Canada's Railway Safety Regulatory Regime: Past, Present & Future

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TABLE OF CONTENTS

I. INTRODUCTION

When accidents happen on the railway, catastrophe usually follows for individuals, the public, property, and the environment. The extreme

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weights involved in moving railway equipment give no quarter to anything unfortunate enough to get in its path—whether metal, rock, or flesh. In addition, trains regularly carry dangerous goods through populated urban areas; products whose potential to inflict death and destruction is immense and previously proven.

Canada is no stranger to railway accidents. Part II of this essay explores a few of the more recent accident examples. The country has a complex regulatory regime in place to ensure the safe operation of railways running within its borders, and the safety of those who could suffer damage as a result of railway mishaps—railway employees, the public, the environment. Part III of this essay examines Canada's historical and current railway safety regulatory regime and the "deregulation" of railways, which began in the late 1980s. This part also discusses the present trend toward creeping re-regulation that seems to be occurring in light of a recent spate of headline-grabbing derailments in Canada. Part IV concludes the essay with the suggestion that the government should take back the self-regulation privileges that have been granted to the industry (such as self-inspection and safety management systems) and recognize that deregulation of safety, wherein the railway is responsible for the management of its own safety, is not adequately protecting the interests of the Canadian public, the Canadian environment, or Canadian railway workers.

II. Railway Accidents in Canada

Canada is no stranger to railway accidents both large and small. This section explores a few of the more recent and devastating accidents that have occurred.

A. Railway Employees

Although rarely reported in newspapers, injuries and deaths of railway employees due to accidents on the job are not infrequent. In a contest between flesh and multi-ton moving railway equipment, the latter always prevails. For example, between 1991 and 2004, the Workers' Compensation Board of British Columbia alone accepted lost time claims relating to work accidents from 282 yard locomotive engineers, 667 conductors/brakemen, 319 yard workers, and 331 track maintenance workers.[1] Multiply those statistics across all provinces with operative railways

1. Workers' Comp. Bd. of B.C., Occupational Injuries by Accident Type and Occupation in British Columbia, 1997-2005, Table 7A at 12, http://www.worksafebc.com/publications/reports/statistics_reports/occupational_injuries/1997-2004/assets/pdf/Table%20%207A%2097-04.pdf.

and one can imagine the magnitude of injuries and fatalities suffered by federally and provincially regulated railway employees.

A few recent examples reported in the press highlight the danger that railway employees face. On September 3, 2006, volunteer heavy equipment operator Bruce Harder, 45, was fatally crushed in a derailment on a deactivated section of the White Pass Yukon Railway that sent three other employees to the hospital.[2] On June 29, 2006, Canadian National Railway (CNR) conductor Don Faulkner, 59, and Brakeperson Tom Dodd, 55, were killed when their runaway train plunged into the Fraser Canyon; Locomotive Engineer Gordon Rhodes, 41, sustained injuries when he was thrown from the wreck.[3] Canadian Pacific Railway (CPR) employee Robert Murdock Martin, 44, of Bowden, A.B. was working on an ice-clearing crew in Glacier National Park on December 14, 2005, when a 300 kg. slab of ice fell on him—he died later in the hospital.[4] Darrell Ross, 42, a conductor with Southern Railway (SRY), died October 11, 2005, after being struck by a train that was being coupled in SRY's Abbotsford works yard.[5] A CPR employee was fatally injured while working on the tracks as part of a train crew switching rail cars in the Scotsford Industrial area near Fort Saskatchewan on February 6, 2004.[6] In February 2003, near Belleville, exploding propane tank cars on CPR tracks—including one that was propelled more than a kilometer through the air—resulted in two seriously injured employees.[7] On May 14, 2003, CNR conductor Ken LeQuesne and locomotive engineer Art McKay died when the locomotive they were riding in fell through a trestle bridge and burned near McBride B.C.[8] On December 30, 1999, an

2. *One Man Dead, Three Injured After Derailment on White Pass Yukon Railway*, DAILY NEWS, Sept. 5, 2006, at 12, *available at* LEXIS News Library. *See also Train Derailment Leaves One Dead, Three Injured*, GLOBE AND MAIL, Sept. 5, 2006, *available at* 2006 WLNR 15333210 and *Volunteer Killed in Train Derailment: 'Heart and Soul' of Local Community Loses Life During Railway Project*, THE VANCOUVER SUN, Sept. 5, 2006, at B1.

3. Darah Hansen, *Funerals set for Workers Killed in Train Plunge*, THE VANCOUVER SUN, July 4, 2006 at B6, *available at* LEXIS News Library. *See also* Brian Hutchinson, *Tommy Died a Hero: B.C. Derailment Survivor Recalls how his Co-worker Saved his Life*, NATIONAL POST, July 8, 2006 at A1.

4. *CPR Worker Killed by 300kg Chunk of Ice*, THE VANCOUVER SUN, Dec. 21, 2005, at B7.

5. *Family of Dead Man Wants Answers*, ABBOTSFORD TIMES, Oct. 21, 2005 at 8.

6. *CPR Worker Killed on the Job*, STANDARD FREEHOLDER, Feb. 9, 2004, at 7.

7. Kevin McGran, *Group Urges Inquiry Into Rail Safety; Campaign Follows the Deaths of two Women in Whitby 'Disturbing Trend' of Derailments Causing Concern*, TORONTO STAR, Jan. 23, 2004, at F03. *See also* TRANS. SAFETY BD. OF CANADA, RAILWAY INVESTIGATION REPORT R03T0080: DERAILMENT/COLLISION, CANADIAN PACIFIC RAILWAY TRAIN NO. 410-16, MILE 80.5, BELLEVILLE SUBDIVISION MELROSE, ONTARIO (Feb. 21, 2003), *available at* http://www.tsb.gc.ca/en/reports/rail/2003/r03t0080/r03t0080.pdf.

8. *Canadian National Fined in Fatal B.C. Derailment*, WINDSOR STAR, Dec. 8, 2004, at A15, *available at* LEXIS News Library. *See also* TRANS. SAFETY BD. OF CANADA, RAILWAY INVESTIGATION REPORT R03V0083: MAIN-TRACK DERAILMENT, CANADIAN NATIONAL TRAIN

eastbound CNR train slammed into a "derailed tank car, sparking an explosion. Engineer Yves Theriault, 47, and conductor Paul Davis, 49, were killed instantly, and thirty-five tanker cars were consumed in the resulting fire."[9] In April 1999, two VIA Rail engineers were killed when a Toronto-bound passenger train derailed on a track maintained by CNR near Thamesville. About seventy-five passengers suffered minor injuries.[10] CNR employee William Carson died when a trestle bridge collapsed under the weight of the crane that he was operating which fell into a water-filled ravine during a project to replace wooden trestles with steel frames on October 27, 1997.[11] "The freight train . . . two [employees] were riding in plunged into the Fraser Canyon eight miles south of Lytton on March 26, 1997, an hour and a half after a landslide swept away a portion of the embankment supporting the CNR's track."[12] On August 12, 1996, Ken Trout, Jake Elder, and John Fraser died when their train slammed into runaway boxcars outside of Edson A.B.[13] On January 20, 1995, two CPR crew members were killed when three locomotives and two freight cars carrying zinc sulphide fell thirty-eight meters into Kootenay Lake.[14] Track foreman Roy Rabe, 48, died instantly June 4, 1992,

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NO.356-51-14 MILE 7.9, FRASER SUBDIVISION MCBRIDE, BRITISH COLUMBIA (May 14, 2003), *available at* http://www.tsb.gc.ca/en/reports/rail/2003/R03V0083/R03V0083.pdf.

9. Kevin Dougherty, *Accident Could've Been Far Worse*, THE GAZETTE, Jan. 5, 2000, at A1, *available at* LEXIS News Library. *See also* TRANS. SAFETY BD. OF CANADA, RAILWAY INVESTIGATION REPORT R99H0010: DERAILMENT AND COLLISION, CANADIAN NATIONAL TRAIN NO. U-783-21-30 AND TRAIN NO. M-306-31-30, MILE 50.84, SAINT-HYACINTHE SUBDIVISION, MONT-SAINT-HILAIRE, QUEBEC (Dec. 30, 1999), *available at* http://www.tsb.gc.ca/en/reports/rail/1999/r99h0010/r99h0010.pdf.

10. Madhavi Acharya, *Cuts Haven't Compromised Safety, CN Chief Says; Railway's Profits hit $266 million Amid Cost Cutting*, TORONTO STAR, Apr. 28, 1999, at 1. *See also* TRANS. SAFETY BD. OF CANADA, RAILWAY INVESTIGATION REPORT R99H0007: DERAILMENT/COLLISION, VIA RAIL CANADA INC., PASSENGER TRAIN NO. 74 MILE 46.7 CANADIAN NATIONAL CHATHAM SUBDIVISION, THAMESVILLE, ONTARIO (Apr. 23, 1999), *available at* http://www.tsb.gc.ca/en/reports/rail/1999/r99h0007/r99h0007.pdf.

11. Daniel Sieberg, *CN Fined $50,000 in Fatal Collapse: The Penalty was Levied Against the Company Over a Worker's Death in a Bridge Collapse*, THE VANCOUVER SUN, Mar. 25, 2000 at B5.

12. *Governments Found Not Guilty in Rail Deaths*, THE PROVINCE, Oct. 19, 2003 at A31. *See also* TRANS. SAFETY BD. OF CANADA, RAILWAY INVESTIGATION REPORT R97V0063: DERAILMENT , CANADIAN NATIONAL TRAIN NO.Q-102-51-26, MILE 106.15, ASHCROFT SUBDIVISION CONRAD, BRITISH COLUMBIA (Mar. 26, 1997), *available at* http://www.tsb.gc.ca/en/reports/rail/1997/r97v0063/r97v0063.asp.

13. *See* TRANS. SAFETY BD. OF CANADA, RAILWAY INVESTIGATION REPORT R96C0172: MAIN TRACK COLLISION, CANADIAN NATIONAL TRAIN 117 AND AN UNCONTROLLED MOVEMENT OF 20 CARS, MILE 122.9, CN EDSON SUBDIVISION NEAR EDSON, ALBERTA (Aug. 12, 1996), *available at* http://www.tsb.gc.ca/en/reports/rail/1996/r96c0172/r96c0172.asp.

14. Brian Morton, *Divers Pull Bodies of 2 CP Rail Workers From Lake Train Wreck*, THE VANCOUVER SUN, Jan. 21, 1995, at A6. *See also* TRANS. SAFETY BD. OF CANADA, RAILWAY INVESTIGATION REPORT R95V0017: DERAILMENT, CANADIAN PACIFIC LIMITED, MILE 111.0,

after being hit by a train.[15] A CPR track maintenance employee died September 24, 1987, in an industrial accident near the Mayfair industrial park in Coquitlam.[16]

Note that only a small fraction of the injuries and fatalities of railway employees across Canada are ever reported in the media; only the spectacular accidents are profitably newsworthy. Lost limbs and unremarkable fatalities are often buried in the back pages or omitted from publication altogether.

In 2005 unions representing CNR employees asked federal Transport Minister Jean Lapierre for a safety review of CNR, citing concerns about maintenance and inspection practices and such things as CNR's decision to use long trains.[17] Lapierre ordered a safety review of CNR's operations.[18]

B. The Public

There are three major railway accidents in Canadian history that so profoundly affected the public that policy and regulatory changes resulted from the post-incident political fallout. The first major railway accident occurred in Mississauga, ON, on November 10, 1979, when twenty-four cars of a CPR train derailed at the Mavis Road crossing-at-grade after a journal burnt off, including tank cars of dangerous goods—Toluene, Liquefied Petroleum Gas (LPG), and Chlorine.[19] Fire ensued and three of the LPG tank cars exploded causing extensive damage to property. A tank car loaded with Chlorine ruptured causing escape of the deadly product in gaseous form and nearly a quarter of a million citizens were evacuated for up to five days.[20]

The second major railway accident occurred eleven miles east of Hinton, A.B., on February 8, 1986, when twenty-three people died and seventy-one were seriously injured in a collision between a CNR freight train and a VIA Rail passenger train.[21] Property damage exceeded thirty

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Nelson Subdivision Near Procter, British Columbia (Jan. 20, 1995), *available at* http://www.tsb.gc.ca/en/reports/rail/1995/r95v0017/r95v0017.asp.

15. *CP Rail Charged in Worker's Death*, The Ottawa Citizen, Nov. 12, 1993, at B1.

16. *CP Rail Worker Dies*, The Vancouver Sun, Oct. 2, 1987, at A13.

17. Gerry Bellett, *Safety Review of CN Rail Ordered: Summer of Accidents Prompts Action by Transport Minister*, The Vancouver Sun, Sept. 2, 2005, at A2.

18. *Id.*

19. Grange Comm'n, Report of the Mississauga Railway Accident Inquiry, Ottawa, Can. (1981). *See also* Ian Burton et al., Ontario Ministry of the Solicitor General, The Mississauga Evacuation 2-2 (1981), *available at* http://cidbimena.desastres.hn/docum/crid/Diciembre2004/pdf/eng/doc4131/doc4131.htm.

20. Grange Comm'n, *supra* note 19, at 1-2.

21. *See* Foisy Comm'n, Report of the Commission of Inquiry: Hinton Train Collision PAGE (1986). *See also* Wikipedia, *Hinton Train Collision*, http://en.wikipedia.org/wiki/Hinton_train_collision (last visited Feb. 8, 2007).

million dollars and the environment was polluted by spilled sulfur, diesel fuel from damaged locomotives, and fire.[22]

The third railway accident that affected safety regulatory policy in Canada occurred on Monday, August 12, 1996. All three occupants in the operating cab of the lead locomotive of CNR westward freight train No. 117 were fatally injured in their train, which was travelling at about 54 mph when it collided head-on with a cut of twenty runaway cars moving eastward at about 30 mph, some six miles east of Edson, A.B.[23] The repercussions of this accident are discussed in Part III. A. below.

There are several other more recent railway accidents that have similarly affected the public in general. For instance, on September 30, 2006, traffic was blocked at downtown Abbotsford railway crossings and power cut to 6,500 homes for six hours after twelve cars on a westbound Southern Railway train jumped the track.[24] About 250 passengers on a Via Rail Toronto-Ottawa train were delayed for five hours on October 1, 2006, when three carriages left the tracks.[25] On July 14, 2006, 65,000 Toronto GO Transit commuters were told to find alternate transportation home after a CNR freight train derailed in the city's western suburbs.[26] And on May 28, 2006, hundreds of passengers were evacuated from a Rocky Mountaineer Vacations train after a six car derailment.[27] On May 2, 2005, an Ottawa Central Railway train collision in Maxville resulted in the spill of 98,000 liters of ethanol and the evacuation of roughly 200 residents.[28] On August 8, 2004, a derailment in Estevan forced a number of residents to leave their home and jobs as a result of an anhydrous ammonia leak from one of the derailed cars.[29] On April 12, 2002, a VIA Rail train carrying 109 passengers and fourteen crew, traveling at more than 70 km/h derailed in Stewiacke, folded like an accordion, and crashed into a feed store. An estimated twenty-four of the 123 people on board the

22. Wikipedia, *Hinton Train Collision* at 3.

23. TRANS. SAFETY BD. OF CANADA, RAILWAY INVESTIGATION REPORT R96C0172, *supra* note 14.

24. Christina Toth, *Train Wreck Takes Out Power*, ABBOTSFORD TIMES, October 3, 2006, at 1.

25. *Derailment Delays VIA Riders for Five Hours,* THE OTTAWA CITIZEN, Oct. 3, 2006, at B3.

26. *Thousands Stranded by Toronto Derailment,* CALGARY HERALD, July 15, 2006, at A11.

27. *Train Derailment,* THE PROVINCE, May 29, 2006, at A3.

28. Kevin Lajoie, *Faulty Brake Application Resulted in Train Collision,* STANDARD-FREEHOLDER, Apr. 21, 2006, at 2.

29. *Merchant Found Guilty of Conduct Unbecoming a Lawyer,* STAR-PHOENIX, Feb. 7, 2006, at A6. *See also* TRANSP. SAFETY BD. OF CANADA, RAILWAY INVESTIGATION REPORT R04W0148: NON-MAIN-TRACK TRAIN DERAILMENT, CANADIAN PACIFIC RAILWAY, FREIGHT TRAIN 494-05, MILE 0.01, BROMHEAD SUBDIVISION, ESTEVAN, SASKATCHEWAN (Aug. 8, 2004), *available at* http://www.tsb.gc.ca/en/reports/rail/2004/r04w0148/r04w0148.pdf.

train were injured, some seriously but there was no loss of life.[30] In Red Deer, A.B., on February 2, 2001, the derailment of two cars of toxic chemicals caused one fatality and the evacuation of 1,300 people, thirty-four of whom were treated in hospitals.[31] On December 30, 1999, two CNR trains carrying petroleum products and waste respectively collided causing several explosions and a major fire; 700 people were evacuated from their Mont-St-Hilaire residences near the crash site and passenger and freight rail operations between Montreal and Quebec City were halted or diverted for several days.[32] On February 15, 1986, forty-two people were injured when a Via Rail passenger train from Moncton to Montreal rammed a stationary CNR freight train on a siding at Bernieres, the third accident in a week for Via Rail. It prompted the then Transport Minister Don Mazankowski to order a sweeping crackdown on the safety practices of railways and their employees.[33]

C. The Environment

In addition to the Mississauga and Hinton disasters mentioned above, the following environmentally detrimental railway accidents are notable. On August 2, 2006, twenty loaded cars of a 124-car CPR coal train travelling on CNR track derailed on a railway bridge over the Thompson River; twelve loaded cars of coal spilled into the fish-bearing river.[34] On June 4, 2006, 200,000 liters of petroleum products spilled from four tank cars, half of which spilt into the Riviere-du-Loup, after a CNR derailment 250 kilometers north of Quebec City.[35] The derailment of a forty-four car CNR train on August 3, 2005, spilled 730,000 liters of bunker C oil and wood preservative into Lake Wabamun near Edmonton.[36] Two days later, a CNR derailment in the Cheakamus Canyon near Squamish spilled 40,000 liters of sodium hydroxide into the Cheakamus and other rivers, which wiped out fish stocks.[37]

On August 31, 2005, just west of Hope nine CNR cars that jumped

30. *Five Years Ago Today*, Daily News, April 12, 2006, at A6.

31. McGran, *supra* note 7. *See also* Transp. Safety Bd. of Canada, Railway Investigation Report R01E0009: Derailment, Canadian Pacific Railway, Train No. CP 966-02, Mile 95.6, Red Deer Subdivision, Red Deer, Alberta (February 2, 2001), *available at* http://www.tsb.gc.ca/en/reports/rail/2001/r01e0009/r01e0009.pdf.

32. *Fatal Wreck to Stall Rail Service for Days*, Toronto Star, Jan. 1, 2000, at 1. *See also* Transp. Safety Bd. of Canada, *supra* note 9.

33. *Quebec Train Crash Prompts Crackdown*, The Gazette, Feb. 17, 1986, at A1.

34. *Derailment Dumps Coal in River*, National Post, Aug. 3, 2006, at A6.

35. *CN Cleaning Up After Derailment*, Journal-Pioneer, June 7, 2006, at 6.

36. Bellett, *supra* note 17. *See also* Toxic Spill, Pollution and Urbanization Put Rivers at Risk, The Leader, Mar. 29, 2006 at 25.

37. *Id.*

the track spilled sulphur from open rail cars.[38] A wildfire in May 2001 that started beside CNR rail tracks near Chisholm consumed 1,045 square kilometers of forest and wiped out about a dozen homes and other buildings. Hundreds of firefighters took weeks to quell the blaze at an estimated cost of $31 million. The fire likely started by sparks flying from a faulty wheel on a freight train; CNR, while not admitting guilt or responsibility, paid $10 million in cash and $8.6 million over the next decade toward property damage and a long list of fire-prevention projects in settlement of a law suit initiated by the Alberta Crown.[39]

On February 2, 2001, four rail tankers derailed near Red Deer, one of which began leaking toxic ammonia fertilizer. Seventy-five to eighty tons of pressurized ammonia leaked from the tanker, some of which vaporized into a deadly gas.[40] On January 20, 1995, three locomotives leaking diesel and two freight cars carrying zinc sulphide fell into Kootenay Lake.[41] On October 30, 1987, 16 rail cars of a BC Rail train derailed and an estimated 200 tons of sulphur were dumped into the Cheakamus River. Deadly sulphur-dioxide gas, generated when friction ignited spilled sulphur, settled around the wreck.[42] On March 10, 1980, thirty-one cars of a CNR freight train derailed near Macgregor M.B., twelve of which were carrying vinyl chloride monomer. Two of those cars leaked product into the environment.[43]

The foregoing is but a small slice of the most recent railway accidents in Canada.[44] From these news stories, one can see the need for effective regulation of railway safety to safeguard the interests of the public and society, the environment, and railways and their personnel.

III. Canada's Railway Safety Regulatory Regime

Canada's federal and provincial governments have long recognized the need for effective safety regulation and enforcement of same in the railway industry. While provincial governments regulate railways that

38. Bellet, *supra* note 17, at A2.

39. *CN Payout Largest of Its Kind,* Calgary Herald, Jan. 14, 2006, at C5.

40. Lisa Gregoire, *Jan Haak's 'Great Big Shower': Decontamination Crew Cleans Up at Red Deer,* Edmonton Journal, Feb. 5, 2001, at A7; *see also* Transp. Safety Bd. of Canada, *supra* note 31.

41. Morton, *supra* note 14.

42. *Train Dumps Sulphur Into Cheakamus River,* The Vancouver Sun, Oct. 31, 1987, at A3.

43. Ry. Transp. Comm., W. Div., Saskatoon, Saskatchewan, Canadian Transp. Comm'n, Report On Inquiry Into The Derailment Of CNR Train B806QM09 On March 10, 1980 At Deer, Manitoba, otherwise referred to as "The MacGregor Derailment" (1980).

44. For a brief historical review of some of Canada's more disastrous railway accidents, *see* Hugh A. Halliday, Wreck!: Canada's Worst Railway Accidents (Toronto: Robin Brass 1997).

operate solely within the borders of the applicable province,[45] the federal government regulates the safety of inter-provincial and international railway operations. This essay focuses on Canada's federal railway safety regulatory regime.

A. The Past

For most of the first century after Canada first had railways, the industry was heavily regulated. The *Railway Act* of 1868[46] created the Railway Committee. By the *Railway Act* of 1903,[47] the Board of Railway Commissioners was established in 1904 with "powers and jurisdiction . . . comprehensive in their scope [and] far-reaching in their effects."[48] The Board of Railway Commissioners had regulatory jurisdiction over federally regulated railways until 1938 when, by virtue of *The Transport Act*,[49] it was replaced by the Board of Transport Commissioners, which had "authority over inland waterways and airlines, along with jurisdiction over railways, telegraphs, telephones, and express companies."[50] The Board of Transport Commissioners existed until 1967 when the *National Transportation Act*[51] caused the amalgamation of the Board of Transport Commissioners, the Air Transport Board, and the Canadian Maritime Commission, which formed the new Canadian Transport Commission (CTC).[52] "The [CTC's] mandate was to deal with all modes of transportation as a competitive whole 'with the object of co-ordinating and harmonizing the operations of all carriers engaged in transport by railways, water, aircraft, extra-provincial motor vehicle transport and commodity pipelines.'"[53]

The CTC exercised three main functions over the transportation industries in Canada: adjudication, economic and safety regulation, and accident investigation. "This could lead to a conflict of interest where all

45. *See generally* Railway (Alberta) Act, R.S.A., c. R-4 (2000); British Columbia Railway Act, R.S.B.C., c. 36 (1996); Manitoba Railway Act, R.S.M., c. 141 (1990); Shortline Railways Act, S.N.B., c. S-8.1 (1994); Railways Act, S.N.S., c. 11 (1993); Shortline Railways Act, 1995, S.O., c. 2 (Can.); Railway Act, 1989-90, S.S., c. R-1.2 (Can.).

46. Railway Act, 1868 S.C., ch. 68 (Can.).

47. Railway Act, 1903 S.C., ch. 58 (Can.).

48. Canadian Transp. Agency, 100 Years at the Heart of Transportation: A Centennial Historical Perspective of the Canadian Transportation Agency and its Predecessors (Ottawa: Minister of Public Works and Government Services Canada, 2004) at 6.

49. The Transport Act, 1938 S.C., ch. 68 (Can.). *See also* Canadian Transp. Agency, *supra* note 48, at 26

50. Canadian Transp. Agency, *supra* note 48, at 30.

51. National Transportation Act, 1967 S.C., ch. 68 (Can.). *See also* Canadian Transp. Agency, *supra* note 48, at 48.

52. *Id.*

53. *Id.* at 53.

three of these functions were carried out by the same body."[54]

After the Mississauga disaster, the Privy Council took the extraordinary measure of appointing a Board of Inquiry to investigate it. This was unusual because "[t]he railway industry and its accidents [were] by statute under the continuous [jurisdiction] of the Canadian Transport Commission."[55] In addition to recommending more stringent regulation regarding dangerous goods transportation, the Grange Commission recommended that the "CTC should continue and expand its Monitoring of Train Operations Programme [because] the supervision of train repairs and train inspections cannot be left entirely to the railways."[56] The Commission also recommended that the "CTC should continue and expand its independent investigations of accidents and should report thereon regularly to the public."[57] As a result of the inquiry into the Hinton disaster, the Foisy Commission stated 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."[58]

By the late 1980s, the federal government believed "that safety, no matter what the prevailing regulatory environment might be, should be addressed through the development and enforcement of effective safety standards and education, not by increasing the degree of economic regulation."[59] A major reorganization of the transportation regulatory regime took place in 1988. The amended *National Transportation Act*[60] became law on January 1, 1988, and the CTC was disbanded, its functions being split between various new bodies. The adjudicative function was vested in the National Transportation Agency, which became the Canadian Transportation Agency[61] in 1996.[62] More importantly (for the purposes of this paper) the regulatory function, including safety regulation, was vested in Transport Canada[63] and the investigative function was vested in

54. Collin J. Churcher, *A Federal Government Perspective: Railway Safety Regulation, in* THE UNIVERSITY OF MANITOBA TRANSPORT INSTITUTE, TRANSPORT SAFETY: PROCEEDINGS OF A CONFERENCE, OCCASIONAL PAPER NO. 8, 14 (John Heads, ed. July 1989).

55. GRANGE COMM'N, *supra* note 19, at i.

56. *Id.* at 207-8.

57. *Id.* at 208.

58. FOISY COMM'N, *supra* note 21, at 5.

59. Ramsey W. Withers, *Transportation Safety and Economic Regulatory Reform – The Canadian Perspective, in* TRANSPORTATION SAFETY IN AN AGE OF DEREGULATION 307 (Leon N. Moses & Ian Savage eds., 1989).

60. National Transportation Act, 1987 S.C., ch. 34 (Can.).

61. Canada Transportation Act, 1996 S.C., ch. 10 (Can.).

62. CANADIAN TRANSP. AGENCY, *supra* note 48, at 74-99.

63. Railway Safety Act, 1985 S.C., ch. 32 (Can.); Transportation of Dangerous Goods Act, 1992 S.C., ch. 34 (Can.).

the Transportation Safety Board of Canada.[64] This reorganization/deregulation "effectively created the institutional separation of rail safety regulation, accident investigation and economic regulation."[65] As a result of the Edson accident in 1996, the Transportation Safety Board of Canada

> identified six broad areas of safety concern that were putting the rail transportation system at risk. The Board questions: [1] The effectiveness of standard railway operating procedures and practices for securing equipment from the perspective of determining how many hand brakes to apply, the training and supervision of operating personnel, and any special considerations that may pertain at particular locations. [2] The adequacy of the rail traffic control system for detecting runaways from the perspective of the ergonomics of workstation displays and warnings, and the policies, procedures, and training for controllers. [3] The variability of braking effectiveness on Government grain covered hopper cars with respect to the design of the hand brakes and their maintenance and the apparent lack of knowledge among railway employees of that variability. [4] *The adequacy of rail safety regulatory overview with respect to the capability to evaluate the rail industry's compliance with national safety standards.* [5] *The effectiveness of company safety management programs from the perspective of ensuring that safety-related information is effectively communicated.* [6] The extent to which the railways rely on strict rules compliance, often as the only defence against human error. . . . [T]he Board has issued two recommendations: one aimed at improving employee understanding of the wide variability in hand brake effectiveness, particularly on Government grain covered hopper cars, and one aimed at *improving the regulator's ability to effectively evaluate the railways' ability to maintain national safety standards.* In addition, in its future investigations of rail occurrences, the Board will continue to assess both the effectiveness of the railways' supervisory policies, procedures and practices, and the degree to which the railways are able to balance the role of rules compliance with the need for a safety system that is resistant to human error.[66]

B. THE PRESENT

1. Transport Canada

Presently in Canada, Transport Canada regulates railway safety and the Transportation Safety Board of Canada investigates and reports on railway accidents. One of Transport Canada's mandates is to carry out the objects of the *Railway Safety Act*:[67]

64. Canadian Transportation Accident Investigation and Safety Board Act, 1989 S.C., ch. 3 (Can.).

65. RY. SAFETY ACT REVIEW COMM., REPORT OF THE RAILWAY SAFETY ACT REVIEW COMMITTEE 33 (1994).

66. TRANS. SAFETY BD. OF CANADA, *supra* note 14 (emphasis added).

67. Railway Safety Act, 1985 S.C., ch. 32 (Can.).

> (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.[68]

Transport Canada believes that "[u]nder the *Railway Safety Act, responsibility for safety lies with those who are subject to the Act* [the railways themselves]. Railway companies must conform to the requirements of the Act and related rules and regulations in operating and maintaining their railways."[69]

In 1993, Transport Canada predicted that "[o]ne third of the rail safety regulations [would] be revoked, and another half would be revised to reflect new technologies and maintenance practices or reoriented to performance standards."[70] Subsequent to the deregulation of the transportation industries, the railway safety regulatory regime has become one of practical self-regulation whereby the railways themselves formulate safety rules which the regulator must then approve.[71] With regard to enforcement and compliance:

> [a]n inspector's key compliance and safety activities involve: MONITORING: Inspectors ensure compliance through audits and inspections. They also investigate complaints and incidents. ENFORCEMENT: In the event of non-compliance, inspectors are also required to enforce legal obligations, which can result in the prosecution of corporations and individuals. PROMOTION: Inspectors routinely advise individuals and groups on legal and regulatory requirements. By promoting awareness of the requirements, these activities enhance safety and security.[72]

In practice, Transport Canada's Railway Safety Inspectors (RSIs) have relied on the railways' voluntary compliance and only as a last resort would they issue notices or orders under *Railway Safety Act* Section 31.[73] In fact, "[a]n order can only be issued when there is an immediate threat to safe railway operation [and the] railway may request an immediate review and the Minister has the power to revoke or alter the decision of the Inspector. Finally, the order may not tell the railway how to resolve

68. *Id.* § 3.

69. TRANSPORT CANADA, THE ROLE OF RAILWAY SAFETY INSPECTORS (emphasis added), *available at* http://www.tc.gc.ca/railway/pamphlet/role_rsi.htm.

70. TRANSPORT CANADA, REGULATORY REVIEW INITIATIVE, VOL. I 24 (1993).

71. Railway Safety Act, *supra* note 66, §§ 19, 20.

72. *Id.*

73. RY. SAFETY ACT REVIEW COMM., *supra* note 65 at 70. *See also* Churcher, *supra* note 54, at 16.

the problem because this is a management prerogative."[74]

Only in the last decade has Transport Canada begun to prosecute railways for non-compliance under *Railway Safety Act* Section 41 and the *Canada Labour Code*[75] Section 148.[76] Prior to 1994, the Railway Safety Directorate of Transport Canada had never used *Railway Safety Act* Section 41 because it did "not believe that the use of [the section was] an appropriate avenue for safety enhancement."[77] The *Railway Safety Management System Regulations*[78] allow railways the opportunity to "define the safety plan and regime against which their safety and compliance performance will be assessed."[79] Under deregulation "[i]t is now very clear that the railway is responsible for the management of its own safety."[80] In 2001, Transport Canada reaffirmed that "[m]onitoring the transportation industry to ensure the continued fulfillment of *safety obligations that have been granted to industry (i.e. self-inspection, safety management systems)* will continue to be one of the department's key priorities."[81]

2. *Transportation Safety Board of Canada*

The Transportation Safety Board of Canada's mandate is:

> to advance transportation safety by (a) conducting independent investigations, including, when necessary, public inquiries, into selected transportation occurrences in order to make findings as to their causes and contributing factors; (b) identifying safety deficiencies as evidenced by transportation occurrences; (c) making recommendations designed to eliminate or reduce any such safety deficiencies; and (d) reporting publicly on its investigations and on the findings in relation thereto.[82]
>
> In making its findings as to the causes and contributing factors of a transportation occurrence, it is not the function of the Board to assign fault or determine civil or criminal liability, but the Board shall not refrain from fully reporting on the causes and contributing factors merely because fault or liability might be inferred from the Board's findings.[83]

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74. RY. SAFETY ACT REVIEW COMM., *supra* note 65 at 70.

75. Canada Labour Code, R.S.C., ch. L 2 (1985).

76. *Id.* §148. *See* Bellett *supra* note 17; Jack Keating, *CN Rail Fined $75,000 in Deadly Bridge Crash: Two Employees Died When Cars Plunged*, THE VANCOUVER PROVINCE, Dec. 8, 2005, at A13. *See also* TRANSPORT CANADA, RAILWAY SAFETY COMPLIANCE POLICY (Jan. 2001), *available at* http://www.tc.gc.ca/railway/Compliance_Manual/Compliance_Policy.htm.

77. RY. SAFETY ACT REVIEW COMM., *supra* note 65 at 70.

78. Railway Safety Management System Regulations, SOR/2001-37 (Can.).

79. RAILWAY SAFETY COMPLIANCE POLICY, *supra* note 76.

80. Churcher, *supra* note 54 at 14, 15.

81. TRANSPORT CANADA, LOOKING TO THE NEW MILLENNIUM: TRANSPORT CANADA'S 2001-2004 BUSINESS PLAN – AN UPDATE 13 (emphasis added), *available at* http://www.tc.gc.ca/Finance/BP/2001-2004/en/new_millennium_e.pdf.

82. Canadian Transportation Accident Investigation and Safety Board Act, 1989 S.C., ch. 3 § 7(1) (Can.).

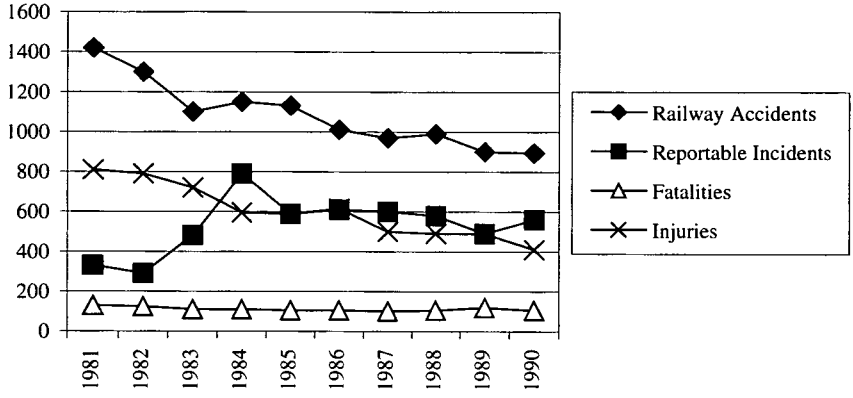
83. *Id.* § 7(2).

In 1994, the government received a recommendation that the "TSBC should adopt risk management as a fundamental organizational principle."[84] The government agreed and added that "risk management principles [prove] especially useful in setting priorities and allocating resources."[85] This is an important point since "only 1.3 per cent of all accidents are investigated by the TSB"[86] and thus the Board must apparently prioritize heavily when allocating the sparse resources it procures from the federal government to fulfill its mandate.

3. Statistics

How has Canada's railway safety fared under deregulation?

ACCIDENTS 1981-1990[87]



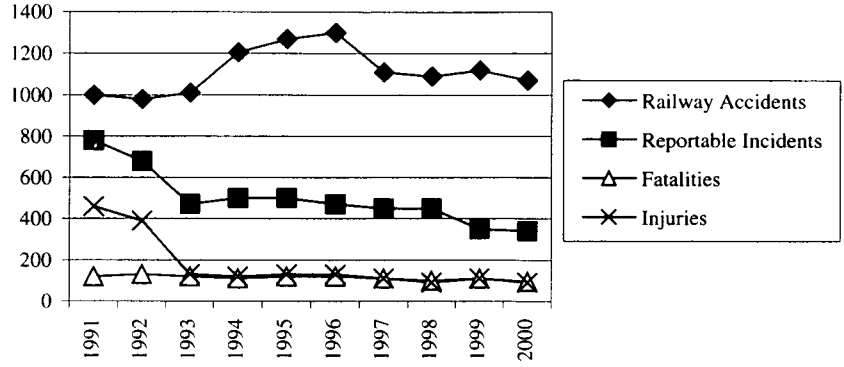
84. CANADIAN TRANS. ACCIDENT INVESTIGATION AND SAFETY BD. ACT REVIEW COMM., REPORT OF THE CANADIAN TRANSPORTATION ACCIDENT INVESTIGATION AND SAFETY BOARD ACT REVIEW COMMISSION 43 (1994).

85. GOV'T OF CAN., GOVERNMENT OF CANADA RESPONSE TO THE REPORT OF THE CANADIAN TRANSPORTATION ACCIDENT INVESTIGATION AND SAFETY BOARD ACT REVIEW COMMISSION 2 (1995).

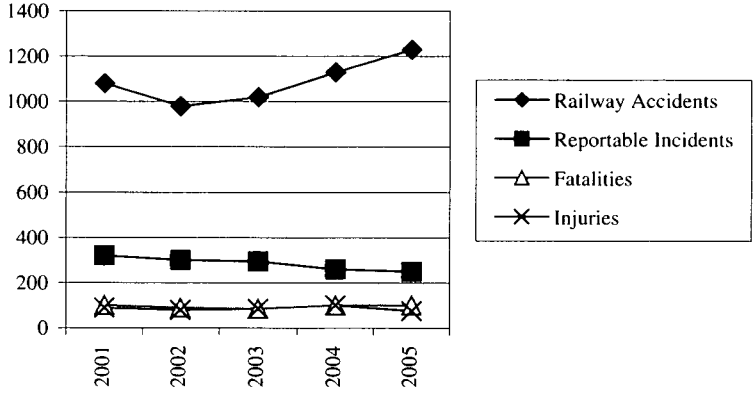
86. Kevin McGran, *Freight Train Accidents Soar*, TORONTO STAR, March 6, 2006, at A01.

87. Transportation Safety Board of Canada, *TSB Statistical Summary: Railway/Commodity Pipeline Occurrences 1990* (Ottawa: Minster of Supply and Services, 1992) at 15.

ACCIDENTS 1991 - 2000[88]



ACCIDENTS 2001 - 2005[89]



From the foregoing statistics, it appears deregulation may have initially contributed to lower reportable incident rates, fatalities, and injuries. However, while railway accident rates were in a decade-long steady decline under the more rigorous pre-1989 regulatory system, after deregulation, accident rates shot up dramatically until 1996. Once again, since 2002, railway accident rates in Canada have been suffering a steep increase. In a recent report[90] the TSB made the following findings:

88. Transportation Safety Board of Canada, *TSB Statistical Summary: Railway Occurrences 2000* (Ottawa: Minster of Supply and Services, 1992) at 13.

89. Transportation Safety Board of Canada, Rail Occurrence Statistics, http://www.tsb.gc.ca/en/stats/rail/2004/statssummaryrail04_sec2.asp (last visted May 12, 2007); Transportation Safety Board of Canada, Rail Occurrence Statistics (preliminary), http://www.tsb.gc.ca/en/stats/rail/2005/prelim_2005.asp (last visit May 12, 2007).

90. TRANS. SAFETY BD. OF CANADA, SAFETY ISSUES INVESTIGATION REPORT SII R05-01/1977: ANALYSIS OF SECONDARY MAIN-LINE DERAILMENTS AND THE RELATIONSHIP TO BULK TONNAGE TRAFFIC 17, *available at* http://www.tsb.gc.ca/en/reports/rail/studies/sIIr0501/sIIr0501.pdf.

> Although railways recognize the accelerated rate of track degradation associated with bulk unit train tonnage on secondary main lines, the occurrence record indicates that an appropriate balance between increased track degradation and timely infrastructure maintenance and/or renewal has not been achieved. Although railways are responsible for putting measures in place to keep the track safe and in compliance with the *Railway Track Safety Rules* (TSR), the TSR may be insufficient to ensure safety because they do not consider the adverse effects of overall increased traffic and specifically bulk unit train tonnage on secondary or feeder track systems over the long term. Inadequately inspected and maintained rail joints represent a critical point of vulnerability since they are prone to defect development and failure. Inspections of rail joints using current rail defect detection equipment or geometry cars are unable to identify joint bar defects. . . .While rail defect testing reduces the risk of broken rail derailments, the detection of all internal rail defects is not within the capacity of the defect testing methods currently in use.[91]

British Columbia recorded 15 main-track train derailments in the first five months of 2006, up from 12 in the same period of 2005 according to the TSB.[92]

C. The Future

In January 2004, "[a] group of railway industry professionals [called] for Ottawa to conduct an inquiry on rail safety [after a] train derailment, which killed two women in Whitby. A Canadian Pacific train jumped the rails and several containers rolled down an embankment, crushing a car and its occupants."[93]

> Winston Smith, . . . a Winnipeg-based lawyer who lectures at the University of Manitoba on rail safety, says the group of like-minded railway professionals got together to shine a spotlight on 'a disturbing trend' of derailments that raise 'concerns about the safety of railway operations in Canada.' . . . 'Our concern here is about the deteriorating condition of the railway bed,' said Smith. 'The railways will tell you they're spending a lot of money on upgrading their cars and siding lengths. What they're ignoring in our view is the maintenance and inspection practices. There's fewer and fewer people out there and fewer inspections taking place.' Smith said an inquiry should look at whether Transport Canada should regulate railways and conduct maintenance checks, or audit the checks that are now [done] by the railways themselves. 'Railways have been allowed in the last little while to regulate their own safety,' said Smith. 'Do we go back into regulation? Something's got to happen to force the railways to start concentrating on keeping (the track bed) conditioned to handle the heavier cars, the longer trains and it

91. *Id* at 23.

92. Victoria Voices, *Train derailments up this year: 15 main track incidents*, http://www.victoriavoices.org/2006/07/train-derailments-up-this-year-15-main-track-incidents/.

93. McGran, *supra* note 7.

> appears they're not spending the money to do so'."[94]
> [O]nly 1.3 per cent of all accidents are investigated by the TSB, with the rest filed under 'data collection.' . . . [S]erious accidents not probed by the TSB include some in which dangerous goods such as ammonium nitrate, sodium chlorate and sulphuric acid were spilled. The TSB says it's at the limit of its staff and has to be selective in what it investigates—injuries, evacuations and magnitude of damage are factors considered. . . . Transport Canada—the rail industry's regulator—is either unable or unwilling to prosecute the railways, with five convictions from seven prosecutions since 1999 under the *Railway Safety Act*, a span that includes 7,658 accidents. . . . Critics—unions, environmentalists and former rail employees—believe the industry accepts derailments as the cost of doing business, that speed is more important than safety [and] they're not happy the industry is allowed to write its own rules and rewrite recommendations from the investigating body before accident reports are published.[95]

"In the past 10 years, CN Rail has been prosecuted seven times for offences under the *Railway Safety Act*. In the same period, there have been no prosecutions of its competitor, CP Rail—the second largest rail carrier in Canada. Of those seven charges, CN Rail pleaded guilty on three occasions and was acquitted once. Three cases [were] still before the courts [in September 2005]."[96] In one of those cases, CN pled guilty under the *Railway Safety Act* and was fined $75,000 while two charges under the *Canada Labour Code* were stayed.[97]

A March 8, 2006, editorial in the Toronto Star called on Ottawa to "consider taking a more active role in pressing regulations on" the railway industry after "analyzing accident reports produced by the Transportation Safety Board and obtained through a federal access to information request, the *Star* found there were 1,246 train accidents [in 2005]—more than in any year over the past decade—including 215 accidents involving hazardous and toxic loads."[98] Presently a federal NDP Member of Parliament is pressing for an "inquiry based on recent figures showing a sharp increase in rail accidents across Canada" and that given the "number of violations of the Railway Safety Act[, t]he government must urgently and immediately take up the responsibility for the public's safety."[99]

In light of the increased rate and notoriety of railway accidents in Canada, Transport Canada Railway Safety Inspectors appear to have increased their use of enforcement tools; viz. orders under *Railway Safety*

94. *Id.*
95. McGran, *supra* note 86.
96. Bellett, *supra* note 17.
97. Keating, *supra* note 76.
98. Editorial, *Put Rail Safety Back On Track*, TORONTO STAR, March 7, 2006, at A18.
99. *MP Seeking Probe into Rise of B.C. Rail Accidents*, THE VANCOUVER PROVINCE, Feb. 24, 2006, at A19.

Act Section 31. In December 2005, Transport Canada ordered CNR to observe "specific safety requirements 'to help ensure they can operate safely' on a section of track near Squamish, B.C." on the former BC Rail line where CNR had several notorious derailments in 2005.[100] However, creeping re-regulation through inspectors' reactive *ad hoc* use of notices and orders, while commendable, will not cure the problems with Canada's virtually self-regulated railway safety regulatory regime.

In order to restore the confidence of the Canadian public in the safety of railway transportation in Canada, Parliament must move to restore rail safety regulatory power primarily to Transport Canada or an equivalent independent body. Government should take back the "safety obligations that have been granted to industry (i.e. self-inspection and safety management systems)" and recognize that deregulation of safety wherein "the railway is responsible for the management of its own safety" is not adequately protecting the interests of the Canadian public, the Canadian environment, or Canadian railway workers. To private railway companies, whose *raison d'être* is to make maximum profits, expensive investments in safety—i.e. proactive track and equipment maintenance—will always be subordinate to other competitive factors when subjected to a cost-benefit analysis. There is an inherent conflict of interest in vesting the subject of regulation with the power of self-regulation. In the context of railway safety—where thousands of tons of steel and dangerous commodities careen through our communities twenty-four hours a day, seven days a week, Canadians cannot afford to allow that conflict to continue.

In August 2006, Lytton's Mayor Chris O'Connor called on "[c]ommunities . . . to put pressure on the provincial and federal governments to raise the safety standards of Canada's railways."[101] There is hope that Canada's parliamentarians are beginning to take note. On October 31, 2006, the all-party Standing Committee on Transport, Infrastructure and Communities "unanimously decided to conduct 'an in-depth inquiry into rail safety in Canada and particularly rail accidents in British Columbia and Western Canada.'"[102]

What the future holds for Canada's railway safety regulatory regime is difficult to discern.[103] However, if the trend toward increased rates of railway accidents continues unchecked, it is only a matter of time before

100. Chris Sorensen, *Transport Canada Imposes Safety Restrictions on CN Rail*, NATIONAL POST'S FINANCIAL POST & FP INVESTING, Dec. 15, 2006, at FP6. *See* Press Release, Transport Canada, Transport Canada Revises CN's Safety Requirements in the Squamish Area, Mar. 7, 2006, http://www.tc.gc.ca/mediaroom/releases/pac/2006/06-p02e.htm.

101. UTU Local 353 London, http://www.utu353.org/News/2006/Aug06/standards.php (last visit May 12, 2007).

102. Scott Simpson, *MPs Set to Grill CN Over Railway Safety in B.C.*, THE VANCOUVER SUN, Nov. 3, 2006, at H3.

103. This is particularly the case given the recent election of a free-market oriented, industry

Canadians are confronted with another Mississauga, Hinton, Edson, or worse.

IV. Conclusion

Trains are fast, powerful, may weigh many thousands of tons, often carry explosive or deadly poisonous dangerous goods, and operate day and night around the clock through our communities, mere meters from our homes and our children's schools. Accidents can and do happen, often with fatal and sometimes with catastrophic results. Railways' potential to inflict death and destruction is immense and previously proven.

The deregulation of Canada's railway safety regulatory regime, which occurred in the late 1980s, making the railway responsible for the management of its own safety has not, and is not, adequately protecting the interests of the Canadian public, the Canadian environment, or Canadian railway workers. In order to restore the confidence of the Canadian public in the safety of railway transportation in Canada, Parliament must move to restore rail safety regulatory and effective enforcement power to Transport Canada, or an equivalent independent body. It is time for government to take back the safety obligations that have been granted to the railway industry; viz. self-regulation.

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friendly minority federal Conservative government. It was the Mulroney Conservatives that initially deregulated railway safety in 1989.