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Our File No. 131167

September 25, 2017

VIA EMAIL AND COURIER

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

Attention: Kirsten Walli,
Board Secretary

Dear Ms. Walli:

Re: Sagatay Transmission LP – Notice of Appeal dated June 9, 2017 under Section 7 of the Ontario Energy Board Act from the Order of the Registrar in EB-2016-0017

On behalf of Sagatay, we write in reply to the OEB Staff Submission dated September 20, 2017 ("**Staff Submission**") and the submission made by Wataynikaneyap Power LP dated September 20, 2017 ("**Watay Submission**"). Capitalized terms in our reply that are not defined will have the respective meanings ascribed to them in Sagatay's submissions dated September 13, 2017.

On July 26, 2017, the Supreme Court of Canada released its decisions in *Clyde River (Hamlet) v Petroleum Geo-Services Inc*[1] and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*[2]. In these decisions, the Supreme Court held that, as a statutory body with delegated executive authority, the National Energy Board's approval process triggered the Crown's duty to consult as it was acting on behalf of the Crown in making a final decision that could adversely affect Aboriginal and treaty rights.[3] The Supreme Court noted that: (1) the National Energy Board has the procedural powers necessary to implement consultation and the remedial powers to, where necessary, accommodate affected Aboriginal claims or Aboriginal treaty rights[4] and (2) a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. "The power of a tribunal 'to decide questions of law implies a power to decide constitutional issues that are properly before it, absent

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[1] 2017 SCC 40 ("*Clyde River*")
[2] 2017 SCC 41 ("*Chippewas*")
[3] *Clyde River*, *supra* note 1 at paras 25 and 29 ; *Chippewas*, *supra* note 2 at para 29-31
[4] *Clyde River*, *supra* note 1 at paras 31-34

a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power'..."[5]

The Ontario Energy Board ("**Board**") is statutory body empowered under section 97.1 of the *Ontario Energy Board Act, 1998* (the "**Act**") to make a final decision dismissing Sagatay's Application for Leave to Construct the Pickle Lake Transmission Line (the "**Application**"). The effect of such a decision would adversely affect the Aboriginal and treaty rights of the Mishkeegogamang First Nation and Ojibway of Saugeen First Nation (the "**First Nations**") as (according to the Registrar's reasoning) it would pave the way for the Board to approve Watay's preferred undertaking, the Dinorwic Route. If it confirms such decision, the Board would be acting under delegated executive authority as the Minister of Energy issued a directive to the Board, approved by Order in Council signed by the Lieutenant Governor of Ontario on July 20, 2017 (the "**Directive**"), requiring the Board to amend Watay's electricity licence to "[d]evelop and seek approvals for a transmission line...originating at a point *between* Ignace and Dryden and terminating in Pickle Lake", which is consistent with the Dinorwic Route. Further, the Crown has *actual* knowledge of the First Nations' claims or treaty rights that might be adversely affected by Crown conduct.[6] We refer you to the letter by the First Nations to Canada's Minister of Indigenous and Northern Affairs dated October 25, 2016.[7] The Board also has the procedural powers necessary to implement consultation and the remedial powers to accommodate affected Aboriginal claims and rights. Its procedural powers include the ability to hold hearings, accept written evidence including expert evidence, direct parties to submit evidence, hold technical conferences, and direct parties to participate in Settlement Conferences. Its remedial powers include section 23(1) of the Act which enables it to place such conditions as it considers appropriate on its grant of leave to construct and to monitor compliance with such conditions. In addition, "[t]he Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact" under section 19(1) of the Act, and section 36 of the Rules provides a procedure for dealing with conditional issues.

Reply to Watay's Submission

Watay stated it would be making submissions only on issues concerning the Board's jurisdiction in relation to Sagatay's appeal. The issue now before the Board is whether Sagatay should be permitted to file affidavit evidence as to the route of the line chosen by Watay, the impact of that line on the First Nations and whether the First Nations have been consulted in a meaningful way. This issue is whether such evidence could be beneficial to the Board in deciding Sagatay's appeal, which is a different issue than the Board's jurisdiction. As such, the Board should give little or no weight to Watay's submission.

Watay argues that no further evidence is needed because Sagatay's appeal is only on an error of law. That assertion is not correct. Sagatay also appeals on the grounds of errors in fact, including

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[5] *Clyde River*, *supra* note 1 at para 36
[6] *Clyde River*, *supra* note 1 at para 29
[7] Notice of Appeal, Exhibit J

in particular whether Watay's proposed line is the "subject of" its Application or, alternatively, "functionally equivalent" to Sagatay's proposed line.

The Registrar's decision also failed to address many aspects of Watay's proposed route, and whether the Board's delegation of such an important matter to an employee was proper. The employee's decision failed to address the impact of Watay's route on endangered species (the Woodland caribou) and the degree to which the route would infringe on the First Nations' Aboriginal and treaty rights. Watay argues that the Board can simply find its proposed route on a map on Watay's website. But a route map on a website cannot describe all of the important characteristics of the route.

Watay next argues that the Board should not allow Sagatay's evidence because it relates to issues that are outside the jurisdiction of the Board on a leave to construct application. However, the issue before the Board now is whether the Board should allow Sagatay to submit evidence. The Board has traditionally taken a permissive approach to requests to submit evidence in its proceedings, while noting that it has the discretion to assign more or less weight to any evidence. When in doubt, it has usually allowed the evidence to be filed, unless there is a compelling public interest that would be violated by doing so. There appears to be no such public interest in this case. Sagatay submits that the proposed evidence would assist the Board in understanding the similarities and differences between the two proposed lines so that it can determine this appeal.

Moreover, the evidence would be useful to the Board in assessing whether the reliability of the electricity service provide by Watay's proposed line would be equivalent to that provided by the Sagatay line and route, which (because of its proximity to the highway and the fact that it does not infringe upon any first nation's traditional territories and treaty and ancestral rights) will be more easily maintained and less likely to be the subject of future disputes.

Watay argues that Aboriginal consultation issues should only be considered during the environmental assessment stage of the process, not at the leave to construct stage. However, in *Clyde River*, the Supreme Court stated that "irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative".[8]

Furthermore, pursuant to *Clyde River*, as a tribunal empowered to decide questions of the law, the Board *must* exercise its decision-making power in accordance with section 35(1) of the *Constitution Act*, 1982 "unless the authority to decide the constitutional issue has been **clearly withdrawn**" by the legislature.[9] In the present case, the Board's authority to decide issues of consultation have not been clearly withdrawn by the legislature. The enactment of section 96(2) of the Act pre-dates the SCC's decision in *Clyde River*, and while it limits what the Board may

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[8] *Clyde River*, *supra* note 1 at para 24
[9] *Clyde River*, *supra* note 1 at para 36

consider on an application under section 92, it does not "clearly withdraw" the Board's authority to consider constitutional issues. Accordingly, the Board must ensure that its decisions comply with section 35(1) of the *Constitution Act*, 1982.

Lastly, Watay relies on section 4.3.8 of the Filing Requirements for Electricity Applications – Chapter 4 ("**Requirements**") to claim that the Board does not have jurisdiction to consider Aboriginal consultation issues in a leave to construct application. Section 4.3.8 is based on the Yellow Falls decision EB-2009-0120 dated November 18, 2009 and section 96(2) of the Act. The Requirements, which are posted on the Board website but not published in the Ontario Gazette or on e-Laws, do not have the indicia of legislation or regulation, and as such, do not have the force of law.[10] Moreover, the Board's decision in Yellow Falls is superseded by the Supreme Court's decision in *Clyde River*.

Reply to Staff Submission

Staff has a conflict of interest in this appeal as it represents both the Board's employee whose decision is the subject of the appeal and the Board. Consequently, the Board should give little weight to the staff's comments in this case.

Staff cited *R v Palmer* for the "high bar" set by the courts for fresh evidence on appeal. But this case dealt with evidence submitted on appeal from decisions of the criminal and civil courts. The rules of evidence in criminal and civil courts are not binding on or always followed by the Board. The principle rule the Board applies is that the evidence should be relevant and relevance is normally interpreted in an expansive manner. For example, section 11.01 of the Rules permits the Board to allow amendments to the evidentiary record on conditions the Board considers appropriate. As noted above, the Board exercises considerable discretion in the weight it gives in that evidence. The Board should treat Staff's comments based on *R v Palmer* with caution.

Even if *R v Palmer* as applied, *Clyde River* and *Chippewas* provide a full answer to Staff's objections as the Supreme Court clarified that a statutory body, acting under delegated executive authority, empowered to make a final decision on a project application that may adversely affect Aboriginal claims and treaty rights triggers the Crown's duty.

Accordingly, on the first factor in *R v Palmer*, Sagatay acted with due diligence in seeking to file evidence on Aboriginal consultation after *Clyde River* and *Chippewas* were released and in accordance with Procedural Order No. 1. Staff also suggest that Sagatay should have made its

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[10] *Hassum v. Contestoga College Institute of Technology and Advanced Learning*, 2008 CanLII 12838 (ON SC) applying *Oldman River Society v Canada (Minister of Transport)*, 1992 CanLII 110 (SCC). In *Hassum*, the ONSC considered whether policy directives, guidelines, circulars or other instruments authorized under a statute create subordinate legislation with the force of law. As the policy directives in question had not been published on e-Laws or in the *Ontario Gazette*, the Court ruled that they did not have the force of law. The power to create subordinate legislation must be found within the four corners of the enabling statute. In the present case, while the Act gives the Board the power to issue policy directives, it does not enable the Board to create subordinate legislation by publishing guidelines on its website.

submission about the details concerning Watay's Dinorwic Route and Corridor Alternatives in its Notice of Appeal dated June 9, 2017. However, Sagatay was unable to provide more detailed comments in its Notice of Appeal because the Dinorwic Route and Corridor Alternatives were included in Watay's final draft version of its environmental assessment issued on June 16, 2016.

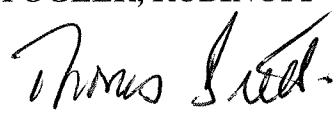
Sagatay submits that the proposed evidence also meets the second factor (evidence is relevant and potentially decision) and fourth factor (proposed evidence could reasonably have affected the result) set out in *R v Palmer*. Staff argues that these factor are not met by describing the position that it would take in this appeal, notably that the question is entirely one of law (statutory interpretation) and that the employee's test of functional equivalence was the right test. However, the issue at this stage is whether Sagatay's proposed evidence Sagatay may help the Board decide whether to confirm, vary, or cancel the order of its employee. The position that the Staff intends to take in the appeal itself is not determinative of whether Sagatay should be allowed to submit its evidence. In any case, *Clyde River* and *Chippewas* make clear that the failure to consult the First Nations on a final decision by the Board that may adversely impact on their Aboriginal claim and treaty rights would be quashed by the courts.

Staff also relies on the fact that Watay has not yet filed an application for leave to construct to contend that "[i]t does not matter for present purposes what consultation Watay may have undertaken or will undertake in the future". But this submission ignores the reasoning behind the Registrar's decision (which Sagatay objects to), that the Directive requires the Board to dismiss Sagatay's Application and approve Watay's application to "[d]evelop and seek approvals for a transmission line...originating at a point *between* Ignace and Dryden and terminating in Pickle Lake". As mentioned above, this Directive is consistent with the Dinorwic Route.

Finally, we note that Staff did not address whether it was in the public interest to allow the Board to have the benefit of the proposed evidence.

Yours truly,

FOGLER, RUBINOFF LLP



Thomas Brett
TB/ce
cc: All Parties *(via email)*