

September 20, 2017

RESS, EMAIL & COURIER

Ontario Energy Board
27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Attention: Ms. K. Walli, Board Secretary

**Re: Sagatay Transmission LP Appeal of Order of the Registrar in EB-2016-0017
(EB-2017-0258) – Sagatay’s Request to File Affidavit Evidence – Responding
Submission from Wataynikaneyap Power LP**

We are legal counsel to Wataynikaneyap Power LP (“Wataynikaneyap”) in the above-reference proceeding.

Pursuant to the Board’s Notice of Hearing and Procedural Order No. 1, these are Wataynikaneyap’s submissions with respect to Sagatay Transmission LP’s (“Sagatay”) September 13, 2017 request to file affidavit evidence in support of its review application. For the reasons set out below, Wataynikaneyap submits that Sagatay’s request should be dismissed. The appeal centers on pure questions of law regarding the Board’s exercise of its jurisdiction under Sections 92 and 96 of the *Ontario Energy Board Act, 1998* (the “Act”) while having regard to the proper effect of Section 97.1. In this regard, Wataynikaneyap submits that no additional evidence is needed for the Board to determine the issues on appeal and that the Board should therefore deny Sagatay’s request.

Furthermore, the evidence which Sagatay wishes to adduce relates to issues that are outside the scope of the Board’s jurisdiction in respect to an application under Section 96(2) for leave to construct and thereby are irrelevant to the consideration of the effect of Section 97.1, which relates directly to the ability of a person to bring a competing leave to construct application. Such additional evidence is not needed for the Board to determine the issues on appeal.

According to its September 13 submission, Sagatay wishes to file affidavit evidence in this appeal on issues relating to: Wataynikaneyap’s preferred route and corridor alternatives as outlined in its Environmental Assessment Report; whether these routes traverse the lands of the Michkeegogamang First Nation and the Ojibway of Saugeen First Nation; the Aboriginal and treaty rights potentially impacted by these routes and the seriousness of such impact; and the adequacy of consultation with the aforementioned First Nations. Neither the issues relating to Wataynikaneyap’s environmental assessment (including the routes considered therein and their potential environmental impacts) nor the issues relating to Aboriginal consultation are pertinent to the Board’s jurisdiction in this appeal or in the underlying leave to construct application. If the Board requires a map showing the routing currently contemplated by Wataynikaneyap for its planned Line to Pickle Lake, one is publicly available on the home page of Wataynikaneyap’s website at www.wataypower.ca and does not need to be filed by affidavit.

Sagatay's EB-2016-0017 application was brought under Section 92(1) of the Act. The Board's jurisdiction in considering a leave to construct application is limited to the application of the public interest test set out in Section 96(2), namely to a consideration of the interests of consumers with respect to prices, the interests of consumers with respect to the reliability and quality of electricity service, and if applicable, the promotion of the use of renewable energy sources consistent with government policy.

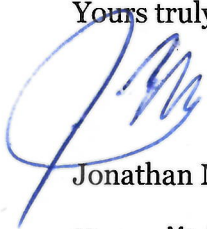
In prior proceedings under Section 92, the Board has clarified that matters which might be broadly described as "environmental" in nature are outside the scope of its jurisdiction on an application for leave to construct.¹ Based on the foregoing, the additional evidence that Sagatay requests to file in relation to environmental assessment issues, including the routes identified in Wataynikaneyap's Environmental Assessment Report and their potential environmental impacts, will not be relevant to the Board's jurisdiction in this appeal and therefore should not be allowed.

With respect to Sagatay's proposed issues on Aboriginal consultation, Wataynikaneyap notes that the Board has no responsibility or authority to consider the adequacy of Wataynikaneyap's consultation efforts in this proceeding. The Filing Requirements for Section 92 applications clearly state that in an electricity leave to construct proceeding, the Board does not have jurisdiction to consider Aboriginal consultation issues, which fall within the scope of the environmental assessment process.²

Additionally, Section 19 of the Act states: "The Board has in all **matters within its jurisdiction** authority to hear and determine all questions of law and of fact." The Board's power to hear questions of law is specifically limited in Section 19 to "matters within its jurisdiction". In the context of a leave to construct application, this relates exclusively to the factors noted above. As such, the Board has no authority to determine constitutional issues, such as the adequacy of consultation with Aboriginal stakeholders, in relation to any matters beyond the criteria in Section 96(2) in a leave to construct proceeding.³

In conclusion, due to the purely legal issues before the Board on appeal and because the factual foundation proposed by Sagatay is outside the scope of this proceeding, the Board should deny Sagatay's request.

Yours truly,



Jonathan Myers

cc: Ms. M. Kenequanash, Wataynikaneyap Power
Mr. T. Lavoie, Wataynikaneyap Power PM Inc.
Mr. C. Keizer, Torys LLP
All Parties

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¹ EB-2016-0310, Procedural Order No. 1, dated February 16, 2017, p. 2; EB-2013-0361, Procedural Order No. 1, dated November 25, 2013, p. 2.

² OEB, *Filing Requirements for Electricity Transmission Applications – Chapter 4. Applications under Section 92 of the Ontario Energy Board Act* (July 31, 2014), s. 4.3.8.

³ Yellow Falls Power, EB-2009-0120, Decision on Questions of Jurisdiction and Procedural Order No. 4, dated November 18, 2009.