



Office of the City Clerk and Solicitor
Bureau du greffier municipal et
de l'avocat général

June 28, 2017

Canada Transportation Agency
15 Eddy Street
Gatineau, Quebec

Attention: Secretariat

Email: Secretariat@otc-cta.gc.ca

**Re: Ottawa River Line – Show Cause Response
Case No. 17-01156**

We refer to the Agency's letter dated June 7, 2017 addressed to the undersigned in respect of the foregoing referenced matter. Defined terms from the Agency's letter are also used in this letter.

The City's response to the Agency's order that the City show cause why the Agency should not find that the City (Capital Railway) has breached its statutory obligations under Division V of the CTA by failing to comply with mandatory discontinuance process set out in that Division (the "**Discontinuance Rules**") is as follows:

1. **Overview:** By way of summary overview the City has not failed to comply with the Discontinuance Rules for the following fundamental reasons:
 - (a) the City has not made a decision and has no present intention (a "**Discontinuance Decision**") to permanently discontinue its ownership and planned use of the Ottawa Rail Line ("**ORL**").

In fact, the City has continued to publicly affirm by way of City Council decisions, City Administration plans, public filings, communications with Agency staff, and through ongoing maintenance activities and public safety/security measures, its very clear continued *intention* and plan to retain the ORL for possible future railway use;

- (b) a railway company has no obligation to, and is not able to, comply with or rely on the Discontinuance Rules unless and until it has confirmed its *intention* to discontinue a rail line in its publicly filed three year operating plan (the "**Railway Plan**") for a period of 12 months;
- (c) the Discontinuance Rules do not expressly provide for or contemplate the concept or principle of "*effective or constructive*" discontinuance ("**Constructive Discontinuance**") being applied;
- (d) even if the principle of Constructive Discontinuance could be read into Division V as an implied term or element of the Discontinuance Rules, this principle should only be applied in

- (e) circumstances where the underlying facts are entirely consistent with a railway company's very apparent decision or intention to permanently discontinue ownership of, its responsibilities for, and the potential future use of, a rail line.

For the reasons stated in subparagraph (a), the facts in the circumstances relating to the ORL are not consistent with such a decision or intention (actual or apparent);

- (f) if the Constructive Discontinuance principle can be applied by the Agency, the proper determination for the Agency to make in these circumstances is whether, through a course of actions (or inactions), a railway company has or will be permanently precluding the continued or future rail service on a rail line owned by the railway company.

With the ORL, the City has no intention to permanently preclude rail service, but instead has a clearly stated intention to establish a future rail transit service, with developed plans to replace removed ORL track and make modifications to small segments of the track alignment to effectively address the presence of the Bayview Station in a timely manner;

- (g) an inactive rail line does not mean a discontinued line, (or even a constructively or effectively discontinued line should that principle apply), within the meaning of the Discontinuance Rules.

There are numerous examples of periodically inactive or dormant rail lines across Canada, with or without fully operable and fully maintained infrastructure in place on a continuous and uninterrupted basis. The ORL is not in a different situation compared to other inactive rail lines in Canada; and

- (h) the application of the Constructive Discontinuance principle by the Agency could be very disruptive to the railway industry in Canada.

The application of this principle could lead to considerable regulatory uncertainty (when, how and to who will the principle be applied etc.) and potentially to the unnecessary and inefficient incurring of premature capital expenditures in restoring rail infrastructure on a speculative basis on inactive lines (with costs ultimately passed on to customers) and/or the premature permanent abandonment of rail lines by experienced capable rail operators.

2. Background Facts

2.1 Prior Submissions and Communications:

Through prior Agency proceedings and communications, the City believes the Agency is very aware of the background facts relating to the City's acquisition of the inactive ORL for purposes of continued (and/or future) rail transit purposes, the Agency's previous determination that the City had not breached its obligations in respect of the Discontinuance Rules, and the City's plans for the ORL at the Bayview Station.

This background includes information already in the possession of the Agency as follows:

- (a) City submissions in relation to Agency proceeding and decision 210-R-2012;
- (b) Email exchanges between the City and the Agency (Patricia Lavigne) in February of 2014, in which the City reaffirms its intentions to retain the ORL and the Prince of Wales ("**PoW**") Bridge in its Railway Plan for future possible rail service;
- (c) City letter to the Agency (John Corey) dated April 18, 2016, in which the City reaffirms its intentions with respect to the ORL, including its willingness to continue to engage in exploratory discussions with Moose Inc. regarding possible future use of the ORL and PoW Bridge;
- (d) Email communications between the City and the Agency in February of 2015, leading to a March 5, 2015, facilitation meeting involving the City, Moose Inc. and the Agency, in which the City again reaffirmed its intention to retain the ORL and the PoW Bridge in its Railway Plan for future rail service;
- (e) Email exchanges between the City and the Agency (Leslie Siegman) in July of 2016, in which the City again reaffirmed its intentions with respect to future ORL rail service at Bayview and across the PoW Bridge, with preliminary sketch plans regarding possible realignment plans for the ORL at Bayview to facilitate and support this future rail service;
- (f) A conference call organized by the Agency with a number of Agency and City representatives on September 6, 2016, to discuss developments with the ORL at Bayview, in which the City again reaffirmed its plans to retain ORL and further discussed some of its preliminary planning for modifications to the rail alignment to facilitate and support future ORL rail service; and
- (g) Email exchanges between the City and the Agency (Leslie Siegman) in February/March 2017, in which the City again reaffirmed its intentions with respect to the ORL, together with further details and plan diagrams regarding City plans for a realignment of the ORL at Bayview to facilitate and support future rail service over the ORL and across the PoW Bridge;

2.2 **Public Filings, Plans and Activities:**

As noted, the City has been very transparent in publicly and consistently confirming (and reaffirming) its intention to retain the ORL and PoW Bridge for continued rail purposes, including future rail transit service into the Province of Quebec. By way of illustration:

- (a) **Certificate of Fitness:** issued by the Agency to the City initially on April 30, 2001 and reaffirmed and varied on November 17, 2006, under which the City continues to hold and operate its commuter rail system, which Certificate of Fitness in part states:

".....for the purposes of operating a light rail commuter service also known as the O-Train, in the provinces of Ontario and Quebec....."

Note that, at the time the Certificate was issued and reaffirmed by the Agency, there were no active passenger rail service between Ottawa and Gatineau on the ORL. This interprovincial rail service was simply part of the City's master transit planning – then as it is today.

- (b) **Three Year Plan:** In the City’s current Railway Plan on file with the Agency, and as confirmed in previously filed Railway Plans, the following excerpt appears:

SUBDIVISION	BETWEEN	AND	DISTANCE	INTENTION
Ottawa River Line	Mileage 0.00 (Km 0.00) at Mileage 4.65 (Km 7.49) Ellwood Subdivision	Mileage 0.93 (Km 1.50) at Mileage 119.12 Lachute Subdivision (Gatineau, Quebec)	0.93 miles (1.50 km)	Retain

- (c) **City Council Resolutions:** Attached as **Appendix A** is a copy of City Council Motion #47/5 from a City Council meeting held on March 8, 2017, in which the following decisions were made:

THEREFOR BE IT RESOLVED that Council direct staff to continue to work with their counterparts in the City of Gatineau, to explore potential enhancements to public transit and active mobility connections between Ottawa and Gatineau, including, but not limited to, the future use of the Prince of Wales Bridge, to inform the next update to the Transportation Master Plan; and

BE IT FURTHER RESOLVED that Council ask Mayor Watson to formalize the exploratory discussions, already initiated by both Mayors, aimed at improving the rapid transit experience for residents of both cities, including, but not limited to, the potential future use of the Prince of Wales Bridge for rapid transit and active mobility with the goal of establishing next steps, and reporting back on the progress of these discussions before the end of this term of Council.

- (d) **City Transportation Master Plan:** The current Transportation Master Plan (“**TMP**”) for the City can be found at: [<http://ottawa.ca/en/city-hall/planning-and-development/official-plan-and-master-plans/transportation-master-plan>].

The TMP includes the following confirmation of the City’s intention in respect of the ORL and PoW Bridge and future rail service:

Project	General Description	Rationale	EA Status
Light Rail Transit Projects			
North-South LRT (Network Concept)	New LRT right of way between Boulevard Alexandre-Taché in Gatineau and Riverside South Town Centre. Includes airport link	Provides new rapid transit service between Gatineau / downtown Ottawa and the south urban community. Also promotes development in the corridor at Confederation Heights and between Carling Avenue and Bayview Stations.	Partially complete (Riverside South to Bayview)

- (e) **Memorandum of Understanding:** Attached to this letter as **Appendix B** is a copy of a Memorandum of Understanding between the Cities of Ottawa and Gatineau and the Service de transport de l'Outaouais ("STO") dated May 26, 2017, regarding the establishment of a joint planning and coordination group to collaborate in respect of future inter-provincial transportation studies and projects, which is prompted in part by the City's O-Train and Confederation light rail projects and possible future rail transit service over the ORL and the PoW Bridge.
- (f) **Maintenance/Safety Measures:** The City continues to proactively and prudently manage and protect the ORL rail infrastructure. By way of illustration: **(a)** the City continues to carry out regular engineering inspections of the PoW Bridge (eg. 2005, 2010, and 2014); **(b)** in 2015/16 the City upgraded and expanded the fencing in and around portions of Bayview Station and the PoW Bridge; **(c)** in 2015/16 the City also expanded the scope of security patrolling in relation to portions of the ORL and the PoW Bridge, and **(d)** the City periodically carries out basic maintenance activities commensurate with an inactive dormant rail line.

All of this confirms a clear City intention to retain the ORL for future use and is wholly inconsistent with an apparent decision or present intention to permanently abandon and discontinue its ownership and planned usage of the ORL.

2.3 **Engineering Plans/Drawings:** As noted, and as previously disclosed to and discussed with the Agency, the City is capable of and has developed plans to restore rail service on ORL, including across the PoW Bridge in a timely manner:

- (a) **Drawing:** attached as **Appendix C** is a schematic drawing dated January 6, 2015, showing preliminary plans for the eventual realignment of the ORL at Bayview;
- (b) **Plan Summary:** by way of high level summary, the City's preliminary planning for addressing the removed ORL track and the presence of the Bayview Station is as follows:
 1. **Present Intention:** to establish future rail transit services over the ORL and PoW Bridge to support a commuter rail passenger transportation service between Ottawa and Gatineau.
 2. **Realignment Plan:** as set out in the attached Drawing, the City intends to carry-out a realignment of the ORL at Bayview with re-installed track. Work will likely also be required to the PoW Bridge to restore it to proper operating condition.
 3. **Land Holdings:** the City currently holds the necessary land and property rights to carry-out the realignment plan currently described in the Drawing.
 4. **Engineering Design Details:** at this time, the City has not developed detailed engineering designs and related work and equipment requirements. These details will be further developed in a prudent and timely manner as the City's conceptual plans are further developed and the City receives further input from all interested persons, including other potential third party railway operators, and carries out further assessments at the relevant time of industry developments with rail infrastructure assets, systems and related technological advancements.

This includes City plans for the management of required grade separations and interface requirements in relation to the O-Train Trillium Line and Confederation LRT Line at Bayview, and with roadway traffic, all of which is and will be managed by the City in a carefully coordinated manner.

3. **Legal Analysis**

The legal analysis is very straightforward in this circumstance. Accordingly, I will be very brief in my summary.

The application of the Discontinuance Rules is based solely on a railway company having the *intention* to discontinue ownership of rail line for railway purposes. The Division V provisions are very clear on this point. There is no jurisprudence from court or Agency rulings that has found otherwise.

For ease of reference and for emphasis Section 141 and 142 of the CTA provide in part as follows:

Three-year plan

141 (1) A railway company shall prepare and keep up to date a plan indicating for each of its railway lines whether it intends to continue to operate the line or whether, within the next three years, it intends to take steps to discontinue operating the line.

142 (1) A railway company shall comply with the steps described in this Division before discontinuing operating a railway line.

(2) A railway company shall not take steps to discontinue operating a railway line before the company's intention to discontinue operating the line has been indicated in its plan for at least 12 months.

As summarized above, the City has clearly and consistently confirmed and reaffirmed its *intention* to retain ORL for future continued rail service. The City has no intention of permanently abandoning or discontinuing its ownership and management of the ORL for future rail service purposes.

The City also has no intention of permanently precluding the future use of ORL for itself or for other railway operators. This would be entirely inconsistent with the City's publicly confirmed transportation plans and stated intentions. Accordingly, the City is taking no steps to permanently discontinue operating the ORL and therefore is not, and cannot possibly be, in non-compliance with the Discontinuance Rules.

In further support of the foregoing conclusions, briefly stated in point form:

- 3.1 The City acknowledges the mandatory nature of the Discontinuance Rules as confirmed by the Agency.
- 3.2 The City acknowledges that, if and when it makes a Discontinuance Decision regarding the ORL, it will be obliged to follow the Discontinuance Rules to provide other qualified railway

companies an opportunity to take over the line for the purposes of restoring a rail transportation service on the ORL.

- 3.3 An inactive or dormant line is not a discontinued or permanently abandoned line. As confirmed by the Agency in the Ménard decisions (268-R-2013; LET-R-52-2013) the termination (or absence) of an active rail service by itself does not invoke the application of the Discontinuance Rules.
- 3.4 There are no prior findings by courts or by the Agency of the principle of Constructive Discontinuance. The Agency previously determined the City had not discontinued the ORL based on a lack of operating level maintenance. There is no reason to alter this prior determination.
- 3.5 There is nothing in the words of Division V that implies the application of the Constructive Discontinuance principle.
- 3.6 As reflected in previous Agency rulings (Ménard; Moose), the Discontinuance Rules should not be applied for the purpose of addressing level of service or level of maintenance matters, termination of service protocols or other operating related matters which are the subject matter of other CTA provisions. To do otherwise would, at a minimum, unnecessarily complicate and confuse the interpretation and application of these Division V provisions for the railway industry and the public.
- 3.7 Discontinuance within the meaning of Division V means a “*permanent and complete*” abandonment, which means a decision to fully relinquish rail line ownership and the related rights and responsibilities that flow from being a railway company under the CTA.
- 3.8 Discontinuance in the circumstance of an inactive line must mean the intended permanent preclusion of future rail service on that line by the current rail line owner, so that the Discontinuance Rules are triggered in order to provide an opportunity to a properly qualified and funded railway operator (or public authority) to step in and acquire ownership, and assume all related rights and responsibilities, associated with fully restoring the line to operating standards.
- 3.9 As noted previously, there is no evidence whatsoever to support a City plan or intention to permanently and completely abandon the ORL and preclude future rail service by itself or by others or to permanently relieve the City from ongoing railway company obligations in respect of the ORL. As summarized above, there is overwhelming and consistent evidence that confirms otherwise.
- 3.10 Applying the Discontinuance Rules based on some kind of Constructive Discontinuance principle to ORL at this time could prematurely preclude the City from being able to follow through with substantial and continued investments in public transit between Gatineau and Ottawa which is clearly not in the public best interest.
- 3.11 The City is becoming increasingly concerned by the Agency’s apparent reluctance to accept the City’s very transparent, very consistent and very clear confirmations and reaffirmations of its intention as a railway company for the continued ownership of the ORL for railway purposes. We simply do not understand the repeated and ongoing enquiries and investigations in the face

of overwhelming evidence of the City's clear intentions which are straightforward and in no way inconsistent with Division V of the CTA.

3.12 With respect for the Agency's past practices and its general mandate, the City has voluntarily agreed (again) to cooperate and respond to the Agency's enquiries on this matter. The City however is not persuaded of the statutory (or factual) basis on which the Agency has commenced with this show-cause proceeding. Accordingly the City reserves all rights to later question and potentially legally challenge the Agency's jurisdiction and authority in these circumstances to carry forward further with this proceeding.

4. Conclusion

The City has no present intention to discontinue its ownership of the ORL for railway purposes and has not taken, and has no intention to take, any discontinuance steps under Division V of the CTA. Accordingly, the City has not in any manner whatsoever failed to comply with these CTA provisions.

Yours sincerely,



M. Rick O'Connor
City Clerk and Solicitor