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April 7, 2004

Honorable Richard Bennett
Honorable Kenneth Blais
Honorable David Carpenter
Honorable Paul Davis
Honorable Carolyn Gilman
Honorable Richard Kneeland
Honorable Kenneth Lemont
Honorable Arthur Mayo
Honorable Betty Lou Mitchell
Maine State Senate
121st Maine Legislature
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Augusta, ME 04333

Honorable Richard Nass
Honorable Christine Savage
Honorable Tom Sawyer
Honorable Kevin Shorey
Honorable Karl Turner
Honorable Carol Weston
Honorable Chandler Woodcock
Honorable Edward Youngblood

Dear Senators:

By letter dated February 18, 2004, you have raised questions about the Joint Order concerning legislators' compensation that was approved by both chambers of the Legislature on January 30th ("the Order"). The Order states that compensation for the second regular session through April 21 is established by statute, and concludes that "any compensation during the same period for a special session would in the opinion of the legislature constitute an increase in legislative compensation specifically prohibited by the Maine Constitution..." It then provides that "there shall be no increase in compensation for service in any special session...held prior to April 22, 2004" above the pay established by statute for the second regular session.

Your first question is: "Was the Order passed by the Legislature constitutional and enforceable?" We believe that a court would likely answer this question in the negative because the Maine Constitution requires that legislative compensation be established by statute and the per diem requirement in the existing statute does not distinguish between special sessions held before rather than after a regular session adjournment deadline.

Article IV, Part 3, §7 of the Constitution states that legislators shall receive such compensation "as shall be established by law..." The language "established by law" has twice been interpreted by the Justices of the Supreme Judicial Court to require enactment of an act or resolve, with the Governor's signature. *See Opinion of the Justices*, 148 Me. 528 (1953), and *Opinion of the Justices*, 152 Me. 302 (Me. 1957). While these opinions are not squarely on point because they each involve an increase in legislative compensation, we believe that they provide sufficient guidance to support the conclusion that the terms of the Order must be enacted by statute if they are to be enforceable.[1] The question then becomes whether the compensation provisions of the Order are consistent with existing statute, or require a statutory amendment that cannot be accomplished by joint order.

Compensation payable to legislators is detailed in 3 M.R.S.A. § 2 (1989 & Supp 2003), three parts of which are relevant to the issue before us. The first paragraph of Title 3, section 2 specifies that each member of the House and the Senate "is entitled to...$7,725 in the 2nd year of each biennium." The second paragraph of section 2 requires that "the 2nd regular session of the Legislature shall adjourn no later than the 3rd Wednesday in April."[2] The sixth paragraph of section 2 provides, [i]n pertinent part, that "in addition to the salary paid for the first and 2nd regular sessions of the Legislature, when a special session is called, the members of the Senate and House of Representatives shall each be compensated $100 for every day's attendance..."

The Order is based on reading these three provisions together to mean that the Legislature did not intend for legislators to be paid the per diem rate for a special session that occurs during the calendar period of a regular session for which they have already been paid. However, the primary rule of statutory construction requires that courts give effect to the plain meaning of a statute. *Harding v. Wal-Mart Stores, Inc.*, 2001 ME 13, ¶ 9, 765 A.2d 73, 75. The "in addition" phrase in the sixth paragraph of section 2 on its face appears to require that the $100 per diem payment applies during any special session without limitation as to when it occurs.[3] Since the special session per diem requirement

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[1] It has been suggested that Article IV, Part 3, §16 of the Maine Constitution provides a basis for a joint order or resolution de-appropriating funds for the $100 per diem payment during the current special session on the basis that such an order would "pertain solely to facilitating the performance of the business of the Legislature, ...or appropriate money therefor or for the payment of salaries fixed by law" and therefore may become effective prior to 90 days after recess of the legislative session in which it was passed. We do not believe that a court would interpret the language of section 16 in this manner. Because the language refers only to appropriating money for the payment of salaries *fixed by law*, we think it unlikely that a court would construe it to encompass, by implication, authority to eliminate a per diem payment through de-appropriation. Further, , to read section 16 as providing authority to the Legislature to de-appropriate funds for legislators' salaries previously "fixed by law" would effectively negate the clear mandate in Article IV, Part 3, §7.

[2] This paragraph also authorizes two consecutive five-day extensions upon a two-thirds vote of each House; provision is also made for one additional day to consider vetoes.

[3] It is certainly the case that when interpreting statutes, courts "consider the whole statutory scheme for which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Hallissey v. Sch. Admin. Dist. No. 77*, 2000 ME 143, ¶14, 755 A.2d 1068, 1073. *See also Darling's v. Ford Motor Co.*, 1998 ME 232, ¶5, 719 A.2d 111, 114 (courts seek to give effect to the intent of the Legislature by examining plain meaning of statutory language and considering the language in context of the whole statutory scheme). However, there is no conflict among these provisions, as currently

in section 2 contains no exception for such sessions if held before the required statutory adjournment date of a regular session, we believe that a court would likely conclude that the per diem is payable and that any contrary clarification of this provision would require a statutory amendment to be consistent with Art. IV, Pt. 3, § 7.

Your second question is this: "Other than passing an emergency enactor, is there any other way that the Legislature could constitutionally deny legislators the extra compensation called for by law?" While the answer to this question is somewhat unclear, the Legislature may be able to enact an amendment to Title 3 M.R.S.A. §2, for example, stating that the per diem pay for a special session does not apply during the period specified in the statute for a first or second regular session, with a retroactivity clause making the change effective as of January 30, 2004. This action would appear to be within the authority of the Legislature unless a court concludes that vested rights of individual legislators are thereby impaired.

The traditional rule is that legislatures lack constitutional power to enact retrospective laws that impair vested rights. *See Fournier v. Fournier*, 376 A.2d 100, 102 (Me. 1977). Where applicable, this restriction on legislative power arises from the due process clause of the Maine Constitution, Art. I, § 6-A. As the Law Court explained in *State v. LVI Group,* 1997 ME 25, ¶ 9, 690 A.2d 960, 963, in determining whether retroactive application of an enactment violates due process, the analysis employs a three part test: 1) the object of the exercise must be to provide for the public welfare; 2) the legislative means employed must be appropriate to the ends sought; and 3) the manner of exercising the power must not be unduly arbitrary or capricious.

We have found no case directly applicable to the somewhat unusual circumstances that would be presented by a retroactive amendment to the legislative compensation statute. It is clear, for example, that the Legislature cannot extinguish an accrued cause of action for damages; *Heber v. Lucerne-in-Maine Village Corp.,* 2000 ME 137, 755 A.2d. 1064. However, the Law Court has on several occasions upheld retroactive statutory amendments against due process or vested rights challenges. In *LVI Group,* the Law Court upheld a 1989 amendment to the severance pay statute that was made retroactive to the statute's 1975 enactment date. That amendment was enacted to clarify, in response to an adverse Law Court decision, that an "indirect owner" of a business liable for severance pay included a parent corporation. Similarly, in *Tompkins v. Wade & Searway Construction,* 612 A.2d 874 (Me. 1992), the Court upheld a 1991 amendment of the statute defining average weekly wage to exclude certain fringe benefits that was made applicable to injuries prior to its effective date, again to clarify the law in response to a contrary interpretation of the Law Court (in *Ashby v. Rust Engineering, 559 A.2d 774 (*Me. 1989*)).*

Moreover, a court might not even apply a vested rights analysis to a situation such as this where the Legislature, by amending section 2, arguably would be taking away its own right to a per diem payment, as opposed to altering the legal rights or obligations of

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written, to harmonize. Where the language is clear on its face, the court need not, and will not, look behind the language to discern intent as a guide to interpretation.

private parties, or of members of another branch of government. It is possible that a court would conclude that the Legislature may take away from its own members or from itself as a body that which it could not take away from others. In a period of significant budget shortfalls, the courts may be reluctant to find that the Legislature lacks the authority to undertake a clarification of this nature as part of its budget balancing efforts.
As we have found no case law on point regarding legislative actions affecting only legislators, however, we cannot predict with any certainty the outcome of a legal challenge to a retroactive adjustment to the legislative compensation statute.

Sincerely,

G. STEVEN ROWE
Attorney General

GSR/dp