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Railway Safety Act Review Panel
Transport Canada

Via e-mail: TC.RSARReview-ExamenLSF.TC@tc.gc.ca

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Re: Railway Safety Act Review

Dear Panel Members,

As you are aware, the Lac-Mégantic disaster has raised very serious questions about the effectiveness of Transport Canada's approach to railway safety regulation. These concerns have been reflected in the work of the Auditor General of Canada, Transportation Safety Board, House of Commons Standing Committee on Transportation, Infrastructure and Communities, railway sector unions, and non-governmental organizations, including the Canadian Centre for Policy Alternatives. I understand that Minister of Transport Marc Garneau's decision to accelerate the scheduled review of the Railway Safety Act is intended to assist the government in responding to these ongoing concerns.

In the aftermath of the Lac-Mégantic disaster, the previous and current federal governments have undertaken several measures to update and strengthen the rules and regulations around the operation of trains carrying dangerous goods. However, the fundamental regulatory framework employed by Transport Canada around railway safety, with its focus on the development and implementation of railway company developed Safety Management Systems (SMS) has remained unchanged. My research suggests that there are serious flaws in this model, and that its role as the centrepiece of Transport Canada's safety regulatory regime, requires serious reconsideration.

In this context I attached for your interest a copy of my paper published in September 2016 in the *Journal of Environmental Law and Practice* entitled "The Lac-Mégantic Disaster and Transport Canada's Safety Management System (SMS) Model: Implications for Reflexive Regulatory Regimes." The paper finds that the SMS initiative began as a well-intended effort to improve railway safety performance, grounded in the concept of "reflexive" regulation. Reflexive regulatory regimes are intended to encourage self-reflective and self-critical processes within organizations. In practice, it finds that the simultaneous implementation of the SMS based regime and direct regulatory oversight functions appears to be beyond the existing capacity of the department, with the result that resources have been drawn away from conventional oversight towards SMS oversight and implementation. Similar observations regarding the SMS regime have been made by the Auditor-General of Canada and the Transportation Safety Board.

Drawing on experience in environmental regulatory regimes, the paper suggests that the SMS system be replaced with strengthened statutory provisions regarding the personal responsibility and liability of company officers and directors. Specifically the *Railway Safety Act* should be amended to require that officers and directors to take "all reasonable care" to ensure the safe operation of railways. Transport Canada's oversight activities should be refocused on direct regulatory oversight functions rather than SMS development and implementation.

The introduction of statutory duties of care for officers and directors in Canadian environmental law triggered the widespread development and implementation of internal environmental management systems without the need for direct involvement or oversight by regulatory agencies. The overall effect was to prompt regulated entities to take more proactive, self-critical approaches to environmental issues, while avoiding the diversion of limited oversight capacity inherent in the SMS regime employed by Transport Canada.

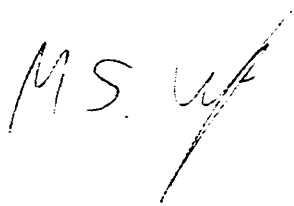
The paper makes a number of additional suggestions for strengthening the railway safety regime. These include:

- the introduction of a general offense provision under the *Railway Safety Act*;
- the streamlining of the consultation and appeal processes available to railways in relation to ministerial orders and other regulatory requirements;
- the establishment of clear reporting and approval requirements for significant changes in railway operations (e.g. changes to one-person train operation);
- a significant strengthening of the provisions related to public access to information, particularly with respect to the transportation of dangerous goods; and
- a review of the role of individual company developed rules in the regulatory regime.

Although improvements have been made to the railway safety regime since the Lac-Mégantic disaster, significant gaps remain, and the safety of Canadians remains at risk as a result.

I would be pleased to discuss my findings with you or the panel secretariat.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'M.S. Winfield', with a long, sweeping flourish extending from the end of the name.

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