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COURT OF APPEAL FOR ONTARIO

WEILER, BLAIR and ROULEAU JJ.A.

B E T W E E N :

MARILYN PEACOCK and REGINALD PEACOCK	)	**Keith M. Jones for the appellant**
Applicants (Respondents)	)	
- and -	)	
THE CORPORATION OF NORFOLK COUNTY	)	**Thomas A. Cline, Q.C. for the respondents**
Respondent (Appellant)	)	
- and -	)	
THE ONTARIO PORK PRODUCERS' MARKETING BOARD	)	**John M. Buhlman for the intervener**
Intervener	)	
	)	**Heard: December 13, 2005**

On appeal from the judgment of Justice Eugene B. Fedak of the Superior Court of Justice dated November 19, 2004.

ROULEAU J.A.:

OVERVIEW

[1] The respondents, the Peacocks, operate a 1,000 head intensive hog operation and wish to double the capacity of their hog raising facility to 2,000 hogs. The facility will contain a large reservoir for nutrient storage. The Peacocks received approval of their Nutrient Management Plan, as required under the *Nutrient Management Act, 2002*, S.O. 2002, c. 4 (the Act), and corresponding Regulation 267/03 (the Regulation). Among the requirements of the Regulation is that the new nutrient storage facility must be at least 100 metres from a municipal well.

[2] The appellant municipality, Norfolk County, passed By-law 64-Z-2003 (the By-law) that prohibits siting intensive livestock operations and associated nutrient facilities within Sensitivity Areas 1 and 2. The appellant submits that the Peacocks' proposed expansion is located within Sensitivity Area 2, also referred to as the two-year capture zone. The two-year capture zone refers to an area from which it would take two years or less for contamination introduced at that point to reach the municipal well.

[3] Norfolk County takes the position that the Peacocks must comply with both the Regulation and the By-law and, that the By-law prohibits the proposed expansion. The Peacocks and the intervener, the Ontario Pork Producers' Marketing Board, take the position that the Regulation supersedes the By-law, pursuant to s. 61 of the Act and only compliance with the Regulation is necessary.

[4] Section 61(1) of the *Nutrient Management Act* provides: "A regulation supersedes a by-law of a municipality or a provision in that by-law if the by-law or provision addresses the same subject-matter as the regulation." There are two main issues on appeal. The first is whether s. 61 specifies that, for conflicts between the Regulation and a municipal by-law, a test different from the impossibility of dual compliance test set out in *11957 Canada Ltée (Spraytech Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 is to be used. Second, whether the Regulation and the relevant provision of the By-law address the same "subject-matter".

[5] The application judge ruled in favour of the respondents having found that the Regulation addressed the same subject-matter as the By-law, and as such, superseded the By-law.

[6] For the reasons that follow, I would dismiss the appeal. Section 3.31.4(c) of the By-law does address the same subject-matter as the Regulation. As a result the Regulation renders that portion of the By-law inoperative.

SUMMARY OF RELEVANT FACTS

1) Background

[7] In response to public concern regarding the potential for groundwater contamination resulting from intensive livestock operations, Norfolk County initiated a groundwater study on December 4, 2001. An interim control by-law was passed on December 19, 2001 that temporarily prohibited the use of land, buildings and structures within Norfolk County for intensive livestock operations. The results of the groundwater study prompted the passing of By-law 64-Z-2003, which amended Norfolk County's Zoning By-law 1-1999. The By-law seeks to protect the municipal water wells by restricting land use in designated areas, which pose an unacceptable risk to the water source. It establishes Sensitivity Areas, ranked one through four where Sensitivity Area one represents the highest potential risk area. Land within each Sensitivity Area is subject to various land-use restrictions. The By-law lists three categories of land use (A,

B and C) and each category lists various activities and their corresponding risk to municipal water supplies, category A posing the highest risk. Intensive livestock operations and associated nutrient facilities are not listed under any of these three categories. They are addressed by a separate provision, s. 3.32.4(c), which specifically prohibits such operations and facilities within Sensitivity Areas 1 and 2. The appellant submits the Peacocks' proposed expansion is located in Sensitivity Area 2, and is thus prohibited by the By-law.

[8] The province enacted the *Nutrient Management Act* in response to the Walkerton tragedy as part of an overall plan to protect Ontario's drinking water.[1] The Act provides province-wide standards governing the distribution, storage, spreading, record keeping of nutrients and the construction of their associated facilities. Under the Act, all farmers expanding or building new intensive livestock operations must obtain provincial approval of a Nutrient Management Strategy and Plan to ensure that their nutrient management meets the provincial standards. The Peacocks have obtained this approval for their expansion.

2) Position of the Parties

[9] The specific area of concern between the Regulation and the By-law is the minimum distance separation required from a municipal well. Section 63(1)(b) of the Regulation prohibits the construction or expansion of a permanent nutrient storage facility, if the facility is located within 100 metres of a municipal well. The By-law prohibits nutrient storage facilities within Sensitivity Areas one and two. On the facts of this case, this has the effect of increasing the distance that the Peacocks expansion must be from the municipal well to more than 100 metres.

[10] The appellant submits that the By-law is necessary to protect the quality of water found in the municipal well and that while the Regulation prohibits construction within 100 metres it is silent on construction located in excess of 100 metres from a municipal well. Using the principle of enhancement, the appellant submits that the By-law enhances the environmental protections found in the Regulation and, thus both can co-exist. Any overlap between the Regulation and By-law can be resolved by use of the principle of accommodation. The appellant also submitted such principles should be invoked because of the precautionary principle, to prevent environmental degradation where there is a threat of serious or irreversible damage demonstrated by the groundwater study.

[11] The respondents submit that construction is permitted as long as the requirements delineated in the Act and its Regulations have been met and that it is irrelevant whether

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[1] See Ministry of the Environment, "Status of Part Two Recommendations Report of the Walkerton Inquiry" *Ministry of the Environment* (May 2005), online: <http://www.ene.gov.on.ca/envision/water/sdwa/status_part2.htm> The government has indicated that recommendations 10 through 15 have been implemented by the *Nutrient Management Act*.

or not the By-law enhances the protection of a municipal water source. They submit that the proper test to be applied is not the impossibility of dual compliance test but rather the test stipulated in s. 61 of the Act.

[12] The intervener submits that the main issue is whether the By-law and the Regulation address the same subject-matter, as provided in s. 61 of the Act. It submits that the Regulation does address the same subject-matter as the By-law as both the substance and purpose are the same.

RELEVANT LEGISLATIVE PROVISIONS

1) The *Nutrient Management Act*

i) Purpose of the Act

[13] The purpose of the *Nutrient Management Act* is set out in s. 1 as follows:

1. The purpose of this Act is to provide for the management of materials containing nutrients in ways that will enhance protection of the natural environment and provide a sustainable future for agricultural operations and rural development. 2002, c. 4, s. 1.	1. La présente loi a pour objet de prévoir des façons de gérer les matières contenant des éléments nutritifs qui protégeront davantage l'environnement naturel et assureront le développement durable des exploitations agricoles et des collectivités rurales. 2002, chap. 4, art. 1.

[14] The *Nutrient Management Act* and the regulatory scheme enacted by Ontario Regulation 267/03 constitute a comprehensive regulatory framework for the distribution, storage, spreading, record keeping of nutrients and their associated facilities.

[15] By enacting the *Nutrient Management Act* and Regulation, the province sought to balance environmental protection and sustainable agriculture. Intensive hog production generates large amounts of nutrients, and as such environmental concerns and risks cannot be avoided. These risks are managed through the *Nutrient Management Act* and Regulation.

[16] The nutrients generated by the hogs are accumulated in storage tanks and, periodically, are taken from the tanks and spread over agricultural land. A significant part of the Act and Regulation deals with the management of environmental concerns surrounding the storage and spreading of these nutrients. A focus of the environmental concern is the potential for the nutrients to contaminate both surface and ground water.

[17] Given the two competing interests, hog production and protection of the environment, the Regulation was prepared as a joint effort between the Ministry of the Environment and the Ministry of Agriculture and Food.

ii) Structure of the Act

[18] The environmental concerns relating to the storage of nutrients are addressed by the *Nutrient Management Act* and Regulation through a combination of

a) zones of prohibition;

b) construction and other safeguards with respect to storage tanks; and

c) the requirement that those generating and storing nutrients receive approvals which involve the filing and compliance with management plans and management strategies.

[19] These safeguards reduce the risk of tanks leaking into the environment and their contents making their way into surface or ground water.

[20] The *Nutrient Management Act* and Regulation deal specifically with the setback requirements from a municipal well. Section 63(1)(b) of the Regulation prohibits the construction or expansion of a permanent nutrient storage facility within 100 metres of a municipal well.

[21] In addition to compliance with the minimum setback provisions, all nutrients storage facilities must meet various construction standards. These construction standards, depending on the type of facility, take into account the hydrogeologic or geotechnical characteristics of the site and soil.

2) The Corporation of Norfolk County's By-law

[22] By-law 64-Z-2003 amended the municipality's Zoning By-law 1-1999 so as to prohibit placing nutrient storage facilities within a "two-year capture zone" or Sensitivity Area 2 as defined in the By-law. The two-year capture zone was determined as a result of an expert groundwater study which studied the tendency or likelihood of contamination reaching a specified position in the groundwater system after introduction at some location above the uppermost aquifer. The limit of the two-year capture zone is the point from which it would take two years for contamination introduced at that point to reach the municipal wells.

[23] The By-law seeks to protect the municipal water wells by prohibiting certain land uses within the Sensitivity Areas established by the By-law. Any facilities built outside of the prohibited areas are not addressed by the By-law. Unlike the *Nutrient Management Act* and Regulation, the By-law does not impose specific construction

standards nor does it provide for any record keeping. The By-law's zones of prohibition also apply to land uses other than intensive livestock operations such as petroleum products refining and various industrial uses. Because the proposed expansion of the respondents' hog operation involved the expansion of a barn and nutrient storage facility within the two-year recapture zone or Sensitivity Area 2 the municipality takes the position that such an expansion would contravene the By-law.

[24] The respondents take the position that they had applied for and obtained approval of their Nutrient Management Plan under the *Nutrient Management Act* and Regulation. Having complied with all of the statutory requirements set by the province, they maintain that they need not comply with the municipal By-law and can proceed with the expansion without municipal approval.

ISSUE

[25] The issue to be determined is whether the By-law, by prohibiting the establishment of an intensive livestock operation within the two-year capture zone, addresses "the same subject-matter as the Regulation" and is thereby rendered inoperative by s. 61 of the *Nutrient Management Act*.

ANALYSIS

1) Law

[26] The leading authority on reconciling overlapping provincial statutes and municipal by-laws is the Supreme Court of Canada's decision in *Spraytech, supra*. In that case, the court upheld the Town of Hudson's by-law regulating the use of pesticides despite the existence of provincial legislation in that field. After recognizing that in environmental matters the precautionary principle should apply, the majority of the court applied the impossibility of dual compliance test, taken from the federal-provincial context, to the provincial-municipal context. The court commented that there was a fine line between laws that legitimately complement each other and those that invade another government's protected legislative sphere. At para. 38, the court held the impossibility of dual compliance test requires first, that the municipal by-law deal with a similar subject as the provincial statute, and then that "obeying one necessarily means disobeying the other". Only then can the court find that a municipal by-law is inconsistent with a provincial statute. The court held that as a general principle, "the mere existence of provincial or federal legislation in a given field does not oust municipal prerogatives to regulate the subject-matter" (para. 39). However, the court also stipulated that the impossibility of dual compliance test would not apply when, as in the present case, the relevant provincial legislation specifies a different test (para. 36).

[27] In my view, this logically flows, in part, from the fact that municipalities are creations of the province and do not have constitutionally protected areas of operation as

in the case of provinces and the federal government. As a result, the province can dictate how overlap in provincial and municipal regulation is to be resolved.

[28] In the present case, the test to resolve overlap between the *Nutrient Management Act* and Regulation and municipal by-laws is established by s. 61. Section 61 reads as follows:

> 61. (1) A regulation supersedes a by-law of a municipality or a provision in that by-law if the by-law or provision addresses the same subject-matter as the regulation. 2002, c. 4, s. 61(1).
>
> (2) A by-law or a provision of a by-law that is superseded under subsection (1) is inoperative while the regulation is in force. 2002, c. 4, s. 61 (2)
>
> 61. (1) Les règlements remplacent les règlements municipaux d'une municipalité ou leurs dispositions qui traitent de la même question. 2002, chap. 4, par. 61(1)
>
> (2) Le règlement municipal ou sa disposition qui est remplacé en application du paragraphe (1) est inopérant tant que le règlement reste en vigueur. 2002, chap. 4, par. 61 (2).

As a result, a by-law of a municipality or a provision of that by-law that "addresses the same subject-matter as the regulation," is rendered inoperative. Only if the by-law or a provision thereof does not address the same subject-matter will the impossibility of dual compliance test established in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 and applied in a provincial-municipal context in *Spraytech*, would apply.

2) Application to the Case at Bar

[29] The appellant argues that the application judge was in error and makes two principal submissions. The first is that, because the *Nutrient Management Act* and Regulation prohibit the construction of a nutrient storage facility within a 100 metres of a municipal well, their silence allows construction of a storage facility beyond the 100 metre zone. The municipality's By-law does not conflict with the Act and Regulation because it expands on the prohibition and enhances the protection of its municipal wells. As set out in *Spraytech*, it is legitimate for municipalities, as trustees of the environment, to enhance the protection provided by another sphere of government; they are at the level of government closest to the citizens affected and should thus be responsive to their needs. The impossibility of dual compliance test should be applied to this case. Since the municipal and provincial provisions are not in conflict, the by-law must be complied with. See *Spraytech*, *supra* at paras. 3, 27, 31-38.

[30] Secondly, in oral submissions, the appellant argued that the expression "addresses the same subject-matter" should be interpreted as meaning "addresses the same purpose." Since the purpose of the *Nutrient Management Act* and Regulation is nutrient management and protection of the environment is only an ancillary purpose, and the

purpose of the By-law is the protection of the environment and the municipality's source of water, they address different purposes or "subject-matter" and s. 61 does not apply.

[31] I will address each of these submissions in turn.

a) Does the Impossibility of Dual Compliance Test Apply?

[32] As set out in *Spraytech*, the impossibility of dual compliance test only applies in the event that the relevant provincial legislation does not specify a different test. Section 61 of the *Nutrient Management Act*, in my view, specifies the test to be applied in the event that the Regulation and a local by-law or provision of a by-law address the same subject-matter. If they address the same subject-matter, s. 61(2) specifies that the by-law or provision of the by-law is "inoperative while the regulation is in force." Section 61 therefore clearly displaces the impossibility of dual compliance test.

[33] In terms of policy, this result is consistent with the intent of the Act. The Act sought to achieve a balance between environmental protection and sustainable agriculture. If municipalities were free to become involved and deal with the same subject-matter as is dealt with by the Act and Regulation and impose a higher environmental standard, then the balance created by the Act as intended by the province would be interfered with.

[34] This reading of s. 61 is reinforced when reference is made to the legislative debates. The Standing Committee on General Government discussions on June 3, 2002 made it clear that the drafters of the legislation did not intend to allow for municipal by-laws to enhance the environmental protection provided by regulation under the *Nutrient Management Act*. The proposal to amend s. 61 to allow the municipality to provide higher standards for the protection of the public or the environment than are provided in the Regulation was defeated.[2]

[35] Additionally, the debates make reference to Recommendation 14 from the Walkerton Report[3] as the basis for the government's insistence on s. 61. Recommendation 14 reads as follows:

> Once a farm has in place an individual water protection plan that is consistent with the applicable source protection plan, municipalities should not have the authority to require that farm to meet a higher standard of protection of drinking water

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[2] Ontario, Legislative Assembly, Standing Committee on General Government, *Hansard*, (3 June 2003) at G-48-G-51. The current s. 61 was referred to then as s. 60, but is substantively exactly the same.

[3] Ontario, Walkerton Commission of Inquiry, *Report of the Walkerton Inquiry*, part 2 (Toronto: Queen's Printer for Ontario, 2002) at 139, online: Ministry of the Environment <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/walkerton/part2/>

> sources than that which is laid out in the farm's water protection plan.

[36] I conclude, therefore, that the impossibility of dual compliance test does not apply as it has been displaced by a specific provision in the legislation. To the extent that the by-law or provision thereof "addresses the same subject-matter" as the Regulation, the By-law or provision thereof will be inoperative.

[37] My conclusion is further reinforced by s. 8 of the Regulation. Section 8 reads as follows:

8. Subject to the Act, the requirements of this Regulation are in addition to and independent of the requirements in an approval, order or instrument issued under any other Act, other than a municipal by-law, and in the event of conflict, shall prevail. O. Reg. 267/03, s. 8.	8. Sous réserve de la Loi, les exigences du présent règlement s'ajoutent aux exigences d'une approbation, d'une autorisation, d'un arrêté, d'un ordre ou d'un acte délivré, pris, rendu ou passé en vertu de toute autre loi, sauf un règlement municipal, sont indépendantes de celles-ci et, en cas d'incompatibilité, l'emportent sur elles. Règl. de l'Ont. 154/04, art. 1.

The section provides that the Regulation under the *Nutrient Management Act* is in addition to and independent of the requirements under any other act but then goes on to specify that, in the event of conflict with other provincial requirements, the Regulation under the *Nutrient Management Act* prevails. Arguably, the section in effect says that the impossibility of dual compliance test is to apply in those situations. The section, however, specifically excludes municipal by-laws from the application of s. 8. This serves as confirmation that a test other than the impossibility of dual compliance test is to apply where the regulation and municipal by-laws overlap. This other test is the one set out in s. 61.

b) Do the Regulation and the By-law address "the same subject-matter"?

[38] In its oral submissions on this point, the appellant acknowledged that if the court were to define the "subject-matter" as the siting of the storage facilities, it would have to conclude that the Regulation and By-law address the same subject-matter. Its position, however, was that "subject-matter" as used in s. 61 in fact means purpose. When approached in that way, the court should conclude that the purpose of the By-law and the purpose of the Regulation are quite different. The purpose of the By-law is the protection of the municipal water source and the purpose of the Regulation is nutrient management.

[39] I agree with the appellant's submission that, in determining whether the Regulation and By-law deal with the same subject-matter, one should look beyond the

direct legal effect of the two provisions and consider their object or purpose, that is, what are they dealing with and what are they seeking to achieve.

[40] The purpose of the statute is the goal pursued by Parliament in enacting it and can be identified either by looking at the broad context of the statute or by considering the problem that Parliament was seeking to remedy. Evidence of this purpose is normally found in the purpose statement of the statute. The effect of the statute is also relevant and considered by examining its practical or legal consequences. See *Samur v. City of Quebec*, [1953] 2 S.C.R. 299.

[41] In the present case, the Regulation and the By-law have similar underlying purposes and objects: to protect against water contamination of municipal wells. Each attempts to achieve this goal in different ways and each has its own unique focus and stated purpose.

[42] The Regulation attempts to achieve this goal by focusing on nutrient management of livestock operations. Depending on whether the livestock operation commenced before the legislation was enacted and the level of nutrients generated, the *Nutrient Management Act* and the Regulation provide a comprehensive scheme dealing with all aspects of the storage and spreading of nutrient materials. The Regulation therefore primarily deals with nutrients and how they should be managed in an agricultural operation. It balances the protection of ground water and the natural environment with the objectives of sustainable agricultural operations and rural development.

[43] The By-law attempts to make appropriate use of land planning by categorizing both the land in the municipality and its sensitivity to potential contamination. It does so by controlling the land use activities that can be performed on such land. Specifically, it prohibits certain combinations of location and activity that were shown by the ground water study to pose a threat to the municipality's source of water. The By-law aims to protect the municipality's water supply and does so by prohibiting land uses within certain areas where those uses pose an unacceptable level of risk to groundwater quality. In doing so, however, the By-law includes a specific provision that regulates intensive livestock operations and associated nutrient storage facilities.[4]

[44] In oral submissions, the appellant argued that, because the dominant purpose of the *Nutrient Management Act* and Regulation is the management of nutrient materials in agricultural operations and the dominant purpose of the By-law is the protection of groundwater through land use planning, the purposes of the Regulation and the By-law

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[4] See Norfolk County, By-law, 64-Z-2003, *Wellhead Protection* Areas, (16 December 2003), s. 3.31.4(c):

> Intensive livestock operations and associated manure storage facilities shall be prohibited on lands with Sensitivity 1 and 2 WHPAs. For the purpose of this Section, Intensive Livestock is defined as including 150 livestock units or 50 or more livestock units on a land base, which exceeds 2 livestock units per tillable acre available to the farm operation for application of nutrients.

are different. They should, therefore, be taken to address a different "subject-matter" and s. 61 should not apply.

[45] This interpretation, however, ignores the fact that s. 61 requires a comparison between the whole of the Regulation and the various provisions within the By-law. As set out above, the By-law contains a specific provision that regulates intensive livestock operations and associated nutrient storage facilities. This provision addresses the same subject-matter and has the same purpose as the Regulation. Section 3.31.4(c) of the By-law specifically prohibits the locating of "intensive livestock operations and associated manure facilities" on lands within the two-year capture zone or Sensitivity Area 2. The dominant feature of this provision of the By-law is the same as the purpose of the Regulation, that is, the management of intensive livestock operations and their associated manure storage facilities, and even has one of the same underlying goals, to prevent groundwater contamination.

[46] My conclusion that this section of the By-law and the Regulation address the same subject-matter, the regulation of livestock operations and, in particular the nutrients generated, is supported by the actions of the appellant. The record indicates that, after identifying the respondents' farm as a potential source of contamination, the appellant sent a letter to the respondents requesting that they cooperate with the appellant in retaining a qualified engineer to report on the structural integrity of the storage facility (barn and manure pits) and to identify any remedial work; install monitoring wells to evaluate the quality of the groundwater and prepare a specific plan for the spreading of manure which would include the potential for runoff, how runoff might affect the water quality of nearby creeks, and the extent of manure loading that the land can assimilate without adversely affecting the quality of surface water and ground water. These are precisely the types of activities that the Regulation addresses.

[47] Before concluding, I would like to comment on the approach taken by my colleague, Justice Blair. In essence he finds that the subject matter of the Regulation is "overall management of nutrient materials in relation to farming operations" and that the subject matter of the portion of the By-law in issue is "the prohibition of the use of land for intensive livestock operations and associated manure storage facilities in the two-year capture zone". In other words, he finds that the Regulation manages while the By-law prohibits. He then concludes that the Regulation and By-law do not address the same subject matter and therefore, s. 61 does not apply.

[48] With respect, I do not agree with his conclusion. I say this for six reasons.

[49] First, as I have explained, the legislative debates make it clear that one of the reasons for including section 61 in the *Nutrient Management Act* was to give effect to Recommendation 14 contained in the Walkerton Report. As set out earlier, that Recommendation was that municipalities should not have the authority to require farms

to meet a higher standard of protection of drinking water sources than that which is provided for in the plan approved under the provincial scheme. The interpretation of s. 61 made by Justice Blair thwarts this intention of Parliament.[5]

[50] Second, I disagree with the use of the pith and substance test in this case. The pith and substance analysis is used to characterize a law for the purposes of determining which head of power it falls within. See *Kitkatla Band v. British Columbia* (*Minister of Small Business, Tourism and Culture*), [2002] 2 S.C.R. 146 at para. 52. As such, it is an exercise in categorizing laws into existing and known heads of power. The pith and substance analysis attempts to determine the true purpose and effect of the law and then is used to ascertain whether the enacting legislature possesses the jurisdiction to enact. That is not an issue in this case. The municipality clearly has the authority to enact the impugned by-law. It is also appropriate, as set out in *Spraytech*, *supra*, that a broad approach to the interpretation of municipal powers be taken.

[51] The issue in this case, however, is not whether the municipality had the authority to enact it but rather, whether the properly enacted by law "addresses the same subject matter" as the Regulation. This demands a comparison of all of the similarities between the two laws and is a much different interpretive exercise than attempting to characterize the dominant feature of a law. By focusing only on the dominant feature of each law, the pith and substance analysis essentially ignores the subsidiary features of each law. This is acceptable in a division of powers exercise as each head of power is relatively broad and the analysis seeks only to slot the impugned law into one category or another. In this case, such an analysis is inappropriate as the test under s. 61 is much broader, and demands a comparison of the similarities of the law.

[52] Additionally, the most common and frequent legislative uses of the phrase "subject matter" indicate that the interpretation of "subject matter" should be content-driven. For example, the term is frequently used to describe the content of dispute, such as a hearing, inquiry, complaint, application, motion or arbitration and the content of a physical item such as a contract, program, lobbying effort or permit.

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[5] Justice Blair also referred to s. 6(2)(u) in stating that his interpretation of s. 61 is not contrary to the legislative intent. In my view, the existence of s. 6(2)(u) does not negate the clear legislative intent to create a system exclusively managed by the provincial government. Section 6(1) provides the Lieutenant Governor with a broad power to make regulations (a) establishing standards respecting the management of nutrients used by and on agricultural operations and (b) establishing standards respecting farm practices. Section 6(2) is a list of examples of areas in which the Lieutenant Governor *may* make regulations and specifically says, "without limiting the generality of subsection (1)." By providing in s. 6(2)(u) that the Lieutenant Governor can pass a regulation setting minimum distance separation between a manure storage facility and a place or feature such as a municipal well and then stating in s. 61 that a regulation supercedes a by-law addressing the same subject matter, the legislative intent revealed in the debates is reinforced rather than weakened. Those debates demonstrate an intent that when a municipal by-law imposes higher environmental standards for nutrient management, s. 61 is meant to make the Regulation supercede the By-law.

[53] In my view, these past legislative uses, although not determinative, suggest that "subject matter" is more than just the dominant feature, and must include an examination of the content, *i.e.* what is included in the By-law and the Regulation.

[54] Third, by limiting the application of s. 61 to situations where the dominant feature of the municipal by-law is the same as the dominant feature of the Regulation the "overall management of nutrient materials in relation to farm operations", s. 61 is rendered to be virtually meaningless. Assuming that municipalities have the authority to enact by-laws that provide for the "overall management of nutrient materials in relation to farm operations", I doubt that a municipality would set out to do so in the comprehensive manner done by the *Nutrient Management Act* and Regulation. This means that, in practice, s. 61 would never apply. Municipalities would be free to manage each element of a farm's operation provided only that they did not do so by way of a by-law whose dominant feature was "the overall management of nutrient materials in relation to farm operations."

[55] Fourth, my colleague restricts the expression "subject matter" to the dominant feature of the Regulation, the overall management of nutrient materials. Although I agree that the broad purpose of the Act has to be taken into account in the interpretation of the expression "subject matter", I do not believe that it ought to be limited in the manner suggested. The expression "subject matter" is to be interpreted in its context. Section 61 applies where a by-law "addresses the same subject matter" [underlining added]. The English Oxford Dictionary defines the verb "address" as follows:

> (a) write the name and address of the intended recipient on …
>
> (b) direct in speech of writing (remarks, a protest, etc.);
>
> (c) speak or write to, esp. formally;
>
> (d) direct ones' attention to (address their concerns).

[56] The verb "addresses" is quite broad. In light of the differences in the nature of their authority and jurisdiction, municipalities and the Province can choose to "address the same subject matter" in very different ways. It follows that a by-law prohibiting the siting of nutrient storage facilities within a given distance of a municipal well is addressing the same subject matter as a regulation containing the same prohibition, albeit for a different distance. It is irrelevant, in my view, that the Regulation provides for an overall management scheme and that the zones of prohibitions are only one aspect of the numerous requirements.

[57] Fifth, if Part VII of the Regulation "siting and construction standards" had been adopted as a separate regulation rather than as a part of the comprehensive Regulation, the "subject matter" of that Regulation would be siting and construction standards of nutrient storage facilities. The dominant feature of this smaller regulation would be the

same as that of the By-law's. Such a narrow interpretation of s. 61 is, in my view, at odds with the modern approach to statutory interpretation which requires that statutes be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of parliament." see Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 21 citing E.A. Driedger, *Construction of Statutes* 2d ed. (Toronto Butterworths, 1983) at 87.

[58] Sixth, assuming that the pith and substance test is the correct approach, my colleague has concluded that the dominant feature of the Regulation is management while the dominant feature of the By-law is prohibition. Because the prohibition provisions in the Regulation are an incidental feature of the Regulation, they are not to be considered in the analysis. Even on a pith and substance analysis, I do not reach the same conclusion. In a pith and substance analysis, the Supreme Court has held that "the effect of the law cannot be disregarded" See *Reference re Employment Insurance Act (Can.) ss. 22 and 23*, [2005] 2 S.C.R. 669 at para. 27. The analysis must look at both the purpose and the effect of the impugned law. *Kitkatla Band v. British Columbia* (*Minister of Small Business, Tourism and Culture*), *supra*, at paras. 53-54. The effect of the legislation includes both its legal effect and its practical effect. The court must look at the effects that flow from the impugned provisions themselves and then the "side effect" that flow from the application of the impugned provisions. The Regulation sets out a comprehensive scheme that manages all aspects of nutrients in an agricultural operation. The Regulation includes provisions about set backs from municipal wells, and where and when nutrient storage facilities can be located. The relevant portion of the By-law does exactly the same thing; it tells an agricultural operation where and when nutrient storage facilities can be located. The legal and practical effect of the By-law is to add supplementary requirements to the approval of the province under the *Nutrient Management Act*. As indicated, the Province's intent was not to allow municipalities to have this role.

[59] Before turning to my conclusion, I will address two additional matters. As indicated, s. 61 provides that we are to consider the By-law or a provision of the By-law and then determine whether this By-law or provision thereof addresses the same subject matter as the Regulation. Justice Blair is of the opinion that s. 61 does not provide that you compare the By-law or provision thereof with a provision of the Regulation. In my view, the structure of s. 61 is not indicative of an intention to limit the comparison of the By-law or provision thereof to the dominant feature of the whole of the Regulation. The section is structured in this way so as to minimally impair any by-law adopted by a municipality. Taken together, s. 61(1) and s. 61(2) provide that it is only the portion of the By-law that addresses the same subject matter as the Regulation that is rendered inoperative, not the whole of the By-law. Applied to the present case, this means that those portions of the municipality's By-law prohibiting other uses, such as foundries, petroleum product and refining remain in force. Only that portion of the By-law which addresses the same subject matter as the Regulation is rendered inoperative.

[60] Finally, in his concluding section, my colleague states that an interpretation of s. 61 that would render a municipality powerless to prevent the construction of a manure storage facility serving 2000 hogs beyond the 100-metre prohibition zone established pursuant to the *Nutrient Management Act* is absurd. I understand him to be saying that the result is absurd. To the extent that he is expressing concern that municipalities should not be powerless when faced with potentially dangerous threats to their sources of drinking water, I share the concern. In reaching my conclusion, I should not be taken as saying that municipalities should not have input when a nutrient management plan is put forward nor am I suggesting that the respondents and the Province or body charged with making a decision as to whether to approve the plan ought not to consult with the municipality and consider its legitimate concerns. I am simply saying that the *Nutrient Management Act* cannot be interpreted so as to lead to the result sought by the municipality.

CONCLUSION

[61] I conclude, therefore, that the portion of the By-law that prohibits the siting of an intensive livestock operation and associated manure storage facilities within the defined capture zone addresses "the same subject-matter" as the Regulation adopted under the *Nutrient Management Act* and is therefore inoperative. I would, therefore, dismiss the appeal.

[62] I would award the respondents their costs against the appellant fixed at $6,500 plus G.S.T. and disbursements. I would award no cost for or against the intervener.

"Paul S. Rouleau J.A."
"I agree K.M. Weiler J.A."

R.A. BLAIR J.A. (Dissenting)
OVERVIEW

[63] The issues in this appeal arise in the wake of the Walkerton water contamination tragedy.

[64] The Province of Ontario responded by enacting the *Nutrient Management Act, 2002* ("the NMA")[6] and corresponding Regulation 267/03 ("the Regulation").[7] The NMA and the Regulation contain an elaborate and comprehensive regulatory scheme for the management of manure and other "nutrient" materials associated with farming operations in an effort to prevent further water contamination problems in the Province.

[65] Public concern was local too. Reacting to those concerns in 2001, the County of Norfolk initiated a wide-ranging study regarding potential ground water contamination in 2001. The results of the study led the Municipality to enact By-law 64-Z-2003, which amends By-law 1-1999 of the former Town of Simcoe. By-Law 64-Z-2003 ("the By-Law") is designed to protect the Town's water supplies from contamination associated with a variety of land uses – including intensive livestock operations and the manure storage facilities associated with them – and to secure the long-term protection of the Town's potable water supply.

[66] Overlapping governmental requirements generated by these provincial and municipal initiatives are the source of the conundrum in which the respondents, Marilyn and Reginald Peacock, now find themselves.

[67] Mr. and Mrs. Peacock operate a large farming enterprise on the outskirts of Simcoe. Part of their enterprise consists of an intensive hog facility – presently housing one thousand hogs – on a fifty-acre parcel of land that is located a little north west of one of the Town's water well sites. Those wells supply a substantial amount of drinking water to the inhabitants of Simcoe.

[68] The Peacocks wish to expand their existing hog operation by doubling its size to one that will house two thousand hogs. To do so, they need to build an addition to their barn and to the manure storage facility associated with the operation.

[69] The proposed expansion brings into play the provisions of both the Regulation and the By-law. Under the NMA and the Regulation, the Peacocks must obtain provincial approval of a nutrient management plan, which they have done. They were able to obtain this approval partly because their facility is located eight hundred and twenty-three metres from the Town's well site and therefore does not run afoul of the requirement in s.

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[6] S.O. 2002, c. 4.
[7] Ontario Regulation 267/03, as amended by O. Reg. 294/04.

63 of the Regulation that a manure storage facility may not be constructed within one hundred metres of such a site.

[70] The proposed expanded facility does run afoul of the By-law, however. The By-law prohibits many land uses that are considered potential water contaminants within certain designated sensitivity areas. One of the prohibited land uses consists of "intensive livestock operations and associated storage facilities" (section 3.31.4 (c)). The Peacock's hog undertaking clearly falls within that category and it is located in what is known in the By-law as a Sensitivity 2 Wellhead Protected Area ("WHPA"). Such an area is defined, not by distance from the wellhead, but by the time it is estimated a water contaminant will take to flow to the well from its source. A Sensitivity Area 2 is a two-year capture zone, that is, an area from which it would take two years or less for contamination introduced at the source to reach the municipal well.

[71] There is thus a tension between the operation of the Regulation (which does not prohibit the proposed expansion and pursuant to which it has been approved) and the operation of the By-law (which prohibits the expansion). The broad question raised on appeal, therefore, is whether the By-law is inoperative because the Province has occupied the legislative field in a manner that ousts the ability of the Municipality to enact a setback by-law, based on local conditions, and designed to protect the health and safety of its inhabitants from potential groundwater contamination.

[72] The Peacocks and the Intervener, the Pork Producers Marketing Board, argue that the By-law is not operative because it has been superseded by the NMA and the Regulation. In this respect, they rely on the provisions of s. 61 of the NMA, which state:

> 61(1) A regulation supersedes a by-law of a municipality or a provision in that by-law if the by-law or provision addresses the same subject matter as the regulation.
>
> (2) A by-law or a provision of a by-law that is superseded under subsection (1) is inoperative while the regulation is in force.

[73] The primary issue on this appeal involves the meaning of the words "addresses the same subject matter as the regulation" in subsection 61(1). Justice Fedak accepted the Peacocks' arguments on the application and granted judgment declaring the By-law to be superseded by the Regulation. My colleague, Rouleau J.A., has also concluded that the By-law, and the provision of the By-law in question, address the same subject matter as the Regulation. Accordingly, he holds that the By-law is inoperative as it has been superseded by the Regulation, and he would dismiss the appeal.

[74] Respectfully, my reading of section 61 of the NMA, together with the applicable legislative framework and jurisprudence, lead me to the opposite conclusion. I would

allow the appeal and set aside the order of the application judge for the reasons that follow.

FACTS

[75] The pertinent facts are reviewed clearly in the reasons of my colleague. Apart from the foregoing overview and whatever brief references may be necessary in the course of developing my conclusions, it is not necessary for me to recite them further.

ANALYSIS

The *Spraytech* Test

[76] I begin with a brief reference to the first issue dealt with by Justice Rouleau. That issue is whether the "impossibility of dual compliance" test enunciated in *Multiple Access Ltd. v. McCutcheon* [1982] 2 S.C.R. 161, and adopted in the provincial/municipal law context by the Supreme Court of Canada in *11957 Canada Ltée (Spraytech Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 ("*Spraytech*"), applies to resolve the tension between the provisions of the Regulation and those of the By-law.

[77] In this respect, I agree with the conclusion of my colleague, for the reasons he states. The *Spraytech* test only applies where the relevant provincial legislation does not specify a different test. Section 61(1) of the NMA does that. The test is whether the By-law or a provision of the By-law addresses the same subject matter as the Regulation. Only if the answer to that question is "No" is it necessary to consider the impossibility of dual compliance yardstick. If the answer is "Yes", the Regulation trumps the By-law, or its provision, which are superseded and rendered inoperative by virtue of s. 61(2).

[78] In my view, as I shall explain, the answer to the question whether the By-law – or, more accurately, section 3.31.4(c) of the By-law – addresses the same subject matter as the Regulation *is* "No". I turn to that question now.

The Approach to Determining Whether the Regulation and the By-law Address the Same Subject Matter

[79] The modern approach to statutory interpretation has been reiterated recently by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 26:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, citing from E.A. Driedger, Construction of Statutes 2d ed. (Toronto Butterworths, 1983) at 87.

[80] When what is at stake in the interpretation is whether the legislative direction of one level of government (here, the Province) will prevail over that of another level of government (the Municipality), it is appropriate in my view to consider, as part of the "entire context", the legislative framework in which the subordinate government's powers have been exercised, as well as the principles relating to the exercise of those powers. In this case, the respondent's By-law is specifically enacted in accordance with the power to pass zoning by-laws under s. 34(1) of the *Planning Act*,[8] but it also brings into play the broader power of municipalities to enact by-laws for the general welfare of its inhabitants pursuant to the *Municipal Act, 2001*.[9]

[81] Courts have commented several times recently on the need to take a broad approach to the interpretation of municipal powers, one that recognizes the importance of permitting municipalities to attend to the welfare of their citizens. In *Spraytech, supra*, para. 3, L'Heureux-Dubé J. commented that matters of governance are now examined through what she called "the principle of subsidiarity", that is, the proposition that law making and implementation are often best achieved at a level of government that is closest to the citizens affected and thus most responsive to their needs. This court expressed a similar view in *Croplife Canada v. City of Toronto* (2005), 75 O.R. (3d) 357 (C.A.). At para. 37, Feldman J.A. said:

> I conclude that absent an express direction to the contrary in the *Municipal Act, 2001*, which is not there, the jurisprudence from the Supreme Court is clear that municipal powers, including general welfare powers, are to be interpreted broadly and generously within their context and statutory limits, to achieve the legitimate interests of the municipality and its inhabitants.

[82] As noted above, the By-law is specifically enacted pursuant to the Municipality's powers to enact zoning by-laws under the *Planning Act*. Section 71 of the *Planning Act* provides that in the event of conflict between its provisions and those of any other general or special Act, the provisions of the *Planning Act* prevail.[10] While I do not think that s. 71 of the *Planning Act* is dispositive of the question whether the Regulation (promulgated under the NMA) prevails over the By-law (enacted pursuant to the

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[8] R.S.O. 1990, c. P.13.
[9] S.O. 2001, c. 25.
[10] In 2002, and again in 2005, the Provincial Government introduced a proposed amendment to s. 61 of the NMA by adding a subsection (3) that would provide "This section prevails over section 71 of the *Planning Act"*. Bill 190, the *Good Government Act, 2005* received first reading on April 27, 2005. It has not yet been enacted.

Planning Act), because the conflict is not between the provisions of the two Acts, the existence of the s. 71 override is supportive of the view that care should be exercised before the municipal legislative initiative – otherwise properly enacted – is declared inoperative. For a similar approach, see the "principles of accommodation" view expressed by Morden J.A. in *Attorney General for Ontario v. City of Mississauga* (1981), 33 O.R. (3d) 395 at 410-411 (C.A.).

[83] In considering the meaning of the term "subject matter" in s. 61(1) of the NMA – with the foregoing interpretive framework in mind – I take the view that "subject matter" in relation to a by-law, or a provision in a by-law, or a regulation, is not the equivalent of "any individual matter" that may be addressed or dealt with in the by-law, its provision or the regulation. "Subject matter" is broader than "an individual matter". It may be that the "subject matter" addressed by a by-law, or a provision of a by-law, is the same as an individual matter dealt with within a regulation – in this case, a minimum distance separation from the municipal well site. It does not follow, however, that the "subject matter" of the By-law or its provisions is necessarily the same as the "subject matter" of the Regulation. The "subject matter" of a by-law, or a provision of a by-law, or a regulation, in my view, has to do with its main thrust, or – to adopt the constitutional language used to resolve conflicts between levels of government – its pith and substance or dominant feature.

[84] That is the analytical approach I propose to adopt in considering the meaning of the phrase "addresses the same subject matter as the Regulation" in s. 61(1) of the NMA. In *Spraytech* the Supreme Court of Canada acknowledged that analytical tools used in division of powers jurisprudence can be useful in sorting out similar tensions between provincial (or federal) and municipal legislation: see para. 36. The constitutional "pith and substance" approach does not fit perfectly, of course, because, as Rouleau J.A. notes, what is at issue here is not an exercise "in categorizing laws into existing known heads of power . . . to ascertain whether the enacting legislature possesses jurisdiction to enact". However, what *is* at play here is the analogous exercise of determining what is the dominant feature (or "pith and substance") of the By-law, its provision, and the Regulation – the very exercise that underlies a division of powers debate.

[85] "Subject matter" is a term that is employed in a variety of ways by judges and in legislation. It has been used, for example, to describe a matter under dispute (the subject matter of a hearing, a complaint, a prosecution or a proceeding), or to explain the overall content of a thing (a contract, a program, an order or judgment, policy or conveyance), or to illustrate the grant of jurisdiction over a general area. The application that is most apt to the present circumstances, however, is the use of "subject matter" to resolve constitutional conflicts between federal and provincial legislation on the basis of the pith and substance analysis.

[86] "Subject matter" has been variously defined in legal dictionaries. For instance, Black's Law Dictionary refers to it as "the issue presented for consideration."[11] Burton's Legal Thesaurus equates the term with the "tenor" of what is under consideration.[12] Weiler J.A. of this court has described the "matter" of a law, for purposes of constitutional analysis, as "its dominant or most important characteristic": *Adler v. Ontario* (1994), 19 O.R. (3d) 1 at 41 (C.A.), per Weiler J.A., dissenting. Other authorities have defined the "matter" of a law as its leading feature, its true meaning or character, its pith and substance: see *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 at 587 (P.C.); *Whitbread v. Walley*, [1990] 3 S.C.R. 1273 at 1286, cited in *R. v. Morgantaler*, [1993] 3 S.C.R. 463 at 481; *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)* (1996), 30 O.R. (3d) 1 at 24 (C.A.); *Maple Ridge (District) v. Meyer* (2000), 77 B.C.L.R. (3d) 171 at para. 29 (S.C.); *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2002] 10 W.W.R. 733 at para. 66 (Sask. Q.B.), rev'd on other grounds, [2005] 1 S.C.R. 188.

[87] When comparing the By-law, or its relevant provision, and the Regulation in this case, then, it is necessary to assess their "tenor", their "dominant or most important characteristic", their leading feature, their true character or pith and substance. First, though, it is necessary to consider precisely what the comparators are under s. 61(1).

[88] To repeat, s. 61(1) provides that a regulation supersedes a municipal by-law, or a provision of that by-law "if the by-law or provision addresses the same subject-matter as the regulation". The structure of the language is not parallel. It does not say: ". . .if the by-law or provision addresses the same subject-matter as the regulation or a provision of the regulation". Thus the relevant comparators here are the By-law, or the provision of the By-law in question (section 31.3.4(c)), on the one hand, and the Regulation as a whole, on the other hand. This supports the view, expressed above, that the comparison is not to be made between the subject matter of the By-law or its provision and an individual matter that may be dealt with within the Regulation, but rather between the "subject matter" of the By-law or its provision and the more extensive "subject matter" of the Regulation.

[89] This approach to the interpretation of s. 61(1) of the NMA using the "pith and substance" of the By-law, it provision, and the Regulation as an analytical framework is appropriate in the context of this case, in my view. It is a principled approach, comparing as it does the most important or dominant features of the provincial and municipal laws under consideration, and permitting various types of environmental protection initiatives to co-exist and achieve their intended purposes without frustrating the intentions of either the Legislature or the municipality. It also permits the competing approaches that are in

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[11] Bryan A. Garner, *Black's Law Dictionary* 8th ed. (St. Paul, NN: Thomson West, 2004).
[12] William c. Burton, *Burton's Legal Thesaurus*, 3d ed. (New York: Macmillan Library Reference, 1999).

play to be balanced in a fitting way. These competing approaches include the underlying provincial design, expressed in the NMA and Regulation, for protecting the environment by developing a province-wide regulatory scheme to control and minimize the potentially poisonous effects of manure and other "nutrients" associated with intensive farming operations on drinking water supplies, while at the same time preserving agricultural development. But they also include the need for municipalities to be able to respond to the health, safety and general well being of their inhabitants, based on local needs and conditions – a part of the contextual analysis for the interpretation of s. 61(1) referred to above.

[90] Both these approaches have their merits. There is no doubt that the Province has the legislative authority to impose its will on the municipalities, should it choose to do so, and to impose a scheme that leaves no room whatever for local response. The question, however, is whether it has done so in this case.

[91] As noted above, courts have recently emphasized the need to take a flexible approach to the interpretation of municipal powers, recognizing the importance of the need for local governments to respond to local concerns. At the same time, I recognize that during the debates in Committee and in the Legislature prior to the enactment of the NMA, the importance of a consistent province-wide system of regulation was emphasized. Indeed, an attempt by the Opposition to amend what is now s. 61 to add a provision that a regulation would not supersede or render inoperative a by-law imposing higher standards for environmental protection, was defeated: Ontario, Legislative Assembly, Standing Committee on General Government, Official Reports of Debates (Hansard), G-3 (3 June 2002). This is evidence of legislative intention that the provincial scheme is to prevail when the competing provincial and municipal provisions address the same subject matter; in those circumstances, the municipality is not permitted to "top up" the provincial mechanism with a by-law imposing higher standards. However, the pre-enactment debates do not assist in resolving the "addresses the same subject matter" discussion, in my view.

[92] Moreover, the interpretation I have placed on the By-law and the Regulation does not frustrate the intention of the Legislature. The issue is not what members may have said in the course of parliamentary debates – although, as indicated, that may provide some evidence of what they intended – but rather the issue is what the Legislature's intention was as expressed in the enactment. Here, it does not appear that in the context of the setback provisions of the NMA and the Regulation, the Legislature gave effect to a "no enhancement by municipalities" intention. I make this observation because the NMA itself gives the Lieutenant Governor in Council the power to make regulations only respecting minimum distance separation requirements (s. 6(2)(u)). This suggests that other distance separation requirements that are not less than the minimums imposed by the Regulation may exist elsewhere. But where? "Minimum" in relation to what? The only other logical source of such requirements would be land use zoning by-laws passed

by municipalities pursuant to the *Planning Act* R.S.O. 1990, c. P.13. It is implicit from this that municipalities may pass distance separation or setback provisions that will enhance or "top up" the minimums provided for in the NMA and Regulation where local conditions and the protection of the health and safety of the local citizens so require. I shall return to the issue of enhancement at the conclusion of these reasons when I deal further with whether the *Spraytech* test has been met on the facts of this case.

Do the Regulation and the By-law Address the Same Subject Matter?

[93] In the meantime, and with the foregoing analysis in mind, I turn to a specific consideration of whether the By-law or its provision (section 31.3.4(c)) addresses the same subject matter as the Regulation. In my opinion, they do not.

[94] In this regard, I begin with the observation that the "purpose" of legislation is not the equivalent of its "subject matter". A pith and substance analysis looks at both the purpose of the legislation as well as its effect: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146 at 171. Here, it may be said that the By-law and the Regulation have similar purposes. However, they seek to achieve those purposes by different means, and therefore their effect and their "subject matter" are not necessarily the same.

[95] In broad terms, the purpose of both the Regulation and the By-law is to promote the protection of the environment and to preserve the health and well being of the members of society. Both do this in the context of preventing or minimizing the contamination of the water supply. This purpose is reflected in the purpose statement in both the NMA and the By-law:

> NMA, s. 1
>
> The purpose of this Act is to provide for the management of materials containing nutrients in ways that will enhance protection of the natural environment and provide a sustainable future for agricultural operations and rural development.
>
> By-law – "Explanation of Purpose and Effect"
>
> This by-law amendment [is] for the protection of municipal water supplies from contamination associated with certain land uses and to secure the long-term protection of a potable water supply for existing residents and businesses and to prohibit land uses from establishing in Wellhead Protection Areas or to ensure that certain uses can be established within Wellhead Protection Areas and have an acceptable level of

risk to groundwater quality.

[96] Although the purpose of a statute, regulation or by-law sheds light on its subject matter, it does not itself define the subject matter. The subject matter of a statute, regulation or by-law is its dominant feature, or pith and substance.

[97] Here, the dominant feature, or "subject matter" of the Regulation is the management of farm operations involving manure and other materials containing nutrients, in accordance with the dictates of the NMA. Those dictates are accomplished through the complex and comprehensive provisions of the Regulation that include, amongst other things – as aspects of the nutrient management scheme – regulations respecting the use, application, holding and storage of nutrient materials, and the construction and location of holding and storage sites. The dominant feature of the Regulation is not the provision for a one hundred metre setback from municipal wells (although that is admittedly an incidental feature). The dominant feature is the overall management of nutrient materials in relation to farming operations.

[98] The subject matter of the By-law (its dominant feature), on the other hand, is the prohibition of a lengthy list of land uses deemed to be potentially harmful to groundwater quality, in certain defined sensitivity zones relative to municipal wells. The subject matter of the particular provision of the By-law in question (section 3.31.4(c)) is similar in nature but more specific in its target; it prohibits the use of land for intensive livestock operations and associated manure storage facilities in the two-year capture zone.

[99] In short, the dominant feature or pith and substance of the By-law and its provision in question (set-back from wells for spreading manure and for the construction of manure storage facilities) compares to an incidental feature of the Regulation, but not to the subject matter of the Regulation, which is the overall management of nutrient materials. I do not see this as rendering s. 61 of the NMA meaningless. The Municipality cannot institute a regime of regulating or managing the nutrient material aspects of farm operations. It does not follow, in my opinion, that the Municipality may not utilize its zoning powers under the *Planning Act* to prohibit an activity that may be incidentally touched upon in a provincial regulatory scheme – as long as the "subject matter" of the by-law and the regulation in question are not the same.

[100] My colleague highlights the actions of the Municipality in sending a letter to the Peacocks after their farm had been identified as a potential source of contamination in the consultants' report, as support for the proposition that the By-law and the Regulation address the same subject matter. In that letter the Municipality requests the respondents to cooperate in retaining an engineer to report on the structural integrity of their manure storage facility and identify necessary remedial work, to install monitoring equipment with respect to groundwater quality, and to prepare a protective plan for spreading

manure. My colleague concludes that this demonstrates the By-law is directed to the management and regulation of the nutrient material aspects of the respondents' farming operations.

[101] I do not interpret the letter in the same fashion. First, I note by its contents that it is directed at the Peacocks' *existing* hog operations – something over which the By-law could have no sway. Secondly, I read the letter as simply an attempt by the Municipality to work out a resolution of the specific groundwater contamination problem identified by the consultants report, with the respondents. The respondents are, after all, citizens of the Municipality with a substantial farming enterprise, and a resolution of the problem was in everyone's interest. I do not take the fact that the Municipality attempted to extract concessions it may not have been able to impose legislatively as any indication of the subject matter of the By-law the County of Norfolk subsequently enacted within its powers.

[102] As indicated above, what is to be compared for the purposes of s. 61(1) of the NMA is the "subject matter" addressed by the By-Law or its provision, on the one hand, and the "subject matter" addressed by the Regulation as a whole (not the subject matter of some particular provision in the Regulation), on the other hand. When that comparison is done here, it is apparent that the dominant feature of the By-law and its provision (i.e., land use prohibition by means of a set back from wells in relation to intensive livestock operations and their associated manure storage facilities) compares to an incidental feature of the Regulation. However, it does not address the same subject matter as the Regulation (i.e., the management of nutrient materials).

[103] I conclude, therefore, that the Regulation does not supersede the By-law or its provision, and, accordingly, that the latter remain operative.

Spraytech **Revisited**

[104] That is not the end of the matter for purposes of the appeal, however. Although the provisions of the By-law are not rendered inoperative by s. 61(1) of the NMA, it remains to be considered whether they are rendered inoperative by virtue of the "impossibility of dual compliance" test set out in the *Spraytech* decision, *supra*. In my view, they are not.

[105] The By-law, and its provision in s. 3.31.4(c), prohibiting the Peacock's proposed expansion facility survive the *Spraytech* analysis because there is no conflict between the municipal legislation and the Regulation in the "impossibility of dual compliance" sense; one does not prohibit what the other permits, or compel what the other forbids. The By-law does not say that a manure storage facility may be constructed within one hundred metres of a municipal well site, which the Regulation precludes. The Regulation does not say that such a facility may be constructed within the larger Sensitivity Area 2 provided for in the By-law; it merely says the facility cannot be constructed within the one hundred

metre set-back from the well. As noted above, the setbacks provided for in the Regulation are only minimum setbacks. Once the "same subject matter" hurdle has been successfully overcome, there is nothing to prevent the respondent from enacting a by-law that provides for more stringent or enhanced requirements in terms of distance separation, based on local exigencies.

[106] Respectfully, the application judge erred in concluding there was an actual conflict in this case.

DISPOSITION

[107] It must not be forgotten that we are talking about "nutrients" here only in the euphemistic sense that legislators like to use in framing their enactments. What we are talking about is manure and its contaminating effects on surface and ground water. On the facts of this case, the Peacocks' new manure storage facility is to be constructed some eight hundred and twenty-three metres from the Town's municipal well site – significantly beyond the on hundred metre set-back called for in the Regulation. However, the logical extension of the argument made by the appellants and the intervener is that the Province has implemented the Walkerton Inquiry Recommendations by providing that a farmer can construct a manure storage facility to collect the waste from two thousand hogs – *three quarters of a million gallons* per year – within the length of a football field from a municipal well that provides drinking water to the community. And the local municipality is powerless to deal with the situation, even though they have a thorough and well-founded study demonstrating that, given local geological and soil conditions, contamination seeping into the soil from a greater distance than one hundred metres will endanger the municipality's supply of drinking water. In my view, such an interpretive result is absurd and could not have been intended by the Legislature. For the reasons set out above, I do not believe that it was.

[108] I would accordingly allow the appeal, set aside the judgment of Fedak J., and dismiss the Peacocks' application.

"R.A. Blair J.A."

RELEASED: June 28, 2006