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Via email: consultations@otc-cta.gc.ca

Canadian Transportation Agency
15 Eddy Street
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Attention: Ms. Liz Barker and Mr. Jason Tsang

Subject: CN Submission to the Canadian Transportation Agency Regarding the Agency's Draft Guide on Applying for Approval to Construct a Railway Line and the Indigenous Engagement Framework for Railway Line Construction

I. INTRODUCTION

The following are CN's comments respecting the Agency's Draft Guide on Applying for Approval to Construct a Railway Line (the Draft Guide) and the Indigenous Engagement Framework for Railway Line Construction (the Framework). CN's specific comments on the Draft Guide are provided in a table format, attached as Appendix I to this submission. Additional comments on the Framework are provided in a memorandum prepared by our legal counsel Dentons Canada LLP and attached as Appendix II to this submission. Finally, related to our comments and for your further consideration we attached as Appendix III to this submission the Government of Canada's guidelines on Aboriginal consultation titled *Updated*

Guidelines for Federal Officials to Fulfill the Duty to Consult (the Federal Official Guidelines).

CN supports the Canadian Transportation Agency (Agency) in its efforts to provide more certainty with respect to the process and requirements for obtaining approval from the Agency to construct federally-regulated railway lines and appreciates the opportunity to comment on this draft.

II. GENERAL COMMENTS

A. CN supports the need for a guide to make the application process predictable and to place the focus back on balancing the railway operations and services with the interest of the localities

Over time, and particularly since the introduction of *Canadian Environmental Assessment Act, 2012* (CEAA, 2012), the requirements for applications under s. 98 of the *Canada Transportation Act* (CTA) have become more difficult to predict for railway companies.

Section 98 of the CTA is a critical provision that aims to balance the interests of affected localities with the need for railways to build infrastructure that adjust to meet customer demand for rail service and, in doing so, contributes to the economic development of Canada. It is fair to say that since the enactment of this provision in 1996, the provision has achieved that balance.
As demonstrated by approvals that CN has received since 1996, there are essentially two main circumstances where approvals are sought: first, when railway lines are required to connect a customer facility and second, when railway lines are required for the purpose of expanding CN's infrastructure to accommodate increases in traffic.

Demand for rail service is often time sensitive. Customers are looking to get their goods to market and take advantage of an opportunity as soon as reasonably possible. Their needs and the commercial negotiations that ensue are the driving forces behind a decision to invest in new rail infrastructure. Constructing railway lines is a significant capital outlay, which can involve land acquisition, materials and significant engineering work and the decision to proceed with an investment requires a regulatory framework that is clear, reliable, predictable and, within reason, expedient. Anything short of that might threaten the underpinnings of the investment.

In an effort to increase predictability, CN designs proposed projects on the basis of the requirements of Section 98 of the CTA and based on prior decisions of the Agency. Where the Agency deviates from previous interpretation of the exceptions found in the Act, it creates uncertainty for proponents in project planning.
CN wishes to highlight that it is does not question the policy rationale for section 98 and merely argues for a framework that eliminates uncertainties.

CN hopes that the final version of the Draft Guide will produce greater predictability with respect to the application process and the minimum requirements that are necessary for every project, and allow individual localities to determine what specific concerns and additional requirements may be relevant to their interests. It is, however, unclear whether the Draft Guide meets that objective.

The Draft Guide lists every document and test that may be relevant to any application, many of which are not relevant in most circumstances, and in many instances deal with matters that do not fall squarely within the Agency's mandate, including matters that are or should be dealt with under CEAA, 2012 in connection with environmental assessments (EAs). It is important to recall that only some railway projects trigger an EA and that the scope of CEAA was revised in 2012 to exclude other rail projects which previously triggered an EA. CN submits that section 98 of the CTA cannot and should not be used to replicate an EA process as the 2012 amendments intended that fewer railway projects would be subject to an EA. A lower common denominator approach may be appealing from an administrative perspective, but it will not reach the balance we alluded to earlier.

The Draft Guide refers to requirements (technical studies, information, documents, etc.) as necessary or desirable for every project even where the subject matter of these documents or tests are beyond the scope of the project or of what the Agency may consider under section 98 applications. As a general rule, where individual localities express specific concerns, CN engages with the localities in order to address these concerns in an open and transparent manner through its consultations. This is a matter of good corporate citizenship and positive partnerships with the localities with whom CN interacts every day. This process has proven to be efficient since 1996. However, through the Draft Guide, the Agency appears to be substituting itself for the localities in raising issues that are not commensurate with the interest of those localities as expressed by them, and many of which have not been raised by localities in the last twenty years. As a result, the Draft Guide places an unnecessary burden on railway companies and, does not afford an equal balance in consideration of the requirements for railway operations and services. By requiring extensive technical studies, and providing a specific and long list of concerns to be raised by localities, the Draft Guide imposes an onerous

process that, if truly necessary, should be found in a regulatory instrument underpinned by proper legislative authority.

B. Object of section 98 Approvals

The object of an approval by the Agency is whether the location of the railway line is reasonable taking into consideration:

1. Requirements for railway operations and services; and
2. Interests of the localities that will be affected by the line.

As provided for by the Federal Court of Appeal in *Canadian National Railway Co. v. Canadian Transportation Agency*[1], the Agency must keep at the forefront the balancing of railway operations and services and the intent of the National Transportation Policy that require the railway company to be able to provide economic and efficient transportation services to its shippers:

> In assessing whether the location of the railway lines are reasonable under subsection 98(2), [the Agency] must have regard to the requirements for railway operations and services. It must also be cognizant of the National Transportation Policy in section 5 of the Canada Transportation Act which, in relevant part, is that safe, economic, efficient and adequate transportation services at the lowest total cost is essential to serve the transportation needs of shippers. The Agency's function is to balance the objectives of the National Transportation Policy, and the requirement of the railway company in respect of its operations and services, with the interests of affected localities […]. The Agency is considered to have expertise in these areas. In imposing burdens on the railway company, the Agency must be reasonable and must not ignore the requirements for railway operations and services and the intent of the National Transportation Policy that the railway company be able to provide economic and efficient transportation services to its shippers.
> [emphasis added]

CN respectfully submits that these principles should continue to guide the Agency in its decision-making process under section 98 of the CTA and should underpin the process outlined in the Draft Guide.

C. The Federal Court of Appeal in *Sharp v. Canada* provided interpretation to section 98 beyond simply the rejection of the "needs" test

The Federal Court of Appeal has ruled in *Sharp v. Canada (Transportation Agency)*[2] (*Sharp*) that the assessment in section 98(2) requires the Agency to focus on whether the location of the line is reasonable. However, with respect to the question of whether the Agency could consider "need" in the context of the

[1] *Canadian National Railway Co. v. Canadian Transportation Agency*, A-46-99.
[2] [1999] 4 FCR 363

"location test" with respect to a railway line, Justice Rothstein in *Sharp* provided significant guidance with respect to the interpretation of section 98.

First, Justice Rothstein clarified that the Agency does not have as a mandate the consideration of whether the construction of a railway line is reasonable, and that Parliament had limited the Agency's role only to the consideration of location:

> I am unable to accept the appellant's contention that section 98 requires an assessment of need. Subsection 98(2) requires the Agency to focus on whether the "location of the railway line is reasonable" [underlining added]. It is significant that although the application is for approval to construct a railway line, the Agency is not mandated to consider whether the construction of the line is reasonable. That may have imported a needs test. On the contrary, it is apparent that Parliament distinguished between construction and location, limiting the Agency's role to considering only the reasonableness of the location of the line. There is no needs test implied in a consideration of the reasonableness of the location of the line.[3]
>
> [emphasis original]

Second, Justice Rothstein provided interpretation to the phrase "requirements for railway operations and services" found in section 98 of the CTA, clarifying that enabling the railway company to provide services to its customers included, among others, the following considerations:

- Efficient use of existing equipment;
- Infrastructure and rail crews; and
- Operational requirements including track grades to allow carriage of the amount of traffic offered.

> In the context of a location decision, "requirements for railway operations and services" refers only to those requirements that will enable the railway company to provide service to its customers. It does not refer to the need for the line. In this case the Agency considered the efficient use of existing equipment, infrastructure and rail crews, as well as operational requirements including track grades to allow carriage of the amount of traffic offered. These are the types of matters contemplated by the words "requirements for railway operations and services".[4]

Third, in interpreting the "interest of the localities", Justice Rothstein was clear that the intention is for the localities to bring their concerns to the Agency. It is not the responsibility of either the railway company or the Agency to impose or substitute their views for what the concerns of the localities should be, but in the spirit of the CTA, for self-governing localities to determine their concerns with the location of the line:

> What is contemplated is localities bringing to the attention of the Agency their concerns respecting the location of the line and the Agency having regard to those concerns in determining whether the

[3] *Sharp* para 9.
[4] *Sharp* at para 10.

> location is reasonable. It is, of course, open to the Agency to determine that a location is not reasonable, in which case it will not grant approval for the construction of the line.[5]

By proposing a long list of specific information related to the interest of the localities rather than using the more generic terms as expressed in the legislation, the Draft Guide is inconsistent with this guidance and should be revised to remove those considerations while reiterating that localities are expected to raise issues they deem appropriate.

Finally, in the context of the National Transportation Policy found in section 5 of the CTA, the Court in *Sharp* observed that market forces are the prime agents in determining whether a line of railway should be constructed. Railway companies have obligations to provide services to any shipper by virtue of the CTA, they are therefore best suited to determine the need for a railway line. In comparing section 98 with its predecessor, the Court remarked that there is no question of whether the public interest is served in the construction of the line, and all that is left is the location test:

> Nowhere in section 98 is there, express or implied, a public interest test, or an increased facilities to business test. All that is left is the location test. This change is in keeping with Canada's move towards deregulation of the railway industry as described by Isaac C.J. in Upper Lakes Group Inc., supra. In accordance with this trend toward deregulation, the Canada Transportation Act has limited the Agency's role in regulating entry into the railway business in Canada and its role in controlling the construction of new railway lines. It is inconsistent with this limited role for the Agency that section 98 be construed as requiring a needs test for the construction of a railway line.[6]

In this context, the Draft Guide raises several concerns by implying a public interest test and suggesting that some elements are relevant in the context of the Agency's consideration of the location of the railway line, when such elements are outside the scope of the Agency's mandate.

In particular, the Guide requires a consideration of the effect of the proposed construction of a railway line on land values. There is little evidence that the presence of rail has a negative impact on property values, beyond anecdotal evidence. In many cases, the presence of rail brings growth opportunities, and leads to development of the area. Regardless, the suggestion that the Agency can consider effects on land and property values in its evaluation of the location of a railway line is inappropriate and misleading to the public. Land or property values are not a relevant consideration under section 98 and should be removed from the Draft Guide.

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[5] *Sharp* at para 11.
[6] *Sharp* para 12.

D. Impact on the Localities

The Draft Guide refers to railway companies being responsible for identifying impacts on the localities. Consistent with the decision in *Sharp*, the localities themselves are in a better position to determine what the potential impacts of the railway lines are likely to be and it is the localities who are responsible for bringing this information to the attention of the Agency, not the railway companies. Applications under section 98 of the CTA are handled by the Agency in the same manner as other applications where parties objecting to the order sought have the burden of providing evidence in support of their contentions. The Draft Guide, by suggesting that railway companies should provide evidence on the interest of the localities, is reversing this burden.

The responsibility of the railway companies should instead be to provide information and, where appropriate, summary results of technical studies or assessments in support of the Application.

In addition, the Draft Guide is framed in a manner that suggests that all impacts on the localities are negative. In CN's experience, impacts on localities are often positive and localities benefit from the construction of railway lines in economic terms. Referring to impacts as though they are negative in all respects inappropriately suggests that localities and railway companies are always adversaries, which is inconsistent with CN's experience and the manner in which the railway companies regularly engage with localities and the partnerships that have been created.

E. Jurisdiction of Transport Canada under the *Railway Safety Act*

Regulatory oversight of federally-regulated railway lines and railway operations is provided for by several other regulatory bodies. In this context, the Draft Guide over-reaches the Agency's authority under section 98 and attempts to extend the Agency's jurisdiction to issues covered by other specialized regulatory bodies. One such example is the Minister of Transport's authority to oversee railway safety by means of the Minister's various powers under the *Railway Safety Act.*

Sections 8 through 10 of the *Railway Safety Act* (RSA) in combination with the *Notice of Railway Works Regulations* provide for a safety-related scheme for authorizing proposed railway works based on safety. "Railway works" under the RSA includes a "line work" which includes a "line of railway". Under section 8 of the RSA, a line of railway can be the subject of an approval if it is of a "prescribed

kind".[7] The Governor-in-Council determines, by regulation, which railway works it wishes to include as a "prescribed kind" and can change the application of this provision by amending the regulation as it sees fit.

A proponent cannot undertake a prescribed work on a line of railway, including the construction of a line of railway involving the acquisition of land, unless it has undergone the consultation process prescribed by the RSA and the *Notice of Railway Works Regulations*. Where the consultation process concludes with an outstanding objection on the basis of safety, the Minister of Transport is granted the authority under the RSA consider whether the proposal is consistent with safe railway operations. By virtue of subsection 4(4), "safe railway operations" under the RSA includes not only the safety of persons and property transported by the railway but also the safety of other persons and other property.

Should the Minister consider that the work is not consistent with safe railway operations, the Minister can refuse to approve the work or require the proponent to file additional information.

Alternatively, if the Minister is satisfied that the work is consistent with safe railway operations, the Minister can notify the proponent and any objecting party that the Minister approves the work, either absolutely or on such terms as are specified. This allows the Minister to make conditions relating to the location of a proposed railway line on the basis of safety, just as the Draft Guide suggests the Agency could, despite the fact that the Agency has neither the mandate nor the expertise to consider such issues.

The Draft Guide requires the railway companies to provide significant safety-related information absent any concerns raised by the localities. This information includes pedestrian, cycling and vehicle safety, information on the transportation of dangerous goods and changes to drainage patterns and soil erosion. This is information that falls within the purview of the scheme provided in the RSA and under the Minister of Transport's authority.

In requiring that safety information be provided through the Draft Guide and suggesting that the Agency can make determinations based on safety, the Agency is usurping the jurisdiction of the Minister of Transport and undermining the authority of the Governor-in-Council to determine, through regulation, which parties are to be notified, and how objections related to safety are to be considered.

CN is committed to safety and discusses safety-related concerns raised by the localities where the localities express such concerns under the scheme provided in

[7] Section 8 of the RSA.

the RSA. This is a matter of compliance, corporate citizenship and positive partnerships. However, the Draft Guide provides for all applications to include safety related studies and information absent concerns from the localities and without justification based on the Agency's mandate and expertise. These references are inappropriate and inaccurate and should be removed from the Draft Guide.

F. Parliament determined section 98 approvals not to require environmental assessments

Under the former *Canadian Environmental Assessment Act* (former CEAA), an environmental assessment was required prior to the Agency exercising its power to issue an approval under section 98. When Parliament enacted CEAA, 2012, it did so in an effort to offer an updated, modern approach that would be adapted to Canada's current economic and environmental context.

It was determined that most section 98 applications would not, in the normal course of business, need to be subject to an EA under CEAA, 2012, the exceptions being:

1. projects described in the *Regulations Designating Physical Activities*;
2. projects that fall within a project that is otherwise subject to an EA under CEAA, 2012; and
3. projects designated by the Minister of the Environment and Climate Change.

The Draft Guide imposes many EA-like obligations back on the railway companies when a section 98 approval is sought, regardless of whether or not CEAA, 2012 requires an EA and absent any specific environmental concern identified by the localities. By requiring that EA obligations be imposed onto the railway companies, the Agency's Guide is in conflict with the will of Parliament as expressed through CEAA, 2012 and the letter of the statute.

Subsection 14(2) of CEAA, 2012 provides that the Minister of the Environment may, by order designate physical activity not prescribed, if, in the Minister's opinion, carrying out that physical activity may cause adverse environmental effects or public concerns related to those effects may warrant the designation. Short of such a designation by the Minister of the Environment or an environmental concern raised by a locality, the Agency, in requiring railway companies to submit elements of an EA as a matter of course on all section 98 approvals, is inappropriately substituting its opinion for that of the Minister of the Environment.

An EA triggered by *CEAA, 2012* will fall under the jurisdiction of Canadian Environmental Assessment Agency. It should also be noted that, even in cases where an EA is required for a project, the Agency's role is limited to a review of the interests of the localities. The Agency should be mindful of duplication of obligations. Given its mandate, environment-related requirements should not be required for every application and should instead only be required if raised by the relevant localities.

At the time of the decision in *Sharp*, EAs under *CEAA* were still required for all section 98 approvals. However, the Court in *Sharp* made it clear that any authority the Agency has over environmental decision-making is found in the former CEAA (now *CEAA, 2012*), not under section 98, and that environmental concerns and authorities should not be exercised for economic regulatory control.

> While the Agency may consider need and alternatives in the context of an environmental assessment, paragraph 16(1)(e) is not a back door means of reempowering the Agency with economic regulatory control over the construction of railway lines. Unless there is a clear conflict, which there is not here, the Agency should strive to harmonize its approach under the CTA and the CEAA. In other words it must respect both Parliament's express deregulatory intention under the CTA and Parliament's vesting it with environmental decision making power under the CEAA. In cases in which it is able to determine that a project is environmentally acceptable, the Agency may not find it necessary to consider need and alternatives. However, I do not rule out the case of a proposed project having so severe adverse environmental consequences that the Agency may consider it necessary to rigorously analyze the question of need and alternatives.[8]

Given that *CEAA, 2012* no longer applies to most section 98 applications, there is no authority for the Agency to use environmental concerns and authorities as a back door means of re-empowering itself with economic regulatory control over the construction of railway lines.

G. The Final Report of the Expert Panel for the Review of Environmental Assessment Processes

On April 5, 2017, the Final Report of the Expert Panel for the Review of the Environmental Assessment Processes (the Report) was made public. The Report proposes a significant shift in policy in relation to EAs, or, as proposed in the Report, the new concept of impact assessments (IA). Subsequent to the release of the Report, the Minister of Environment and Climate Change launched a public comment period. CN was actively engaged in this process and filed its comments on the Report with the Minister. Chief among CN's concerns with the Report is the uncertainty it raises in terms of which projects may trigger IAs, the timelines

[8] *Sharp* para 28.

associated with IAs, who will have "standing" to participate in IAs, and the new "sustainability" approval test.
The stark differences in the proposed policy raises questions that will likely only be clarified once the Government responds to the Report. As a result, while projects continue to be regulated by *CEAA, 2012* for the time being, CN cautions that changes to this and other environmental legislation could change the face of environmental regulation in Canada and have an impact on the Agency's jurisdiction. CN recommends that the Agency monitor developments in this area and prior to the finalization of the Draft Guide and Indigenous Framework align them with any changes to the IA process.

H. Indigenous (Aboriginal) consultation obligations in the Agency's draft documents are inconsistent with CTA's legal duty to consult and contrary to well-established legal principles and Government of Canada guidelines

Given the unique and special status of legal rights held by Aboriginal peoples, any differential treatment and proposed engagement process must be reflective of such legal rights and the CTA's duties related thereto. The Draft Guide and the Framework as currently drafted do not reflect well-established 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's decisions that may affect an Aboriginal interest. Accordingly, CN is of the view that any Aboriginal engagement guidelines such as those proposed by the CTA should reflect the CTA's legal duty as Crown and be consistent with constitutional, statutory, and common law principles governing Aboriginal rights, and Aboriginal consultation and engagement matters.

In particular, the Framework erroneously places the burden on railway companies to identify the Aboriginal group to consult and to further determine and mitigate the potential impacts such Crown approval may have on the potential or actual Aboriginal interests of each identified Aboriginal group. Rather, it is the Crown's legal duty to discharge and as such Crown must determine the Aboriginal groups to consult taking into account various factors determined on a case-by-case basis in order to identify the consultation and engagement activities required for each Aboriginal group. At law, although the Crown may delegate procedural aspects of its duty to consult to the railway company applicant, the Crown must provide guidance and direction on engagement activities to the railway company at the outset and throughout the consultation process.

For further explanation on how the proposed engagement process is inconsistent with well-established constitutional, statutory, and common law principles, please refer to the memorandum prepared by Dentons Canada LLP enclosed in our submission. CN also brings to your attention the Government of Canada's guidance for departments and agencies looking to establish engagement processes in order to discharge the Crown's duty to consult as set out in the Federal Official Guidelines, a copy of which is attached as Appendix III to our submission. In many aspects, the proposed engagement process is contrary to such Federal Official Guidelines.

III. CONCLUSION

On its website, the Agency requested that stakeholders provide comments on the Draft Guide and Framework based on three questions. The general comments above provide substance to clarify CN's position, and CN is also including a table of specific concerns on the Draft Guide for the Agency's consideration, a memorandum in respect of the Framework, and a copy of the Federal Official Guidelines. In conclusion, CN provides the following responses to the Agency's specific questions:

1. *Is there anything that needs to be more clearly explained in the Guide on the:*
    a. *applicant's requirement to consult with the localities; and*
    b. *information that the applicant is required to file with the Agency in support of its application?*

The Draft Guide should:

- Clarify the link between the application requirements and the Agency's mandate under section 98 of the CTA so as to avoid duplication of obligations and mandates that rest with other federal government authorities and under other federal Acts;
- Identify the proximity within which a neighbourhood, community, township and municipality must be to qualify as a "locality";
- Clarify that a business that does not qualify as either a resident or land-owner should not be considered a "locality";
- Link all requirements to the Agency's mandate under section 98 of the CTA;

- Clarify which requirements are common to any and all applications under section 98 instead of providing a list of what may be required;
- Alternatively, if different circumstances or types of projects will determine the requirements for a given type of application, these should be set out in relation to the type of project. (e.g. (a) construction of a yard as opposed to construction of a single line of track, (b) construction in urban areas as opposed to construction in uninhabited areas, (c) construction within a right-of-way where line was previously removed, (d) construction of sidings and (e) projects requiring the creation of a right-of-way where none previously existed);
- Clarify that the responsibility of the applicant is to identify or explain the proposed project, not to identify the concerns of the locality since that is a matter best left to the locality itself;
- Describe the consultation required instead of prescribing a consultation plan to be submitted since requiring such a plan adds unnecessary burden and red tape; and
- Clarify that construction activities are not relevant to the determination of the location of a railway line.

2. *What additional clarification would help applicants so that they can file a complete application?*

The Draft Guide should be amended as follows:

- To specify the information required for every application, in the context of the Agency's mandate, with respect to approving the location of the railway line;
- To either remove any requirements that are solely the responsibility of the localities or specify how the Applicant should access this information assuming the localities are not willing to share the information; and
- To not require that information on future operations or customers that is either confidential or unknown be required in the application.

3. *Is there anything that needs to be more clearly explained in the Framework on how the applicants are to engage Indigenous communities that may be affected by the location of the railway line?*

The proposed engagement process for Aboriginal groups set out in the Framework is inconsistent with well-established constitutional, statutory, and common law legal principles on Crown's duty (as represented by CTA as the Crown decision-maker

concerning railway line construction approvals) to consult those Aboriginal groups whose interests may potentially be impacted by the Crown's decision. Aboriginal groups enjoy special legal rights, and consultation of a separate legal nature is required. The proposed engagement process must ensure it is in compliance with the legal obligations owed to Aboriginal groups in circumstances where Crown's decisions may affect an Aboriginal interest and work with railway companies accordingly in respect of this process. We refer to the enclosed memorandum from Dentons Canada LLP for further explanation on how the engagement process as currently proposed is inconsistent with well-established constitutional, statutory, and common law principles.

Thanking you for your consideration,

Rachel Heft
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