



DETERMINATION NO. R-2018-23

February 16, 2018

DETERMINATION by the Canadian Transportation Agency (Agency) as to whether the City of Ottawa (City) has contravened Part III, Division V of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) by effectively discontinuing the operation of a portion of its Ottawa River Line (ORL) without complying with the mandatory discontinuance process.

Case No. 17-01156

SUMMARY

- [1] This Determination addresses the issue of whether the City has effectively discontinued the operation of a portion of its ORL without complying with the mandatory discontinuance process set out in Part III, Division V of the CTA.
- [2] For the reasons set out below, 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, and orders the City to either:
1. 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; or,
 2. Initiate and complete the discontinuance process established in Division V of the CTA.
- [3] The City is to inform the Agency by April 30, 2018 whether it will proceed with option 1 or 2 and indicate how it intends to comply.

BACKGROUND

- [4] In 2016, information was filed with the Agency indicating that the City had dismantled a section of the ORL, approximately between mileages 0.62 and 0.77, between the Bayview Station and the POW Bridge. The information indicated that the City was constructing a permanent structure on the ORL railway right of way that would create an obstruction and prevent railway operations over the POW Bridge into and from the city of Gatineau, Quebec.

- [5] On February 17, 2017, City staff confirmed in an e-mail to Agency officials that a portion of the ORL had been removed to construct the new west side entrance to the Bayview Station and, as a result, the ORL was obstructed at the Bayview Station.
- [6] In Decision No. LET-R-27-2017 dated June 7, 2017, the Agency ordered the City to show cause why the Agency should not find that the City had effectively discontinued a portion of the ORL without complying with the mandatory discontinuance process set out in Division V of the CTA. It required the City to address the operability of the ORL, including over the POW Bridge, and its plans for the line.
- [7] On June 28, 2017, the City responded, confirming its “intent” to retain the ORL and, at some point in the future, to expand its commuter rail passenger service to the city of Gatineau. As part of that response, the City provided a realignment plan for working around the permanent structure and stated that it had no intention of taking any discontinuance steps under Division V of the CTA.
- [8] On August 14, 2017, the Agency sought clarification from the City on the time that the City anticipated it would require to carry out its realignment of the ORL and restore the POW Bridge to operable condition, in the event that the Agency were to grant an application pursuant to Division IV of the CTA, such as an application for running rights filed by another railway company pursuant to section 138 of the CTA.
- [9] On September 8, 2017, the City responded, stating that it would take approximately two years to complete the ORL realignment and three years to undertake the POW Bridge restoration, while indicating that expedited timelines could be explored where warranted and properly supported. The City indicated, however, that it was not providing any assurances, representations or commitments of any kind regarding its ability to meet or accommodate these timelines in the future, given the uncertain and potentially variable nature of the specific circumstances at the time.
- [10] On September 20, 2017, the Agency issued Decision No. LET-R-58-2017 in which it communicated its preliminary opinion that the time periods that the City had provided were not reasonable. Noting that the City had indicated that it could explore the possibility of expedited timelines, the Agency directed the City to confirm how quickly it could bring the ORL, including the POW Bridge, into operable condition, if the Agency were to grant running rights to another railway company.
- [11] On October 4, 2017, the City responded by declining to provide the requested expedited timelines, stating that “it would be imprudent and irresponsible for the City to provide a highly speculative and heavily qualified response [...] knowing that the Agency intends to then adopt and impose regulatory standards on the basis of this speculative information”. The City added that it was of the view that the Agency did not have the proper jurisdiction and was exceeding its statutory authority by proceeding to determine whether the City had effectively discontinued a portion of its railway line.

THE LAW

- [12] The national transportation policy is set out in section 5 of the CTA and states, among other things, that “[,,,] competition and market forces [...] are the prime agents in providing viable and effective transportation services”, and that “[...] regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces”.
- [13] Part III, Division II of the CTA establishes the rail licensing regime as the means by which railway companies can construct or operate a railway that falls within the legislative authority of Parliament. It requires that railway companies hold a certificate of fitness, which is issued by the Agency when certain conditions are met, to construct or operate a federal railway.
- [14] Part III, Division IV of the CTA deals with railway companies’ rates and services, and includes several provisions that are intended to foster competition and user choice. For example, the running rights provisions in section 138 of the CTA allow one railway company to operate on another railway company’s railway lines, where an application is granted by the Agency.
- [15] Division V of the CTA sets out a process for the discontinuance of federally-regulated railway lines. Section 142 states that "A railway company shall comply with the steps described in this Division before discontinuing operating a railway line." A railway company’s obligations in respect of the operation of a railway line or portion of a railway line terminate when it:
- (i) sells, leases or otherwise transfers its railway line, or its operating interest in its line, for continued operations, as provided for in subsection 141(3) and section 144.1 of the CTA; or,
 - (ii) complies with the discontinuance process set out in sections 143 to 145 and provides notice of the discontinuance to the Agency pursuant to section 146 of the CTA.
- [16] Key actions that a railway company must take under subsection 141(1) and sections 143 to 145 of the CTA are as follows:
- (i) indicate on a plan that is kept up to date and made available to the public that it intends to, within the next three years, take steps to discontinue operating the line;
 - (ii) after indicating its intention in its plan for at least 12 months, advertise its intention to discontinue the line and afford persons interested in continuing to operate the line the opportunity to acquire it;
 - (iii) if no agreement is reached to transfer the line, offer the line, for not more than its net salvage value, to the federal government, and then to any provincial and municipal governments and urban transit authorities, through whose territory the line passes.
- [17] Pursuant to section 26 of the CTA, the Agency may require a person to do or refrain from doing anything that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

ANALYSIS AND DETERMINATION

- [18] The Agency is responsible for administering and enforcing the CTA. This includes ensuring that the CTA's provisions are not vitiated by actions or inactions that are inconsistent with the statute's terms and purpose.
- [19] The ORL, as a line owned by a federally-regulated railway company, falls under the jurisdiction of the CTA.
- [20] The Agency finds that the most reasonable interpretation of the Division V discontinuance requirement, particularly when read in concert with Division IV and the national transportation policy, is that where a railway company does not trigger the discontinuance process, it must intend to operate the line at the present time or at some point in the future, and have the ability to bring a currently inoperable line into operable condition within a reasonable period of time if, for example, the Agency grants running rights to another railway company upon application.
- [21] The choice provided by section 142 of the CTA to a railway company is to either operate or discontinue its lines. The law does not include an option of no longer operating a railway line without completing the discontinuance process.
- [22] This does not mean that the CTA obligates railway companies to keep every line that they own in fully-operable condition at all times. There may well be situations where a railway company decides, for example, to relocate a portion of a line or limit its maintenance activities on an unused line, to the point where the line is rendered temporarily inoperable. It does not follow, however, that lines can be allowed to fall into a state of permanent or long-term inoperability without the discontinuance process having been respected. Such an interpretation would undermine the very purpose and logic of the discontinuance provisions. To comply with the legislative scheme, a railway company must ensure, at minimum, that it is in a position to restore a line that has not been discontinued to operability within a reasonable period of time, in order to meet its obligations under Division IV of the CTA.
- [23] The City references the fact that in Decision No. 210-R-2012, the Agency stated that "[...] the discontinuance provisions do not provide the Agency with the authority to oversee a railway company's maintenance and safety practices to ascertain whether, with respect to a specific railway line, a de facto discontinuance has occurred. The Agency has neither the jurisdiction nor the expertise to determine whether a railway line complies with the requirements of the *Railway Safety Act*." This Determination confirms and clarifies that decision. The Agency does not examine a railway company's maintenance and safety practices to determine compliance with the discontinuance process, but may conclude that a railway company has failed to respect that 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 the line by the company or by another company granted running rights is not possible within a reasonable period of time.

- [24] With respect to the portion of the ORL from the Quebec 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 has linked any restoration of operability to the possibility of rail operations at an undefined time in the future.
- [25] In determining what is a reasonable time period within which the City must be able to make that currently inoperable line operable, the Agency has considered, on the one hand, the City's transportation plans and the fact that there have been no applications pursuant to Division IV of the CTA in respect of the line and, on the other hand, the impact that allowing the line to fall into a state of permanent or long-term inoperability would have on the City's ability to comply with its obligations, were such an application to be made. On balance, the Agency finds that in the circumstances of this case, it would be reasonable to require that the City be in a position to make the line operable within 12 months of the date of an Agency order pursuant to Division IV of the CTA.

CONCLUSION

- [26] Given that the City has stated that it would take two years to complete the ORL realignment and three years to undertake the POW Bridge restoration, the Agency finds that the City has, for all intents and purposes, discontinued a portion of the ORL without complying with the discontinuance process set out in Division V of the CTA.

ORDER

- [27] The Agency orders the City to either:
1. Take the steps necessary to restore the ORL, including the POW Bridge, to a point where it could be made operable within 12 months of an Agency order under Division IV of the CTA; or,
 2. Initiate and complete the discontinuance process established in Division V of the CTA.
- [28] The City is to inform the Agency by April 30, 2018 whether it will proceed with option 1 or 2 and indicate how it intends to comply.

(signed)

Scott Streiner
Member

(signed)

Sam Barone
Member