



EB-2017-0258

## Sagatay Transmission LP

### Appeal under section 7 of the *Ontario Energy Board Act, 1998* of the Order of the Registrar in EB-2016-0017

#### OEB Staff Submission September 20, 2017

### Background

Sagatay Transmission LP (Sagatay) filed a Notice of Appeal on June 9, 2017 under section 7 of the *Ontario Energy Board Act, 1998* (the Act) asking the Ontario Energy Board (OEB) to cancel the May 5, 2017 decision of the Registrar that dismissed Sagatay's application for leave to construct an electricity transmission line to Pickle Lake. In the Notice of Appeal, Sagatay also requested permission to file affidavit evidence. In the Notice of Hearing and Procedural Order No. 1 issued on September 1, 2017, the OEB invited Sagatay to make submissions in support of its request to file evidence, and invited the other parties to respond to those submissions. Sagatay filed submissions on September 13, 2017. This is OEB staff's response to Sagatay's submissions.

Sagatay asks to file evidence on six issues.<sup>1</sup> Five of them relate to the detailed route proposed by Wataynikaneyap Power LP (Watay), and the impacts of Watay's proposal on the Mishkeegogamang First Nation and Ojibway of Saugeen First Nation. The sixth issue is "whether there has been adequate consultation [by Watay] of the First Nations."<sup>2</sup>

For the reasons below, OEB staff does not believe the evidence Sagatay proposes to file would be of assistance to the OEB in deciding this appeal.

### Filing fresh evidence in an appeal is not a right

As the OEB noted in the Notice of Hearing and Procedural Order No. 1, "Normally a section 7 appeal proceeds as an appeal based on the record that was before the

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<sup>1</sup> Sagatay submission dated September 13, 2017.

<sup>2</sup> *Ibid.*, p. 2.

employee who made the order, rather than a hearing *de novo*.”<sup>3</sup> But as the OEB recognized when it invited submissions from Sagatay and the other parties, it may in some cases be appropriate to allow fresh evidence. The OEB’s *Rules of Practice and Procedure* do not establish a test for allowing fresh evidence. They do suggest, however, that the OEB has broad discretion. For instance, Rule 11.04 provides that the OEB may require any evidence that it “considers necessary to enable the Board to obtain a full and satisfactory understanding of an issue in the proceeding.”

The courts apply a high bar when determining requests to file fresh evidence in an appeal. In *R. v. Palmer*, the Supreme Court of Canada articulated the following four principles:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.<sup>4</sup>

Although in OEB staff’s view, the OEB is not limited to these criteria, they are instructive. In this case, OEB staff has no particular concerns with the third factor (credibility), but submits that the other three factors weigh against Sagatay’s request.

The first factor suggests that normally the OEB should be reluctant to admit fresh evidence in an appeal unless it is satisfied that the evidence could not have been presented to the OEB employee who was delegated to make the decision: the parties should put their best foot forward in the initial proceeding. Before the Registrar dismissed Sagatay’s application for leave to construct, she provided Sagatay with an opportunity to make submissions (and extended the deadline for those submissions upon Sagatay’s request). In its submission to the Registrar dated November 18, 2016, Sagatay argued that its project followed a different route to Pickle Lake from Watay’s project, and that the two projects would have different impacts, including impacts on the environment and local First Nations, but Sagatay did not file any evidence about Watay’s project to support that assertion. (It did file a System Impact Assessment of Sagatay’s project prepared by the IESO.) Nor did Sagatay explain in its September 13, 2017 submission to the OEB why it could not have filed evidence about Watay’s project with its submission to the Registrar.

Even more important, in OEB staff’s view, are the second and fourth factors (which are closely related). Sagatay has not demonstrated why the proposed evidence is relevant

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<sup>3</sup> Generally, in the absence of a legislative provisions expressly stating otherwise, an appeal will proceed on the existing record. See, for example, *Ford v. Toronto (City) Compliance Audit Committee*, 2012 ONCJ 92, para. 3.

<sup>4</sup> [1980] 1 S.C.R. 759, p. 775 (internal footnotes omitted).

or could have convinced the Registrar not to dismiss its application for leave to construct.

**The proposed evidence is irrelevant and/or could not reasonably be expected to have resulted in a different outcome**

The first ground of appeal raised in Sagatay's Notice of Appeal is that the Registrar misinterpreted section 97.1 of the Act, which provides that leave to construct an electricity transmission or distribution line cannot be granted where another person is required under an OEB licence to develop the line,<sup>5</sup> by applying "the wrong test" (i.e., by asking whether Sagatay's line to Pickle Lake and Watay's line to Pickle Lake were "functionally equivalent"). In OEB staff's view, that is a purely legal question of statutory interpretation on which no evidence is necessary. OEB staff will take the position in this appeal that the Registrar applied the right test.

Another ground is that, "In any case, the Registrar erred and misapprehended the facts by concluding that the two lines are 'functionally equivalent' despite the numerous material differences between them."<sup>6</sup> Much of the proposed evidence (i.e., the evidence associated with five of the six issues identified in Sagatay's September 13, 2017 submission) appears to be for the purpose of supporting that argument.

OEB staff will take the position in this appeal that there is no merit to this ground of appeal. The Registrar used the term "functionally equivalent" to mean that the two lines would achieve the same primary function. In her May 16, 2017 letter to Sagatay, which is referenced in the order under appeal, she explained that "The proposals of each of Wataynikaneyap and Sagatay would achieve the primary function of enabling long-term load-meeting capability in the Pickle Lake Subsystem of approximately 160MW, and of providing a basis for the future grid connection of remote communities north of Pickle Lake," and that "Each of the proposed lines is approximately 300 km in length, interconnects with the provincial transmission grid at a point on Hydro One Transmission's 230kV 'D26A' transmission circuit lying between Dryden and Ignace and terminates at a point in Pickle Lake."

In assessing whether Sagatay's proposed line and Watay's proposed line would achieve the same primary function, the Registrar was, quite properly, not concerned with whether the lines would have the same impacts on the environment or on local First Nations. Indeed, the Registrar made no findings of fact on the impacts of the

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<sup>5</sup> Section 97.1 reads:

**No leave if covered by licence**

**97.1** (1) In an application under section 92, leave shall not be granted to a person if a licence issued under Part V that is held by another person includes an obligation to develop, construct, expand or reinforce the line, or make the interconnection, that is the subject of the application.

**Transition**

(2) For greater certainty, an application made, but not determined, before the day section 16 of Schedule 2 to the *Energy Statute Law Amendment Act, 2016* comes into force, is subject to subsection (1).

<sup>6</sup> Sagatay Notice of Appeal, para. 2.

projects, as such findings were not necessary for her analysis. All the Registrar needed to know was that Watay's licence requires it to develop and seek approvals for "a new 230 kV transmission line originating at a point between Ignace and Dryden and terminating in Pickle Lake (the 'Line to Pickle Lake')," in accordance with "the scope recommended by the IESO,"<sup>7</sup> and that Sagatay's project also met that description. In OEB staff's view, a detailed comparison of the particulars of the two proposals is not required for the purposes of determining whether Sagatay's application is captured by section 97.1 of the Act. In the circumstances of this case, section 97.1 precludes the OEB from granting leave to construct to any person other than Watay in respect of any line to transmit electricity from a point between Ignace and Dryden to Pickle Lake within the scope recommended by the IESO.

The sixth issue listed in Sagatay's September 13, 2017 submission – the question of whether Watay has consulted sufficiently with First Nations – is, in OEB staff's view, unrelated to any ground of appeal raised in Sagatay's Notice of Appeal. The OEB's *Rules of Practice and Procedure* prevent an appellant from relying on any grounds not identified in the Notice of Appeal (Rule 17.04). In any case, even if the matter of Watay's consultation had been raised in the Notice of Appeal, it would seem to be clearly irrelevant to the real issue of whether the Registrar was bound by section 97.1 of the Act to dismiss Sagatay's application. This appeal is not a hearing on Watay's project. (In this regard, OEB staff notes that Watay has not yet filed an application for leave to construct.) It does not matter for present purposes what consultation Watay may have undertaken or will undertake in the future. Evidence on that consultation would not have affected the Registrar's decision, and would be of no assistance to the OEB in this appeal.

All of which is respectfully submitted.

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<sup>7</sup> Watay's Electricity Transmission Licence (ET-2015-0264). Watay's licence echoes the language in the Minister's Directive to the OEB dated July 29, 2016, which is referred to in the Registrar's reasons for her decision.