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**Submission to the
Standing Committee on Justice Policy
Re: Bill 198
Safeguarding and Sustaining Ontario's Water Act, 2007**

May 9, 2007

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Canadian Bottled Water Association
Submission Regarding Bill 198
Standing Committee on Justice Policy
May 9, 2007

On behalf of the Canadian Bottled Water Association, the following represents our submission on Bill 198, Safeguarding and Sustaining Ontario's Water Act, 2007. This submission is made with the knowledge provided by the Ministry of the Environment (MOE) that a further, separate submission on the water taking charges proposal may be made until June 4, 2007.

We have asked our legal counsel from the firm of Blake, Cassels, Graydon to provide a submission on the actual legislation itself from a legal perspective. Attached is their opinion that will deal with the issues in the bill as drafted.

The purpose of this submission is to express, on behalf of the Board of Directors and the member companies of the CBWA, our concerns with the purpose and intent of the bill as well as its application in real, practical terms.

Bill 198's response and comment period was a very short time of 30 days. In our view, this time frame was insufficient. This legislation was derived over a prolonged period of time; 30 days is a short period of time to completely review the details and to respond to all points.

Background and Context

The Canadian Bottled Water Association (CBWA) supports the protection, conservation and efficiency measures for all users of our precious water resources in Ontario. The CBWA has been on record for over a decade as a strong proponent to have in place a regulatory framework that provides standards to protect our groundwater resources, promote sustainable development, and ensure a board-based approach for Ontario's water sources. As Executive Director of the CBWA, I have been a participating member of the Ontario Great Lakes Charter Annex Advisory Panel for several years.

Our society uses bottled water extensively. It is a healthy alternative to the consumption of sweet drinks that burden our health system, and should be encouraged as opposed to being overly regulated or financially penalized. It appears odd that the provincial government, after moving to remove sugar laden beverages from the province's elementary schools as part of a junk food ban, would subsequently act to treat bottled water as a revenue source.

In Canada, bottled water is regulated as a packaged good product under the federal Food and Drugs Act. Under the Act, federal responsibility for regulating bottled water sold in Canada is shared by Health Canada and the Canadian Food Inspection Agency.

Bottled water production is a highly efficient process. Scientific analysis shows, on average, 97 percent of the water withdrawn by bottled water companies for bottling is actually bottled and consumed by humans. The bottled water industry not only applies conservation to its day to day operations, but is one of the most efficient users of Ontario's water resources. One would assume that within legislation whose stated purpose is water efficiency and conservation, our industry would be rewarded. Instead, this bill proposes that water bottlers pay the highest rate of the new charges, and that we pay first.

CBWA members account for approximately 85% of the bottled water sold in Canada. Every member company of the CBWA must adhere to our association's Model Code. We take environmental responsibility very seriously. Details about our model code may be found at www.cbwa-bottledwater.org. Even though the bottled water industry uses only a small fraction of the water taken in Ontario, 0.002 (two tenths of one percent), the member companies of the CBWA represent hundreds of millions dollars of capital investments in Ontario, and employing thousands Ontarians in primarily rural areas of the province.

Water Transfers

Bill 198 does provide for an existing exception for inter-basin transfers for water in containers of 20 litres or less, but does not allow for specific issues that exist within the bottled water industry regarding source protection measures that have been implemented for many years. For years, many bottled water companies provide environmental resource protection by intentionally keeping the source separate from the bottled water food manufacturing plant. For example, reducing any external exposure to the resource/wellhead will provide additional protection of the aquifer. The source/wellhead can be located in one watershed, while the bottling food manufacturing plant is located in another watershed.

The CBWA is pleased to see that the current exemption for water containers less than 20 litres in size will be carried forward in Bill 198. We do see the restrictions on watersheds as being problematic from a scientific and logistical point of view. From a scientific perspective, a surface water divide is not always respected by the groundwater below. For example, much of the aquifer that the Town of Orangeville draws its water from (in the Lake Ontario Basin) is recharged by precipitation that falls to the west (in the Lake Erie Basin). This is a natural condition which would then put the Town of Orangeville in the awkward position of inter-basin transfer. This is just an example, albeit on a major volume scale, and there are many others that can be identified on many different scales. It is a simple fact of the layered bedrock geology of southern Ontario.

The second example is more pragmatic in nature. Often a bottled water company will put their plant in a community because of available zoning. The water taken from the source may be trucked or piped to the plant. This is done to ensure wellhead protection by keeping industrial activities at a distance. The refining of the watershed boundaries down to the Great Lakes scale will seriously affect some bottlers whose plants and sources are on opposite side of such divides. Should they wish to increase their water taking, they would be so prevented, even if it was environmentally sound and perhaps socially preferred. The use of these boundaries will also prevent bottlers from having multiple sources, a very desirable thing in times of low water response, and for source protection, i.e., spreading the taking out to minimize effect.

To solve this, we suggest a specific clause that would allow water to move in trucks if the ultimate purpose is for bottling in same containers (<20L) by permitted water bottlers. To prevent unscrupulous operators from taking advantage of this, a radius of 500 or 1000 km, and remaining within Ontario could be imposed. This would ensure water taken and transported is bottled by MOE permitted bottlers.

Safeguarding and Sustaining Water: Quality and Quantity

The CBWA is disappointed that a bill that is presented as being necessary to safeguard and sustain Ontario water is so focused on quantity while remaining remarkably silent on quality. We say this being fully aware that other legislation pertaining to water exists; we are puzzled that bill 198, especially as it relates to the proposed water taking charges, appears to be numerically driven, with little to no regard for water quality.

We find it odd, and of questionable environmental policy benefit, that the bottled water industry should be made to pay the highest and earliest water taking charges because of a somewhat vague and ill defined "consumptive use" definition, broadly, water leaving the watershed from which it was taken. Our product, intended for human sustenance, is one of the cleanest usages as it passes through the hydrological cycle.

We respectfully submit that other users, including users that are industrial/commercial and those that are not, take water, use it, and return it to the watershed in a condition that is very degraded and quite frankly, far worse than when it was taken. Our review of Bill 198 and its accompanying materials suggests that the highest and earliest payers of the charges will be the industries who take water and transport it over a line on a map. There appears to be no consideration given to the quality of water that may be returned to its original watershed in substandard condition. We would urge the MOE to adjust its thinking in this regard.

Proposed Water Taking Charges

The MOE materials accompanying the bill indicate that only industrial and commercial water takers of a certain size would be paying these water charges, and that these are regulatory charges (not a royalty or a tax) intended to defray the provincial government's costs of managing Ontario's water resources. According to the MOE's own information, industrial and commercial takers account for 2% of permitted water takings in Ontario. In the Legislature, second reading debate has referenced the province's water management costs as being \$18 million. It is difficult for us to imagine that this number represents just 2% of the government's total water management costs; it is very unfair to ask those who take 2% of the water to bear a disproportionate share of the province's costs.

We note as well that these charges are to be reviewed in three years, and then every five years after that. For this process to be credible, it is incumbent on the MOE to make its detailed costing available to those industries who are being asked to pay, as well as a confirmation of the total revenue expected to be raised by the new water taking charges. We note that when permit fees were increased to the point that some of our members now pay \$3,000 for their permits, this was justified by the statement by the MOE that this was reflective of the costs associated with the permit process. We would therefore reasonably assume that no part of the new charges is required to defray the province's costs in managing the permitting process.

We further note that within recent provincial legislation, including the Source Water Protection Act and the Clean Water Act, water bottlers were left largely on their own when it comes to protecting and managing their private water resources. It would stand to reason, therefore, that the province actually incurs lower costs when it comes to our sector. Inexplicably, notwithstanding this, Bill 198 creates a legislative and regulatory framework wherein our industry will pay more than those industries that actually have their water resources managed and protected by the province to a greater degree.

In terms of the "consumptive uses" definition, we respectfully submit that this is an inappropriate measure on which to base financial consequences for our members and other industries. In fact, this raises many questions. For example, we would assume that any water taken, bottled and sold within the same watershed from which it was taken would be exempt from these charges, and this would apply to other industries as well.

One is also left to wonder how the legislation and regulations will apply to other commercial interests. For example, a very simplistic look at golf course operators who take water from the ground in order to water their grass, would suggest that the water returns to the watershed from which it was taken. However, any scientific analysis definitively concludes that in fact the greatest portion of that water transpires (evaporates) and leaves the watershed. This suggests a consumptive use. Moreover, given the use of chemical ground treatments, the quality of the water that does return to the ground may be questionable. How will Bill 198 and its regulations treat this sector?

How will commercial horticultural interests that supply sod, flowers and house plants be governed? Clearly, the content of their products is primarily water, these products generally leave the watershed from which they were taken, and a very large amount of water is taken (and evaporates) during their production process. How will this legislation and regulations treat these industries?

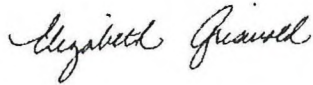
While we do not intend to single out other industries, it becomes apparent that the "consumptive use" definition is not a sound basis for policy. While we respect the definition as having been similarly used in the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, Bill 198 and its accompanying materials fails to acknowledge that the International Joint Commission, in a 1999 report, recognized the Great Lakes Basin as a net importer of bottled water ("Great Lakes Basin – Bottled Water Markets & External Trade" November 1999). Similarly, the Great Lakes Annex Charter does not view bottled water as a diversion. To selectively choose this "consumptive uses" definition while ignoring other policies and decisions surrounding bottled water rings hollow.

The CBWA strongly believes that the new charges must be applied to all uses, at the equal rate, and at the same time to ensure that Ontario's water resources are sustained, protected and properly managed for generations to come. The overall percentages taken by different users, "water-in/water-out" principles and trade agreements all need to be considered before the passage of Bill 198. We would also submit that the condition and quality of water taken be considered before implementation.

Conclusion

Section 1 of Bill 198 states that "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." The CBWA supports these objectives; however, we submit that this bill as written, particularly the regulatory regime that proposes the new water taking charges, fails to meet these goals. We protect and manage our water resources. We are efficient users. The bill does not help our economic well-being. Our usage is sustainable; if not, we would be out of business. We urge the government to revisit the water charges components of this bill.

Sincerely,



Elizabeth Griswold
Executive Director



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May 2, 2007

VIA FACSIMILE

Caroline Cosco
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Re: Bill 198

Dear Ms Cosco:

We act for the Canadian Bottled Water Association (CBWA). The CBWA has asked us to review and comment on s. 1(13) of the recently release Bill 198 as well as the water takings charges that the Province has indicated an intention of issuing pursuant thereto. As is discussed below, we have significant concerns regarding the constitutionality of the proposed water takings charges.

THE PROPOSED WATER CONSERVATION CHARGES MUST BE CHARACTERIZED AS REGULATORY CHARGES IN ORDER TO BE CONSTITUTIONAL

The Province is able, pursuant to s. 92(2) of the *Constitution Act, 1867* to raise revenue for provincial purposes only by means of direct taxation.¹ Examples of direct taxes are such things as flat fees for licences (such as are already charged for Permits to Take Water) and taxes imposed on the ultimate purchaser of a good (such as the retail sales tax) or a tax on land.

The converse of the provincial ability to impose direct taxes is the provincial inability² to raise revenue by means of indirect taxation. Taxes on raw materials, or taxes imposed at the manufacturer or wholesale level are classic indirect taxes. The Supreme Court of Canada has established a test for determining whether a tax is indirect as follows:

is the tax related or relateable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in the course of being manufactured or marketed³

¹ *Allard Contractors Ltd. v. Coquillam (District)* [1993] 4 S.C.R. 371 at para. 33. Examples of direct taxes are such things as flat fees for licences (such as are already charged for Permits to Take Water) and taxes imposed on the ultimate purchaser of a good (such as the retail sales tax) or a tax on land.

² The *Constitution Act, 1982*, expanded the taxing power of the provinces by allowing that they could, subject to certain conditions, impose taxes of any form on "non-renewable natural resources and forestry resources in the province and the primary production therefrom". It is notable that water, being a *renewable, non-forestry* natural resource, is one of the rare natural resources that was not captured by this expanded power.

³ *Allard* at para. 39.

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Fees such as those proposed in the current Water Conservation Charges Proposal⁴ are by their nature indirect. Through the water conservation charges the province proposes to impose a fee on water takings that is related to the volume taken. As a result these proposed fees are directly "relateable" to "a unit of the commodity" (bottled water), are "imposed in the course of its manufacture" (when it is being taken for bottling) and are indirect taxes that are *ultra vires* the Province.

As a result, unless the Province is successful in its attempt to characterize the fees as "regulatory charge[s] for water use, not a royalty or a tax",⁵ it is unable to impose them.

CALLING THE CHARGES "REGULATORY CHARGES" DOES NOT NECESSARILY MAKE IT SO

The exception that provinces rely on in circumstances where they have been found to be imposing an indirect tax or fee is their limited ability to charge fees that are ancillary or "adhesive" to an otherwise valid regulatory scheme pursuant to s. 92(9) of the *Constitution Act, 1867*.⁶ The Courts have determined that such fees must either:

- (i) be direct, (in the same way as direct taxes are, meaning they would somehow have to be charged to the ultimate consumer directly, which is impractical if not impossible); or
- (ii) be indirect, in which case they must be directed to a recovery of the actual costs of the regulated activity.

By its very nature this power is an exception to a more general prohibition against indirect taxation. As a result, such fees are allowed only in limited circumstances:

"in so far as the power pursuant to s. 92(9) comprehends indirect taxation, this power is to be strictly limited 'such that it can only be used to defray the costs of the regulation'. Any power of indirect taxation extending beyond regulatory costs would indeed render s. 92(2) meaningless."⁷

It is important to note that this limitation has two aspects. First, the purpose of the fees must be to defray costs. Secondly, the costs that the fees are intended to defray must be the actual costs of the regulated activity for which they are charged. To put it another way, fees cannot be tied to a regulated activity in some indirect, or theoretical sense, but must be focused directly on defraying the cost of the actual activity a permit or license is issued for.

The above requirement for a direct link between the fee and the regulated activity is clear in the analysis by the majority of the Supreme Court of Canada⁸ in *Re Ontario Home Builders' Association v. York Region Board of Education*. In *Home Builders'* the Supreme Court was asked to review the constitutionality of Ontario's Education Development Charge (EDC) legislation, which imposed charges on new home

⁴ Ontario Ministry of the Environment, "Water Conservation Charges Proposal", April 2007.

⁵ Water Conservation Charges Proposal, page 3.

⁶ The *Constitution Act, 1867*, s. 92(9) permits provinces to make laws relating to "Shop, Saloon, Tavern, Auctioneer and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes."

⁷ *Re Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929 at para 53.

⁸ The majority upheld the EDC scheme on the basis that it allowed charges that adhered to a regulatory scheme. The minority was of the view that the scheme constituted indirect taxation and could not be saved by the exception.

developments intended to defray the cost of constructing educational facilities to house the increased number of children in the area of the development. As the majority stated in *Home Builders*:

It is important to note that EDCs can only be directed toward education capital costs made necessary by new residential development. EDC revenue cannot be used to defray capital costs associated with existing schools; this is another indication that the scheme is properly limited to the actual costs of regulation.⁹

The charges are not proposed to defray the costs of regulating the bottled water industry

Unlike the EDC regime, the proposed water takings charges are not imposed to defray the costs the Province incurs in granting permits and in responding to the direct impact of those permits. Rather, as the province itself states:

The overarching objective of the proposed charge is to contribute to the conservation, protection and sustainable use of water for the environmental, social and economic benefit of the people of Ontario.¹⁰

In addition, the Province has attempted to exert an apparent behaviour modification power by claiming that by imposing the charges it/or the Province will "influence behaviour consistent with the goals of the program (e.g., promoting water conservation)."¹¹ Indeed, the goal of promoting water conservation is evidenced by the name of the proposal itself

Water conservation is a laudable goal. There may in fact be serious issues with water conservation in Ontario that can be remedied by Provincial regulation. The fact, however, that an indirect fee is taken for a laudable goal is not sufficient to render it constitutional. Irrespective of the merits of the Province's reasons, the fee *must be taken to defray costs that are directly associated with the regulated activity*.

Conservation has no link to water taken for the purpose of producing bottled water. There is virtually no wastage by water bottlers – they bottle what they take. Further, the public has a set requirement for drinking water; bottled water is used to satisfy part of that demand. Any decrease in water taken to produce bottled water will be offset by an increase in water taken by other means for public consumption. Indeed, the only potential nexus between water conservation and bottled water is if the Province is proposing that the public drinks too much water!

The charges go beyond defraying the cost of regulating those who pay them

It is no more constitutional for charges to be taken to pay for regulation of those who are not required to pay the charges than it is for charges to be taken to pay for regulation not related to the charges. That, however, is exactly what is proposed by the Water Conservation Charges Proposal. If water conservation charges are implemented as proposed not all of those who take water are required to pay fees.

By establishing a cross-subsidization scheme that charges some users more than their fair share and others less or nothing at all the Province has not established a regulatory charge - it has established an indirect tax. If the proposed charges were truly regulatory charges they would be tied to the effects of the activity

⁹ *Home Builders*, *supra* at para 55.

¹⁰ Water Conservation Charges Proposal, page 4.

¹¹ Water Conservation Charges Proposal, page 3.



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permitted by the fee (e.g., water taking for bottled water uses), not to all water-related activities. The parallel can be drawn to the EDC scheme in *Home Builders*, which was limited to paying for *new* education costs incurred as a result of the permitted development, not to all education costs in the Province.

Those who pay a higher fee than their share of the regulatory costs are paying an indirect tax.

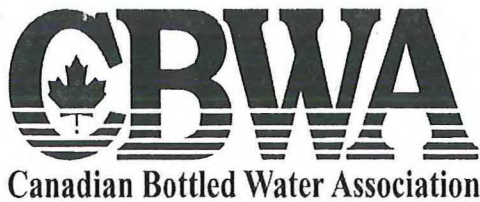
Yours very truly,

T. W. Bermingham

TWB/mnm

c: P. Hogg
✓ E. Griswold, Canadian Bottled Water Association

COPY



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Bill 198 and the Bottled Water Industry: Myths and Facts

As Ontario's MPPs consider bill 198, the Canadian Bottled Water Association wants to ensure that decisions are made based on facts, rather than myths and incorrect statements.

Myth: Water bottlers take a large amount of Ontario water.

Fact: According to the Ministry of the Environment's own permit data, water bottling companies take 2/10 of 1% of all water taken in Ontario.

Myth: Excluding municipal and agricultural takers, water bottlers take more water than other private industries.

Fact: All Ontario water bottlers combined take as much water in a year as ten golf courses. There are 700 golf courses in Ontario.

Myth: Water bottlers are not interested in paying anything for water taking.

Fact: Water bottlers support the concept of paying their fair share for water usage. All users of water should be required to pay according to their use to drive efficient water management practices.

Myth: Water bottlers get their source water for free.

Fact: Bottlers face significant costs associated with exploration, property acquisition, drilling, plant construction, equipment, testing, monitoring, packaging, labour and shipping. There is very little that is free in the water bottling business.

Myth: Water bottlers export Ontario water to other jurisdictions.

Fact: The weight of the product, combined with a number of new plants in other jurisdictions makes bulk exports unfeasible. None of the Ontario bottled large container (18 litre) product is exported; a very small amount of the 500 ml product is exported.

Myth: The Great Lakes basin needs protection from water exports.

Fact: According to a report prepared for the International Joint Commission, the Great Lakes basin is a net importer of bottled water, with nine litres imported for every one litre exported.

Myth: Water bottlers should pay because theirs is a "consumptive use"; that is, the water leaves the watershed from which it was taken.

Fact: Every time someone waters their lawn, 87% of that water evaporates and leaves the watershed from which it was taken. And most bottled water is sold and consumed in markets close to the source. Shipping water over great distances doesn't make financial sense.

Myth: Water bottlers have large profit margins, so the proposed water taking charges are small enough to not be a problem.

Fact: Water bottlers sell to retailers, not to the public. Most bottled water is bought and sold by the case, for pennies per bottle, often at big box retail stores. These retail chains make their buying decisions on pennies, even fractions of a penny. Any new government charges will have a negative impact on Ontario's beverage and food manufacturers, many of whom provide economic opportunities in rural Ontario.

Myth: Water bottlers do not support measures to protect the quality and quantity of Ontario's water supply.

Fact: Water bottlers have said publicly that they support measures to protect the quality and quantity of Ontario's water. Bottlers have millions of dollars invested in this province; without a clean, plentiful supply, bottlers would be out of business. The Executive Director of the Canadian Bottled Water Association has been a member of the Ontario Great Lakes Charter Annex Advisory Panel for several years.

Myth: Water bottlers are not socially or environmentally responsible.

Fact: Ontario water bottlers have an admirable environmental track record, even with the Ministry of the Environment. And when the Walkerton tragedy struck, water bottlers donated 1.5 million litres of water to the people of Walkerton.

Statement: Water bottlers make a profit, so they should pay something to the province.

Fact: Water bottlers who make a profit contribute to the province through corporate income taxes. The province also collects Permit To Take Water fees, Employer Health Taxes, WSIB premiums, Blue Box fees—whether bottlers are profitable or not, and retail sales tax on the sale of the product to consumers. Water bottlers agree with the concept of paying their fair share for water usage. All users of water should be required to pay according to their use to drive efficient water management practices.

Statement: "A secondary objective (of the new charges) is to provide a financial incentive for companies to use water more efficiently." (MOE website April 3rd, 2007)

Fact: 97% of water taken by bottlers for bottling ends up in the bottle. The industry is extremely efficient.

Statement: "The charge framework is based on different rates being developed for sectors depending on how the water is being consumed." (MOE website April 3rd, 2007)

Fact: An aquifer cannot distinguish who takes water and for what purpose. Water taken is water taken. Any new fees should be equally applied across all users, at the same time. There is no policy basis for singling out water bottlers, or to have bottlers be the first to pay.

Statement: "The costs of Ontario's water quantity management programs are significant...One way to recover management costs is to require commercial and industrial users to pay their fair share." (MOE website April 3rd, 2007)

Fact: The government's cost of managing water does not discriminate between different users. Only the proposed new water taking charges do by not treating users equitably.

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Bill 198: What Every Ontario MPP Should Know

As Ontario's MPPs consider bill 198, the Canadian Bottled Water Association wants to ensure that decisions are made based on facts, rather than myths, incomplete information and incorrect statements.

Some facts for Members to consider:

- Bill 198 states that only industrial and commercial takers of water will have to pay the new regulatory charge on water takings
- The bill and its related materials (backgrounders, news releases, etc.) indicate that the revenue generated from this new fee is necessary to defray the costs of Ontario's water management and conservation programs
- According to the Ministry of the Environment's own document ("Water Conservation Charges Proposal, April 2007"), industrial and commercial water takers account for 2% of all of the permitted water takings in this province; 98% of water is taken by hydropower generators, other power generators; municipal (domestic) takers, non-commercial users, and agricultural users
- Of that 2%, the bottled water industry accounts for 2/10 of 1% of all MOE permitted water takings
- Water bottlers pay up to \$3,000 for water taking permits; this fee is supposed to defray the costs associated with the permitting process
- Under existing provincial legislation, source water bottlers are left to cover the cost of their own water infrastructure and water management, creating little cost to the province
- Notwithstanding these realities, Bill 198 calls for water bottlers to pay these new fees and to be among the first to pay because water bottlers make a profit by using water
- The CBWA believes it is unfair for water bottlers and other businesses, who the government acknowledges only take 2% of the water in Ontario, to be asked to pay for a disproportionate share of the government's costs associated with water management and conservation
- The government also says that the new charge is intended to encourage conservation and efficiency
- It takes a little over a litre to produce a litre of bottled water, considered by the government to be a "highly consumptive use" because the water leaves the watershed from which it originated
- It takes over 7,800 litres of water to produce 4 tires; over 147,000 litres to produce a car; and over 236,000 litres of water to produce a ton of steel. The government does not consider these to be highly consumptive.
- Bill 198 proposes that water bottlers pay the new charge on ALL water taken by bottlers; there are no provisions for water that is taken, bottled and returned to the water shed from which the water originated.

The Canadian Bottled Water Association believes that Ontario's water bottlers should pay no more than their fair share under this new regulatory scheme. Fairness demands that all takers of water contribute to the costs of Ontario's water management and conservation programs. At the very least, all industrial and commercial users should pay the same amount, beginning at the same time. Anything else would be unfair.

For more information, contact Elizabeth Griswold, Executive Director, at (416) 618-1763.