

September 28th, 2022

BY EMAIL: law@runyowa.com

Docket No. FD 36500 et al.

305396

Attn: The Honourable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001.

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Office of Proceedings
September 28, 2022
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Public Record

Dear Ms. Brown,

RE: Response to Canadian Pacific Railway's application of September 27, 2022 to strike our clients' whistleblower complaint from the STB's record.

This letter is in response to Canadian Pacific Railway's application of September 27, 2022, in which the company seeks to strike my clients' whistleblower complaint that we filed with the STB on September 23, 2022. The complainants ask the Board to reject CP Railway's application because it has no merit, makes demonstrably false assertions, and avoids addressing the issues of relevance to the Board's mandate in this merger review process. The detailed reasons are as follows:

1. The crux of CP Railway's argument is that none of the issues in the complainants' whistleblower filing have any bearing on the proposed CP Railway-Kansas City Southern merger. CP Railway asserts that the complainants' only purpose is to advance their private litigation against CP Railway and CN Railway in Canada. Our letter of September 22, 2023 addressed these allegations but it appears that once more, CP Railway has avoided certain points that undermine its assertions. A careful review of the whistleblower alert reflects issues that could not reasonably be construed as advancing the complainants' Canadian litigation against CP Railway. For example:
 - a. The complainants provided the STB freedom of information disclosures from the Royal Canadian Mounted Police ("RCMP") showing that CP Railway has abused its access to the Canadian Police Information Centre database, a resource with highly

sensitive law enforcement information with information from Canada's international allies (including the United States). CP Railway misused this database for the non-policing function of conducting background checks on prospective employees (potentially including CP Police Service officers). The records show the RCMP's representative expressing deep concern about this practice. Despite my clients' efforts to obtain information from the RCMP about how long CP continued with this practice, the RCMP stated that it and no further records to disclose. **This issue has no relation to the Field, British Columbia derailment of CP Railway Train 301 in which Runyowa Law's clients died in 2019.** This issue touches directly on CP Railway's access to, and handling of sensitive cross-border law enforcement information. CP Railway has neither addressed this issue nor disputed the authenticity of the RCMP's documents. Nor has CP Railway unequivocally denied ever having engaged in such practices in the United States or Canada, nor its corporate access to, and cross-border sharing of, information about American citizens for non-policing purposes.

CP Railway has also taken no initiative to assure the Board about how the company's corporate police command structure would allow its allegedly independent police officers to honor corporate requests for information about potential employees. Only CP Railway has something to lose through the full exploration of this issue. Given that the CPIC issue is unrelated to the Field, BC derailment of Train 301, the complainants have nothing to "leverage" on this national security/privacy issue that could help them establish any liability by CP Railway. If CP Railway violated the privacy of American citizens by using its police force to access the higher levels of the CPIC database for human resources purposes, that finding would still not advance the complaints' Canadian lawsuits arising from the Train 301 derailment in Canada. Although the complainants cannot "leverage" CP Railway's misconduct to advance the merits of their lawsuits, the American public **does** have a direct stake in that question. If corporate civilians have been able to demand and obtain sensitive information from CP Police about job applicants from levels of databases which are not for human resources purposes, that practice and its implications for American's rights must first be identified before the STB grants CP Railway the ability to expand such practices after it subsumes the Kansas City Southern police.

- b. The complainants' whistleblower alert also addresses the issue of whether it is a violation of Americans' civil and constitutional rights to be subjected to arrests, searches, seizures, and prosecutions that arise from police powers that are exercised on behalf of, and controlled by, non-American corporate entities outside American soil. These corporate civilians are not sworn police officers in the United States and do not report to any American authority on police operational matters. Even if this question was resolved against CP Railway and the status quo was found to violate

Americans' rights, that would have no application to the complainants' wrongful death lawsuits **in Canada**.

- c. The question of whether the cross-border police command that CP Railway's leadership exercises in the United States from Canada violates America's sovereignty is of no assistance to the complainants' wrongful death litigation in Canada. Nor is the question of whether this policing structure creates immediate and systemic national security vulnerabilities. Any benefits of exploring these questions would accrue to the American public, not the complainants in their civil action against CP Railway in Canada. Violations of the United States' sovereignty and national security are simply unrelated to litigation regarding workplace deaths **in Canada**.
- d. The CP Police Service's role in customs and immigration functions on trains entering the United States from Canada and its international feeder ports in Canada (through which cargo enters the United States' supply chain) has no connection with the complainants' wrongful death lawsuits in Canada. Instead of asserting such a tenuous connection, CP Railway should explain to the STB and American people what role its police officers play on cross-border trains. How do they share jurisdiction with Canadian and American border services officers? Do they ever oust or accept these public officers' willful ceding of jurisdiction over customs and immigration enforcement? In law and in practice, do they report certain findings or conduct related to customs and immigration enforcement to American authorities in any state or on a federal level? What role do they play in the handover of trains between the United States and Canadian border? Regardless, none of these important questions could provide the complainants with leverage in their litigation against CP Railway **in Canada**.
- e. The question of whether CP Railway has used its police service to exercise exclusive or concurrent jurisdiction over workplace deaths and serious injuries for which it may be responsible in the United States cannot assist the complainants' civil litigation **in Canada**.
- f. The national security implications of allowing private individuals who have not been vetted by American authorities to exercise command over police officers and operations in the United States from abroad are significant. The potential repercussions are not speculative. Contrary to CP Railway's assertions, such a

situation leaves a gaping hole in the United States' national security infrastructure. The notion of bad faith actors taking advantage of such vulnerabilities is a serious matter. It is deeply troubling that CP Railway would minimize the potential catastrophe of allowing unvetted parties outside of American soil to acquire and control command law enforcement powers in the country, and to access associated police databases and law enforcement partnerships. Nevertheless, exposing the potential national security vulnerabilities would not provide the complainants with any "leverage" in their wrongful death litigation in Canada.

In summary, there is no merit to CP Railway's assertion that the complainants' whistleblower complaint is nothing more than an effort to advance their private litigation in Canada. The real question is why CP Railway would vehemently argue against the full exploration of these important national security, sovereignty, civil rights, privacy, and other questions while failing to provide any substantive rebuttals to justify preventing the discussion.

2. In its letter of September 27, 2022, CP Railway reiterated the misleading information it previously presented about the complainants' shareholder proposals:
 - a. CP Railway insists that the complainants' litigation regarding their shareholder proposals in Canada constitutes a pattern of "hijacking" proceedings to advance their wrongful death litigation (also in Canada). Notably CP Railway fails to discuss what the shareholder proposals actually say, let alone explain how the proposal allegedly advance the complainants' civil litigation in Canada. For the record, the texts of Ms. Desrochers' two shareholders proposals are attached to this correspondence as **Attachment 1** and **Attachment 2**.

The STB will note that the focus of these shareholder proposals is **not** to compel the disclosure of any records or information from CP Railway that any of the complainants could use against the company in litigation. The two proposals ask CP Railway to commit to declaring and securing the integrity of its cross-border police force **and** to make the related corrective regulatory filings to American authorities with respect to how the company has run its corporate police force. When it received these proposals, CP Railway could have included them and advised shareholders to vote no on them because it had already taken all such regulatory reporting steps, was fully compliant with the law, and would doubtlessly handle its post-merger police force with integrity. Therefore, the proposals were unnecessary. However, this

is not what CP Railway did. Instead, the company argued that the proposals were for the “primary” purpose” of advancing some of our clients’ civil litigation against the company. This is problematic. CP Railway’s refusal to state that it already complied with its regulatory reporting obligations and would commit to ensuring the continued integrity its police force in the United States raises significant red flags. Complying with these legal duties should not be a burdensome commitment, but for CP Railway, turning the tables onto the complainants’ motives was the company’s best available option. Why?

Further, even if any parts of Ms. Desrochers’ shareholder proposals involved disclosures that the complaints could “leverage” in their litigation against CP Railway, that would raise far greater problems for the company than the complainants. CP Railway’s repeated concerns about “leverage” raise the concern that its handling of its cross-border police force in Canada and the United States gives rise to legitimate problems that could be “leveraged” against the company. If CP Railway has been forthcoming about its private cross-border police force and is committed to the “truth”, then CP Railway should not fear the disclosure of any information about its policing activities that could purportedly be used against it.

The complainants will leave it to the STB to determine whether there is anything improper about asking a major corporation with cross-border police powers to assure its shareholders about the transparency and integrity of its policing activities in two countries. CP Railway’s active refusal to affirm these legitimate expectations is a troubling sign about what past, current, and future conduct the company may wish to shield from public discussion and analysis.

- b. CP Railway neglects to mention that when a corporation’s management accepts a shareholder proposal for inclusion in its management information circular, this step merely allows the company’s shareholders to vote on the proposal. A shareholder proposal like the ones that Ms. Desrochers submitted to CP Railway’s management, cannot compel a corporation to disclose records relating to active litigation. Therefore, had CP Railway’s management accepted Ms. Desrochers’ proposals for inclusion its 2021 circular, the culmination of that event would have been that CP Railway’s shareholders, who own the company, would have voted on whether to accept or reject the proposals. If CP Railway’s shareholders found the proposals to be frivolous or submitted for an ulterior purpose, they would have simply defeated the proposals. Thus, Ms. Desrochers could not “leverage” the company’s owners to vote against their own interests. The only parties that benefit from preventing the important issues in Ms. Desrochers’ shareholder proposals from going before CP

Railway's shareholders are the members of management whose exercise of cross-border police powers gave rise to the potential jeopardy that the shareholder proposals exposed. As evident in the shareholder proposals, that jeopardy involves largely the same issues that the complainants placed before the Board in their whistleblower complaint, and whose full exploration CP Railway's management is vigorously contesting. Hence, CP Railway's repeated mention of Ms. Desrochers' shareholder proposals reflects an intention to stifle debate about a legitimate issue by disparaging a separate legal proceeding that sought to bring those very issues to the attention of the company's shareholders.

- c. In its letter of September 27, 2022, CP Railway states that: "Most recently, in March 2022, Mr. Runyowa's effort on behalf of his clients to enjoin the holding of CP's annual shareholders meeting was rejected by the Alberta Court of King's Bench." This framing is a subtle pivot from the untrue statement that CP Railway made in its letter of September 21, 2022. In that letter, CP Railway had alleged that the Alberta Court had dismissed the shareholder proposals. Now, CP Railway is conceding that the decision **was** an interim decision unrelated to the merits of the proposals. CP Railway still fails to add that the interim issue was about whether Subsection 137(5) of the *Canada Business Corporations Act* imposed a duty on CP Railway to apply to the Court to reject the proposal, or whether the shareholder had the duty to apply for the enjoining of the shareholder meeting. In the first ever public interpretation of that provision by a Canadian court, the Court held that the shareholder (Ms. Desrochers) had the duty to apply. Given the imminence of the 2021 shareholder meeting, the Court allowed CP Railway's 2021 annual shareholder meeting to proceed. However, the Court made no findings on the merits of the proposals and the ongoing litigation is now focused on whether the proposals will be included in CP Railway's 2023 Management Information circular.
- d. CP Railway refers to Ms. Desrochers' shareholder litigation as attempted "hijacking" without specifying exactly what is being "hijacked". Ms. Lori Desrochers was the legitimate owner of the legal threshold shares in CP railway to file a shareholder proposal under Canadian law. She held the shares for the statutorily required period and CP Railway never disputed her bona fides for filing the proposals at law. When CP Railway invoked one of the potentially applicable exceptions for the inclusion of shareholder proposals in its management information circular, the parties resorted to the courts as the law requires. The Court did not grant Ms. Desrochers' requested interim remedy, but it is an irresponsible allegation for CP Railway to state that Ms. Desrochers' decision to exercise her legal rights as a shareholder amounted to "hijacking". **The reasons that CP Railway has not submitted any court decision to the STB to prove such finding is because such a decision does not exist.** If

the Court had found that Ms. Desrochers was engaged in any form of “hijacking” or abuse of process, the Court would have made such a ruling but did not. It appears that in a strident effort to avoid scrutiny about its private, cross-border law enforcement activities in the United States, CP Railway is attempting to undermine the complainants’ legitimate right to participate in the shareholder process. A shareholder and corporate management’s disagreement about whether a proposal should be included in a management circular does not amount to “hijacking” by the shareholder. Participating in that process for the purposes it was created is not hijacking. CP Railway’s characterization of Ms. Desrochers’ shareholder proposals as “hijacking” court proceedings while providing no evidence or court decisions to justify this disparagement is misguided.

3. CP Railway again misrepresents the complainants’ position about the timing of their whistleblower submissions. The complainants only mentioned that CP Railway was aware of the issues in their whistleblower complaint in January, 2022. This **does not** mean that the complainants had the threshold evidence they believed was sufficient to file a complaint that the Board could consider on its merits. The complainants specifically mentioned that their efforts to obtain further supporting records continued beyond that date and were ongoing. In fact, they are in the process of obtaining further records from Canadian and American authorities to reinforce the points they made in their whistleblower alert. Their objective was to balance expeditiousness with thoroughness. Filing in January 2022 would have unduly advanced the former at the expense of the latter.
4. CP Railway asserts that railroad policing has existed in the United States for a more than a century and that CP Railway has always been bound by the applicable laws. This statement underlies the very heart of the problem. The complainants’ whistleblower alert explains how the largely self-regulated railroad policing system and absence of public, civilian oversight bodies in many states has relegated these problems to in-house concerns. As such, when parties wielding police powers play a significant or an exclusive role in determining whether they have wielded those powers appropriately, the associated problems are unlikely to come to light (even after a century). This too was the Canadian experience until a confluence of events in the Field, BC disaster of 2019 came together and precipitated the first ever criminal investigation into a railroad company by the RCMP. In 2020, after disavowing criminal jurisdiction over such incidents, the RCMP finally opened its criminal investigation into CP Railway, even though there have been dozens of workplace deaths and hundreds of overall deaths across Canadian railroads. Therefore, CP Railway cannot point to the continued existence of a system that grants it significant insulation from public oversight and scrutiny to argue that its longstanding police powers raise no issues of public concern. If they did not before, they certainly do now. CP Railway is on the verge of

concluding a merger that will empower it to create the first USMCA law enforcement apparatus, which as a collective force, will not answer to any sole public oversight authority on operational issues. The creation of a body with such extraordinary powers at least warrants an exploration of how the CP Railway's police force has handled deaths and serious injuries at its operations in the United States to date, and whether the manner it handled the Field, BC derailment is a pattern that the merger would extend further across the USMCA region. After all, CP Railway's ultimate corporate management in Canada, cross-border police command, contiguous cross-border policing jurisdiction, and Precision Scheduled Railroading model are largely similar on both sides of the United States-Canada border.

If the impediments to transparency and accountability that Field, BC eventually exposed had been going on for more than a century, there is no reason to conclude that the mirror structures on the American side of the border did not have the same consequences. The only difference is that intense media attention and the whistleblower disclosures of Constable Mark Tataryn, formerly of the CP Police Service, brought the flames of a slow-burning underground fire that had been burning for "more than a century" to the surface in Canada. Due diligence would at least require putting CP Railway to the task of providing details about its cross-border police command structure; how its police force has exercised criminal jurisdiction over workplace death investigations in which the company is implicated; and CP Railway's corporate control over, and reporting relationships with, its police officers. Only then can CP Railway prove, rather than merely assert, that its operation of a railroad police force in the United States for over a century, has entailed no abuses of power or the detriments to American interests.

5. CP Railway attempts to undermine the complaints' whistleblower filing on the purported basis that they are not "insiders" who are blowing the whistle on any misconduct. CP Railway adopts a mechanistic definition of what a whistleblower is, and what the core of the concept is meant to capture. Whistleblowing is about raising public alarm about issues or problems of public interest that would otherwise have remained under wraps. The public interest is at the core of the whistleblower concept. Although the concept has been codified in statutes and applied in specialized contexts, it would be unduly limiting, and even dangerous, if public authorities like the STB disavowed relevant information because the parties who provided it do not meet a specific template or statutory definition of a whistleblower. As long as the complaint has independent merit and is made in good faith, nothing prohibits the STB from considering it.

In fact, even without attaching the term "whistleblower" to the complainants' submission, the STB still has the statutory authority to exercise its discretion and waive formal requirements as it did when it allowed Runyowa Law to make oral submissions at the public hearing on September 29, 2022. The STB's statutory mandate to promote the good

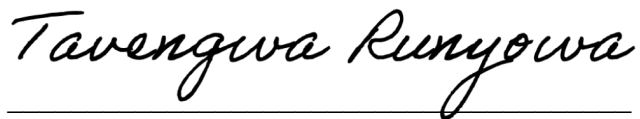
governance of railroads and public safety also grants the STB wide latitude in what material it can accept, from who, for what purposes, and under what conditions. The STB does not need to invoke or rely on the term “whistleblower” to justify its review of important matters within its jurisdiction.

6. CP Railway argues that the complainants’ whistleblower filing makes no allegations of wrongdoing against CP Railway. This is incorrect and demonstrates that CP Railway did not fully review the complaint and its accompanying exhibits. The complaint distinguishes between cases where the evidence points to serious concerns that require further investigation and *prima facie* cases of wrongdoing. Examples respectively include whether the Police’s assertion of police jurisdiction over workplace deaths at the company in Canada extend to the similar incidents in the United States, and CP Railway’s abuse of the CPIC law enforcement database and the breaches of privacy that entailed. Regardless of whether these incidents are categorized as “wrongdoing”, potential wrongdoing, or instances that create systemic threats to American interests, their unifying quality is that they all need to be investigated before CP Railway is allowed to expand these prejudicial outcomes through its merger with Kansas City Southern. This is the key issue before the STB, not the possible categorization or characterization of these potential impediments to the merger.
7. Instead of rebutting the allegations in the complainants’ whistleblower complaint in detail, the best effort that CP Railway makes is to state: “Although Mr. Runyowa’s submission has no place in the Board’s record in this proceeding, the Board can rest assured that there is no underlying risk of harm to the public interest.” A blanket reassurance to address detailed and specific allegations raises questions about the reliability of such a reassurance. As the complainants stated in their previous filings, if CP Railway asserts that there is no substance to any of the complainants’ allegations and concerns in their whistleblower filing, then CP Railway should be unafraid to engage in a process in which it addresses each of these issues on their merits, and through the sworn documents of its CEO, Mr. Keith Creel, who publicly and forcefully committed to the “truth” in these proceedings.
8. Finally, the complainants ask the Board to consider the Railroad Workers United letter that it filed asking the STB to consider the complainants’ whistleblower filing. One of arguments that CP Railway had advanced most forcefully to date is that the complainants’ whistleblower submissions is for the sole purpose of advancing their private litigation in Canada. However, The RWU is an organization of railroaders, most of whom are in the United States, and have the “on-the-ground” experience with some of the issues that the complainants’ raised. The notion that the RWU, as an organization, would seek the fulsome exploration of issues that are of no greater significance than advancing private litigation in Canada, is not credible. We trust that if the Board provides potential stakeholders in the

United States the opportunity to review the whistleblower filing and the questions it raises, many more will seek a robust review process of the national security and other issues at stake before handing CP Railway police powers over greater expanses of the United States.

In light of the above, our clients request that the STB keeps their whistleblower filing on the record, reviews it on its merits, and considers the steps the submission proposes on how to proceed on the question of CP Railway's post-merger policing jurisdiction.

Thank you,

A handwritten signature in black ink, reading "Tavengwa Runyowa". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Tavengwa Runyowa

This correspondence has been served upon the parties of record by email.

Attachment 1

RESOLVED – That the Board shall draft and post a “CPPS Integrity Declaration” on CP Railway’s website, and file it with the US-STB within 10 business days of CP Railway’s 2022 annual shareholder meeting.

Supporting statement.

CP Railway’s pending merger with Kansas City Southern Railway (“KCS”) presents an historic opportunity to create the first USMCA railway. American and Mexican reviewing authorities will likely consider broader public interests beyond market competition. One area of probable scrutiny includes the post-merger implications of the new CPKC Police that would emerge from combining the CP Police Service (“CPPS”) and KCS police.

CP Railway’s cross-border policing infrastructure poses significant regulatory risks to the merger because a) the CPPS has no governmental or civilian oversight body in Canada or the USA; b) the CPPS police chief, who commands all CPPS officers in the USA from Canada, is an employee and subordinate of CP’s corporate management in Canada; c) CP’s management determines its police chief’s remuneration and performance bonuses, and thus; d) American regulators will likely apply a fresh, contemporary, and more skeptical lens to review the wisdom of expanding a Canadian corporation’s policing powers on sovereign American soil, especially given the broader debates and related controversies around the permissible uses and regulation of police powers, civil rights, and specific concerns about CP Railway’s apparent abuses of the CPPS.

To reassure American and Mexican regulators, and to bolster shareholders’ confidence in CP Railway’s corporate governance, ESG profile, and the related cost of capital implications, the Board shall publicly release a “**CPPS Police Integrity Declaration**” confirming that:

- a) CP Railway’s management, CPPS chiefs, and CPPS commanding officers have never violated the legal principle of police independence as reflected in the Supreme Court of Canada’s decision in *R v. Campbell* and equivalent authorities under American laws. Specifically, CP’s management has never directed, reviewed evidence from, obtained operational updates regarding, or overseen CPPS investigations into deaths and serious injuries under the companies’ watch, including where CP was a presumptive suspect under the Westray amendments to Canada’s *Criminal Code* and its USA equivalents;
- b) CP Railway’s management has never used the CPPS to access the Canadian Police Information Centre database, which contains confidential and secret information about Canadian, American, and other nationals, for corporate purposes that are unrelated to law enforcement;
- c) CP Railway has never required its Canadian and American CPPS officers to sign corporate non-disclosure agreements imposing obligations which violate, or are unrelated to, the officers’ obligations as public law enforcement officers acting solely in the furtherance of the administration of justice;
- d) A combined CPKC and its police department will refrain from all the aforementioned conduct throughout its USMCA policing and security operations.

The Board shall post the “Declaration” on CP Railway’s website and file it with the US Surface Transportation Board and Mexican merger review authorities within 10 business days of CP’s 2022 annual shareholder meeting. The Board’s failure to be 100% transparent about these public interest concerns across the USMCA region could jeopardize the historic CP-KCS merger.

Attachment 2

RESOLVED – To mitigate the risks to CP’s proposed merger with KCS, the Board shall investigate, make regulatory referrals, mandate corrective regulatory filings, and remediate all problems arising from CP’s ownership of the CPPS.

Supporting statement.

If approved, the CP Railway and Kansas City Southern (“KCS”) merger would create the first USMCA police and security department. The new CPKC management and its police chief would ultimately command the entire CPKC Police from the company’s global headquarters in Calgary, Canada. This poses two significant risks for the merger.

First, the CP Police Service’s (“CPPS”) current police chief is a Canadian citizen who is based in Canada alongside the corporate leaders to whom he reports. From Canada, they effectively exercise cross-border command of CPPS’ American officers who enforce the criminal law against American citizens on sovereign American territory. A proposed merger that expands foreign persons’ ability to project any degree of control over police powers across an international border is problematic. Such “remote control” policing violates America’s indivisible, exclusive, and inalienable sovereignty over criminal law enforcement on its territory, and violates its citizens’ civil and constitutional rights to be free from subordination to unaccountable foreign entities.

Second, the CPPS has historically exercised policing jurisdiction over deaths and serious injuries in which CP Railway was implicated (*Westray* incidents). The CPPS leadership has knowingly asserted such jurisdiction even though it is unlawful for employees to direct or oversee any criminal investigation or exoneration of their corporate employer.

As questions of public interest that impact the integrity of their justice systems, American and Mexican authorities will likely consider the above concerns in their merger reviews. These concerns are also important because Mexico, where CP Railway has not previously operated, has strict laws regulating the use of force, labour matters, firearms, constitutional rights, and reporting requirements for foreign corporations operating on its sovereign territory. To pre-empt the risks that CP Railway’s policing structure and practices pose to the merger, the Board shall:

- a) Review every death and serious injury at CP Railway’s Canadian and American operations since January 1, 2001 to identify cases where the CPPS conducted any investigative tasks, exercised criminal jurisdiction, or exonerated CP Railway in any such incidents. By June 29, 2021, the Board shall report its findings to the STB as well as Canadian and American securities regulators; make corrective regulatory filings; and refer any related unlawful conduct to relevant authorities in both countries;
- b) Inform the STB that the new CPKC Police would disavow jurisdiction over all deaths and serious injuries across CPKC’s operations, refer these cases to local police forces, and notify the US Department of Transportation Office of the Inspector General (Office of Investigations) about every incident;
- c) Within 10 business days of the 2022 annual shareholder meeting, the Board shall post on its website a sworn affidavit from CPPS Chief Al Sauvé, confirming that the CPPS has

never asserted jurisdiction over workplace injuries, fatalities, or matters where CP Railway or its subsidiaries were implicated in Canada or the USA.