



# Environmental Review Tribunal

Case No.: 12-131

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

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; and

In the matter of a preliminary hearing held on February 22, 2013 at the Council Chambers, Loyalist Township, 263 Main Street, Odessa, Ontario.

### **Before:**

Dirk VanderBent, Vice-Chair

### **Appearances:**

- |                 |   |   |
|-----------------|---|---|
| Tim Bermingham  | - | Counsel for the Appellant, Nestlé Canada Inc.   |
| Justin Jacob    | - | Counsel for the Director, Ministry of the Environment                                       |
| Alexandra Mingo | - | Articling Student for the Director, Ministry of the Environment                             |
| Charles Hatt    | - | Articling Student for the Other Parties, Council of Canadians and Wellington Water Watchers |

**Dated this 25<sup>th</sup> day of March, 2012.**

## ORDER

### Background

[1] Nestlé Canada Inc. (“Nestlé”) draws water for its commercial bottled water operation from a well located in Erin Township. Due to the volume of this water taking, a permit to take water is required under the *Ontario Water Resources Act* (“OWRA”).

[2] On September 28, 2012, the Director, Ministry of the Environment (“MOE”) issued Permit to Take Water (Ground Water) No. 3716-8UZMCU (the “PTTW”) to Nestlé, pursuant to section 34 of the *OWRA*. The PTTW is for taking water 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 (the “Well”). The PTTW contains several terms and conditions which regulate this water taking.

[3] On October 11, 2012, Nestlé appealed the Director’s decision pursuant to section 100 of the *OWRA*, respecting Conditions 3.4 and 3.5 of the PTTW, which 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 Table A.

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.

[4] The grounds upon which Nestlé seeks an alteration to these two conditions are the allegations that they:

- would subject Nestlé to mandatory water taking reductions that are not applied uniformly or equitably, or at all, throughout the watershed;
- are contrary to the structure of Ontario's Low Water Response Protocol, under which responses to Level 1 Drought and Level 2 Drought are voluntary;
- are not necessary in order to give the Director the full authority to respond to any level of drought experienced in Ontario; and

- deprive Nestlé of its right to have any decisions reducing its permitted water takings made by a Director pursuant to the *OWRA* and, for any such decisions, to be subject to the hearing rights afforded by s. 100 of the *OWRA*.

[5] In its appeal, Nestlé proposes alternate provisions to replace these conditions of the PTTW. During Level 1 and 2 drought conditions, Nestlé's proposed conditions would require reductions in the maximum amount of water taken per minute and the maximum taken per day, but would not require a reduction in the average daily taking in any month between April 1 and September 30, which is permitted under Condition 3.3 of the PTTW.

[6] Prior to the preliminary hearing, two incorporated non-profit non-government organizations, The Council of Canadians ("COC") and Wellington Water Watchers ("WWW"), submitted written requests to the Tribunal seeking party status in this proceeding. As directed by the Tribunal, the Director and Nestlé filed written submissions in response. They both indicated that they opposed these requests.

[7] Also 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.

[8] At the preliminary hearing held on February 21, 2012, no other persons requested party, participant, or presenter status. The Tribunal heard additional oral submissions respecting the requests by COC and WWW for party status. After considering both the written and oral submissions, the Tribunal granted their requests. The Tribunal's reasons for this disposition are set out below.

[9] At the preliminary hearing, Justin Jacob, counsel for the Director, advised that written minutes of settlement were being prepared in respect of the settlement agreement between the Director and Nestlé. Nestlé and the Director also indicated that Nestlé intends to withdraw its appeal as part of this settlement agreement. Because this agreement would require that the PTTW be amended, they indicated that they will request that the Tribunal issue a decision disposing of Nestlé's appeal in accordance with the minutes of settlement, without continuing with a full hearing, pursuant to Rule 201 of the Tribunal's Rules of Practice (the "Rules").

[10] Because COC and WWW have been granted party status, their positions regarding the amendment of the PTTW and withdrawal of the appeal are relevant. All parties agreed that Nestlé and the Director will proceed with their request that the Tribunal issue a decision without continuing the hearing. On consent of all parties, the Tribunal gave procedural directions that their request should be submitted by way of motion, which will be heard in writing only, including submissions. Further particulars of these directions are set out below.

### **Relevant Rules**

[11] The relevant Rules are attached as Appendix A to this Order.

### **Issue**

[12] Whether COC and WWW should be granted party status.

### **Discussion, Analysis, and Findings**

#### *Overview*

[13] Under Rules 62 (party status), 66 (participant status), and 69 (presenter status), persons who are not an appellant, approval holder, or the Director, may apply for status to formally take part in the proceeding. Party status allows a person to fully participate in the proceeding. Participant status is more restrictive than party status, and presenter status, in turn, is more restrictive than participant status. With regard to granting party status, Rule 63 provides:

63. In deciding whether to name a person as a Party to the proceeding, the Tribunal may consider relevant matters including whether:
- a) a person's interests may be directly and substantially affected by the Hearing or its result;
  - b) a person has a genuine interest, whether public or private, in the subject matter of the proceeding; and

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- c) a person is likely to make a relevant contribution to the Tribunal's understanding of the issues in the proceeding.

[14] The same criteria are considered when deciding whether to grant participant or presenter status, with one additional consideration: the Tribunal must consider whether the person's connection to the subject matter of the proceeding or issues in dispute is more remote than a party's would be.

[15] Regarding the criteria to be considered under Rule 63, COC and WWW concede that they do not have personal interests that may be directly and substantially affected by the hearing or its result. They acknowledge that they are environmental groups focused on protecting the public interest. They accept the interpretation of direct interest as described by Jerry V. DeMarco and Paul Muldoon, in *Environmental Boards and Tribunals in Canada: A Practical Guide*, (Markham, ON: LexisNexis Canada, 2011) at 54, wherein the authors liken a direct interest to a pecuniary or property interest.

[16] The Director and Nestlé both agree that COC and WWW have a genuine public interest in the subject matter of the proceeding. The Director further agrees that COC and WWW are likely to make a relevant contribution to the Tribunal's understanding of the issues in this proceeding. Nestlé does not. The Director concedes that COC and WWW are entitled to be named as participants under Rule 66. Nestlé does not agree, but states that it does not oppose their being named as participants.

#### *Undisputed matters*

[17] Neither the Director nor Nestlé questions the factual information advanced by COC and WWW in support of their requests for status in this proceeding.

[18] COC describes itself as a federally incorporated not-for-profit public interest advocacy organization. Founded in 1985, COC has a longstanding interest in the protection of water as a public resource. COC has campaigned provincially, nationally and internationally on the importance of treating water as a common public resource. COC has been active since 2000 on issues of water resource management within Wellington County. In 2008, in respect of Nestlé's application for a water permit renewal, COC participated by submitting comments on the length of the permit and on impact monitoring. With 671 members in the Guelph and Wellington County area, as well as 17,458 members and 44,096 supporters across Ontario, COC speaks for many citizens interested in the legal status of water in Ontario as a public resource.

[19] WWW describes itself as a provincially incorporated not-for-profit environmental organization. Incorporated in 2008, WWW is committed to the protection of local water resources in the Guelph and Wellington County area and to educating the public about threats to the local watershed. WWW works to keep local citizens informed of water resource management decisions which will affect water resources in Guelph and Wellington County. WWW's activities also include organizing local speaking events on the topic of water conservation, as well as panel discussions for local media outlets, broader education, and special events. With dozens of local members and over 900 newsletter subscribers, WWW works on behalf of many citizens concerned with watershed protection in Guelph and Wellington County. Beyond its direct engagement with local citizens and communities, WWW partners with local and national groups to further promote the goal of watershed protection. These groups include the City of Guelph, the Guelph Civic League, the Polaris Institute, and the COC.

[20] COC and WWW both state that they have a genuine public interest in seeing that the conditions reducing the maximum allowable water-taking for the permit holder Nestlé Canada Inc. ("Nestlé") are affirmed. They assert that the conditions are an example of precautionary regulation of consumptive water use which respects the needs of future generations. As such, they maintain that the issues under appeal are at the core of their organizational objectives and the interests of their supporters.

[21] COC and WWW both state that they have a demonstrated interest, and history of involvement with, the PTTW, as they each have submitted comments on the conditions under appeal to the MOE during Nestlé's application for a renewal of its PTTW in the spring of 2012. In addition, they made efforts to inform the public of their ability to comment on the application for renewal. COC and WWW also state that, in March 2012, they advocated for a new regulation in Ontario as it pertains to the permitting of water bottling operations.

*COC and WWW submissions in chief*

[22] COC and WWW note that the water taking being appealed impacts several watersheds in Wellington County, an area in which both the WWW and the COC have had a longstanding interest in protecting public water rights. They further note that they both were specifically involved with the permit renewal process in the spring of 2012 and submitted comments on the subject matter of the impugned conditions.

[23] COC and WWW submit that although the MOE does have a responsibility to represent the public interest generally, this does not mean that the views of groups seeking to become added parties are necessarily subsumed by those of the MOE. Rather, the question is whether groups can “bring a slightly different perspective distinct from the other parties without unduly delaying the proceedings” (see *Waterhouse, Re* (1998), 25 C.E.L.R. 83 (Ont. Env. App. Bd.) at paragraph 19). If so, they submit that the Tribunal should then err on the side of public participation. In support of this submission they cite *Assembly of the Church of the Universe v Ontario (Minister of Environment and Energy)*, [1995] O.E.A.B. No. 9.

[24] In this appeal, COC and WWW state that they intend to jointly submit several common law and statutory bases which support the impugned conditions. In particular, they intend to submit that, pursuant to the *public trust doctrine*, the conditions are justified on the basis of the Crown’s obligation to protect public rights to water at common law. Additionally, they will assert that the conditions are justified on the basis of the broad public interest purpose of the recently amended *OWRA*, and as a valid application of the MOE’s Statement of Environmental Values under the *Environmental Bill of Rights, 1993* (“*EBR*”)

[25] COC and WWW maintain that the participation described above would constitute a relevant contribution to the proceeding. In support of this position, they note that in *Concerned Citizens Committee of Tyendinaga and Environs v. Ontario (Director, Ministry of the Environment)*, 2012 CarswellOnt 9476 (Ont. Env. Rev. Trib.) (“*Tyendinaga*”), the Tribunal found that the added party’s plan to make a legal argument respecting the Director’s failure to consider the common law tort of public nuisance in approving the Environmental Compliance Approval for a landfill closure would constitute a relevant contribution to the Tribunal’s understanding of the issues in the proceeding.

[26] The COC and WWW also emphasize their commitment to call whatever lay and expert testimony that may be necessary to elicit the evidence required to ground their arguments, while endeavoring to confer with Nestlé and the MOE in order to avoid unnecessary repetition or duplication of testimony. COC and WWW assert that they are committed to respecting the Tribunal’s goal of assuring the efficiency and timeliness of proceedings.

[27] Based on the above, COC and WWW submit that they have demonstrated that they have a genuine public interest in the subject matter of this proceeding and that they will make a relevant contribution to the Tribunal's understanding of the issues in this proceeding. They further submit that the level of their interest and contribution is sufficient to be named as parties to this proceeding.

*Director's response submissions*

[28] The Director submits that, in this case, the probative question is how direct or remote a person's interest is to the subject matter of the proceeding. The Director maintains that this is central to determining whether a person should be granted party status as opposed to participant or presenter status. The Director submits that there are two reasons why COC's and WWW's interests in and contributions to the proceeding are sufficiently remote to warrant granting them only participant status.

[29] Firstly, the Director notes that COC and WWW concede that they do not have interests that are directly and substantially affected by the hearing or its result. Consequently, the Director maintains that their interests are more remote than a person who has such a direct connection.

[30] Secondly, the Director notes that one of the main distinctions between party and participant status is that parties may raise their own issues, whereas participants may not. The Director submits that the Tribunal must consider COC's and WWW's requests in the context of the circumstances of this proceeding. In this case, the Director and Nestlé have reached a proposed settlement of the issues raised in Nestlé's appeal. The Director notes that, pursuant to Rule 200, they will request that the Tribunal issue a decision in accordance with this settlement, without proceeding further with a hearing. Consequently, the Director asserts that if the hearing does proceed, it is unclear what the issues will be. The Director submits, therefore, that it would be contrary to the overall regulatory scheme under the Rules to allow COC and WWW to raise additional issues before the settlement agreement is reviewed. In further support of this position, the Director emphasizes that COC and WWW would not be prejudiced if they were granted participant status, because they would still be able to make submissions regarding their interests. In support of this assertion, the Director notes that Rule 200 requires that the Tribunal must consider the interests of participants and presenters, as well as parties, when deciding whether or not to continue with the hearing. The Director submits, therefore, that COC and WWW should only be granted participant status. In the alternative, the Director submits that the Tribunal could grant them participant status

now, subject to the condition that they be permitted to renew their request for party status when, and if, the Tribunal decides that the hearing should continue.

[31] In addition to the above submissions, the Director states that it is important to note that both of these groups had the opportunity to apply for leave to appeal pursuant to the *EBR* but declined to do so. The Director asserts that WWW and COC do not appear to be relying on grounds of appeal distinct from those set out in the Appellant's notice of appeal. As such, the Director asserts that COC and WWW do not have an independent basis for proceeding with this hearing. The Director submits that if COC and WWW are seeking to advance their own grounds of appeal, then they should have done so by way of an application for leave to appeal and should not be allowed to use party status to circumvent the statutory timelines and procedures required in a leave to appeal application.

[32] Finally, the Director notes that, under Rule 62, the Tribunal may grant party status for all or part of the proceeding, on such conditions as the Tribunal considers appropriate. The Director submits that if the Tribunal decides to grant COC and WWW party status, then the Tribunal should also impose a condition that they are not allowed to raise issues that have not already been raised by the Director and Nestlé.

#### *Nestlé's response submissions*

[33] Nestlé endorses the submissions made the Director.

[34] In addition, on the question of whether COC's and WWW's interests are more remote than that required for party status, Nestlé emphasizes that the consideration of whether a person has a public interest in the subject matter of the proceeding is one that any person interested in policy can satisfy. Nestlé also submits that this does not satisfy the key consideration under Rule 63, which is to show a direct effect that would be caused to the person requesting party status.

[35] Respecting the consideration whether COC and WWW are likely to make a relevant contribution, Nestlé notes that the materials filed in support of the requests for party status indicate an intention to make submissions on the statutory and common law bases which justify the Director's decision to attach the impugned conditions. Nestlé submits that the statutory and common law bases of the decision are irrelevant to the subject matter of this hearing. Nestlé maintains that the question of which form of conditions best serves the public interest requires factual and/or expert evidence of the relationship, or lack thereof, between spike rate draws and the water table and surface water in Level 1 and Level 2 drought conditions. Nestlé submits that the materials filed by COC and WWW fail to indicate any intention to present helpful evidence to the

Tribunal that would contradict the professional judgment of the Director and the Grand River Conservation Authority. In this regard, Nestlé emphasizes that the submissions of COC and WWW do not refer to any technical data or technical professional opinions. Nestlé acknowledges that COC and WWW can address public interest issues. However, Nestlé emphasizes that the Director also addresses the public interest, as the Director is statutorily charged with protecting the water table and the environment. Nestlé submits that where the two collide, all other things being equal, the Director's role should be given paramountcy, particularly as COC and WWW have no interests which may be directly and substantially affected by the hearing or its result.

*COC and WWW submissions in reply*

[36] COC and WWW submit that there is no authority for the assertion that the considerations set out in Rule 63 address whether a person's connection to the subject matter of the proceeding, or issues in dispute, is more remote than a party's would be.

[37] Regarding the Director's submission that it would be contrary to the overall regulatory scheme to allow COC and WWW to raise additional issues before the settlement agreement is reviewed, COC and WWW refer to the decision of the Tribunal in *Giampaolo v. Ontario (Ministry of the Environment)* (2006), 24 C.E.L.R. (3d) 187 ("*Giampaolo*"), where the Tribunal found that the acceptability of the settlement agreement did not need to be determined before addressing a request for party status.

[38] Regarding the Director's submission that COC and WWW could, or should, have sought leave to appeal under the *EBR*, COC and WWW argue that they agree with the conditions under appeal and, therefore, they had no reason to seek leave to appeal the Director's decision to issue the PTTW.

[39] Regarding Nestlé's submissions on the question whether COC and WWW are likely to make a relevant contribution to the Tribunal's understanding of the issues, COC and WWW restate their commitment to call whatever lay and expert testimony is necessary to elicit the evidence required to ground the above arguments. They submit that there has been insufficient time since the filing of Nestlé's appeal to obtain relevant disclosure in order to determine whether it will be necessary for them to adduce evidence in addition to the evidence of Nestlé and the Director. They emphasize this point, in particular, in respect of the very recent settlement agreement between Nestlé and the Director.

### *Findings*

[40] The central question raised by the Director and Nestlé is how the Tribunal determines whether a person's connection to the subject matter of a proceeding or issues is more remote than a party's would be. The relevant Rules clearly indicate that a decision to grant party, participant, or presenter status is subject to the Tribunal's discretion. Consequently, each request must be determined on its own merits in the circumstances of each individual case.

[41] It is not disputed that persons seeking party status need not satisfy all three criteria under Rule 63. In other words, it is not a three-part test where all the relevant matters listed under Rule 63 must be present. In *Stericycle Inc. v. Ontario (Ministry of Environment)*, [2006] O.E.R.T.D. No. 21 at paragraph 22, the Tribunal stated that it may exercise its discretion and grant a person party status even if the person satisfies only one of the three criteria, or shows that party status is warranted for some other relevant reason.

[42] The Director and Nestlé emphasize the importance of the first consideration set out in Rule 63(a): whether a person's interests may be directly and substantially affected by the Hearing or its result. They maintain that the Tribunal should find that a person's interest is more remote if the person does not have such a direct connection. The Tribunal accepts that this may be a factor, but does not accept that it is conclusive, in and of itself. If it were, then all persons who do not have a direct connection could not qualify for party status. This restrictive approach would contradict the interpretation, as noted above, that the considerations listed in Rule 63 are not a three part test where all three criteria must be met.

[43] Nestlé emphasizes that consideration of a public interest in the subject matter is one which can be satisfied by any person interested in policy. The Tribunal finds that this is an overstatement. Rule 63(b) requires that a person's public or private interest must be genuine. Also, there may be circumstances where a person's private or public interest only collaterally relates to the subject matter of the proceeding, with little involvement and/or expertise respecting the specific matters raised in the appeal. In such circumstances, it cannot be automatically assumed that such a person would be granted party status. Again, Rule 63 requires that all relevant matters be considered, including the ones listed.

[44] The Director and Nestlé emphasize that they have been able to resolve the issues raised by Nestlé in this appeal by agreement. In light of this agreement, they assert that the regulatory regime under the Rules does not contemplate that COC and WWW should be allowed to raise issues which have not already been raised by the parties. They emphasize that, if COC and WWW are granted party status, they can raise such issues, whereas, if they are granted participant status, they cannot. The Tribunal is aware that if party status is granted in this case, this may result in a situation where the settlement agreement is no longer unanimous among the parties, and that COC and WWW may raise their own issues in challenging the acceptability of the agreement. It must first be noted that that COC and WWW, upon reviewing the evidence in support of the agreement, may decide to not oppose it. However, this also could create the potential that, based on new issues raised by COC and WWW, the Tribunal may conclude that the hearing should continue, notwithstanding that the Director and Nestlé agree that the appeal can be resolved.

[45] In addressing the Director's submission, it must first be observed that a request to terminate proceedings based on a settlement agreement is only one aspect of the proceeding. There is nothing in Rule 63 to suggest that in such circumstances the consideration of "relevant matters" should be restricted to consideration of the acceptability of the settlement agreement alone. The Tribunal finds that it must more broadly consider whether a person is likely to make a relevant contribution to the subject matter raised in the grounds of appeal in the proceeding. However, the Tribunal accepts that a person's contribution to its determination of the acceptability of a settlement is one of these relevant matters. The Tribunal now turns to its evaluation of this consideration.

[46] The Tribunal first notes that, under both Rule 201 (where no party objects to the withdrawal of the appeal) or Rule 200 (where an appeal is not agreed to by all parties), the test is whether the proposed withdrawal of the appeal is consistent with the purpose and provisions of the relevant legislation and is in the public interest. Accordingly, the nature of COC's and WWW's potential contribution must be assessed in this context.

[47] In essence, the Director and Nestlé submission is that the acceptability of the settlement agreement should be decided before addressing COC's and WWW's request for party status. As noted in the submissions of COC and WWW, the Tribunal dealt with this proposition in *Giampaolo*, stating at paragraphs 14 and 15:

14 The Tribunal finds that no Party has taken issue with the IRLLC's submission that it has the requisite interest to be granted status under the Tribunal's Rules. Rather, the Director asserts that no decision should be made on the request until the Tribunal determines whether the settlement agreement should be accepted. The Director's point appears to be that if the settlement agreement is acceptable, then there is no point in deciding the request for Party status.

15 The Tribunal does not agree that the acceptability of the settlement agreement needs to be determined first. Indeed, as an added party, the I-RLLC has the potential to contribute to the Tribunal's determination of the acceptability of the settlement agreement, including the issue of the agreement's effect on the public interest and its consistency with the applicable legislation. In the circumstances of this case, the IRLLC should not be penalized for having held its request for Party status in abeyance during an adjournment of the Preliminary Hearing. Granting the IRLLC's request also furthers the attainment of the purposes of the Tribunal's Rules, which emphasize access and public participation.

[48] The Tribunal finds this analysis to be persuasive. Therefore, the Tribunal does not accept that COC and WWW should be denied party status simply because Nestlé and the Director have entered into a settlement agreement. Rather, as stated in *Giampaolo*, the question is whether COC and WWW will potentially contribute to the Tribunal's determination of the acceptability of the settlement agreement. In this regard, the Tribunal emphasizes that, as stated in *Giampaolo* at paragraph 15, the question is not whether their involvement *will* contribute to this determination, it is whether their involvement has the *potential* to contribute.

[49] Admittedly, at this stage in the proceeding, it is difficult to comprehensively answer this question, as full particulars of the settlement agreement are not before the Tribunal. However, as noted earlier in this order, in correspondence dated February 19, 2012 from Nestlé to the Tribunal, Nestlé describes the agreement as follows:

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.

[50] In their requests for status, COC and WWW clearly indicate that it is their position that these conditions should remain, unaltered, in the PTTW. They further state that they intend to jointly submit several common law and statutory bases to support this position. These are described above. Thus, the agreement between Nestlé and the Director directly contradicts the positions COC and WWW propose to advance in this proceeding, if they are granted party status. In these circumstances, the Tribunal finds that their proposed participation is likely to make a relevant contribution to the Tribunal's determination of whether it is acceptable to alter Condition 3.4 and eliminate Condition

3.5. As stated in *Giampaolo*, this would also further the attainment of the purposes of the Rules, which emphasize access and public participation.

[51] The Tribunal does not accept the Director's submission that had the COC and WWW wished to raise additional issues in this proceeding, then they should have sought leave to appeal pursuant to the *EBR*. Clearly, COC and WWW agree with the Director's decision to include Conditions 3.4 and 3.5 in the PTTW, so they had no reason to seek leave to appeal the Director's decision.

[52] The Director and Nestlé submit that, if party status is granted, the Tribunal should impose a condition (as it is permitted to do under Rule 62), prohibiting COC and WWW from raising any new issues. The Tribunal does not accept this submission. Nestlé's appeal is narrowly confined to Conditions 3.4 and 3.5, and COC and WWW acknowledge that the issues they will raise in this proceeding will be restricted to matters pertaining only to these two conditions.

[53] Nestlé asserts that the statutory and common law bases of the decision are irrelevant to the subject matter of the hearing. Nestlé maintains that, in order to determine whether the impugned conditions are required to best serve the public interest, the Tribunal will require factual and/or expert evidence of the relationship, or lack thereof, between spike rate draws and the water table and surface water in Level 1 and Level 2 drought conditions. In this regard, Nestlé emphasizes that the submissions of COC and WWW do not refer to any technical data or technical professional opinions. Nestlé submits, therefore, that the materials filed by COC and WWW fail to indicate any intention to present helpful evidence to the Tribunal. The Tribunal does not accept either of these assertions. While factual and/or expert opinion is obviously of central importance when deciding an appeal of this nature, the interpretation of the applicable regulatory provisions is also important. As COC and WWW have noted in their submissions, in *Tyendinaga* the Tribunal found that legal argument regarding the application of common law principles would constitute a relevant contribution to the Tribunal's understanding of the issues. The Tribunal also notes that until status to participate in this proceeding is granted, COC and WWW do not have access to full disclosure of all relevant documents. Consequently, their requests for party status must be evaluated in the context in which they have been framed, which is based only on the information currently available to them. In this regard, the Tribunal notes that COC and WWW have stated their commitment to call evidence that is necessary to support their submissions. Their integrity in making this commitment has not been questioned.

[54] The Director notes that under both Rule 200 and Rule 201, the Tribunal must consider the interests of participants and presenters when determining whether a settlement agreement is acceptable. The Director submits, therefore, that the Tribunal should grant COC and WWW participant status, on the condition that they may renew their applications for party status if, and when, the Tribunal decides that the hearing should continue. The Tribunal does not accept this submission. The Tribunal first notes that this approach may preclude COC and WWW from raising new issues in presenting their interests for consideration by the Tribunal under Rule 201. The Tribunal has already found that there is no basis to preclude COC and WWW from doing so.

[55] Furthermore, the determination of status (party, participant, or presenter) in a proceeding has ramifications for other procedural aspects of the proceeding, including, most notably, rights to receive disclosure of relevant documents and to claim costs or be subject to a claim for costs. For this reason, determining a request for status should generally not be bifurcated in the manner suggested by the Director. While there may be circumstances where such an approach might be appropriate, the Tribunal finds that the Director and Nestlé have not established a convincing rationale for adopting this approach in this case.

[56] Turning to other relevant matters, COC's and WWW's descriptions of their organizations (summarized earlier in this order) indicate that they have a genuine public interest in the subject matter of this proceeding. These descriptions indicate that the activities of these organizations include public education and policy advocacy regarding water resource management, water conservation, and watershed protection, within Wellington County in particular. They have engaged in specific policy advocacy regarding regulation of water taking for bottled water operations. They have also provided comments to the MOE respecting Nestlé's application for the PTTW. No one questions that all of these activities are relevant to the specific subject matter of this proceeding.

[57] In summary, taking all relevant matters into consideration, the Tribunal finds that COC's and WWW's connection to the subject matter of the proceeding or issues in dispute cannot be described as remote. Consequently, the Tribunal decides that COC and WWW should each be granted unconditional party status in this proceeding.

#### *Procedural Directions*

[58] As noted earlier in this order, the parties, which now include COC and WWW, agree that the Director and Nestlé should first proceed with their request to terminate this proceeding pursuant to Rule 200 or 201. The Tribunal has directed that this aspect

of the proceeding be heard by way of motion in writing. On consent of the parties, the preliminary hearing in this proceeding is adjourned until the disposition of this motion. Particulars of the Tribunal's directions respecting the motion were communicated orally to the parties at the preliminary hearing and are set out in the order below.

## **ORDER**

[59] The Council of Canadians and Wellington Water Watchers are granted party status in this proceeding.

[60] The request by Nestlé and the Director to terminate this proceeding in accordance with Rule 200, or Rule 201, shall be heard by motion in writing, including submissions in writing, as follows:

1. By March 22, 2013, Nestlé and the Director shall serve on all other parties, and file with the Tribunal, their notice(s) of motion, supporting evidence, which includes the written minutes of settlement confirming their settlement agreement, and submissions in chief.
2. By April 22, 2013, The Council of Canadians and Wellington Water Watchers shall serve on all other parties, and file with the Tribunal, their response submissions and any supporting evidence.
3. By April 29, 2013, Nestlé and the Director shall serve on all other parties, and file with the Tribunal, their reply submissions and supporting evidence.

[61] The parties are directed to file one electronic copy and one hard copy of all materials filed in respect of this motion.

[62] This preliminary hearing is adjourned, and will be resumed, if required, on a date to be scheduled by the Tribunal Case Coordinator.

*Requests for Party Status Granted  
Procedural Directions Ordered  
Preliminary Hearing Adjourned*

*"Dirk VanderBent"*

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Dirk VanderBent, Vice-Chair

**Appendix A**

**Relevant Rules**

**PARTIES, PARTICIPANTS AND PRESENTERS**

**Naming of a Party**

62. The following persons are Parties for the purpose of the Rules:
- (a) persons specified as Parties by or under the statute under which the proceeding arises;
  - (b) persons otherwise entitled by law to be Parties to the proceeding; and
  - (c) persons who request Party status and are so specified by the Tribunal as Parties for all or part of the proceeding, and on such conditions as the Tribunal considers appropriate.
63. In deciding whether to name a person as a Party to the proceeding, the Tribunal may consider relevant matters including whether:
- (a) a person's interests may be directly and substantially affected by the Hearing or its result;
  - (b) a person has a genuine interest, whether public or private, in the subject matter of the proceeding; and
  - (c) a person is likely to make a relevant contribution to the Tribunal's understanding of the issues in the proceeding.

**Role of a Party**

64. A Party to the proceeding before the Tribunal may:
- (a) bring motions;
  - (b) be a witness at the Hearing;
  - (c) be questioned by the Parties;
  - (d) call witnesses at the Hearing;
  - (e) cross-examine witnesses;
  - (f) make submissions to the Tribunal, including final argument;
  - (g) receive copies of all documents exchanged or filed by the Parties;
  - (h) participate in a mediation;
  - (i) attend site visits; and
  - (j) claim costs or be liable to pay costs where permitted by law.

**Co-operation of Parties**

65. Parties shall co-operate with each other in matters such as scheduling, disclosure, procedure and agreements on uncontested facts to the fullest extent that is compatible with their interests.

### **Naming of a Participant**

66. The Tribunal may name persons to be Participants in all or part of a proceeding on such conditions as the Tribunal considers appropriate. A Participant to a proceeding is not a Party to the proceeding. In deciding whether to name a person as a Participant, the Tribunal may consider whether the person's connection to the subject matter of the proceeding or issues in dispute is more remote than a Party's would be. A person who may otherwise qualify as a Party may request Participant status.

### **Role of a Participant**

67. A Participant in a Hearing may:
- (a) be a witness at the Hearing;
  - (b) be questioned by the Parties;
  - (c) make oral and written submissions to the Tribunal at the commencement and at the end of the Hearing;
  - (d) upon request, receive a copy of documents exchanged by the Parties that are relevant to the Participant's interests; and
  - (e) attend site visits.
68. A Participant in a Hearing may not:
- (a) raise issues that have not already been raised by a Party;
  - (b) call witnesses;
  - (c) cross-examine witnesses;
  - (d) bring motions;
  - (e) participate in a mediation, unless permitted to do so by the Tribunal; and
  - (f) claim costs or be liable for costs.

### **Naming of a Presenter**

69. The Tribunal may name persons to be Presenters in all or part of a proceeding on such conditions as the Tribunal considers appropriate. A Presenter to a proceeding is not a Party to the proceeding. In deciding whether to name a person as a Presenter, the Tribunal may consider whether the person's connection to the subject matter of the proceeding or issues in dispute is more remote than a Party's or Participant's would be. A person who may otherwise qualify as a Party or Participant may request Presenter status.

### **Role of a Presenter**

70. A Presenter in a Hearing may:
- (a) be a witness and present his or her relevant evidence at a pre-arranged time, either during a Hearing's regular day-time session or at a special evening session;
  - (b) be questioned by the Parties;

- (c) provide the Tribunal with a written statement as a supplement to oral testimony; and
- (d) upon request, receive a copy of documents exchanged by the Parties that are relevant to the Presenter's interests.

71. A Presenter in a Hearing may not:

- (a) raise issues that have not already been raised by a Party;
- (b) call witnesses;
- (c) cross-examine witnesses;
- (d) bring motions;
- (e) make oral and written submissions to the Tribunal at the commencement and at the end of the Hearing;
- (f) participate in a mediation, unless permitted to do so by the Tribunal;
- (g) attend site visits unless permitted to do so by the Tribunal; and
- (h) claim costs or be liable for costs.

#### **Similar Interests**

72. The Tribunal may direct persons who have similar interests to designate one person to act as their representative or to co-ordinate their participation in the proceeding.

#### **Termination of Proceedings**

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.

201. Where there has been a proposed withdrawal of an appeal as part of a settlement agreement not objected to by any Party that alters the decision under appeal, the Tribunal shall review the settlement agreement and consider whether the agreement is consistent with the purpose and provisions of the relevant legislation and whether the agreement is in the public interest. The Tribunal shall also consider the interests of Participants and Presenters. After consideration of the above factors, the Tribunal may decide to continue with the Hearing or issue a decision dismissing the proceeding.