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18 September 2018

Ms. Indrani Hulan
Director, Rail Policy Analysis and Legislative Initiatives
Transport Canada
330 rue, Sparks Street,
Ottawa ON K1A 0N5

Subject: Moose Consortium Inc. Petition Under Section 40 of the Canada Transportation Act Requesting that the Governor in Council Vary Agency Determination No. R-2018-23

Dear Ms. Hulan,

Section 40 of the Canada Transportation Act provides that “The Governor in Council may ... either on petition of a party or an interested person or of the Governor in Council’s own motion, vary or rescind any decision, order, rule or regulation of the Agency" (Canadian Transportation Agency).

This Section 40 Petition follows our letter to you of 30 July 2018 in which Moose Consortium Inc, on behalf of the companies of MOOSE Consortium (“MOOSE”) requested that the Minister of Transport Canada:

> “Exercise the authority pursuant to Section 40 of the Canada Transportation Act to modify the order issued in the Agency Determination No. R-2018-23 by removing its dependence upon any separate hypothetical Agency order under Division IV of the Act, and for the Agency or Governor in Council to use Sections 43(1), 47(1) and/or 116(4)(a)(i) of the Act, or any other remedy for non-compliance with Division V, to unconditionally order the City of Ottawa to physically reconnect the Ellwood Subdivision in Ontario with the Lachute Subdivision in Québec via the Prince of Wales Bridge within 12 months in a manner that conforms with Transport Canada’s “Standard Respecting Railway Clearance” and all other applicable federal railway standards. We note that Section 23(3) of the "Transportation Modernization Act" amends Section 116 of the Canada Transportation Act to require railway companies to make certain information available to the Minister and the public, to establish a remedy for non-compliance with the process, and to empower the Agency, subject to authorization and any terms and conditions of the Minister, to initiate and conduct an investigation in order to determine whether a railway company is fulfilling its service obligations.”

This Petition contains three sections describing how and why we believe Determination No. R-2018-23 should be varied. Three additional sections provide comment on the roles in this case of the Canadian Transportation Agency, the Rail Policy Directorate of Transport Canada, and the office of the Minister of Transport Canada. In closing, we identify other Parties that we believe may have a direct material interest in the outcome of this Section 40 Petition, and should therefore be invited to comment.

Moose Consortium Inc. is an independent start-up involving over a dozen companies (“MOOSE”, an acronym for Mobility Ottawa-Outaouais: Systems & Enterprises) proposing a 250-mile (400 km) commercially-financed and operated metropolitan passenger railway undertaking throughout the Greater National Capital Region. Our service would operate on existing and reactivated railway corridors in a six-pointed star pattern radiating from the urban core of Ottawa/Gatineau to termini in semi-rural areas in eastern Ontario and western Québec, connected via the Prince of Wales Bridge:

- Smiths Falls ON — Ottawa ON — Gatineau QC — La Pêche (Wakefield) QC;
- Arnprior ON — Ottawa ON — Gatineau QC — Montebello QC;
- Alexandria ON — Ottawa ON — Bristol QC.

A. Remove the Hypothetical Scenario and Use the Asset's Legal Name in the "Order" Part

1. Determination No. R-2018-23 of the Agency orders the City of Ottawa ("the City") to:

> "Take the steps necessary to restore the ORL, including the Prince of Wales Bridge (POW Bridge), to a point where it could be made operable within 12 months of an Agency order pursuant to Division IV of the CTA."

2. Moose Consortium Inc. requests that the Governor in Council vary this order such that it stands on its own, without dependence upon a hypothetical order from an exceptional non-existent case. We also request that the Determination use the legal name of this railway, as explained in section B below. Following is a suggested re-statement of the order:

> Take the steps necessary to restore the Chaudière Extension, including the Prince of Wales Bridge (POW Bridge) within 12 months of this renewed order, making it no less operable than when it was acquired by the City of Ottawa in 2005 "for continued railway operations" between the Ellwood Subdivision in Ontario and the Lachute Subdivision in Québec.

3. Most crucially this case is concerned with the City's planned, deliberate and complete dismantlement of an entire segment of federally regulated main line railway track without Agency authorization, followed by its permanent physical obstruction of the main line railway corridor which it acquired "for continued railway operations", and which is protected in federal legislation under Section 92(10)(c) of Canada's Constitution. This case is also in part concerned with a debatable matter regarding the appropriate level of maintenance standards on 'currently out-of-service' track. This case does not involve the timeliness of a railway owner's repairs following some unforeseen disruption.

4. There is nothing in the Canada Transportation Act or in related case law to support Agency acquiescence to a major Division V violation so long as no Division IV order comes along. It is an error in law for Determination No. R-2018-23 (paragraphs 24 and 27) to narrowly pivot upon "the fact that there have been no applications pursuant to Division IV of the CTA", while not acknowledging multiple *bona fide* strategies, recommendations, plans and proposals from public and private sector organizations to develop railway undertakings in the near term on the same line. To make enforcement of a Division V order conditional upon a prior Division IV (Section 138) order is entirely inappropriate because:

    4.1. In Decision No. 40-R-2006 the Agency agreed with Canadian Pacific Railway (CPR) that until a line of railway is officially discontinued pursuant to Division V of the Canada Transportation Act (CTA), the railway company owning the work continues to have level of service obligations pursuant to the CTA, which could require the railway company to provide service on this line at any time to other operators. The Agency agreed with CPR that the absence of train movements over an extended period of time on a line does not provide the owner of the asset license to unilaterally terminate its maintenance, inspections and testing, unless specific exemptions from these procedures are obtained from the Railway Safety Branch of Transport Canada.

    4.2. On 27 February, 2015 the Commissioner of Competition tabled a "Submission to the Canada Transportation Act Review Panel" expressing concern with the Agency's narrow interpretation of Division IV:

> "Pursuant to section 138 of the CTA [Canada Transportation Act] a railway company may apply to the Agency to obtain running rights ... 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."

The long-standing Agency Decision No. 505-R-2002 places broad judgement about the public interest ahead of the narrow and exceptional sort of requirement found in the recent Determination No. R-2018-23 that specifically requires "*an Agency order pursuant to Division IV*". Decision No. 505-R-2002 explains:

> "[I]t is to be acknowledged that there may be cases where the existence of other remedies, perhaps less pervasive than running rights, could eliminate or diminish certain problems in the marketplace. The availability then of these other remedies is relevant to the general public interest assessment required under the section. A statutory running right is an exceptional remedy. ... The Agency finds that the principle of competition without actual evidence of market abuse or failure is not sufficient to trigger the application of section 138 of the CTA."

Nevertheless Determination No. R-2018-23 did indeed make a remedy to the acknowledged Division V violation contingent upon an exceptional Division IV order. Therefore:

4.2.1. On this basis MOOSE sent a letter dated 17 July 2018 to Agency staff with detailed tangible evidence that two "municipal governments had violated Section 78(1)(e) of the Competition Act with specific actions in 2016 and 2017 to withhold from the National Capital Region interprovincial railway market existing railway infrastructure". Section 78(1)(e) of Canada's Competition Act on "Abuse of Dominant Position" defines an "anti-competitive act" to include "pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market".

4.2.2. An email received back from Mr. John Touliopolis, Director, Rail & Marine Determinations for the Agency on 29 August 2018 stated: "The Canadian Transportation Agency has no authority to enforce the Competition Act. Concerns regarding any possible violation of paragraph 78(1)(e) of the Competition Act should be sent to the Competition Bureau."

4.2.3. As things presently stand, the Agency has made an order to restore an illegally dismantled and obstructed federal railway contingent on some other party first winning a separate case to obtain running rights, and that case would be contingent upon some party first winning a separate case under the Competition Act.

4.2.4. A logical corollary of the Agency's current stance, therefore, is that the owner of a railway work in Canada to which Section 92(10)(c) of Canada's Constitution applies, has *carte blanche* to take specific actions that render it inoperable without following the requirements of Division V of the Canada Transportation Act, so long as there is no current order arising from a separate Division IV (Section 138) case, and that prior case hinges on a separate prior ruling from a Section 78(1)(e) case under the Competition Act.

4.2.5. The companies of MOOSE Consortium strongly doubt that this convoluted and prohibitively expensive legal maze correctly represents the intent of Parliament, or the public interest.

4.3. Agency personnel are aware through communications with MOOSE, but surely also through many other channels of public information, that there are multiple active and recent development strategies, recommendations, plans and proposals that depend upon the redevelopment of operational rail capability between the Ellwood Subdivision in Ontario and the Lachute Subdivision in Québec via the Prince of Wales Bridge. All such initiatives are unrealizable because "from the Québec shore of the POW Bridge to the Bayview Station ... the City has taken specific actions that render that portion inoperable".

4.3.1. To begin with, throughout the seven years of this case at least one railway company has held active running rights between the Ellwood Subdivision in Ontario and the Lachute Subdivision in Québec via the Prince of Wales Bridge. The City of Ottawa, operating as Capital Railway, holds Certificate of Fitness No. 00002-3 "for the purposes of operating a light rail commuter service, also known as the O-Train, in the provinces of Ontario and Québec".

4.3.2. City of Ottawa Mayor Jim Watson stated in his letter to Minister Garneau on 6 March 2018 that there are “ongoing discussions between the cities of Gatineau and Ottawa, as well as with local members of Parliament, with respect to the future potential use of the Ottawa River Line in connecting our two transit systems.” However his letter did not explain why “the City has taken specific actions that render that portion inoperable” as was concluded in Determination No. R-2018-23.

4.3.3. Under a different but recent municipal administration, the “Mayor of Ottawa’s Task Force on Transportation” (1 June 2007, led by former federal Minister of Transport, David Collennette) proposed use of the Prince of Wales Bridge for freight and passenger rail. And in the current municipal election, at least one mayoralty candidate’s campaign emphasizes the redevelopment of passenger rail between Ottawa and Gatineau.

4.3.4. Pursuant to Section 13 of the National Capital Act, the National Capital Commission (NCC) “may construct in the National Capital Region, in accordance with plans prepared under this Act, a railway and related facilities.” The “Interprovincial Transit Strategy for Canada’s Capital Region” (2013) was prepared by the NCC in collaboration with Ottawa and Gatineau. Its "Medium Term Actions by 2018" include the development of passenger rail between Ottawa and Gatineau via Prince of Wales Bridge. The 2013 strategy document explains that passenger rail service between Ottawa and Gatineau “via the Prince of Wales Bridge in the medium term could provide relief to existing core area transit infrastructure and better connect non-downtown destinations to improve overall network connectivity”. The Strategy further observes that if passenger rail service “was extended across the Bridge to either the Hull core or the Montcalm Rapibus Station, it would enhance network connectivity and/or minimize transfers for interprovincial passengers travelling between Gatineau and west or south Ottawa. Making this connection prior to 2021 would provide additional transit capacity prior to the introduction of a new east end bridge.” The report explains that this objective “was raised frequently during the various public and stakeholder study meetings”.

4.3.5. The National Capital Commission’s “Plan for Canada's Capital (2017-2067)” also states: “The NCC will support efforts toward seamless and continuous interprovincial transit services, consistent with the principles espoused by the Interprovincial Transit Strategy, including the adaptation of the Prince of Wales rail bridge for transit and active mobility.” (Page 109)

4.3.6. Moose Consortium Inc. submitted an application to the Agency for a Certificate of Fitness in 2016 proposing an interprovincial passenger rail service that requires operation between the Ellwood Subdivision in Ontario and the Lachute Subdivision in Québec via the Prince of Wales Bridge. The application documents included a 25-page “Preliminary Rehabilitation Plan for the Prince of Wales Bridge and Lemieux Island Sections of the Chaudière Extension” prepared by REMISZ Consulting Engineers. On 15 November 2013 MOOSE presented a written offer to Ottawa City Council to finance the refurbishment of the Prince of Wales Bridge, and this has been repeated at various times through the years, most recently in a letter to Ottawa Mayor Jim Watson on 29 March 2018, which was shared with the Agency. Agency personnel explained in a 24 February 2017 letter that MOOSE’s application for a Certificate of Fitness was set aside in large

part because "it is still in the feasibility stage of its implementation plan with the required agreements and funding to implement the undertaking to be secured in a later phase". It appears that Agency personnel believe that such agreements and investor commitments can proceed despite the illegal dismantlement and structural obstruction of the most mission-critical section of this entire interprovincial railway network by the City, combined with regulatory inaction by the Agency to protect the short segment which connects the Ontario and Québec parts. MOOSE's investment syndicator awaits tangible evidence that the Agency is capable of performing its statutory role promptly and vigorously. Failing that, our investment counsel trusts that the Minister of Transport will now ask Cabinet to ensure that the integrity of federal railway law shall outweigh all the other forces that have been pushing the illegal destruction of this interprovincial connector railway. Without good governance, commercial investment stalls.

B. Clarify the Legal Status of the Work in "The Law" Part

5. Decision No. 210-R-2012 uses long-established operating names, referring to:
    - "the Prince of Wales Bridge (Bridge) ...[which] runs from the Lachute Subdivision in Québec to the Ellwood Subdivision in Ontario."
6. However the related Determination No. R-2018-23 uses an *ad hoc* name, referring to:
    - "a portion of its Ottawa River Line (ORL)"
    - "the ORL, including the Prince of Wales Bridge (POW Bridge)"
7. Moose Consortium Inc. requests that the Governor in Council vary this determination to eliminate unwarranted complication and confusion arising from multiple overlapping names generated by the City for various parts of the same railway infrastructure. The name used should be clearly related to the legal name(s) long-established in federal legislation and case law for the track which is at issue here. With consistent naming, the Determination can unambiguously communicate the expressed intent of Parliament since 1867 with regard to this connector railway. If the City would be permitted to continue using partially overlapping *ad hoc* operating names in legally-significant communications with the Agency and Transport Canada, then text similar to the following should become part of the determination. (Specific mileages are for the railway owner to specify.)

    7.1. Legal Name of the Railway Section at Issue

    7.1.1. "*Chaudière Extension*" This case concerns the operational integrity of a connector railway work given the legal name "Chaudière Extension" in federal legislation of 1867 and 1872. This name should be used in legally-significant communications when referring to this work.

    - In the "Act to Incorporate the St. Lawrence and Ottawa Railway Company" (1867) Parliament declared this planned connector railway "to be a work for the general advantage of Canada" pursuant to Section 92(10)(c) of Canada's Constitution.
    - In the "Act to Amend The St. Lawrence and Ottawa Railway Act" (1872), Sections 2 and 25 named this connector railway the "Chaudière Extension" and reiterated its federal status.

    7.1.2. The Chaudière Extension is an approximately 2.5 kilometre (1.5 mile) section of main line railway completed in 1880 to connect the eastern Ontario and western Québec railway networks via the Prince of Wales Bridge. This connector railway was built between 1877 and 1880 by the Québec, Montreal, Ottawa and Occidental Railway ("QMO&O"), which was a wholly-owned enterprise of the Government of Québec. Until it was purchased in 2005 by the City of Ottawa, the Chaudière Extension accommodated

normal interprovincial through-traffic of conventional trains between Ontario and Québec via the Prince of Wales Bridge.

7.2. Long-Standing Operating Names of the Two Railway Subdivisions

7.2.1. "Ellwood Subdivision" The portion of the Chaudière Extension within Ontario, south of the Ontario-Québec border midway in the Ottawa River has long been referred to as an integral part of a railway with the operating name "Ellwood Subdivision", a name which dates from 1967.

7.2.2. "Lachute Subdivision" The portion of the Chaudière Extension within Québec, north of the Ontario-Québec border, has long been referred to as an integral part of a railway with the operating name "Lachute Subdivision".

7.2.3. To avoid confusion, the names "Ellwood Subdivision" and "Lachute Subdivision" should be used in legally significant communications with federal regulatory authorities when referring to these works, with the same meanings and mileages as they had prior to 2012.

7.3. Recent Operating Names Used by the City of Ottawa

7.3.1. *"Ottawa River Line"* Following Decision No. 210-R-2012 the City began referring to the part of the Chaudière Extension that is north of the switch for the Bayview Station spur by a new separate operating name, the "Ottawa River Line" (ORL). There has been no further acknowledgement from the City that the Ellwood Subdivision reaches the Lachute Subdivision via a continuous line of track. The southern part of this ORL is actually part of the now unacknowledged portion of the "Ellwood Subdivision", while the northern part of the ORL overlaps with the "Lachute Subdivision", all of which partially overlaps with the Chaudière Extension. This is confusing.

7.3.2. *"Trillium Line"* Since 2014 the City has also referred to the part of the Chaudière Extension south of the switch for Bayview Station spur as an integral part of a railway section to which it gave the operating name "Trillium Line". This encompasses part of the "Ellwood Subdivision" as well as the entire Bayview Station spur, but not the "Ottawa River Line" north of the switch for the Bayview Station spur, also confusing.

7.3.3. The "Transport Canada Delegation Agreement: for Regulation of the Design, Construction, Operation, Safety and Security of Ottawa Light Rail Transit System" (dated 1 October 2011) explicitly reiterated the federal regulatory status of the "Trillium Line" without any detailed description. Presumably this refers to the "Ellwood Subdivision" until it reaches the Bayview Station spur, and then the Bayview Station spur. But to avoid confusion, it must be pointed out that the remainder of the Ellwood Subdivision extending north to the Lachute Subdivision also remains federally regulated.

7.3.4. The City's *ad hoc* operating names should not be used in legally significant communications with federal regulatory authorities when referring to any these works, except where such additional references can assist rather than hinder understanding.

C. Define Key Operational Words and Phrases, Thereby Eliminating Further Ambiguity and Unwarranted Manoeuvrability in the "Analysis and Determination" Part

8. MOOSE contends that ambiguity and omission by the Agency in its Determination No. R-2018-23, and in the prior Decision No. 210-R-2012, have enabled this straightforward case to drag on for seven years and counting. The resulting confusion amongst stakeholders and the steady undermining of investor confidence is impeding the revitalization of integrated passenger rail service throughout Canada's Greater National Capital Region.

9. MOOSE therefore asks that the Governor in Council minimize the risk of further ambiguity and manoeuvrability amongst the parties, by expanding the analysis part of the determination to give explicit meaning to the key operational words and phrases contained in the order.

9.1. The Petitioner asks that key terms and phrases in the order be defined as follows:

9.1.1. *"Steps Necessary"* The phrase "steps necessary" shall be taken as referring to the five steps of the ISO 25100 Standard on Project Management: Initiating; Planning; Execution; Controlling; Closing.

9.1.2. *"Restore"* The word "restore" shall mean that the infrastructure and its maintenance regimen are returned to conformance with the explicit requirements and implicit reasonable expectations of the Canada Transportation Act, Transport Canada's Standards Respecting Railway Clearances, the Railway Safety Act, the Railway Safety Management System Regulations, the Guideline for Bridge Safety Management, and related federal railway regulations and case law.

9.1.3. *"Within 12 Months"* The phrase "within 12 months" means that a failure to comply with this order within 365 days constitutes civil contempt of a Federal Court order.

9.2. *"Initiating"* Completion of the "Initiating" step shall be taken to mean:

9.2.1. Written acknowledgement by the City of the necessary steps specified by the Agency.

9.2.2. Development of a project management plan to fulfil the necessary steps within the required time.

9.3. *"Planning"* Completion of the "Planning" step shall be taken to mean:

9.3.1. An independent professional civil engineer's comparative description and 'critical path' delivery estimate of each physically feasible restoration alternative, using baseline facts on the ground as of the date of Determination No. R-2018-23 (16 February, 2018), within 150 meters radius (approx. 500 ft) of the original main line railway track. This information shall be open to the public.

9.3.2. A full cost estimate of each restoration alternative, taking account of expected facts on the ground within the same perimeter, but setting the 'critical path' to begin from the date of the revised order. This information shall be open to the public.

9.3.3. Posting of a surety bond equal to the highest of the restoration cost estimates, and administrated (for guidance) in conformance with Appendix S of the "Contracting Policy" of Treasury Board of Canada Secretariat. Remittance of the surety bond must be accompanied by an attestation signed by the City of Ottawa Manager that no funds originating from Government of Canada transfers, grants or contributions have been or will be diverted within 10 years into covering the cost of this surety bond obligation. The related documentation shall be open to the public.

9.3.4. A completed consent authorization, or a front-ending agreement, or equivalent, for the construction of each restoration alternative by a contractor. This must be accompanied by a written decision from the City of Ottawa's Committee of Adjustment which pre-authorizes any variances, permissions, consents, or property line adjustments that a contractor may require to undertake each restoration alternative described by the independent professional civil engineer.

9.3.5. A completed consent authorization, or a front-ending agreement, or equivalent with which, in the event of a failure by the City of Ottawa or its contractor to fulfil the necessary steps, the National Capital Commission or its designate, pursuant to Section 13 of the National Capital Act, would take over completion of the work using funds from the surety bond, in alignment with Section 8 (General Transaction Guidelines) in the

"Guide to the Management of Real Property", published by Treasury Board of Canada, Secretariat.

9.3.6. A summary description of optional enhancements in the public interest that the City may voluntarily propose to combine with any of the restoration alternatives under a separate budget (e.g. cantilevered cycling and pedestrian trails). This information shall be open to the public.

9.3.7. Concise consultations with direct stakeholder and the broader public to assist in documenting preferences and constraints, and weighing the relative merits of the restoration alternatives.

9.4. "*Execution*" Completion of the "Execution" step shall be taken to mean:

9.4.1. Selection of one restoration alternative supported by a document that explains how the various factors have been taken into account. This shall be open to the public.

9.4.2. Elaboration of the selected restoration alternative and sign-off of the engineering plans by the Agency and by a panel of direct stakeholders identified by the Agency.

9.4.3. Implementation of the selected reconnection, in reasonable accordance with the engineering design and critical path documentation.

9.5. "*Controlling*" Completion of the "Controlling" step shall mean:

9.5.1. Inspection by independent certified professional railway infrastructure and safety specialists that results in their certifying the functional integrity and safety of the Chaudière Extension, and attesting that it is no less operable than when it was acquired by the City in 2005 "for continued railway operations" between the Ellwood Subdivision in Ontario and the Lachute Subdivision in Québec.

9.5.2. Completion of a successful demo run of a conventional 'heavy' train between the Ellwood Subdivision in Ontario and the Lachute Subdivision in Québec via the Prince of Wales Bridge. The last train to traverse the Prince of Wales Bridge was an Ottawa Central Railway work train (Locomotive OCRR 1842, 1,800 hp) which on 26 July 2001 pulled 22 hopper cars fully loaded with ballast for the track development being undertaken in connection with the opening of the O-Train service. This operation must be repeatable.

9.6. "*Closing*" Completion of the "Closing" step shall mean:

9.6.1. Publication online of an official attestation by the City of Ottawa Manager that the Chaudière Extension is "open for business" to accommodate normal interprovincial through-traffic of conventional trains between Ontario and Québec via the Prince of Wales Bridge.

9.6.2. The City of Ottawa accepts the requests of at least three independent railway companies seeking running rights across the Prince of Wales Bridge between the Ellwood Subdivision in Ontario and the Lachute Subdivision in Québec.

D. Comments With Respect to the Role of the Canadian Transportation Agency

10. The Agency's Determination No. R-2018-23 this year maps directly to MOOSE's original complaint seven years ago:

10.1. On 27 June 2011 MOOSE submitted a complaint to the Agency that "the City of Ottawa ... has *de facto* discontinued this federal railway work without due process respecting applications for discontinuance of lines of railway under Division V of the Act".

10.2. On 16 February 2018 the Agency's Determination No. R-2018-23 concluded: "the Agency finds that the City has discontinued the operation of a portion of its ORL without complying with the mandatory discontinuance process set out in Division V of the CTA".

11. This seven-year process, still ongoing into its eighth year, places an unreasonable, unfair and investment-stifling burden against a group of companies that only seeks regulatory compliance and enforcement of the central tenets of Canadian railway law, and accommodation for the explicit intent of Parliament concerning this particular section of railway since 1867.

12. The trajectory of this case must be considered against the 120-day and 90-day targets expressed in the "General Rules" of the Canadian Transportation Agency:

> "The Agency is required to resolve disputes as expeditiously as possible, and the Act establishes a 120-day statutory deadline after receipt of a complete application for the Agency to make its decision unless the parties agree to extend the deadline. In addition, the Agency strives for high performance and has adopted a set of high performance targets which are monitored and reported on an annual basis. In the case of complex formal disputes, the Agency has committed to resolving 80 percent of these cases in 90 days after the close of pleadings. Meeting this target has been a challenge and the Agency is now working to improve its performance in this area by focusing on reviewing its procedures, with a view to streamlining and simplifying them and to gain efficiencies in case processing."

13. In the interim, in full knowledge of Agency personnel at a visible location just three kilometres from the Agency's offices, the City dismantled and obstructed this railway. Throughout this entire period MOOSE maintained its active formal request that the Agency protect the integrity of this railway. Yet the Agency took no action to stop the dismantling and obstruction of the railway, and inexplicably, even declined repeated written requests from MOOSE to undertake a formal site inspection pursuant to Section 25 of the Canada Transportation Act.

14. On 27 June 2011 MOOSE submitted a complaint to the Agency which resulted in Decision No. 210-R-2012 a year later on 6 June, 2012. But after that Decision, MOOSE has been repeatedly compelled to seek Agency enforcement of even that simple order:

14.1. Paragraph 41 of Decision No. 210-R-2012 reiterated and ordered that within 90 days the City "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".

14.2. On 12 September 2012 MOOSE notified the Agency of the City's failure to comply with the order in paragraph 41 of Decision No. 210-R-2012, by not publishing within 90 days of the order an updated Three Year Plan 2012-2015 that included the Prince of Wales Bridge.

14.3. On 25 October 2012 MOOSE provided a detailed 9-page submission to the Agency detailing factual and legal misrepresentation by the City (Capital Railway) in its updated Three Year Plan 2012-2015. The Prince of Wales Bridge mainline railway was wrongly portrayed as the "Lemieux Island Spur", which is a separate and legally distinct work. This material violation of Section 173 of the Canada Transportation Act was not pursued by the Agency, despite an explicit written request by MOOSE to address the mistake.

14.4. On 3 February 2015 MOOSE notified the Agency that a week previously, on 26 January 2015 the City published a "Request for Qualifications: Prince of Wales Bridge Enhancements - Conversion to a Pedestrian and Cycling Bridge over the Ottawa River" (RFQ No. 27615-92533-Q01). The City's RFQ document stated: "The project consists of converting the Prince of Wales Bridges from a rail facility to a pedestrian and cycling link over the Ottawa River. It will also include converting the railway line on Lemieux Island to a pedestrian and cycling facility." The project specified: "Removal of tracks from the existing north and south bridges and conversion to a multi-use pathway (inactive railway) ... to be completed by 15

December 2016." This violated the order in Decision No. 210-R-2012 because it contradicted the City's (Capital Railway) 2012-2015 and 2015-2018 Three Year Plans which stated that the line from Mileage 4.65 at the switch for Bayview Station Track through to and including so-recently named "Ottawa River Line" across the Prince of Wales Bridge to Québec was to be retained as a railway under the Canada Transportation Act. The City defined the word "Retain" in its 2012-2015 and 2015-2018 plans as follows: "Capital Railway intends to continue the current operation of these railway lines." However the City did exactly the opposite, which is plain for anyone to observe on-site.

14.5. On 25 July 2016, MOOSE notified the Agency that the City had structurally dismantled a section of main line track, and also that it had begun to permanently obstruct this railway corridor. The 25 July 2016 letter from MOOSE to the Agency reported: "contractors to the City of Ottawa are presently constructing large installations of reinforced concrete that, apparently, would obstruct through traffic of any future train between Ontario and Québec on the Chaudière Extension, as illustrated in photos and diagrams of Annex 1. It is not clear how the track would be re-connected."

14.6. On 15 August 2016 MOOSE provided a more detailed letter to the Agency explaining:

> "The City of Ottawa has dismantled a section of continuous main line railway located approximately between and Mileage 0.62 and Mileage 0.77 of the 'Ottawa River Line', which is documented as to be 'retained' in Capital Railway's current and previous Three-Year Plans (2012-2015; 2016-2018). The City of Ottawa has installed earthworks and built reinforced concrete installations that, if left in place, will permanently obstruct the right-of-way for inter-provincial railway services between the Ellwood Subdivision in Ontario and the Lachute Subdivision in Québec. In 1867 the Parliament of Canada declared this connection to be 'for the general advantage of Canada'. Further construction of unauthorized earthworks and installations is proceeding at the present time, which would permanently obstruct the railway right-of-way. Moose therefore requests an immediate preliminary enquiry by the Agency to establish the facts on the ground at this location, pursuant to Sections 25, 38 and 39 of the Canada Transportation Act."

14.7. Again, this obvious violation of Section 173 of the Canada Transportation Act was not pursued by the Agency, despite another written request by MOOSE.

14.8. During the subsequent year and a half, the Agency stood by while the City completed its installation of large reinforced-concrete pillars and major earthworks which fully block the railway corridor. These would need to be removed to restore interoperability between the Ellwood Subdivision in Ontario and the Lachute Subdivision in Québec via the Prince of Wales Bridge within Transport Canada's "Standards Respecting Railway Clearances".

14.9. On 16 February 2018 the Agency published Determination No. R-2018-23, in which Paragraph 24 states: "With respect to the portion of the ORL from the Québec shore of the POW Bridge to the Bayview Station, which is the focus of this Determination, the Agency notes that the City has taken specific actions that render that portion inoperable". And with regard to Division V of the Canada Transportation Act, Paragraph 23 of this Determination explains that "a railway company has failed to respect that [Division V] process if the company has removed infrastructure, created physical barriers, or allowed one of its lines to fall into a state of disrepair such that operation of line by the company or by another company granted running rights is not possible within a reasonable period of time."

14.10. On 30 July 2018 MOOSE supplied the Minister of Transport Canada and the Agency a general diagram for four potential reconnection routes, each of which our engineers expect would involve significant retrofit construction projects costing no less than $20 million. It is our view that the forces pushing to take this interprovincial connector railway out of service must not be allowed now to maintain their current situational foothold obtained through the violation of federal railway law.

E. Comments With Respect to the Role of the Rail Policy Directorate, Transport Canada

15. Section 5 of the Canada Transportation Act is an integral part of the Act which establishes core principles by which the National Transportation Policy is to be guided and enforced.

16. On 25 April 2018 the City was granted Leave to Appeal by the Federal Court of Appeal. MOOSE believes that the Rail Policy Directorate of Transport Canada has its own primary obligation to become an intervenor in Federal Court of Appeal Case 198-A-18 in order to:

    16.1. Defend the Canadian Transportation Agency against the City's challenge to its jurisdiction and authority; and to,

    16.2. Defend the operational integrity of the Chaudière Extension which the federal Parliament has designated through legislation to be "for the general advantage of Canada"; and to

    16.3. Ensure that the National Transportation Policy articulated in Section 5 of the Canada Transportation Act is reliable and enforceable in its substance, and is not just a pretence.

17. These underlying governance responsibilities must not be foisted upon a start-up group of companies whose only intention is to assemble expertise and investment that would contribute to the commercial development of an undertaking in Canada's railway sector, based upon the reasonable premise of a rules-based competitive market in which business decisions can be guided by routine federal regulatory principles and protections.

18. The current situation harms the public interest throughout the entire National Capital Region, as evidenced by the 25 July 2016 letter from the Mayor of Smiths Falls to the Agency, with a copy to the Minister of Transport Canada, saying: "It is difficult to imagine a more symbolic offence to Canada's 150th Anniversary than to break the one strategic railway connection in the National Capital Region between two founding provinces which, when its construction was first described in an Act of the Canadian Parliament in 1867, was declared to be 'for the general advantage of Canada' under Section 92(10)(c) of our Constitution." A copy of his letter is attached.

F. Comments With Respect to the Role of the Minister, Transport Canada

19. More than six months after MOOSE notified the Agency that the City had structurally dismantled a section of main line track, and also that it had begun to permanently obstruct this railway corridor, on 6 February 2017 MOOSE wrote to Minister Garneau regarding the lack of Agency action in this case. The letter stated that "we do not seek your intervention on the substance of its deliberations or its determination. Rather we are requesting that you use your good offices to immediately instruct the Agency to perform its role promptly as the regulator of record and to produce a determination on this case without further delay."

20. On 11 May 2018 MOOSE wrote to Minister Garneau in response to a 6 March 2018 letter from City of Ottawa Mayor Jim Watson to the Minister asking that Decision No. 210-R-2012 and Determination No. R-2018-23 be rescinded. MOOSE's requested that the Governor in Council uphold the referenced Decision, explaining that:

    "The purpose of our present letter is to inform you that if Cabinet were to rescind the results of federal regulatory due process in this case, such an outcome would prejudice the legitimate business interests of Moose Consortium Inc. and of the companies that operate as "MOOSE Consortium". To override the order would wipe out significant tangible investment by the multiple companies involved, and would reward the City of Ottawa's persistent violations of central provisions of the Canada Transportation Act."

21. On 11 July 2018 City Solicitor Rick O'Connor wrote to Ottawa Mayor and Council that “the Governor in Council has been asked to hold the City's [Section 40] petition in abeyance, pending the decision by the Federal Court of Appeal. Only if that Appeal is unsuccessful will the City reinstate its request that the Governor in Council exercise its broad discretion to intervene”.

22. On 30 July 2018 MOOSE wrote to Minister Garneau to request that Determination No. R-2018-23 be modified pursuant to Section 40 of the Canada Transportation Act, to unconditionally order the City to physically reconnect the Ellwood Subdivision in Ontario with the Lachute Subdivision in Québec via the Prince of Wales Bridge. Our present letter elaborates upon that initial request by providing background information and rationale, along with specific suggestions for modifying the Determination to remove ambiguity and unwarranted manoeuvrability.

23. MOOSE understands that time is required to step through a Section 40 petition, as follows:

    23.1. Rail Policy Directorate, Transport Canada

        23.1.1. Requests information/evidence from the Petitioner to support the petition.

        23.1.2. Receives information/evidence from the Petitioner

        23.1.3. Seeks input from and consults with the Party(ies) to the Agency Decision.

        23.1.4. Seeks input from and consults with other interested parties identified by the Petitioner or the Party(ies) to the Agency Decision.

        23.1.5. Considers all information provided by all parties.

        23.1.6. Writes a confidential recommendation to the Minister.

    23.2. The Minister, Transport Canada

        23.2.1. Decides whether to recommend that the Governor in Council (GIC) uphold, rescind, or vary the decision of the Agency.

    23.3. The Governor in Council (GIC)

        23.3.1. Considers the Minister’s recommendation at a Treasury Board meeting.

        23.3.2. Decides whether to prepare an Order in Council for the Governor General.

    23.4. The Governor General

        23.4.1. Signs the Order in Council.

G. Identification of Parties with a Direct Material Interest in this Section 40 Petition

24. The Parties to the three legal stages in this case differ:

    24.1. Parties to the complaint leading to Decision No. 210-R-2012 were MOOSE and the City.

    24.2. The parties to the enforcement action resulting in Determination No. R-2018-23 (and to Federal Court of Appeal Case 198-A-18 which challenges it) are the City and the Agency.

    24.3. The parties to the present Section 40 Petition are MOOSE, the Agency, and the City.

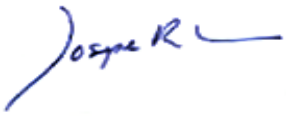
25. MOOSE believes that the following additional public sector entities have direct material interests in the outcome of this case, in light of their own respective statutory mandates. Additionally, two commercial railway companies are included which have in the past and may potentially have reason to operate conventional trains between Ontario and Québec via the Prince of Wales Bridge. The Railway Association of Canada is included because on 5 July 2018 their President and CEO Marc Brazeau wrote the the Minister of Transport to say in reference to Determination No. R-2018-23: “The decision, which appears to us to be ill-founded in law, is a source of concern to us and our federally regulated members.”

26. As a courtesy the present letter is being copied to entities that we believe have direct material interests in the outcome of this Petition, without implying anything whatsoever about their respective views regarding this case or any of the statements made herein. The following organizations are provided a copy of this letter and its package of attachments, on the understanding that each may elect to comment on the substance of this Petition, or not.

- La Ville de Gatineau
- La Société de transport de l'Outaouais
- Province of Ontario
- Province of Québec
- National Capital Commission
- Genesee & Wyoming Canada Inc. (Québec Gatineau Railway)
- VIA Rail Canada Inc.
- Railway Association of Canada

We will be pleased to supply additional documentation or clarification on request.

Respectfully,



18 September 2018

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c.c.
Mayor Jim Watson, City of Ottawa
Maire Maxime Pedneaud-Jobin, Ville de Gatineau
John Manconi, General Manager, Transportation Services, City of Ottawa
Line Thiffeault, Directrice générale, La Société de transport de l'Outaouais
The Hon. John Yakabuski, Minister of Transport, Ontario
Marc Lacroix, Sous-ministre, Le ministère des Transports, Québec
Marc Seaman, Chair and Board Members, National Capital Commission
Christian Richard, VP Business Development, Genesee & Wyoming Canada (Québec Gatineau Railway)
Jean-Francois Allaire, Directeur Infrastructures et Ponts, VIA Rail Canada
Marc Brazeau, President and CEO, Railway Association of Canada
Fred Gaspar, Chief Compliance Officer, Canadian Transportation Agency
Allan Matte, Counsel, Legal Services Directorate, Canadian Transportation Agency