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# *Mohawk Council of Kahnawake*

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December 9, 2022

**BY ELECTRONIC FILING**

305768

Attn: The Honourable Cynthia T. Brown  
Chief, Section of Administration  
Surface Transportation Board  
395 E Street, S.W. Washington, FD\_36500

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Office of Proceedings  
December 9, 2022  
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**RE: Finance Docket No. 36500**

***BRIEF OF THE MOHAWK COUNCIL OF KAHNAWÀ:KE***

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CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC.

-CONTROL -

KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY COMPANY

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Dear Ms. Brown,

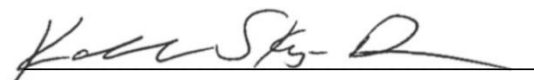
Please accept this Brief of the Mohawk Council of Kahnawà:ke. We truly apologize to all parties for the late nature of our submission. The MCK nevertheless feels compelled to bring certain important matters to the attention of the United States Surface Transportation (STB) for its consideration as it decides upon the proposed merger of Canadian Pacific Railway Inc. (CPR) and Kansas City Southern (KCS).

The MCK has sought to have formal discussions with CPR to discuss the detrimental and continuing impact that CPR infrastructure has on our Indigenous lands and interests for quite some time now with very limited success. We are justifiably concerned that CPR repeatedly fails to seriously consider the impact of its infrastructure has on the lands of marginalized communities, such as ours, and this is the only means for CPR to take such interests seriously.

We understand that the deadline to close the evidentiary record has passed; however, due to the information that has recently come to our attention, we feel that that is in the public interest for the STB to consider the information in this Brief and to consider our experience.

If there is any fee, the MCK respectfully requests a waiver of any such fee as a local government entity.

In Peace and Friendship,

  
Grand Chief Kahsennenhawe Sky-Deer

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- **BRIEF OF THE MOHAWK COUNCIL OF KAHNAWÀ:KE** -

**1. INTRODUCTION**

I am submitting this Brief on behalf of the Mohawk Council of Kahnawà:ke (MCK) in opposition to the acquisition of Kansas City Southern (KCS) by Canadian Pacific Railway (CPR) on the basis that it is not in the public interest due to CPR's spotty track record regarding Indigenous rights and for other reasons that will be more fully outlined herein. The MCK wishes

to ensure that CPR is acting responsibly with respect to lands it currently occupies prior to expanding its network further.

## **2. THE MOHAWK COUNCIL OF KAHNAWÀ:KE**

The MCK is the duly elected governing body of the Mohawks of Kahnawà:ke having its head offices at 1 Church Road, Mohawk Territory of Kahnawà:ke, Quebec, Canada, J0L 1B0. The Mohawks of Kahnawà:ke are a recognized Indigenous community located within an Indigenous reserve territory on the south shore of Montreal, composed of approximately 8,000 members. There are 11 Indigenous Nations living on the territory known as Quebec, Canada. Those nations are spread out into 55 different communities of which Kahnawà:ke is one.

CPR owns a railway line and railway bridge on our Territory, the impacts to our lands have been devastating for our community since its construction. The presence and operation of the railway line and bridge continue to be a massive risk to the safety of our community as well as a significant nuisance. These nuisances include noise, annual pesticide spraying in residential areas, dissection of a residential area (making the rail a dangerous but convenient route for pedestrians due to lack of alternative access), traffic delays at the four crossings and landlocking residents when there are breakdowns or repairs. As we grapple with the impact that the presence that CPR railway infrastructure has on our community, CPR enriches itself from the use of our lands.

## **3. KAHNAWÀ:KE LAND BASE**

We, the Mohawks of Kahnawà:ke, currently reside on a small postage stamp compared to the actual size of our historical and traditional territory. The reserve is only 18.55 square miles in size. The current Mohawk Territory of Kahnawà:ke on which we live has reserve status (also known as “Kahnawà:ke Indian Reserve No. 14” pursuant to the Canadian *Indian Act*, R.S.C. 1985, c I-5.

The Mohawk territory, as it is historically known, includes, but is not limited to, lands in present day southwest Quebec, southern Ontario and down into New York State. Since time immemorial, these lands and bodies of water formed part of our territory and traditional hunting and fishing grounds over which we exerted control.

Kahnawà:ke territory also includes the Seigneurie of Sault St. Louis (“SSSL”) land grievance lands, which extends from what is known today as Chateauguay to La Prairie in the Province of Quebec on the south shore of Montreal (a map of the SSSL can be found in the link in the footnote).<sup>1</sup> Kahnawà:ke’s SSSL land grievance has been accepted for negotiation by the Government of Canada. If and when Aboriginal title is recognized or proven with respect to the SSSL lands, which is likely, CPR will have been complicit in the infringement of Kahnawà:ke’s interests on these by failing to secure its consent to use our lands.<sup>2</sup>

Although KCS does not have infrastructure located on our territory, it is in the public interest for the STB to consider the MCK’s submission as CPR’s treatment of Indigenous interests in Canada could impact its operation in the United States. And given that CPR has a significant amount of infrastructure within our Territory, the MCK is well-positioned to share insight as to CPR’s treatment of Indigenous interests. We maintain that the decision to allow further acquisition

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<sup>1</sup> At a time when the British and the French were trying to wrestle control of North America from one another, the French wished for the Iroquois to permanently settle on the south shore of modern-day Montreal. The SSSL lands were a concession by Louis XIV, King of France, made by letters patent to the Jesuit missionaries for the sole benefit of the “Iroquois of the Sault” (as the ancestors of the Mohawks of Kahnawà:ke were known at the time). Over time, our unceded lands were illegally sold off to non-Indigenous settlers, thus eroding Kahnawà:ke’s land base. The SSSL lands that were illegally ceded are still considered by us to be Mohawk territory and are subject to a land grievance that has been accepted for negotiation by the Government of Canada.

See the SSSL Historical Pamphlet and map: <http://kahnawake.com/council/seigneurie.asp>

<sup>2</sup> See *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 257, paras. 95-97 <<https://canlii.ca/t/g7mt9>>.

of railway infrastructure by CPR in the United States of America needs to be made in full consideration of their role in the plight of Indigenous people in Canada.

#### **4. CPR LACK OF ABSOLUTE TITLE**

The lands in our Territory were originally taken by the predecessor to CPR (Atlantic/Northwest Railway (A&NWR)) with expropriations beginning in the 1880s and continuing into the 1910s. The lands were expropriated under the *Indian Act* legal framework in force at the time with numerous irregularities. Such irregularities included the issuance of letters patent that violated the restraint against alienation set out in the expropriating statute (the *Railway Act*). It also included inadequate compensation and trespass on reserve lands. CPR most recently violated the restraint against alienation by licensing the use of the lands to third parties without our knowledge or consent and even though they do not hold absolute title.

The expropriation mechanism used by the predecessor to CPR (A&NWR) to acquire an interest in our lands did not give them absolute title to the lands. This has been confirmed in the MCK's discussions with the Government of Canada in the context of its Specific Claims regarding the CPR Line expropriation. It has also been confirmed multiple times by Canada's Specific Claims Tribunal.<sup>3</sup> Canadian Courts have been clear that the issuance of letters patent to railway companies in Canada do not automatically provide fee simple title. This would be incompatible with the restriction on alienation that applies to the Crown lands they have acquired. Justice Harry Slade validated this stance in the first decision of the Specific Claims Tribunal. In *Re Osoyoos Indian*

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<sup>3</sup> See *Siska Indian Band v. Her Majesty the Queen in Right of Canada*, 2021 SCTC 2; see also *Osoyoos Indian Band v. Her Majesty the Queen in Right of Canada*, 2012 SCT 3.

*Band*<sup>4</sup>, Justice Slade relied on Saunders J. (now J.A.) decision in *Canada (Attorney General) v. Canadian Pacific Ltd.*<sup>5</sup> to support his conclusion that the *Railway Act* trumps the letters patent:

However, as I have earlier found, the grants were made under the *Railway Act*, title lay with British Columbia and the Indians did not surrender the lands. The result is that the statute trumps the terms of the Letters Patent, and the Letters Patent must be read as subject to the restraint on alienation found in the *Railway Act*.<sup>6</sup>  
[Emphasis added]

This restraint on alienation did not prevent CPR from licensing the use of our lands to a third party fibre optic provider without our knowledge or consent. This disregard added to the frustration in our community concerning the conduct of CPR regarding its use of our lands.

If CPR uses our lands in a manner with such blatant disregard to the nature of the restrictions imposed on them by statute in Canada, we feel this conduct needs to be highlighted to provide the STB with all available facts regarding CPR's past and current conduct.

## **5. HARMFUL IMPACTS TO OUR LANDS**

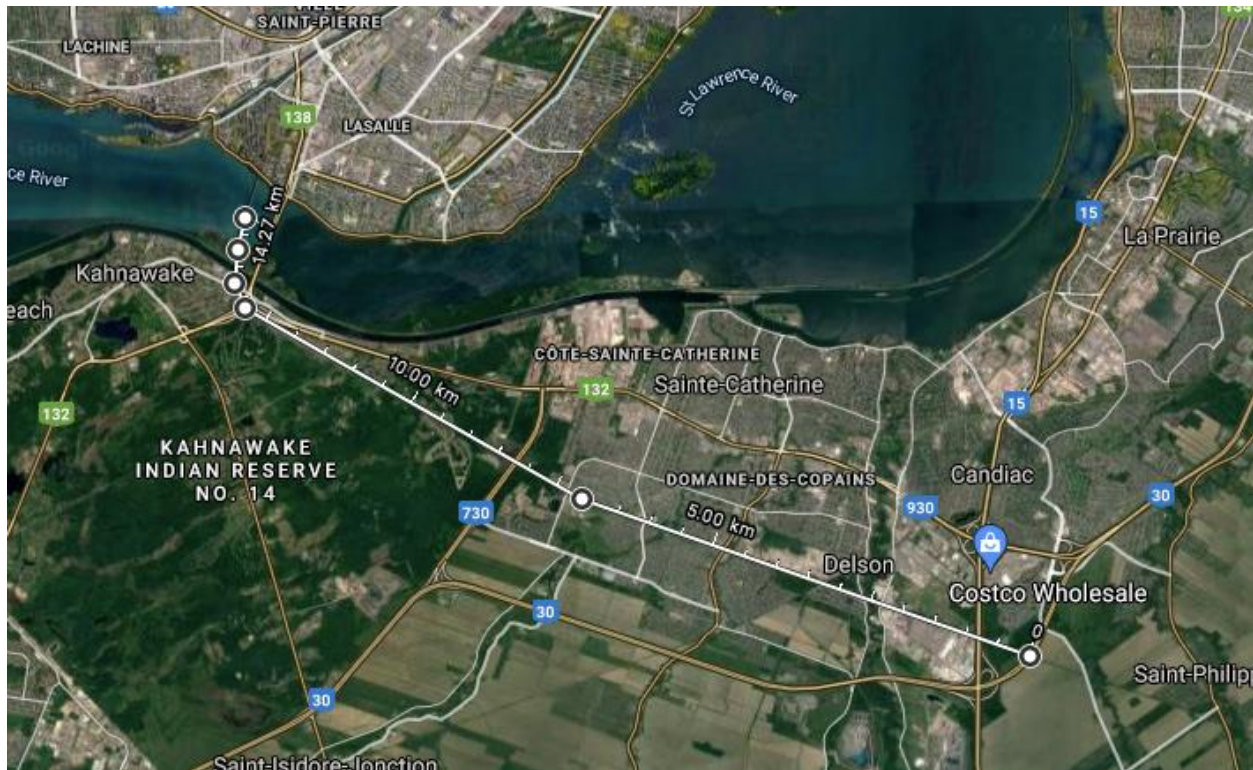
The map below shows the footprint of the CPR line and train bridge over our reserve lands and the SSSL lands.

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<sup>4</sup> SCT-7002-11 at para. 83 (*Re Osoyoos Indian Band*, 2012 SCT 3).

<sup>5</sup> (2000), 79 B.C.L.R. (3d) 62 (S.C.).

<sup>6</sup> *Ibid*, at para. 194. (Tab 86).



The Mohawks of Kahnawà:ke have suffered numerous injustices over the years, including the dispossession of our historical territory, SSSL lands, and unilateral imposition of the *Indian Act*. The application of the *Indian Act*, the goals of which was to assimilate Indigenous peoples and cultures to facilitate the expropriation of our lands. Attracted by Kahnawà:ke's proximity to Montreal, major infrastructure projects were disproportionately placed on Kahnawà:ke's ever-shrinking land base rather than on the lands of near neighbors.

Over the past two centuries, Kahnawà:ke's lands were expropriated for several projects, including **a major highway, two major roadways, the St. Lawrence seaway, a major road bridge, a railway bridge, two railway lines, and four hydroelectric transmission lines.** Each of these projects has resulted in land takings and in some cases, expropriations, as in the case of the CPR line. These land takings often involved no compensation or paltry one-time lump sum payments in exchange for a perpetual interest in the lands.

Kahnawà:ke never had a say in these land takings. These major infrastructure projects were placed on our lands as a result of environmental racism. Our lands were attributed less value than our adjoining non-Indigenous lands simply because of who we are. In the case of the CPR line, it was simply the most politically expedient and economical location for the line and train bridge as, under Canadian law, few Indigenous peoples could vote in Canadian elections and the community did not “own” land outright. And as a result, it devastated our community, and the impacts are felt to this day. This is why today our community is so protective of its lands.

One of our elders, the late Grand Chief Joseph Tokwiro Norton, addressed the negative impacts the CPR-related land taking had on our:

[the railway] cut into a lot of properties [...] [T]hey did not really give any consideration to areas that they, that they filled in. They just put in this elevated rail line and it flooded. It caused a lot of flooding, swamps where there was natural flowing water at one (1) time [...] it destroyed some of the wells [...] a lot of the vegetation died and the land wasn't usable anymore.<sup>7</sup>

The CPR line cuts the community in two and runs through primarily residential lands. CPR runs approximately eight (8) freight trains per day carrying anything from crude oil, potash, coal, ethanol, grain, sulphur, industrial or oversized products through our Territory. Moreover, the CPR tracks are used by commuter trains with stops in surrounding municipalities to carry commuters to and from the Island of Montreal. There are no train stops in Kahnawà:ke. We do not benefit from this line in any way, shape, or form.

There are 155 homes within 300 feet of the tracks. Given the volume of crude oil CPR carries, a derailment and/or fire could completely decimate our community as it did in the case of

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<sup>7</sup> Interview of Joseph Tokwiro Norton on the CPR Rail line from the transcript of oral testimony (April 11, 2011).

Lac-Mégantic, Quebec, where 47 people died just under a decade ago. It appears that the company continues to place profit before basic safety. CPR currently faces a high-profile lawsuit alleging lack of concern for safety arising to gross negligence, which lead to three deaths in 2019.

Just a few weeks ago, a CPR train stopped in Kahnawà:ke blocking the only access out of a residential area because their single-operator engineer was disoriented. This type of incident is a common occurrence for us due to the breakdown of trains, human error and the maintenance of the tracks. The stalled freight train locked in an entire segment of our community given that there is only one access to exit the residential area. Then again on December 4<sup>th</sup>, 2022 another train stopped locking in residents of our community for hours. Our community members are regularly trapped and held hostage by CPR's infrastructure. We are just lucky that to date, stalls or stops of long trains have not resulted in more harm to community members. With no exit and no access to emergency services, CPR's infrastructure is a disaster waiting to happen.

In addition to the fear and risk of derailment, the train is a constant irritant for our community members who will hear upwards of 240 train whistles per day at all hours as each train that passes our four crossings must sound the whistle four times.

The MCK also must annually address the issue of the spraying of pesticides in our community. Many in our community do not believe in the use of toxic herbicides on our lands and, yet, because of rail safety and CPR's focus on cost-cutting, we have had to allow CPR to spray toxic chemicals annually and protect our lands and people from possible derailment. While we have been promised by CPR that these chemicals and the way they are applied are safe (although we are not yet convinced this is the case), it goes against our traditional ways and our obligations as stewards of the land. Furthermore, we do not know the long-term impact on the ecosystem in our area for plants, animals, and insects to be exposed to such chemicals.

It must also be noted that the train tracks have changed the geography in this area by causing lands to flood. They have created wetlands where wetlands did not naturally occur. This has negatively impacted trees, vegetation (including important traditional medicines), as well as wildlife. For their economic gain, our natural environment, plants, animals and land have been taken away and destroyed. This has also reduced the already small landmass where we can develop lands for housing.

If CPR and its predecessors have spent over 140 years neglecting Indigenous communities for their own bottom line, permitting them to expand their network further will not compel them to curb their pattern of utter disregard towards Indigenous and marginalized communities in Canada, or the United States for that matter. The adverse effects of extending CPR's network further will thin out its resources and compromise its ability to properly manage its expanding rail network. CPR has had ample time to make things right in our community, but has done the bare minimum. As such, its poor track record should be taken into account in assessing CPR's capacity to mitigate the impact of networks on communities once it acquires KCS.

#### **6. WHY THE US SURFACE TRANSPORTATION BOARD (STB) SHOULD GIVE DUE CONSIDERATION TO THE GRIEVANCES OF THE MCK**

Railway companies have a history of running roughshod over the rights of Indigenous peoples in Canada. A quick search of Canadian case law reveals that there is an abundance of serious legal questions that have arisen over the decades regarding the taking of Indigenous reserve lands.

Recently, Canada's railways have become a prime target for disruption by Indigenous protesters looking to have their voices heard for anything ranging from pipelines to land disputes. This is not a Kahnawà:ke issue, this is a pan-Canadian issue.

Although CPR itself may not be the direct culprit or instigator, it is often a viable target because it moves environmentally harmful products and was often involved in expropriation of Indigenous lands at some point. CPR is a cause for Indigenous discontent in Canada instead of being a leader in the efforts to reconcile their corporate interests with the interests of Indigenous Peoples. Unless these underlying issues of Indigenous environmental racism are addressed in a meaningful way, one can only assume that there will be a continued risk of disruption to their railway infrastructure by those attempting to leverage the economic importance of the infrastructure to protest legitimate grievances.

One such interruption of services took place in Kahnawà:ke as recently as February 2020 and caused a national crisis when community members joined others across Canada to block access to the tracks.<sup>8</sup> This led to a massive disruption Canada's railway network. The issue being protested in that case had nothing to do with CPR, but it was an easy target because CPR's presence in the community is largely detrimental and symbolic of the ongoing exploitation of Indigenous lands for the convenience and profit of its corporate interests.

The Council of Chiefs of the MCK, as well as the Indigenous police force, the Kahnawake Peacekeepers (the only police force with jurisdiction and capacity to police the territory), played a vital role in de-escalating the situation and worked to protect the integrity of CPR's railway infrastructure. However, CPR must address the historical wrongs in our community and others to alleviate the potential for future disruptions by direct citizen actions. Ultimately, any disruption to the Canadian railway network will have an impact to the United States railway network given the interconnected nature of the network.

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<sup>8</sup> <https://www.cbc.ca/news/canada/montreal/blockade-kanesatake-oka-pipeline-1.5474931>.

The MCK, its Council of Chiefs and other community organizations are particularly well-positioned to intervene in such situations and mitigate the situation, but they lack the financial resources. In order to do so, we need resources to protect the integrity of the railway infrastructure. The MCK simply does not have the financial resources to assume the safety of CPR's infrastructure on our Territory as we are almost entirely dependent on external government funding. It is unfair to our community to have to allocate significant resources and effort to ensuring the protection of CPR's infrastructure without any benefit, especially when our community members do not even have suitable access to safe-drinking water or sewer hook-up. It is egregious.

CPR will probably argue that they were innocent bystanders in the railway disruptions in 2020, but this could not be further from the truth. They have directly contributed to the protests by expropriating Indigenous lands and acting as entitled occupiers. We submit that the railway interruptions could have been entirely avoided in our community if CPR had played a positive role instead of adversely impacting our community on a daily basis.

Fair use of Indigenous lands in Canada must be made a priority. Despite the illegal land takings, CPR still fails to compensate Indigenous communities fairly for the use of their lands. CPR must make a real effort to address the lands issues in our community and other affected communities.

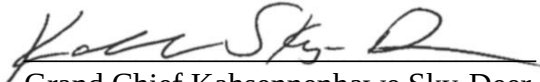
CPR will likely respond to this submission by denying its role in the plight of our community. It will probably point to the "relationship" that it has MCK and the nominal sums that it pays to Kahnawà:ke. We wish to respect the confidentiality of MCK's current arrangements with CPR other than to say that the compensation CPR barely covers an average salary of one employee of the MCK. It is wholly insufficient and insulting and a continuation of colonial exploitation of Indigenous lands for the profit and convenience of non-natives.

## **7. APPROVAL NOT IN THE PUBLIC INTEREST**

Respectfully, we submit that it is not in the public interest to approve this merger until CPR demonstrates that it has taken meaningful action to resolve the adverse environmental, communal and societal impacts caused by its infrastructure in Canada's Indigenous communities like Kahnawà:ke. It is in the economic interest of the United States of America to ensure that CPR is fulfilling its duties north of the border to ensure the fair treatment of Indigenous peoples and their lands.

If you have any questions, please contact Eric Doucet, Legal Counsel for the Mohawk Council of Kahnawà:ke.

In Peace and Friendship,

  
Grand Chief Kahsennenhawe Sky-Deer

cc. All Parties of Record

### **CERTIFICATE OF SERVICE**

I certify that I have, on this 9<sup>th</sup> day of December 2022, served by email copies of the foregoing document on all parties of record in this proceeding on behalf of the Grand Chief of the Mohawk Council of Kahnawà:ke.



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Eric Doucet,  
Legal Counsel for The Mohawk Council of Kahnawà:ke