Submission to the Railway Safety Act Review Advisory Panel
By Professionals for Rail Safety Accountability Inc.

Professionals for Rail Safety Accountability Inc. ("PRSA") is a consulting firm that was established in 2003 to promote rail safety and assist parties that are involved with train incidents but who do not have the expertise or knowledge in railway operations, railway regulations or transportation law. PRSA provides necessary expertise and knowledge and may engage experts and specialists that are capable of analyzing incident data to assess responsibility, preventability and determine corrective action.

PRSA would like to thank the Railway Safety Act Review Advisory Panel for the opportunity to present its views on issues relating to the working and overall efficiency of the Railway Safety Act. In its presentation, PRSA will concentrate on certain aspects of the following key issues identified for review and examination by the Advisory Panel:

1. The Efficiency and effectiveness of the legislative/regulatory framework established under the Railway Safety Act – Safety Management Systems - Monitoring, audit, inspection and enforcement.


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Background and Context

I was counsel for one of the parties at the Commission of Inquiry into the Hinton Train Collision, held in Edmonton and Jasper, Alberta in 1986. You will recall that the Commission of Inquiry was called following the collision between a CN freight train and a VIA Rail passenger train, approximately 11 miles east of Hinton, Alberta. Twenty-three people were killed in that collision. Mr. Justice Rene Foisy was appointed pursuant to the Inquiries Act to inquire into the collision and report. The Overview of the Report contains the following, under the heading “Main Findings: general levels of railway safety”:

"It is the Commission’s conclusion that the 8 February disaster resulted from a lack of alertness and a failure to follow established railway operating rules on the part of the CN employees involved in the operations of Train 413, and from a failure on the part of CN to install the superior safety devices in the lead locomotive of Train 413."
The Commission has found no reason to suppose that these were isolated circumstances within the context of the operations of the railway system.

Rather, the Commission believes that the style of operations and the culture of the "railroader", as it has evolved within CN, creates an environment in which otherwise well motivated and responsible people throughout the company place inadequate priority on safety and, if effect, give tacit acceptance to rules violations that affect the safety of CN's rail operations.

Within this culture, rules and procedures intended and developed to ensure the safe and prudent operations of the system have become “background” and ritual, with the result that CN management and its partner in the definition of work environments and conditions – organized labour – fail to place proper or effective emphasis on safety.

This attitude is reflected in measures related to the development, proving, and installation of safety technology, both by the railway and the CTC. There is insufficient priority given to safety technology or to its orderly and effective implementation throughout the system.

It is the opinion of the Commission that the legislative and regulatory environment within which the railway system operates, including the supervisory activities of the CTC, the process whereby regulations are promulgated and enforced, and the effectiveness and rigour with which the CTC moves to correct identified problems, is inadequate.”

That was a judicial inquiry under the *Inquiries Act*. At that inquiry, individuals were required to give evidence under oath, and were subject to cross-examination. Strict measures were put into effect following that judicial inquiry to address railway safety.

**Deregulation of Railway Safety in Canada**

However, in the intervening years, the regulatory regime relating to railway safety was fundamentally changed. The *Railway Safety Act* was introduced in 1989, removing the jurisdiction of the Canadian Transport Commission (a predecessor of the Canadian Transportation Agency) over railway safety, and placing the responsibility of railway safety under the jurisdiction of Transport Canada. In 1999, amendments were introduced to the *Railway Safety Act* that saw a marked deregulation in railway safety in Canada. PRSA believes that this deregulation has resulted in deterioration in railway safety in this country.
PRSA’s Calls for a Comprehensive Independent Inquiry into Railway Safety

Because of its concern as to the state of railway safety in Canada, manifested by certain findings of the Transportation Safety Board with respect to the railways’ inspection and maintenance practices, and the number and severity of railway occurrences, PRSA began to advocate a similar inquiry into railway operations in Canada today as had been undertaken by the Government in appointing Mr. Justice Foisy in 1986 to conduct an inquiry into the Hinton Rail Collision.

PRSA first began calling for an independent inquiry into railway safety in Canada in January of 2004. In a letter to Hon. Tony Valeri, Minister of Transport dated January 27, 2004, PRSA referred to the amendments to the Railway Safety Act that were enacted in 1999 to implement a new approach to rail safety. In that letter, PRSA stated:

“This new approach represented a substantial deregulation of railway safety in Canada, and was welcomed by the railways and heralded by your predecessor. However, the severity and frequency of recent railway occurrences, and the findings of the TSB with respect to inspection, maintenance and compliance enforcement raise the real prospect that the system is not working as intended. PRSA believes that the concept of placing the responsibility on the railways for the safety of rail operations needs to be carefully examined”.

Further serious occurrences at the time prompted PRSA to write again to the Minister Valeri February 10, 2004, reiterating the need for a comprehensive independent inquiry. In that letter, PRSA stated:

“Quite candidly Mr. Minister, we are wondering how many more of these occurrences have to take place before it is considered advisable to initiate a comprehensive independent inquiry into the railways’ operations and maintenance standards and procedures; the state of compliance enforcement; and to determine whether regulatory intervention is required to protect the safety of railway operations in Canada and the innocent public? It is fortunate indeed (and very fortuitous) that the many recent occurrences which we have brought to your attention have involved so few fatalities.”

PRSA received a response to its letters from the Minister’s Chief of Staff Daniel M. Rogers dated March 2, 2004. In that letter, Mr. Rogers stated that:

“At the outset, I would point out that Canada’s railways are among the safest in the world, and long-term statistical trends indicate that they are becoming safer with rail-related accident rates decreasing”.

Mr. Rogers also said that:

“As you know, the department has regular inspection and monitoring programs in place, as well as a mechanism to audit railway infrastructure, equipment, and methods of operation to ensure compliance with established regulations and standards. If non-compliance is found, or if there is a threat to safe railway operations, Transport Canada will take immediate enforcement action”.

PRSA responded to Mr. Roger’s letter in a letter to Minister Valeri dated April 7, 2004, referring to further railway occurrences that had taken place since February 10, 2004, and stating:

“We respectfully submit that the Minister of Transport cannot be satisfied with the safety system in place for Class One railways operating in Canada. He cannot ignore signs that the safety system in place has flaws that is placing an unsuspecting public at an ever-increasing risk. The causes of the railway occurrences outlined in our letters, together with the TSB reports of trains exceeding their operating authority, clearly demonstrate that the present railway safety system and Transport Canada’s monitoring procedures are not serving to protect the public from serious derailments.

Accordingly, we request, once again, that the Minister of Transport order a public inquiry into the specific causes of these occurrences and into the reported unsafe railway operational practices to identify the deficiencies in maintenance, inspection and operational practices of the federal railways. The inquiry would also be asked to recommend procedures the railway employ to correct the deficiencies or face substantial penalties and sanctions for failing to do so. The public must be assured by the Government of Canada that it is doing everything possible to prevent injury and loss to the public due to inadequate maintenance and inspection of the railway trackage and unsafe operating procedures.”

PRSA received a response from the Minister’s Special Assistant – West and North dated May 10, 2004. In that letter, Mr. Basra stated that:

“Transport Canada takes all transportation accidents very seriously. Investigations of incidents and accidents can provide information that is of significant value in advancing railway safety. To this end, the department responds to all of the safety issues identified through its monitoring programs, as well as those raised by the TSB. Safety issues, including those related to the incidents mentioned in your letter, are reviewed and addressed with the railway companies concerned”.
Mr. Basra also said that:

"Transport Canada is committed to continuous improvements in rail safety. In this regard, the department will be further assessing railway companies’ maintenance programs, operations, and culture. This examination will be carried out from the safety management systems’ perspectives of safety planning, practices, and procedures, including their implementation and consistency throughout railway companies. As previously stated, safety monitoring and enforcement programs are currently being modified to improve their effectiveness. The objective is to identify and correct any systemic safety issues and to reduce individual failures to the lowest possible level.

Finally, I would note that Transport Canada has informed railway companies that it expects to see continuous improvement and increased safety. Enforcement action is taken where necessary, and changes being implemented will continue to improve rail safety”.

PRSA wrote once again to the Minister of Transport August 24, 2004, this time to the Hon. Jean-C. Lapierre. In that letter, PRSA referred to many serious railway occurrences that had taken place since receiving Mr. Rajvir Basra’s letter, and stated:

“It is apparent from the letter PRSA received from Mr. Daniel M. Rogers, Chief of Staff of the Office of the Minister of Transport dated March 2, 2004, and from the letter received from Rajvir Basra, Special Assistant – West and North of the Office of the Minister of Transport in April of this year, and from your news release in connection with the derailment two days ago near Beaumont, QC, that great reliance is being placed by your office on the safety management systems monitoring and compliance approach that is currently the regime in place in Canada as the best means of ensuring railway safety. The occurrences that are happening, despite this legislative and regulatory regime, and despite the best efforts of all involved, make it crystal clear that the system is simply not working. Perpetuating that flawed system, by continuing to rely blindly upon the existing legislative and regulatory regime, despite the reality of what is taking place before our eyes, is folly”.

PRSA has made other requests for a comprehensive independent inquiry into railway safety in Canada since that time, but PRSA’s requests have fallen on deaf ears. PRSA knew that the system wasn’t working. PRSA knew that the system needed to be changed. Unfortunately, the system had achieved an “untouchable” status with policy makers in Ottawa.

It took some dramatic developments to demonstrate that the system is inadequate, and needs to be changed. For instance, on August 3, 2005, a CN derailment caused a toxic spill contaminating Lake Wabamun, about 65 kilometres west of Edmonton, Alberta. Two days later, a CN derailment near Squamish, British Columbia contaminated the Cheakamus
River. These are major catastrophes that the current Safety Management System and audit regime was not successful in preventing.

PRSA notes that the Consultation Guidance Document issued by the Advisory Panel describes the Safety Management System currently in place as follows:

“The RSA seeks to promote and provide for safety in the operation of railways using a modern, flexible and efficient regulatory scheme adapted to the current context of the rail sector. A Safety Management System (SMS) is one tool to achieve this objective, and the 1999 amendments to the Act gave authority to implement this approach. An SMS is defined as a formal framework for integrating safety into day-to-day railway operations; it includes safety goals and performance targets, risk assessment, responsibilities and authorities, rules and procedures, and monitoring and evaluation processes.”

The Consultation Guidance Document then asks a number of questions concerning SMS. With respect, the key question concerning SMS is not asked. The key question is “Given the failure of SMS filings and audits to protect railway safety in Canada, should the SMS filing and audit system be supplanted with specific regulation relating to railway safety?” In PRSA’s view, the answer to that key question is “yes”.

**PRSA recommends that the Government call a comprehensive public inquiry to receive and critically test evidence to determine the extent to which the current regime of SMS filings and audits should be supplanted with specific regulation relating to railway safety.**

**Provisions and Operation of the Railway Safety Act – Enforcement powers.**

In the Overview of the Report following the Commission of Inquiry into the Hinton Rail Collision, the following statement is contained under the heading “The Governmental Responsibility”:

“It is essential that the regulatory role of the CTC be strengthened where necessary to ensure safe operations of the railway, and that an independent agency be established with responsibility for enforcement and investigation of all safety related standards.

The Commission recommends that this agency be provided with effective means of enforcement of safety standards, and that it adopt a policy of prosecution of railways and individuals for breaches of these standards. A system of Ministerial penalties similar to that established in the amended Aeronautics Act, in addition to conventional prosecutions through the courts, could strengthen this necessary enforcement capability. In any event, the penalties for safety-related infractions should be severe. ...”
The Report also contained the following recommendation:

"22. That the regulatory system be restructured so that the rule making function is not assigned to the same agency as the supervision, enforcement and investigation functions."

Shortly following the introduction of the Railway Safety Act, the Canadian Transportation Accident Investigation and Safety Board Act was enacted. That statute created the Transportation Safety Board of Canada as an independent agency, whose mandate is to advance transportation safety in the marine, pipeline, rail and air modes of transportation by (1) conducting independent investigations, including public inquiries when necessary, into selected transportation occurrences in order to make findings as to their causes and contributing factors (2) making recommendations designed to eliminate or reduce any such safety deficiencies; and (3) reporting publicly on its investigations and on the findings in relation thereto.

The regime that was thus established with the Railway Safety Act and the Canadian Transportation Accident Investigation and Safety Board Act is structured and characterized by the following:

1. Contrary to Mr. Justice Foisy's recommendation that that the rule making function should not be assigned to the same agency as the supervision, enforcement and investigation functions, the rule making function was assigned to the same agency as the supervision and enforcement functions (i.e. Transport Canada). This creates a conflict of interest that is unacceptable in PRSA's view. Would Transport Canada tend to be critical of a railway's operating or infrastructure practices, when Transport Canada has approved that railway's operating rules, and has conducted an audit of that railway's SMS? Would Transport Canada representatives tend to respond to legitimate concerns about railway safety by extolling the virtues of SMS, rather than recognizing that there is a problem that needs to be addressed?

2. Contrary to Mr. Justice Foisy's conclusion that the regulatory role of the CTC (a predecessor of the Agency) should be strengthened, the regulatory role of the regulator over railway safety was abolished.

3. Contrary to Mr. Justice Foisy's conclusion that an independent agency should be established with responsibility for enforcement and investigation of all safety related standards, the agency that was established with responsibility for investigation of safety related standards (the Transportation Safety Board) was not given any power to enforce its recommendations. As a result, findings and recommendations of the TSB have no teeth.

4. Contrary to Mr. Justice Foisy's conclusion that the penalties for safety-related infractions should be severe, the penalties set out in the Railway Safety Act are woefully inadequate to alter behaviour. The maximum penalty set out in the
Railway Safety Act is $200,000. It has been reported that the CEO of CN received, in 2005, $56,219,496.00 in total compensation. It has also been reported that CN itself realized a net profit in 2005 of $1,556,000,000.00. When CN pleaded guilty to a criminal charge in connection with the McBride derailment in December of 2005, CN was fined $75,000.00. That derailment resulted in the deaths of two CN employees.

PRSA recommends that the enforcement of railway safety be removed from Transport Canada and given to the Transportation Safety Board of Canada.

PRSA also recommends that the Transportation Safety Board of Canada be given authority to levy fines and impose conditions on the railways that are sufficient to alter behaviour that jeopardizes railway safety in Canada.

Related Railway Safety Issues – Collection and dissemination of railway safety data.

Data relating to railway safety is not readily available, and in some cases is not available at all to the public.

On February 20, 2004, PRSA made a request for information relating to the safety management systems of CN and CP. The request was threefold: (1) a request for access to CN and CP's SMS filings since the year 2000 (2) a request for access to CN and CP's annual SMS updates since the year 2000 and (3) a request for access to records pertaining to any audit performed by the Minister of Transport or Transport Canada Staff pertaining to the safety of the works, equipment and operations of CN and CP since the year 2000, including correspondence between Transport Canada personnel and CN and CP, notices and orders issued by Transport Canada to CN and CP and the railways' responses to those notices and orders.

PRSA received three letters from Transport Canada's Access to Information Coordinator dated March 10, 2004 in response to the access to information requests. Those letters stated, in part: "Pursuant to paragraph 9(1)(a) of the Act, an extension of up to 120 days is required beyond the statutory 30-day time limit allowed for the processing of your request. Due to the large number of records involved, meeting the original time limit would unreasonably interfere with the operations of the Department."

In response to this extension, PRSA wrote to Transport Canada's Access to Information Coordinator March 19, 2004, indicating that: "In order to permit us to gain access to at least some of the records that have been requested expeditiously, we ask that you release right away a portion of the records that have been required in our request number 3, file no. A-2003-0049/kf, viz: all notices and orders issued by Transport Canada personnel to the said two railways since the year 2000. These notices and orders should be on file in Ottawa, and do not require consultation with third parties since they were created and issued directly by Transport Canada. Once the release of these notices and orders is accomplished, we request that you continue to process the remainder of our Access to Information Act requests."
Also on March 19, 2004, PRSA filed a complaint submission under the *Access to Information Act* with the Hon. John Reid, P.C., the Information Commissioner of Canada, citing the failure of Transport Canada to disclose the records requested within the 30 day time limit in the Act.


PRSA subsequently received two letters dated June 23, 2004 from Transport Canada’s Deputy Coordinator, relating to two of PRSA’s access requests, indicating, in part, that: “Pursuant to paragraph 9(1)(c) of the Act, an extension is required beyond the statutory 30-day limit allowed for the processing of your request because third party consultations are necessary to comply with the request. These consultations cannot reasonably be completed within the original time limit.” PRSA also received a letter dated July 21, 2004 from Transport Canada’s Acting Deputy Coordinator, relating to the third access request, indicating, in part, that: “Pursuant to paragraph 9(1)(c) of the Act, an extension is required beyond the statutory 30-day limit allowed for the processing of your request because third party consultations are necessary to comply with the request. In addition, consultations with other government departments are also required. These consultations cannot reasonably be completed within the original time limit.”

The Information Commissioner provided PRSA with the result of his investigation by letter dated August 31, 2004. In that letter, the Information Commissioner stated, in part:

“On March 10, within the time limit to do so, TC claimed a 120-day extension pursuant to paragraph 9(1)(a) of the Act, which allows the head of a government institution to extend the legal time limit for its response if the request is for a large volume of records and meeting the original time limit would unreasonably interfere with its operations. The investigation revealed that TC could not provide satisfactory justification that it had met both criteria. Given the large volume of records responsive to your request (6,285 pages), I consider an extension of 60 days to be reasonable. That said, you should have received a response no later than May 25, 2004. As you know, TC failed to provide a response by that date, placing itself in a deemed-refusal situation pursuant to subsection 10(3) of the Act.”

On September 20, 2004, PRSA received two letters from Transport Canada. One letter, from Transport Canada’s Deputy Coordinator, indicated that the requested records were available for review or reproduction. The other letter, from the Minister of Transport’s Special Assistant – West and North, stated that: “…In accordance with the requirements of the Act, consultations must be conducted with third parties. In this instance, consultations are ongoing with CN and CPR. The third parties’ representations will be considered, after which a decision will be made regarding disclosure. In the interim, records that are not subject to consultations were being reviewed and will be released.”
The letter concluded by stating:

"Please let me assure you that Transport Canada makes every effort to comply with the Access to Information Act and to provide the best possible service to persons making requests under the ATIP legislation. Thank you for writing."

When PRSA reviewed the documents that were released by Transport Canada in response to its access to information requests, some of the information contained in the documents had been expurgated.

The expurgated documentation was only received 7 months after the initial request, despite the statutory time limit of 30 days. The fact that the Information Commissioner found that Transport Canada could not provide satisfactory justification that it had met the criteria in the Act for extending the time limit, and the fact that the Information Commissioner found that Transport Canada was in a deemed-refusal situation pursuant to subsection 10(3) of the Act, belies the concluding statement made by the Minister’s Special Assistant - West and North as set out above. There can be no justification for delay or secrecy with respect to the release of such documentation.

**PRSA recommends that the railways’ SMS filings be made available to the public in unexpurgated form by Transport Canada upon request.**

**PRSA also recommends that all records pertaining to any audit performed by the Minister of Transport or Transport Canada Staff, correspondence between Transport Canada personnel and CN and CP, notices and orders issued by Transport Canada to CN and CP and the railroads’ responses to those notices and orders be made available to the public in unexpurgated form upon request.**


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