



29 June, 2016

Information Centre  
Competition Bureau  
50 Victoria Street  
Gatineau, Quebec  
K1A 0C9

**Subject: Preliminary Step in an Application by Moose Consortium Inc. to Canada's Competition Bureau for a Written Opinion of the Degree of Accessibility Versus Exclusivity of the Metropolitan Passenger Railway Market in Canada's Greater National Capital Region**

1 On 27 February 27, 2015 the Commissioner of Competition tabled a "Submission to the Canada Transportation Act Review Panel" which observes:

*"Pursuant to section 138 of the CTA [Canada Transportation Act] a railway company may apply to the Agency to obtain running rights — rights to operate its own trains on the tracks of another railway where it has been unable to obtain such rights through commercial negotiation. The Agency may grant the rights and impose any conditions “as appear just or desirable to the Agency, having regard to the public interest”. ... In the Agency’s most recent decision relating to running rights, the 2002 Ferroequus decision, the Agency characterized running rights as an “exceptional remedy” that should be granted only if there is evidence of market abuse or market failure. Despite having received a number of applications for running rights, the Agency has yet to grant one."*

2 In light of the above, any Canadian railway market proponent or investor conducting pre-investment due diligence on a railway proposal which may ultimately be expected to depend upon the usability of Section 138 running rights should establish from the outset whether the target market is functioning in conformance with the goals expressed in Section 5 of the CTA, which states that the National Transportation Policy prioritizes "a competitive, economic and efficient national transportation system ... in both urban and rural areas throughout Canada". Section 3 of the CTA expressly upholds the federal Competition Act which has amongst its purposes: "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy". The appropriate time to undertake such an assessment of target market characteristics would be after a proposal and target market have been described, but before any significant investment is committed.

3 Since the Canadian Transportation Agency has never in its history made a determination in favour of an applicant for Section 138 running rights, one might assume that Canada's railway markets operate in general conformance with the goals expressed in Sections 3 and 5 of the CTA. However various subject matter experts have described shortcomings in the the competitive character of Canadian railway markets, for example:

3.1 Lawyers Siobhán O’Sullivan (McMillan LLP) and François Tougas (McMillan LLP & Adjunct Professor in Competition Law & Policy, UBC) described the Canadian rail sector as "an industry with very high barriers to entry and a bias against new entry" ("Running Rights and the Public Interest", 47th Annual Proceedings of the Canadian Transportation Research Forum, 2012).

3.2 Joseph Monteiro, an economist with the Competition Bureau, Industry Canada, and Gerald Robertson of the Industry Sector, Industry Canada, have observed that even though new shortline railways have been formed in Canada, "one noticeable aspect of this development was the concentration of the ownership of these shortlines" ("Railways in Canada and the Experience

with Regulatory Reform, with Emphasis on the Competitive Provisions”, 45th Annual Proceedings of the Canadian Transportation Research Forum, 2010).

3.3 Considering more specifically the prospects for any metropolitan passenger railway, the 2014 global “Future of Urban Mobility” report by the consulting firm A.D. Little observes that in most areas, “the management of urban mobility operates in an environment that is too fragmented and hostile to innovation. Our urban management systems do not allow market players to compete and establish business models that bring demand and supply into a natural balance”. <http://www.adlittle.com/future-of-urban-mobility.html>

- 4 It must be recognized that any running rights application under Section 138 anticipates that the Agency, which is part of Transport Canada, would need to first determine that Transport Canada itself has been ineffective with regard to its primary mandate under Sections 3 and 5 of the CTA. This could place the Agency in an apparent or potential regulatory conflict of interest scenario.
- 5 Moreover, there seems to exist a curious barrier to entry in the *de facto* requirement that a start-up company attempting to assemble investor and capital market financing to enter Canada's railway industry with a train service that would need to operate on other companies' railway lines, must first, paradoxically construct a conclusive argument that it does not have an equitable opportunity to participate in the very market that it proposes to enter. This would be an interesting prospectus.
- 6 Therefore, when the success of any new Canadian railway investment is contingent upon the proponent having ultimate legal recourse to Section 138 running rights, prior to making substantial commitments of resources the cautious proponent or investor should develop some means to reduce this regulatory uncertainty. One potential approach that has not yet been attempted in Canada is for the proponent or investor to make an application for a written opinion to Canada's Competition Bureau in order to obtain an arms-length assessment of the degree of accessibility versus exclusivity in the target railway market. Such an assessment from the Competition Bureau might be reasonably expected to carry enough weight with all stakeholders as to reduce investor uncertainty about whether or not the provisions of Section 138 could ever be counted on:
  - If the Competition Bureau determines that the target market conforms reasonably well with the expectations of Sections 3 and 5 of the CTA, then the investor should logically expect to have no potential recourse to Section 138.
  - If the Competition Bureau should determine that the target market resembles the sorts of characterization cited in paragraph 4 above, then the proponent and investor may logically expect to rely upon the operability of Section 138.

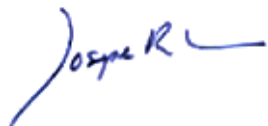
The fundamental difference in this scenario, is that it would be the Competition Bureau under Industry Canada which determines whether or not Transport Canada has been upholding its mandate under Sections 3 and 5 of the CTA in the target market. This removes the apparent or potential regulatory conflict of interest described in paragraph 5 above.

- 7 Moose Consortium Inc. (“Moose”, an acronym for Mobility Ottawa-Outaouais: Systems & Enterprises) is the first fully-independent inter-provincial passenger railway start-up in Canada in at least 100 years. The Moose group of companies has designed a highly entrepreneurial, competitive, economic and efficient passenger railway service plan based on a real property market involving up to 100 square kilometers of land spread amongst fifteen Québec and Ontario municipalities in both urban and rural sectors of Canada's Greater National Capital Region. The Consortium's “*Property-Powered Rail Open Market Development Model*” is a unique approach to railway financing with no dependence upon public sector funds, in-kind subsidies or market restrictions. If this initiative proceeds successfully through to operation, it will become the only fully private sector metropolitan-scale railway transit undertaking in Canada.
- 8 Concurrently with this *Initial Step in an Application for a Written Opinion* from Canada's Competition Bureau, today Moose is also submitting to the Canadian Transportation Agency an

*Application for a Comprehensive Certificate of Fitness* to develop a 400 km passenger railway undertaking throughout Canada's Greater National Capital Region, and to rebuild or enhance required railway works owned by other companies which Moose rail operations will require.

- 9 Moose's business model is based upon leasing rather than owning railway tracks and corridors. Therefore it will be ultimately dependent upon recourse to Section 138 (running rights) of the CTA.
- 10 Prior to submitting any evidence at all regarding the degree of conformance or non-conformance of the metropolitan passenger railway market in Canada's Greater National Capital Region with Sections 3 and 5 of the CTA, Moose would like to initiate a procedural discussion with the Competition Bureau towards developing a suitable approach to this request. This initial step would be helpful because several of the direct stakeholders in this regional market are municipal governments that operate federal and provincially regulated transit companies, and that own the most essential railway corridors and bridges. These municipally-owned transit companies could be seen as complementary or competitive with Moose's proposal, depending upon one's perspective.
- 11 In closing this preliminary step in our request for a written opinion, Moose points out that the original mass transit railway services in Canada's Capital were initiated, planned, financed, developed and sustainably managed by commercial firms with private sector investment. Today is the 125th Anniversary of the opening of the Ottawa Electric Street Railway on 29 June, 1891, fully financed by successful engineering entrepreneurs Thomas Ahearn and Warren Soper. Three years later, in 1894 the Hull Electric Railway Hull was inaugurated by three partners, entrepreneur Théophile Viau, banker Jacques-P. de Martigny, and millwright Stanislas Aubry, who raised funds from a Montreal financier and a physician from Saint Jérôme. From 1901 these two electric railway services negotiated the integration of their services north-south across the Alexandra Bridge, which was financed and built by the Ottawa Northern and Western Railway Company. Their combined twin city service exchanged passengers with Canadian Pacific's regional service out to rural villages such as Smiths Falls, Arnprior, Bristol, Wakefield, Alexandria and Montebello. Later, through coordinated federal-provincial-municipal government intervention in the late 1940s, the cities of Ottawa and Hull took over the urban electric railway companies, and by 1959 the National Capital Commission, Ottawa and Hull shut down regional railway transit altogether, replacing it with public-sector municipal bus fleets and highways.
- 12 Today it is not clear whether a group of independent firms and investors would be allowed to develop a commercial passenger railway undertaking to serve Canada's Greater National Capital Region. Prior to assembling further commitments of resources, the Moose Consortium group of companies are taking this preliminary step in an application to determine the competitive character of our target market.

All of which is respectfully submitted.



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