

Recommendations for improving Safety Management Systems Oversight Regime.

A Brief Submitted to the Common Transport Infrastructure and Communities Committee: Investigation into railway safety subsequent to his testimony, June 17, 2021

By Bruce Campbell:

[“Regulatory capture is](#) the result or process by which regulation, either in law or application, is systematically directed away from the public interest towards the special, private interests of regulated industries, largely but not exclusively by the intent and actions of industries themselves.” Under regulatory capture the regulated industry is able to divert the regulatory agency from its primary mandate of protecting the public. There is evidence of a capture–complicity relationship in the rail transportation sector. These recommendations aim to bolster the regulator with countervailing powers in order to rebalance the relationship from one of deference to one of necessary tension.

- Restore resources to regulatory agencies. They have undergone a major erosion over the last 3-4 decades. Strengthen in-house professional analytical and research expertise in order to be able to effectively submit and evaluate regulatory proposals, company risk assessments; and conduct independent systemic risk assessments. Regulatory resources have been increased modestly in the last few years, but they pale in comparison to what has been cut. Moreover, there is no commitment to make them permanent. Statistics for Rail Safety and Transportation of Dangerous Goods Directorates are no longer specified independently in the Departmental Plans. The increase in resources for the transportation of dangerous goods directorate is largely because it has been consolidated and now regulates all modes of transportation.
- Audits have largely replaced unannounced on- site inspections. The statistics do not distinguish between the two and yet they are entirely different operations. Audits which take place usually in company offices have been referred to as a rubberstamp checklist. Transport Canada needs to distinguish between these inspections in the published statistics. Inspections should be the primary means by which companies are held accountable. Audits and inspections (and the inspectors doing them) should be separated within each modal safety division.
- Whistleblower protections should be taken out of SMS. They clearly contradict the SMS goal of a positive safety culture—one in which safety values are firmly entrenched in the minds of managers and employees at all operational levels and respected on a daily basis in the performance of their duties—when they involve companies that operate based on a culture of fear and retribution. The ranking of two international bodies on the effectiveness of [whistleblowing frameworks in 37 countries](#), which placed Canada tied for last provides ample justification for this change. In 2017, a parliamentary committee belatedly reviewed the legislation and recommended 25 changes, none of

which the government has implemented to date. In 2021, [Parliament again sent these recommendations to the government](#). They should be enshrined in legislation as in the US, and there should be an independent office for this purpose. A robust whistleblower protection program will ensure that both private and public sector employees who come forward with safety concerns will not be harassed and threatened.

- Fatigue management regulations in SMS are ineffective and allow companies to get away with practices driven by cost considerations, that are not science-based and constitute a major risk to safety of workers and the public. Science based provisions should be enacted in legislation.
- Rail Safety and Transportation of Dangerous goods regulatory directorates within Transport Canada are compromised by the Department's dual mandate of the economy and safety. This despite repeated assurances by the Minister that "safety is my number one priority." They should become stand-alone agencies reporting to parliament.
- Mandate time limits for action by Transport Canada in response to Transportation Safety recommendations, with penalties for noncompliance.
- Mandate a searchable, on-line database on accident and incident reporting. All organizations that handle or transport dangerous goods should be registered with Transport Canada in an official database and be required to maintain certification. Both databases should be publicly accessible. Unlike the United States, Canada does not have a dangerous goods registry.
- Mandate rerouting of trains carrying dangerous goods away from heavily populated areas where possible via company interchange agreements and other means.
- Mandate the implementation of long-recommended, enhanced safety systems: satellite-based systems for monitoring and controlling train movements [electronic train control] and modern electro-pneumatic braking systems [ECP]. Railways in the US are far ahead of Canada in implementing these measures. The committee should recommend a clear timetable for implementation. Vague calls for further study are not tenable.
- Curb "revolving door:" namely, negative consequences of movement of personnel between industry and government described to me as, "They don't take off the railway hats". Managers seeking employment with industry down the road will tend to pull their punches to remain on good terms with the companies they regulate. Measures should include training for those coming from industry on their duties as guardians of the public interest; an effective conflict of interest system and other ethical rules, and a cooling off period limiting movement back to industry or as lobbyists. Ensure salaries and career opportunities for public sector employees are comparable to the private sector.

- Hold senior government officials, company executives, directors and owners, to a higher standard of accountability, including legal liability, for decisions, which endanger public health and safety, and the environment. Restore Privy Council guidelines for ministerial responsibility—weakened in 2011—as follows: “Ministers are individually responsible to Parliament and the prime minister for their own actions and those of their department, including the actions of all officials under their management and direction, whether or not the ministers had prior knowledge.”
- The Lac-Mégantic disaster revealed a convoluted accountability ladder, a governance structure which provided protection from direct accountability by the most senior departmental officials and politicians.
- Government should make major changes to its overall regulatory policy document, the *Cabinet Directive on Regulatory Policy*, and eliminate the Red Tape Reduction Act and one-for-one rule, both which have contributed to a mentality supporting financial savings over safety. Government must prioritize the precautionary principle over competitiveness considerations when taking decisions about health, safety and environment.
- Increase parliamentary scrutiny of regulations, to ensure consistency with legislation. There is a tension in the federal regulatory landscape between legislation enacted by Parliament and Executive control of regulatory regimes without regard to the limits imposed by Parliament. **According to Ed Schmidt, former General Counsel, Department of Justice**, duty to comply with law has been abandoned by the DoJ. It is now only a matter of “risk tolerance” and “risk management”. According to Schmidt, DoJ’s assumption that it is always its duty to defend executive actions in litigation, even when its actions were believed to be almost certainly unlawful. [Can provide more information if requested]
- Provide financial and other forms of support to include, public-interest groups, municipalities, etc. to enable more broad-based citizen engagement in the legislative and regulatory process, thereby reducing the industry for on power over the regulator.
- SMS, currently protected under commercial confidentiality, should be accessible to outside scrutiny.
- Access to information laws should be strengthened to require lobbyists make public more information about their activities, and provide more information accessible to the public, fulfilling the government’s election promise of “information on demand.”
- The new NAFTA (CUSMA) Regulatory Cooperation Council [RCC] working groups which are charged with harmonizing regulations across North America, should be accountable to parliamentary and public scrutiny to ensure it is not a forum for behind-the-scenes deregulation.

- Hunter Harrison pioneered the cost-cutting operating model known as *Precision Scheduled Railroading*, or PSR, when he was CN CEO in the early 2000s, and later implemented it at CP Rail. All major railways have now adopted his model with the exception of Warren Buffet's BNSF. PSR's main tenets put company profits and investors before all. Keith Creel is Mr. Harrison's best-known protégé -- succeeding him as CEO at CP. The chairman of the Transportation Committee in the U.S. House of Representatives, has very recently called for a study on the impact of the PSR operating model, including on rail safety, *The Commons Transport Committee should consider conducting a similar study*.
- The penalties under the Railway Safety Act are still considerably lower than other federal statutes such as the Environmental Protection Act. They should be increased as should those under the TDG Act.
- Government should put an end to the historical artifact of conferring extraordinary policing powers to CN and CP Rail. CP's investigation of itself in the wake of the Field, BC tragedy provides ample evidence for justifying its removal.
- Previous parliamentary investigations into the Lac-Mégantic disaster, both politically controlled by majority governments, had limited mandates. The Transportation Safety Board investigation [left many unanswered questions](#). Both Conservative and Liberal governments, repeatedly refused to hold an independent judicial into the tragedy. Both Transport Canada and the railways did not want uncomfortable details of their operations, oversight and accountability to come to light. The citizens of Lac-Mégantic deserve to know the truth about what happened, why it happened, and who was accountable.
- Above all, Transport Canada must ensure that SMS are part and parcel of an effective, adequately financed, comprehensive system of regulatory oversight: on-site inspection, surveillance and enforcement supported by sufficient, appropriately trained staff. If the Committee determines SMS falls short in this regard, SMS should be suspended and replaced by conventional oversight until this change occurs.

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Transportation Safety Management Systems – Still not right; Les Systèmes de Gestion de la
Sécurité dans les Transports – Encore du travail à faire, 2020.
He was a member of the advisory committee of the Auditor General's rail safety investigation,
2021*