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LD 2194

Senator T. Tarpy Schulten
Chairman, Committee on National Resources
State House
Augusta, Maine 04330

Dear Senator Schulten:

I am in receipt of a letter from Helen T. Ginder, Legislative Assistant to your Committee, soliciting, at the request of Representative E. James Briggs of the Committee, my opinion as to the constitutionality of L.D. 2194, which seeks to exempt the "harvesting of sand and gravel from the St. John River," or in the alternative from a two to four mile stretch of the river, from the operation of 12 M.R.S.A. § 2205, which prohibits the dredging of such a river without the permission of the Commissioner of Inland Fisheries and Game. Miss Ginder's letter indicates that the testimony on the bill before the Committee disclosed that the primary purpose of this legislation is to exempt the Madawaska Brick and Block Company from the law. In view of these facts, it is my opinion that the bill would present substantial constitutional problems because legislation granting such special exemptions from the general law are disfavored under the Constitution of both the United State and Maine.

1. Federal Constitution

Section 1 of the Fourteenth Amendment to the United States Constitution provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." While it has been long established that this clause does not invalidate all special legislation per se, it has been equally understood that it does require that "all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Leavitt v. Canadian Pacific Railway Co., 90 Me. 153,159 (1897), citing Missouri Pacific Railway Co. v. Mackey, 127 U.S. 205 (1888). Consequently, any piece of special legislation which grants an exemption from a piece of general legislation to a specific person or narrow group of persons will be carefully examined by any court in judging its constitutionality. The Supreme Judicial Court has manifested such close scrutiny on

several occasions, the most recent being, Look v. State, 267 A.2d 907 (Me. 1970), in which it invalidated a legislative resolve which sought to exempt a canning company and its proprietor from a general requirement of law that a landowner must file suit for damages to his property caused by the altering of a state highway within six months of the time of the injury. In so holding, the Court quoted the famous words of the State's first Chief Justice, Prentiss Mellen, in the case of Lewis v. Webb, 3 Me. 326,336 (1825), written before the enactment of the Fourteenth Amendment, but quoted with approval by the Court several times thereafter:

> "On principle, then, it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law, in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation."

Similarly, the Court has invalidated a legislative resolve seeking to exempt a specific person from meeting the qualifications required for taking a pharmacist's examination, Maine Pharmaceutical Ass'n v. Board of Commissioners, 245 A.2d, 271 (Me. 1968), and a municipal ordinance exempting owners of established filling stations from the operation of the ordinance, which required that all storage of explosives in the city be further than a prescribed distance from any school house, Boothby v. City of Westbrook, 138 Me. 117 (1941). In the latter case, the Court, in finding no rational basis for exempting existing but not prospective filling stations, said:

> "The inhibition of the Fourteenth Amendment that no person should be deprived of the equal protection of the law is designed to prevent any person or class of persons being singled out as a special subject for discriminating or favoring legislation." Id. at 123 (citations omitted).

Only in cases when the Legislature has created a statutory exemption for a genuine class of persons, which discrimination has a rational basis reasonably related to the purposes of the statute, has the Court found no violation of the Equal Protection Clause. Thus, in State v. Leavitt, 105 Me. 76 (1909), a Special Law prohibiting anyone from digging clams in the town of Scarboro during the summer months except a class of persons consisting of the inhabitants, residents and hotel keepers of the town was sustained; and in State v. King, 135 Me. 5 (1936) a statute subjecting the class of contract carriers, but not the class of common carriers, to public regulation was upheld. Even in the latter case, however, the Court

took pains to remark, with reference to the Equal Protection Clause,

> "To present law-made favoritism and to supply full measure of evenly apportioned liberty to the people of this nation was the purpose of this amendment." Id, at 19-20.

From the facts as stated in Miss Ginder's letter, the legislation proposed here, which is intended to exempt a single company from the operation of the general law, though it is phrased in territorial terms, cannot reasonably be considered to create any kind of class, and would therefore appear to be squarely within the constitutional prohibition.

2. State Constitution

In addition to its own Equal Protection Clause, Article I, §6-A, the Maine Constitution contains a separate provision which casts further doubt upon legislation of this type. That provision is Article IV, Part 3, § 13, which provides:

> "§13. Special Legislation. The Legislature shall, from time to time, provide, as far as practicable, by general laws, for all matters usually appertaining to special or private Legislation."

In the early history of the United States, it was common practice in many states for the legislature to engage in the wholesale enactment of laws for the advancement of personal rather than public interests. To counteract this trend, many state legislatures, in the latter part of the nineteenth century, enacted prohibitions against such special legislation. These prohibitions varied from outright bans to requirements that all such legislation be permitted to be enacted only when there was no general law applicable. Am. Jur., Statutes, §§ 49-50. In Maine, where the abuse of the special legislation device had not been particularly acute, the approach which the legislature adopted in 1875 was that manifested by the language of the amendment; future legislatures were encouraged to do as much by general legislation, and as little by special legislation, as possible. Notwithstanding this somewhat mild approach, the purpose of the amendment was clear. Commenting upon it in his Annual Message of 1876, Governor Selden Connor remarked:

> "The title of 'Special and Private Laws,' which includes so large a portion of the laws of former Legislatures, is an obnoxious one, conveying suggestions of privilege, favoritism and monopoly; though happily these evils have not in fact, stained the character of our legislation, they should not be suffered to have, even in the form of our laws, any grounds of suspicion that can be removed. Other weighty objections to special laws

> for private benefit are, that they are obtained at public expense, and in their passage distract the attention of legislators from matters of public interest. The opportunity is now afforded, and the duty enjoined upon you, by the amendment, to restrict the necessity for such laws to the narrowest possible limits. An analysis and classification of the private and special laws upon the statute books, will inform you of the objects for which it is desirable to provide by general laws, if practicable." Annual Message of Governor Connor, Resolves of the State of Maine, 1875-77, 145, 165. (These views have been quoted as authoritative on the question of the intent of the amendment by the Supreme Judicial Court. Opinion of the Justices, 146 Me. 316, 322 (1951).

Although not widely known today, the amendment is hardly a dead letter, the Supreme Judicial Court having made use of it as an alternative ground for invalidating special legislation in its two most recent forays into the area; Look v. State, supra, at 910; Maine Pharmaceutical Ass'n v. Board of Commissioners, supra, at 273. Its existence increases the concern with which any legislation which appears special rather than general outlook must be viewed.

In view of all the foregoing, I must express my grave doubt as to the constitutionality of L.D. 2194.

Yours very truly,

JON A. LUND
Attorney General

JAL:mfe

cc: Senator Edward P. Cyr
Representative E. James Briggs
Helen T. Ginder, Legislative Assistant