

Final Submissions of the Huron-Wendat Nation

Submitted to the
Milton Logistics Hub Project Review Panel

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Olthuis, Kleer, Townshend LLP
<contact information removed>

On behalf of the Huron-Wendat Nation

Table of Contents

Introduction	3
Joint Review Panel Framework	4
<i>Canadian Environmental Assessment Act, 2012</i>	4
<i>Terms of Reference</i>	6
Huron-Wendat Nation Rights to be Considered by Panel	6
<i>Significance of Burial and Archaeological Sites to the Huron-Wendat Nation</i>	7
Accommodation with Respect to the Project	9
Impact Mitigation with Respect to the Project	10
Proposed Conditions	11
Schedule “A”	13
<i>Conditions Proposed to Panel by the HWN</i>	13

INTRODUCTION

1. The Huron-Wendat Nation is a First Nation that now inhabits the area of Wendake, Quebec.
2. From time immemorial, the Huron-Wendat Nation (“HWN” or the “Nation”) occupied and used a vast territory in southern Ontario and Quebec. The HWN’s traditional lands in Ontario, called Wendake South, border the Great Lakes and span from Lake Nipissing in the north to Lake Ontario in the south, and from Owen Sound in the west to the Quebec border in the east. Historically, these lands were occupied by more than 30,000 members of the HWN, and the imprints of these lives and the Nation’s culture, traditions and heritage are found across this territory.
3. The site of the proposed Milton Logistics Hub is within Wendake South.
4. The HWN has been involved in the environmental assessment process for the Milton Logistics Hub Project (the “Project”) for several years, and has worked closely with the Canadian National Railway Company (“CN”) to identify and protect its interests in the Project’s area.
5. The proposed Project will occupy 400 acres of land surrounding an existing mainline rail in Milton. The Project includes: a new mainline rail to double track the existing line; adding over 20 km of new railyard track; truck cargo loading and unloading; and up to

800 truck roundtrips per day.¹ These Project components have the potential to impact HWN archaeological and burial sites.

6. The HWN's involvement with the Project relates to its inherent and treaty right to the integrity of its archaeological and burial sites. The HWN has worked collaboratively with CN to ensure that the HWN's right is respected and that impacts and potential impacts to its right are avoided or mitigated. Based on the HWN's collaboration with CN and the commitments made by the parties concerning ongoing avoidance and mitigation measures, and with the inclusion of certain proposed conditions on approval, the HWN does not have residual concerns regarding the Project's approval.

JOINT REVIEW PANEL FRAMEWORK

Canadian Environmental Assessment Act, 2012

7. The Joint Review Panel is empowered under the *Canadian Environmental Assessment Act, 2012*² to conduct an environmental assessment of the Project. Pursuant to section 5(1)(c) of the Act, this assessment must include consideration of archaeological and cultural heritage:

5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are [...]

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

(i) health and socio-economic conditions,

(ii) **physical and cultural heritage,**

¹ Milton Logistics Hub Environmental Impact Statement dated December 7, 2015, at pp. 2-6, sections 1.2-1.3, Document #57 [EIS].

² S.C. 2012, c. 19, s. 52 at s. 43 [CEAA 2012].

(iii) **the current use of lands and resources for traditional purposes, or**

(iv) **any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.**³

8. Section 19 of *CEAA 2012* outlines the factors that the Panel must consider in its environmental assessment:

19 (1) The environmental assessment of a designated project must take into account the following factors:

(a) the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;

(b) the significance of the effects referred to in paragraph (a);

[...]

(d) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;

(e) the requirements of the follow-up program in respect of the designated project; [...]⁴

9. Section 43 of *CEAA 2012* provides that the Panel must prepare a report setting out its rationale, conclusions and recommendations, including any mitigation measures and follow-up program, in accordance with its Terms of Reference.⁵

³ *Ibid.*, at s. 5(c) [emphasis added].

⁴ *Ibid.*, at s. 19. Pursuant to s. 19(2)(b), the scope of these factors is to be determined by the Minister of the Environment and Climate Change. The Panel's Terms of Reference state that the scope of factors are outlined in the *Guidelines for the Preparation of an Environmental Impact Statement for the Milton Logistics Hub Project*. The *Guidelines* specify that physical and cultural heritage and archaeological sites of significance to aboriginal peoples are Valued Components to be examined (at 3.3.2).

Online: https://www.acee.gc.ca/050/evaluations/document/102000?culture=en-CA#_Toc419371936 [*Guidelines*].

Terms of Reference

10. The Panel's Terms of Reference state that it must accept as part of its record, and must review, information from Indigenous groups related to the nature and scope of potential or established Aboriginal or Treaty rights in the area of the project, as well as potential impacts on these rights, and information regarding measures proposed to avoid or mitigate these potential impacts.⁶ The Terms of Reference specify that this includes information concerning any potential effects of the Project on heritage or archaeological resources.⁷ The Terms of Reference further state that the Panel is not to make any conclusions or recommendations as to the validity of potential or established Aboriginal or Treaty rights asserted by an Indigenous group.⁸
11. The Terms of Reference also state that the Panel may use the information received through its process to make recommendations which, if implemented, would avoid or mitigate the environmental effects of the project, including those effects that might adversely affect potential or established Aboriginal or Treaty rights.⁹

HURON-WENDAT NATION RIGHTS TO BE CONSIDERED BY PANEL

12. The HWN has presented information to the Panel regarding its right to the integrity of its archeological and burial sites. This right is recognized under Canadian law pursuant to both section 35 of the *Constitution Act, 1982* and the treaty concluded by the Nation with the Crown in 1760 (the "1760 Treaty").

⁵ *CEAA 2012*, *supra* note 2 at s. 43(1)(d).

⁶ Agreement to Establish a Joint Process for the Review of the Milton Logistics Hub Project, Appendix 1, Terms of Reference, article 4 [Terms of Reference].

⁷ *Ibid.*, article 4.2(c).

⁸ *Ibid.*, article 4.1(a).

⁹ *Ibid.*, article 4.4.

13. The 1760 Treaty has been recognized by the Supreme Court of Canada.¹⁰ This treaty explicitly recognizes and protects the HWN's cultural and spiritual practices.¹¹
14. Moreover, section 35 of the *Constitution Act, 1982* provides that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."¹² This provision captures and constitutionally protects both the HWN's inherent and treaty rights, which include, but are not limited to, the right to the integrity of the Nation's archaeological and burial sites.

Significance of Burial and Archaeological Sites to the Huron-Wendat Nation

15. As described in its Written Submissions for the Technical Session held July 10, 2019,¹³ and as outlined in the information presented to the Panel on July 10, 2019, the HWN has a sacred obligation to ensure the respect and protection of its archaeological and cultural heritage in Ontario. This obligation is especially strong in relation to protecting its ancestors' burial sites.¹⁴
16. It is the HWN's belief that its ancestors' souls remain with their ancestors' bones. The HWN has a sacred duty to ensure that its ancestors' remains are not disturbed, so that their spirits can rest in peace.¹⁵
17. The HWN's beliefs and spiritual practices, including the Feast of the Dead and the belief that people have two souls, one of which remains with a person's buried remains even

¹⁰ See *R. v. Sioui*, [1990] 1 S.C.R. 1025 [*Sioui*].

¹¹ *Ibid.*, at p. 1067.

¹² *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 35(1) [*Constitution Act, 1982*]. We note that the HWN is an "aboriginal people" as defined by the *Constitution Act, 1982* at s. 35(2).

¹³ Written Submissions from the HWN to the Review Panel, Document # 785 [Written Technical Submissions].

¹⁴ Hearing Transcript July 10, 2019 at pp. 2813-2818.

¹⁵ See e.g. Visual Aid to Technical Presentation delivered July 10, 2019, at Slides 5-8, Document #901 [Technical Presentation].

after the Feast of the Dead, have been well-documented, including by European sources from the time of contact.¹⁶ These sources also contain observations of the importance of non-disturbance of burials to the HWN.¹⁷ These sources confirm in a written, European format the practices and beliefs that the HWN know have been integral to their society and culture since time long past.

18. The HWN's Council adopted a resolution on June 15, 2015 describing the rights of the HWN in Ontario and the HWN's sacred obligation to protect its archaeological and burial sites in Ontario.¹⁸ The resolution states and recognizes that only the HWN is able to assume this responsibility, and further states that all necessary measures must be taken to ensure the respect and the protection of Huron-Wendat cultural and archaeological sites.
19. As the 2015 resolution states, "the history of the Huron-Wendat people is woven into the field, lakes and mountains of the Great Lakes at the mouth of the St. Lawrence River."¹⁹ The HWN's archaeological and burial sites document thousands of years of the Nation's ancestors. This history has created the richest archaeological record in all of Wendake South.
20. Over 800 archaeological sites associated with the HWN have been documented in Wendake South, with more sites being identified every year. These sites include burial sites as well as ancient Huron-Wendat villages.

¹⁶ Written Technical Submissions, *supra* note 13 at para. 10, referring to: *Jesuit Relations* 10: 280-281; 286-287; 295-296; Technical Presentation, *supra* note 15 at Slides 5-6 .

¹⁷ Written Technical Submissions, *supra* note 13 at para. 10, referring to: *Sagard's Long Journey to the Country of the Hurons*, George Wrong ed. (Toronto: Champlain Society, 1939), 209; Technical Presentation, *supra* note 15 at Slides 7-10.

¹⁸ Resolution 6598 dated June 15, 2015, Appendix "A" to Written Technical Submissions, *supra* note 13. See also Hearing Transcript July 10, 2019 at pp. 2813-2818.

¹⁹ Resolution 6598 dated June 15, 2015 at p. 1, Appendix "A" to Written Technical Submissions, *supra* note 13.

21. It is estimated that more than 2,000 HWN archaeological and burial sites have been destroyed by development in southern Ontario, including the Greater Toronto area, without the knowledge of the HWN and without its consent.²⁰
22. HWN burials and ossuaries are difficult to detect using the usual methods for archaeological assessments prescribed by the legislation in Ontario. This is because these sites are normally deeply buried deposits.²¹ The HWN therefore actively participates in many development projects in Ontario by sending monitors during all project phases to ensure the protection of its archaeological sites.

ACCOMMODATION WITH RESPECT TO THE PROJECT

23. The Crown in right of Canada and Ontario has a duty to consult and accommodate the HWN when there is a possibility that the Nation's right to the integrity of its archaeological and burial sites may be impacted.²² The Crown has recognized and acted on this duty for many years.²³
24. While the Panel will not be making determinations regarding the scope of the Crown's duty to consult and accommodate or whether this duty has been met,²⁴ the information gathered by the Panel will assist the Crown in making this determination.
25. The Crown's duty to consult and accommodate Indigenous peoples when there is a possibility that Indigenous rights or title may be adversely impacted by proposed conduct is well-established in case law.²⁵

²⁰ Written Technical Submissions, *supra* note 13 at para. 15; Hearing Transcript July 10, 2019 at pp. 2811-2812.

²¹ See e.g. Technical Presentation, *supra* note 15 at Slides 12-14.

²² See e.g. *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 at para. 486 [*Tsleil-Waututh*]; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 32 [*Haida Nation*].

²³ See e.g. *Guidelines*, *supra* note 4 at Part 5.

²⁴ Terms of Reference, *supra* note 6 at article 4.1(b) and (c).

26. In its recent Tsleil-Waututh decision, the Federal Court of Appeal held that:

The duty to consult and accommodate ... reflects the need to avoid the impairment of asserted or recognized rights caused by the implementation of a specific project.²⁶

27. In this case, the right at issue for the HWN is the right to the integrity of their archaeological and burial sites, which may be impacted and impaired by the Project.

IMPACT MITIGATION WITH RESPECT TO THE PROJECT

28. As reflected in the Milton Logistics Hub Environmental Impact Statement²⁷ and CN's Aboriginal Engagement Update Report,²⁸ the HWN and CN have been actively engaged in identifying and mitigating the Project's potential impacts to HWN rights.

29. The HWN has had monitors participate in the archaeological field work completed at the Project site, and has had the opportunity to review and provide comments on the draft archaeological reports generated by CN's archaeological consultant.²⁹ CN and its archaeological consultant have been responsive to concerns and comments raised by the HWN.

30. As CN has reported to the Panel, all archaeological assessments for known sites in the Project area have been completed.³⁰ The HWN is satisfied with the archaeological work done to date and its participation in that work. Importantly, so far no Huron-Wendat

²⁵ See e.g. *Tsleil-Waututh*, *supra* note 22 at para. 486; *Haida Nation*, *supra* note 22 at para. 32.

²⁶ *Tsleil-Waututh*, *supra* note 22 at para. 486 (citation to *Haida Nation* omitted).

²⁷ EIS, *supra* note 1.

²⁸ Aboriginal Engagement Update Report prepared by CN dated May 29, 2019, Document #799.

²⁹ *Ibid.*, at 5.1, p. 10.

³⁰ *Ibid.*, at 5.3, p. 11.

burial sites have been identified at the Project site.³¹ However, there remains the possibility that archaeological or burial sites will be uncovered during construction.³²

31. To address the ongoing risk of impacts on HWN archaeological and burial sites, the HWN has requested that its monitors have continued involvement at the site during construction, and CN has agreed to this request. In addition, as part of building a respectful bilateral relationship, CN and the HWN have come to an agreement outlining the parties' obligations and responsibilities in relation to the Project.
32. The continued protection and recognition of the HWN's rights and interests will require ongoing consultation and accommodation over the course of the Project's construction and the environmental assessment's next stages. CN's commitment to the HWN regarding ongoing participation of monitors during construction, together with the other commitments made in the agreement referred to above, are significant and positive measures to ensure that potential impacts are avoided or mitigated. In addition, CN has consented to the conditions proposed by the HWN to the Panel, which are attached as Schedule "A" (the "Proposed Conditions").
33. In light of these commitments by CN, and the positive bilateral relationship CN and the HWN have been building, the HWN does not have residual concerns with the Project's approval.

PROPOSED CONDITIONS

34. As noted above, the Panel is empowered to make recommendations which, if implemented, would avoid or mitigate the environmental effects of the project, including

³¹ Hearing Transcript July 10, 2019 at p. 2812.

³² *Ibid.*, at p. 2813.

those environmental effects that might adversely affect potential or established Aboriginal or Treaty rights.

35. The Proposed Conditions require CN to ensure that the Project is constructed and operated in a manner that avoids, minimizes or manages impacts to local archaeological and heritage resources. They further require CN to provide the Canadian Environmental Assessment Agency (the “Agency”) with a plan outlining the continued participation of the HWN, the Mississaugas of the Credit First Nation, and Six Nations of the Grand River in monitoring activities for archaeological resources during construction. They also require CN to implement such a plan and to provide the Agency with an analysis and summary of this implementation on an annual basis during construction.
36. Finally, the Proposed Conditions require that CN provide quarterly reports to the Agency during construction regarding its ongoing engagement with the First Nations as part of the required mitigation measures and follow-up programs for the Project.
37. The HWN requests that the Panel include the Proposed Conditions in its recommendations to the Minister, since it is the HWN’s position that these Proposed Conditions will assist in ensuring that any adverse impacts on its right to the integrity of its archaeological and burial sites are avoided or mitigated.

SCHEDULE “A”

Conditions Proposed to Panel by the HWN

1. CN shall ensure that the Designated Project is constructed and operated in a manner that avoids, minimizes or manages impacts to local archaeological and heritage resources.

2. CN shall develop and submit a plan to the Canadian Environmental Assessment Agency (the “Agency”) describing participation by the Huron-Wendat Nation, the Mississaugas of the Credit First Nation, and Six Nations of the Grand River (the “Indigenous Groups”) in monitoring activities for archaeological resources during construction at least 60 days prior to the commencement of construction activities. The plan submitted will be required to include:
 - (a) a summary of engagement activities undertaken with the Indigenous Groups to determine opportunities for their participation in monitoring activities;
 - (b) a list of potentially affected Indigenous groups, if any, that have reached agreement with CN to participate in monitoring activities;
 - (c) the scope, methodology, and justification for monitoring activities to be undertaken by CN and the Indigenous Groups, including those elements of construction and geographic locations that will involve Monitor(s) from the Indigenous Groups;
 - (d) a description of how CN will use the information gathered through the participation of the Indigenous Groups’ Monitor(s); and

- (e) a description of how CN will provide the information gathered through the participation of the Indigenous Groups' Monitor(s) to the Indigenous Groups. CN must also provide a copy of the report above to the Indigenous Groups at the same time that it is filed with the Agency.
- 3. CN shall implement the plan and provide to the Agency an analysis and summary of the implementation of the plan, as well as any amendments made to the plan in response to the results, on an annual basis during construction.
- 4. In addition, CN shall provide quarterly reports to the Agency during construction regarding its ongoing engagement with the Indigenous Groups as part of the required mitigation measures and follow-up programs for the Project.