federal jurisdiction and others under provincial jurisdiction.

136. Also, the railway industry had matured over the years: the two major railways in Canada, CN and CP, had become large, well-established companies in business now for over 100 years. They had built up substantial expertise in running, operation and construction or railways and in many ways, their knowledge outstripped that of the government. The Railways wanted to have control over their activities and felt that they were in the best position to do so. Because of deregulation, the new mantra for government departments in the 1980s was downsizing and cost cutting; this applied to all modes of transport, not just rail, and railway safety regulation resources were not exempt from this policy.

137. One result of all these changes was that the RSA focuses on the concept of risk management of safety and the transferring some of the responsibility for railway safety regulation from the government to the railway industry. The intention was to alleviate the regulatory burden from TC, to whom regulation making role had been transferred from the CTA and whose staff, as a consequence, had been drastically reduced. Also, rule-formulating, whether by government or industry, allowed for more flexibility in regulation in that rules were explicitly not made to be statutory instruments (s.46(b) RSA). The process of rule-formulating was intended to be less formalistic. Rules, as opposed to regulations, did not have to go through a formal Justice review process, nor comply with other statutory, policy and legal requirements relating to such instruments, such as drafting conventions, publishing requirements in the Official Gazette, etc. The objective, clearly stated in section 3 RSA was to “facilitate a modern, flexible and efficient regulatory scheme that (would) ensure the continuing enhancement of railway safety”.

138. However, it is submitted that deregulation of safety is a misnomer. It is clear from the RSA that the government did not shift ultimate responsibility for railway safety over federally regulated railways from the government to industry. The scheme of the Act contemplates final Ministerial or government approval of safety requirements, whether these requirements are in the form of railway driven rules, enforced government rules, regulations, engineering standards or inspector/Ministerial orders and directives. Moreover, with regard to rule-formulating, whether
industry or government driven, all rules once approved have the force of law and TC has broad powers to either require a rule, change a rule, or make its own regulation over the subject matter.

139. Some of the decision-making process as to what is a safety matter and what is not has been shifted to the railway as a result of the power to make their own rules, and with that shift, substantial control over the existence and content of these rules. To this extent, it could be said that there is a degree of industry self-regulation. This unilateral ability on the part of the railways to decide what is a safety matter and its decision not to classify particular issues as safety matters and hence to make rules relates directly to the government’s decision to invoke its own rule-formulating powers under section 19 and is a contentious issue with respect to rule-formulating under the RSA: it is discussed below in greater detail under section 4.6.2 at paragraphs 253 and 254.

140. Notwithstanding this shift, it is submitted that the RSA is clear, both from the general perspective of its over-all regulatory scheme and structure and specifically with respect to its substantive provisions and processes that the federal government, and particularly, the Minister of Transport, in no way has abdicated nor can he abdicate his mandate as set out in section 3 of the CTA Act, to create “a safe, economic, efficient and adequate transportation network that...meets the highest practicable safety standards”

141. In this consultant’s view, this premise is extremely important in assessing a) the comments of the railway companies respecting rule-formulating and particularly enforced rule-formulating and the Minister’s power to impose conditions on railway driven rules and b) the comments of critics of the current regime who see the current regime as industry self regulation.

4.2 Overview of the Rule-formulating Process

142. To understand the rule-formulating process and where it fits into the overall regulatory scheme as set out in the RSA, the objectives of the Act in section 3 must be looked at in the light of all the regulatory mechanisms provided for in Part II RSA.

4.2.1 Objectives of the Act

143. The objectives of the Act as set out in section 3 are to:

“(a) promote and provide for the safety of the public and personnel, and the protection of property and the environment, in the operation of railways;

(b) encourage the collaboration and participation of interested parties in improving railway safety;

(c) recognize the responsibility of railway companies in ensuring the safety of their operations; and

(d) facilitate a modern, flexible and efficient regulatory scheme that will ensure the continuing enhancement of railway safety.”
144. The provisions relating to rule-formulating (sections 19 and 20) are, in theory, fully consistent with and appear to embody all the objectives noted above, and most particularly with paragraphs (b), (c) and (d). For example, respecting “collaboration and participation of interested parties”, there is a statutory requirement for consultation in both sections 19 and 20 and the opportunity for relevant associations or organizations, including unions, to comment on and object to a proposed rule. Whether in practice there is such collaboration and participation to the extent intended by the legislation will be discussed below.

4.2.2 Overview of Part II RSA

145. To get a complete picture of the rule-formulating regime under the RSA, Part II of the RSA, entitled “Operation and Maintenance of Railway Works and Equipment” has to be looked at as a whole.

146. Part II contains three regulatory mechanisms: regulations (s.18), railway driven/drafted rules (s. 20) and government mandated/railway or government drafted rules (s. 19). Part of the system relating to rule-formulating is a Ministerial authorization scheme for granting exemptions from the requirements of the rules (subsection 22(2)).

147. The regulation-making power belongs solely to the Governor-in-Council (GIC) and is in respect to the following items:

- the operation or maintenance of line works, and the design, construction, alteration, operation and maintenance of railway equipment, which regulations may embrace, among other things, performance standards; (para. 18(1)(a))

- declarations that certain positions in railway companies are critical to safe railway operations; (para. 18(1)(b))

- respecting persons in railway companies declared to be critical to railway safe operations in so far as the regulations relate to safe railway operation:
  - their training, both before and after appointment to those positions,
  - their hours of work and rest periods to be observed by them,
  - their minimum medical, including audiometric and optometric, standards to be met by them,
  - the control or prohibition of the consumption of alcoholic beverages and the use of drugs by them, and the establishment of support programs for them and standards applicable to such programs; and
  - respecting the establishment of a scheme for the licensing of such persons and prescribing the fees for the licences. (para. 18(1) (c) and (d))
crossing works, including regulations for requiring a railway company, road
authority or other person who has rights relating to a road crossing to conduct a
safety review of the road crossing following an accident of a type specified in the
regulations. (subsection 18(2))

the security of railway transportation. (subsection 18(2.1))

148. There are concurrent powers given to the Minister to require a railway to submit rules that it
formulates (s. 19) and to the railway company to formulate its own rules or revise them on its
own initiative. (s. 20), with respect to all of the items listed above, except for crossing works.

149. The order of precedence of these three mechanisms is:

regulations take precedent over rules, whether railway driven or government
mandated and the government can make regulations that supercede rules at any
time: (subsection 18(3))

government mandated rules take precedent over railway driven rules, if the
Minister refuses the railway driven rule and gives a notice of intention to establish
rules on its own: subsections 19(6) and (7).

if no railway driven rule exists, the Minister can order a railway company to
formulate a rule or to revise its rules: subsection 19(1)

150. The effect of a rule once approved by the Minister has the same force as a regulation as
against the company that requested the rule: section 23 RSA. If the RAC requested the rule on
behalf of its members, the rule will apply against those members for which the RAC files a power
of attorney. Apparently the procedure is that the RAC will file a proposed rule and have a list of
signatory railways attached as an Annex. A railway can also become subject to a rule by
becoming a signatory to it after the fact, whether or not a member of the RAC, although if it is an
RAC member, presumably the RAC will ensure that it is made aware of the rule and signed to it.
This in fact was part of the “regulatory capturing” program begun after the 1998 Review and
recently completed by the RAC. There are several issues relating to the lack of any guidance in
the Act, regulations or even TC guidelines respecting the question of becoming party to the rules
after they are approved. These will be discussed below, under the topic: “TC Experience to Date
with the Process” in section 4.4.

151. Another important provision relating to the rule-formulating process, whether government
mandated or railway driven is that in approving a rule applicable to a particular railway company,
the Minister must to the extent it is reasonable and practicable to do so, ensure that these rules are
uniform with rules dealing with a like matter and applying to other railways: s. 21. This provision
is important respecting harmonization issues already noted because it endorses such principle in
legislation, at least on the federal level. This aspect of harmonization will be discussed in more
detail below, under the topic: “Adequacy of TC Oversight Role in Approving Rules” in section
4.9.
152. Finally, it should be noted that a rule is not a statutory instrument (para. 46(b)), and therefore as already noted, not subject to the requirements set out in the Statutory Instruments Act regarding notice, review, consultation etc.

4.2.3 Railway driven Rules: s. 20

153. Although government mandated rules come chronologically before railway driven ones in the RSA, the latter will be discussed first. This is because logically, from a reading of sections 18, 19 and 20 together, the only time government mandated rules would apply would be if the railways decided not to submit a rule and the government felt that a rule was needed, the government refused an railway driven rule and the government decided to substitute its own rule (subs. 19(7), or the industry failed to submit a rule after the government ordered it to do so (subs. 19(1) and 19(7)).

154. The steps regarding industry-driven rules are as follows:

- the railway makes the decision to formulate a rule or revise an existing rule (s. 20(1)) on
  - any matter relating to the operation or maintenance of line works, defined in section 1 RSA to mean not only the railway line but all structure supporting or protecting it, switching systems and any structure across beside, under or over a railway line that facilitates railway operations
  - the design, construction, alteration and maintenance of railway equipment
  - respecting various matters relating to training and working conditions of railway employees,
  - security matters (subsections 18(1) and (2.1))

- in making the decision to formulate a rule or revise an existing rule on its own initiative, the railway also has to decide if the matter in question is a safety issue: this is explicitly stated with respect to employee-related rules (subsection 19(1) and para. 18(1)(c)) and implicit with respect to any other rule.

- before filing a rule for approval, the railway must consult with relevant associations or organizations likely to be affected by the rule: a sixty day period within which the consultation must take place is prescribed in the Act. (subs. 20(2)).

- the parties to whom the rules are sent for consultation can object to the rules on the grounds of safety (subsection 20(3)(b))

- the railway, after the lapse of the 60 days referred to above, can send file the proposed rules with the Minister. The rule must be accompanied by a notice setting out the reasons why the railway company proposes to formulate or revise the rules and the objection if any from the relevant association or organization (subsection 20(3)).

- when the rules are filed with the Minister (acting through the Director General, Rail Safety, to whom the power to approve rules has been delegated), the Minister
considers whether the rules should be approved, taking into account current railway practice, the views of the railway company and any views of the relevant association or organization to whom the rules were sent and to any other factor that the Minister considers relevant and whether the rules are conducive to safe railway operations by the company (subs. 20(4) and 19(4)).

- the Minister approves the rule if satisfied that it is conducive to safety of railway operations and notifies the company and relevant associations and organizations accordingly.
- the Minister can approve the rule subject to conditions specified in the notice (subsection 19(4)
- the railway company can request the Minister to review any terms and conditions imposed by the Minister under subsection 19(4)
- after receiving a request from a railway company to review the terms and conditions attached to a rule approval, the Minister may amend the terms and conditions and provide a copy of the amendments to all parties: subsection 19(4.2).

4.2.4 Government mandated Rule: section 19

155. The steps regarding government mandated rules are as follows:

- The Minister can order a railway company to formulate rules or to revise current rules respecting
  - any matter relating to the operation or maintenance of line works, defined in section 1 RSA to mean not only the railway line but all structure supporting or protecting it, switching systems and any structure across beside, under or over a railway line that facilitates railway operations
  - the design, construction, alteration and maintenance of railway equipment
  - respecting various matters relating to training and working conditions of railway employees,
  - security matters (section 19 and subsections 18(1) and 18(2.1))

- When rules are filed with the Minister pursuant to an order, the railway must consult with relevant associations or organizations likely to be affected by the rule: a sixty day period within which the consultation must take place is prescribed in the Act. (subs. 19(2)). The parties to whom the rules are sent for consultation can object to the rules on the grounds of safety (subsection 19(3))

- When the rules are filed with the Minister (acting through the Director General, Rail Safety, to whom the power to approve rules has been delegated - see the Delegation of Authorities Authorization dated June 19, 2006, attached as Annex 1), the Minister considers whether the rules should be approved, taking into account
current railway practice, the views of the railway company and any views of the relevant association or organization to whom the rules were sent and to any other factor that the Minister considers relevant and whether the rules are conducive to safe railway operations by the company (subs. 19(4))

- The Minister approves the rule if satisfied that it is conducive to safety of railway operations and notifies the company and relevant associations and organizations accordingly: subs 19(4)

- The Minister can approve the rule subject to conditions specified in the notice (subsection 19(4))

- The railway company can request the Minister to review any terms and conditions imposed by the Minister under subsection 19(4.1)

- After receiving a request from a railway company to review the terms and conditions attached to a rule approval, the Minister may amend the terms and conditions and provide a copy of the amendments to all parties: subs. 19(4.2)

- If the Minister is not satisfied that the rule is conducive to railway safety, he can refuse the rule (subs 19(4); he can also indicate, at the same time, his intention of establishing his own rules, (subs 19(6)) and then establish his own rules, after consultation with all relevant parties of 60 days prior to making any decision (para 19(7)(b)). If he refuses a rule without giving an intention to establish his own, the railway company can reformulate and refile new rules and any delays relating to the process will begin with the date of refusal: (subs. 19(6))

- If a railway refuses to file a rule after having been issued an order under subsection 19(1) to do so, the Minister can establish rules on his own: subsection 19(7), after giving the 60 day period inviting consultation: subsection 19(8).

- Rules established by the Minister after a company refuses to file rules or where the Minister refuses the company’s rules have the same effect as if they had been formulated by the company and approved by the Minister: subsection 19(9).

### 4.2.5 Exemptions

156. Exemption powers under the RSA (sections 22 and 22.1) mirror the regulation-making and rule-formulating power in that both the GIC and Minister have concurrent jurisdiction to allow exemptions from rules. In the case of the GIC power, this is done through order (subsection 22((1)); in the case of the Minister’s power, this is done through notice (subsection 22(2)). In addition, there is a right to an automatic temporary exemption for testing unless there are objections, in which case, the Minister must make a decision as to whether the exemption threatens safety (s. 22.1). Exemptions under the RSA relate to specified companies, equipment and railway works and therefore are not industry wide. This is an important factor with respect to
the harmonization issue and will be discussed in more detail below, under the topic “Uniformity of Rules and Harmonization Issues with the Industry”, section 4.8.

157. Under subsection 22(1), the GIC can by order exempt, with terms and conditions, as it sees fit, particular railways or particular railway equipment or works from the application or a regulation or rule or any provision of a regulation or rule. There is no procedure for applying for such an exemption and no criteria binding the GIC regarding such exemption, in contrast to that of the Ministerial power to exempt where criteria do bind the Minister (subsection 22(7).

158. Under subsection 22(2), the Minister can make the same exemption, by notice. Under this provision, a railway company may apply to the Minister for the exemption and the same requirements regarding consultation under the rule-formulating provisions apply to exemptions as well (subsections 22(5) and (6).

159. The Minister may grant the application for an exemption if it determines that it is in the public interest to do so and is not likely to threaten safe railway operations (subsection 22(7).

160. There is also an automatic temporary exemption for testing (s. 22.1) that applies upon notice by the railway company to relevant associations or organizations, unless there is an objection, in which case, the Minister must make a decision as to whether the exemption threatens safety (s. 22.1(3)). The time frame for filing notice of the exemption and within which objections may be filed and a decision rendered by the Minister is 21 days (subsections 22(2) and (3).

4.3 Transport Canada Experience To Date With The Process

4.3.1 Over-all assessment

161. Generally, the TC experience to date with the rule-formulating process has been good. Rule-formulating under the RSA has relieved to a large degree the regulatory burden for formulating railway safety requirements that the previous legislative regime involving the Railway Act had imposed. There has been a big shift in the regulator’s duties from regulation drafting to railway driven rule approval. There are currently 16 rules that have been approved and are in force. These are:

- Canadian Railway Operating Rules (CROR)
- Rules for the Protection of Track Units and Track Work
- Maintenance Rules for LED Signal Modules used in Wayside Signal Systems for the Quebec North Shore and Labrador Railway
- Railway Employee Radio Communication Rule
- Railway Equipment Reflectorization Rules
- Railway Freight Car Inspection & Safety Rules
- Railway Freight & Passenger Train Brakes Rules
- Railway Locomotive Inspection & Safety Rules
- Railway Medical Rules for Positions Critical to Safe Railway Operations
- Railway Passenger Car Inspection & Safety Rules
- Railway Passenger Handling Safety Rules
162. Of these, all except four are railway driven. Three of the four remaining, (all government mandated), are provisions contained in other rules, not separate Rules, listed above. Only the Railway Equipment Reflectorization Rules (2005) apply industry wide. The other three -- switching in dark territory, transfer movements and belt packs are directed specifically at CN, CP or VIA. Government imposed conditions have been made with respect to only one rule (the Railway Equipment Reflectorization Rules) There have however, been conditions imposed on section 7 railway driven engineering standards, all of which were objected to by the railways. Since the process for these standards mirrors the rule-formulating process under sections 19 and 20, these instances of government intervention and industry response are relevant to the present discussion.

163. Overall, it can be concluded that government-ordered rule-formulating and imposed conditions-making powers have not been exercised to any appreciable degree since 1989. However, its use has been quite recent: pre-1995, there are only a few examples of rules approved subject to TC imposed conditions. Its invocation can therefore be considered to be a relatively recent event and could indicate a growing trend towards government intervention. It is certainly seen by the railway as such and, as will be described below, is a major concern of the railways.

4.3.2 TC Concerns

164. Notwithstanding the generally good experience that TC has had with rule-formulating, it has several concerns with s. 19 and 20, as well as with exemptions under section 21.

165. TC concerns can be divided into three general areas: process, manpower/resources and consultation.

4.3.2.1 Process

166. The RSA does not provide a process for extending rule coverage to railways that were not part of the original rule submission (in the case of s. 20) or the original order (in the case of s. 19) and approvals (for both s. 19 and 20). This poses a problem from the regulator’s point of view. Where the railway is not party to the rule submission or order, as the case may be, at the time the rule is approved, the process is for TC to write to a particular railway and ask if it wants to be party to the rule or to submit its own rules. Usually, a railway will assent by letter indicating that it will comply with the approved rules:. The question that is asked by TC officials charged with this program: what effect legally does this letter have?

167. The RSA refers only to railways that were part of the original submission and if not, it would appear that the proper procedure would be for the non-party railway to itself send a notice
under section 19 or 20, with a copy of the rule and have the rule approved specifically so as to
apply to it. One way to deal with this is to provide in section 20 a provision to cover this
situation, such as: a railway company not a party to the submission on the date of filing the
submission or at the time of approval of the rule shall be bound by the rule by signifying his
acceptance of it by letter to TC.

168. A simpler way would be to provide a similar requirement in a regulation made under section
47 as part of the GIC powers to make regulations “generally for carrying out the purposes and
provisions of this Act”. It is submitted that while the wording of section 47 is general and the
matter in question is not mentioned in the list of times under section 47, these items are examples
only. A general omnibus power such as the one used in section 47 has been held to allow for
substantive regulation-making. (see, inter alia, R. v. CKOY SCC 1979, Canada v. Newfield Seed
Dart, 1974 FCTD). In any case, this situation is one respecting which Legal Services should be
asked its opinion.

4.3.2.2 Manpower and Resources

169. There is no question that rule-formulating under the RSA has reduced the regulatory burden
on TC. Instructions to drafters on regulations were a major part of CTC work. However, while a
lot of work was eliminated, not all of it was: there is still the approval process and this should not
be taken lightly.

170. Also, the Minister has the power to establish its own rules should the railway fail to file rules
after being ordered to do so or where the Minister refuses to approve the railway’s rules
(subsection 19(7)). Granted, this power has not been used to date but it still exists and if and
when used, must be used properly and in a credible manner. In addition, the Minister has the
power to impose its own conditions, a power which it has exercised on several occasions and
which also requires both technical and legal expertise.

171. The lack of manpower and other resources is a concern to TC and this Consultant agrees that
it is a significant setback to fulfilling its role as the lead railway safety oversight and regulatory
body in Canada.

172. For example, one proposal of the RAC asks that TC be required to do some kind of
cost/benefit and risk assessment whenever it imposes its own terms and conditions in relation to
an railway driven rule (s. 19)(4)(a), orders a rule to be submitted under s.19 or makes it own rule
under s. 19: see below under concerns of the railway section 4.4. At present, neither the expertise,
resources nor manpower is sufficient within the Railway Safety Directorate to do this, assuming
the Panel recommends it.

173. Another example is the approval process. As previously discussed, rule-formulating under
the RSA did not remove government’s ultimate responsibility over railway safety. The approval
process makes it very clear that government is responsible for all rules created pursuant to the
RSA as well as engineering standards approved under the same Act. What goes into the approval
process is set out under a separate heading below, under section 4.8. In summary, it is evident that more resources are needed to give this process credibility and strength. There is a need for training of officers in such matters as performance based standards and provisions, as well as basic drafting rules on legislative instruments.

174. It is submitted that the Railway Safety Directorate needs to train someone (or even better, a team of persons) as an expert in rule-formulating, who can also be the resource person for consultation. This idea is elaborated upon under the topic “Consultation Process” under section 4.5. This person needs to be credible to the railways and, in order to be credible, needs training and the correct background in railway technology and operations, knowledge of the legal framework and applicable principles and the time to develop his/her expertise in these areas. Such people exist within the Directorate, but they are so busy multi-tasking that they do not have the time to update themselves on different areas of sector development.

175. It is submitted that the Railway Safety Directorate does not have the manpower or resources at present to dedicate one person to this task. An indication of the lack of sufficient resources in this area is illustrated by the engineering section, (which among other matters, is mandated to oversee the Track Safety Rules, examined in more detail, below, under section 4.8.2: Legal Services Role in Approval of Rules).

176. There are supposed to be three people dealing with track issues. There is presently only one, the Chief, Infrastructure, Rail Safety, TC who is a highly respected (by both the railways and within government) engineer who is not only an inspector and a manager but also is currently working on two regulations presenting in the drafting stage (Controlled Access Regulations and Grade Crossing Regulations) as well as providing track expertise to any other section within the Directorate that requires such advice. It is impossible for such a person, as qualified as he is, to keep abreast of all developments in his area, at least to the extent that his counterparts in the railways can. Hiring new people can take up to 8 months, and then they have to be trained. Manpower issues in the engineering branch are set out in more detail in Annex 2.

177. It is normal that the railway industry as it matured over the years, and as the provider of railway services and infrastructure should be abreast of the latest developments in the industry; after all it is the industry. At the same time, however, the regulator must also be up to date on these developments and even be considered the leader in its knowledge for the regulatory system to be credible.

178. It is recommended that adequate funding be given to the Rail Safety Directorate to either hire or train from within a Rules Expert (and ideally a team of experts), that will serve on the consultation body recommended below as well as offer advice at the approval level. This person can coordinate and bring in other TC experts as and when required. The concerns relating to fettering the discretion of the Minister, though valid, can be avoided by, for example, by presenting at the consultation meetings an order or other instrument signed by the Minister stating that the expert is in no way bound by what he/she says at the meeting and that his/her presence there is intended to assist and facilitate the development of rules and the Minister will not be bound by any position that the expert may take at these meetings. In fact, such wording already
exists and is found in the TC Guide to Submitting a Proposed Rule or Revision to a Rule. The Guide states, in relation to TC participation in rule-formulating:

“Views expressed by Transport Canada (TC) representatives during discussions with a railway company on a proposed rule do not necessarily reflect those of the Minister. Such discussions in no way bind the Minister or fetter the powers of the Minister or any authorized delegate under the RSA.”

179. It is submitted that the Rules Expert will by a key factor to the success of the proposed recommended consultation model. The whole premise of consultation is that a better rule will result from a collaborative effort; it is important that the process is non-adversarial and cooperative. The type of person needed for this position must not only have the requisite knowledge, but also be skilled in interpersonal relations, be non-confrontational and respected by all parties:

180. Another area that is lacking in both TC and in industry is training in drafting rules. Because rule making under the RSA is such a unique process, combining industry initiative with the force of law, there is a gap in training. In fact, not much is known about this form of drafting and this needs to be addressed.

181. Another area where training is needed is in drafting of performance based requirements, which are specifically mentioned in the objectives of the RSA. If such standards are to be used (and it is evident from section 3 RSA that the intention of the legislature is that they should be used), training is needed so that they are used properly, particularly, that they are enforceable. The pitfalls of a performance based requirement has already been illustrated with respect to the term “sound engineering principles.” There are courses that have been developed within the government on performance based regulation. These should be adapted to the audience at issue, which like training in the rule-formulating process, should be aimed not only in-house but at industry as well.

182. It is also recommended that funding be given to the Rail Safety Directorate, as the lead entity charged with creating, promoting and implementing railway safety regulation in Canada, to provide a training program in rule drafting that will be used not only in-house, but as a resource to the industry, including the railway companies, unions and other regulators, such as TC’s provincial counterparts. With respect to the latter, the many inspection agreements and their adherence and respect for federal standards reflected in these agreements is proof of TC’s leadership role in the field of railway safety regulation. In this Consultant’s view it is not only entirely appropriate that TC undertake this role; it ought to lead the way at least in this aspect of rule-formulating.

4.3.2.3 Consultation

183. This is the third concern of TC with regard to the rules. Consultation will be discussed in detail under section 4.5.
184. In summary, TC’s concern over consultation is that it does not consider that the railway’s consultation under sections 19, 20 and 21 to be sufficient. It is after the fact and bilateral, even though TC guidelines on consultation recommend that consultation be commenced early on in the drafting process, in fact, the usual process is to send the drafted rule to the unions and invite comments, the comments, the railway’s reply to the comments and any objections are all submitted with the proposed rule to TC.

185. In this consultant’s view, this concern is valid; it also reflects the union’s position (see CAW-TCA Presentation to Railway Safety Act Review Panel May 15 2007) and at least as far as TC participation, it is supported by the RAC. It is submitted that the current approach meets the requirements of the Act as outlined earlier, but not the spirit of the Act, as embodied in its objectives, set out in Section 3.

186. Under section 4.5 entitled “Consultation”, it is recommended that a consultation model based on a (at least) tripartite (union-TC-railway) dialogue be required by the legislation, with the ability to call in other interested parties, such as the provinces where necessary. Also recommended with regard to consultation, under section 4.3.2.1 entitled Manpower/Resources, a person (or team of persons) dedicated to rule-formulating be either hired or trained within the department in addition to current resources and that one of the duties of this person would be to serve as TC representative in consultations on rule-formulating, with the appropriate waiver regarding binding the discretion of the Minister at the approval level.

4.4 Industry Experience To Date With The Process

4.4.1 Overall assessment

187. As a preliminary note, when “industry” is mentioned in this section, it is intended to mean just the railways, and specifically, the views of the RAC. It was not within the scope of this study and there was no time to examine the different views of individual railways: the consultant tried to set up a meeting with a non RAC member, but this unfortunately could not take place in the time frame provided. As for the unions view, it is mentioned when it arises with respect to specific topics, not as a separate experience. This is because the solutions that the unions recommend -- a return to prescriptive based regulations, rather than rule-formulating and a repeal of the railway’s right to seek exemptions from their own rules – is not, in this Consultant’s opinion, a realistic or productive approach and it has already been rejected earlier in favour of improving the rule-formulating system.

188. Over all, industry is happy with the rule-formulating system; certainly it prefers it over GIC regulations, especially with respect to its own operations.

4.4.2 Railways’ Concerns

189. There are four main concerns of the industry: a) consultation, b) government mandated rules and government-imposed terms and conditions attached to approved rules, c) exemptions and d) provincial/federal legislative gaps not permitting provincial railways to benefit from rights under
the federal regime. These latter rights relate to requests for funding of crossings and the ability of provincial railways to initiate rule-formulating and ask for exemptions.

4.4.2.1 Consultation

190. The Railways do not believe that consultation is adequate because TC is not involved in the process from the beginning of rule-formulating. Ironically, all interested parties agree with each other on the inadequacy of the consultation process, but not all for the same reasons! The question of consultation is dealt with in a separate section (4.5).

4.4.2.2 Government mandated rules and terms and conditions on approved rules

191. The concerns relating to these two topics are very similar.

4.4.2.2.1 Government mandated rules

192. This is a major area of concern to the railways. They simply do not see the value or the point of s. 19 rules. They feel that the railways are not consulted on importance of a government mandated the rule; there is no dialogue before the decision is made to impose a rule; TC doesn’t ask it if a rule is the proper way to go. The railways feel that they are in a better position to draft rules than the government since it covers their operations. No Regulatory Impact Study (RIAS) is required of the government when it imposes a rule. A RIAS is required for a regulation and involves a cost/benefit analysis. Thus there is no cost/benefit study required.

193. The example that is given by the RAC to demonstrative how ill-advised a government mandated rule can be and how no consultation goes into the decision to order one is that of the Railway Equipment Reflectorization Rules.

194. The FRA approved the US rule relating to rail car reflectorization in 2005. TC ordered industry to submit a rule within 120 days with added requirements (not in the US rule) including accelerated implementation. This meant that the reflectors had to be installed on Canadian cars before the American railways were required to do the same. According to the RAC, the railways have already committed to submit the rule voluntarily under Section 20 and there was no need for a section 19 order.

195. To some extent, the RAC’s concerns relating to using a section 19 order for the Reflectorization Rules are understandable. TC’s order seems to be politically motivated, in direct reaction to the US rule. Apparently no cost/benefit study was done for Canada: the US studies were used. It seems to be a common sense that the application of American costs to the Canadian market is deceptive. Also, there seems to be no logic to imposing earlier dates than those required in the US since many rail movements are international, and the end result would be that on the same train, Canadian cars would have the reflectors while the American ones would not. Anyway, the RAC states that the railways were prepared to submit the rule voluntarily.
196. In this consultant’s view, the Railways’ concerns over TC’s enforced rule making in this particular case could have been allayed had there been open dialogue between the two parties before TC’s unilateral action. This kind of dialogue seems to be missing in the relationship between TC and the railways in today’s environment. Maybe the lack of communication is a sign of the times, of a more contentious and litigious society that we live in, one in which the regulator and regulates are mistrustful of each other and of informal discussions and the fear of being taken to court has an influence over both parties’ actions.

197. It is submitted that TC’s power to order rules or make its own rules is a necessary power in the context of the rail safety regulatory regime as a whole under the RSA. There has to be a balance between industry initiative and government oversight and the government mandated rule making and the government’s power to make rules if the railway does not make them provides that balance under the Act. It does not mean it has to be used on a regular basis. In fact, it is submitted that its use should be the very last straw, after all informal dialogue and consultation has not produced a more acceptable result to all parties.

198. The other option is a return to GIC regulation-making for all requirements and it does not appear, notwithstanding the railways’ views on the need for RIAs, that anyone (except for the unions) would be happy with a return to this system. As will be pointed out below, under the topic “Regulation-Making”, in section 5, regulation-making is far more formalistic and procedural and as a result, very time-consuming. Rule-formulating is a far more expedient process and in a sector where technology plays an important role, a system whereby developments in technology can be quickly taken into account in standards and other requirement is a crucial element to the success of the regulatory regime.

199. It is suggested here that before a section 19 order is used, there should be open dialogue between the TC’s intentions and the railways and the latter should be offered the chance to file the proposed rule on its own initiative. In the current environment, this open dialogue is not happening. The new Rules Expert suggested above, may provide the liaison necessary to get this dialogue going; also the consultation model recommended below under section 4.5 may provide a more appropriate atmosphere for this type of dialogue to take place.

200. This open dialogue should also be used to discuss what are safety issues and a consensus should be the end goal of these discussions. Since the trigger to a section 19 order will most probably be the result of a decision by the railway that a particular matter was not a safety issue, with TC disagreeing with this decision, one way to avoid over-use of section 19 orders is continuous, meaningful dialogue. This decision is discussed in more detail in the context of consultation, below under the heading “Consultation”, section 4.6.

201. Another suggestion which this Consultant endorses, is that some kind of cost analysis or cost benefit study, although not a full-blown RIA should accompany a s.19 order or government created rules. Apparently, this cost analysis is in fact done, but it is an internal process. This may be so, but transparency is a key principle in SMART regulation that has been accepted as policy and promoted by the Government of Canada (See, for example, the Report of the External Advisory Committee on Smart Regulation, 2004 and Government of Canada’s Implementation Plan for Smart Regulation, TSB 2005.) As already noted, preparation of this type of document,
even if not a full RIAs, requires manpower that the Railway Safety Directorate. Consideration must be given to this factor if this recommendation is accepted. The model recommended for this type of analysis is the same as that which is required presently of the railway, in proposing its rules. The Guidelines for Submitting a Proposed Rule or for Revision to a Rule state that the rules should be accompanied by a risk assessment that sets out:

- A description of safety issues and concerns, an evaluation of those issues and concerns by means of a risk assessment and an indication of measures for risk mitigation and control.
- An analysis of the implications for other interested parties (e.g. where co-production, or shared running rights exist).
- As applicable, a description of how potential environmental implications of the proposed rule would be addressed.

202. The Guide in question also states that it is recommended that the railway utilize the
Canadian Standard Association (CSA) Standard CAN/CSA-Q850-97 Risk Management Guideline for Decision-Makers, as amended from time to time. The CSA guideline is intended to assist decision-makers in effectively managing all types of risk issues, including injury or damage to health, property, the environment, or something else of value. Other risk assessment methodologies may also be used. It is recommended that if any risk assessment is (as is recommended) be required by TC for imposed rules or its own rules or for any terms and conditions it imposes on an approval, should also utilize the CSA standard.

4.4.2.2 TC Imposed Terms/Conditions on Approved Rules

203. The same comments and recommendations as those set out for s. 19 Rule making apply to any terms or conditions that TC decides to attach to a rule approval. These should also have be accompanied by some form of cost/benefit study.

204. But even more important than a cost/benefit study for TC imposed terms and conditions is that, in this consultant’s view, the imposition of such terms and conditions should not be happening at the stage of an approval. There should be open enough prior dialogue and informal consultation between the Railways and TC in the development stage of the rule so that there are no surprises of this type at the approval stage. It is submitted that this should be so, even though legally speaking there is no requirement for consultation respecting government imposed terms and conditions under paragraph 19(4)(a): there is only a mechanism to have the terms and conditions reviewed by TC after the fact under subsection 10(4.1).

205. In any case, it is this consultant’s view that terms and conditions are not the appropriate mechanism for dealing with changes of a substantive nature that TC feels should be in a particular rule. Such terms and conditions do not form part of the rule, rather they are put in the notice sent to the railway company that the Minister approves the rule subject to terms or conditions. If the latter are substantive in nature, (as opposed to say, a procedural requirement such as imposing a time limit on implementation) they could complicate the rule unnecessarily. The person applying or enforcing the rule has to read both the rule and the terms or conditions attached to it in two separate instruments and decide what it all means. This is not good regulation. At the very least, there should be consolidation of the terms and conditions imposed
by the Minister with the rule, this should be done by TC as part of its oversight role and should be
distributed to all interested parties when the consolidation is effected.

206. It is reiterated that the proper time to deal with issues that could result in the imposition of
Ministerial terms or conditions should be dealt with at the level of development of the rules,
through collaboration and consultation with TC being involved. Again, it is anticipated that the
existence of the recommended Rules Expert will provide the proper degree of expertise and
informality needed to resolve these issues, so that they may not have to reach the point where
rules are submitted and terms and conditions are determined to be necessary at this late date in the
process.

207. Incidentally, this view is not intended to fetter the Minister’s discretion to impose such terms
and conditions: it is merely an interpretation of the purpose of subsection 19(4) and a suggestion
on how it can be used in the most effective way.

208. Even though it has been noted that the government power under subsection 19(4)(a) can
cause problems in the application of rules, if used to impose substantive requirements, it is
submitted that these provisions should remain in the Act because they provide the balance to
railway driven rules and have to be there “just in case”. They are a tool for government to use if
absolutely necessary and more as a “back-up” position in case all other, more collaborative
efforts fail.

4.4.2.3 Exemptions

209. The railway states that basically all exemptions approved by the Minister are subject to
Ministerial imposed conditions, otherwise they are simply rejected. Some of these conditions
could be major ones, to the point that a railway has no interest in proceeding with the exemption.

210. The Unions state that there should be no exemption process, their point being if the railways
make the rules and can then get exempted from them, what is the point of making the rules in the
first place.

211. In this consultant’s view, an exemption process is appropriate and necessary in a scheme that
is intended to be adaptable to the particular needs of individual railways and their particular
working environment. Also, because of the way the application process for rule approval
operates, with the RAC acting under a blanket power of attorney for its members unless they
instruct it not to so, a railway can find itself requiring an exemption for a particular aspect of a
rule after the rules are approved.

212. If all exemptions are being approved subject to conditions, this seems to point to a lack of
meaningful consultation and dialogue at the development stage of the rules and the exemptions.
The criteria for granting an exemption are the public interest and the absence of a threat to safety:
The problems with the exemption process appear to be once again due to a lack of dialogue and it
would seem that any issues relating to these criteria could be discussed and maybe eliminated
prior to the submission of any application for exemption.
4.4.2.4 Provincial/Federal Legislative Gaps

213. The RAC in outlining this concern is no doubt speaking on behalf of its provincially regulated member railways. Except for Ontario, which has adopted the federal regulatory regime in its entirety through its inspection agreement with TC and is enabled to do so through its shortline legislation, provincially regulated railways cannot avail themselves of the RSA exemption and crossing funding provisions. With regard to exemptions, this means that such railways will be bound by the rules that the particular agreement specifies, without being able to ask for an exemption from any provision of these rules, certainly an inequity in the system that should be remedied. Since this will probably involve changes to provincial legislation, the impetus for these changes should probably come from the provinces, since they have the option of choosing their regulatory model and could choose a model that permits an exemption granting process.

214. This issue has already been touched on above, with respect to harmonization issues and it was recommended that TC and the provinces use the FPWGRS forum to look into the possibility of creating some legal mechanism (the RAC recommends a Protocol, but it is likely that changes to provincial legislation would be involved) to allow provincially regulated railways to avail themselves of exemptions from RSA requirements.

215. No recommendation is made with respect to providing a mechanism to allow provincially regulated railways to apply for crossing grants under section 12. If these railways run over federally related track, the appropriate applicant would be the federally regulated railway; if the track belongs to the provincially regulated railway, the question of funding for crossings or crossing improvements would be a wholly provincial matter.

4.5 Consultation and Rule-formulating

216. Regarding development of rules, the RSA system supports an important industry role in developing safety requirements. At the same time collaboration is emphasized as an important element in this development. The RSA rule formulation scheme seems to envisage a form of “co-regulation” rather than an industry “self-regulation” as the scheme has often been categorized. Consultation is clearly a key element to rule-formulation because it is expressly provided for in the rule-formulating provisions of the RSA. However, it would appear that from discussions with TC and the RAC and from reading the briefs of the Unions, consultation regarding rule development is not being done in a meaningful way and is not meeting the needs of the interested parties nor the intent of the legislation as expressed section 3 RSA.

4.5.1 Consultation Process related to Proposed Rules and how it has been used

217. This process has already been briefly touched upon in section 4.4.

218. The following provisions deal with consultation respecting rule-formulating: subsection 19(2) (railway duty to consult on government mandated rules), subsection 19(8) (Minister’s duty to consult on its own rules), subsection 20(2) (railway duty to consult on its own rules) and subsection 22(5) (railway duty to consult on proposed exemptions).
219. With respect to railway consultation on government mandated and railway driven rules, there are TC guidelines (see: TC Guidelines for Submitting a Proposed Rule or for Revision to a Rule) on how this should be done. These guidelines state that regarding consultation the railway must provide, when filing a proposed rule:

- a demonstration that the railway company has afforded each relevant association or organization that is likely to be affected by the proposal a reasonable opportunity during a period of sixty days to consult with it, as required by subsections 19(2) and 20(2) of the RSA;
- Copies of all comments received during consultation with relevant associations and organizations and, where the comments received include safety questions, concerns, or objections, an indication of how the railway is responding to those questions, concerns, or objections (e.g. a letter from the railway company to the relevant association or organization, addressing their concerns).

220. After this interpretation of what is needed as consultation, there is a note in the Guideline that provides that

“It is recommended that the railway company contact relevant association and organizations early in the drafting process to initiate dialogue on the proposed rule”.

221. What the railways actually do is what is stated in paragraph 219: the drafted rule is sent to the unions and their comments invited, the comments, the railway’s reply to the comments and any objections that remain are all submitted with the proposed rule to TC. There appears to be no evidence that the recommendation in paragraph 220 regarding early involvement of relevant associations or organizations is being followed.

222. With respect to consultation by TC over rules it initiates, in fact there have to date been no TC drafted rules; so no consultation precedent for this situation. There has however, been TC mandated rules under subsection 19(1) and imposed terms and conditions, under subsection 19(4). The former imposes the consultation requirement on the railways and the latter requires no consultation under the RSA.

223. The Railway Safety Consultative Committee (RSCC) however, still exists, although it has not met since 2002. The RSCC was created in 1999 as a permanent committee composed of TC officials and railway safety stakeholders. The mandate of this Committee included biannual meetings. Membership was open to persons and groups with an interest in rail safety. The establishment of the Committee was one of a number of new railway safety measures put into place after the 1998 RSA Review.

224. The Executive Committee of this body met in January of 2006 and the issue of consultation was specifically discussed, and in detail. This meeting provides insight into why there meetings were basically discontinued: TC’s viewpoint, expressed at that meeting was that since TC met twice a year with the railways and regularly with the RAC, and tried to meet once a year with the unions, there were not many issues to discuss at the RSCC since they had already been addressed.
in prior meetings. Bilateral meetings were felt to be more appropriate and there were more of them than the RSCC meetings.

4.5.2 Evaluation of Different Consultation Models

225. The different consultation models available to RSA rule-formulating include the following:

- the status quo;
- the RSCC;
- the American model of RSAC

4.5.2.1 The Status Quo

226. The status quo has already been described. It is set out in the Guidelines mentioned above and basically is interpreted to mean a form of bilateral written exchange between the railways and the union, that occurs after the rules have been formulated by the railway or the RAC. It is evidenced by the written comments and objections that are made during this exchange. It does not include consultation with TC in any formal capacity although there is an informal give and take between TC and the railways. This exchange is uneven and depends on the subject matter being covered by the proposed rules and the personalities of the particular people who are responsible for the particular rule or subject matter in both organizations.

227. It is evident to this consultant that this model is inadequate to meet the needs of all interested parties involved – the railways, the unions, the regulator and other persons or organizations with an interest, such as consumer groups, railways not party to the proposed rules, etc. Not one interested party has expressed satisfaction with it, and the major ones (railways, unions and TC) have in fact expressed dissatisfaction with it.

228. In this consultant’s view, this form of bilateral, after the fact, non-verbal dialogue is almost adversarial in nature, the type of procedural exchange that goes on in a civil law suit. As such, it is submitted that it is inappropriate to meet the objectives of the RSA that explicitly calls for a collaborative, participatory role of interested parties. It does not create an environment or an atmosphere that encourages meaningful consultation. It almost seems an afterthought to the railway’s rule-formulating process.

229. The advantages to this procedure are that it meets the letter of the law, is relatively simple to follow and relatively expeditious, certainly more expeditious than a model involving tripartite or face-to-face discussions, with little expense attached to it from either a government or industry perspective. Apart from this, it has little to recommend it and it has clearly not been successful up to now. In fact it could be said to discourage multi-lateral, face-to-face meetings and encourage the separation and isolation of all the parties, because the latter do not have to meet person to person to actually discuss anything.

230. It is recommended that a new consultation model be developed based on at least a tripartite model (railway-union-TC), with other parties invited on an interest basis, that consultation begin with the development of the rule, not after its formulation by the railway, that at least some of this
consultation involve meetings in person or by conference call and that at least some of these criteria be explicitly provided for in the legislation. Different models should be examined further, such as various aspects of the American model of RSAC described in more detail below. This new model should, if this is feasible, be integrated into the existing RSCC structure, such as, for example, having some kind of reporting requirements to RSCC. These are just ideas: the recommendation is not to propose a specific model but that different ideas should be explored with the goal of a model that promotes collaboration and participation in rule development.

### 4.5.2.2 RSCC

231. The RSCC is too large and unwieldy a body to be useful in the development of rules. The list of organizations, persons and stakeholders contains 65 railway representatives, 36 federal government representatives, 11 provincial representatives, 10 union representatives, and 13 representatives from other organizations, including consumer groups and industry associations from other modes of transport. Its role, like the Railroad Safety Advisory Committee (RSAC) in the US is more to provide advice and recommendations to the regulator, who in Canada is the Minister or Transport, regarding the development of the rail safety regulatory program.

232. It should, however, be used in conjunction with the smaller model suggested above. The RSCC should be reinstated and meet on a bi-annual basis as was originally envisaged. This type of open and transparent exchange on railway safety involving a wide variety interests is unquestionably useful, at the very least, in creating a collaborative and participatory atmosphere to exchange views. It is clear to this consultant that this atmosphere is missing in the current environment and needs to be developed and nurtured. The way it can be used in the development of rules is to have the railway/union/TC subgroup envisaged as the core rule developers, present their progress report at these meetings and invite discussion. The main responsibility however, for providing input into the rule would be that core group. The role of the TC member of this group, the recommended “Rules Expert” has already been discussed in detail. As noted, this person will play a key role in the consultation function and his expertise, knowledge, training and personality must be credible to all involved.

233. Another item for discussion at the next RSCC meeting should also be on developing a consultation model for rule-development.

### 4.5.2.3 The American Model of RSAC

234. RSAC is the main consultative body by which advice and recommendations regarding the development of the railroad safety regulatory program, including issuance of new regulations, review and revision of existing regulations, and identification of non-regulatory alternatives for improvement of railroad safety.

235. The RSAC structure consists of three levels: (1) the RSAC itself (the full committee); (2) working groups responsible for developing recommendations on one or more specific tasks assigned to RSAC and (3) task forces that develop data and recommended actions with respect to elements of tasks assigned to working groups. The RSAC is appointed and chaired by the Federal Railroad Administration (“FRA”). At each level, membership must reflect parity between
representatives of railroad labour and management interests. In addition to railroad labour and management, representatives of other interests directly affected by FRA’s safety regulatory program also sit on the RSAC and as appropriate, on working groups and task forces.

236. Decision-making in RSAC is on a consensus basis, meaning each representative has a vote. Voting by proxy is permitted at any of the three levels.

237. RSAC establishes working groups to undertake each program development task (e.g., rulemaking which in the US is government driven even though it is called “rule-formulating”, or issue to be examined for possible rule-formulating) and that working group will be dissolved when the task is completed) normally following issuance of a final rule or decision not to institute rulemaking). A working group may be assigned more than one task if tasks are clearly related, but standing working groups are not used. The working group functions as staff to the RSAC and is comprised of individual representatives from RSAC member organizations who may but need not be, RSAC members themselves.

238. The Chairperson, after consultation with the committee, determines the appropriate structure for a working group. Each working group is comprised of only those members directly interested in the task and is limited to the smallest number necessary to accomplish the assigned task. In selecting members for the working group, strong preference is given to persons with technical expertise in the subject matter. A fair balance of interests actually implicated by a particular task is sought in the selection of the working group membership. There is typically, a minimum of three FRA representatives (a program person, an attorney and an economist) are signed to each working group. These representatives serve as the liaison between the working group and the Agency. As members of the working group, the FRA representatives are responsible for presenting the agency’s concerns and suggestions on the topic tasked. Each working group is supported by necessary FRA staff (e.g., program specialist or research staff member). The FRA representatives collaborate with the internal team established to support the working group and ensure unity of Agency thought and action.

239. The working group makes recommendations on its mandated tasks based on full consensus. Once it has reached full consensus about its recommendations it reports them to RSAC. RSAC then considers whether to adopt the recommendations. The working group present its recommendations during a public meeting of the RSAC. The Chairman places the working group’s recommendations in the Federal Register, the equivalent of which is the Canada Gazette, indicating the date, time and location for the meeting, as well as the public location where copies of the working group’s recommendations may be reviewed in advance. When the RSAC meeting is convened, the working group spokesperson presents its recommendations to the RSAC, responding to any questions regarding the factual basis of the recommendations, the options reviewed, and considerations bearing on those options.

240. Based on the circumstances however, the Chairperson may decide the RSAC need not consider the recommendations during a formal meeting but may, instead, distribute the recommendations in writing. This method is most useful in the case of relatively minor regulatory matters on which extended deliberation is not likely. When this method is used, public notice is published in the Federal Register indicating the publication where copies of the working
group’s recommendations may be reviewed and pointing out that no formal meeting is planned to discuss them.

241. Having received the full consensus recommendations of the working group, the RSAC has three options (1) by full consensus (unanimous vote) accept the working group’s recommendation and forward them to the Administrator without change; (2) by majority consensus, accept the working group’s recommendations and forward them to the Administrator along with any non-consensus views offered by a non-concurring voting members of RSAC that were not represented on the working group or (3) by full consensus return the working group’s recommendations to the working group for further consideration of specific issues. With regard to a particular task, the third option is available only once.

242. The RSAC considers the working group’s recommendations in their entirety, seeking consensus for approval of the recommendations as a whole. For the recommendation to be submitted to FRA, the voting members of RSAC, the voting members of RSAC must approve the working group’s recommendation without change. The full RSAC is not the appropriate level at which to write or rewrite detailed recommendations. That is the job of the working groups. Members of the RSAC consider whether they can “live with and support” the recommendations embodied in the working group report taken as a whole. FRA employs its resources and energy to encourage and facilitate the achievement of consensus.

243. At this level consensus needs to be unanimous. If it is not, the RSAC refers the matter back to the working group where it re-examines its report with a view towards getting full consensus and changing it if necessary to achieve this. Once the RSAC reaches consensus, the Chairperson transmits the RSAC’s recommendation to the Administrator. If there is no unanimous consensus at the working group level or majority consensus at the RSAC level, the RSAC reports the absence of consensus to the Administrator. In the absence of consensus recommendations, the FRA will simply determine the best course of action on a particular issue without the benefit of the RSAC’s advice.

4.5.2.4 Applicability of the American Model to RSA Rule-formulating

244. RSAC is aimed at consultation for government driven rule-formulating – these are equivalent to regulations rather than section 20 rule-formulating. So, right away, this difference makes this consultation process less applicable to RSA rule-formulating and more comparable to consultation with stakeholders that takes place with regard to a regulation (see below).

245. However, the process does contain some thought-provoking ideas for consultation that perhaps can be incorporated into a new consultation model for rule-formulating and at least should be studied in more detailed. In particular, the emphasis on reaching a consensus among all the three main interest groups and the idea of the regulator concentrating resources and energy to encourage and facilitate this consensus seems a worthwhile goal, even though it is time consuming and this factor would have to be considered in assessing it as a model. Also, the three-tiered approach, with decision making and consensus required at every level is complicated and not very expedient. Also, again, is it relevant to railway driven rule-formulating or more applicable to government driven regulations? In this consultant’s view, it is more applicable to
regulation making. Rule-formulating is intended to provide a more expeditious process. The RSAC model does not provide a consultative framework to achieve this goal.

246. On the other hand, the idea of making consultation under the rule-formulating provisions of the RSA part of RSCC, like the working group and task forces report to RSAC in the US model, may be of some value. This would enhance the role of RSCC, use an already existing consultative structure and provide the Minister with a broader perspective on the views of all interested parties to the rules.

247. In order to respect the railway’s scope of control over its own activities and rule-formulating jurisdiction, this model could leave to it the responsibility of forming the consultation group as long as all relevant persons and associations were represented. There would be an obligation on the part of the railway to start this consultation at the beginning of its rule drafting. The results of the consultation, instead of going straight to the Minister, could go to the RSCC which could add comments, adopt any recommendations made or reject them: the whole package would go to the Minister for his consideration. The down side of this is that it adds another layer of decision-making; however, given the universal dissatisfaction with the consultative model presently being used, it could provide at least a trigger for discussion.

4.6 Is the rule-making process effective; should the industry-led rule making be expanded or restricted in Canada?

4.6.1 Is the rule-formulating process effective?

248. In this consultant’s view, the rule-formulating process is effective. It provides more flexibility and is a more expeditious a process than regulation-making: see below. However, it is a unique process concerning which not much is known about. At the same time, the railway sector has now had industry rule making for 15 years and this is an adequate amount of time to know whether it works or not or should be changed or abandoned all together. This consultant is of the view that industry led rule making should remain in place, but needs modification and improvement. At present, there are issues relating to harmonization, consultation, insufficient manpower and resources in the Railway Safety Directorate and issues regarding the approval process, as outlined and discussed elsewhere in this Report that need to be addressed and resolved. Another important issue that needs to be resolved with respect to this process is the decision that triggers industry-led rule-formulating in the first place: that of deciding what is a safety-related matter.

4.6.2 Should the industry-led rule making be expanded or restricted in Canada

249. As has already been noted, the RSA allows rule-formulating or operation of maintenance of line works and the designing, construction, alteration, operation and maintenance of railway equipment, and security. In addition, the RSA allows for the railways to formulate their own engineering standards governing the construction or alteration of railway works There is also concurrent GIC regulation-making powers in these areas.
250. In addition, there is exclusive GIC regulation-making powers over construction of crossings (s. 7.1). There is also such exclusive powers over such matters as fencing, drainage, pipes, buildings and roads not part of railway works or operations but may affect safe rail operations (s. 24).

251. Looking at the regulations that have been made by the GIC (paragraph 87) and are in the works (Access Control Regulations and Crossing Regulations), generally speaking, with the exception of the new SMS regulations, the regulation making power has been used with respect to areas over which the government has been given exclusive as opposed to concurrent regulatory powers. Thus, for the most part, the railway has been left to deal with matters affecting its own operations and railway property.

252. In this consultant’s view this should remain as is and the powers respecting industry-led rule making should not be expanded or restricted. It is logical and fair that where many third party interests are involved, the matter should be dealt with by regulation. Neither TC nor the railway is suggesting a change here; only the union would have the powers of the railway to make rules not only restricted but removed entirely and a regulation based system applied across the board. This is not considered to be a viable option by this consultant.

253. However, this being said, the question of what is a safety issue and what should be the subject matter of a rule is tied to the question of expansion or restriction of industry led rules. The decision to formulate a rule under section 20 being totally within the discretion of the railway, its decision on whether to make a rule depends on its assessment of a particular matter as a safety issue. If it decides that the matter is not a safety-related issue, there will be no rule. If the government disagrees, section 19 enforced rule-formulating could come into play, with the result that government led rule-formulating becomes more frequent and railway driven rule making restricted. The more areas of disagreements, the more section 19 will be used. This is not a desirable result. The theme behind the RSA is cooperation and participation.

254. In this consultant’s view, the decision as to what is a safety issue should be made on a cooperative basis, based on face-to-face meetings and on-going dialogue, and maybe through using the RSCC forum. Much of the current debate and criticism of government led rule-formulating may be diffused and reduced or even eliminated through this type of common effort. If there is no consensus on what is a safety issue, the decision must be made by TC as the body empowered by Parliament to regulate and oversee railway safety on the federal level.

**4.7 Uniformity of Rules and Harmonization Issues within the Industry**

255. The issues of uniformity of rules and harmonization have already been discussed earlier, with respect to the question of harmonization generally (see “Establishing a Complete Regulatory Regime”, section 2, with recommendations dealing with these issues found in paragraphs 102, 103, 104, 109, 110 and 112).

256. The particular problems relating to harmonization of rules in the context of a rule-formulating process that is based upon a specific railway or railways making an application for approval of a rule and approval of rules and exemptions that apply only to that specific railway or
railways has been discussed above, under the heading “Process” (section 4.3.2.1 at paragraphs 166 and 167) that discusses the concerns of TC with the rule-formulating process, one of which relates to the extension of rule coverage to non-RAC members and provincially regulated railways, and again under the heading “Provincial-Federal Legislative Gaps”, listed as one of the railways’ concerns, under section 4.4.2.4 in paragraphs 213 -215.

Recommendations respecting harmonization of rules are found below under section 4.10.

257. Another issue that relates to the question of uniformity and harmonization of rules is that of the adequacy of the approval process, which is discussed in the following paragraphs.

4.8 Adequacy of Transport Canada oversight role in approving rules

4.8.1 TC Approval Role

258. The approval process regarding rules is outlined in the TC Guideline for Submitting a rule or for Revision of Existing Rules and is derived from the factors set out in subsection 19(4) RSA.

259. The Guideline provides that where a proposed rule is filed with the Minister, the Minister considers whether, in the Minister’s opinion, and after having regard to current railway practice, to the views of the railway company and the views of any relevant association or organization for which a notice of objection has been filed and to any other factor that the Minister considers relevant, the rule is conducive to safe railway operations.

260. The Guideline provides that in making this determination, the Minister may take into consideration the information provided by the railway (see paragraph 259, above), and any other factor the Ministers considers relevant, such as whether:

- the requirements of the RSA have been met regarding consultation or filing of notice (failure of a railway company to demonstrate consultation with, or to file notices of objection by, relevant associations or organizations as required by the RSA is sufficient to preclude the Minister from considering the proposed rule);
- the requirements of Section 11 of the RSA have been met regarding engineering work related to railway works;
- the railway company has ensured that the safety implications of, and/or risks associated with the rule have been identified and assessed, and whether risk mitigation strategies would be adequate;
- any safety-related issues or questions remain outstanding, and whether follow-up action is required;
- objections from parties consulted or notified have been addressed by the railway company (e.g., responding to their concerns by letter);
- a new or revised rule is the optimum regulatory instrument for achieving the desired result; and,
- the proposed rule is drafted such that it is clear, understandable and capable of being interpreted in only one way.
261. Under the RSA, the Minister has an assessment period of 60 days to consider the proposed rules and notify the railway company that filed them of the Minister’s decision. This assessment period begins when the Minister has received all of the information and documentation required by the RSA.

262. The Guideline provides that TC Rail Safety may contact the filing railway company to discuss its proposal after it has been filed (e.g., to request further information or clarification with respect to the proposal or its supporting documentation). If TC Rail Safety determines that it requires further information to evaluate such a proposal, it seeks to request that information in a timely manner. A railway company may likewise contact TC Rail Safety officials to discuss its proposal after filing it. However, if a railway company chooses to contact TC regarding its proposal, it is advised to seek to complete such discussions at least ten (10) working days before the end of the assessment period; after which time, additional information might not be accepted.

263. If, before the end of the 60-day assessment period, the Minister determines that, by reason of the complexity of the rules, the number of rules filed or any other reason (e.g., to provide a railway company additional time to provide further information requested by TC Rail Safety), it will not be feasible to consider the proposal before the expiration of that period, the Minister may, by notice, extend the assessment period to any time in excess of 60 days that is specified in the notice.

264. The Minister’s decision on whether to approve or refuse the proposal will be conveyed to the filing railway company and each association or organization that objected to the implementation of the proposed rule during the consultation process, in the form of a notice. TC’s letter accompanying the notice may address outstanding objections from the relevant associations or organizations, as deemed necessary.

265. If the Minister decides to approve the proposal, the notice may specify terms and conditions upon which the rule is being approved. Terms and conditions so specified are binding on the railway company in the implementation of the particular rule. Before recommending that the Minister approve a proposed rule on certain terms and conditions, TC Rail Safety may, when practicable and appropriate, endeavour to contact the railway company to inform it of those possible terms and conditions.

4.8.2 Legal Services Role in Approval of Rules

266. TC Legal Services involvement in rule-formulating for the most part, comes at the approval level. When the Rail Safety Secretariat gets the rule from the railways it sends a copy to among others, Legal Services. At this point, there is no action taken by Legal Services with respect to the rule. The rationale for this is that they are technical rules and their filing meets the requirements under the Act.

267. When the rule goes from the Secretariat for approval by the Minister, Legal will look at the instruments relating to the approval, i.e., the approval order and the notice of approval, to see if they conform procedurally to what is required under sections 19 and 20 RSA and with the drafting conventions applicable to these types of documents. It does not look at the content of the
rules, or how they are drafted. This is because these rules are not statutory instruments (s. 47 RSA) and there is no requirement that they be scrutinized pursuant to the Statutory Instruments Act, by the body mandated to perform this scrutiny, the Regulations Section of Justice Canada.

268. As a result, rules are not reviewed for such things as language, consistency with other rules covering the same matter, whether the rules are intra vires the RSA, subdelegation issues, whether goal oriented provisions are precise enough to enforce, and other like issues that relate to regulation drafting.

4.8.3 Assessment of the Adequacy of TC’s Oversight Role in the Rule Approval Process

269. Two areas are highlighted as areas of concern relating to the adequacy of TC’s oversight role in the rule approval process.

270. The first concern has been discussed in detail, earlier and relates to the need to have a person who is both an expert in rule-formulating and in the technical safety issues respecting individual topics covered by rules. It has already been noted that the railways now seem to lead the regulator in knowledge and expertise and that this needs to be addressed. The recommended action, explained earlier in greater detail, is to create a new position of Rules Expert, to be additional to existing resources, that will free current staff from this role and that will provide advice and coordination both at the consultation level and at the approval level.

271. The second concern relates to the lack of any legal review of rules. While the reasoning behind it conforms to the Statutory Instruments Act, in fact, many of the same issues that are examined with respect to regulations exist with respect to rules, such as clarity issues, enforceability of performance based standards, subdelegation issues, etc. Moreover, these rules become as binding as regulations once approved by the Minister.

272. An example of some of the enforceability issues that arise and the need for Legal Services oversight with respect to rule-formulating can be demonstrated by some provisions of the Track Safety Rules. These provisions indicate that a lot of decision-making discretion is left to railway employees, especially regarding what falls under exemptions to the rules, making it difficult to know what in fact constitutes an infringement of the requirements in question. The following is not meant to be an in depth analysis of the Track Safety Rules and their adequacy because there was not enough time to go through these or any rules in detail. Suffice it to say, a cursory examination of the Track Safety Rules revealed vague performance based standards and non-enforceable requirements. For example, sections 6.1 – 6.3 of these Rules provide

“6.1 Where a line of track is not in compliance with the requirements of these rules, the railway company shall immediately

(a) bring the line of track into compliance; or

(b) halt operations over that line of track.”
6.2 Notwithstanding subsection 6.1, in the case of Class 1 track that is not in compliance with these Rules, the railway company may operate on that line of track under the authority of a track supervisor for not more than 30 days.

6.3 If a railway company designates a segment of track as “excepted track” under section 5, operations may continue over that track without complying with the provisions of subparts B, C, D and E.”

273. Subpart B relates to the roadbed, Subpart C relates to Track Geometry, Subpart D relates to Track structure and E relates to Track Appliances and Track Related Devices. In fact, there are only 2 Subparts not included in this exemption: Part A that sets out the classes of track and includes section 6 so the exception could not apply to it, and Part F that provides for inspections.

274. As a result of all the exceptions, there is basically very little requirement left. A TC inspector trying to enforce this section would have to ensure that all the exceptions were not complied with before determining an infringement of the rule. This is not per se to criticize the rule: it merely is meant to point out that the way it is formulated creates problems regarding enforcement for an investigating inspector or a prosecutor if there is an accident on a particular line and a legal services review could eliminate or alleviate these types of problems.

275. As parties become more litigious, it is predicted that rules will become the basis of more prosecutions, including administrative fines, if these become part of the enforcement scheme, and the focus of more Court scrutiny. It is submitted that the lack of any legal review is a gap in the process and should be addressed. It is not suggested that these rules be submitted to the Regulations Section of Justice, but that a modified legal review be undertaken by TC Legal Services or within the Rail Safety Directorate, with appropriately trained staff dedicated to this function.

276. Another reason why some form of legal review of proposed rules appears appropriate and necessary, are that many of the harmonization issues already discussed could be dealt with at this level.

277. It is therefore recommended that a modified legal review of rules be undertaken by TC Legal Services that compares proposed rules with existing rules for consistency of language and form, examines the rules to see if they are intra vires the powers of the Minister under the RSA, establishes that are no illegal subdelegations of legislative power and deals with harmonization questions and other questions, to the extent that they are related to legal issues.

4.9 Rules vs. Regulations: are there situations where the better approach may be through GIC regulation rather than industry-led rules?

278. It has already been noted that this Consultant agrees with the current division of topics that are covered by GIC regulations and industry led rules. This being said, the railways have voiced the view that the reflectorization rules that were required under section 19 may have been more appropriately dealt with by regulations because non-railway parties were involved and because there were cost implications. The consultant makes no comment on this other than some form of
RIAS would have been beneficial in this case in order to assess the full implications of the proposed requirements.

279. In the future, it is recommended that when non-railway parties are involved in a proposed requirement, that the regulation-making powers of the GIC should be considered rather than enforced rule-formulating under section 19, especially if section 19 is not amended to provide some form or cost-benefit study required by the government.

4.10 Conclusions and Recommendations with respect to Rule-formulating

280. It is recommended that TC Legal Services be asked to look at the question of whether a letter to TC by a railway that is not party to a particular rule, setting out its agreement to be bound by that rule is sufficient to meet the requirements of section 20 RSA and if not, whether a regulation made under section 47 to this effect would be permissible under that section.

281. It is recommended that adequate funding be given to the Rail Safety Directorate to either hire or train from within a Rules Expert or a team of experts, that will provide input during the consultation process, as well as offer advice at the approval level and who will coordinate and bring in other TC experts as and when required, to meet the needs of the rule-formulating process and that this Rules Expert is in additional to current staff within the Rail Safety Directorate.

282. It is recommended that a training program in rule-formulating should be immediately developed and initiated within transport and the industry. This training should include sessions on drafting performance based requirements. Appropriate funding should be provided to TC to implement this recommendation.

283. It is recommended that a modified RIAS or some kind of cost/benefit analysis accompany every s. 19 order or government created rule under that section, that appropriate resources be given to the Rail Safety Directorate to do this and that the model for this analysis be taken from the one already recommended in TC’s applicable guidelines to accompany the railway’s proposed rule submission under section 20 RSA.

284. Alternatively, the feasibility of using s 18 regulation making powers rather than s. 19 rule-formulating powers should be further examined, especially if the above recommendation for imposing on government a modified RIAS for all section 19 orders is not accepted.

285. It is recommended that the ministerial power to impose terms and conditions under subsection 19(4) RSA on approved rules be used exceptionally and only with respect to non-substantive, procedural matters and that the policy should be that matters relating to possible imposed terms and conditions be, as a rule, resolved by dialogue and consultation before the rule reaches the approval stage and the matters form part of the rule itself.

286. The same recommendations respecting consultation that were made with respect to rule-making apply to applications for exemptions and the exemption granting process under subsections 22(2)-(7) RSA.
It is recommended that a new consultation model be developed based on at least a tripartite model (railway-union-TC), with other parties invited on an interest basis, that consultation begin with the development of the rule, that at least some of this consultation involve meetings in person or by conference call and that at least some of these criteria be explicitly provided for in the legislation. Different models should be examined further and a model developed that promotes collaboration and participation in rule development.

It is recommended that the American RSAC model should not be used as the model for consultation but should be studied along with other models in deciding on a new consultation model for rule-formulating.

It is recommended that the meetings of the RSAC be reinstated as soon as possible and that two items on the agenda should be a report on the progress current rules being drafted and development of a consultation model for rules.

It is recommended that a modified legal review of rules be undertaken by TC Legal Services that compares proposed rules with existing rules for consistency of language and form, examines the rules to see if they are intra vires the powers of the Minister under the RSA, establishes that there are no illegal subdelegations of power and deals with harmonization questions and other questions, to the extent that these questions are classified as legal issues.

5.0 REGULATIONS, SAFETY DIRECTIVES, EXEMPTIONS

5.1 The Regulation-Making Process

5.1.1 Overview of Powers

The GIC powers to make regulations and the areas where these powers are concurrent with industry and Ministerial rule-formulating is set out in paragraphs 147 and 148.

In summary, there is concurrent GIC regulation and Ministerial/industry rule-formulating powers for maintenance of line works and the designing, construction, alteration, operation and maintenance of railway equipment, and security and concurrent regulation and Ministerial/industry engineering standard-making powers governing the construction or alteration of railway works. (sections 18, 19 and 20 and section 7)

In addition, there is exclusive GIC regulation-making powers over construction of crossings (s. 7.1) and over fencing, drainage, pipes, buildings and roads not part of railway works or operations but may affect safe rail operations (s. 24).

Under section 47 there are additional exclusive GIC regulation-making powers generally for carrying out the purposes and provisions of the Act, including certain specified topics.

Under section 47.1, there is exclusive GIC regulation-making powers respecting safety management systems and release of pollutants into the environment.
5.1.2 Overview of Process

296. The regulatory process is too long to set out here. A summary of it is provided in Annex 3 to this Report. Briefly, the process consists of approximately 11 stages, as follows:

- Planning of the regulation
  - Drafting of the regulation
  - consultation with departmental Legal Services and Regulations Section Justice
  - the development of a RIAS which includes consultation with stakeholders and cost/benefit study
- Review by Regulations Section Justice and Blue-stamping
- Signing off by the responsible Minister of the recommendation to GIC
- First review by PCO
- Request to the Special Council Committee of the GIC to Prepublish
- Updating the regulatory proposal
- Second PCO review
- Final SCC Approval and GIC enactment.
- Publication in Part II Canada Gazette
- Registration with the Registrar of Statutory Instruments
- Review by the Standing Joint Committee for the Scrutiny of Regulations

5.1.3 TC experiences to date

297. The consultant discussed with the TC Rail Safety Directorate Engineering Section, two proposed regulations: the Controlled Access Regulations and the Grade Crossing Regulations. The development of both of these regulations has taken many years. They are still drafts even though the planning and drafting processes started years ago.

298. The elements that seem to characterize the TC experience to date with the regulatory process, as exemplified by these two draft regulations, are the length of time the consultations have taken and the difficulty of reaching consensus on the various issues. This is not surprising given the number of stakeholders, the many jurisdictions involved and the variety of legal issues, which include not only regulatory but private law concerns.

299. For both these draft regulations, consultation has been a lengthy, time-consuming experience. This is covered under the topic “Consultation” below.

300. The consultant has no recommendations to offer with respect to improving the problems encountered in this respect. These are difficulties inherent in the regulatory process and the solution for which is beyond the scope of this study. Also, it should be noted that the experience
with these two regulations may not be typical of all regulations: time restrictions prevented further study of the experience of other regulations and the time frames involved.

5.1.4 Industry experience to date

301. Industry experience to date with the regulatory process has been relatively negative. The Railways have expressed frustration with the long delays involved in the current draft regulations already noted. However, they expressed approval of the requirement for a RIAS, particularly the cost/benefit study and, as mentioned in relation to the Rail Reflectorization Rules, they stated that because a RIAS was imposed on the government in the case of regulations, the better approach would have been to have a regulation. Of course, the delays involved in the regulatory process would have benefited the railways in this case and this has to be taken into account in assessing the validity of their viewpoint.

302. Nonetheless, it has already been suggested above, that there is merit in the idea that since section 19 provides no cost/benefit study, the appropriate mechanism for imposing a regulatory proposal having substantial cost implications, as well as third party effects, may be a government driven regulation.

5.1.5 Consultation Process for Regulations and Role of the RSCC

303. The Privy Council’s Guide for Effective Regulatory Consultations provides guidelines for consultation regarding proposed regulations. Basically, it proposes that a list of stakeholders be created by the department responsible for creating the regulations and decides on the size and scope of the consultative process. This will depend on the proposed regulation and the number of people or groups affected by it. Depending on the number of stakeholders and complexity of the issues involved, there can be public meetings, the submission of written views, etc.

304. Using the Access Control Regulations and Grade Crossing Regulations, as the examples of TC’s consultation policy, the consultation process developed for these two regulations indicate how the Guide noted above was interpreted.

305. Both regulations involved many stakeholders, including railways, municipalities, road authorities and private land owners. Consultations in both cases have been long and complicated. A summary of these processes is attached as Annex 4. The stakeholders list for both regulations is attached as Annex 5.

306. In summary, both these regulations indicate how difficult and time-consuming the development of a regulation can be when it involves so many different interests as well as levels of government. The RSCC in this Consultant’s view is of value in this development. Both these regulations are being developed by working groups formed under the auspices of the RSCC. As such it is recommended that the RSCC’s meetings be reinstated as set out in its mandate described in Annex 6. This recommendation has already been put forward in paragraph 289.
5.2 Safety Directives and Exemptions

307. Safety Directives will be discussed in relation to Monitoring and Enforcement actions under section 6. Exemptions and industry’s views on them, along with proposed solutions, have already been discussed above under section 4.

6.0 MONITORING AND ENFORCEMENT

6.1 Range of Options

308. Basically, monitoring and enforcement powers can be divided between the powers of Railway Safety Inspectors (RSIs) and the powers of the Minister. RSIs have a range of tools, both statutory and administrative, to enable them to respond to non-compliance or unsafe conditions.

309. The RSIs’ statutory powers consist of inspectors’ powers under section 28 RSA to ensure compliance with the Act, such as to seize property, compel witnesses, enter into premises, obtain documents etc. under section 28, their powers to issue notices/notices and orders under section 31 RSA, their powers to audit SMSs under the Safety Management Systems Regulations and their powers to instigate prosecutions under section 41 RSA. The Safety Management Systems Regulation are themselves a monitoring and enforcement tool and will be discussed under section 6.2.

310. Administratively, the RSI powers include issuing Letters of Non-Compliance and provision of a variety of educational and promotional activities which are listed in the Railway Safety Compliance Policy, (January 2001).

311. The Minister statutory powers consist of the power to issue notice/Notice and Order under sections 32 and 33 RSA and powers of review of RSIs’ orders (section 31)

312. The Minister’s administrative powers include the power to make nation-wide policies respecting compliance. At present there are two policy documents relating to monitoring and enforcement: The Railway Safety Compliance Policy (January 2001) which is currently under review and will be replaced imminently. It is not considered here because it was not in force at the time of writing of this report. The other policy document is Education and Awareness Policy Framework (February 11th, 2003). There is also a TC guideline on the role of RSIs, entitled the Role of Railway Safety Inspectors (TP 13555E). This is also to be revised along with the Railway safety Compliance Policy 2001.

6.2 Safety Management Systems Regulations

313. These regulations represent a form of self-regulation by the railways, obliging them to submit information on how they commit themselves to ensuring safe railway operations, including setting out safety goals and applicable safety requirements, including rules that they are bound by, how they intend to and are currently meeting, enforcing and monitoring compliance with these requirements.
314. As a form of self-regulation they represent a monitoring and enforcement tool that should be mentioned under this topic and assessed as to its adequacies.

315. The way TC enforces and monitors these regulations is through SMS audits, performed by the regions on the railways within their jurisdiction.

316. There are a variety of issues respecting SMS requirements. The railways have concerns about information gathering and these issues are dealt with respect to information gathering under s. 28 powers below, under the heading Adequacy of Options, section 6.2.

317. The use of SMS requirements to connect the NTA COF with the RSA and to enable the NTA to cancel or suspend a COF based on failure to meet safety requirements has already been referred to under section 2.5 under the topic “New Operators and Safety” and is a recommendation in paragraph 115.

318. Two other issues will be elaborated upon here. Both are referred to in paragraph 43 above, with respect to the issue of harmonization.

319. The first is that safety management systems are submitted to the Minister, but not approved by him or given any sort of official sanction by him or TC. In Australia, there is certification of SMS systems but in Canada, in other modes of transport, specifically air and marine, there is likewise no approval of SMS systems.

320. The problem with no approval system is that when the railway submits its SMS, there is no process of evaluating it as to its adequacy. I was told by TC that there is some kind of review, on a superficial level, and a SMS that is patently inadequate, for example, does not contain all the elements set out in the Regulations, would not be accepted. This however, is a far cry from an evaluation of the information submitted. The time when there is an in-depth assessment on the adequacy of the SMS is at the time of an audit, which takes place some time after the SMS is submitted.

321. The downside of approval of SMS is the time factor and the regulatory burden on HQ staff, where the approvals would probably (and should) be delegated. Also there would not be consistency with the treatment of these plans in other modes. TC’s Safety and Security Management Policy, set out in the document “Moving Forward, Transport Canada’s Approach, provides overall policy for SMS systems in all modes, while recognizing sector differences as well as differences in size and complexity of particular operations. All of the systems are based on TC intervention in the form of audits after submission of the plan, at the organizational or system level.

322. The second issue relates to the adequacy of certain information that has to be filed for new railways, mentioned at paragraph 90. If the railway is new and has no rules, it cannot identify them and the procedures for demonstrating compliance with them as required by the SMS Regulations. It is therefore recommended that a new provision be added requiring new railways to submit proposed rules if no rules apply to it at the time of submitting the SMS.
6.3 Railway Safety Inspectors’ Statutory Powers

6.3.1 Section 28 RSA RSIs’ Powers

323. All RSIs have, for purposes on ensuring compliance with the RSA, regulations, emergency directives, rules orders and security measures under the Act, statutory powers that permit them to

- enter places [paragraph 28(1)(a) subject to conditions of subsections 28(3) and (4)];
- inspect [paragraph 28(1)(a) of the Act, subject to conditions of subsection 28(3) and (4)];
- take copies or extracts of documents [paragraph 28(1)(a.1) of the Act];
- seize property [paragraph 28(1)(b) of the Act];
- submit property to reasonable tests [paragraph 28(1)(b) of the Act];
- require attendance of persons [paragraph 28(1)(c) of the Act];
- question those persons required to attend investigations [paragraph 28(1)(c) of the Act];

6.3.2 Inspectors’ Section 31 RSA (Notices and Emergency Orders)

324. All RSIs have the power to issue notices informing the railway that certain of its line works or railway equipment pose a threat to safe railway operations (subsection 31(1)(a)).

325. All RSIs, if they believe there is an immediate threat to safe railway operations, have the power to issue a notice of such threat and an order requiring the railway company not to use those works or equipment, or to use them subject to the RSI’s terms and conditions. The railway company cannot reuse the work or reuse it without the terms and conditions until the threat is removed to the RSI’s satisfaction (s. 31(1)).

326. All RSIs have the same powers regarding crossing works and drivers or operators of vehicles over crossing, to issue notices (for a threat to railway operations) and notices and orders (for an immediate threat to railway operations) against any person responsible for the maintenance of the crossing work or any driver/operator of a vehicle (subsections. 31(2) and 2.1)).

327. All RSIs have the same power to issue notices/orders against railway companies or owners/lessees of railway equipment regarding operations of a line work or railway equipment that threatens the safety or security of railway operations.

328. Since RSIs include both regional officers and many HQ’s officers, both HQ and Regional Offices can issue section 31 orders. At the same time, as a result of the delegation of the Minister’s section 32 and 33 powers to the DG Rail Safety Directorate, TC HQ can also issue notices and orders under these sections as well.

329. Subsection 31(4) of the RSA places certain restrictions on issuance of the notices and orders set out above under paragraphs 324-326 above (i.e., regarding subsections 31(1) and 31(2)). An
RSI will not determine that the standard of construction or maintenance poses a threat if the standards conform to all applicable regulations, rules and emergency directives.

330. The TC Compliance Guidelines provide that “**In order to ensure the highest level of safety to the industry and the public, a RSI shall follow the application of 31(1) of the RSA, with any objections to be reviewed subsequent to the Notice/Order**”; i.e., the order is issued first, and any objections dealt with after.

331. Where an order is issued under section 31 (to not use certain works, equipment, vehicles etc) the RSI must inform the Minister of such an order (subsection 31(5)).

332. An RSI order under section 31 is appealable to the Transportation Appeal Tribunal of Canada (TATCA) (section 31.1).

6.4 Minister’s Statutory Powers/Delegation of Authority

6.4.1 Ministerial Section 31 Powers to review, confirm, revoke RSI’s orders

333. The Minister can review, and after reviewing, confirm, alter or revoke a RSI section 31 order

- on his own initiative (section 31.4)
- at the request of a member of TATCA (subsection 31.1(4)) or of the appeal panel of the Tribunal (subsection 31.2(3))

6.4.2 Ministerial Section 32 Orders

334. The Minister can order the removal or modification of any railway work where, in his opinion,

- a railway work the construction of which began after the coming into force of this section has not been constructed in accordance with the requirements imposed by or under this Act,
- any railway work has not been altered in accordance with the requirements imposed by or under this Act, or
- any railway work is not being, or has not been, maintained in accordance with the requirements imposed by or under this Act

335. The Minister can, where a person fails to comply with such an order, remove and destroy the work concerned and sell, give away or otherwise dispose of the materials contained in that work (subsection 32(1)).

336. The Minister can, by notice, order any action necessary to be taken to remove a threat where a section 24 regulation (e.g., concerning buildings, structures, anything including trees or brush on adjacent lines) has been contravened, and the Minister believes an immediate threat exists to safe railway operations; this action includes orders against a railway company not to use certain...
works and equipment while the action to remove the threat is being undertaken (subsection 32(2)).

337. The Minister must given reasons along with the notice and order, but no consultation or hearing is required prior to his actions (subsection 32(3)).

338. The Minister can by notice sent to the railway company, order any SMS containing deficiencies that risk compromising railway safety, to correct those deficiencies.

339. All section 32 orders are appealable to TATC, who may refer the decision back to the Minister for review of his own decision (section 32.1 and 32.2).

340. A request for a TATC review automatically stays any orders under subsection 32(1) and 3.1) relating to unauthorized or improperly maintained works and SMS deficiencies, but all other orders are not stayed pending the outcome of the appeal (section 32.3).

341. The exercise of the above powers have been delegated by the Minister of Transport to the Deputy Minister, the ADM Safety and Security, and the Director General Rail Safety.

6.4.3 Ministerial Emergency Directives (section 33)

342. The Minister can issue emergency directives to a railway if he is of the opinion that there is an immediate threat to safe railway operations or the security of rail transportation and order the railway to,

- either absolutely or to the extent specified in the directive ,stop using the kind of railway works or railway equipment that poses the threat or following the maintenance or operating practice that poses the threat; or
- follow a maintenance or operating practice specified in the directive if the threat is posed by the company's not following that practice. (subsection 33(1))

343. The Minister may issue an emergency directive even though the construction of the railway work was undertaken in accordance with the law in force at the time and using the railway equipment or following or not following the maintenance or operating practice is in accordance with the RSA or any regulations or rules made under it. (subsection 33(2))

344. The exercise of this power has been delegated by the Minister of Transport to the Deputy Minister, the ADM Safety and Security, and the Director General Rail Safety.

345. A Ministerial emergency directive has effect for no more than 6 months (subsection 33(2)) but this period can be renewed for another 6 months (subsection 33(6)), presumably over and over again.

346. A Ministerial emergency directive is not appealable.
347. A Ministerial emergency directive can be made an order of the Federal Court and enforceable under the Federal Court Act (section 34).

6.5 Adequacy of Options

348. To evaluate the adequacy of these options, the interplay of some of the RSIs’ administrative powers with the statutory powers must be explained.

349. As has already been noted above, the usual procedure when a violation of the RSA Act, regulations or rules has been discovered by an inspector, through inspection, audit or any other means available to him, is to use an administrative tool, the Letter of Non-Compliance. This tool is viewed as both a technique to promote compliance and to respond to non-compliance. A letter of non-compliance is issued by the RSI on a standardized form that specifies what the non-compliance is and includes a time frame for the regulated party(ies) to detail their corrective action. Failure to correct the non-compliance will result in either progression towards prosecution or the issuance of a Notice/Notice and Order (for a notice, only if there is a threat to safe railway operations and for a Notice and an Order, only if the threat is immediate). RSIs carry out follow-up inspections to verify corrective actions undertaken by the regulated party.

350. If there is no correction of the situation spelled out in the Letter of Non-Compliance, a notice under section 31 must be issued by an inspector if an RSI believes that a threat to safety exists. In fact, the way “threat” has been interpreted up to now has been the railway’s consistent failure to correct the violations set out in the Letter of Non-Compliance after being told to do so several times. However, such consistent non-compliance, while it can lead to a threat to safety, it may not for quite some time, if ever, amount to a “threat”.

351. Apparently, a recent TC legal opinion (the consultant heard about it but never saw a copy of it) has stated that continued non-compliance is not enough to trigger the section 31 notice: a threat must be assessed and that threat cannot be simply because of non-compliance with the Act, regulations or rules. The only recourse in this case, is prosecution. This is seen by many regional offices interviewed by the Consultant as a defect in the Act which should be remedied.

352. One regional officer that was interviewed felt that the “threat” trigger should be taken out of section 31, thus giving inspectors equal powers with that of the Minister under sections 32 and 33.

353. Another solution, pretty much agreed upon by all regions and by HQ, are administrative penalties, or “ticketable offences” which would allow for an alternative to prosecution of persistent non-compliance with requirements that do not amount to a threat under section 31. The Railways and other interested parties ought to be consulted on this proposal.

354. This consultant’s preference regarding a solution leans in favour of the having administrative penalties rather than removing the “threat” trigger, at least before further study is conducted on this matter.
355. The enactment of an administrative penalties (ticketing) scheme is also seen more generally as a solution to prosecution difficulties involving burden of proof (the “beyond a reasonable doubt” test of criminal law) that were alluded to earlier respecting the enforcement of section 11 of the RSA. The dearth of prosecutions under the RSA has been to some extent been attributed to the lack of flexible sentencing regimes such as administrative penalties and the implementation of such a regime could provide a partial answer to this. It would also bring it in line with other modes of transport, particularly air and marine as well as with transportation of dangerous goods in all modes of transport under federal jurisdiction.

356. Another inadequacy relating to monitoring and enforcement relates to the overlapping of regional inspectors’ powers with those of HQ’s inspectors and the overlapping of the Minister’s powers under the Act with those of the inspectors’ powers due to the effect of the delegation of the Minister’s powers to the Director General Safety level.

357. Since inspectors exist at both the regional and HQ levels, they can all issue section 31 orders. In fact, HQ inspectors, who also are chiefs and directors of the various sections and programs established on the national level, can issue inspector’s notice/order in the same way as regional inspectors. The basic criteria is that such notices/orders must have national implications. However, regional inspectors’ notices/orders can also have national effect if no specific area is spelled out (although presumably in such a case they must consult first with HQ).

358. An examination of section 31 notices and notices/orders (attached as Annex 7) indicates that HQ issued a total of 4 such notices and notices/orders (there is no breakdown of what were notices alone and notices/orders), from 2003-2006, out of a total of 214 such notices and notices/orders issued in all regions over that same time period. The consultant was told by one regional officer that HQ inspectors’ notices and notices/orders could be issued without any first hand knowledge of a particular matter, but simply through reading through reports sent in by the regions.

359. The problem with this overlay of identical powers at the regional and national levels is that HQ ends up with a balance of powers on its side that may not have been intended: the Ministerial powers under sections 32 and 33 have been delegated down to the Director General Rail Safety Directorate and the Chiefs and Directors who are inspectors have section 31 powers as well. It seems to this Consultant that a better balance would be to leave the section 31 powers with the regions and the section 32 and 33 Ministerial powers with the Rail Safety Directorate, as currently delegated and avoid the confusion that could result (and as stated by at least one region, has resulted) from having two level of inspectors issuing similar orders.

360. It is beyond the scope of this study to recommend the solution to the proper division of powers among inspectors at the national and regional levels and the also to evaluate the consequences of the delegation of Ministerial powers to the Director General Safety Directorate, except to the extent that it is recommended that this should be looked at further and in detail and some kind of coordination of activities achieved to a greater extent than they are now.

361. Another inadequacy that should be looked into and that was raised by the Pacific Region is the drafting of section 31 RSA. It provides for four different notices/orders; if the wrong section
is used, the regulator has to go back and rewrite the notice and resend it. This has actually
happened in the Pacific Region. It was suggested that there be a single notice/order for section 31,
with different criteria providing for the different situations. This could avoid the problem of citing
the incorrect provision noted earlier.

362. Another inadequacy mentioned by the Pacific Region relates to the obtaining of information
under section 28 RSA. While most of the time there is no problem with obtaining information
without going in person to the railway offices, the railways apparently at times insist that the
information must be obtained in person, on site, based on a narrow interpretation of section 28.
In this Office’s view the RSI should not have to go on site to get the information. In its view, the
Act does not seem to recognize the electronic world. It feels that any reasonable request to obtain
information should be honoured, as under the Dangerous Goods Act.

363. The railways, on the other hand, feel there are security and privacy issues with respect to the
obtaining of information under section 28. In particular, in the post 9/11 world, the possibility of
sensitive information falling into the wrong hands was mentioned in this respect. The railways
mentioned the benefit of having some sort of privilege attached to information obtained for safety
investigation purposes as under the CTAISBA.

364. This consultant was restricted by time limitations to examine these issues relating to
information gathering in depth, but believes they are important issues and need further study.
Virtually every region pointed this out as an important issue for each of them and so do the
railways, obviously for different reasons.

365. Another very important inadequacy was addressed again by the Pacific region. It mentioned
the need for training in enforcing and inspecting by the railways and other stakeholders having a
direct interest in enforcement (such as municipalities and road crossings). The Pacific office has
its own training program in the area of crossings and stated that its own on-going training
program involved regular meetings with interested parties and was supported as well in HQ. This
consultant agrees with the comment of the Pacific region regarding the need for industry
inspector training and it is suggested below, under section 6.7.3.3, in discussing training of
inspectors, that standards be developed to deal with minimum qualifications for such inspectors.

366. Finally, two inadequacies with the SMS regulations have to noted above, one relating to the
lack of an approval process for SMSs submitted under the regulations and the other relating to the
existence of a possible gap in information respecting rules for new railways where they are not
signatories to any rules at the time the SMS is submitted to TC. Regarding the approval process, a
recommendation has been made at paragraph 115 that an approval process be at least considered
for SMSs under the RSA. Regarding the possible gap in information for new railways, a
recommendation is made under section 6.5.

6.6 To what extent are the enforcement actions consistent across the five regions

367. The short and not very helpful answer to this question is that there is some consistency in
some areas and no consistency in others.
368. Before elaborating on this answer, the terms of reference of the consultant’s inquiry must be specified. The consultant asked each region how sections 28 and 31 inspector’s powers have been used and how audits have been used to enforce the SMS regulations.

369. Regarding section 28 powers, all regions except for the Atlantic region said that, to varying degrees, there were problems with information gathering.

370. The Atlantic region representative told me that section 28 powers were not often invoked. Most material that the regional office needed for enforcement purposes was voluntarily handed over without any problem or need to invoke section 28 powers. He said the reason for this was because in a region such as his, where there had not been a big turnover of staff (he himself has been there since 1998) a relationship of trust has developed with the railways, and section 28 powers did not need to be invoked. Most material that the regional office needed for enforcement purposes was voluntarily handed over without any problem. He felt that generally speaking, regarding all regions, that one of the reasons for inconsistency in approach to enforcement to a large degree resulted from on whether a particular region had the same staff over a number of years or whether there was a lot of turn over.

371. Other regions do not have the same experience with Section 28 powers. In the Pacific, Prairie and Ontario Regions, section 28 powers are invoked on a regular basis to obtain information. Quebec Region obtains a lot of information by voluntary action of the railways, but also combines this with letter requests or by invoking section 28 power: in Quebec, even with voluntary action, however, the railways can make life difficult with respect to requests for information. The representative from the Quebec region felt that section 28 powers should be clarified.

372. The Prairie Region pointed out a lack of cooperation on the part of the railways respecting requests for information, who objected to release on a variety of grounds, including privacy issues. This region was even going so far as to initiating a prosecution regarding obtaining of information.

373. The Pacific Region stated that for the most part, it obtained information on a cooperative basis, but pointed out that the railways were getting more careful and as result this Region has begin relying on its section 28 powers more and more.

374. The Ontario Region representative agreed that, while overall he felt that section 28 powers were adequate enforcement tools, there were information gathering problems respecting s. 28 and that more often than not, section 28 has had to be invoked on a formal basis to obtain information and also, the inspector has to appear on site, in person, to get it.

375. On the issue of the use of letters of non-compliance, the representative from the Pacific Region said that these were a non-starter and they were never used in the Pacific region. His interpretation of the Act was that if a non-compliance is found, the railway should have to show cause why they were not compliant; the Act already demanded compliance and it was implicit in the Act that action should be taken right away in the face of non-compliance. He also felt there should be no “threat” trigger for section 31 orders.
376. Other regions use letters of non-compliance, but their use in combination with s. 31 notices and notices/orders varies from region to region. It is in this area that the consultant found the most inconsistencies in enforcement.

377. For example, Ontario uses the *TC Compliance Policy* (2001) referred to earlier by using a combination of letters of non-compliance, with notices and then notices/orders in an escalating manner, culminating in the issue of a section 31 order. As noted, the Atlantic region disagrees to some extent with this approach, and does not believe that section 31 be used in this way: it takes the view that the assessment of a threat situation may include non-compliance, but is not comprised only of it. However, this may not be such a significant difference in approach, since in many cases, consistent non-compliance over a period of time will in fact result in a “threat” situation anyway.

378. The representative of the Atlantic Region stated that he was trying to get away from using the Letter of Compliance along with notices under section 31 as an escalating enforcement tool, culminating in the issuance of a section 31 order. Where there was no threat but continued non-compliance, he stated that something was needed other than the prosecution route to deal with these types of violations and believed that an administrative penalty scheme was the best way to go. The representative of the Prairie Region agreed with this approach, as did the representatives of the Pacific and Ontario regions.

379. The representative from the Quebec region stated that it preferred to issue letters of compliance, identify the problem and give the railways the opportunity to correct it.

380. It is also noteworthy that the Atlantic Region, with the most cooperative approach in effect, has the fewest number of section 31 orders; however, the fact that there is far less total distance in track being regulated in the Atlantic region as opposed to the Pacific and Prairie Regions must also be taken into consideration.

381. It is also noteworthy that the Ontario region expressed its satisfaction with the *TC Compliance Policy* 2001 and felt it provided adequate guidance with section 31 orders and in general enforcement has not been a problem with this region. It has been able to take action without significant problems. It did feel however, that it would be even better if there was consistency among the regions in its application.

382. In order to really appreciate the significance of the differences noted above regarding s. 31 orders, the representative of the Atlantic Region felt there needed to be a study of, say, 10 inspectors, asking them how many had assessed serious threats and of these how many notices/orders had been issued: this is beyond the timeframe of this study. This consultant agrees with this and recommends that more detailed study be undertaken immediately to see if the differences in approach to the use of Letters of Non-Compliance with s. 31 procedures was significant among the regions.

383. The representative from the Quebec region also noted that he felt that section 31 notices and orders were being used to regulate the railways instead of regulations or rules being enacted and that this was an incorrect use of section 31 powers. In his view, he felt that all section 31 orders
should be examined on a country-wide basis and where a common problem identified, a
regulation or rule should be developed. This consultant agrees with this view and recommends
that a study be made of all such orders with a view towards finding any common themes that
should be dealt with by an industry wide rule or regulation.

384. Regarding SMS audits, the representative of the Atlantic Region led the way in a new
approach to SMS auditing, based on a global, risk-based approach to safety concerns and
violations. Based on first obtaining minimum sample data on various SMS requirements and the
railways’ compliance record in these areas, each railway will get a report card on their
compliance in the sample areas; if their mark is good, they will not be checked again in the near
future for these items, rather a focused audit will be made on the non-compliant areas. Thus the
resources of this region are concentrated in those areas that have been flagged as being
problematic, and full audits are the exception not the norm.

385. The Pacific and Prairie regions applaud this approach and to some extent follow it; however,
due to the differences in the amount of mileage over which they have jurisdiction, the Pacific and
Prairie Regions both say that they are behind the Atlantic Region in pursuing the risk based
model that it has developed. In particular, the representative of the Pacific Region pointed out that
he had 16,000 federally regulated track while the Atlantic region had 850 miles, so by necessity
the approaches were different and the Atlantic Region was able to have a certain flexibility in its
regulatory approach. The Prairie Region does not follow the “report card” method (although it
was highly regarded), but did try to concentrate its audits in areas that required it.

386. The representative of the Pacific Region said that he had 58 territories to deal with and that
he ran his inspection and audit regime on the basis of a form of risk management, for example,
the model used the characteristics of the line, the number of passengers, the line density as the
criteria to decide whether an audit or inspection would be performed on that line. He said there
was not a lot of guidance from HQ on criteria and felt that this was an area where more work
could be done to assist the regions.

387. The Ontario Region also applied a risk based approach very similar to the Atlantic region,
but without the report cards: This region’s representative indicated that he was in contact on a
regular basis with every stakeholder and there was not need in his region, for a report card.

388. The Quebec Region has not done SMS audits but rather takes the approach of integrating
SMS oversight into the Office’s daily functions. It tried a risk assessment approach, particularly
with respect to track, but found that the follow up to the identified risks took too long, the
process was complicated and required more staff for it to be done effectively. This especially
true with respect to short lines where the Regional Office found that there was sporadic use of
internal safety monitoring processes and in some cases no processes at all. In this area, it was felt
that a stronger federal government presence was needed.

6.7 Role and Power of Inspectors

389. The powers and role of inspectors have been outlined above under section 6.1. There are
several issues that arise from these powers and role: what are the implications under the current
RSA of the delegation of powers directly to inspectors; do the statutory powers of inspectors impede independent action or review action by the Minister in their direct authority under section 31 and finally, what is the training and qualifications of inspectors and are they adequate.

6.7.1 What are the implications under the current RSA of the delegation of powers directly to inspectors?

390. As noted earlier, there are two types of powers given directly to inspectors under the RSA: section 28 inspectors’ powers to obtain information, enter premises, collect evidence, etc., and section 31 enforcement powers to issue notices/orders regarding threats and immediate threats to railway safety.

391. The implications of giving these powers directly to inspectors are that inspectors under the Act have a lot of individual power and discretion regarding requiring action to be taken by railways and others in the face of threats to railway safety and with regard to assessment as to what constitutes a “threat” to safety. Some guidance is given in the Act as to what does not constitute a threat (section 34(4)), but not much, nor is much guidance given in the TC Compliance Policy referenced earlier.

392. As also noted earlier, the manner of using these powers and discretion are not consistent throughout the country. However, just how inconsistent they are has not been examined by this Consultant in detail – only a brief overview was possible in the limited time frame. Also this overview was obtained only through brief conversations over the phone with regional representatives. This important facet of enforcement merits a more in depth study and it is recommended that a comparison of inspectors’ interpretation and application of section 28 and 31 powers be undertaken immediately on a more in-depth and detailed basis than that provided in this report.

393. Another conclusion that follows from the broad powers given to inspectors under the RSA is that more guidance on a country-wide basis is needed than that currently provided in the Compliance Policy 2002, and it has been stated that this has been revised. The new policy needs to be examined before any recommendations can be made in this respect.

394. Another implication of the powers granted directly to inspectors is that the RSIs’ powers under section 31 coincide to some degree with the Minister’s powers under sections 32 and 33. In itself, this overlap does not pose problems. Each has his own sphere of jurisdiction: the Minister’s powers under sections 32 and 33 are broader than the RSIs and this is completely appropriate, given that the Minister represents another layer of protection regarding threats to railway safety and also provides a review and appeal oversight role to the RSIs’ exercise of powers.

395. The problems that have been mentioned with regard to giving the inspectors the two powers mentioned above have already been mentioned in section 6.1.

396. Since RSIs include both regional officers and many HQ’s officers, both HQ and Regional Offices can issue section 31 orders. At the same time, as a result of the delegation of the
Minister’s powers under sections 32 and 33 to the DG Rail Safety Directorate, TC HQ can also issue notices and orders under those sections.

397. It has been noted above that having inspectors at the regional and national levels both issuing notices/orders has caused difficulties in at least one region and it has been recommended that thought should be given to keeping the RSIs’ powers restricted to the regions, with TC HQ’s using only its delegated section 32 and 33 powers.

6.7.2 Do the statutory powers of inspectors impede independent action or review action by the Minister in their direct authority under section 31?

398. From the foregoing, it is clear that the statutory powers given directly to inspectors under section 31 do not impede independent action or review action by the Minister.

399. While it is true that the Ministerial power under section 33 (emergency directives) has been used very sparingly (this consultant is aware of only one case where it was used), this does not mean that it was impeded by the powers of inspectors to issue similar (but not identical) notices/orders under section 31. It is entirely proper, in this consultant’s view that the inspectors’ section 31 powers are used far more frequently than the Minister’s. After all, there is more oversight over inspectors’ orders than those of the Minister and therefore appropriate from the perspective of due process and fairness, that the Minister’s powers are only used exceptionally.

400. It is submitted that behind this question however, looms other concerns: the railways feel that the inspectors have far too much power and discretion under sections 28 and 31.

401. This consultant does not agree that there is too much power granted to the inspectors under section 28. These are very normal enforcement powers granted to inspectors under many other Acts of Parliament are necessary to the enforcement of these statutes.

402. With respect to the inspectors’ powers under section 31, these do give formidable powers to these individuals. However, the Act does provide for several limitations to this power, particularly in the curtailment of the inspectors right to consider any actions that are compliant with the Act, its regulations and rules as a threat to railway safety under subsections 31(1) and (2). (This limitation does not exist with respect to the Minister’s powers.) Also, there is a right of appeal and review of these powers. Without discounting the concerns of the railways’ on this issue, no recommendations for change to these powers are recommended at this time. It is possible that other recommendations relating to coordination of the inspectors’ activities and a more consistent and detailed compliance policy may assist in defining the inspectors’ powers to a greater degree and in making their exercise more consistent and predictable on a country-wide basis.
6.7.3 What is the training and qualification of inspectors and is it adequate?

6.7.3.1 Industry Inspectors

403. With regard to the training and qualification of industry inspectors, TC does not get involved. The only training requirements are found in the *Railway Employee Qualification Standards Regulations* for certain types of railway operating employees for which a railway company must provide the necessary employee training; this regulation does not include inspectors. TC wants to update these regulations, including the extension of their application to other types of operational employees and maybe to employees in other areas; however, there is no specific time frame for this.

6.7.3.2 TC Railway Safety Inspectors

404. Training for RSIs is found in the TC "*Overview of the Rail Safety National Training Program*" and is attached as Annex 8.

6.7.3.3 Adequacy of Training and Qualifications

405. Regarding industry inspectors, since the philosophy behind the RSA is to transfer some of the responsibility for railway safety to industry and this responsibility includes enforcement, standards regarding the training of industry inspectors is an important issue that needs to be addressed. In this consultant’s view, the development of these standards should be initiated by TC since it trains its own inspectors and has extensive experience in this area as well as in inspections generally. The development of these standards should be conducted on a cooperative and collaborative basis with the railways.

406. Regarding TC Railway Safety inspectors, no recommendations are made for change to the requirements set out in Annex 8.

6.8 Accident/Incident Reporting and Investigation

407. This topic was not directly part of the original terms of reference of this report but arose when examining the adequacy of the RSIs powers and responsibilities.

408. Currently, the RSIs do not investigate railway accident/incidents. They may go to an accident site to verify compliance with regulations under the RSA and the same applies to the marine and air modes with respect to verifying compliance with their own respective governing laws.

409. The TSB is the multi-modal body empowered to investigate accidents/incidents relating to all modes of transport under federal jurisdiction, including railways. However, the TSB only investigates “reportable” accidents and incidents as defined in the CTAISBA. There are other accidents and incidents not dealt with by the TSB that RSIs could investigate and in this consultant’s view, should investigate. For one thing, there are safety lessons to be learned from
such investigations and information derived from them that could assist TC regulators in deciding whether a new regulation or rule is needed in a particular area.

410. In the US, the FRA has concurrent jurisdiction with the National Transportation Safety Board (NTSB). Where the NTSB decides to investigate, its investigation generally has priority over those of all other federal agencies, but does not extinguish the investigative authority of those agencies. In those cases, which usually involve the most serious accidents, FRA investigators work closely with NTSB and serve on NTSB's teams. FRA also investigates a broader category of accidents and incidents, including every grade crossing collision involving three or more fatalities and every employee fatality.

411. It is not suggested here that RSIs have a concurrent mandate with the TSB, as is the case with the FRA and NTSB; however, there is a role for RSIs in accidents/incidents not covered by the CTAISBA and the RSIs section 28 powers should be expanded to cover this new role. These powers would be in addition to the inquiry that the Minister can order under section 40 RSA regarding accidents or incidents associated with railway works or with the operation of railway equipment that raises or may raise issues of public interest relating to safe railway operations.

6.9 Conclusions and Recommendations respecting monitoring and enforcement

412. It is recommended that an administrative penalty scheme be examined in the light of similar schemes for other modes and its adaptability to the rail mode assessed.

413. It is recommended that the question of appointment of powers of inspectors at the federal and regional levels, the division of these powers and the effect of the delegation of Ministerial powers regarding sections 32 and 33 RSA should be examined in detail, with the end purpose of establishing coordination among all parties concerned and a proper balance between the regions and HQ.

414. It is recommended that Section 31 be re-examined and the feasibility of combining the different notices/orders into one be studied, with criteria regarding the different situations covered by the order as part of the section 31 requirements.

415. It is recommended that a study be undertaken, perhaps by an RSCC Working Group formed for that purpose, regarding information gathering under section 28 RSA with a view towards finding a balance between the information safety requirements of the regulator and the need for protecting this information on the part of the railways.

416. It is recommended that a nation-wide policy and program be developed regarding training in enforcement and monitoring by the railways and other directly interested parties, of the kind initiated by the Pacific region for railway crossings.

417. It is recommended that a comparison of inspectors’ interpretation and application of the Letter of Non-Compliance combined with the exercise of section 31 powers be undertaken immediately on a more in-depth and detailed basis that that provided in this report, in order to establish the extent the regions apply these enforcement tools in a consistent way.
418. It is recommended that all section 31 orders be examined to see if there are areas which need to be addressed on a country and industry-wide basis, with the aim of developing appropriate rules or regulations to deal with these areas in a consistent way and uniform way.

419. It is recommended that continued efforts be made to create a consistent approach to enforcement, with TC HQ and the regions acting cooperatively and collaboratively together.

420. It is recommended that standards regarding the training of industry inspectors needs to be addressed; the development of these standards should be initiated by TC and continued on a cooperative and collaborative basis with the railways.

421. It is recommended that the possibility of extending the inspectors’ powers and training to include accident and incident investigations not covered by the TSB be examined.

422. It is recommended that with respect to new railways that a new provision be added to the SMS requirements, obliging new railways to submit proposed rules if no rules apply to it at the time of submitting the SMS.

7.0. APPEAL MECHANISMS RESPECTING TC RULINGS

7.1 The Current Scheme

423. The following decisions are appealable under the Act to the TATC:

- under section 27.5, a decision made by the Minister to refuse to designate a person as a screening officer or suspend cancel or refuse to renew the designation of a person as a screening officer on the Minister’s opinion that the person is incompetent, does not meet the qualifications or fulfill the conditions required for the designation or cease to met the qualifications or fulfill the conditions of the designation. (A screening officer duties involve the observation, control, and search of people or goods to prevent the unauthorized possession or carriage of weapons or explosives on railway property)
- under section 27.5, a decision made by the Minister to suspend or cancel the designation of a person as a screening officer if in the Minister’s opinion the person constitutes or is likely to constitute a threat to railway security
- under section 27.5, a decision by a member of TATC to confirm the Minister’s decisions referred to above or refer the matter back to the Minister for reconsideration
- under section 31.2, a decision of a member of TATC to confirm an inspector’s order made under section 31 or send it back to the Minister for consideration
- under section 32.2, a decision of a member of TATC to confirm an order of the Minister under section 32 or refer the matter back to the Minister for reconsideration

420. In the context of this report, there are two appeals of note: one respecting a section 31 order made by a RSI and the other respecting a section 32 order made by the Minister. In both these
cases, the applicant must first request a review by a TATC member assigned to the matter and can then appeal that decision to the Tribunal: subsection 31.1(1) and 32. 1(1) RSA.

7.2 What are the advantages and disadvantages of expanding appeals

424. First, the question to be determined is: to which decisions could TATC appeals be extended?

425. The areas suggested by the railways have been to allow appeals respecting industry driven rule making (e.g., the decision not to approve a rule, or to approve it with conditions) and imposed rule-formulating under section 19 as well as to exemption applications. There has been no suggestion that an appeal be allowed under section 33 (Minister’s emergency directives).

426. To date, there have been no reviews or appeals that have been heard by TATC before being withdrawn by the appellant. Apparently 6 were filed to be heard at the first level (i.e., by a member of the Tribunal) and all have been withdrawn, the last very recently, in July 2007. This does not mean that the right should be changed or repealed or that there should be no expansion of the right to appeal to other decisions under the Act. Just having the right to appeal probably inspires the parties to reach an agreement before going to a hearing.

427. In determining whether it is advisable to recommend an extension of the right to appeal to those areas suggested by the railways, the nature of the decision involved must be analyzed. In the case of a decision not to approve a rule or to approve it with conditions, the decision being made can be classified as a legislative one. This differs from currently appealable decisions under the RSA: for example an RSI’s decision under section 31 or the Minister’s decision under section 32. These decisions are administrative in nature, not legislative. They involve the exercise of administrative discretion – in the case of the RSI, the decision that there is a threat or an immediate threat and the decision to issue an order the railway to stop operations. Likewise, in the case of the Minister, his order to stop operations or modify a work is the result of the exercise of his administrative discretion.

7.3 Conclusions respecting Appeals from TC Rulings

428. It is very uncommon to have an appeal to an administrative tribunal such as TATC from a legislative decision; an appeal to TATC regarding Ministerial decisions not to approve a rule or to approve it with conditions and similarly from subsection 7(2) Ministerial orders (requiring the railway to formulate engineering standards) is therefore not recommended.
Pursuant to the authority conferred upon me under section 45 of the Railway Safety Act (the Act), I hereby authorize and designate the persons holding the positions listed in the attached schedule and their respective successors, including in their absence, a person or officer designated in writing as having authority to act in the place of the holder of any such position, to exercise those of my powers and duties that are set out in Schedule “B” in respect of each position set out in Schedule “A”.

En vertu du pouvoir que me confère l'article 45 de la Loi sur la sécurité ferroviaire, je désigne par la présente les personnes occupant les postes inscrits à l'annexe de désignation ci-jointe et leurs successeurs respectifs et, en leur absence, les personnes ou agents qui auront reçu une procuration écrite pour occuper leurs fonctions, et les autorise à exercer tous les pouvoirs et les fonctions, tel qu'indiqué dans l'annexe « B », correspondant à chacun des postes, tel qu’indiqué dans l’annexe « A ».

No authority is granted to any designate, to reverse, in any matter, a decision taken in that matter by myself.

Aucune autorisation n’est accordée par la présente à ces personnes d’inverser, quelle que soit la question, une décision que j’ai prise à cet égard.

The Authorization dated July 21, 1999, and registered in the Legal Registry as Document No. 149818 is cancelled.

L’autorisation donnée le 21 juillet 1999 et enregistrée au Service des documents juridiques à titre de document n° 149818 est annulée.

Dated at Ottawa, Ontario,
This 19 day of June 2006.
Fait à Ottawa (Ontario),
le 19, juin 2006.

Original signed by Lawrence Cannon

Minister of Transport, Infrastructure and Communities
Ministre des Transports, de l’Infrastructure et des Collectivités
### Schedule “A”

**Agents and Officers**

<table>
<thead>
<tr>
<th>Agent or Officer</th>
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<tr>
<td>Deputy Minister</td>
<td>DM</td>
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<td>DG RS</td>
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<td>Director General, Security and Emergency Preparedness</td>
<td>DG SEP</td>
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<td>Regional Directors, Security</td>
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ANNEX 2

EXAMPLES OF MULTI – TASKING AND STAFFING ISSUES IN TC

Source: the consultant requested this information from the Engineering Branch during the course of her consultation with TC for purposes of this Report.

Rail Safety on the rail infrastructure side, requires expertise in track, structures, signals, grade crossings, access control and other rail infrastructure such as pipeline crossings, fire control. Presently, in TC HQ there are 3 manager positions in Engineering Branch: Signals, Crossings, & Infrastructure, with 2 staff members each. They each have responsibilities, in their areas of expertise, for standards and regional safety monitoring programs, issues management such as major accidents, legal actions, etc., as well as participation in development of Rail Safety strategies, policies, etc., :

Regulation/Rules/Standards:

Monitoring technology, leading departmental research, liaising with other regulators in US and oversees, development of Regulations, rules, engineering standards, managing ongoing applications for exemptions to rules and regulations, evaluating and implementing recommendations of the the Transportation Safety Board

Oversight:

Developing safety oversight program activities for railway infrastructure, developing data collections systems for information collected by railway safety inspectors, as well as provided by the railway industry, conducting analysis of TSB accident data, inspection data, industry supplied data to identify areas of interest for investigation or industry response, trends, AND IMPORTANTLY, recently Engineering Branch is called upon to take a more active leadership role and participation in railway safety management system audits and enforcement of system changes which result in significant industry impact and resistance.

There are additional demands for: monitoring railway technology, providing research oversight, doing quality assurance on program delivery, organizing and managing TC railway safety inspector and industry Workshops, assessing and managing applications for rule exemptions, review and response to TSB investigation reports, accident/incident information development for departmental response (i.e. the focus on CN safety during past 24 months following the derailment at Lake Wabamun), and involvement in litigation. Add in the requirements for training and development, departmental audits and evaluations, initiatives such as the Railway Safety Act Review, and it is a lot of work for a few people.

Using Fred Rose's Infrastructure Group as an example:

Fred is the Infrastructure Manager responsible for railway track, structures (i.e. bridges), right of way access control measures (trespassing), environmental assessments for railway projects requiring minister approvals, utility crossings (pipelines)
Robert Pratt; Senior Track and Structures Engineer; departed on December 21, 2006 immediately following an 8 month period of paternity leave. Work on staffing for the position commenced immediately, was posted without a qualified railway structures candidate being identified. The problem is that this is a very limited field and attracting someone to Ottawa is difficult. Presently, Fred Rose is considering posting for a structures candidate without railway background.

Similarly, Fred's other reporting employee, Ryan Rickard, departed for a position in our Atlantic Regional Office in mid-March. Staffing action to replace this person with an employee with track experience and the abilities to work in our environment is underway.

Fred is without a track engineer and a structures engineer until these staffing actions can be completed.

Fred and his two engineers are also responsible for oversight measures under the RSA to control of railway right of way access (i.e. trespassing and livestock) and for utility crossing standards (i.e. pipelines - oil, gas, water, sewer). For Fred's Group, examples for monitoring railway technology includes participation in American Railway Engineering Maintenance of Way Association technical committees, and participation in FRA's Continuous Welding Rail Working Group. Providing research oversight in Fred's case involves 2 hr conference calls a month and 2 workshops per year in addition to frequent liaising with TC Transport Development Centre and the preparation and review of technical reports and projects.

The Access Control Regulations have been in development for a considerable time, affect and require consultations with many outside organizations in addition to the Railway Industry. This can be reviewed at [http://www.tc.gc.ca/railway/RSCC/TresLst_Par.htm](http://www.tc.gc.ca/railway/RSCC/TresLst_Par.htm). It is a major undertaking and there has been a great deal of work done, and it is continuing, but progress has been slow.

Engineering Branch recently has been contributing to redevelopment of the Rail Safety Oversight Model to integrate safety management systems into the oversight programs.

External demands such as accidents, issues management, time restricted applications under the RSA, departmental initiatives take priority on our resources. Recent examples of such demands were:

- Focused inspections and audits of CN during the past 18 months in light of the national attention on rail derailments across Canada;

- Multiple applications from the City of Ottawa and many consultations and meetings for approvals of new standards, and exemptions to existing standards associated with its proposal to expand the light rail network within the City that took a great deal of effort by Engineering Branch staff from June to December;

- the very recent CP strike of track maintenance employees, which has involved meetings with CP officials to overview strike management plans, organization of regional inspectors to monitor CP track management closely for the duration of the strike, daily conference calls with CP management to exchange information and keep the department and government informed of the
impact on safety.

Progress on developing a strategy and plan with the railway industry for modernization of the Track Safety Rules following our TC sponsored 'Symposium on the Track Safety Rules' last fall has been slow.

With the expertise issue, there is a complete lack of candidates in Ottawa and a small number of experts in Canada. It is impossible to find temporary persons to fill gaps for issues such as paternity leave, and it is difficult to be at fully staffed over a sustained period. If a manager loses one employee, for example track engineer, he has no "track" staff until the position can be re-staffed and the employee can be oriented within the department. Similarly for structures. Also, Fred must rely upon the assistance of these two persons handles the additional matters such as Access Control, utility crossings, etc.

The expertise is difficult to maintain when there is no depth of knowledge in the size of the HQ group.

It is recognized within the Department that there are resource issues and Rail Safety is working to deal with them.

There are similar challenges in the other two TC managers' groups, however, to a lesser degree. It has resulted in slow progress in other regulatory initiatives, in particular with respect to development of the necessary data, analysis, and systems to support the proposed Grade Crossing Regulations.

Development of standards, programs, data systems etc, requires a significant contribution of resources from our regions (i.e.participation of regional railway safety inspectors).
The Government of Canada Regulatory Policy

The key policy governing regulation in Canada is the Government of Canada Regulatory Policy that was approved by Cabinet in November 1999. The Regulatory Policy provides direction on all aspects of making regulations, including the regulatory process. The Privy Council Office, Regulatory Affairs and Orders in Council Secretariat supports the development and implementation of the Government of Canada Regulatory Policy.

The objective of the policy is to ensure that use of the government's regulatory power results in the greatest net benefit to Canadian society. The integrity of this objective is upheld mainly through the Regulatory Impact Analysis Statement (RIAS) as well as the consultative process.

The Regulatory Policy applies to federal departments and agencies with regulatory authority. For example, within a department's legislation, a Minister may be granted legislative authority to make regulations in certain areas.

Canadians view health, safety, the quality of the environment, and economic and social well being as important concerns. Ensuring that the public's money is spent wisely is also in the public interest. The government will weigh the benefits of making regulations against their cost, and focus resources where they can do the most good.

To these ends, the federal government is committed to working in partnership with industry, labour, interest groups, professional organizations, other governments and citizens and will maintain its responsibility to serve the public interest.

The Regulatory Process

The approval process for regulations is governed by the Statutory Instruments (SI) Act. The following describes briefly what departments and ministers are required to do before a regulation is brought into force. For a more detailed description of the process, readers are invited to consult the PCO Guide to the Regulatory Process.

The Statutory Instruments Act defines a regulation as a statutory instrument made in the exercise of a legislative power conferred by or under an Act of Parliament, or for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament.

This definition of a regulation includes a rule, order, or regulation governing proceedings before a judicial or quasi-judicial body established by an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament.

The regulatory process applies to proposals for regulations as defined in subsection 2(1) of the Statutory Instruments Act and to proposals for other statutory instruments that are registered under the statutory orders and regulations (SOR) designation and published in the Canada Gazette, Part II.
Regulations are a form of law, often referred to as delegated or subordinate legislation. They have the same binding legal effect as Acts. The involvement of departments in regulatory matters or issues depends on the mandate of the department. The Canadian Food Inspection Agency, Canada Customs and Revenue Agency, Environment Canada, Fisheries and Oceans Canada, Health Canada, Industry Canada, and Transport Canada are seven key regulatory authorities.

Many pieces of legislation have regulations attached to them and each year a significant number of new or amended regulations are brought into force.

The regulatory process is mandatory for all proposals that fit these definitions and that are made or approved by the Governor in Council (Order in Council) or by a Minister (Ministerial Order).

### There are three broad classes of regulations:

| Governor in Council (GIC) Regulations | Regulations requiring the authorization of the Governor General on the advice of the Special Committee of Council (SCC). Most regulations fall into this category. |
| Ministerial Regulations | Where an Act gives an individual Minister the authority to make regulations. |
| GIC or Ministerial Regulations requiring Treasury Board approval | Regulations require approval from the Treasury Board (TB) when there are financial implications or when a department's enabling act requires Treasury Board recommendation to the Governor in Council. |

### Applying the Regulatory Process

The regulatory process applies to most regulations, as defined in the *Statutory Instruments Act*. Some regulations are not subject to the regulatory process. They are wholly or partially exempted by their enabling Act or by the Statutory Instruments Regulations.

### The main steps in developing a regulation are as follows:

#### Step 1 - Planning

Departments must review their regulatory proposals to ensure that they are necessary and that non-regulatory means or instruments are not better suited to address the issue identified.

#### Step 2 - Drafting

The department or agency drafts the regulatory proposal, with the assistance of its legal advisors and the Regulations Section of the Department of Justice.

The department must also complete the regulatory impact analysis statement (RIAS) that includes a description of the proposal, alternatives considered, a benefit-cost analysis, the results of consultations with stakeholders, compliance and enforcement mechanisms.

#### Step 3 - Review by Justice

The department sends the proposed regulation and supporting documentation to the Regulations Section, Legislative Services Branch of the Department of Justice (RS-J) for review. Once everything is in order, the RS-J "blue stamps" the proposed regulations and returns it to the department.
Step 4 - Sign-off by Sponsoring Minister

The proposed regulation package is signed-off by the sponsoring Minister. By signing the documents, the Minister formally recommends that the Governor in Council (GIC) pre-publish the regulations. The department sends the submission to PCO.

In cases where regulations require Treasury Board recommendation to the Governor in Council, the department will send a submission to TBS.

Step 5 - First Review by the Privy Council Office (PCO)

PCO reviews the proposal for consistency with the Regulatory Policy and other government initiatives, reviews the supporting documents and prepares a briefing note on each proposal for consideration by SCC.

Step 6 - Request to SCC for Pre-publication

The first time that a regulatory proposal is seen by SCC, the sponsoring Minister is seeking approval for pre-publication in the Canada Gazette, Part I. The Minister may however seek exemption from pre-publication, or a shorter publication period. SCC considers the proposal and either approves or rejects the request.

Pre-publication allows for public scrutiny and comment on the proposal, generally for a period of 30 days. It is expected that the department will address public comments in a revised regulation, or provide reasons why a given concern could not be addressed.

Step 7 - Updating the Regulatory Proposal

Comments obtained during pre-publication may require changes to the regulatory proposal. If so, the regulations would again require a "blue-stamp" by the Department of Justice.

If the proposal does not require changes, the RIAS is revised to include a description of the comments received during pre-publication and the department's response. The sponsoring Minister must then sign the submission and recommend the item for final approval and publication in Part II of the Canada Gazette.

Step 8 - Second Review by PCO

PCO reviews the comments received after pre-publication and the department's response to the comments and prepares a briefing for consideration by SCC.

Step 9 - Final Approval by SCC

SCC Ministers make the decision to approve the regulatory proposal.

IF APPROVED
- the Governor General makes the regulation by signing it; and
- the regulation is subsequently registered with the Registrar of Statutory Instruments.
Note: Regulations normally come into force as soon as they are registered, which must occur within seven days of final approval, but can only be enforced once published in the Canada Gazette, Part II. Publication must occur within 23 days of registration.

**IF NOT APPROVED**

Sponsoring department must decide:

- to modify the initiative and go back to the beginning of the approval process; or
- abandon the initiative entirely

**Step 10 - Review by Standing Joint Committee for the Scrutiny of Regulations**

The Standing Joint Committee for the Scrutiny of Regulations is a Parliamentary Committee that reviews all regulations. It can recommend changes to regulations. It also reports to Parliament on problems, and proposes that regulations be repealed.

**Roles and Responsibilities of Key Cabinet Committees**

The two key Cabinet Committees involved in the creation or amendment of regulations are the Special Committee of Council and the Treasury Board.

**Special Committee of Council (SCC)**

The SCC is one of the Cabinet Committees and has nine members. The Treasury Board President is a member of Special Committee of Council (SCC). Four Ministers must be present to have a quorum.

In most federal acts, the regulation-making authority is the Governor in Council. In practice it is a Committee of Cabinet Ministers, the Special Committee of Council, that acts as Governor in Council. The term "Governor in Council", means the Governor General, acting on the advice of the Privy Council (i.e. the Cabinet or one of its Committees, notably the Special Committee of Council).

SCC's responsibilities include consideration of all Orders in Council (OICs) and regulatory submissions that originate from departments and that require Governor in Council approval.

An Order in Council (OIC) is required to give legal force and effect to government decisions, and thus covers many matters of state. It is essentially a legal instrument. Some examples of Orders in Council include:

- New or amended regulations;
- Remission orders;
- Appointment orders;
- Orders respecting the transfer of land or assets;
- Orders authorizing federal-provincial agreements; and
- Orders bringing into effect Acts or certain provisions of Acts.
When a regulation is to be made or approved by the Governor in Council, the SCC approves it for pre-publication in the *Canada Gazette, Part I*. Afterwards, the SCC approves it to be sent for signing by the Governor General and subsequent registration and publication in the *Canada Gazette, Part II*. When reviewing regulations, the SCC focuses on potential impacts on Canadians such as costs, benefits, fairness, policy or political implications and competitiveness.

When Parliament is in session, SCC meetings generally occur on Wednesday afternoons. PCO, Regulatory Affairs and Orders in Council Division acts as a Secretariat to SCC.

Some issues of particular interest to SCC Ministers are cost recovery, governance issues, consistency in application, regional and constituency implications, precedent setting cases, conformity to the Federal Identity Program, adequacy of public consultation and any outstanding concerns brought to their attention by external parties.

TBS, Regulatory Issues Unit supports the Treasury Board President for her participation at SCC.

**Treasury Board (TB)**

The Treasury Board is one of the Cabinet Committees. Its role is to provide direction in the management of government's financial, personnel and administrative responsibilities.

Whenever a submission has financial implications, or when the sponsoring department's enabling statute requires Treasury Board's recommendation, Treasury Board will review the submission and, if appropriate, recommend to the Governor in Council that it be approved.

In reviewing these submissions, the Treasury Board will consider cost, expenditure and governance implications. Cost recovery and establishment of fees are of particular interest to Treasury Board Ministers. Many fees are established through regulations. The [Cost Recovery and Charging Policy](#) is an important policy framework for regulations dealing with fees and cost recovery.

**Items for which Treasury Board acts on behalf of the Committee of the Privy Council**

In December 2000, the Prime Minister designated the Treasury Board to act as the Committee of the Privy Council for most non-regulatory matters.

As of January 2001, Treasury Board, acting on behalf of the Committee of the Privy Council, has the authority to give final approval on certain submissions to the Governor in Council without having to forward these to the Special Committee of Council. These are Treasury Board submissions that include a recommendation to the Governor in Council to approve:

- the signature of federal-provincial agreements, federal-territorial agreements, or federal-First Nations agreements;
- assets or real property management transactions;
- corporate plans and related matters; and
- regulations concerning pension plan benefits for federal employees.

The Treasury Board agenda will identify these cases where Treasury Board will act as the Committee of the Privy Council. This new initiative does not have any effect on the manner in which departments
prepare and process Treasury Board submissions. Departments should continue to prepare the same required documentation.

Once Treasury Board has approved the submission with the Order in Council, TBS-SCDC will forward the Order in Council directly to PCO who will arrange to have it signed by the Governor General. Usually Orders in Council are signed by the Governor General within three working days of the Treasury Board meeting. PCO will subsequently send the signed order to the department. A list of approved Orders in Council is also available on the Government of Canada Web Site.

Items such as cost recovery initiatives or user charges, parliamentary matters, remission orders, revisions of the workforce adjustment directive and all regulatory matters (except for pension regulations relating to federal employees) will continue to need the approval of both the Treasury Board and the Special Committee of Council. For assistance, please consult with the TBS Regulatory Issues Unit.

Roles and Responsibilities of Key Organizations

Privy Council Office - Regulatory Affairs and Orders in Council Secretariat

The Special Committee of Council is responsible for the Government of Canada Federal Regulatory Policy.

The Privy Council Office, Regulatory Affairs and Orders in Council Secretariat consists of two distinct divisions and is responsible for monitoring, co-ordinating and advising on regulatory and OIC issues, and their relationship with economic, social, environmental and federal-provincial policies.

The main focus of the Regulatory Affairs Division is to provide secretariat support to the SCC. This includes monitoring regulatory proposals and preparing briefing material for the weekly SCC meetings. The Regulatory Affairs Division also supports the development and implementation of the Regulatory Policy. Finally, it provides secretariat support to the Deputy Ministers’ Challenge Team on Law Making and Governance.

The Orders in Council Division manages the approval process for all OICs, regulations and other statutory instruments, including the provision of advice and secretariat services to SCC related to these OIC proposals.

Department of Justice

The Department of Justice, Legislative Services Branch, Regulations Section (RS-J) reviews the legality and wording of all proposed regulations submitted by departments and agencies. This review is required by the Statutory Instruments Act and it involves ensuring that proposed regulations are authorized by statute, do not constitute an unusual or unexpected use of their authority, do not trespass unduly on existing rights and freedoms, and are drafted in accordance with established standards.

Once the proposed regulation has been examined by RS-J, it is “blue stamped” and returned to the sponsoring department. The project is now ready to be presented to SCC or another body that has the authority to make it. RS-J also provides other legal advice relating to regulation-making, that include drafting services and opinions on the scope of regulation-making authority.

Treasury Board Secretariat (TBS), Regulatory Issues Unit
The Regulatory Issues Unit provides support within TBS and to the President of the Treasury Board. The Unit is a central resource when Treasury Board Secretariat Analysts require clarification or direction on a regulatory issue.

The main role and responsibilities of the Treasury Board Secretariat (TBS) Regulatory Issues Unit are to:

- support the President on regulatory issues in his/her capacity as a member of the Special Committee of Council and as Chair of Treasury Board;
- support TBS senior management on regulatory issues as well as the Treasury Board Secretary for his/her participation on the Deputy Minister’s Challenge Team on Law-Making and Governance;
- provide advice and guidance within TBS on regulatory issues; and
- provide guidance to other government departments as part of TBS’ general responsibilities related to good government and reporting to Parliament.

Each week, the Regulatory Issues Unit forwards the SCC agenda to TBS Program Analysts to inform them of regulatory initiatives that are being proposed by their portfolio departments or agencies. The Regulatory Issues Unit prepares a briefing note to the President to inform her of items on the SCC agenda that may raise particular issues. TBS Program Analysts are requested to bring issues they may be aware of to the attention of the Regulatory Issues Unit for incorporation in the SCC note. Treasury Board items including a recommendation to the GIC that must be approved by SCC (as opposed to TB acting as CPC) are scheduled for SCC thirteen (13) calendar days after consideration by TB.
Consultations on proposed grade crossing regulations have taken place with multiple stakeholders since the introduction of the *Railway Safety Act* in 1989. Many alternatives have been considered.

The first proposal, the draft *Road Crossings at Grade Regulations 88-999 (CG-1)*, was published in the Canada Gazette, Part 1, December 24, 1988. It consisted of a short technical standard. A large number of concerns were received and major revision was required.

This was quickly followed by several additional drafts and consultations during 1989 and 1990 including the Ministry of Transportation of each province, the Railway Association of Canada and member railway companies, and the Federation of Canadian Municipalities (FCM) and many member municipalities.

The regulation of grade crossing safety turned out to be more complex than had been anticipated, as a result of the extensive number of stakeholders, including railway companies, provincial and municipal road authorities, private road owners and adjacent landowners, and the organizations representing them, as well as the myriad of factors that could affect the safety management of each grade crossing.

To simply matters, the engineering specifications for construction, inspection, testing and maintenance were moved into a separate manual which would be incorporated by reference as part of the regulations.

A draft *Grade Crossing Construction, Alteration and Maintenance Manual* containing safety requirements and recommended practices as well as background on each of the safety requirements was completed in June 1993 and distributed to stakeholders for comment.

Ongoing consultations involving the many stakeholders and resulting in many revisions continued through 1994 and 1995. Due to stakeholder concerns about lack of clarity in the Manual concerning the distinction between required standards and recommended practices, a revised proposal was prepared containing only the proposed mandatory engineering standards, operation and maintenance procedures, and inspection and test requirements as they had evolved through the consultations up to that point in time.

Nevertheless, by April 1996, following a meeting of stakeholders in Ottawa, many of the stakeholder issues remained unresolved with respect to the standards, responsibilities, and the need for the grade crossing regulations, and the Department was not prepared to proceed with the grade crossing regulations that they had evolved up to that point in time, while it searched for a more effective means to resolve the outstanding issues.

In August of 1996 the Railway Association of Canada provided a detailed written submission outlining their key concerns with the proposed requirements, along detailed issues with many of the specific requirements.
Transport Canada responded to the RAC:

“Since your submission, concern for clarity between required standards and recommended practices has resulted in a new proposal to create a separate technical standards document that will include only those requirements that would be required by the regulation. The technical standards document would be incorporated fully by reference in the regulation.”

However, during this same time period, proposed revisions to the RSA resulting from the recommendations of the Railway Safety Act Review of 1995 were put on hold following some serious railway incidents, pending a further review of the Railway Safety Act initiated by the Minister of Transport, and so were the proposed grade crossing regulations.

This second review of the RSA included broad consultations on railway safety matters that ultimately resulted in revisions to the RSA in 1999 which touched on grade crossing safety, including the creation of safety management systems requirements for railway companies, revision to Section 11 RSA respecting engineering work relating to crossing works, the addition of Section 23.1 with respect to prescribing standards for grade crossings for the elimination of train whistling, and Section 26.2 requiring road users to give way to railway equipment at grade crossings if adequate warning was given of its approach.

These broad consultations on the RSA also resulted in the new Railway Safety Consultative Committee (RSCC) being established under the authority of the Minister of Transport to provide a forum for open communication and consultation with stakeholders on railway safety and environmental issues, such as the proposed grade crossings regulations.
ANNEX 5
LISTS OF STAKEHOLDERS FOR ACCESS CONTROL
REGULATIONS AND GRADE CROSSING REGULATIONS

Trespassing Working Group
(List of Participants)

- Transport Canada
- Consulting and Audit Canada
- Railway Companies
- Railway Unions
- Canada Safety Council
- Federations
- Police
- Canadian Transportation Agency
- Provincial Ministry of Transportation
- Transports Québec
- Other Resources

Transport Canada

- Fred Rose (Chief Infrastructure, Working Group Chairman)
- Mark Zadarnowski (Senior Right-of-Way Engineer, Working Group Project Leader)
- Bernard Parent (Chief, Consultations)
- Gary Drouin (National Administrator, Direction 2006)
- René Turgeon (Railway Works Engineer)
- Blair Raitt (Safety Systems Overview Inspector)
- Ryan Rickard (Environmental Assessment Co-ordinator)
- Helen Pierre (General Counsel)
- Madeleine Mercier (Legislative Counsel)
- Louis Gautier (Legal Adviser)

Consulting and Audit Canada

- Karen Walker (Principal Consultant - RIAS)

Railway Companies

- Jim Kienzler (Canadian Pacific Railways)
- Lynda Macleod (Canadian National Railways)
- Mike Lowenger (Railway Association of Canada)
• Mike Regimbal (Railway Association of Canada)
• Dan Di Tota (Operation Lifesaver)
• Kevin Campbell (GO Transit)
• Ranald MacDonald (VIA Rail)
• Robert Rivest (VIA Rail)

Railway Unions

• Ken Deptuch (Brotherhood of Maintenance of Way Employees)
• George Hucker (Brotherhood of Locomotive Engineers)
• Glenn King (United Transportation Union)

Canada Safety Council

• émile Thérien (Canada Safety Council)

Federations

• Jennifer Fellows (Canadian Federation of Agriculture)
• David Campbell (Federation of Canadian Municipalities)
• Cathy Coulthard-Dewey (Township of Bathurst Burgess Sherbrooke)
• Peter Jeffery (Ontario Federation of Agriculture)

Police

• Serge Meloche (Canadian National Railways)
• Michael Melanson (Canadian National Railways)
• Gerry Moody (Canadian Pacific Railways)
• W.J. (Bill) Law (Canadian Pacific Railways)

Canadian Transportation Agency

• Paul Lacoste (Engineering & Environmental Services)

Provincial Ministry of Transportation

• Joe Bucik (Ministry of Transportation of Ontario)
Transports Québec

- Alain Bérubé (Ministry of Transportation of Québec)

Other Resources

- Lori Byers (Ministry of Municipal Affairs and Housing)
- Diana Summers (Ontario Good Roads Association)
- Brian Knox (Bruce County Highways Engineer)
- Raynald Bélanger (Agency of Metropolitan Transport)
- Rod Sanderson (City of Chilliwack)
- Julie Mcardle (Ministry of Municipal Affairs and Housing)

Working Group - Grade Crossing Regulations (List of Participants)

- Transport Canada
- Railway Companies
- Railway Unions
- Road Authorities
- Association Representative
- Resources

Transport Canada

- Mr. Mike Coghlan - Director Engineering, Working Group Chairman
- Mr. Pierre Delorme - Chief, Health, Safety & Security, Operations Branch
- Mr. Bruce Kavanagh - Manager Engineering, Prairie and Northern Region
- Mr. Daniel Lafontaine - Chief Crossings, Engineering Branch

Railway Companies

- Mr. Mike Lowenger - Vice President, Railway Association of Canada
- Mr. Jim Kienzler - Director, Rules & Regulatory Affairs, Canadian Pacific Railways
- Mr. Don Watts - System Manager - Safety and Regulatory Affairs, Canadian National Railway
- Mr. Ranald A. MacDonald - Manager, Transportation Planning, VIA Rail
Railway Unions

- Mr. Gary Housch - VP - Legislative Department, Brotherhood of Maintenance of Way Employees
- Mr. George Hucker - VP and Legislative Representative, Brotherhood of Locomotive Engineers
- Mr. Glenn King - Vice Chairperson - Ontario Legislative Board, United Transportation Union
- Mr. John Platt - International Representative, International Brotherhood of Electrical Workers

Road Authorities

- Mr. Bernard Royer - Ingénieur - Service du Transport ferroviaire, Ministères des Transports du Québec
- Mr. Oulton (Ben) Roger - Director Traffic Engineering, Manitoba Highways and Transportation
- Mr. Ken Becking - County Engineer - County of Renfrew, Municipal Engineering Association of Ontario
- Mr. David Campbell - Senior Policy Analyst, Federation of Canadian Municipalities
- Mr. Sinclair Harrison - President, Saskatchewan Association of Rural Municipalities
- Mrs. Jennifer Fellows - Policy Analyst, Canadian Federation of Agriculture
- Mr. Rod Sanderson - Manager, Transportation & Drainage, City of Chilliwack

Association Representative

- Mr. émile Thérien - President, Canada Safety Council

Resources

- Mr. Glen Furtado - Program Manager, Roads and Education, Transportation Association of Canada
- Mr. Stephen Laskowski - Director, Policy Development, Canadian Trucking Alliance
ANNEX 6

MANDATE AND TERMS OF REFERENCE OF THE RSCC

Railway Safety Consultative Committee (RSCC)

PREAMBLE: The following draft Terms of Reference was proposed for discussion, revision at the inaugural session of the RSCC.

1. Authority & Mandate
2. Objectives
3. Scope
4. Membership
5. Structure, Roles & Responsibilities
6. Frequency of Meetings
7. Process
8. Administrative Arrangements

TERMS OF REFERENCE

I. AUTHORITY & MANDATE:

The Railway Safety Consultative Committee (RSCC) is established under the authority of the Minister of Transport (the Minister) to provide a forum for open communications with stakeholders on railway safety and environmental issues.

II. OBJECTIVES:

The objectives of the RSCC are:

1. to provide the Minister, the Department and the Transport Canada (TC) Rail Safety business line with stakeholder input to decisions on railway safety/environmental issues, including decisions with regard to the issuance of new regulations, revisions or revocations of existing regulations, and identification of alternatives to regulations for improving railway safety in Canada;
2. to dialogue on railway safety issues and possible courses of action and to address those issues with a view to improving railway safety in Canada.

III. SCOPE:

RSCC consultations shall primarily be focused on issues related to railway safety and the environment that fall within the purview of the Railway Safety Act. The committee may also consider on occasion safety issues that affect rail transportation that are within the purview of other regulatory regimes. Consultation for the purposes of the RSCC is understood to mean open, active, direct, two-way communication that will afford RSCC members the opportunity to develop a broader understanding of railway safety issues. Such consultation will provide the Minister, the Department, the TC Rail Safety business line and the industry with the benefit of diverse perspectives and consequently, will provide for better informed decisions on issues of railway safety and the environment.

IV. MEMBERSHIP:

Membership in the RSCC shall be open to any person or group with a recognized interest in railway safety and who wish to participate. Every railway company, relevant association or organization, and group with
a recognized interest in railway safety, shall be invited to nominate one member and one alternate to represent them on the committee.

V. STRUCTURE, ROLES & RESPONSIBILITIES:

A. A representative of the Minister shall chair the RSCC. The chair shall be responsible for convening meetings of the RSCC, for conducting those meetings, for establishing working groups and for overseeing the function of the committee as a whole.

B. The chair shall be assisted by an executive secretary who shall be responsible for ensuring the appropriate handling of information, documentation, correspondence and reports related to the business of the RSCC and its working groups.

C. An executive committee shall be established for the purpose of:

1. reviewing and prioritizing railway safety issues that have been submitted for discussion in plenary;
2. reviewing reports prepared by working groups and forwarding those reports to the plenary;
3. reviewing the progress of working groups and authorizing interim adjustments to their terms of reference, membership etc. and reporting such changes to the plenary; and
4. establishing the RSCC agenda.

The executive committee shall as a minimum include:

1. the chair of the RSCC who will chair meetings of the executive committee;
2. a RSCC member and one alternate nominated to represent the railway companies;
3. a RSCC member and one alternate nominated to represent the railway labour organizations or associations;
4. a RSCC member and one alternate nominated to represent the public; and
5. a RSCC member and one alternate nominated to represent other levels of government
6. a RSCC member nominated to represent the TC Rail Safety business line
7. the Executive Secretary of the RSCC
8. a RSCC member and one alternate nominated to represent the Environmental Community
9. *Each member of the Committee with the exception of the chair and the executive secretary will serve a term of 2 years on the Committee. Each member of the Committee with the exception of the chair and the executive secretary will serve a term of 2 years on the Committee.

D. RSCC members shall be responsible for:

1. submitting railway safety/environment issues to the executive committee for discussion in plenary.
2. bringing their particular expertise and informed opinions to the discussions of the RSCC in the interest of railway safety.
3. as applicable, providing a communications link between the RSCC and their respective companies, groups, associations or organizations.
4. reviewing working group reports.

E. Working groups shall be established by, and at the discretion of the RSCC chair to study and report on specific railway safety issues that have been discussed in plenary. At the time they are established, working groups shall be given clear mandates and timelines.

Working groups shall be chaired by TC Rail Safety Directors, or their designates. Such groups shall include subject matter experts (not limited to RSCC members) who have been nominated by their respective groups to represent the railway companies, the railway labour associations or organizations, the TC Rail Safety business line and other groups, such as legal counsel and financial experts, if deemed appropriate or necessary by the chair of the working group.
The chair of a working group shall provide the RSCC executive committee with regular reports on the progress of the working group. Members of the working group shall likewise provide the groups they have been nominated to represent with regular progress reports.

F. A facilitator may assist at meetings of the RSCC and its working groups to provide advice to the chair on consultative and regulatory processes.

VI. FREQUENCY OF MEETINGS:

A. The RSCC shall meet in plenary at a minimum twice per year:

1. to discuss the railway safety regulatory oversight plan of the TC Rail Safety business line for the coming months, including but not limited to anticipated activity related to regulation-making;
2. to provide a forum for the industry to present their strategic direction plans for the coming months as they relate to railway safety, including but not limited to anticipated activity related to rule-making;
3. to identify emerging railway safety/environmental issues that may require regulations, rules, standards or guidelines or revisions to same and to discuss possible courses of action; and
4. to provide status reports on the ongoing business of the RSCC and its working groups.

B. Interim meetings of the RSCC may be convened by the RSCC chair as deemed necessary.

C. The RSCC executive committee shall meet as necessary but, at a minimum, twice per year, usually 1 month in advance of the bi-annual plenary sessions:

1. to review the status of ongoing business of the RSCC and its working groups;
2. to review and prioritize new railway safety/environmental issues for consideration by the RSCC;
3. to review reports received from working groups;
4. to set the agenda for the bi-annual meeting.

D. Working groups shall meet as necessary to fulfill their mandate.

VII. PROCESS:

A. RSCC members or other persons wishing to address the RSCC on a railway safety or environmental issue, or to raise a railway safety/environmental issue to the RSCC for discussion, shall submit a written proposal, outlining the issue, to the executive committee, one month prior to the date fixed for the next meeting of the executive committee.

B. The executive committee shall consider the proposals received and prioritize them for inclusion on the agenda of the next RSCC plenary session.

C. Railway safety/environmental issues identified as agenda items shall be discussed in plenary. The discussions shall include consideration of:

1. the issue as outlined in the submission to the executive committee;
2. whether action is currently being taken by the industry and/or the regulator to address the issue;
3. whether new or additional action is warranted on the part of the industry and/or the regulator.
4. whether the RSCC requires additional information on the issue.
5. where action is warranted on the part of industry or the regulator this advice will be provided to the department

D. The RSCC chair, acting on the advice of the committee, may establish a working group to facilitate thorough consideration of a particular railway safety/environmental issue. Consideration of a proposal for a
working group shall include the proposed mandate, timelines, funding and personnel requirements to undertake the work.

E. Working groups shall:

1. characterize the railway safety/environment issue to which they have been assigned in terms of, but not limited to: background, current situation and scope.
2. identify options for addressing the issue.
3. analyze the costs and qualitative or quantitative benefits associated with the identified options.
4. rank the options based on the above-noted analysis.
5. prepare a report to include the information developed in 1 through 4 above, noting any points of contention.
6. submit the report to the executive committee for consideration by plenary.

F. The executive committee shall review the report of the working group and to facilitate their review may request additional information or clarification from the working group. The executive committee shall forward the report of the working group to the plenary. Following consideration of the report it will be forwarded to the department.

G. The Department shall consider the report from the RSCC, decide the disposition of the issue and advise the RSCC accordingly.

H. The Department may decide to:

1. handle the issue using the regular procedures and protocols available within the Department;
2. refer the issue back to the RSCC giving direction on how it is to be progressed;
3. refer the issue to the industry for handling; or
4. hold the issue in abeyance.

I. If the decision of the Department is in favor of a rule-making (or rule revision), or if the railway industry proposes to make a rule the railway(s) may engage the RSCC in the process.

J. If the decision is to develop new, or to amend existing regulations using the RSCC, a working group shall normally be established to input to the regulatory process by assisting the Department in:

1. the development of the drafting instructions and a statement of the regulation objectives.
2. the drafting of the regulatory impact analysis statement.
3. the review and resolution of consultation comments.
4. the review of legal drafting.

K. The chair of the working group shall provide the necessary link between the working group and the Department in order to progress the proposed regulation or amendment through the regulatory process.

VIII. ADMINISTRATIVE ARRANGEMENTS:

A. Meetings of the RSCC shall be held at a reasonable place and time and with reasonable advance notice.

B. Secretariat support services for the RSCC and its working groups shall be provided by TC and shall include:

1. providing a central communications point for the RSCC, its executive committee, working groups and members in both official languages.
2. producing and distributing agendas for meetings, including supporting documentation;
3. taking, transcribing and distributing minutes of meetings, including records of decision;
4. ensuring appropriate distribution of reports;
5. maintaining official records of RSCC activities;
6. arranging meeting facilities;
7. arranging translation services;
8. maintaining current lists of RSCC members and railway safety stakeholders; and
9. updating the Privy Council Office (PCO) O federal consultation database and the TC web site regarding the consultative activities of the RSCC.
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1 trespassing Notice in Quebec in 2003 included in Infrastructure data

Operations  41  
Equipment    26  
Infrastructure 68  
Crossing     79  

ANNEX 7
STATISTICS s.31 RSA
ANNEX 8

RAILWAY SAFETY INSPECTORS’ TRAINING

Overview of the Rail Safety National Training Program

Table of Contents

A. Introduction

I. Purpose

II. Scope

III. Guiding Principles

B. Roles and Responsibilities

C. Present Situation

. Courses Delivered F/Y 2003/04

I. Decision Making Criteria

D. Other Related Rail Safety National Training Program Activities

Appendix

• A Rail Safety Technical/Regulatory Training Policy

• B-1 Terms of Reference for Rail Safety National Training Committee

• B-2 Terms of Reference for Training Steering Committee

• B-3 Training Responsibilities for Audit and Quality Assurance

• B-4 Roles and Responsibilities for Operations, Equipment & Engineering

A. INTRODUCTION

I. Purpose

This overview sets out the roles and responsibilities of the Rail Safety National Training Program, functional areas and regional clients; shows the short and long term priorities, and links to the strategic plan for Rail Safety for the next three to four years.

II. Scope of the National Training Program

The Rail Safety National Training Policy (Annex A) defines the responsibilities of the Rail Safety National Training Program. The Rail Safety National Training Program defines business and Job Specific Competencies. Position Profiles (Competencies and UCS Job Descriptions) identify competencies, technical knowledge and regulatory knowledge requirements for all technical positions supporting rail safety programs.
III. Guiding Principles of the Rail Safety National Training Program

1. All persons who support the rail safety program need to develop or maintain a level of competency, skill and knowledge to remain credible and professional

2. Every RSI is entitled to current information through various learning opportunities

3. Promote consistency of regulatory interpretation and program delivery

4. Provide consistent standards for certification of Railway Safety Inspectors

5. Provide a challenging work environment

B. ROLES AND RESPONSIBILITIES

Introduction to the Process
Each area of the Rail Safety/Surface structure plays a part in the National Training Program by providing input into specific training requirements. Typically, the functional area would canvass the regions to determine the level of training required by individual inspectors. This training may be specific to the function or may have cross-functional application. (e.g. Canadian Rail Operation Rules is required by Operations and Engineering) As well, there may be regionally specific training required. The region would identify this training with notice given to the functional branch in HQ as well as the National Training Program for tracking and information purposes.

Funding for the development or delivery of training can be seen as a continuum with one end being totally funded by the region and the other end being totally funded by the National Training Program. In all cases, each region and branch is responsible for travel and accommodation for their participants at training courses.

I. Rail Safety National Training Committee (RSNTC) - Terms of Reference (Annex B-1)
The RSNTC is made up of regional and headquarters representatives. Their main function is to put forward recommendations to the Rail Safety Training Steering Committee with respect to technical and regulatory training as well as provide input to the development of Business and Job Specific Competencies. This committee meets on a quarterly basis.

II. Rail Safety Training Steering Committee (RSTSC) - Terms of Reference (Annex B-2)
The steering committee meets on a quarterly basis to discuss the recommendations of the RSNTC and provide input as to the direction of the Rail Safety National Training Program.

III. Audit and Quality Assurance Branch (ASRA) - (Annex B-3)
The role of the Audit and Quality Assurance Branch is to provide consistent, high quality technical and regulatory learning opportunities to those who support the rail safety program. ASRA is also responsible for the RSA, Compliance Policy and Inspector’s Manual, Minister's Observer Program, Investigative Techniques and SMS Audit/Lead Audit training.

IV. Operations, Equipment and Engineering Branches (ASRC, ASRE) - (Annex B-4)
The functional branches, with regional input, are responsible for identifying technical training requirements and providing resources for this training. Resources may include cost of the course development or delivery.

V. Program Analysis and Performance Branch (ASRD)
Provides support to the Rail Safety National Training Program through performance measurement and analysis using indicators provided by the Rail Safety National Training
Program. ASRD will also track and provide reports on cost associated with the technical and regulatory training on a per course basis.

**VI. Rail Safety Surface Regional Offices - (Annex B-4)**

Regional personnel make up the majority of the client base for the Rail Safety National Training Program. The region will be responsible to provide participants and where necessary share in the cost of course delivery when the course is delivered in their region. Regional offices shall identify any specific and unique training requirements and inform the appropriate HQ functional branch and the National Training Program.

**C. FISCAL YEAR 2003/04**

I. F/Y 2003/2004 saw the delivery of the following courses.


**II. Railway Safety Act Refresher** – This is a condensed version of the Orientation for New Employees and includes modules on the Transportation Appeals Tribunal of Canada and the Integrated Framework Risk Module.

**III. SMS Auditor** - Describes the Railway Safety Management System Regulations (SMS) and the use of audit procedures to determine compliance with the SMS regulations.

**IV. SMS Lead Auditor** - Same as the SMS Auditor course with an emphasis on competencies and skill sets required by an individual who will lead an audit.

**V. Occupational Health and Safety** - Gives an in-depth knowledge of the Canada Labour Code, Part II, the On-Board Trains Occupational Health & Safety Regulations, and Committee and Health & Safety Representatives Regulations.

**VI. Minister's Observer** - Takes participants through the Policy and Procedures Manual, MOU, functional directive, ATIP and a presentation by a Transportation Safety Board Investigator to explain how participants will be able to fulfill the role of a Minister's Observer at a TSB investigation.

**VII. Canadian Rail Operating Rules** - In general, this training course is to provide knowledge about Canadian Rail Operating Rules (CROR) and the application/differences as applied by CN and CP. Through presentations, case studies, exercises and sharing information, this course will help participants to develop a better understanding of our responsibilities regarding the safety of railway operations.

**VIII. Track Safety Rules** - In general, this training course provides knowledge about Transport Canada's Track Safety Rules. Upon completion of this course, participants will be able to interpret and apply Track Safety Rules to inspecting track, recording defects, and taking any necessary remedial action.

**RSA** = Railway Safety Act  
**CP/IM & IF** = Compliance Policy and Inspector’s Manual & Integrated Framework (Risk Management/Performance Measurement)  
**Audit** = Railway Safety Management System Auditor  
**Lead Audit** = Railway Safety Management System Lead Auditor  
**S&C** = Signals and Communications  
**Loco** = Locomotive Standards  
**Bridge** = Fundamentals of Railroad Bridge Inspections  
**OHS** = Occupational Health and Safety
SCHEDULING

II. Decision Making Criteria - Priorities
Rail Safety National Training Program priority setting is determined by:

1. Departmental requirement - E.g. Minister's Observer Policy, other policies
2. Legal Obligation
   1. Introduction of course material - E.g. Acts, Regulations, rules
   2. Immediacy of impact
3. Qualification need - Railway Safety Inspectors
4. Refresher training requirements - based on a three-year cycle as agreed to by the Steering Committee.

Training requirements are also determined by the needs of the employee in the field and through a needs analysis process. This process is designed to identify the impact, performance and learning that is required to determine if it is a training situation or some other method of knowledge delivery will fulfill the needs.

D. Other Related Rail Safety National Training Program Activities
1. Designation of a Qualified Person Working Group – This group was formed to determine factors that qualify an individual to be designated as a Railway Safety Inspector. Certain aspects of the final report (i.e. designated matters) were discussed and approved by the RSSMC. Other areas that will have a great impact on the training program are
   1. Determining pre-requisites (mandatory requirements) before designation of an individual
   2. Structured On-The-Job Training Program
Rail Safety Technical/Regulatory Training Policy

1) **Purpose** - This document establishes the technical training policy for Rail Safety employees.
2) **Scope** - The policy applies to training required for Rail Safety employees to be successful in the performance of their duties. It covers the following areas:
   - Training philosophy
   - Training commitment
   - Categories of training
   - Training development
   - Training evaluation
   - Training information
   - Effective date

3) **Training Philosophy** - Employees are a valued resource whose continuing development is important. In keeping with the principles and priorities of Transport Canada, this policy reflects our commitment to strengthen the professional skills of Rail Safety employees and support personal growth and effectiveness through ongoing training and professional development.

4) **Training Commitment** - Rail Safety's training responsibility is fulfilled by the:
   - Director General, responsible to ensure the integrity of the rail safety programs at a national level.
   - Headquarters' Directors, responsible to develop national standards for specialty and technical training, and support supplementary non-technical training.
   - Regional Directors and their management teams, are responsible for ensuring their staff are fully qualified to perform their responsibilities
   - Manager, Rail Safety National Training Program (RSNTP), responsible to plan, develop and coordinate the implementation of the Rail Safety training and development program.
   - Rail Safety Employees, as partners in a continuous learning environment, responsible to complete identified training and seek other appropriate training and development.

5) **Categories of Training** - The following categories of training will be supported by the Rail Safety National Training Program:
   - core competencies (TC publication: TP13194)
   - business competencies (RSA, audit, compliance)
   - job-specific competencies (Rail Safety specialty, technical and non-technical)

6) **Training Development** - Rail Safety training is based on the Treasury Board standard that consists of the following components:
   - analysis of training needs
- course design
- course delivery
- evaluation of the individual's performance and course delivery
- validation of the results through feedback and monitoring process

7) Training Evaluation - Training will be evaluated periodically through feedback and reviews to assess the effectiveness in meeting Rail Safety's training needs. Those who develop and deliver the training will perform these evaluations. Information gathered through this process will be used to ensure that the training packages are relevant to Rail Safety business.

8) Training Information - A training database for national technical training will be maintained at Headquarters. Regions will be responsible for other training profiles.

9) Effective Date - Accepted by RAIL SAFETY NATIONAL TRAINING PROGRAM Steering Committee
Annex B

Annex # B-1
TERMS OF REFERENCE
RAIL SAFETY NATIONAL TRAINING COMMITTEE

Approval of Terms of Reference
We, the undersigned, hereby concur with the attached Terms of Reference.

______________________________
Training Committee Representative

_______________
Date

______________________________
Steering Committee Representative

_______________
Date

MISSION
- To promote excellence in the consistent, effective delivery of Rail Safety activities.

RSNTPC Responsibilities
- Develop and implement a competency based national technical training and development program.
- Recommend 'job specific' competencies for positions within rail safety programs.
- Recommend training needs based on competencies.
- Recommend training and development program priorities.
- Recommend strategies to fulfill national training needs.
- Identify sources to complete training in an effective and efficient manner.
- Recommend training implementation strategies.

Scope
- The National Training Program will address the technical and regulatory training and development needs of all Rail Safety employees.

Accountability
- The RSNTC is accountable to the Steering Committee.

Membership
- RSNTC members will be appointed by Headquarters and Regional Directors.
- The Chair will be appointed by the Training Committee.

Members Roles
- Actively participate in RSNTC activities.
- Demonstrate respect for other team members points of view and opinions.
- Assist and support the Chair in reaching consensus decisions.
- Carry out assigned tasks.

- Obtain information and assistance from management as required.
- Identify resources to assist in approved activities.

**Chair's Role**
- Direct approved work plans to accomplish objectives.
- Establish priorities.
- Notify members of date, time and location of meetings.
- Promote discussion to enable consensus decisions.
- Record decisions and actions on behalf of the RSNTC.

**Manager's Role**
- Provide advice and direction in training methods, practices, policies and strategies to the RSNTC members.
- Manage the coordination, development and implementation of all training deliverables contained in the training plan.
- Monitor, report and make recommendations on improvements relating to the quality of deliverables and the overall training program.
- Provide training to Subject Matter Experts (SMEs).
- Communicate program to stakeholders.
- Provide meeting logistics.
- Assist Chair in completing responsibilities.

**Broad Issues and Dispute Resolution Mechanism**
- Where the RSNTC is unable to reach consensus on any issue, the Chair will advise the Steering Committee.

**Frequency of Meetings**
- The RSNTC will convene on a quarterly basis. The frequency may be changed as responsibilities dictate.
TERMS OF REFERENCE
TRAINING STEERING COMMITTEE

**Purpose:** To ensure implementation of a continuing, comprehensive and integrated Rail Safety National Training Program that develops and maintains the highest calibre of skilled, knowledgeable and professional employees.

**Composition:** The TSC is chaired by the Director General Rail Safety and is comprised of 2 Regional Directors and 2 Headquarters Directors, or their alternates and 1 resource person.

**Responsibilities:** The Training Steering Committee is responsible for:

- Fostering a climate which holds training as a predominant factor in rail safety programs.
- Overseeing the ongoing development, implementation and maintenance of a Rail Safety National Training Program
- Providing direction and guidance to the Rail Safety National Training Committee to ensure life-cycle training needs of all employees are addressed.
- Approving all principles and policies developed for training in rail safety programs.

**Meetings:** Meetings are held quarterly. The chairperson may call ad hoc meetings as required. The TSC recognizes the importance of continuous communications and the use of available technological tools (e.g. video or audio conferencing) will be used to the extent possible to enhance communications across the country.

**Budget:** Normal travel costs associated with the TSC will be borne by the respective branch or region. However, there may be occasion where special costs (e.g. studies or working groups) might be incurred. These costs will be the responsibility of the Director General Rail Safety who may seek a cost-sharing among TSC members as required.
Annex B-3

Audit and Quality Assurance
Training Responsibilities

a) Provide a nationally consistent training program to all employees who support rail safety programs.
b) Devise needs assessment strategies for functional specific training.
c) Evaluate knowledge transfer and revise training packages either in-house or through the use of consultants.
d) Facilitate regional and headquarters input on the direction of the National Training Program through the RSNTC.
e) Provides training on the Rail Safety Compliance Policy and Inspector's Manual, providing interpretation and revision as required.
f) Identify training opportunities through needs assessments.
g) Funds general regulatory and policy training (Those that apply to all RSI)
   (1) Room requirements
   (2) Set-up requirements
      1. A/V equipment

(3) Course material
   1. Binders
   2. Handouts
   3. Pens & Pencils
   4. Flip Charts

(4) Shipping of course material
h) Develop and deliver instruction on regulation and policy as required.
i) Manage contracts to develop and deliver training as required.
j) Provide guidance to functional areas for training needs.
k) Maintain a centralized database on all technical training received by employees who support the rail safety program.
l) Produce quarterly training reports to Regional and Headquarters Directors.
m) Consult with Directors on training requirements.

n) Facilitate working groups of Subject Matter Experts involved in course development and management.
o) Develop Requests for Proposals for outside contracting.
p) Develop and maintain the Business and Job specific Competencies
q) Develop and maintain Position Profiles for all technical positions in Rail Safety
r) Examine and evaluate new learning technologies
s) Determine efficacy of using new training technologies
t) Brief senior management of these new learning technologies.
u) Liaise with other training departments within TC and the Federal Government for best practice
v) Participate in committees pertaining to training, competencies and the Regulatory/Inspection community.
Operations, Equipment and Engineering

Roles and Responsibilities

a) Provide input to the Rail Safety National Training Program training requirements through the Rail Safety National Training Committee
b) Provide Subject Matter Experts for training delivery, as required
c) Responsible, along with the regions, to identify technical training requirements
d) Determine standards and criteria for certifying Operational, Equipment & Engineering RSI (i.e. Core courses required by an individual to remain current and qualified in designated matters)
e) Update RSI certification criteria on annual basis
f) Update list of technical training providers for the Training Database
g) Request training using Technical Training Request Form

Regional

Roles and Responsibilities

a) Provide training request to the Rail Safety National Training Program
b) Provide participant names
c) Provide space for course delivery (includes hospitality, if any provided)
d) Provide input into course content through evaluation/validation process and membership in the Rail Safety National Training Committee
e) Provide Subject Matter Experts for development of course content as needed
f) Provide for regionally specific technical training
g) Provide functional branch in HQ of any technical training requirements or any specific technical training course being delivered within that region.