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MEMORANDUM

To Canadian National Railway

From Mai Rempel and Michael Alty

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Subject Comments and Review Relating to the Guide On Applying for Approval to Construct a Railway Line and Aboriginal Engagement Framework for Railway Line Construction

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We understand that the Canadian Transportation Agency ("**CTA**") is requesting comments from the railway industry and other interested stakeholders on its proposed documents:

1. "Guide On Applying for Approval to Construct a Railway Line ("**Guide**"); and

2. "Aboriginal Engagement Framework for Railway Line Construction ("**Framework**").

Further to Canadian National Railway's ("**CN**") intention to provide such comments to CTA, we have reviewed the Guide and the Framework and as requested by you, we have set out our comments in this memorandum as it relates to Aboriginal Law principles and Crown regulatory approval processes concerning rail operations as contemplated in the Guide and Framework.

It should be noted that our comments contained within are not intended to be exhaustive but rather to provide high level information, intended to generate further consideration and discussion between CN and CTA.

1.0 Introduction

1.1 It is our understanding that the purpose of the Guide is to provide information regarding the process and requirements to be complied with by Applicants seeking railway line construction approvals ("**Applicants**"), including materials that must be filed with CTA in support of the approval review and application process ("**Application**"). We further understand that as part of the Application, a process of engagement with Aboriginal communities and the additional filing of related information may be required as described in the Guide and set out in the Framework. Upon reviewing the Indigenous ("**Aboriginal**") engagement process and the requirements for submission of engagement activities in support of an

Application, we are concerned that the general approach and expectation with respect to Aboriginal engagement, the engagement activities to be undertaken by the Applicant, and the application submission requirements relating to the Aboriginal engagement activities as set out in the Framework, are not reflective of Aboriginal Law principles and are inconsistent with the Crown's legal duty (as represented by CTA as the Crown decision-maker concerning railway line construction approvals) to consult with Aboriginal peoples with respect to Crown decisions that may affect an Aboriginal interest. Insofar as the Guide sets out the process required in relation to consultation with Aboriginal groups through the adoption of the Framework, both the Guide and the Framework must be reconsidered and replaced in order to reflect the CTA's legal duty as Crown and to be consistent with constitutional, statutory, and common law principles governing Aboriginal rights, and Aboriginal consultation matters.

2.0 Aboriginal Law Principles and the Crown's Duty of Consultation

2.1 CTA as indicated in the Framework, recognizes the "importance of considering the impact its determinations may have on Aboriginal communities," however, it appears that because the interests of such Aboriginal communities are referenced under the Guide as being included within the meaning of "Locality" for the purposes of satisfying consultation requirements (a "Locality" is defined to include "neighbourhoods, communities, townships and municipalities and related residents, land owners and business owners, and Indigenous peoples") there is a lack of understanding and recognition that Aboriginal peoples enjoy unique legal rights which gives rise to specific legal obligations owed by the Crown to Aboriginal peoples. An assessment of their rights requires treatment that is separate and distinct from any other regulatory consultation requirement relating to non-First Nation Localities for the purpose of the Application process.

2.2 It is important to note that the duty to consult with Aboriginal peoples is a "legal" obligation imposed on the Crown, and not on the Applicant which precludes the Crown from divesting itself entirely from its consultation obligations by passing such obligations onto the Applicant.

2.3 The special status of Aboriginal people results from a combination of rights granted pursuant to the federal legislation of the *Indian Act*, R.S.C 1985, c I-5, the protections afforded to Aboriginal peoples under the *Constitution Act, 1982,* Schedule B to the *Canada Act 1982* (UK), 1982, c 11, and the clarity around the meaning of such rights as provided through judicial decisions. Such rights oblige the Crown to act as a fiduciary on behalf of Aboriginal peoples in order to protect their interests. Therefore in respect of any Crown decisions that may have the potential to impact or infringe Aboriginal rights or title (such as approvals made by CTA in relation to railway line construction projects), a legal duty is triggered requiring the Crown to consult with Aboriginal peoples in an effort to provide them with information about the project and regulatory decision in question, address their concerns, and if appropriate, provide measures of accommodation which may include the mitigation of potential adverse impacts to their interests caused by the decision, or may also include benefits intended to address the loss of opportunities that may be suffered.

2.4 However, we note that the Framework as currently drafted constitutes a reversal of these well-established legal principles related to CTA's legal duty to consult with Aboriginal peoples as it imposes upon the Applicant all the responsibilities of the Crown by requiring the Applicant to:

(a) identify those Aboriginal groups (Aboriginal communities) whose rights and interests may potentially be impacted by CTA's decision regarding the proposed railway line construction project; and

(b) use its discretion without direction from CTA to determine the scope or the extent of the Crown's legal duty as it relates to the Application in question.

In doing so, it appears that the Crown is divesting itself entirely from its duty relating to the consultation process.

2.5 While the Crown may "delegate procedural aspects" of its legal duty to the proponent of projects with the rationale being that it is the proponent or industry who best understands its business, and therefore can explain the nature of their activity or construction activities to the Aboriginal community that is subject of the Crown decision, the Framework provides insufficient guidance on what is expected as part of this delegation of the procedural aspects of duty to consult. It is important to note that because the duty of consultation is held by the Crown, if the Crown elects to delegate aspects of its duty, it does so in reliance on engagement activities undertaken by the Applicant on its behalf, however ultimately it is the Crown that must ensure that it has satisfied its duty.

2.6 This delegation therefore necessitates clear direction to the Applicant and collaboration with respect to the engagement activities. Not only should the proponent receive direction on the engagement activities expected of them relative to their project and the corresponding Crown decision required, recent judicial decisions have referenced the need for Crown to formally provide Aboriginal peoples with notification of the Crown's intention to delegate the procedural aspects of its duty to the proponent, including information with respect to the nature of the consultation duty delegated.

3.0 Proper Identification of Aboriginal Group(s) to be Consulted

3.1 The Framework requires Applicant to use their sole discretion and judgement to identify those Aboriginal groups (Aboriginal communities) whose rights and interests may potentially be impacted by CTA's decision relating to their respective project Applications. However, it is not appropriate for the Applicant to determine without instruction and guidance from the Crown which Aboriginal group(s) is to be consulted. Although the Applicant can provide information regarding the location of its project in order to identify the proximity of the project in relation to Aboriginal communities, it is unreasonable to expect the Applicant to have the knowledge or expertise to undertake the detailed research required to assess the nature and strength of any asserted or claimed rights by those Aboriginal groups whose interests may be located within the proximity of the project area in question.

3.2 The Applicant is not in a position to undertake "a strength of claim analysis" to determine the scope and extent of Aboriginal rights and title relating to particular Aboriginal groups that must be considered when identifying the Crown's consultation obligation as it concerns the potential infringement of those interests. Given this, it is therefore also unreasonable to expect Applicants to identify Aboriginal communities" by using the *Aboriginal and Treaty Rights Information System* ("**ATRIS**"). Furthermore ATRIS which essentially provides high level information regarding the approximate location of an Aboriginal group's community as identified by a point on a map, is deficient and unreliable as the search parameters of the system does not enable the boundaries of asserted or claimed Aboriginal traditional territories to be identified, nor does it identify the boundaries associated with treaty or Aboriginal rights in respect of those areas that may be used or occupied for hunting, fishing, trapping or cultural and spiritual activities. Because ATRIS does not provide data regarding such spatial geographical boundaries, Applicants are also unable to search for overlapping areas between different Aboriginal groups.

3.3 It is the Crown that must conduct the initial necessary research to determine areas where such Aboriginal rights and title may exist, or may be claimed, and whether such areas are claimed by one or more Aboriginal groups. Often there are overlapping claims and occupation of areas by a number of Aboriginal groups which may require further assessment by the Crown as to the relative strength of claim of each group. In order for the Crown to ensure that its duty is satisfied, it would not want Applicants to guess where such Aboriginal rights and title areas may exist, resulting in the risk that the appropriate Aboriginal group(s) have not been identified which may lead to the unfortunate result that the Crown's regulatory decision may be open to challenge on the basis that the consultation duty had not been satisfied in respect of one or more Aboriginal group(s).

3.4 We understand that CTA has adopted an approach in the past which requires Applicants to identify the Aboriginal groups to be consulted on the basis of determining the geographical proximity of the project, the boundaries of which are determined by drawing a circular radius (ie. 75 km to 100 km radius) around the project area. The Applicant is then expected to consult with any Aboriginal groups that may fall within such a radius. Although proximity of a project in relation to an area that may be occupied or used by an Aboriginal group(s) may be one factor to be considered when identifying the particular Aboriginal group(s) that must be consulted, an approach solely based on this factor is not acceptable as it negates the legal principles upon which the consultation duty is predicated. Namely that the consultation duty is triggered by a determination of the potential impact or infringement to an Aboriginal group(s) rights and the scope or level of engagement required, is directly proportional to the potential degree of impact or infringement. As such, not all Aboriginal group(s) located within a fixed radius in proximity to a project area may necessarily attract the same level or scope of the consultation duty, especially if the occupation or attachment of an Aboriginal group(s) to the area in question is minimal or the potential impact of the proposed project on a particular Aboriginal group(s) interest is negligible. By treating all Aboriginal group(s) the same without taking into account the nature or degree of infringement to a particular Aboriginal group's interest, places both an onerous burden on the Applicant to consult with all Aboriginal group(s) identified within the radius whether warranted or not, and equally places an administrative burden on those Aboriginal group(s) in terms of requiring them to review project materials and undertake engagement activities when they may be unable to do so due to lack of staff and resources, all of which may not be necessary.

4.0 Assessment of Scope of Consultation Duty

4.1 The Applicant is not in a position to assess the scope of the CTA's duty to consult Aboriginal peoples, and the Framework provides no guidance on the scope and content of the consultation activities required relative to the applicable Aboriginal group(s) potential rights and interests.

4.2 As set out in the Framework, Applicants are to comply with a generic approach, under which expectations with respect to certain broad engagement activities and the documentation of such activities are listed. This broad and generic approach which consists of requiring each Applicant without due consideration for the nature of its particular project, the asserted or claimed Aboriginal rights of those Aboriginal groups in proximity to the project area, or the degree of potential impact or infringement caused to the group(s) rights by the project in question, is contrary to established legal principles which recognizes that all such factors must be taken into account in determining the scope of the consultation duty which will be specific to each project and corresponding Crown decision in respect of that project.

4.3 Legal principles have established that the scope of the consultation duty should be proportionate to a preliminary assessment of the strength of the claim supporting the existence of the Aboriginal right or title in the impugned area, and the potential for infringement of such rights or title. The content, scope and level of such engagement will occur upon a "consultation spectrum" and vary according to the circumstances on a case by case basis. At one end of the spectrum, if the infringement is minimal, the duty may be limited with only notice and minor disclosure required, while at the other end where there may be established rights and the infringement substantial, the duty may require full and continual engagement at the "deep end" of the consultation spectrum possibly continuing throughout the phases of the project, and if appropriate may also include the need for measures of accommodation.

4.4 Because the duty rests with the Crown, such a determination requires that Crown conduct its own research and analysis to determine the Aboriginal peoples or communities that may be affected by the Crown's decision, and the level of engagement or consultation required relative to each groups asserted or claimed rights, and potential impact to such rights. In light of this, it is inappropriate for CTA to require that the Applicant undertake without the Crown's involvement or assistance, its own assessment to determine the legal scope of the Crown's duty to be satisfied.

4.5 Issues concerning the improper identification of the appropriate Aboriginal group(s) to be consulted, or questions relating to the scope and adequacy of the consultation activities undertaken can potentially attract legal challenges to both the regulatory process and to the Crown decision itself, the risk of which can be mitigated or avoided with Crown directions to the Applicant. Accordingly this responsibility cannot be placed entirely on the Applicant, as it is currently set out in the Framework, without any direct involvement or instruction by CTA either at the outset, or throughout the consultation process. In the absence of any direction and coordination with the CTA, the Applicant cannot be expected to assess whether they have in fact satisfied the legal duty which is owed by the Crown to Aboriginal peoples.

4.6 It has become standard practice with Crown decision-makers both provincially and federally, to provide formal instructions to proponents on a case by case basis in relation to the project in question and the regulatory approvals relating thereto by way of a "Consultation Plan" which may be developed with

input by the project proponent. The proponent by providing information to the Crown decision-maker relating to the design, development and construction phases of its project, assists Crown in developing a "Consultation Plan" for the proponent that provides direction to them in terms of the consultation or engagement activities that are to be undertaken and how extensive those activities must be along the various regulatory approval stages required for each phase of the project in question. In contrast, the generic or one-size approach to Aboriginal engagement for all "railway line construction projects" as contemplated by the Framework is unacceptable as it assumes that all such projects will be the identical in nature and as such, the same level or scope of consultation or engagement will be required in every case.

4.7 Equally important as the instructions provided in the Consultation Plans, is the direction provided by Crown to the Applicant in relation to the development and recording of the "Consultation Log." Given the purpose of the Consultation Log is to formally identify "on the record" the consultation or engagement activities that may be undertaken by the Applicant on behalf of the Crown in satisfying the Crown's duty of consultation, in the event of a challenge by an Aboriginal group to the Crown's decision, it is important for Crown who would be acting in reliance on such information contained in the Log in defence of such challenge, to ensure that it works closely with the Applicant in developing and maintaining the Log. As such, it is not acceptable for Crown to expect the Applicant to develop and maintain the Consultation Log without its direction and input.

4.8 In addition, the one-size approach as contemplated by the Framework that treats all projects as the same does not function well where projects may be of a scale such that they trigger an environmental assessment review pursuant to the *Canadian Environmental Assessment Act, 2012* ("**CEAA**") or in those cases where multiple approvals or authorizations are required from different Crown decision-makers for the project. With projects of this nature, because CEAA approvals, as well as additional Crown authorizations will give rise to an independent duty of consultation in respect of each Crown decision required, in order to give proper guidance to the Applicant, there must be a coordinated approach among Crown decision-makers. This may require each Crown decision-maker to collaborate in developing a "unified Consultation Plan" to provide the appropriate instructions to the proponent to identify the Aboriginal group(s) to be consulted, the nature of the consultation or engagement activity to be undertaken, and the sequencing of engagement discussions or negotiations needed to satisfy each decision-maker to avoid duplication of consultation efforts.

4.9 The broad blanket approach under the Framework as set out in Section 3.0 "Documenting Engagement Activities and Information to Include in an Application" which requires the Applicant to provide comprehensive information in support of its Application is further fundamentally flawed as it sets the Applicant up for failure at the outset. The Applicant must not only exercise its judgement in terms of assessing the Aboriginal groups to be consulted, including an analysis of their respective asserted or claimed rights but must also use its discretion to determine the nature and extent of the information to be submitted as part of its Application.

4.10 Following this, it is only upon receiving the Application, of which the documentation pertaining to the consultation activities is to be included, that the Crown will assess whether the Applicant satisfactorily conducted the appropriate Aboriginal engagement activities, and if determined to be unsatisfactory," will deem the Application incomplete". Not only are these requirements unduly onerous, particularly at the

initial application stage but as importantly, the outcome is unacceptable as it requires the Applicant to exercise its unilateral judgement in relation to satisfying a legal duty that it does not ultimately hold, with the potential result that if the information supplied is incomplete or the engagement activities are not sufficient, the Applicant runs the risk of having its Application rejected.

4.11 Requiring Applicants to exercise an educated guess not only in respect of the appropriate Aboriginal group(s) that must be consulted, but also in terms of accurately assessing whether they have satisfied all the requisite engagement activities as a precondition in support of their Application, is suggestive of a "hit or miss" approach.

4.12 Without guidance from the Crown, if the Applicant after undertaking all the extensive engagement activities required under the Framework, including compiling the comprehensive package of information and materials that must be accompany the Application, either fails to consult the appropriate Aboriginal group, or fails to provide proper or complete information, they are subject to rejection of their Application. This is not without significant adverse consequences for the Applicant in terms of time and energy expended to comply with such requirements, but there may also be further negative consequences to the project as a result of project timeline delays and cost overruns. As such, not only is this approach problematic as in terms of the Crown's legal obligations relating to consultation but in addition, a process that is based on guesswork which may invite error is unreasonable and is not supportive in recognizing the importance of the business and operational interests of the rail industry.

4.13 In addition as a further consideration, the manner in which consultation is undertaken with Aboriginal communities has the potential to affect the both the Crown's and Applicant's relationships with such communities and therefore, thought and care in terms of conducting consultation discussions and an understanding of the Crown's expectations and requirements as they relate to the project in question must be factored in at the beginning of this process. This can only be accomplished by coordination and collaboration with the Crown.

4.14 The Crown cannot divest itself of its duty by passing all responsibility onto the Applicant. CTA as the Crown decision-maker must not only instruct Applicants but also be prepared to work with them throughout the consultation process. There may be expectations by Aboriginal group(s) themselves that the Crown be directly involved or engage in some of the discussions. The CTA may also decide to undertake its own consultation in conjunction and collaboration with the Applicant or may elect to conduct its own parallel consultation. In some cases, questions or concerns may be directed to, or may more appropriately only be answered by the Crown. As such, direction from CTA and coordination with the Applicant throughout the process is important, with the parties deciding where this may not be necessary.

5.0 Other Factors to Consider

5.1 It is also worth noting that the proposed consultation process set out in the Framework does not account for the different and unique type or status of lands across Canada owned, or occupied by Aboriginal groups over which railway line corridors are located. Depending on the location of the railway line, it may traverse through lands held by the federal Crown for the use and benefit of Aboriginal peoples

pursuant to the Indian Act ("**Indian Reserve Lands**"). There are also Indian Reserve Lands, the administration and management of which have been delegated to Aboriginal peoples in accordance with the *First Nations Land Management Act*, SC 1999 c 24. In addition, historic treaty lands over which Aboriginal groups may exercise certain rights, or modern treaty lands, owned and governed by Aboriginal peoples represent another category of lands over which railway line projects may be located. As a result, there may be different requirements for consultation and engagement in relation to Crown decisions made in respect of these different categories of lands, all of which will necessarily require further analysis on the part of the CTA in order to provide guidance to Applicants.

5.2 It is also important to note that for those Applications that may be submitted for projects located in British Columbia, there may be more stringent requirements imposed upon Crown in discharging its duty of consultation undertaken with those Aboriginal groups whose communities, traditional territories and treaty lands are located within the province. This is due to the fact that with an exception of a small area of the province, treaty-making did not historically take place and as such, Aboriginal title to the majority of British Columbia has not been extinguished and has been held by the Supreme Court of Canada to remain as an underlying burden on the Crown's title. This fact may raise the threshold in terms of the scope and degree of consultation required for Crown decisions regarding projects in British Columbia which is not taken into consideration in the Framework.

5.3 In light of our comments in this memorandum which underscore the need for CTA to adopt an approach and process to Aboriginal consultation which reflects the Crown's legal duty owed to Aboriginal peoples pursuant to constitutional, statutory and common law principles, given the complexity of this subject matter and in order to provide proper direction and guidance to Applicants, it is important for CTA to develop and cultivate dedicated internal expertise and resources, which we understand to be currently lacking. Equally as important is the establishment of a coordinated and inter-ministry/inter-agency approach which would also enable CTA to work in conjunction with the Ministry of Indigenous and Northern Affairs Canada in order to avail itself of the expertise of this ministry, and similarly to work with the Department of Justice – Aboriginal Law Group, as applicable. A combined approach in which CTA has internal expertise together with a process that recognizes the need for the expertise and coordination among other ministries and agencies, is necessary for those projects that may be complex and require CEAA approvals and multiple regulatory authorizations.

6.0 General Comments

6.1 Ultimately, the engagement process set out in the Framework requires review. The Framework erroneously places the burden on the proponent to identify the Aboriginal group(s) to consult and to further determine the potential impacts such Crown approval may have on the potential or actual Aboriginal interests of each identified Aboriginal group. Proponents do not have the resources, background or legal obligation to make such a determination on behalf of the Crown. Rather, it is the Crown that must discharge this legal duty and as such should make every effort to ensure the proponent is reaching out to the correct Aboriginal group(s).

6.2 The Framework further directs the proponent to consult each identified Aboriginal group using the same standard of consultation, which runs contrary to legal principles that obligate the Crown to take into account various factors determined on a case-by-case basis in order to identify the consultation activities required for each Aboriginal group. By using this one-size-fits-all approach to consultation, the process fails to recognize that Aboriginal groups will have different strengths of claim, the result of which is the potential risk that the Crown decision will attract legal challenge by Aboriginal groups on the basis of inadequacy or insufficiency in scope of consultation. Conversely, there may be circumstances in which the potential infringement of the Aboriginal interest is minor and therefore only warrants consultation activities corresponding to the lower end of the spectrum.

6.3 Moreover, the prescriptive consultation activities do not take into account that the size, location, and complexity of a project will determine the scope of consultation required; a small project with minimal or no impact on Aboriginal interests should not require consultation activities on par with projects that are certain to impact or infringement on Aboriginal interests. In addition, an Application process that as a precondition to a satisfactory outcome imposes broad and unclear expectations on the Applicant to exercise its judgement in determining what is required to satisfy the Application process, is not conducive to a satisfactory outcome.

6.4 In sum, the proposed process set out in the Framework is unlikely to discharge the Crown's legal duty to consult, and may in fact lead to increased risk that the impugned Crown decision will be legally challenged by Aboriginal groups on the basis of inadequate or insufficient consultation. The Framework should be amended to bring the engagement process in line with well-established legal principles. As a starting point, the CTA may wish to consider the *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult March 2011* ("**Federal Official Guidelines**") prepared by the Government of Canada as a resource for departments and agencies looking to establish engagement processes in order to discharge the Crown's duty to consult, a copy of which is attached to this memorandum for ease of reference. The Framework as it is currently drafted sets out requirements and processes that are in fact contrary to the Federal Official Guidelines.

MR/mjaa