



**EB-2017-0258**

**IN THE MATTER OF** the *Ontario Energy Board Act*,  
1998, S.O. 1998, c. 15 (Schedule B);

**AND IN THE MATTER OF** an appeal under section  
7 of the *Ontario Energy Board Act*, 1998 of the order  
of the Registrar dated May 25, 2017 dismissing  
Sagatay's application for leave to construct a  
transmission line (EB-2016-0017)

### **PROCEDURAL ORDER NO. 3**

**October 3, 2017**

On June 9, 2017, Sagatay Transmission LP (Sagatay) filed a Notice of Appeal pursuant to section 7 of the *Ontario Energy Board Act*, 1998 (the Act). Sagatay appeals the May 25, 2017 order of the Registrar of the Ontario Energy Board (OEB) dismissing Sagatay's application for leave to construct an electricity transmission line to Pickle Lake (EB-2016-0017). The Registrar concluded that the OEB was precluded from proceeding with the application by section 97.1 of the *Ontario Energy Board Act*, 1998, because Sagatay's proposed line is "functionally equivalent" to the line that another licensee, Wataynikaneyap Power LP, is required to develop under the terms of its licence.

The Registrar's authority to make the order was delegated to the Registrar under section 6 of the Act. Section 7 provides for an appeal to the OEB of a decision under delegated authority.

In its Notice of Appeal, Sagatay requested permission to file fresh evidence. In the Notice of Hearing and Procedural Order No. 1, the OEB invited submissions on that request.

Sagatay then filed a submission outlining six areas on which it wishes to file affidavit evidence:

1. the corridor from Dinorwic to Pickle Lake (the “Dinorwic Route”) that Wataynikaneyap Power LP (“Watay”) identifies in its most recent draft Environmental Assessment Report issued June 2017 as the “preferred undertaking” for developing and constructing the “Line to Pickle Lake” or Phase 1;
2. Watay’s “Corridor Alternatives” for Phase 1;
3. whether the Dinorwic Route and Corridor Alternatives will traverse through the traditional, ancestral and reserve lands of the Mishkeegogamang First Nation and Ojibway of Saugeen First Nation (the “First Nations”);
4. the Aboriginal and treaty rights that will be affected by the Dinorwic Route and Corridor Alternatives;
5. the seriousness of the potential impact of the Dinorwic Route and Corridor Alternatives on the such (sic) Aboriginal and treaty rights; and
6. whether there has been adequate consultation of the First Nations.

Sagatay submits that the OEB cannot fairly assess the Registrar’s determination that Sagatay’s project is functionally equivalent to Watay’s project “in the absence of evidence on the particulars of the lines proposed by Watay, including its preferred undertaking.” Sagatay further submits that evidence on whether Watay’s project would traverse the traditional lands of the two First Nations, and on the extent of any impacts on those First Nations, is necessary to support its argument that the two lines are not “of equal value” to the First Nations. Finally, Sagatay submits that evidence on the adequacy of the consultation with the First Nations in respect of Watay’s project is necessary because “the Crown’s duty to consult the First Nations has been triggered by (among other things) the Board’s approval process under the Act and, in particular, the Registrar’s decision to dismiss Sagatay’s Application and this appeal.”

Watay objects to Sagatay’s request to file fresh evidence. Watay argues that this appeal turns on pure questions of law in respect of the OEB’s statutory authority, on which no evidence is necessary. Watay cites s. 96(2) of the Act and previous OEB decisions interpreting it to argue that the evidence Sagatay asks to file relates to matters that are outside the OEB’s jurisdiction in applications for leave to construct an electricity transmission line, namely, matters concerning the line’s impacts on the environment and First Nations.

OEB staff takes the position that the proposed evidence would not be of assistance to the OEB in this appeal. In particular, OEB staff submits that the proposed evidence is irrelevant and would not have affected the Registrar’s decision even if it had been filed before that decision was made.

## **Findings**

The OEB is of the view that additional evidence concerning the proposed route of the Watay project may be of assistance to the OEB in this appeal. In particular, such additional evidence may be helpful in understanding and evaluating Sagatay's argument that Watay's project is not functionally equivalent to Sagatay's project. The OEB will therefore permit Sagatay to file affidavit evidence relating to items 1 through 3 above.

The OEB is not persuaded, however, that additional evidence concerning items 4 through 6, dealing with the impacts of Watay's project on Aboriginal and treaty rights and the adequacy of First Nations consultation in respect of Watay's project, could be relevant in this appeal.

This appeal is about whether the Registrar properly determined that the OEB Act precludes the OEB from proceeding with Sagatay's application for leave to construct. It is not a hearing on Watay's proposal; nor is it a hearing to determine which of Sagatay's or Watay's proposal is preferable. When Watay files an application for leave to construct its project, which it is required to do by the terms of its transmission licence, the OEB will determine whether that project is in the public interest under s. 96 of the Act (although the OEB must, by virtue of s. 96.1(2), accept that the project is needed, and s. 96(2) limits the factors that the OEB may consider in assessing whether an electricity transmission project is in the public interest).

It is not for this Panel, in this case, to draw any conclusions on the merits of Watay's proposal. Accordingly, this Panel does not consider that any evidence going to what Sagatay may judge to be the flaws in Watay's proposal, or what Sagatay may judge to be the likelihood of Watay's application for leave to construct being granted, would be helpful in this appeal.

## **THE ONTARIO ENERGY BOARD ORDERS THAT:**

1. Sagatay may file affidavit evidence, in accordance with the reasons above, and any further written submissions in support of its appeal by no later than **October 18, 2017**.
2. The other parties shall file written submissions responding to the appeal by no later than **November 1, 2017**.
3. Sagatay shall file any reply submissions by no later than **November 8, 2017**.

All filings to the OEB must quote file number EB-2017-0258 and be made electronically through the OEB's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/> in searchable/unrestricted PDF format. Two paper copies must also be filed. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Michael Lesychyn at [Michael.Lesychyn@oeb.ca](mailto:Michael.Lesychyn@oeb.ca) and OEB Counsel, Ian Richler at [ian.Richler@oeb.ca](mailto:ian.Richler@oeb.ca).

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**ISSUED** at Toronto, October 3, 2017

### **ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli  
Board Secretary