

2013 CarswellOnt 11509
Ontario **Environmental** Review Tribunal

Nestlé Canada Inc. v. **Director**,
Ministry of the **Environment**

2013 CarswellOnt 11509, [2013]
O.E.R.T.D. No. 54, 76 C.E.L.R. (3d) 331

In the Matter of an appeal by **Nestlé Canada** Inc.,
filed October 11, 2012, for a hearing before the
Environmental Review Tribunal pursuant to section
100 of the Ontario Water Resources Act, R.S.O. 1990, c.
O.40, as amended, with respect to Permit to Take Water
No. 3716-8UZMCU, issued by the **Director**, **Ministry**
of the **Environment**, on September 28, 2012 under
section 34 of the Ontario Water Resources Act, for water
taking from one bedrock drilled well (TW1-88) MOE
Well Tag No. A095193 located at Lot 24, Concession
7, Geographic Township of Erin, County of Wellington

In the Matter of a motion for approval of a proposed
settlement and withdrawal of the appeal pursuant to Rule
200 of the Tribunal's Rules of Practice, heard in writing

Bruce Pardy Member

Judgment: August 15, 2013
Docket: 12-131

Counsel: Tim Bermingham, for Appellant, **Nestlé Canada**
Inc.

Justin Jacob, Alexa Mingo, for **Director**, **Ministry** of the
Environment

William Amos, Charles Hatt (Articling Student), for Other
Parties, Wellington Water Watchers and Council of Canadians

Subject: **Environmental**; Natural Resources

Table of Authorities

Cases considered by **Bruce Pardy Member**:

Associated Industries Corp. v. Ontario (Director, Ministry of the Environment) (2008), 2008 CarswellOnt 7651, 40 C.E.L.R. (3d) 101 (Ont. **Environmental** Review Trib.) — referred to
British Columbia v. Canadian Forest Products Ltd. (2004), 321 N.R. 1, 8 C.E.L.R. (3d) 1, 24 C.C.L.T. (3d) 161, 28 B.C.L.R. (4th) 195, 2004 SCC 38, 2004 CarswellBC

1278, 2004 CarswellBC 1279, [2004] 9 W.W.R. 1, [2004] 2 S.C.R. 74, 198 B.C.A.C. 1, 240 D.L.R. (4th) 1 (S.C.C.) — considered

Burns Bog Conservation Society v. Canada (Attorney General) (2012), 2012 CarswellNat 3188, 71 C.E.L.R. (3d) 118, 2012 FC 1024, 2012 CarswellNat 4657, 2012 CF 1024 (F.C.) — referred to

CanRoof Corp. v. Ontario (Director, Ministry of the Environment) (2008), 2008 CarswellOnt 8126 (Ont. **Environmental** Review Trib.) — referred to

Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans) (1997), 142 D.L.R. (4th) 193, 43 Admin. L.R. (2d) 1, 1997 CarswellNat 10, 1997 CarswellNat 11, 206 N.R. 363, 31 C.C.L.T. (2d) 236, [1997] 1 S.C.R. 12 (S.C.C.) — considered

Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, 48 F.T.R. 160, 1992 CarswellNat 649, 1992 CarswellNat 1313 (S.C.C.) — referred to

Giampaolo v. Ontario (Director, Ministry of the Environment) (2010), 52 C.E.L.R. (3d) 296, 2010 CarswellOnt 5787 (Ont. **Environmental** Review Trib.) — referred to

Johnson v. Ontario (Ministry of the Environment) (February 28, 2006), Doc. 05-031 (Ont. **Environmental** Review Trib.) — referred to

Krek v. Ontario (Director, Ministry of Environment) (2011), 2011 CarswellOnt 3245 (Ont. **Environmental** Review Trib.) — referred to

Larocque c. Canada (Ministre des Pêches & Océans) (2006), 2006 CAF 237, 2006 CarswellNat 1775, 2006 FCA 237, 2006 CarswellNat 2437, (sub nom. *Larocque v. Canada (Minister of Fisheries & Oceans)*) 352 N.R. 133, (sub nom. *Larocque v. Canada (Minister of Fisheries & Oceans)*) 270 D.L.R. (4th) 552 (F.C.A.) — referred to
RPL Recycling & Transfer Ltd. v. Ontario (Director, Ministry of the Environment) (2006), 21 C.E.L.R. (3d) 80, 2006 CarswellOnt 2917 (Ont. **Environmental** Review Trib.) — considered

Tembec Industries Inc. v. Ontario (Director, Ministry of the Environment) (2011), 2011 CarswellOnt 11752, 66 C.E.L.R. (3d) 35 (Ont. **Environmental** Review Trib.) — referred to

Uniroyal Chemical Ltd., Re (1992), 9 C.E.L.R. (N.S.) 151, 1992 CarswellOnt 220 (Ont. **Environmental** App. Bd.) — referred to

Statutes considered:

Environmental Bill of Rights, 1993, S.O. 1993, c. 28

Generally — referred to

Ontario Water Resources Act, R.S.O. 1990, c. O.40

Generally — referred to

s. 0.1 [en. 2007, c. 12, s. 1(1)] — considered

s. 34 — referred to

s. 34(6) — considered

s. 100 — referred to

s. 100(10) — considered

Words and phrases considered:

spiking

Nestlé indicated that it wished to obtain permission for short term increases in the rate and daily amount of taking [of water for commercial bottling under the *Ontario Water Resources Act*], but not so as to increase the total amount of water taken in a month. The ability to vary the rate of taking in this manner, referred to as "instantaneous" taking or "spiking", would allow **Nestlé** the operational flexibility to respond to periods of high demand for bottled water.

MOTION by N Inc. to approve settlement and withdraw appeal.

Bruce Pardy Member:

Background

1 Since 1988, **Nestlé Canada** Inc. ("**Nestlé**") has taken water for commercial water bottling from a bedrock drilled well in Erin Township, identified as TW1-88, MOE Well Tag No. A095193, located at Lot 24, Concession 7, Geographic Township of Erin, County of Wellington (the "Well"). Because of the volume of the water taking, a permit to take water is required under the *Ontario Water Resources Act* ("*OWRA*").

2 **Nestlé's** previous permit was issued in 2007 and expired on August 31, 2012. In April 2012, **Nestlé** applied for a new permit to replace the one that would expire in August 2012. **Nestlé** indicated that it wished to obtain permission for short term increases in the rate and daily amount of taking, but not so as to increase the total amount of water taken in a month. The ability to vary the rate of taking in this manner, referred to as "instantaneous" taking or "spiking", would allow **Nestlé** the operational flexibility to respond to periods of high demand for bottled water. **Nestlé** did not

request that the total amount of taking be increased under the new permit. During the consultation process for the new permit, the Grand River Conservation Authority ("GRCA") requested that spiking be restricted if Level 1 or 2 drought conditions were declared in the watershed.

3 On September 28, 2012, Carl Slater, **Director** ("the **Director**"), **Ministry** of the **Environment** ("MOE"), issued Permit to Take Water (Ground Water) No. 3716-8UZMCU (the "PTTW") to **Nestlé**, pursuant to s. 34 of the *OWRA*. The PTTW expires on August 31, 2017.

4 Condition 3.2 of the PTTW establishes the rate and amount of water taking pursuant to the PTTW. It specifies, among other things, that **Nestlé** shall take water at a maximum rate of 775 litres per minute and a maximum amount of 1,113,000 litres per day. These are the same amounts as in **Nestlé's** previous permit.

5 Condition 3.3 provides for spiking by authorizing a higher per minute rate and higher per day amount than permitted in Condition 3.2, as long as the average daily taking in a month is unchanged. In effect, Condition 3.3 allows **Nestlé** to vary when the water will be taken but does not change the maximum amount that may be taken in a month. Condition 3.3 states:

3.3 Notwithstanding the [maximum rate per minute] and [maximum amount per day] specified in ... Condition 3.2, the instantaneous rate and amount of taking may increase up to a maximum of 946 litres per minute ... and 1,362,240 litres per day ... in each month between April 1 and September 30 for the duration of the permit to provide operational flexibility. However, the average daily taking in any month between April 1 and September 30 shall not exceed 1,113,000 ...

6 Conditions 3.4 and 3.5 address water taking during drought conditions. They state:

3.4 Notwithstanding Conditions 3.2 and 3.3 the maximum daily water taking shall be reduced should the Grand River Low Water Response Team declare a Level 1 or Level 2 drought condition in the watershed in which the taking is located. The reductions shall be in accordance with the Ontario Low Water Response Protocol and ensure that the reduction is based on the maximum taken per day permitted in [Condition 3.2].

3.5 Notwithstanding Conditions 3.2, 3.3, and 3.4 should the Ontario Water **Directors** Committee declare a Level

3 drought condition in the watershed in which the taking is located, the maximum daily water taking shall be reduced in accordance with the Level 3 declaration.

7 On October 11, 2012, pursuant to s. 100 of the *OWRA*, Nestlé appealed the Director's decision to include Conditions 3.4 and 3.5 in the PTTW.

8 Prior to the preliminary hearing, the Director and Nestlé advised the Tribunal that they had reached a proposed settlement of Nestlé's appeal. By correspondence dated February 19, 2013, Nestlé advised as follows:

Subsequent to the filing of Nestlé's request for a hearing, the Director has reviewed Conditions 3.4 and 3.5 and has received clarification from the Grand River Conservation Authority, regarding the intent and effect of the conditions.

The Director and Nestlé Canada Inc. have agreed, in light of, and consistent with, the advice of the Grand River Conservation Authority, that Conditions 3.4 and 3.5 are not appropriate and do not properly reflect the wishes of the Grand River Conservation Authority, and that Condition 3.4 should be altered and that Condition 3.5 should be eliminated.

9 At the preliminary hearing on February 21, 2013, two incorporated non-profit non-government organizations, the Wellington Water Watchers ("WWW") and the Council of Canadians ("COC") were granted party status. The Director and Nestlé advised that Nestlé intended to withdraw its appeal as part of the settlement agreement. WWW and COC indicated that they would oppose the proposed amendment to Condition 3.4 and elimination of Condition 3.5. On consent of all parties, the Tribunal gave procedural directions that Nestlé's request for a decision disposing of the appeal should be submitted by motion heard in writing. Nestlé and the Director submitted materials in support of the motion, WWW and COC provided responding materials opposing the motion, and Nestlé and the Director replied to the submissions of WWW and COC.

Relevant Rule

10 Rules of Practice of the Environmental Review Tribunal:

200. Where there has been a proposed withdrawal of an appeal not agreed to by all Parties, the Tribunal shall consider whether the proposed withdrawal is consistent

with the purpose and provisions of the relevant legislation and whether the proposed withdrawal is in the public interest. The Tribunal shall also consider the interests of Parties, Participants and Presenters. After the consideration of the above factors, the Tribunal may decide to continue with the Hearing or issue a decision dismissing the proceeding.

Issue

11 The issue is whether the Tribunal should accept the proposed settlement and withdrawal of the appeal pursuant to Rule 200 of the Tribunal's Rules of Practice.

Discussion, Analysis and Findings

12 Rule 200 calls upon the Tribunal to assess whether the proposed withdrawal is consistent with the purpose and provisions of the relevant legislation and whether the proposed withdrawal is in the public interest. The Tribunal must also consider the interests of parties, participants and presenters. For the reasons that follow, the Tribunal finds that the proposed settlement and withdrawal are not consistent with the purpose and provisions of the *OWRA* or with the public interest, and orders that the appeal continue to a hearing. This order does not preclude the Director and Nestlé from developing an alternative proposal for settlement and withdrawal of the appeal.

1. The original conditions

13 The Director's submissions characterize the original Conditions 3.4 and 3.5 as provisions that would require drought-based reductions from the "instantaneous" or spiking rate and amount of taking permitted by Condition 3.3. Paragraph 26 of his submissions states:

Conditions 3.4 and 3.5 created a mandatory requirement on Nestlé to reduce its daily water taking in the event of a Level 1 or Level 2 Low water Declaration, effectively prohibiting elevated rates of taking under Condition 3.3 of the Permit during Low Water Declarations.

14 However, in his affidavit, Mr. Slater acknowledges that the wording of the original Conditions 3.4 and 3.5 require mandatory reductions in water takings, including those authorized by Condition 3.2, during Level 1 or Level 2 drought conditions. Mr. Slater states that was not his intention. Instead, he says at paragraph 23 of his affidavit that Condition 3.4 and 3.5 were included "to attempt to address the GRCA's concerns about elevated water taking during low

water response declarations issued pursuant to the Ontario Low Water Response Protocol."

15 **Nestlé**, WWW and COC interpret Conditions 3.4 and 3.5 as requiring drought-based reductions from both the instantaneous rate and amount in Condition 3.3 and from the regular taking rate and amount in Condition 3.2. **Nestlé** states (at para. 29 of its submissions):

The original, appealed version of Condition 3.4 of the PTTW requires a ten per cent reduction in the maximum permitted daily water taking (in the case of a Level 1 Low Water Declaration) and a twenty per cent reduction of the maximum permitted daily taking (in the case of a Level 2 Low Water Declaration) and also precludes the use of the "spike rate".

16 WWW and COC agree. Their submissions state (at para. 46):

The **Director's** original action was to require drought-based reductions in pumping, not just from the level allowed under the spiking rate, but also from the regular baseline under Condition 3.2. This interpretation is consistent with a plain reading of Conditions 3.4 and 3.5. The use of the spiking rate described in Condition 3.3 is not mentioned specifically in either Condition 3.4 or 3.5, but rather is only curtailed by implication. The **Director's** submissions and the settlement agreement take a different view, focusing solely on Condition 3.4's effect on the spiking rate.

17 The Tribunal agrees that the original wording of Conditions 3.4 and 3.5 applies to both the regular rate and amount of taking in Condition 3.2 and to the "instantaneous" or spiked taking in Condition 3.3. This interpretation is clear from a plain reading of the provisions. Condition 3.4 starts with the words, "Notwithstanding Conditions 3.2 and 3.3 ..." If Condition 3.4 did not potentially alter the provisions of Condition 3.2, there would be no need to mention 3.2. Furthermore, Condition 3.4 refers to a reduction in the "maximum daily water taking", which is established in Condition 3.2, not to a reduction in "instantaneous" taking, which is the term used in 3.3. Finally, Condition 3.4 specifies that reductions are to be based on the maximum taken per day as permitted by the provisions of Condition 3.2. A similar analysis applies to Condition 3.5, and leads to the same conclusion. Like 3.4, 3.5 states that it applies notwithstanding 3.2, and reductions shall be to the maximum daily water taking, which is an amount established in 3.2.

18 The Tribunal finds that the original Conditions 3.4 and 3.5 provide for drought-based reductions to the maximum take per day permitted in Condition 3.2 as well as reductions to instantaneous taking permitted in Condition 3.3.

19 The distinction between Condition 3.2 and 3.3 is significant. While 3.3 allows for a spike in the per minute rate and amount of daily taking, it does not permit an increase in the total taking over the course of the month in which the spike occurs. Since 3.3 relates only to the timing of taking and not the amount (over the course of the month), a reduction of spiked taking likewise affects only the timing and not the total amount. Therefore, a drought-based reduction to the spiking permitted in 3.3 would not reduce the total take. However, 3.2 establishes the maximum amount of taking, and a drought-based reduction in that amount would have the effect of reducing the total take.

2. The proposed settlement and amendments to the PTTW

20 The Minutes of Settlement between the **Director** and **Nestlé** are appended to this order as Appendix A. The main effects of the proposed settlement are amendment to Condition 3.4 and elimination of Condition 3.5. The amended Condition 3.4 would read:

Notwithstanding Condition 3.3, the instantaneous rate and amount of taking allowed by Condition 3.3 shall not be permitted in the event that the Grand River Low Water Response Team issues a Level 1 or Level 2 low water declaration in the watershed in which the taking is located. This Condition does not apply in respect of a Level 1 lower water declaration if the **Director** grants approval in writing of the Level 1 Pumping Test Assessment Report described in Schedule B. Nor shall this Condition apply in the case of Level 2 low water declaration if the **Director** grants approval in writing of the Level 2 Pumping Test Assessment Report as described in Schedule B.

3. Whether the proposed withdrawal is consistent with the purposes and provisions of the OWRA and is in the public interest

(a) The Scope of the Tribunal's consideration under Rule 200

21 Rule 200 directs the Tribunal to consider whether the proposed withdrawal is consistent with the purpose and provisions of the *OWRA* and whether the proposed withdrawal is in the public interest. The Tribunal must also

consider the interests of parties, participants and presenters. Under Rule 200, the Tribunal considers matters that are within the subject matter of the appeal. In *RPL Recycling & Transfer Ltd. v. Ontario (Director, Ministry of the Environment)* (2006), 21 C.E.L.R. (3d) 80 (Ont. Environmental Review Trib.) at para. 17, the Tribunal stated:

A variety of matters may be considered by the Tribunal in determining whether to proceed with a hearing where parties propose to conclude a proceeding through a settlement agreement (*Johnson v. Ontario (Ministry of Environment)*, [2006] O.E.R.T.D. No. 5). The Tribunal will not take a mechanistic approach to this task but rather focus on the substance of an appeal. The Tribunal will examine the substantive matters raised in an appeal and examine how they may be affected by a proposed settlement.

22 Also see *Uniroyal Chemical Ltd., Re* (1992), 9 C.E.L.R. (N.S.) 151 (Ont. Environmental App. Bd.); *Johnson v. Ontario (Ministry of the Environment)*, [2006] O.E.R.T.D. No. 5 (Ont. Environmental Review Trib.); *CanRoof Corp. v. Ontario (Director, Ministry of the Environment)*, [2008] O.E.R.T.D. No. 33 (Ont. Environmental Review Trib.); *Giampaolo v. Ontario (Director, Ministry of the Environment)* (2010), 52 C.E.L.R. (3d) 296 (Ont. Environmental Review Trib.); *Krek v. Ontario (Director, Ministry of Environment)*, [2011] O.E.R.T.D. No. 9 (Ont. Environmental Review Trib.); and *Tembec Industries Inc. v. Ontario (Director, Ministry of the Environment)* (2011), 66 C.E.L.R. (3d) 35 (Ont. Environmental Review Trib.).

23 The parties dispute the scope of consideration that should be undertaken in this case. WWW and COC maintain (at para. 45) that the subject matter of this appeal

... is the determination of the substantive conditions in Nestlé's PTTW necessary to best protect the environment, broadly construed, from the risks of maximum pumping during droughts.

24 The Director does not agree that the scope should be as wide as WWW and COC propose, instead submitting that the scope of the Tribunal's consideration under Rule 200 should be limited to the matters that Nestlé intended to appeal, namely the wording of Conditions 3.4 and 3.5; and thus should be restricted to considering "whether the original wording of Conditions 3.4 and 3.5 should be confirmed or amended in accordance with the settlement agreement" (at para. 66).

25 In the present case, the differences between these competing characterizations of the subject matter of the appeal and scope of consideration are moot. For the reasons described below, the Tribunal concludes that when the proposed amendments are compared to the original conditions, the proposed withdrawal of the appeal is not consistent with the purpose and provisions of the *OWRA* or the public interest. It is therefore not necessary to consider in the context of this motion whether other possible conditions or other versions of the same conditions should be considered under Rule 200. The scope of the appeal itself will be determined by the panel hearing the appeal in accordance with s. 100(10) of the *OWRA*, which states:

... a hearing by the Tribunal under this section shall be a new hearing and the Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

26 Under Rule 200, the issue of whether a proposed settlement and withdrawal of an appeal are consistent with the purpose and provisions of the relevant legislation and in the public interest is a matter to which the Tribunal must turn independently of the scope and focus of objections that may be brought by parties who oppose the settlement. That is not to say that the substance of parties' objections are not to be directly and fully considered, but only that the Tribunal's consideration is not necessarily limited by the scope of those objections. This mandate is apparent from the operation of Rule 201, under which the Tribunal is directed to consider the same factors as under Rule 200 even though no party objects to the settlement and withdrawal.

(b) *The purpose and provisions of the OWRA, the public interest and the interests of the parties*

27 The Tribunal is directed to consider whether the proposed withdrawal is consistent with the purpose and provisions of the *OWRA* and in the public interest and also to consider the interests of parties, participants and presenters.

28 Section 0.1 of the *OWRA* states:

The purpose of this Act is to provide for the conservation, protection and management of Ontario's waters and for their efficient and sustainable use, in order

to promote Ontario's long-term **environmental**, social and economic well-being.

29 Under s. 34(6), the **Director** has discretion to impose terms and conditions in permits to take water. The exercise of this discretion is to be carried out in a manner that furthers the legislative purpose (see: *Associated Industries Corp. v. Ontario (Director, Ministry of the Environment)*, [2008] O.E.R.T.D. No. 57 (Ont. **Environmental** Review Trib.) at paras. 74-78).

30 The Tribunal is also directed to consider the public interest. While public interest is a broad, vague term capable of a variety of meanings in different contexts, in the present case the meaning of public interest is informed by the purposes of the *OWRA*, and in particular its mandate to achieve conservation, protection, management, efficient use, and sustainable use of Ontario's water.

31 In this case, WWW and COC are focused on sustaining the groundwater resource in the public interest. Therefore, in this case they have no additional interests to consider independently of the public interest. There are no other parties, participants or presenters with status in the proceeding.

(c) *The proposed amendments*

32 The well from which **Nestlé** is authorized to take water pursuant to the PTTW is fed by a bedrock aquifer which supplies high quality water. The parties dispute whether this aquifer feeds baseflow of surface water bodies such as streams, rivers and wetlands in the area of **Nestlé's** well. WWW and COC maintain that the aquifer's discharge flows contribute to the Grand River and Credit River watersheds, while the **Director** and **Nestlé** maintain that there is no evidence that suggests that the aquifer is hydrologically connected to local surface waters. Relying on the affidavit evidence of **two** of his expert witnesses, the **Director's** submissions state (at para. 12):

The **Ministry's** technical review of the application determined that water takings from the TW1-88 well do not influence surface water features in the well's zone of influence. Accordingly, the use of a spike rate at TW1-88 is unlikely to cause an impact on surface water levels.

33 If the aquifer is not hydrologically connected to local surface waters, then taking from the aquifer would have no effect upon local surface water levels. However, the amended Condition 3.4 addresses **Nestlé's** spiked taking

from the aquifer during Level 1 and **2** drought conditions. It prohibits spiked taking unless the **Director** grants approval for spiked taking based upon pumping test reports. This provision suggests that there is a need to confirm that spiked taking may proceed during drought conditions, which means there must be some uncertainty about whether the aquifer is indeed hydrologically connected to local surface waters.

34 If there is uncertainty, then the amount of maximum taking under Condition 3.2 must be relevant as well. However, under the amended Condition 3.4, the PTTW does not require reduction from the maximum daily water taking in the event of Level 1 or **2** drought conditions. Whether the aquifer is hydrologically connected to local surface waters or not, there is no clear rationale for Condition 3.4 to be concerned about spiked taking under Condition 3.3 but not about maximum taking under Condition 3.2.

35 Furthermore, in his reply submissions, the **Director** cites a document from the Grand River Conservation Authority entitled "Low Water Response — Areas of concern — Speed and Eramosa Rivers" (Exhibit H of the affidavit of Mike Nagy), which indicates that the potential for groundwater impact on stream flow depends on the amount of taking rather than the rate of taking. The document states:

With surface water takings, the rate at which the water is taken is important. With groundwater takings, it is the amount of water taken that is significant.

[Emphasis in original.]

36 The amended Condition 3.4 provides that the spiked taking allowed by Condition 3.3 will not be permitted in the event of a Level 1 or **2** drought condition unless the **Director** gives approval. It does not limit the maximum amount of taking allowed under Condition 3.2. The spiked taking permitted under Condition 3.3 affects the rate only, not the amount, since the average daily rate must remain the same over a monthly period. Given the evidence upon which the **Director** relies, it does not make sense in drought conditions to limit spiking but not the amount taken. If the GRCA is correct that it is the amount of taking and not the rate that is significant, then there is no need to limit the spike rate but potentially a reason to limit the total amount taken.

37 Having endorsed the evidence from the GRCA that what matters is the amount of taking from groundwater rather than the rate of taking, the **Director** proposes to amend Condition 3.4 to address only the rate of taking and not the amount during Level 1 and **2** drought conditions. The authority under

the original Condition 3.4 includes the authority to reduce the total amount of taking. In spite of the evidence of Mr. Slater that the original Condition 3.4 did not reflect his intention, the original Condition 3.4 makes more sense than the proposed amendment.

38 The water in the aquifer comes from somewhere and goes somewhere. No evidence was submitted that indicates whether, if the aquifer is not hydrologically connected to the surface waters in the area of the taking, it is hydrologically connected to surface waters outside the area of the taking. Even if taking from the aquifer does not directly affect surface waters in the immediate area, that does not mean that surface waters elsewhere would not be affected by taking from the aquifer during drought conditions. Without knowing where the water comes from, how fast it arrives, where it is going, or how fast it gets there, it is difficult to assess the significance of drought conditions on the aquifer, and of taking from the aquifer on drought conditions locally or elsewhere in Ontario.

39 Furthermore, while the **Director** discusses whether taking from the aquifer could have an effect upon drought conditions in local surface waters, nowhere is there consideration of the reverse: whether drought conditions in local surface waters could have an effect upon taking from the aquifer. During drought conditions, especially severe ones, in which the supply of water from surface bodies is restricted, would demand for water from the aquifer increase? If so, what would be the effect of the increased taking in combination with the maximum taking by **Nestlé** and all other present users of the aquifer? It is not apparent that the cumulative effect of total taking during drought conditions has been the subject of assessment in proposing to amend Condition 3.4.

40 The **Director** and **Nestlé** submit that Condition 3.5 is unnecessary. The **Director** states (at para. 77):

...the revocation of Condition 3.5 avoids any potential fettering of discretion by either the **Director** or the Ontario Low Water **Director** Committee. The Ontario Low Water Response protocol indicates that in Level 3 low water conditions, the Ontario Low Water **Director** Committee may take a variety of **environmental** measures that may include mandatory reductions in water takings. To the extent that Condition 3.5 may be interpreted as requiring mandatory water taking reductions, it may be in conflict with the actual response issued during a Level 3 low water declaration. The revocation of Condition 3.5 will also preserve the

Director's discretion to exercise his statutory authority in such circumstances.

41 **Nestlé** states in its reply submissions (at para. 32):

... any implementation of a Level 3 condition will contain its own mandatory restrictions which will be suited to the exact nature of the low water condition. Section 3.5 ... is redundant and, if anything, tends to limit the response required in the event of a Level 3 condition.

42 The Tribunal disagrees. Condition 3.5 is not redundant. It does not affect the authority of the Ontario Low Water **Director** Committee ("OLWDC"). Instead, under Condition 3.5, the **Director** adopts OLWDC declarations as his own. In doing so, such declarations become binding upon **Nestlé** not merely as OLWDC declarations, but as conditions under the PTTW. Therefore, a breach would constitute a breach of the PTTW, which would not be the case in the absence of Condition 3.5. In the event of such a breach, the **Director** would be able to pursue remedies for breach of the PTTW under the *OWRA*. These remedies would not be available if Condition 3.5 was removed.

43 Without Condition 3.5, there remains within the PTTW no accounting for Level 3 drought conditions. The effect of eliminating Condition 3.5 would be to place the primary responsibility for managing the level of **Nestlé's** water taking during Level 3 drought conditions outside of the scope of the PTTW. Placing responsibility on the **Director** within the terms of the PTTW would be consistent with the purpose of the *OWRA*.

44 The Tribunal finds that the proposed amendments to Condition 3.4 and the proposed elimination of Condition 3.5 are not consistent with the purpose and provisions of the *OWRA* or in the public interest. The Tribunal does not conclude that the original Conditions 3.4 and 3.5 are necessarily ideal or effective at achieving the purposes of the *OWRA*, but that they are more coherent and internally consistent than the proposed amendments in Condition 3.4 and elimination of Condition 3.5.

(d) *The public trust doctrine*

45 WWW and COC base their objection to the proposed settlement and withdrawal on the public trust doctrine. Since the Tribunal has found above that the proposed settlement and withdrawal are not consistent with the purpose and provisions of the *OWRA* or in the public interest, the arguments submitted by WWW and COC on the public trust doctrine are

moot. However, since the bulk of their submissions on this motion are on the subject of public trust, the Tribunal makes the following observations.

46 WWW and COC submit that a public trust doctrine imposes obligations on the **Director** to manage the aquifer in a particular way. They state that the proposed settlement between the **Director** and **Nestlé** is inconsistent with the public trust doctrine and breaches the **Director's** trust obligations. Therefore, they argue, the proposed settlement cannot be consistent with the public interest under Rule 200. Furthermore, they submit that the settlement is also inconsistent with the purpose of the *OWRA*, which they say must be interpreted in a manner consistent with the public trust doctrine.

47 The essence of the **Director's** reply is that no legal basis exists for the application of the public trust doctrine in these circumstances, and to apply it would "go beyond the the subject matter of the appeal and risk undermining the statutory scheme of the *OWRA* and the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28." The **Director** also submits that application of the public trust doctrine is unnecessary "given the clear test set out in Rule 200, which affords the Tribunal the discretion to evaluate whether a settlement agreement is consistent with the public interest and the applicable legislation."

48 To the extent that public trusts presently exist in Canadian common law, the rights they produce are rights of access. Common law public rights most often cited in relation to public trusts are the public's right to fish (see *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans)*, [1997] 1 S.C.R. 12 (S.C.C.); *Larocque c. Canada (Ministre des Pêches & Océans)* (2006), 270 D.L.R. (4th) 552 (F.C.A.), *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.)) and right to access navigable water (*Friends of the Oldman River Society, supra*). These rights of access do not prevent the Crown from establishing regulatory regimes over the resources or from governing the resources in accordance with those regimes. In *Comeau's Sea Foods Ltd., supra*, the Supreme Court of **Canada** stated (at para. 37):

Canada's fisheries are a "common property resource", belonging to all the people of **Canada**. Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). Licensing is a tool in the arsenal of powers available to the Minister under the

Fisheries Act to manage fisheries. It restricts the entry into the commercial fishery, it limits the numbers of fishermen, vessels, gear and other aspects of commercial fishery.

49 Groundwater is transient. It runs and pools underneath the surface, belonging to no one until captured. In this sense groundwater is a public resource. If it is subject to a public trust, then the common law public right is a right to access groundwater similar to the public right to fish and to navigate navigable waters. The **Director** has not prohibited public access to water taking from the aquifer. Restrictions on access to groundwater arise out of statutory schemes such as the *OWRA*, which may coexist with or supercede common law public rights, depending on their terms.

50 The authority on which WWW and COC mainly rely for their public trust argument is the Supreme Court of **Canada** decision in *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74 (S.C.C.) ("*Canfor*"), in which the Crown in right of British Columbia claimed compensation for both harvestable and non-harvestable trees destroyed by fire. The judgment of the Supreme Court of **Canada** acknowledged the notion of common property in such resources as running water, air, and the sea, vesting in the Crown on behalf of the public. However, the Court declined to apply the public trust doctrine to the facts of the claim before it, deciding instead to proceed on the basis that the Crown was simply the landowner of a tract of forest and claimed in that capacity. The Court specifically declined to decide whether the notion of public trust was sufficiently broad to create Crown liability "for inactivity in the face of threats to the **environment** [and] the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard ..." (at para. 81). (See also *Burns Bog Conservation Society v. Canada (Attorney General)*, [2012] F.C.J. No. 1110 (F.C.) at para. 39.)

51 In this case, WWW and COC urge the Tribunal to do what the Supreme Court declined to do in *Canfor*, and find that the public trust doctrine should be broadened to place obligations on the **Director** to exercise his authority under the *OWRA* in a particular way. Since the Tribunal has found on other grounds that the proposed settlement and withdrawal are not consistent with the purpose and provisions of the *OWRA* or in the public interest, the question of the nature and breadth of the public trust doctrine need not be resolved in the context of this motion.

Order

52 The Tribunal dismisses the motion for approval of the proposed settlement and withdrawal of the appeal, and orders that the proceeding continue to a hearing.

Motion dismissed.

Appendix A — Minutes of Settlement

ERT File No. 12-131

ENVIRONMENTAL REVIEW TRIBUNAL

In the Matter of an appeal by **Nestlé Canada Inc.** filed October 11, 2012 for a Hearing before the **Environmental Review Tribunal** pursuant to section 100 of the Ontario Water Resources Act, R.S.O. 1990, c. O.40, as amended ("OWRA"), with respect to Permit to Take Water (Groundwater) #3716-8UZMCU (the "PTTW"), issued by the **Director, Ministry of the Environment**, on September 28, 2012 under section 34 of the OWRA, for the water taking from one bedrock drilled well (TW1-88) located at Lot 24, Concession 7, Geographic Township of Erin, County of Wellington, Ontario (the "Site")

In the matter of a proposed withdrawal of an appeal as part of a settlement agreement between the **Director** and **Nestlé Canada Inc.**

Minutes of Settlement

WHEREAS the **Director** issued Permit to Take Water (Groundwater) #3716-8UZMCU (the "PTTW") on September 28, 2012 to **Nestlé Canada Inc.** ("**Nestlé**"); and

WHEREAS **Nestlé** appealed Conditions 3.4 and 3.5 of the PTTW, which required the **Nestlé** to reduce the maximum daily water taking in the event that the Grand River Low Water Response Team declared a Level 1, **2**, or 3 drought condition in the watershed in accordance with the Ontario Low Water Response Protocol; and

WHEREAS **Nestlé** and the **Director** (the "Parties") have agreed that this appeal should be resolved by way of an Order from the **Environmental Review Tribunal** (the "Tribunal" or "ERT") approving these Minutes of Settlement between the Parties and dismissing the proceeding;

THEREFORE, the Parties agree as follows:

1. **Nestlé** confirms its intention to continue to voluntarily reduce the average daily taking in any month by 10% of 1,113,000 Litres in response to a Level 1 Low Water Declaration and by 20% of 1,113,000 Litres in response

to a Level **2** Low Water Declaration and to its intention to voluntarily not utilize the permission granted by Condition 3.3 during a Level 3 Low Water Declaration.

2. These Minutes of Settlement shall constitute a full and final settlement of the appeal.

3. Upon execution of these Minutes of Settlement, an executed copy of the minutes shall be filed with the **Environmental Review Tribunal** in support of **Nestlé's** request to withdraw its appeal (ERT Case File No. 12-131), and the **Director** shall consent to the request to withdraw said appeal.

4. The **Director** shall amend the PTTW, as follows:

(i) Condition 3.4 shall be amended to read as follows:

Notwithstanding Condition 3.3, the instantaneous rate and amount of taking allowed by Condition 3.3 shall not be permitted in the event that the Grand River Low Water Response Team issues a Level 1 or Level **2** low water declaration in the watershed in which the taking is located. This Condition does not apply in respect of a Level 1 low water declaration if the **Director** grants approval in writing of the Level 1 Pumping Test Assessment Report described in Schedule B. Nor shall this Condition apply in the case of a Level **2** low water declaration if the **Director** grants approval in writing of the Level **2** Pumping Test Assessment Report as described in Schedule B.

(ii) Condition 3.5 shall be revoked.

(iii) A copy of the "Erin Spring Supplementary Monitoring Plan" shall be appended to the amended PTTW as "Schedule B" and shall form part of the PTTW.

(iv) An executed copy of these minutes shall be appended to the amended PTTW as "Schedule C" and shall form part of the PTTW.

5. For the sake of clarity, the approval in writing of a Pumping Test Assessment Report described in Condition 3.4 ("PTA Report") shall be subject to the following conditions:

(i) **Nestlé** shall prepare separate PTA Reports for takings during Level 1 and Level **2** low water

declarations in the Eramosa sub-watershed, and a separate approval is required for each report in order to remove the restriction contained in Condition 3.4 for that level of low water condition addressed in the PTA Report.

(ii) Nestlé shall submit each PTA Report to the Director, Wellington Water Watchers ("WWW"), and the Council of Canadians ("COC") for review.

(iii) Upon issuance of an approval in writing for the purposes of Condition 3.4, for the type of low water declaration addressed in the PTA Report, no further approvals are required for water takings in accordance with Condition 3.3 in that type of low water declaration, subject to the terms and conditions as may be specified by the Director.

6. Within fourteen days of the date the Director receives a PTA Report submitted in accordance with paragraph 5(ii) of these Minutes, any interested person, including the WWW and the COC, may provide comments on the report in writing to the Director, who may consider these comments in his review of the report.

7. Within twenty one days of the date the Director receives a PTA Report submitted in accordance with paragraph 5(ii) of these Minutes, the Director may issue an approval in writing for the purposes of compliance with Conditions 3.3 and 3.4 of the PTTW.

8. In the event that the Director does not issue an approval in writing of a PTA Report in accordance with paragraph 7 of these Minutes, and the Parties cannot

otherwise reach an agreement, the Director shall amend the PTTW to revoke or alter Conditions 3.3 or 3.4 and Nestlé may exercise its rights under s. 100 of the OWRA to appeal any such amendment.

9. The PTA Report prepared by Nestlé shall be made publicly available in the Press Release section of Nestlé's website at www.nestle-waters.ca at the same time it is distributed to the Parties described in paragraph 5(ii) of these Minutes.

10. Nestlé, WWW and/or the COC shall not appeal any amendments to the PTTW made in accordance with paragraph 4 of these Minutes of Settlement.

11. These Minutes of Settlement may be executed by one or more of the Parties by facsimile transmitted signature, and all Parties agree that the reproduction of any signature on a copy of this Agreement by way of a facsimile device will be treated as though such reproduction is an executed original copy of this Agreement.

12. These Minutes of Settlement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which taken together shall be deemed to constitute one and the same instrument.

IN WITNESS WHEREOF the Parties have executed these Minutes of Settlement effective as of the _____ day of March, 2013, by their duly authorized representatives.

Per:
for Nestlé Canada Inc.
Appellant

Date

Carl Slater, Director under the OWRA
Ministry of the Environment
Respondent

Date