

February 25, 2020

BY COURIER

Commissioner Thomas Carrique
Ontario Provincial Police
General Headquarters
Lincoln M. Alexander Building
777 Memorial Avenue
Orillia, ON, L3V 7V3

Dear Commissioner, Carrique,

RE: Open letter raising questions about the Ontario Provincial Police's jurisdiction over railway-related policing incidents in Ontario, and the OPP's working relationship with railway police forces.

I represent Tara Jijian whose husband died while working at the CP Rail yard in Regina (2013). I also represent Lori Desrochers and Kaity Timmerman who are the survivors of Kevin Timmerman. Kevin was Lori's ex-husband and Kaity's father. He died while working at the CN Rail yard in Saskatoon (2015). I raise my clients' cases only to provide the background for the concerns we present in this letter that are relevant to Ontario. My clients' cases raise important questions about Canadian railway policing and the Ontario Provincial Police's (OPP) jurisdiction and involvement in this arena.

This letter arises from, but extends beyond, the ongoing railway protests involving the Wet'suwet'en First Nation, the blockades related to those protests, and the capacity of the OPP's involvement. The OPP has been active in policing this dispute, including by arresting protestors and removing blockades along rail lines. The questions I raise in this letter will remain relevant even after the Wet'suwet'en dispute is resolved. That is because they relate to important questions about your police force's jurisdiction and whether your officers have the authority to be involved in these protests in any capacity.

Our questions are as follows:

- **Question 1:** In light of Sections 44 and 44.1 of the *Railway Safety Act* (R.S.C. 1985, c. 32, 4th Supp.) which provide that private railway companies may own, appoint, and control their own police forces, does the OPP have the independent **jurisdiction** to conduct any policing functions within 500 meters of property owned or controlled by Canada's railway companies? If so, pursuant to what legal authority?
- **Question 2:** In light of Sections 44 and 44.1 of the *Railway Safety Act* (R.S.C. 1985, c. 32, 4th Supp.) which provide that private railway companies may own, appoint, and control their own police forces, does the OPP have the independent **duty** to conduct any policing functions within 500 meters of property owned or controlled by Canada's railway companies? If so, pursuant to what legal authority?
- **Question 3:** In light of Sections 44 and 44.1 of the *Railway Safety Act* which provide that private railway companies own, appoint, and control their own police forces, does the OPP have the independent jurisdiction and/or duty to conduct any policing functions relating to individuals implicated in policing matters within the railway police forces' jurisdiction (beyond the 500 meter zone)? If so, pursuant to what legal authority?
- **Question 4:** If the OPP has, and always had, the jurisdiction to investigate railway-related deaths, serious injuries, derailments, oil spills and other harmful railroad incidents, has the OPP ever investigated, charged, or facilitated the criminal or regulatory prosecution of any Canadian railway company, its **management, board** or **officers**?

When people die violent, sudden, or unnatural deaths, criminal liability and the necessary investigations cannot be precluded upfront. This means that when employees die in the course of their employment, or railway explosions kill people in Canadian cities, criminal liability can only be ruled out after a thorough and independent investigation. That has not happened to for the vast majority of victims. The disparity between railway incidents and the laying of criminal charges is stark. According to the TSB:

Overall, **1172 railway accidents** were reported to the TSB in 2018, a **7% increase over 2017 and a 13% increase from the 5-year average of 1035**. Most of the increase relates to non-main-track derailments of 5 or fewer cars. There were 57 rail-related fatalities reported in 2018, well below the 5-year average of 74, 34 of which involved trespassers. The number of crossing-accident fatalities was the same as in 2017 (19) and similar to the 5-year average (21), but the number of serious injuries due to crossing accidents nearly doubled (42) compared to 2017 (22) and to the 5-year average (24).

Further, between 2008 and 2018, the TSB reported more than 800 railway-related fatalities and more than 10,000 rail accidents for the same period.

- <https://www.tsb.gc.ca/eng/stats/rail/2018/sser-ssro-2018.html>.

Despite these alarming statistics, we were unable to identify any cases where the OPP independently investigated and criminally charged any railway company (or its corporate officers, board, or and management) for any of these incidents. We were also unable to find any cases that proceeded to a prosecution or conviction. It is statistically improbable that none of these incidents and deaths were due to the railway companies' corporate actions or omissions. Even if we are wrong in this respect, this cannot be presumed without fulsome investigations. That is why it is critical for Canadians to understand which police service is really responsible for investigating these incidents and advancing prosecutions. It is our position that the railway police are disqualified because of an untenable conflict of interest. Their officers would be investigating the superiors to whom they report.

As you know, the Westray amendments to the Criminal Code were specifically designed to address workplace-related deaths and injuries.

- <https://www.justice.gc.ca/eng/rp-pr/other-autre/westray/p1.html>

The Westray amendments were made in recognition that such cases cannot be assumed to be confined to regulatory occupational health and safety incidents. When people die violent, sudden, or unnatural deaths, criminal liability cannot be precluded. This means that when employees die in the course of their employment, or railway explosions kill people in Canadian cities, criminal liability can only be ruled out after a thorough and independent investigation. The disparity between railway incidents and the laying of criminal charges is stark.

That is why it is critical for Canadians to understand which police service is really responsible for investigating these incidents and advancing prosecutions. If railway police are solely responsible, then they too should shoulder the burden of policing protestors on railway property.

As you know, the Transport Safety Board and Transport Canada investigations are not intended to be used for legal proceedings and are not conducted to facilitate prosecutions.

- <https://www.tsb.gc.ca/eng/qui-about/index.html>.

Given that railway police officers work directly for the rail companies and are answerable to corporate management, this raises questions about whether the OPP has been deferring any investigations of fatal and other serious incidents to the very management that may be responsible. Hence, we request the OPP's clarification of what criminal investigations it has ever conducted and what charges it has ever laid with respect to Canadian railway deaths, serious injuries, explosions, derailments, and discharges of hazardous materials into the environment.

- **Question 5:** If Canada's railway police forces have primary jurisdiction over policing incidents within 500 meters of railway property and jurisdiction over persons whose actions touch on railway affairs (Railway Safety Act, Sections 44 and 44.1), has any railway company ever asked the OPP to investigate a workplace fatality or other railway disaster (i.e. with the view of determining whether any criminal or quasi-criminal charges should be laid)? Please clarify the existence of any memoranda of understanding, request for assistance, or other relevant legal agreements (formal or otherwise) between the OPP and Canada's railway police forces. Please also clarify whether the railway companies reimburse the OPP for providing any assistance (if any).
- **Question 6:** With respect to the Wet'suwet'en First Nation protests, did the CN Rail Police Service, the CP Police Service, or Via Rail Police Service, formally request the OPP to participate in, or take over policing actions related to these protests anywhere in Canada?


The public needs an unequivocal statement from the OPP regarding the extent of the police force's jurisdiction and the basis for its involvement in any protests or policing events within railway police jurisdiction. Furthermore, as a question of transparency and accountability, the public deserves to know the extents and limits of law enforcement powers, what OPP police officers can do, where they can do it, and whether their jurisdiction is shared.

Given the above and Sections 44 and 44.1 of the *Railway Safety Act*, it appears that the OPP has no jurisdiction to be arresting any Wet'suwet'en-related protestors. There is a difference between police forces cooperating on one hand, and one police force delegating its work to another. The latter situation is what appears to be happening with the Wet'suwet'en situation. Even if the railway police's jurisdiction is concurrent with that of the OPP or the OPP's jurisdiction is not "primary", that does

not dispense of all the underlying concerns. Another concern relates to the potential redirection of public funds to private companies with a mandate to fund their own policing. By taking the leading role in policing such protests, the OPP may be subsidizing private railway companies' law enforcement bills, and at the public's expense. The railway companies cannot have it both ways. They cannot summon the OPP to assist with arresting protestors while remaining in the background, and then foreclose on the OPP's investigation of incidents that implicate the company (deaths, derailments, explosions etc.). That is unless the OPP has expressly disavowed such jurisdiction, notwithstanding any positions taken by the railway companies. In any event, it appears that the railway police forces are outsourcing the politically volatile task of dealing with the Wet'suwet'en protests to the OPP, the RCMP and other public police forces.

There is compelling evidence that jurisdictional ambiguity between the railway police forces and other law enforcement bodies has led to an accountability vacuum in Canadian policing. That was the case with my clients in Saskatchewan. It appears that meritorious cases across Canada, including in Ontario, are not being consistently and fully investigated because the railway police forces with the jurisdiction over these incidents, are employed by the very the subjects of their investigations. If the OPP has the jurisdiction to investigate such incidents, this would provide citizens with clarity on whether they can approach the OPP to conduct investigations into railway-related incidents from a policing perspective (beyond the non-punitive and prospective correctional goals of the TSB and Transport Canada investigations). This includes fatalities, injuries, derailments, and releases of hazardous gases into the environment. We look forward to your response to the questions above.

Thank you,



Tavengwa Runyowa

(Counsel for Tara Jijian and sons, Lori Desrochers, and Kaity Timmerman).

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June 25, 2020

Via Email to law@runyowa.com

Mr. Tavengwa Runyowa
Runyowa Law
Royal Bank Building
7th Floor 2010-11th Avenue
Regina SK S4P 0J3

Dear Mr. Runyowa:

Re: Open Letter raising questions about the OPP's jurisdiction over rail-way-related policing incidents in Ontario, and the OPP's working relationship with railway police forces

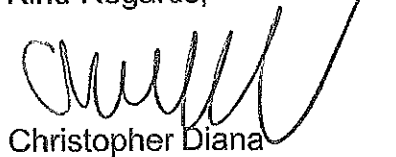
I am counsel with the Legal Services Branch, Ministry of the Solicitor General. In that capacity, I act on behalf of the Commissioner of the Ontario Provincial Police (OPP) with respect to various matters. I have reviewed your letter to Commissioner Carrique with respect to railway-related policing incidents in Ontario. I am pleased to respond on his behalf.

I note your questions about policing jurisdiction of the OPP. The OPP's jurisdiction is set out in the *Ontario Police Services Act*, R.S.O. 1990, c. P.15, and the legal responsibilities and duties of its officers are established in various statutes and the common law. The OPP has jurisdiction to police areas in Ontario that are not policed by municipal police services, including areas adjacent to railways.

While the OPP polices areas adjacent to railways, including investigating death or injury involving railways/trains as a result of vehicles or pedestrians being struck, we have not been able to identify any incidents of the OPP charging railway companies for workplace fatalities or railway disasters.

With regard to the recent protest activity in relation to the We'etsutween land issue, the OPP's role is to ensure public safety and enforce the law. The OPP respects the right of everyone to freedom of expression and peaceful assembly. However, the OPP is legally obligated to assist the Sheriff in enforcing injunctions pursuant to section 141(2) of the *Courts of Justice Act*. As there are currently matters before the court with respect to such protests, it would not be appropriate for me to comment or provide any further information.

Kind Regards,

A handwritten signature in black ink, appearing to read 'Christopher Diana', with a long, sweeping flourish extending upwards and to the right.

Christopher Diana
Senior Counsel