

STATE OF MICHIGAN
COURT OF APPEALS

TAXPAYERS OF MICHIGAN AGAINST
CASINOS and LAURA BAIRD, State
Representative in her official capacity,

FOR PUBLICATION
September 22, 2005
9:00 a.m.

Plaintiffs-Appellees/Cross-
Appellants,

v

No. 225017
Ingham Circuit Court
LC No. 99-090195-CZ

THE STATE OF MICHIGAN,

Defendant-Cross-Appellee,

ON REMAND

and

GAMING ENTERTAINMENT, LLC, and LITTLE
TRAVERSE BAY BANDS OF ODAWA
INDIANS,

Intervening Defendants-
Appellants/Cross-Appellees,

Official Reported Version

and

NORTH AMERICAN SPORTS MANAGEMENT
CO,

Intervening Defendant.

Before: Owens, P.J., and Schuette and Borrello, JJ.

BORRELLO, J. (*dissenting*).

I respectfully dissent because I strongly disagree with the majority's erroneous conclusion that the provision in the tribal-state gaming compacts that grants the Governor the authority to amend such compacts without legislative approval violates the separation of powers doctrine found in Const 1963, art 3, § 2. I would therefore reverse the trial court's ruling that the

amendment provision in the compacts constituted a violation of the Separation of Powers Clause of the Michigan Constitution.

In Justice Kelly's concurring opinion in *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 349; 685 NW2d 221 (2004) (*TOMAC*), she asserted that, while the issue of the constitutionality of the amendment provision in the compacts was not ripe for review because no amendment to the compacts had been made, "[t]he amendment provision of the compacts survives a facial challenge to the Separation of Powers Clause of the Michigan Constitution." I agree with Justice Kelly's reasoning and would further conclude that, as applied, the provision in the compacts that permits the Governor to amend the compacts without legislative approval does not violate the separation of powers doctrine. The Separation of Powers Clause of the Michigan Constitution provides:

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [Const 1963, art 3, § 2.]

Under the Michigan Constitution, "the Legislature is to exercise the 'legislative power' of the state, Const 1963, art 4, § 1, [and] the Governor is to exercise the 'executive power,' Const 1963, art 5, § 1" *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 613; 684 NW2d 800 (2004). The legislative power includes "the general power to contract unless there is a constitutional limitation." *TOMAC*, *supra* at 328. As the majority correctly observes, "[b]y separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise." *Nat'l Wildlife Federation*, *supra* at 613. However, "the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 296; 586 NW2d 894 (1998).

Section 16 of the compacts provides:

This Compact may be amended by mutual agreement between the Tribe and the State as follows:

(A) The Tribe or the State may propose amendments to the Compact by providing the other party with written notice of the proposed amendment as follows:

(i) The Tribe shall propose amendments pursuant to the notice provisions of this Compact by submitting the proposed amendments to the Governor who shall act for the State.

(ii) The State, acting through the Governor, shall propose amendments by submitting the proposed amendments to the Tribe pursuant to the notice provisions of this Compact. [Compact between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan, § 16.]

Section 16 effectively grants the Governor the power to amend the compacts without the Legislature's approval. The Legislature's approval of the compacts by resolution included approval of this amendment provision. Therefore, the Legislature, in approving the compacts by resolution, also approved the amendment process, thus permitting the Governor to amend the compacts without legislative approval. It is significant that the Legislature approved the compacts with full knowledge of the existence of the amendment provision. While it may be true that the Legislature did not anticipate or contemplate a particular amendment, it nevertheless knowingly approved the compacts with the amendment provision. Therefore, as long as any amendment of a compact was constitutional, it was proper.

When the Legislature approved the compacts with the amendment provision, the Legislature effectively granted the Governor approval in advance of any amendments of the compacts. This legislative action authorized the Governor, in advance, to bind the state to any amendments. It is not the function of this Court to interfere with the legitimate exercise of legislative discretion, and this Court must be mindful of the limits on the judiciary's role regarding matters involving the separation of powers. I believe that by holding that the provision in the compacts permitting the Governor to amend the compacts without legislative approval violates the separation of powers doctrine, the majority effectuates an improper interference by the judicial branch with the legitimate discretion of the Legislature to give advance authorization to the Governor to make amendments to the tribal-state gaming compacts. As the Supreme Court explained in *TOMAC*:

More importantly, because our Legislature had the discretion to approve the compacts by resolution rather than by bill, the courts cannot interfere with that legitimate exercise of legislative discretion. As this Court recognized long ago in *Detroit v Wayne Circuit Judge*, 79 Mich 384, 387; 44 NW 622 (1890):

"It is one of the necessary and fundamental rules of law that the judicial power cannot interfere with the legitimate discretion of any other department of government. So long as they do no illegal act, and are doing business in the range of the powers committed to their exercise, no outside authority can intermeddle with them" [*TOMAC*, *supra* at 329.]

Respectful of the judiciary's role in such matters, I would decline to interfere with the Legislature's legitimate exercise of its discretion, in approving the compacts by resolution, to approve in advance any amendments of the compacts. The Supreme Court has previously recognized that, as a part of the judicial branch of government, courts must exercise judicial restraint when deciding cases presenting separation of powers issues relating to the delegation of legislative power to administrative agencies. See *Judges of the 74th Judicial Dist v Bay Co*, 385 Mich 710, 727-728; 190 NW2d 219 (1971). In my view, judicial restraint is also appropriate in the case at bar when the Governor is exercising authority under the amendment provision of the compacts, which were validly approved by the Legislature. I am mindful of our Supreme Court's admonition regarding "[t]he need for utmost delicacy on the part of the judiciary, and respect for the unique office of Governor "It would be . . . unseemly and unlawful to invade [the Governor's] discretion"" to make decisions regarding a matter that the Legislature validly entrusted to the Governor's discretion. *Straus v Governor*, 459 Mich 526, 532-533; 592 NW2d

53 (1999), quoting *Straus v Governor*, 230 Mich App 222, 227-228; 583 NW2d 520 (1998) (citation omitted).¹

In my estimation, the majority fails to appreciate that "an indispensable ingredient of the concept of coequal branches of government is that "each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches."" *Judicial Attorneys Ass'n*, *supra* at 305, quoting *Employees & Judge of the Second Judicial Dist Court v Hillsdale Co*, 423 Mich 705, 717; 378 NW2d 744 (1985), quoting *United States v Will*, 449 US 200, 228; 101 S Ct 471; 66 L Ed 2d 392 (1980). It is not the function of this Court to invalidate a decision made by the Legislature in its exercise of a constitutionally permitted authority when the Legislature itself elected to grant the Governor the power to amend the compacts and validly did so. In *Flint City Council v Michigan*, 253 Mich App 378, 391; 655 NW2d 604 (2002), this Court held that because the Legislature did not impose procedural requirements for the conduct of a hearing to be conducted by the Governor or the Governor's designee under MCL 141.1215(2), it "inten[ded] to leave the scope of review to the Governor's discretion." I would similarly conclude that in approving the compacts with the amendment provision, the Legislature intended to leave the decision whether to amend the compacts to the Governor's discretion as limited by the language in the existing compacts themselves and provided, of course, that any amendment is not unconstitutional.² The majority suggests that *Flint City Council* is distinguishable from the instant case because, in the instant case, the Legislature did not validly confer the power to amend the compacts on the Governor, whereas *Flint City Council* involved power that was validly conferred by statute. I disagree. The Legislature validly conferred on the Governor the power to amend the compacts. Out of consideration of the separation of powers doctrine and respect for and deference to the Legislature's authority and discretion to grant the Governor the power to enter into the compacts and to amend them without legislative approval, I would decline to interfere with the Legislature's authority to approve the compacts and issue advance approval of any amendments to those compacts.

The unique legal status of Indian casino gaming and the facts of this case, as well as the limits that federal law places on the states' role in negotiating with the tribes, also support the conclusion that the separation of powers doctrine was not violated in this case. As our Supreme Court accurately observed in *TOMAC*, "[T]he Legislature could not have unilaterally exerted its will over the tribes involved." *TOMAC*, *supra* at 319. Federal law limits the states' role in negotiating with the tribes through the compacting process. Therefore, because of the state of

¹ Such deference to the role of the Legislature and the Governor is in keeping with our Supreme Court's decisions during the tenure of our previous governor.

² For reasons that will be explained more fully later in this dissent, I do not believe that the Legislature's grant of authority to the Governor in this case was so broad as to constitute an unconstitutional delegation without limitation. Although I am not convinced that the Legislature's approval of the compacts constituted a delegation of power, if, in fact, such a delegation occurred, there were adequate safeguards and limitations to render the delegation constitutional.

Michigan's limited role in negotiating with the tribes under federal law, it was necessary, as the Legislature recognized in approving the compacts containing the amendment provision, to facilitate the Governor's involvement in the negotiations process with the tribes. The Supreme Court recognized in *TOMAC* that by approving the compacts, "the Legislature simply expressed its approval of valid contracts between two independent, sovereign entities." *Id.* at 312. In doing so, the Legislature helped to secure an important source of revenue for the state.

The majority, relying on *Roxborough v Michigan Unemployment Compensation Comm*, 309 Mich 505; 15 NW2d 724 (1944), concludes that the Governor is not authorized to enter into compacts or make amendments to compacts without legislative approval because there exists no statutory or constitutional authority for the Governor to do so and mere approval by resolution is insufficient to confer such authority. In *Roxborough*, our Supreme Court stated that "[p]ublic officers have and can exercise only such powers as are conferred on them *by law*, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred *by statute or the Constitution*." *Roxborough, supra* at 510 (emphasis added; citation omitted). The holding in *Roxborough* is consistent with the rule that "[g]enerally, only persons authorized by the state constitution or a statute can make a contract binding on a state" 72 Am Jur 2d, States, Territories, and Dependencies, § 71, p 457. Notwithstanding its holding in *Roxborough*, however, the Supreme Court specifically held in *TOMAC* that the Legislature's approval of the compacts, which included a provision granting the Governor the power to amend the compacts without legislative approval, by resolution was valid because the compacts were contractual in nature, not legislation: "Our Constitution does not prohibit the Legislature from approving contracts, such as the compacts at issue here, by concurrent resolution." *TOMAC, supra* at 327. The majority's view disregards the significance of the Supreme Court's explicit holding that the "Legislature had the discretion to approve the compacts by resolution rather than by bill" and fails to recognize that "the courts cannot interfere with that legitimate exercise of legislative discretion." *Id.* at 329. I would interpret the Supreme Court's holding in *TOMAC* as permitting the Governor to enter into the compacts and make amendments to them even without explicit statutory or constitutional authority to do so because such power was validly conferred on the Governor by the Legislature through a resolution. In my view, in light of the fact that the Supreme Court explicitly held in *TOMAC* that the Legislature's approval of the compacts by resolution was valid, the Supreme Court's pronouncement in *Roxborough* that "a State is not bound by contracts made on its behalf by its officers or agents without previous authority conferred *by statute or the Constitution*" is not dispositive or controlling in this case. *Roxborough, supra* at 510 (emphasis added; citation omitted). Irrespective of whether there was a statutory or constitutional authorization for the Governor to enter into or amend a compact on behalf of the state, I would conclude that the Governor did possess such authority on the basis of the Legislature's valid approval of the compacts by resolution. *TOMAC, supra* at 327-329.

I also question the majority's reliance on *McCartney v Attorney General*, 231 Mich App 722; 587 NW2d 824 (1998), in support of its holding. The majority relies on this Court's statement in *McCartney* that "there is no constitutional impediment to the Governor's negotiating with an Indian tribe where the product of his [or her] negotiations has no effect *without legislative approval*." *Id.* at 729 (emphasis added). According to the majority, in *McCartney* this Court "expressed careful recognition that although the Governor had the authority to negotiate and execute gambling compacts, the actions were subject to legislative approval." *Ante* at _____. The majority's reliance on *McCartney* is questionable because, in the instant case, the

Legislature did approve any amendments of the compacts made by the Governor when it approved the compacts by resolution. Because there was legislative approval in this case, albeit advance approval, I disagree with the majority's suggestion that such approval did not exist in the instant case.

Moreover, I disagree with the majority that there was no valid delegation of legislative authority to the Governor in this case. I would conclude that the Legislature, to the extent that it may have delegated to the Governor its authority to enter into contracts on behalf of the state, adequately specified the Governor's power and placed sufficient limitations and restraints on the Governor's power to contract. "Generally, the courts have adopted a lenient and expansive test to measure the constitutionality of the standards which delegate legislative authority." *Delta Co v Dep't of Natural Resources*, 118 Mich App 458, 464; 325 NW2d 455 (1982). "If the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other, a sharing of power may be constitutionally permissible." *Judicial Attorneys Ass'n*, *supra* at 297. The Legislature is permitted to delegate its legislative authority as long as there are standards that are as reasonably precise as the subject matter requires or permits. *Westervelt v Natural Resources Comm*, 402 Mich 412, 439; 263 NW2d 564 (1978) (opinion by Williams, J.). When such standards exist, the delegation is constitutional "because the Legislature has (1) authorized and (2) limited such action." *Id.* at 441. The purpose of the delegation requirements is to provide constitutional accountability so that the Legislature, the courts, and the public might effectively measure or "check" the use of delegated power. *Id.* at 439.

I am not persuaded that the Legislature's approval of the compacts constituted a delegation of legislative power at all, as opposed to the Legislature merely exercising its own authority to bind the state to subsequent contractual amendments negotiated between the Governor and the tribe. However, assuming that the Legislature did delegate to the Governor its authority to enter into contracts on behalf of the state, I would reject the conclusion that the delegation was constitutionally infirm because it was not sufficiently defined or specific or lacked adequate standards. At the outset, I would observe that while the Supreme Court has held that the Legislature must provide standards to an administrative agency for the exercise of the power delegated to it, "we are not dealing here with an administrative agency; rather, this case involves a decision by the chief executive officer of the state, who stands on an equal level with the Legislature and the judiciary." *Flint City Council*, *supra* at 391. However, to the extent that the Supreme Court has suggested that the standards approach to analyzing whether a delegation of legislative authority to an administrative agency is valid can be applied to test the validity of other types of delegations of legislative authority, *Westervelt*, *supra* at 444 n 21 (opinion by Williams, J.), I would conclude that the standards were sufficient in this case, if, in fact, there was a delegation.

First, if the Legislature did delegate its power to contract to the Governor, it did not broadly delegate its entire power to enter into tribal-state gaming compacts with an Indian tribe. Rather, any delegation of the Legislature's power to enter into contracts on behalf of the state of Michigan was limited to granting the Governor the authority to amend the existing tribal-state gaming compacts. Moreover, the express terms of the amendment provision in the compacts itself further limit the Governor's power. For example, § 16(A)(iii) prohibits the Governor from consenting to an amendment that would expand the definition of "eligible Indian lands."

Furthermore, the Governor's power to amend the compacts is also restricted by constitutional considerations. Therefore, even assuming that the Legislature's approval of the compacts did constitute a delegation to the executive branch of the Legislature's authority to enter into contracts on behalf of the state, I would conclude that there were sufficient standards and limitations on that power. Because there are sufficient safeguards in place to check the exercise of any power that may have been delegated, any grant of legislative authority to the Governor did not create encroachment or aggrandizement of one branch of government at the expense of another.

For these reasons, I disagree with the majority. Accordingly, I would reverse the trial court's decision and hold that the provision in the tribal-state gaming compacts granting the Governor the authority to amend the compacts does not violate the Separation of Powers Clause of the Michigan Constitution.

/s/ Stephen L. Borrello