

November 1, 2017

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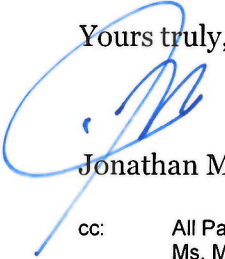
Ontario Energy Board  
27th Floor  
2300 Yonge Street  
Toronto, ON M4P 1E4

Attention: Ms. K. Walli, Board Secretary

**Re: Sagatay Transmission LP - Appeal of Order of the Registrar in EB-2016-0017  
(EB-2017-0258) – Submissions of Wataynikaneyap Power LP**

We are counsel to Wataynikaneyap Power LP (“WPLP”), party in the above-referenced proceeding. In accordance with Procedural Order No. 3, please find attached WPLP’s submissions on Sagatay Transmission LP’s appeal.

Yours truly,



Jonathan Myers

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

**ONTARIO ENERGY BOARD**

**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 the application from Sagatay Transmission LP for leave to construct a transmission line (EB-2016-0017).

**SUBMISSIONS OF WATAYNIKANEYAP POWER LP****A. INTRODUCTION**

1. These are the submissions of Wataynikaneyap Power LP (“WPLP”) in response to the appeal by Sagatay Transmission LP (“Sagatay”) under Section 7 of the *Ontario Energy Board Act, 1998* (the “OEB Act”) of the order by the Registrar of the Ontario Energy Board (the “OEB” or “Registrar”), dated May 25, 2017, dismissing Sagatay’s application for leave to construct a transmission line in EB-2016-0017.
2. An appeal made under Section 7 of the OEB Act is subject to the threshold test established for Rule 42 and Sagatay’s appeal does not meet the threshold test.
3. In any event, the Board correctly framed the issue in this appeal when it stated that 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.”<sup>1</sup> For the reasons that follow, it is WPLP’s submission that the Registrar’s order should be confirmed and that the OEB should therefore deny Sagatay’s appeal.

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<sup>1</sup> Procedural Order No. 3, p. 3

## **B. BACKGROUND**

4. On January 20, 2016, in EB-2016-0017, Sagatay filed an amended application for leave to construct an approximately 300 km 230 kV transmission line from the existing Hydro One Networks Inc. (“Hydro One”) circuit D26A between Dryden and Ignace, and terminating at a new transformer station in Pickle Lake, which would be interconnected with Hydro One’s existing circuit E1C (the “Sagatay Application”).

5. On July 20, 2016, pursuant to Section 96.1 of the OEB Act, the Lieutenant Governor in Council (“LGIC”) made an order-in-council (the “Section 96.1 OIC”) declaring the following as priority projects:

- 1) The construction of an electricity transmission line originating at a point between Ignace and Dryden and terminating in Pickle Lake; and
- 2) The construction of electricity transmission lines extending north from Pickle Lake and Red Lake required to connect the Remote Communities (as named in the Section 96.1 OIC).

6. The priority project comprising the electricity transmission line that terminates in Pickle Lake is the same as the line that is the subject of the Sagatay Application – a line commencing between Dryden and Ignace and terminating at Pickle Lake.

7. Also on July 20, 2016, and in conjunction with the Section 96.1 OIC, the LGIC made an order-in-council pursuant to Section 28.6.1 of the OEB Act, approving the Minister’s directive requiring the OEB, without holding a hearing, to amend the conditions of WPLP’s transmission licence. The amendment added a condition to the licence requiring WPLP to proceed to develop and seek approvals for the very same projects that were identified as priority projects in the Section 96.1 OIC, subject to the requirement that the development of those projects accord with the scope recommended or supported by the IESO, as applicable. The Minister issued the LGIC-approved directive to the OEB on July 29, 2016 and, in response to the directive, the OEB amended WPLP’s transmission licence (ET-2015-0264) on September 1, 2016.

8. Consequently, Section 13.1 of WPLP’s transmission licence states as follows:

Effective September 1, 2016, the Licensee shall proceed to do the following related to expansion of the transmission system to connect the Remote Communities to the provincial electricity grid:

- (a) Develop and seek approvals for a transmission line, which shall be composed of a new 230 kV line originating at a point between Ignace and Dryden and terminating in Pickle Lake (the “Line to Pickle Lake”). The development of the Line to Pickle Lake shall accord with the scope recommended by the IESO.
- (b) Develop and seek approvals for the transmission lines extending north from Red Lake and Pickle Lake required to connect the Remote Communities to the provincial electricity grid. The development of these transmission lines shall accord with the scope supported by the IESO.
- (c) For the purposes of this paragraph 13.1 and Schedule 1, the Remote Communities are: Sandy Lake, Poplar Hill, Deer Lake, North Spirit Lake, Kee-Way-Win, Kingfisher, Wawakapewin, Kasabonika Lake, Wunnumin, Wapekeka, Kitchenuhmaykoosib Inninuwug, Bearskin Lake, Muskrat Dam Lake, Sachigo Lake, North Caribou Lake, and Pikangikum.

9. In a November 2, 2016 letter to Sagatay, the OEB noted that the Sagatay Application continued to be incomplete. The OEB further noted that, while the Sagatay Application was being held in abeyance, the OEB was directed by the Minister of energy to amend (and the OEB so amended) WPLP’s electricity transmission licence. On the basis of section 97.1 of the OEB Act, and subject to any submissions from Sagatay, the OEB advised of its intention to dismiss the Sagatay Application.

10. In submissions filed November 18, 2016, Sagatay argued that section 97.1 of the OEB Act does not apply because the Sagatay transmission line is not the line that WPLP is obligated to develop and construct pursuant to WPLP’s transmission licence. Sagatay took issue with the OEB’s determination that Sagatay’s proposed line was “functionally equivalent” to WPLP’s planned transmission line.

11. In a May 16, 2017 letter to Sagatay, the OEB confirmed its intention to dismiss the Sagatay Application. The OEB reiterated that the dismissal was grounded in Section 97.1 of the OEB Act and confirmed its view that Sagatay’s proposed transmission line is functionally equivalent to the line that WPLP is required by its licence to develop, namely the Line to Pickle Lake.

12. On May 25, 2017, by delegated authority, the Registrar issued an order dismissing the Sagatay Application for the reasons provided in each of the November 2, 2016 and May 16, 2017 letters.

### C. THRESHOLD TEST

13. The OEB has determined that in order for an appellant to succeed in an appeal under Section 7 of the OEB Act, the appellant has to satisfy the “threshold test” that the OEB has established for motions to review under Rule 42 of the Board’s *Rules of Practice and Procedure*.<sup>2</sup> WPLP submits that Sagatay’s appeal does not satisfy the “threshold test” because, through the appeal, Sagatay is merely trying to reargue its case in the hope of achieving a different result.

14. The Board, on numerous occasions,<sup>3</sup> has established that a motion to review must meet the following test:

- the grounds must raise a question as to the correctness of the order or decision;
- the issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the OEB deciding that the decision should be varied, cancelled or suspended;
- there must be an identifiable error in the decision, as a review is not an opportunity for a party to merely reargue the position it took in the original case; and
- in demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, or that the panel failed to address a material issue. The applicant must be able to show that the panel made findings that were inconsistent with the evidence, not merely that the OEB interpreted evidence in a manner that was different than was urged upon it by the applicant in the original case.

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<sup>2</sup> See OEB, Decision and Order on Appeal in EB-2012-0006, April 26, 2012 at p. 6.

<sup>3</sup> See OEB, Decision and Order in EB-2014-0369, January 28, 2016 at pp. 5-6.

15. On November 2, 2016, the Registrar sent a letter to Sagatay indicating the Board's intent to dismiss the Sagatay Application and providing an opportunity for Sagatay to make written submissions regarding the intended dismissal. Sagatay responded on November 18, 2016 by setting out its position as to why the Registrar should not dismiss the Sagatay Application. In particular, Sagatay asserted that:

- Sagatay's project is not "functionally equivalent" to the project proposed by WPLP;
- WPLP's routing impacts the traditional territories of the two First Nations that are partners in Sagatay project; and
- dismissal of the Sagatay Application would be contrary to public policy and the Board's statutory mandate, and would compromise commercial discussions between Sagatay and WPLP.

16. In the current proceeding, Sagatay was provided with the opportunity to introduce fresh evidence to assist in showing why the Registrar should have not dismissed the Sagatay Application. As discussed below, most of the material filed by Sagatay is either out of scope or comprises submissions rather than evidence. Applying the "threshold test" to the current appeal, WPLP submits that Sagatay has not raised any grounds that properly challenge the correctness of the Registrar's decision. Furthermore, in its appeal submission, Sagatay does not provide any new arguments that call into question the correctness of the Registrar's decision such that a review of the decision would result in it being varied, cancelled or suspended. In its submissions, Sagatay once again argues that the two projects are not "functionally equivalent". The materials and arguments submitted by Sagatay amount to no more than a comparative exercise to highlight differences and allege the value of one proposal over another. Sagatay is using this appeal simply as an opportunity to re-argue the position it took in the prior proceeding in the hope of achieving a different result and, as such, Sagatay has failed to satisfy the threshold test.

## **D. LEGISLATIVE FRAMEWORK**

17. Section 97.1(1) of the OEB Act states:

“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 . . . that is the subject of the application.”

18. The interpretation of Section 97.1(1) has two important components. First, the Section must be interpreted in parallel with the Minister’s directive power exercisable under Section 28.6.1(1) of the OEB Act, which provides that the Minister of Energy may issue, and the OEB shall implement, directives, approved by the LGIC, requiring the OEB to take such steps as are specified in the directive relating to the construction, expansion or re-enforcement of transmission systems. The purpose, therefore, of Section 97.1(1) is to ensure that such a directive of the Minister and the resulting licence condition creating the obligation are not nullified by a competing leave to construct application made by a person who is not the licensee that has the obligation.

19. The LGIC and the Minister designated the Line to Pickle Lake to be a priority project and through the Minister’s directive selected WPLP to be the proponent that would be responsible for developing and seeking approvals to construct the Line to Pickle Lake. In relation to Section 97.1 of the OEB Act, it was the LGIC’s and the Minister’s intention that no person other than WPLP, bearing the licence obligation, could be granted leave to construct under Section 92 of the OEB Act for any line that falls within the parameters of the Line to Pickle Lake as set out in WPLP’s licence condition. This was reiterated in Ontario’s 2017 *Long-term Energy Plan* wherein WPLP was again identified as the proponent of the line from the Dryden and Ignace area to Pickle Lake.<sup>4</sup>

20. Second, as a result of the foregoing, the terms of the licence “obligation” governs whether a leave to construct application in question under Section 97.1 of the OEB Act can be granted since the OEB, in applying the provision, must determine whether the licence obligation includes the line that is the subject of the leave to construct application.

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<sup>4</sup> Ontario’s 2017 Long-Term Energy Plan, p. 144

## **E. THE APPLICATION OF SECTION 97.1**

21. It is WPLP's submission that, in dismissing the Sagatay Application, the Registrar properly interpreted and applied the legislative framework relating to Section 97.1 of the OEB Act.

22. Sagatay's basic argument is that WPLP's proposed line is not the subject of and is different from the line proposed in the Sagatay Application and that the OEB is therefore not precluded by Section 97.1 from considering the Sagatay Application for leave to construct.<sup>5</sup> This argument is fundamentally flawed since the argument relies upon an irrelevant comparison between Sagatay's proposed line and WPLP's proposed/preliminary preferred transmission line routing. Sagatay's stated position is that:

"... it is not enough to say that both lines will transmit power, from the portion of circuit D26A between Dryden and Ignace to Pickle Lake. Attention must also be paid, inter alia, to the constructability of the two lines, the two lines' environmental impacts, their respective costs, and their impact on First Nations' lands and rights in the area between circuit D26A and Pickle Lake, as well as First Nations led land use planning efforts under the Far North Act."<sup>6</sup>

23. Based on Sagatay's position, the OEB in applying Section 97.1 must undertake a comparative analysis to judge the suitability of one proposal over the other based upon a number of factors. In effect, this would seem to entail an alternative analysis that is tantamount to completing leave to construct processes, which is contrary to the very intent of Section 97.1, being the preclusion of competing leave to construct applications. Sagatay's application of Section 97.1, in effect, renders Section 97.1 meaningless.

24. Furthermore, based on Sagatay's interpretation, Section 97.1 could be easily circumvented by choosing a different route or some other different characteristic. This is clearly not the intent behind Section 97.1 given that the statutory requirement under Section 97.1 is tied to a licence condition, which licence condition can only be imposed by an authority with the power to impose licence conditions – being either the Minister through a direction to the OEB or the OEB based on that direction from the Minister or the OEB's own statutory power to amend

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<sup>5</sup> See for example paragraphs 25, 32, 33, 34, 35, 36 and 37 of Sagatay's June 9, 2017 Notice of Appeal.

<sup>6</sup> Sagatay, Submissions in Sagatay Application dated November 18, 2016, as referenced at para. 21 of Sagatay Notice of Appeal, June 9, 2017, p. 9.



licence conditions under the OEB Act. An applicant seeking leave to construct cannot circumvent that statutory authority to amend licence conditions by proposing a project that has different characteristics such as different routing, or different environmental impacts, costs or impacts on First Nation lands and rights.

25. In addition, in order for Sagatay's interpretation to function from a practical perspective, both projects that could be the subject of leave to construct applications must be at similar levels of development in order for the comparison proposed by Sagatay to be performed. This is because where one project is more advanced than the other, the projects would always be different, thereby avoiding the impact of Section 97.1 based on Sagatay's interpretation.

26. However, the foregoing circumstance is explicitly excluded as a possibility based on the wording of Section 97.1. Considerations under Section 97.1 occur because of the creation of a licence obligation. That obligation can be created any time before the granting of the leave to construct of the project potentially subject to Section 97.1. This can occur even after an application is filed. The licence obligation or the terms of the obligation cannot exactly match the characteristics of the developed line for which a leave to construct is already being sought. This is consistent with the nature of the obligation imposed, which, based on Section 97.1 and Section 28.6.1 is the "obligation to develop, construct, expand or reinforce the line". The designated proponent is charged with the responsibility of performing these tasks and to do so in a manner that permits leave to construct to be granted at a later date. To be prescriptive in the licence obligation by defining the obligation so specifically as to be equivalent to describing a developed line or one for which development is well progressed, as proposed by Sagatay, would not be consistent with the legislative framework which requires the designated proponent to undertake the activity that is the subject of the obligation.

27. It is important to recognize that the parameters for the Line to Pickle Lake, as set out in Section 13.1 of WPLP's transmission licence, do not pre-determine or pre-judge the route or design for the Line to Pickle Lake, except as stated therein (including by means of the scope that has been recommended by the IESO). The purpose of this is to preserve for WPLP, as the proponent for the Line to Pickle Lake, flexibility to determine any route and transmission line design so long as it meets the parameters established in the licence and as recommended by the

IESO. Any route or design that WPLP determines, which falls within the parameters set out in the licence, will satisfy WPLP's licence obligation.

28. The parameters set out in WPLP's licence require only that the Line to Pickle Lake be a new 230 kV transmission line that originates at a point between Ignace and Dryden and that it terminates in Pickle Lake. The licence is silent on the question of whether, in developing the Line to Pickle Lake, WPLP should use a corridor from Dinorwic or run along Highway 599 from Ignace, or employ any other routing. The routing for the Line to Pickle Lake is a matter for WPLP as the selected proponent to determine, and for the OEB to consider within the parameters of sections 92 and 96 of the OEB Act at such time that WPLP brings its application for leave to construct those facilities. The flexibility afforded by WPLP's licence condition is relevant when considering the application of Section 97.1 of the OEB Act.

29. The relevant consideration is whether Sagatay's proposed line falls within the parameters of the priority transmission project that is WPLP's licence obligation and *as that project is defined in WPLP's transmission licence*. Those parameters do not specify any particular routing - only an approximate starting point and an approximate end point - and it is abundantly clear from the evidence on the record that Sagatay's proposed line indeed falls within those parameters. It is on this basis that the Registrar found that the OEB is precluded from proceeding with Sagatay's leave to construct application and WPLP agrees with that conclusion.

30. As discussed above, WPLP's licence includes an obligation for WPLP to develop and seek approvals for a new 230 kV transmission line that originates at an interconnection to circuit D26A between or near Dryden and Ignace, and that terminates at a new or expanded existing transformer station in or near Pickle Lake, for a distance of approximately 300 km. The primary purposes of the Line to Pickle Lake are to provide additional load-meeting capability to the Pickle Lake Subsystem and to provide a basis for the future grid connection of remote communities north of Pickle Lake. Sagatay's proposed transmission line would be a new 230 kV transmission line that originates at an interconnection to circuit D26A between or near Dryden and Ignace, and that terminates at a new or expanded existing transformer station in or near Pickle Lake, for a distance of approximately 300 km. It would provide additional load-meeting capability to the Pickle Lake Subsystem and provide a basis for the future grid connection of

remote communities north of Pickle Lake. Since WPLP's licence includes an obligation for WPLP to develop a transmission line, the parameters of which include the line that is the subject of Sagatay's application, the OEB is precluded from granting leave to construct to Sagatay by Section 97.1 of the OEB Act.

31. In its November 18, 2016 letter, as well as its June 9, 2017 Notice of Appeal, Sagatay argues that the Registrar erred by relying on "functional equivalence" in making the order dismissing the application and by finding that Sagatay's proposed line and WPLP's proposed/preliminary preferred line are in fact "functionally equivalent". In WPLP's view, although the words "functionally equivalent" do not appear in Section 97.1 of the OEB Act, the Registrar's use of those words does not imply that she applied a legal test that she should not have or that she considered any irrelevant facts or she failed to consider any material relevant facts in determining that the Sagatay Application should be dismissed.

32. Rather, they are words that were intended to express, and in our view do clearly express, the Registrar's determination that Sagatay's proposed line would run from the same originating point to the same terminating point, using the same voltage and for the purposes of achieving the same underlying purpose as the Line to Pickle Lake, as defined by the parameters set out in WPLP's transmission licence.

33. Contrary to Sagatay's assertion that the Registrar did not clarify the term "functionally equivalent", the Registrar explained that both the Sagatay proposal and the line that WPLP is required to develop "would achieve the primary function of enabling long-term load-meeting capability in the Pickle Lake Subsystem of approximately 160 MW, and of providing a basis for the future grid connection of remote communities north of Pickle Lake . . . (moreover, each) is approximately 300 km in length, interconnects with the provincial transmission grid at a point on Hydro One Transmission's 230 kV "D26A" transmission circuit lying between Dryden and Ignace and terminates at a point in Pickle Lake."<sup>7</sup>

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<sup>7</sup> OEB, Letter to Sagatay in EB-2016-0017, May 16, 2017, p. 2.

**F. SUBMISSIONS ON THE SCOPE OF THE APPEAL AND PERMITTED EVIDENCE**

34. In Procedural Order No. 3, the OEB considered Sagatay's request to file evidence in support of its motion. The OEB permitted Sagatay to file affidavit evidence in respect of only three discrete areas. These were related to the corridor from Dinorwic to Pickle Lake that WPLP identifies in its most recent draft Environmental Assessment Report issued June 2017, WPLP's "Corridor Alternatives" for Phase 1, and whether the Dinorwic Route and Corridor Alternatives will traverse the traditional, ancestral and reserve lands of the Mishkeegogamang First Nation and Ojibway of Saugeen First Nation.

35. The OEB did not permit Sagatay to file evidence in respect of the impacts of WPLP's project on Aboriginal and treaty rights or the adequacy of First Nations consultation in respect of WPLP's project.

36. The admissibility of Sagatay's evidence and the weight to be given to it has to be considered relative to the scope of the appeal as described by the OEB. Specifically, in Procedural Order No. 3, the OEB states clearly:

**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.** (emphasis added)

37. Despite the clear direction from the OEB, almost all of the evidence filed by Sagatay on October 18, 2017 is irrelevant and not permitted to be filed in this appeal. In determining the appeal, it is WPLP's submission that the OEB should give no weight to that evidence.

38. First, Procedural Order No. 3 only permitted Sagatay to file *affidavit evidence* relating to the three aspects it found to be potentially relevant. Any additional statements made and not filed in the form of an affidavit should only be considered to be submissions and should be given no evidentiary weight. The only affidavit evidence filed by Sagatay on October 18 were the affidavits of Chief David Masakeyash and Chief Edward Machimity at Schedules E and F of Sagatay's filing.

39. Both affidavits contain statements relating to land use planning and the potential impacts of the Dinorwic Route and Corridor Alternatives on Aboriginal and treaty rights and the adequacy of consultation by the Crown, found at paragraphs 5, 8, 9 and 10 of Chief Masakeyash's affidavit and in paragraphs 6 and 8 of Chief Machimity's affidavit. This information is outside the scope of Procedural Order No. 3 and is irrelevant.

40. All of the commentary, set out at paragraphs 7 to 34 of Sagatay's October 18 submission, amounts to a comparative exercise to highlight differences and allege the value of one proposal over another. This commentary is irrelevant to the appeal based on the OEB's ruling above and should be given no weight. Sagatay's comparison of the routes, including the associated schedules of evidence, are precisely what the OEB had in mind when it determined that this 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." As further stated in Procedural Order No. 3, "this Panel does not consider that any evidence going to what Sagatay may judge to be the flaws in Watay's proposal . . . would be helpful in this appeal."

41. There are only two relevant aspects in Sagatay's October 18 filing:

- the first two sentences from paragraph 4 of Sagatay's submissions, including their reference to the map (taken from WPLP's website) at Schedule 'D' to Sagatay's submissions, which together fully satisfy items 1 and 2 of the evidence that the OEB permitted to be filed; and

- the first part of paragraph 8 of the affidavit of Chief Maskaeyash<sup>8</sup> and the first part of paragraph 8 of the affidavit of Chief Machimity<sup>9</sup>, which satisfy item 3 of the evidence that the OEB permitted to be filed.

## G. CONCLUSION

42. It is WPLP's submission that Sagatay has not filed any evidence or presented any submissions that challenge the Registrar's interpretation or application of the applicable regulatory framework, including in particular Section 97.1 of the OEB Act. Since WPLP's transmission licence includes an obligation for WPLP to develop a transmission line, namely the Line to Pickle Lake, the parameters of which include the line that is the subject of Sagatay's application, the OEB is precluded from granting leave to construct to Sagatay by Section 97.1 of the OEB Act. The Registrar properly interpreted and applied Section 97.1 of the OEB Act in dismissing Sagatay's application for leave to construct. WPLP therefore submits that the OEB should confirm the Registrar's order and deny Sagatay's appeal.

All of which is respectfully submitted this 1st day of November, 2017.



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Charles Keizer

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Jonathan Myers

Torys LLP  
Counsel for Wataynikaneyap Power LP

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<sup>8</sup> Specifically, the words "I confirm that most, if not all of, the Dinorwic Route proceeds through the traditional and ancestral lands of Mishkeegogamang".

<sup>9</sup> Specifically, the words "I confirm that most, if not all, of the Dinorwic Route proceeds through the traditional and ancestral lands of Saugeen".