

TO:	CHAIR AND MEMBERS CIVIC WORKS COMMITTEE MEETING ON JULY 17th, 2018
FROM:	GEOFFREY BELCH CORPORATION COUNSEL
SUBJECT	NORTEL NETWORKS LIMITED AND NAGATA AUTO PARTS CANADA CO., LTD. APPEALS TO THE ENVIRONMENTAL REVIEW TRIBUNAL CASE NO.S: 11-125/1-126

RECOMMENDATION

That, on the recommendation of Corporation Counsel, this report **BE RECEIVED** regarding the conclusion of the appeals by Nortel Networks Limited and Nagata Auto Parts Canada Co., Ltd., to the Environmental Review Tribunal from an Order of the Director, Ministry of the Environment, Order No. 3250-8J4J3G, dated July 20th, 2011 (the "Director's Order").

PREVIOUS REPORTS PERTINENT TO THIS MATTER
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- Report from the General Manager of Environmental and Engineering Services Department and City Engineer at its meeting held on March 22, 2010
- Report from the City Solicitor's Office to the Environment and Transportation Committee at its meeting held on September 27, 2010
- Report from the City Solicitor's Office to the Built and Natural Environment Committee at its meeting held on October 17, 2011
- Confidential Report from the City Solicitor's Office to Civic Works Committee at its meeting held on January 9th, 2018.

BACKGROUND

Summary

The City was a Party to Environmental Review Tribunal (ERT) proceedings in which Nortel Networks Limited ("Nortel") and Nagata Auto Parts Canada Inc. ("Nagata") appealed the Ministry of the Environment and Climate Change ("MOECC") Director's Order against them.

Both of these appeals have now been withdrawn and the ERT proceedings are concluded. The City did not object to the appeals being withdrawn. The ERT decisions are attached to this report, and can also be found online at: <http://elto.gov.on.ca/tribunals/ert/decisions-orders/>.

Background

Summary of Director's Order

Nortel owns lands generally located at 811 Wilton Grove Road. Nagata owns lands located at 1477 Sise Road, generally to the east of the Nortel lands. The City owns lands generally to the south of these sites consisting of an open drainage ditch. Freightliner Ltd. ("Freightliner") owns land at 795 Wilton Grove Road, generally to the west of the Nortel lands. Both the Nagata lands and the Freightliner lands were at one time part of a larger Nortel site. Both properties were impacted by Nortel's operations and are contaminated by the Nortel operations.

On October 29, 2009, the Director of the MOECC confirmed an Order of the Provincial Officer dated October 7, 2009 that, amongst other things, ordered Nortel and Nagata to undertake certain preventive measures in connection with lands generally municipally located at Sise Road and Wilton Grove Road in the City of London (the "Director's Order"). The Director's Order required, amongst other things, that Nortel and Nagata prepare a work plan that included as a minimum, an assessment of the existing System, and evaluation of the potential for offsite contamination

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and an assessment of the groundwater quality down-gradient to defined areas.

Summary of Appeal to Environmental Review Tribunal

Nortel and Nagata appealed the Director’s Order to the Environmental Review Tribunal (“ERT”) in or about November 17, 2009. The matter went to a pre-hearing conference before the ERT in or about March 2010. The City of London was granted participant status at the proceeding. The MOECC subsequently issued a new Order to Nortel, Nagata, Freightliner and the City, and revoked a previous Order. At the City’s request, the Tribunal granted the City Party status as it relates to Site 3 on June 17, 2016.

Companies’ Creditors Arrangement Act - Settlement Agreement – approved – MOECC and Nortel

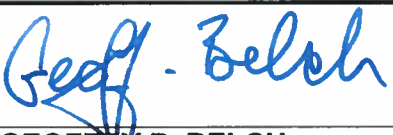

Nortel was engaged in a liquidating insolvency through *Companies’ Creditors Arrangement Act* (CCAA) proceedings. The MOECC made a claim in those insolvency proceedings; Nortel and the MOECC reached a proposed settlement of that claim. Nortel has stated that under the settlement agreement it will pay the MOECC approximately \$3,000,000. Nortel submits this is more than sufficient to address the outstanding work under the Director’s Order.

ERT Decision

The City did not object to the revocation of the Director’s Order against Nortel and Nagata, nor the withdrawal of the appeals. The City took the position that the City is relying on the MOECC’s assessment and expertise to have obtained the best CCAC settlement, and it is relying on the MOECC’s assessment and expertise to appropriately manage and monitor contaminants on the site.

The ERT, with respect to the Nortel appeal, found that the proposed withdrawal of the appeal and revocation of the Director’s Order was “consistent with the purpose and provisions of the *EPA*”, and that they are “in the public interest”. While the ERT noted concern that there are “outstanding risks to human health and the environment at the Sites”, it is “satisfied by the assurances of both of the Director’s experts and of Nortel’s expert that the funding to be provided will be sufficient to address these outstanding issues and to ensure the protection and conservation of the natural environment.”

With respect to the Nagata appeal, the ERT similarly found that the proposed withdrawal of the appeal is consistent with the purpose and provisions of the *EPA*, and that it is “in the public interest”.

PREPARED BY:	PREPARED BY:
	
GEOFFRY P. BELCH CORPORATION COUNSEL	LYNN P. MARSHALL SOLICITOR II

- cc: K. Scherr, City Engineer
 S. Mathers, Director of Water and Wastewater
 S. Chambers, Division Manager, EES – Stormwater Management

Attachments:
 ERT Orders dated February 15, 2018 and May 2, 2018

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: February 15, 2018

CASE NO.:

11-125

PROCEEDING COMMENCED UNDER section 140(1) of the *Environmental Protection Act*, R.S.O. 1990, c.E.19, as amended

Appellant: Nagata Auto Parts Canada Co., Ltd.
(ERT Case No. 11-125)

Appellant: Nortel Networks Limited/Corporation Nortel
Networks Limited (ERT Case No. 11-126)

Respondent: Director, Ministry of the Environment and Climate
Change

Subject of appeal: Order regarding the maintenance and operation of a
groundwater extraction and treatment system, the
name of a qualified Consultant to carry out the work
of a clean-up plan and the discharge of volatile
organic compounds, trichloroethylene and its
breakdown products from operations impacting
groundwater

Reference No.: 3250-8J4J3G

Property Address/Description: Site 1) Concession 3, PT Lot 15 RP 33R13850 Parts
3 to 5
Site 2) Concession 3, PT Lots 14 & 15 RP
33R12879 Parts 1 & 2
Site 3) Concession 3, PT Lots 14 & 15 RP
33R12879 Parts 3 to 9, and
Site 4) Concession 3, PT Lot 15 RP EER13850
Parts 6 to 8

Municipality: County of Middlesex

ERT Case No.: 11-125

ERT Case Name: Nagata Auto Parts Canada Co., Ltd. v. Ontario
(Environment and Climate Change)

Heard: January 19, 2018 by telephone conference call

APPEARANCES:

<u>Parties</u>	<u>Counsel</u>
Nortel Networks Limited/Corporation Nortel Networks Limitee	Alexandria Pike
Nagata Auto Parts Canada Co., Ltd.	Laird French
Director, Ministry of the Environment and Climate Change	Justin Jacob
Freightliner Properties Ltd.	Aaron Atcheson
The Corporation of the City of London	Geoffrey Belch and Lynn Marshall

ORDER DELIVERED BY HUGH S. WILKINS

REASONS**Background**

[1] This Order is regarding a proposed settlement of an appeal. It arises from a Director's Order from the Ministry of the Environment (now the Ministry of the Environment and Climate Change ("MOECC")) requiring work to be done at a contaminated site in the County of Middlesex ("County").

[2] Until 1994, Nortel Technology Limited/Nortel Technologie Limitee (together with its relevant successor companies referred to as "Nortel" in this Order) carried on business at a property in the County. Nortel's property was subdivided into four sites in 1997, with Nortel retaining ownership of Site 1 (Concession 3, PT Lot 15 RP 33R13850 Parts 3 to 5). Site 2 (Concession 3, PT Lots 14 and 15 RP 33R12879 Parts 1 and 2) is now owned by Nagata Auto Parts Canada Co., Ltd. ("Nagata") and is occupied by London Automotive and Manufacturing. Site 3 is owned by the Corporation of the City

of London ("City") (Concession 3, PT Lots 14 and 15 RP 33R12879 Parts 3 to 9). Site 4 is owned by Freightliner Properties Ltd. ("Freightliner") (Concession 3, PT Lot 15 RP EER13850 Parts 6 to 8). Collectively, Sites 1, 2, 3 and 4 are referred to as the "Sites" in this Order.

[3] In 1999, Nortel paid for the installation of a groundwater extraction and treatment system to address groundwater contamination on Sites 1 and 2. The system operated under Certificate of Approval No. 5590-5J9TE4. A consultant was retained to manage the system and to provide annual monitoring program reports to the MOECC.

[4] When reviewing annual reports in June 2009, technical staff at the MOECC questioned the effectiveness of the system and its ability to keep contamination from migrating from Sites 1 and 2. On October 7, 2009, Provincial Officer Don Hayes issued Provincial Officer's Order Number 6548-7WJKV4 ("Provincial Officer's Order") to Nortel, Nagata, the City and Freightliner concerning the impacts of contamination from volatile organic compounds ("VOC") and trichloroethylene ("TCE") and its breakdown products at various locations on the Sites. It required Nortel to retain a consultant to prepare a plan containing an assessment of the system's effectiveness, an evaluation of potential offsite contaminant migration, a delineation of the area, location and extent of contamination, and an assessment of groundwater quality down gradient of the areas of contamination.

[5] On October 26, 2009, Nortel requested a review of the Provincial Officer's Order by the Director. On October 29, 2009, Director's Order No. DO-6548-7WJKV4 was issued to Nortel confirming the Provincial Officer's Order in its entirety. On November 17, 2009, Nortel filed a Notice of Appeal with the Environmental Review Tribunal ("Tribunal").

[6] On July 26, 2011, the Director informed the Tribunal that she intended to revoke her Order and that she had already issued a new Order on July 20, 2011 to replace it. This new Order was Director's Order No. 3250-8J4J3G ("Director's Order"). It too was

appealed by Nortel and also by Nagata.

[7] While the 2011 Director's Order is substantially similar to the 2009 Order, it addresses additional concerns about the Sites. Among other things, the Director's Order requires that Nortel and Nagata prepare and obtain MOECC approval of a work plan for specified locations of groundwater impacts at the Sites in order to prevent or reduce the risk of discharge of contaminated groundwater into the natural environment and to prevent, decrease or eliminate any adverse effects that might result from such a discharge in, on or under the Sites.

[8] During the course of the above-noted events, Nortel obtained protection under the *Companies' Creditors Arrangement Act* ("CCAA"). Since January 14, 2009, it has been subject to the oversight of the Ontario Superior Court of Justice (Commercial List) ("Superior Court") with respect to issues regarding its insolvency.

[9] The Parties updated the Tribunal as the matter proceeded through the courts under the CCAA. Over this time period, the Tribunal convened numerous telephone conference calls ("TCCs") at which it was informed of the Parties' efforts to resolve the matters and at which procedural issues were addressed. Orders staying the Director's Order were issued and the Tribunal granted party status to the City and Freightliner.

[10] On December 18, 2017, a TCC was held at which the Director and Nortel informed the Tribunal that they had reached a settlement with respect to the Nortel appeal (Tribunal File No. 11-126). They requested the scheduling of a settlement TCC at which the proposed settlement would be presented to the Tribunal and the dismissal of that proceeding considered. As part of the proposed settlement, Nortel agreed to withdraw its appeal and the Director agreed to have the Director's Order revoked as against Nortel. The proposed settlement arises from an agreement, dated November 6, 2017, that was reached between the MOECC and Nortel with respect to the MOECC's claim in the CCAA proceedings. That agreement was approved by the Superior Court on November 28, 2017. Negotiations regarding a settlement of the Nagata appeal are

ongoing and a settlement of that appeal is not being presented to the Tribunal at this time.

[11] As required under Rule 198 of the Tribunal's *Rules of Practice* ("Rules"), Nortel notified the Tribunal and the other Parties by letter on December 19, 2017 that it proposed withdrawal of its appeal. Although the Director did not notify the Parties in writing of the proposed revocation of the Director's Order as against Nortel, Nortel did indicate the Director's support to have the Director's Order revoked in its December 19, 2017 letter and the Director did give verbal notice at the December 18, 2017 TCC to all the Parties of her intention that it be revoked.

[12] On January 19, 2018, the Tribunal convened a settlement TCC at which it considered the proposed settlement. During the call, Freightliner asked to withdraw as a party to the proceeding, which the Tribunal acknowledged. As Freightliner was not an Appellant, its withdrawal was not subject to Rules 198 to 201.

Relevant Legislation and Rules

[13] The following are the relevant provisions of the *Environmental Protection Act* ("EPA") and the Tribunal's Rules:

EPA

Purpose of the Act

- 3.(1) The purpose of this Act is to provide for the protection and conservation of the natural environment.

Tribunal's Rules

Termination of Proceedings

198. A Proponent or Applicant who proposes to withdraw an application, an Appellant who proposes to withdraw an appeal, or a Director, Risk Management Inspector or Official, Authority or

municipality who proposes to revoke a decision that is the subject of the appeal shall notify the Tribunal, other Parties, Participants and Presenters by letter. Any Party, Participant or Presenter who objects to the proposed withdrawal of an appeal or revocation, with the exception of the revocation of an order made under section 74 of the *Ontario Water Resources Act*, shall notify the Tribunal and the other Parties, Participants and Presenters within ten days of the date of the letter.

...

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.
202. Where a Director, Risk Management Inspector or Official, Authority or municipality proposes to revoke a decision that is the subject of an appeal, the Tribunal shall consider whether the proposed revocation is consistent with the purpose and provisions of the relevant legislation and whether the proposed revocation 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.

Issues

[14] The issues to be addressed are whether the Tribunal should accept the proposed withdrawal of the appeal brought by Nortel, accept the proposed revocation of the Director's Order as against Nortel, and dismiss the corresponding proceeding under Rules 201 and 202.

Discussion, Analysis and Findings

[15] The Tribunal's Rules require the Tribunal to consider whether a proposed withdrawal of an appeal (under Rule 201) and a proposed revocation of an order (under Rule 202) are consistent with the purpose and provisions of the *EPA* and whether they are in the public interest. In these regards, the Tribunal must also consider the interests

of parties, participants and presenters. The Tribunal has the discretion either to continue with a proceeding or to dismiss it.

[16] Prior to the settlement TCC, Nortel filed the Affidavit of Leanne Burns, which was sworn on January 8, 2018. She is an environmental engineer at Golder Associates Ltd. ("Golder"). Among other tasks, Golder was retained by Nortel to undertake investigatory and risk assessment work at two critical areas on the Sites (identified by Ms. Burns as the "Swale Area" and the "Nagata Area"). In her affidavit, Ms. Burns states that Golder's risk assessments of these two areas concluded that there are no remaining unacceptable risks to human receptors with the exception of risks to onsite utility maintenance workers, landscape maintenance workers and indoor workers (in any future building) in specific areas of the Sites. She states that potentially unacceptable ecological risks are limited to onsite terrestrial plants and soil organisms. In her affidavit, Ms. Burns states that risk management measures have been identified to address these risks and that groundwater monitoring is proposed. She states that the identified risk management measures are:

- potential mitigation related to any future construction of buildings (e.g., soil vapour intrusion mitigation requirements) in specific areas of the Sites;
- implementation of a health and safety plan with respect to utility workers in specific areas of the Sites; and
- a barrier to site soils (soil or hard cap) to address risks related to landscape workers and ecological exposure in a specific area of the Sites.

Ms. Burns states that the investigations and risk assessments conducted by Golder satisfy the requirements of the Director's Order "to a significant extent" and that under the current land use, only the implementation of the proposed risk management measures and monitoring is required. In her affidavit, she confirms the sufficiency of settlement funds proposed in the proposed settlement to undertake the future risk

management measures and monitoring activities proposed in Golder's risk assessment reports.

[17] In its submissions, Nortel states that it is insolvent and its assets will be distributed in accordance with the Court's directions in the CCAA proceedings. It submits that it has spent significant resources to address the items in the Provincial Officer's Order and the Director's Order. It submits that the risk assessments that it has undertaken confirm that impacts could remain in place with limited risk and that any risks can be addressed through the management measures set forth in the risk assessment reports. It submits that the risk management measures and monitoring are the only remaining items of work to be done under the Director's Order and that they are not significant. Nortel states that under the proposed settlement it will pay the MOECC approximately \$3,000,000, which it submits is more than sufficient to address the outstanding work under the Director's Order.

[18] The Director filed affidavits sworn by Todd Fleet and Jeffrey Markle, both dated January 17, 2018. They support the proposed revocation of the Director's Order. Mr. Fleet is the District Engineer in the MOECC's London District Office and Mr. Markle is a hydrogeologist employed there. They each state that they have reviewed Golder's environmental risk assessments and are satisfied that they provide acceptable approaches to protecting the environment and human health in respect of the Sites. Mr. Fleet states that he is of the opinion that Nortel's site investigations, assessments and reports "substantially satisfy" the environmental requirements of the Director's Order and that the funds to be provided to the MOECC under the proposed settlement "are sufficient to implement the risk management measures described in the risk assessments". He states that they will enable the MOECC to ensure that groundwater and soil contamination at the Sites are addressed and that measures will be taken that will be protective of the environment and human health. Mr. Markle adopts these statements made by Mr. Fleet.

[19] The Director submits that the focus of the Director's Order was to identify the

contamination and environmental risks in specific areas of the Sites, which has been done. She submits that the proposed revocation of the Director's Order as against Nortel is a pre-condition for allowing funds to be provided to the MOECC under the proposed settlement for the purpose of addressing the environmental issues on the Sites. She submits that these funds provide for work that will ensure that the contamination that is the subject of the Director's Order will be managed and/or remediated. She submits that the proposed settlement is consistent with the polluter pays principle and that, absent the settlement, such funding may not be made available. The Director submits that the proposed revocation and appeal withdrawal support the MOECC's mandate to protect the environment and human health, are consistent with the purpose and provisions of the *EPA* and are in the public interest.

[20] None of the Parties oppose the proposed withdrawal of Nortel's appeal and the proposed revocation of the Director's Order as against Nortel. There are no participants or presenters in this proceeding.

[21] Taking into account the provisions of the Director's Order, the work that has already been completed by Nortel, Nortel's insolvency, and the funding that will be provided under the terms of the proposed settlement for further work to be undertaken at the Sites, the Tribunal finds that the proposed withdrawal of the Nortel appeal and revocation of the Director's Order as against Nortel are consistent with the purpose and provisions of the *EPA*. The Tribunal also finds that they are in the public interest. The Tribunal notes with concern that there are outstanding risks to human health and the environment at the Sites, but is satisfied by the assurances of both of the Director's experts and of Nortel's expert that the funding to be provided will be sufficient to address these outstanding issues and to ensure the protection and conservation of the natural environment.

[22] The Tribunal accepts Nortel's withdrawal of its appeal, revokes the Director's Order as against Nortel, and dismisses the proceeding in Tribunal Case No. 11-126 pursuant to Tribunal Rules 201 and 202. Tribunal Case No. 11-125 (the Nagata appeal)

remains open.

ORDER

[23] The withdrawal of Nortel's appeal is accepted and the Director's Order as against Nortel is revoked. The corresponding appeal (Tribunal Case No. 11-126) is dismissed.

*Director's Order Revoked in Part
Appeal 11-126 Dismissed*

"Hugh S. Wilkins"

HUGH S. WILKINS
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Environmental Review Tribunal

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: May 02, 2018

CASE NO.:

11-125

PROCEEDING COMMENCED UNDER section 140(1) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended

Appellant: Nagata Auto Parts Canada Co., Ltd.
(ERT Case No. 11-125)

Appellant: Nortel Networks Limited/Corporation Nortel
Networks Limitee (ERT Case No. 11-126)

Respondent: Director, Ministry of the Environment and Climate
Change

Subject of appeal: Order regarding the maintenance and operation
of a groundwater extraction and treatment
system, the name of a qualified Consultant to
carry out the work of a clean-up plan and the
discharge of volatile organic compounds,
trichloroethylene and its breakdown products
from operations impacting groundwater
3250-8J4J3G

Reference No.:

Property Address/Description: Site 1) Concession 3, PT Lot 15 RP 33R13850
Parts 3 to 5
Site 2) Concession 3, PT Lots 14 & 15 RP
33R12879 Parts 1 & 2
Site 3) Concession 3, PT Lots 14 & 15 RP
33R12879 Parts 3 to 9, and
Site 4) Concession 3, PT Lot 15 RP EER13850
Parts 6 to 8

Municipality: County of Middlesex

ERT Case No.: 11-125

ERT Case Name: Nagata Auto Parts Canada Co., Ltd. v. Ontario
(Environment and Climate Change)

Heard: March 8, 2018 by telephone conference call

APPEARANCES:

<u>Parties</u>	<u>Counsel</u>
Nagata Auto Parts Canada Co., Ltd.	Laird French
Director, Ministry of the Environment and Climate Change	Justin Jacob and Hayley Valteau (student-at-law)
The Corporation of the City of London	Lynn Marshall

DECISION DELIVERED BY HUGH S. WILKINS

REASONS

[1] This Decision addresses the remaining appeal arising from a Director's Order of the Ministry of the Environment (now the Ministry of the Environment and Climate Change ("MOECC")) requiring work to be done at contaminated sites in Middlesex County ("County"). The proceeding initially consisted of two appeals. One was brought by Nagata Auto Parts Canada Co., Ltd. ("Nagata"). It is the subject matter of the present Decision. The other was brought by Nortel Networks Limited/Corporation Nortel Networks Limitee (together with its relevant successor companies referred to as "Nortel"). It was filed as Tribunal Case No. 11-126. That appeal was dismissed by way of an Order of the Tribunal, dated February 15, 2018 ("February 2018 Order") (see: *Nagata Auto Parts Canada Co., Ltd. v Ontario (Environment and Climate Change)*, 2018 CanLII 6906).

[2] Nagata now seeks to withdraw its appeal and have the proceeding dismissed. The Tribunal held a telephone conference call ("TCC") on March 8, 2018 to hear evidence and submissions on the proposed withdrawal and dismissal. For the reasons that follow, the Tribunal accepts the proposed withdrawal and dismisses the proceeding.

Background

[3] As summarized in the February 2018 Order, Nortel carried on business at the property in question until 1994. In 1997, the property was subdivided into four sites:

- Site 1 was retained by Nortel (Concession 3, PT Lot 15 RP 33R13850 Parts 3 to 5);
- Site 2 was acquired by Nagata and is now occupied by London Automotive and Manufacturing (Concession 3, PT Lots 14 and 15 RP 33R12879 Parts 1 and 2);
- Site 3 was acquired by the Corporation of the City of London ("City") (Concession 3, PT Lots 14 and 15 RP 33R12879 Parts 3 to 9); and
- Site 4 was acquired by Freightliner Properties Ltd. ("Freightliner") (Concession 3, PT Lot 15 RP EER13850 Parts 6 to 8).

Collectively, Sites 1, 2, 3 and 4 are referred to as the "Sites" in this Decision.

[4] In 1999, Nortel paid for the installation of a groundwater extraction and treatment system to address groundwater contamination on Sites 1 and 2. The system operated under Certificate of Approval No. 5590-5J9TE4. A consultant was retained to manage the system and to provide annual monitoring program reports to the MOECC.

[5] When reviewing annual reports in June 2009, technical staff at the MOECC questioned the effectiveness of the system and its ability to keep contamination from migrating from Sites 1 and 2. On October 7, 2009, Provincial Officer Don Hayes issued Provincial Officer's Order Number 6548-7WJKV4 ("2009 Provincial Officer's Order") to Nortel, Nagata, the City and Freightliner concerning the impacts of contamination from volatile organic compounds ("VOC") and trichloroethylene ("TCE") and its breakdown products at various locations on the Sites. It required Nortel to retain a consultant to prepare a plan containing an assessment of the system's effectiveness, an evaluation of potential offsite contaminant migration, a delineation of the area, location and extent of

contamination, and an assessment of groundwater quality down gradient of the areas of contamination.

[6] On October 26, 2009, Nortel requested a review of the Provincial Officer's Order by the Director. On October 29, 2009, Director's Order No. DO-6548-7WJKV4 ("2009 Director's Order") was issued to Nortel confirming the 2009 Provincial Officer's Order in its entirety. On November 17, 2009, Nortel filed a Notice of Appeal with the Tribunal.

[7] On July 26, 2011, the Director informed the Tribunal that she intended to revoke her Order and that she had issued a new Order on July 20, 2011 to replace it. This new Order was Director's Order No. 3250-8J4J3G ("2011 Director's Order"). On July 29, 2011, Nagata appealed the 2011 Director's Order, as did Nortel.

[8] While the 2011 Director's Order is substantially similar to the 2009 Director's Order, it addresses additional concerns about the Sites. Among other things, the 2011 Director's Order requires that Nagata and Nortel prepare and obtain MOECC approval of a work plan for specified locations of groundwater impacts at the Sites in order to prevent or reduce the risk of discharge of contaminated groundwater into the natural environment and to prevent, decrease or eliminate any adverse effects that might result from such a discharge in, on or under the Sites.

[9] During the course of the above-noted events, Nortel obtained protection under the *Companies' Creditors Arrangement Act* ("CCAA"). The Parties updated the Tribunal as the matter proceeded through the courts under the CCAA. Over this time period, the Tribunal convened numerous TCCs at which it was informed of the Parties' efforts to resolve the matters and at which procedural issues were addressed. Orders staying the 2011 Director's Order were issued and the Tribunal granted party status to the City and Freightliner.

[10] On December 18, 2017, a TCC was held at which the Director and Nortel informed the Tribunal that they had reached a settlement with respect to the Nortel

appeal (Tribunal File No. 11-126). On January 19, 2018, the Tribunal convened a settlement TCC at which it accepted Nortel's withdrawal of its appeal, revoked the 2011 Director's Order as against Nortel, and dismissed Nortel's appeal. At the TCC, Freightliner withdrew as a party. The Tribunal's reasons are set out in the February 2018 Order.

[11] On March 7, 2018, Nagata informed the Tribunal that Nagata and the Director had reached a settlement of the Nagata appeal. As noted above, on March 8, 2018, the Tribunal convened a settlement TCC at which it heard evidence and submissions on the proposed withdrawal and dismissal.

Relevant Legislation and Rules

[12] The following are the relevant provisions of the *Environmental Protection Act* ("EPA") and the Tribunal's *Rules of Practice* ("Rules"):

Environmental Protection Act

Purpose of the Act

3.(1) The purpose of this Act is to provide for the protection and conservation of the natural environment.

Tribunal's Rules

Termination of Proceedings

198. A Proponent or Applicant who proposes to withdraw an application, an Appellant who proposes to withdraw an appeal, or a Director, Risk Management Inspector or Official, Authority or municipality who proposes to revoke a decision that is the subject of the appeal shall notify the Tribunal, other Parties, Participants and Presenters by letter. Any Party, Participant or Presenter who objects to the proposed withdrawal of an appeal or revocation, with the exception of the revocation of an order made under section 74 of the *Ontario Water Resources Act*, shall notify the Tribunal and the other Parties, Participants and Presenters within ten days of the date of the letter.

...

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

Issues

[13] The issues to be addressed are whether the Tribunal should accept the proposed withdrawal of Nagata's appeal and dismiss the corresponding proceeding under Rule 200.

Discussion, Analysis and Findings

[14] Rule 198 of the Tribunal's *Rules* requires that an appellant who proposes to withdraw its appeal must provide 10 days' notice of its intentions by letter to the Tribunal, other parties, participants and presenters. In the present case, Nagata provided notice of its intention to withdraw its appeal on March 7, 2018. Although evidence and submissions regarding the proposed withdrawal were heard the next day by TCC, the Tribunal withheld its decision until the 10-day time period set out in Rule 198 had expired, providing parties, participants and presenters time to object. No objections were made.

[15] Although the City does not object to the proposed withdrawal, it also does not consent to it. Where there has been a proposed withdrawal of an appeal not agreed to by all Parties, the Tribunal must consider under Rule 200 whether the proposed withdrawal is consistent with the purpose and provisions of the *EPA* and whether it is in the public interest. In these regards, the Tribunal must also consider the interests of parties, participants and presenters. The Tribunal has the discretion either to continue with a proceeding or to dismiss it.

[16] The Director filed an affidavit sworn by Todd Fleet, dated January 17, 2018. Mr. Fleet is the District Engineer in the MOECC's London District Office. The affidavit states that Mr. Fleet reviewed environmental risk assessments that were conducted at the Sites by Golder Associates Ltd. ("Golder Associates") on behalf of Nortel and that he is satisfied that they provide acceptable approaches to protecting the environment and human health in respect of the Sites. Mr. Fleet states that he is of the opinion that Nortel's site investigations, assessments and reports "substantially satisfy" the environmental requirements of the 2011 Director's Order.

[17] At the March 8, 2018 TCC, Mr. Fleet was qualified as a professional engineer and provided opinion evidence on the proposed settlement. He stated that earlier that day (on March 8, 2018) he issued Provincial Officer's Order No. 6277-AWLJL6 to Nagata ("March 2018 Provincial Officer's Order") requiring it to implement risk management and monitoring measures identified in Golder Associates' risk assessments. The measures set out in the March 2018 Provincial Officer's Order include:

- risk management measures in the event of building construction on the Sites;
- a health and safety plan for the Sites;
- site monitoring and maintenance, including annual groundwater sampling and analysis; and
- the development of contingencies for groundwater, soil vapour and indoor air monitoring at the Sites.

[18] Mr. Fleet stated that the work required under the 2011 Director's Order had been substantially completed and that the March 2018 Provincial Officer's Order will ensure that the remaining contamination that is the subject of the 2011 Director's Order will be managed and/or remediated. Some of the funds provided by Nortel pursuant to the settlement of its appeal will be used for this work.

[19] The Director submits that the proposed withdrawal of the appeal supports the MOECC's mandate to protect the environment and human health, is consistent with the purpose and provisions of the *EPA* and is in the public interest.

[20] Nagata submits that Golder Associates' risk assessments provide for acceptable approaches to protecting human health and the environment at the Sites and that the March 2018 Provincial Officer's Order provides for a method and process of implementing the risk assessments' recommendations.

[21] The City does not oppose the proposed withdrawal of Nagata's appeal. There are no participants or presenters in this proceeding.

[22] Taking into account the provisions of the 2011 Director's Order, the work that has already been completed by Nortel and the issuance of the March 2018 Provincial Officer's Order requiring further work to be undertaken at the Sites in line with the recommendations in Golder Associates' risk assessments, the Tribunal finds that the proposed withdrawal of the Nagata appeal is consistent with the purpose and provisions of the *EPA*. The Tribunal also finds that it is in the public interest.

[23] The Tribunal accepts Nagata's withdrawal of its appeal and dismisses the proceeding in Tribunal Case No. 11-125 pursuant to Rule 200. This dismissal concludes the proceeding.

DECISION

[24] The withdrawal of Nagata's appeal is accepted. The appeal in Tribunal Case No. 11-125 is dismissed.

*Appeal 11-125 Withdrawn
Appeal 11-125 Dismissed*

"Hugh S. Wilkins"

HUGH S. WILKINS
MEMBER

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Environmental Review Tribunal

A constituent tribunal of Environment and Land Tribunals Ontario
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