Challenging Nestlé’s Water Takings in Ontario

All around the world bottled water companies like Nestlé are depleting freshwater sources to make money. The Council of Canadians is part of the fight to say “no” to corporate greed over water, and fighting for it to be recognized as part of the commons – a shared public resource for all.

The Council of Canadians and Wellington Water Watchers (WWW), with legal representation from Ecojustice, are parties to a legal case involving Nestlé’s water withdrawals in Hillsburgh, Ontario. In February, the two groups won the right to challenge a proposed agreement between Nestlé and Ontario’s Ministry of Environment (MoE) that would permit Nestlé to take water from a shared water source during low water conditions. The agreement stems from Nestlé’s appeal of conditions in their Permit to Take Water, requiring the company to reduce its water takings during times of drought.

Nestlé has been withdrawing water from a deep aquifer well in Hillsburgh, Ontario since 2000, paying $3.71 for every million litres that it removes from the watershed. Last September, the MoE renewed Nestlé’s permit for another five years. The permit set out a mandatory restriction requiring Nestlé to reduce its maximum allowable water taking by 20 per cent during times of moderate drought.

On October 15, 2012, Nestlé filed a Notice of Appeal with respect to the permit, arguing that the mandatory restrictions were not being applied uniformly throughout the watershed, and that water-taking restrictions should be implemented by conservation authorities, not by the Ministry.

The Council of Canadians and WWW applied to intervene in the case, which both Nestlé and the Ministry argued against, but the Environmental Review Tribunal ruled in favour of our intervention because of our genuine public interest in the case.

Earlier in the year we formally requested a review of Ontario’s water-taking permit process as it applies to licences granted by the province to bottle water, urging Ontario to overhaul its “outdated and narrow approach.” We argued that the permit process is inconsistent with the Public Trust Doctrine, which asserts that certain natural resources, including groundwater, belong to all Canadians and cannot be privately owned or controlled. The doctrine recognizes the inherent importance of natural resources to individuals and to society as a whole.

The Public Trust Doctrine requires that governments fulfill legal responsibilities of a “trustee” and manage natural resources for the benefit of present and future generations. It embodies key principles of environmental protection, including stewardship, communal responsibility and sustainability. Essentially, under the Public Trust Doctrine, the government holds the natural resource in trust for the benefit of the public – now and in the future.

The Council of Canadians and WWW are concerned that under the agreement struck between the MoE and Nestlé, the company will be allowed to take up to approximately 1.1 million litres of water per day from Hillsburgh for its bottling operations in Aberfoyle even during times of drought, which have recently affected the area. The City of Guelph issued a red alert last summer requiring a 20 per cent mandatory reduction in water use from Guelph residents because of drought conditions. Wellington County farmers, livestock producers and residents were seriously impacted, experiencing the worst drought in over a decade. Guelph/Eramosa Township, located at the southern end of Wellington County bordering the city of Guelph, was on Level II drought restrictions (yellow alert) well into November of last year.

Water sources are under stress from increasing commercial use, population pressure and drought-inducing climate change. A 2010 Statistics Canada study has warned that renewable water in southern Canada has declined by 8.5 per cent from 1971 to 2004. Water-taking decisions that approve large commercial uses without considering the long-term needs of the local community and environment could seriously impact freshwater sources.

Because water is a fundamental resource, the Council of Canadians and WWW will argue that the Ministry’s permitting process must recognize the urgent need to protect it in a time of growing stresses. Provincial governments are legally responsible for the protection of groundwater supplies. Ontario and other Great Lakes jurisdictions have committed to a precautionary approach in managing water. This sort of approach stems from the precautionary principle, which says that where a risk of serious and irreversible harm exists, lack of full scientific certainty should not prevent measures to protect the environment.

This case presents an exciting opportunity for the courts to recognize that the Public Trust Doctrine provides a valid legal basis for adding drought-related conditions to Nestlé’s water-taking permit, and to prioritize public rights to water over private, commercial uses.

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