

August 19, 2020

BY EMAIL & COURIER

Chief Constable Adam Palmer
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Email: cacp@cacp.ca

ATTN: Deputy Chief Constable Palmer, Deputy Chief Constable Howard Chow and Deputy Constable Norm Lipinski.

RE: Inquiry into the jurisdiction of Police Services across Canada to investigate railway accidents, the interaction between Public and Private Police services in Canada, and the willingness of CACP to assist in lobbying to amend the *Railway Safety Act*.

We are writing to you in your capacity as the President of the Canadian Association of Police Chiefs (CAPC). We have copied Deputy Chief Constable Howard Chow and Deputy Constable Norm Lipinski in their capacities as co-chairs of the CAPC's Law Amendments Committee.

Our firm represents Tara Jijian, Lori Desrochers, and Kaity Timmerman, whose loved ones, Jaime Jijian and Kevin Timmerman, died while working at Canadian Pacific Railway (CP Rail) and Canadian National Railway (CN Rail) properties, respectively. Our clients have actively sought answers regarding the deaths of Jamie and Kevin, but both CP Rail and CN Rail (and their respective police forces) have persistently refused to provide any information regarding the deaths. Further, the RCMP, Regina Police, and Saskatoon Police all declined to investigate the workplace deaths of Jamie Jijian and Kevin Timmerman, in deference to CP Police and CN Police. Before presenting our questions and requests to you, we will provide some context regarding the Canadian National Police Service, the Canadian Pacific Police Service, and the impact of Sections 44 and 44.1 of the *Railway Safety Act* on railway-related policing

in Canada. We have the legal and evidentiary material to support the following background and are prepared to share it upon request.

Railway Safety Act Concerns

Our concerns regarding CN Police and CP Police are entrenched in Sections 44 and 44.1 of Canada's *Railway Safety Act* (the Act). See the Appendix to this letter for the text of the provisions. These provisions of the *Act* allow Canada's railway companies to create and control their own private police forces. These police forces are more than enhanced security units. They have all the powers of other public police forces such as the RCMP. However, their officers are full employees of the company; answer directly to its private corporate management. The officers can be dismissed without the companies seeking the permission of the courts that appointed them. Further, unlike police forces such as the RCMP and your other members, the railway police have no independent oversight body with governmental or civilian representation. The railway police services are wholly owned divisions of the railway companies and are not independent from them.

Although this situation is less of a concern when the railway police forces attend to policing incidents such as the theft of railway property, the problem arises when deaths, derailments, explosions and oil spills may be the direct result of company policy, action, or inaction. Although the private railway police officers swear oaths to uphold the law, as a practical matter, it is not realistic for a junior constable to investigate and question the senior management and corporate board that employs them.

For example, the 2019 Field, British Columbia derailment that killed three CP Rail workers and the recent derailment that spilled 1.2 million liters of oil in Guernsey, Saskatchewan, raise questions about the railway company's potential legal liability. However, when CP Police Service has primary, exclusive, or overlapping jurisdiction in relation to public police forces, this raises questions about whether thorough, fair, and independent investigations are being conducted into these human and environmental tragedies. To date, the RCMP has not actively investigated railway deaths to determine whether any criminal charges are warranted under the *Criminal Code*, including under the *Westray* amendments to the *Code*. Despite the hundreds of railway-related deaths across Canada over the last decade, and the numerous derailments and other incidents, the RCMP and other provincial and municipal police forces have deferred to the railway companies' own police forces.

With the exception of Lac Mégantic, there have been few, if any, independent investigations, criminal charges, or prosecutions of railway companies and their senior leadership. This is troubling especially given that the Transport Safety Board (TSB) reported 1172 railway related incidents in 2018 alone, a 7% increase over 2017 and a 13% increase from the 5-year average of 1035. The TSB also reported 57 rail-related deaths in 2018. It is statistically improbable that none of these incidents necessitated charges.

This outcome is not surprising given the railway companies control and employment of the very police officers who report to the senior management of the railway companies.

Clarifications we seek from the CACP.

We would like to be clear that we are not asking the CACP to become involved in the on-going litigation regarding Kevin's and Jamie's deaths. However, the CACP can provide clarity on the following questions regarding how its member police services interact with the private railway police services:

1. Are the CN Police Service and CP Police Service members of your organization?
2. Do the CACP member Police Services have any jurisdiction to investigate railway deaths, derailments, and other disasters? If so, is this jurisdiction concurrent, overlapping, or subordinate to the jurisdiction of the railway police services such as CP Police Service and the CN Police Service?

Context: Under Section 44(1)(3) of the *Railway Safety Act*, the railway police forces, including the CP Police Service and the CN Police Service, have jurisdiction within 500 meters of property that the railway company owns, possesses, or administers.

While we understand that cooperation between police forces is common, we are interested in which police force takes precedence or exclusive jurisdiction over any such investigations.

3. Do CACP members or the organization as a whole have formal or informal policies of handing over investigations regarding **railway worker** injuries, deaths, or railway disasters to the relevant railway police forces?
4. Do CACP members or the organization as a whole have formal or informal policies of handing over investigations regarding the injuries, deaths of **members of the public**, or railway disasters, to the relevant railway police forces?
5. Do CACP member Police Services (apart from railway police force, if they are members) have similar powers to arrest and charge persons for alleged offences relating to railway property, even if the alleged offender is not on the property and did not commit the alleged offence within 500m of railway property?

Context: Section 44(4) of the *Railway Safety Act* extends the railway polices' jurisdiction beyond the physical 500m on either side of railway property. The *Act* extends the railway police jurisdiction to offences that relate to the railway context, even if the person was not arrested in the area, or the alleged offence did not occur in the area. We would like to know whether the CACP member Police Services have identical, overlapping, concurrent, or any jurisdiction over such situations, or whether they are subordinate to the railway police under the *RSA*.

6. Sudden and/or violent deaths in Canada cannot be presumed to preclude foul play or criminal conduct at the outset. To your knowledge, when a CACP member Police Service (apart from railway police) receives a report of a death on railway property, as a matter of policy, practice, or law, do your members routinely investigate these deaths to exclude foul play or criminal negligence?
7. Do the CACP member Police Services' (apart from railway police) have the jurisdiction to mount criminal investigations under Sections 217.1, 22.2, 220, 221, or any other provisions of the *Criminal Code* for matters arising within 500m of railway property, or relating to matters that arose from railway property as set out under Section 44(4) of the *Railway Safety Act*?
8. Do the CACP's member Police Services have officers or investigators who are specifically trained in the investigation of industrial incidents and railway related incidents in particular?

Context: This question goes beyond the investigation of criminality that happens on railway property (e.g. one worker assaulting another). We are concerned with the CACP Member Police Services' technical capacity to investigate industrial incidents to distinguish between true "accidents" and criminal acts (including criminal negligence) that causes injury, death, threats to public safety and environmental damage.

Note that we are not referring to regulatory investigations such as those conducted by Transport Canada, the Transport Safety Board or occupational health and safety authorities. None of these investigations can give rise to criminal proceedings under the law. We are interested in criminal investigations as contemplated under the Westray amendments to the *Criminal Code* (Section 217.1) or related provisions such as Sections 22.2, 220, and 221. Such industrial incidents can be highly technical in nature.

The scenes of the railway incidents may not immediately indicate the role of criminal negligence or foul play as is often evident in crimes that most public police forces are engaged in. Typically, specially trained investigators with applicable forensic experiences are required to properly investigate complex industrial incidents.

We know that numerous police departments in British Columbia signed a memorandum of understanding with the RCMP and WorkSafe BC to provide specialized investigations services for such complex industrial accidents. Where founded, these investigations could lead to criminal referrals to the Attorney General of BC. However, this is only for British Columbia. We would like to know whether such capabilities exist in other jurisdictions in which your members operate.

9. If it is apparent that a railway death, injury, explosion, spill, or derailment may have been the outcome of corporate misfeasance, do CACP member Police Services (apart from railway police, if they are CACP members) have the authority to claim primary or exclusive jurisdiction over the investigation from the railway police services that answer to the railway companies?
10. If a railway police officer is alleged to have committed a criminal offence while engaged in their duties, do the CACP member Police Services' have the authority to investigate that potential crime? Have any CACP members ever conducted such investigations?
11. If a railway company own and controls its own police such as CP Rail and CN Rail, do the CACP member Police Services' still have the jurisdiction to investigate that **company**, its executives, board, or employees for potential *Criminal Code* offences? Have any CACP member Police Services ever done so?
12. When railway police request the help of CACP member Police Services' in carrying out tasks such as dealing with protests, jailing or transporting persons in custody, do the railway companies that control the police services pay the member Police Services for that service?
13. If a member of the public requests a CACP member Police Services to investigate a death, derailment, environmental disaster, or serious injuries that were allegedly caused by the railway company, its internal policies, or actions, do your member Police Services have the jurisdiction to initiate that investigation and without the involvement of the company's railway police forces?

We understand that the CACP is not a monolithic organization which imposes policies upon its members. However, any answers the CACP can provide to the above queries will be appreciated, including the CACP's formal position on whether private railway corporations should control police forces with the same public powers that your members exercise.

CACP and Amending the *Railway Safety Act*.

The mandate of the CACP states that: "The Association is dedicated to the support and promotion of efficient law enforcement and to the protection and security of the people of Canada". In keeping with this commitment, we request that the CACP joins us in advocating to the Federal Government and Parliament of Canada the following reforms to the *Railway Safety Act*:

1. The amendment of the *Railway Safety Act* so that Canadian railway companies cannot own and control their own police forces with full public powers. This reform will bring the RSA in line with the principle of police independence. Police forces should not answer to private corporations (CN Rail and CP Rail) both of which are controlled, at least in part, by non-Canadian management, shareholders, and boards of directors.

The CEO of CP rail, Mr. Keith Creel, is an American citizen. About half the board of directors of CN Rail are also American citizens. The largest single shareholder in CN Rail is Cascade Investment LLC, the private investment vehicle of Mr. Bill Gates. The issue is not foreign participation in Canadian corporate life. The problem is the private ownership, control, or undue influence of federal Canadian police forces by private foreign persons and entities.

We are not currently asserting that these foreign persons and entities have done anything wrongful with respect to the railway police forces. However, at the very least, that ownership, control, and influence alone is inconsistent with the principle of police independence.

2. To advocate for the creation of a new, independent, Public Railway Police of Canada, still funded by the railway companies but fully controlled by an independent oversight commission with civilian, government, and railway worker representation.
3. To advocate for a fully funded team of independent railway safety experts from within and outside of Canada to conduct criminal investigations into all railway-related deaths of Canadians in the past ten years, including those of Jamie Jijian and Kevin Timmerman.

Conclusion

We ask you to advocate for the above actions by challenging the federal government and Parliament to promote the necessary legislative reforms. Private railway companies must not be allowed to police themselves. Corporate controlled police forces threaten the Rule of Law and provide impunity that encourages unsafe workplace practices.

We look forward to hearing from you,

Tavengwa Runyowa

Tavengwa Runyowa
(Counsel for Tara Jijian, Lori Desrochers, and Kaity Timmerman)

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APPENDIX ONE

The relevant sections of the *Railway Safety Act*.

Sections 44 and 44.1 of the *Railway Safety Act* read as follows:

Police Constables

Appointment

44 (1) A judge of a superior court may appoint a person as a police constable for the enforcement of Part III of the [Canada Transportation Act](#) and for the enforcement of the laws of Canada or a province in so far as their enforcement relates to the protection of property owned, possessed or administered by a railway company and the protection of persons and property on that property.

Limitation

(2) The appointment may only be made on the application of a railway company that owns, possesses or administers property located within the judge's jurisdiction.

Jurisdiction

The police constable has jurisdiction on property under the administration of the railway company and in any place within 500 m of property that the railway company owns, possesses or administers.

Power to take persons before a court

The police constable may take a person charged with an offence under Part III of the [Canada Transportation Act](#), or any law referred to in subsection (1), before a court that has jurisdiction in such cases over any area where property owned, possessed or administered by the railway company is located, whether or not the person was arrested, or the offence occurred or is alleged to have occurred, within that area.

Court's jurisdiction

The court must deal with the person as though the person had been arrested, and the offence had occurred, within the area of the court's jurisdiction, but the court may not deal with the person if the offence is alleged to have occurred outside the province in which the court is sitting.

Dismissal or discharge of police constable

A superior court judge referred to in subsection (1) or the railway company may dismiss or discharge the police constable and the dismissal or discharge terminates the powers, duties and privileges conferred on the constable by this section.

Procedures for dealing with complaints

44.1 (1) If one or more police constables are appointed with respect to a railway company, the railway company must

- (a) establish procedures for dealing with complaints concerning police constables;
- (b) designate one or more persons to be responsible for implementing the procedures;
and
- (c) designate one or more persons to receive and deal with the complaints.

Procedures to be filed with Minister

(2) The railway company must file with the Minister a copy of its procedures for dealing with complaints and must implement any recommendations concerning how the procedures are to be made public.

Re: CACP and Jurisdiction over Railway Related Matters

Tavengwa Runyowa <law@runyowa.com>

Wed 2020-09-09 2:54 PM

To: Peter Cuthbert <peter.cuthbert@cacp.ca>

Attn: Mr. Cuthbert,

I received your email below. The CACP's refusal to get involved in any efforts to end corporate controlled railway police forces is on the record, and amounts to an endorsement of the principle. This is inconsistent with the CACP's mandate as stated on the CACP website: "safety and security for all Canadians through innovative police leadership".

If the security of all Canadians matters to the CACP, your association should at least be concerned about the hundreds of railway-related deaths that required criminal investigations but that your members have deferred to the very railway companies that needed to be investigated.

The CACP's response to our letter is also inconsistent with the first and third sub-parts of CACP's "Advocacy" Strategic Pillar as provided on the CACP's website, which states:

1. We believe in advancing our profession and to promoting trust and legitimacy in our police services.
3. We counsel and work with government agencies to advance legislation, regulations and policies that support crime prevention, facilitate effective investigations, solve problems, and support a victim-centered and trauma-informed approach.

It does not promote public trust and legitimacy in the CACP's members when their umbrella organization expresses indifference towards corporatized policing and the numerous victims who have died on the railways. Nor does the CACP's response to our letter reflect an organization that is sincerely working to "facilitate effective investigations". As with the other quotes on the CACP's website, this appears to be a slogan than a bona fide commitment to ensuring that police investigations are effective in every context, including in the railways context.

The CACP appears unaware about how many families have been devastated and left with no answers about how their loved ones died on the railways. We urge the CACP to reconsider its refusal to seek reforms to private railway policing because your association's inaction would amount to an endorsement of the status quo. As more Canadians learn about the privatized policing on our nation's railways and the CACP's indifference to it, public confidence in your association and stated goals will be seriously undermined.

Further, beyond seeking the CACP's involvement in de-privatizing law enforcement in the railway context, our letter also asked the CACP a list of questions that your response below does not address. As the representative association of public police forces that have the duty to be transparent, it is troubling that the CACP would decline to answer the most basic questions that citizens are entitled to know about their police forces.

For example, through your response, is the CACP stating that it cannot disclose:

1. Whether or not the CP Police and CN Police services are members of the CACP? Is that a secret?
2. Whether the CACP members have jurisdiction over railway incidents? Is that a secret?
3. Whether your members ever investigate railway incidents? Is that a secret?
4. Whether your members have any training in investigating railway incidents? Is that a secret?
5. Whether your members endorse the idea of deferring criminal investigations to police forces that are owned and controlled by the companies that need to be investigated? Is that a secret also?

These questions go to the heart of law enforcement, a public function whose basic structures and policies should be a matter of open and candid disclosure. Your members are funded through taxpayer funds. In an open, democratic society where the rule of law is supposed to govern, it is troubling that Canada's police chiefs, the top law enforcement officers in the country, would proactively avoid responding to citizen requests about their policing powers and jurisdiction.

Again, we ask for the CACP's response to the questions we asked in our letter of August 19, 2020. Canadians have the right to know the powers and obligations of the police forces that are supposed to serve and protect them.

We look forward to your response.

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From: Peter Cuthbert <peter.cuthbert@cacp.ca>
Date: Wednesday, September 9, 2020 at 1:49 PM
To: Tavengwa Runyowa <law@runyowa.com>
Cc: Peter Cuthbert <peter.cuthbert@cacp.ca>
Subject: CACP and Jurisdiction over Railway Related Matters

AttentionTravengwa Runyowa

On behalf of the President of the Canadian Association of Chiefs of Police (CACP) , Chief Bryan Larkin and the Co Chairs of the CACP Law Amendments Committee , DC Norm Lipinski and DC Howard Chow , I wish to confirm receipt of your correspondence , dated Aug. 19, 2020 concerning the above subject matter . The Association have consulted with our legal advisers and I am sorry to advise you that the CACP have no intent in getting involved in this private litigation nor will be answering any of the proposed questions.

Sincerely:

Peter Cuthbert
Interim Executive Director
CACP