

## DRINKING WATER SOURCE PROTECTION: *PEACOCK V. NORFOLK COUNTY* SETS THE STAGE FOR FUTURE REGULATORY CONFUSION

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Late in June, the Ontario Court of Appeal upheld the 2005 decision of the Superior Court of Ontario that the *Nutrient Management Act* (NMA) and its regulation are pre-eminent over municipal drinking water source protection by-laws.

The Peacocks received approval from the Ontario Ministry of Agriculture Food and Rural Affairs (OMAFRA) for their nutrient management plan (required under the NMA and its regulation) to double the size of their intensive hog operation in Norfolk County. The planned expansion included a new nutrient storage facility. Although the location of the nutrient storage facility met the requirements of the NMA and its regulation, it conflicted with the well head protection area bylaw passed by the County under its *Planning Act* zoning powers. The Court of Appeal agreed that pursuant to Section 61.1 of the NMA, the requirements of the NMA and its regulation superseded the bylaw given its express language that the NMA regulation supersedes the bylaw of a municipality if the bylaw addresses the same subject matter as the regulation.

When Peacock was decided it represented a great setback to municipalities and their post-Walkerton efforts to protect drinking water at the source. A further troubling issue, however, arises from the tabling of the *Clean Water Act* (Bill 43) by the Ministry of the Environment (MOE) in December, 2005, summarized in the February 2006 *EnviroNotes*. Once law, it will provide municipalities with the authority to regulate activities that threaten drinking water sources by requiring risk assessments for the activity, permits, or compliance with a risk management plan. Some land uses could also be restricted and could require a permit from a municipality permitting the restricted use. The Bill would also amend the *Planning Act* permitting municipalities to pass zoning by-laws for areas where sensitive ground or surface water features exist.

It is expected that Bill 43 will be enacted into law before the end of 2006. It would seem likely that overlap if not outright conflicts will arise between the NMA and Bill 43 regulatory schemes. Yet Bill 43 is silent as to the principles which should govern if this happens. In order to fully accomplish the goals of the Walkerton Report as the genesis of the NMA and Bill 43, farmers, developers, industry and municipalities will require far greater clarity from the OMAFRA and the MOE as the regulators than what exists presently as to what the rules are and what is expected of them.

### WHAT'S HAPPENING AROUND MILLER THOMSON

**Tamara Farber** was recently certified by the Law Society of Upper Canada as a Specialist in Environmental Law, bringing Miller Thomson's total to four Ontario certified lawyers in this practice area. Miller Thomson's other Certified Specialists in Environmental Law are John Tidball, Bruce McMeekin and Bryan Buttigieg.