Willms & Shier | Environment Aboriginal Energy Law

Memorandum Privileged and Confidential

To: [redacted]

From: Julie Abouchar, Willms & Shier Environmental Lawyers, LLP

Date: September 23, 2016

File: 6948

Re: Opinion on the legality of the delegated authority specificity of terms within New Brunswick's water classification scheme

cc:

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1 PURPOSE

You have asked us to provide an opinion on whether the Minister's power in New Brunswick's Water Classification Regulation[1] to classify water is ultra vires or whether the Regulation is unenforceable and/or unconstitutional due to lack of specificity. Our opinion responds to the legal justification provided by the New Brunswick Department of Environment and Local Government (DELG Legal Justification).[2]

2 CONCLUSIONS AND RECOMMENDATIONS

The basis for abandoning the regulation cannot be that it is *ultra vires*, vague or unenforceable.

Section 3 of the *Water Classification Regulation* provides the authority to the Minister "with the approval of the Lieutenant-Governor in Council" to classify water. The Lieutenant-Governor in Council (LGC) is not removing itself from the decision. We conclude that it is not a sub-delegation as it will be a shared decision. However, to the extent it is a sub-delegation, it is not an improper delegation.

Further, the regulation is not unconstitutional based on vagueness. To the extent that the regulation might require further details for enforcement clarity for the public and staff, it can easily be amended, or the Minister may prepare technical guidance documents.

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1 NB Reg 2002-13 [Water Classification Regulation].

2 New Brunswick Department of Environment and Local Government, Legal Justification pertaining to NB Regulation 2002-13, *Water Classification Regulation* – Clean Water Act June 9, 2016 [DELG Legal Justification].

Notwithstanding, it is clear that the government is motivated to revise and possibly abandon the water classification regulation and process. In our opinion, this is not required from a legal standpoint. However, the process could be improved by the following:

a) ensuring all stakeholders are represented on the water classification groups

b) development of technical guidance on definitions, and enforcement for Department of Environment staff

c) training and guidance from the Department of Environment on all aspects of water classification for the watershed groups, and

d) development of guidelines for landowners, and stakeholders.

3 DISCUSSION

Section 3 of the *Water Classification Regulation*, states:

> 3. The Minister may, in the Minister's discretion, with the approval of the Lieutenant-Governor in Council and in accordance with this Regulation, by a Water Classification Order classify all or any portion of the water of a watercourse as one of the classes set out in paragraphs 4(a), (c), (d), (e) or (f).[3]

This regulation was passed pursuant to the LGC's authority under s. 40 of the *Clean Water Act*:[4]

> 40. The Lieutenant-Governor in Council may make regulations
>
> …
>
> (k) respecting the establishment of a water classification system;
>
> …
>
> (k.3) providing the Minister with the discretion to determine the suitability of classification of the water of a watercourse;
>
> …
>
> (k.5) providing the Minister with the discretion to determine whether the water of a watercourse meets the criteria or standards of a particular class before it is classified;

[3] Water Classification Regulation, *supra* note 1, s 3.
[4] *Clean Water Act*, SNB 1989, c C6.1, s 40 [NB Clean Water Act], s 40.

The Department of Environment and Local Government (DELG) has alleged that s. 3 of the *Water Classification Regulations* is an improper sub-delegation of authority because the section should be in *Clean Water Act* similarly to the Watershed Protection authority in s. 14 of the *Clean Water Act.*[5] The DELG alleges that "the authority lies with the LGC on the advice of the Executive Council".[6] The redacted version of the advice to the Minister provides no support for this statement.

Section 3 of the *Water Classification Regulation* provides the authority to the Minister "with the approval of the Lieutenant-Governor in Council." The LGC is not removing itself from the decision. We conclude that it is not a delegation as it must still have approval of the LGC.

To the extent that it is considered to be a complete sub-delegation, it is not an improper delegation. The *Clean Water Act* at sections 40(k.3) and (k.5) gives the Minister the discretion to classify water.

4 THE CLEAN WATER ACT PROPERLY DELEGATES THE POWER TO CLASSIFY WATER

4.1 THE APPROPRIATENESS OF SUBDELEGATION WILL DEPEND ON LEGISLATIVE INTENT

An enabling statute must give authority of one body to sub-delegate powers to another body.

In *Reference re Validity of Chemical Regulations,*[7] the Supreme Court of Canada was asked to determine whether the Governor in Council had the authority under the *War Measures Act* to delegate some of their powers to subordinate agencies. In conducting their analysis, the Court stated that "[t]he question of the powers of the Governor in Council under the *War Measures Act* is…solely one of interpretation of the provisions of that Act, and it is to be determined by reference to those provisions by which the powers were conferred."[8]

In *Peralta v Ontario,*[9] a group of commercial fisherman in Ontario challenged the authority of the Governor in Council to make regulations under the *Fisheries Act*[10] that delegated the authority to impose terms and conditions in a license to provincial ministers. In analysing the regulation and enabling legislation in question, the Court stated that the "language of the statute must be interpreted in light of what the statute is seeking to achieve". The Court determined it must be able to "find the right to sub-delegate from the wording of the legislation itself and not from the manner in which the power is exercised."[11]

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5 DELG Legal Justification, *supra* note 2.
6 DELG Legal Justification, *supra* note 2.
7 [1943] SCR 1 [Chemical Reference].
8 *Ibid*, para 40.
9 [1985] OJ No 2304, aff'd [1988] 2 SCR 1045 [Peralta].
10 RSC 1985, c F.14 [Fisheries Act].
11 Peralta, *supra* note 9, paras 34, 36.

4.1.1 USE OF "RESPECTING" IN THE CONTEXT OF REGULATORY POWERS

The *Clean Water Act*, section 40(k) provides the authority to the LGC to pass regulations "respecting the establishment of a water classification system". The courts have considered the significance of the word respecting in delegation of powers.

The Ontario Court of Appeal (confirmed by the Supreme Court of Canada) in *Peralta* determined that an amendment changing the language of the provision in question from "prescribing the terms and conditions…" to "respecting the terms and conditions…" (emphasis added) had purpose and significance.[12] The term "respecting" was found to confer a wide authority and allowed for a delegation of the administration of the regulations.[13] The Court concluded that through the amendment, Parliament was "ensuring that the Governor in Council was empowered to delegate to others the administration of its regulations."[14]

In *Jackson v Ontario (Minister of Natural Resources*),[15] Ontario-based commercial fisherman challenged the Minister of Natural Resources' authority to impose quota on fishery licenses, which was delegated from the Governor in Council. The Ontario Court of Appeal determined that "respecting" is "a broad term and…reflects Parliament's intention that the Governor in Council has authority to delegate its power to other bodies."[16]

Similarly, the *Clean Water Act* states that the LGC may make regulations "respecting the establishment of a water classification system" (emphasis added).[17] The term "respecting" is sufficiently broad to give the LGC the ability to delegate the power to classify water to the Minister.

4.1.2 SPECIFIC PROVISIONS THAT DELEGATE AUTHORITY

Despite the broad interpretation of "respecting", the New Brunswick Government must have believed 40(k) was inadequate to delegate the authority to classify water. The legislature amended the *Clean Water Act* to include sections 40(k.3) and (k.5) which provided the LGC the authority to make a regulation that gives the Minister the discretion to classify water.

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12 *Ibid*, para 32.
13 *Ibid*, paras 34, 37.
14 *Ibid*, para 32.
15 2009 ONCA 846 [Jackson].
16 *Ibid*, para 34.
17 *NB Clean Water Act*, *supra* note 2, s 40(k).

In *Jackson*, the Court highlighted a provision that authorized the Governor in Council to "prescribe the powers and duties of persons employed in the administration and enforcement of the statute."[18] The Court concluded that at least implicitly, the provision allowed the Governor in Council to make regulations delegating its power and duties. [19] Additionally, the Court found the provision did not limit the persons who may be prescribed powers and duties.[20]

The *Clean Water Act* gives the LGC the authority to enact regulations "providing the Minister with the discretion to determine the suitability of classification of the water of a watercourse"[21] and "providing the Minister with the discretion to determine whether the water of a watercourse meets the criteria or standards of a particular class before it is classified."[22] This language clearly states that the LGC is permitted to bestow discretion on the Minister to determine the appropriate classification.

4.2 *DELEGATUS POTESTAS NON POTEST DELEGARI* IS NOT A RULE OF LAW AND WILL GIVE WAY IF THE STATUTE INTENDS TO DELEGATE POWER

The DELG posits that the *Water Classification Regulation* is an unauthorised sub delegation of authority.[23] The doctrine of *delegatus potestas non potest delegari*, dictates that delegated powers cannot be further delegated. However, it is accepted in Canada that this maxim is not a rule of law. Even in its first articulation as a principle in Canada, legal scholar John Willis acknowledged that *delegatus potestas non potest delegari* is "at most a rule of construction".[24] Further, in its application, there "must be a consideration of the language of the whole enactment and of its purposes and objects."[25] This conclusion has been followed in later academic literature. Leading authority on statutory interpretation Elmer Driedger wrote there "is no rule or presumption for or against sub-delegation."[26]

In *Reference re Validity of Chemical Regulations*, the Court ruled that *delegatus potestas non potest delegari* contains "no reference to an authority to legislate conferred by statute of Parliament."[27] In *Peralta*, it was determined that "sub-delegation was intended by necessary implication, and the *prima facie* rule of construction *delegatus non potest delegare* gives way to the intent of the legislation."[28]

Clean Water Act sections 40(k.3) and (k.5) show the intent to allow the LGC to delegate its authority to the Minister (if indeed there is a sub-delegation, which we refute). It is probable that *delegatus non potest delegare* will yield to this intent.

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18 *Fisheries Act*, *supra* note 10, s. 43(l).
19 Jackson, *supra* note 15, para 35.
20 *Ibid*.
21 *NB Clean Water Act*, *supra* note 4, s. 40(k.3)
22 *Ibid*, s 40(k.5)
23 DELG Legal Justification, *supra* note 2.
24 John Willis, "Delegatus Non Potest Delegare" (1943), 21 Can B Rev 257.
25 *Ibid*.
26 Elmer Driedger, "Subordinate Legislation" (1960), 38 Can B Rev 2, at 22.
27 Chemical Reference, *supra* note 7, para 50.
28 Peralta, *supra* note 6, para 38.

5 SPECIFICITY OF THE WATER CLASSIFICATION REGULATION

The DELG alleges that the Water Classification Regulation lacks specificity.

The Supreme Court of Canada opines that s. 7 of the Charter of Rights and Freedoms[29] requires that laws sufficiently delineate an "area of risk"[30] or a sufficient "basis for distinguishing between permissible and impermissible conduct."[31] A law will be deemed unconstitutionally vague "if it so lacks in precision as not to give sufficient guidance for legal debate."[32]

In determining whether a statute or regulation is unconstitutionally vague, the Court must consider the law or regulation's purpose, subject matter and nature as well as societal values, related legislative provisions and prior judicial interpretations of the provision.[33] The standard of legal precision required by the Charter will "vary depending on the nature and subject matter of a particular legislative provision."[34] The Court must determine whether the average citizen, with an average understanding of the subject matter of the prohibition, has received adequate substantive notice of prohibited conduct.[35] The substantive notice requirement will be met if the citizen has "an understanding that some conduct comes under the law."[36]

The Supreme Court of Canada balances specificity with freedom to legislate for the protection of the environment. The Supreme Court of Canada has concluded that legislators "must have considerable room to manoeuvre in the field of environmental regulation, and s. 7 must not be employed to hinder flexible and ambitious legislative approaches to environmental protection."[37] In the context of environmental legislation, requiring legal precision might "undermine the ability of the legislature to provide for a comprehensive and flexible regime."[38] Additionally, "[w]here the legislature provides protection through regulatory statutes…it is appropriate for courts to take a more deferential approach to the Charter review of the offences contained in such statutes."[39]

Based on the foregoing findings of the Supreme Court, it would be difficult to succeed with a Charter challenge. Further, it is somewhat surprising that a government would argue against its own flexibility in implementing its environmental legislation. However, to the extent that the Government still perceives there is a problem, it would be a relatively simple matter to amend the Regulation, or draft guidance materials.

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29 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
30 *R v Canadian Pacific Ltd*, 1995 CarswellOnt 968, para 47 [Canadian Pacific].
31 *Ibid*, para 48.
32 *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, at 643 [Nova Scotia Pharmaceutical Society].
33 Canadian Pacific, *supra* note 32, para 48.
34 *Ibid*, para 50.
35 *Ibid*, para 54.
36 Nova Scotia Pharmaceutical Society, *supra* note 34, at 633-634.
37 Canadian Pacific, *supra* note 32, para 60.
38 *Ibid*, para 53.
39 *Ibid*, para 59.

By way of example, Ontario's *Clean Water Act* gives authority to the local Source Protection Committees to determine policies to ensure that activities never become "significant drinking water threats"[40] The Act defines "significant drinking water threat as: a drinking water threat that, according to a risk assessment, poses or has the potential to pose a significant risk".[41] This is an intentionally vague standard, which is further detailed in regulations and technical guidance. Ontario Regulation 287/07 prescribes twenty one activities as drinking water threats[42], and provides more detailed guidance in bulletins including the "Threats Assessment and Issues Evaluation". The local Source Protection Committees developed Source Protection Policies, working hand in hand with the Ministry of Environment and Climate Change using numerous Ministry technical guidance materials.

6 ENFORCEABILITY

The DELG Legal Justification[43] states:

> "Classification standards require that certain conditions such as aquatic life or trophic status be as "naturally occurring" or "naturally changing". Nowhere in either the Act or the Regulation are these terms defined so as to give certainty to either the regulator or the person who purportedly has committed an offence under the regulation… Without an understanding and specific definition associated with these terms, the public cannot know whether or not they are committing an offence under this regulation."

The use of terms like "naturally occurring" are consistent with the court's view that environmental legislation requires a certain amount of flexibility in order to protect the environment.

Indeed the New Brunswick *Clean Water Act* adopts a similar approach in defining contaminant:

> "Contaminant means any solid, liquid, gas, microorganism, odour, heat, sound, vibration, radiation or combination of any of them present in the environment:
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> a) that is foreign to or in excess of the natural constituents of the environment,
>
> b) that effects the natural, physical, chemical or biological quality or constitution of the environment,
>
> c) that endangers the health, safety, or comfort of a person, or the health of animal life, that causes damage to property or to plant life or that interferes with visibility, the normal conduct of transport or business, or the normal enjoyment of life or use or enjoyment of property, or

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40 *Clean Water Act*, SO 2006, c 22, s 22(2)2.
41 *Ibid*, s 2(1).
42 *General Regulation*, O Reg 287/07 s 1.1 (1).
43 DELG Legal Justification, *supra* note 2.

d) that is designated by the Minister of Health or the Minister as a contaminant under section 10."[44]

The New Brunswick *Clean Environment Act* has the same definition,[45] yet the government has not identified an issue of enforcement generally with the *Clean Water Act* or *Clean Environment Act*. Where there is a need for detail, the Minister can prepare technical guidance documents for its staff, for the watershed groups and for the public.

Ideally, the water classification recommendations to the Minister will be made by a watershed group which is democratic and includes the opinions of all stakeholders. If the watershed group's decisions are made by consensus, the landowner, or regulated entity will have had an opportunity to shape the recommendations. This will further ensure that they are enforceable and understood.

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[44] *NB Clean Water Act*, *supra* note 4, s 1.
[45] *Clean Environment Act*, RSNB 1973, s 1.