Phillips Lytle LLP

Mr. Ron Rienas
General Manager
Buffalo and Fort Erie Public Bridge
Authority
One Peace Bridge Plaza
Buffalo, NY 14213-2494

May 1, 2013

Re: Legality of Proposed Dissolution of Buffalo and Fort Erie Public Bridge Authority by Act of New York State Legislature

Dear Mr. Rienas:

On Saturday, April 27, 2013, New York State Senator Mark Grisanti and New York State Assemblyman Sean Ryan held a press conference announcing that they would soon propose legislation in the New York State Legislature to shift responsibility for the U.S. side of the Peace Bridge Border Station from the Buffalo and Fort Erie Public Bridge Authority ("PBA") to the Niagara Frontier Transportation Authority ("NFTA"), a public authority of the State of New York. The New York Legislators further indicated that they would seek to dissolve the PBA and have the NFTA create a new entity to run Bridge operations. Specifics of the proposal are not available and no legislation has yet been filed. Nonetheless, we have prepared an analysis of whether the New York State Legislature has the power to either dissolve the PBA and/or to transfer operations of the U.S. side of the Peace Bridge Border Station to the NFTA (hereinafter referred to as the "Proposed Changes").

BRIEF ANALYSIS

A review of applicable U.S. law indicates that the New York Legislature lacks the power to enact the Proposed Changes without the consent of the Government of Canada. Pursuant to the U.S. Constitution, the Proposed Changes would also require approval by the U.S. Secretary of State.

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DISCUSSION

As noted recently by the United States Court of Appeals for the Second Circuit, the PBA "is the product of a compact between New York and Canada, approved by Congress" pursuant to its authority under Article I, § 10, clause 3 of the United States Constitution, which provides that "[n]o state shall, without the consent of Congress, . . . enter into any agreement or compact with another state, or with a foreign power . . . ." Mitskovski v. Buffalo & Fort Erie Pub. Bridge Auth., 435 F.3d 127, 135 (2d Cir. 2006). This compact originally took effect in 1934, when Congress provided its consent to:

> the State of New York to enter into the agreement or compact with the Dominion of Canada set forth in chapter 824 of the Laws of New York, 1933 [attached as **Exhibit A**], and an act respecting the Buffalo and Fort Erie Public Bridge Authority passed at the fifth session, Seventeenth Parliament, Dominion of Canada (24 George V 1934), assented to March 28, 1934 [attached as **Exhibit B**], for the establishment of the Buffalo and Fort Erie Public Bridge Authority . . . .

Id. (quoting H.J. Res. 315, 73rd Congress, 2d sess. (May 3, 1934) (attached as **Exhibit C**)). Accordingly, the existing Compact which created the structure and operations of the PBA constitutes U.S. Federal law, because: (i) it was authorized by the United States Constitution, (ii) it was approved by the U.S. Congress, and (iii) its subject matter – viz., the operation and management of a bridge between the United States and a foreign country – was appropriate for Congress' legislation. Cuyler v. Adams, 449 U.S. 433, 440 (1981) (citing, inter alia, West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 26 (1951)). Accord, Bush v. Muncy, 659 F.2d 402, 407 (4th Cir. 1981) (noting that an interstate compact approved by Congress is federal law whose interpretation is a federal question).

Interjurisdictional compacts approved by Congress "are analogous to contracts" between states or between a state and a foreign country. Alcorn v. Wolfe, 827 F. Supp. 47, 52 (D.D.C. 1993) (citing Texas v. New Mexico, 482 U.S. 124, 128 (1987)). As such, the

entities created by such compacts "are not subject to the unilateral control of any one of the States that compose the federal system." Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 42 (1994).

As contracts which constitute Federal law, it is well established that an interjurisdictional compact approved by Congress "takes precedence over the subsequent statutes of signatory states and . . . [that] a state may not unilaterally nullify, revoke, or amend one of its compacts, if the compact does not so provide." Lines v. Wargo, 271 F. Supp. 2d 649, 671 (W.D. Pa. 2003). Accord, Bush v. Muncy, 659 F.2d at 411-12; State of Nebraska ex rel. Nelson v. Cent. Interstate Low-level Radioactive Waste Comm'n, 902 F. Supp. 1046, 1049 (D. Neb. 1995); Alcorn v. Wolfe, 827 F. Supp. at 53 (citing, inter alia, Kansas City Area Transp. Auth. v. State of Missouri, 640 F.2d 173, 174 (8th Cir. 1981)); Balzano v. Port of N.Y. Auth., 232 N.Y.S.2d 776, 779 (Sup. Ct. Kings County 1962) (commenting that an entity created by an interjurisdictional compact "may not have imposed upon it through the unilateral action [of one state] a modification . . . without the consent of" the other party thereto), aff'd, 23 A.D.2d 573 (2d Dep't 1965). This is especially true in the case of a compact that fails to include language that authorizes one party "to modify the compact through legislation 'concurred in' by the other." Int'l Union of Operating Eng'rs, Local 542 v. Del. River Joint Toll Bridge Comm'n, 311 F.3d 273, 276 (3d Cir. 2002). Absent such language, any purported amendment to the compact "would have no effect unless it were approved by all signatories and Congress." Proctor v. Wash. Metro. Area Transit Auth., 412 Md. 691, 724, 990 A.2d 1048, 1067 (2010).

State of Nebraska ex rel. Nelson v. Cent. Interstate Low-level Radioactive Waste Comm'n, 902 F. Supp. 1046, 1049 (D. Neb. 1995), is instructive on the issue. In that matter, several states, which were parties to an interstate compact approved by Congress, agreed to amend the compact to change the number of representatives on the compact entity governing body. Specifically, the Amendment would have changed the compact to provide that one of the State members of the compact entity (the state that would host compact operations) would have an extra vote on the compact entity's governing body. The State of Kansas made its approval of the change contingent upon the host state issuing a license to the compact entity to operate a low-level radioactive

waste disposal facility. Nebraska was subsequently chosen as the host state but tried to seat its extra appointee to the compact entity governing body prior to issuing a license to the compact entity to operate a low-level radioactive waste facility in Nebraska. The Court held that, as a matter of law, the compact cannot be amended until or unless all parties to the compact approve legislation incorporating the change. CILLRWC, 902 F.Supp. at 1050. (Kansas, a signatory to the Compact, has not effectively concurred in the proposed amendments to the Compact and until Nebraska issues a license for the proposed disposal facility, the original Compact as consented to by Congress, remains in effect.)

Such is true of Senator Grisanti's and Assemblyman Ryan's Proposed Changes to amend or repeal the international compact that created the PBA. Nothing in that compact authorizes its unilateral modification or termination by the State of New York or by the Government of Canada. Because that compact constitutes a binding contract under U.S. Federal law that takes precedence over any laws specific to New York, the Proposed Changes would also require the approval of the Government of Canada.

In evaluating a remarkably similar attempt to vest control of the Peace Bridge Border Station in the NFTA more than a half century ago, the New York State Attorney General reached the same conclusion after New York State created the NFTA upon enacting Chapter 870 of the Laws of 1955. That legislation included a new Section 1534 of the New York Public Authorities Law (attached as **Exhibit D**), which purported, in pertinent part:

> (i) to vest "[a]ll property, rights and powers" of the PBA in the NFTA, subject to the PBA's outstanding "pledges, covenants, agreements and trusts" and its "debts, liabilities, and obligations;"
> (ii) to confer "all of the powers of the board" of directors of the PBA upon the board of directors of the newly created NFTA; and
> (iii) to require "[t]he powers, jurisdiction and duties of the board" of directors of the PBA to "cease," such that the PBA's "property and assets acquired and held by it within the state of New York" would "thereafter be under the jurisdiction of" the NFTA.

Upon the enactment of Chapter 870 of the Laws of 1955, the PBA asked then-New York State Attorney General (and later United States Senator) Jacob Javits to issue an official opinion as to whether that law could "become operative with respect to the [PBA] and the Peace Bridge without the approval of the Dominion of Canada and the Congress of the United States." 1955 Op. Atty. Gen. N.Y. 244-45 (attached as **Exhibit E**). After reviewing the matter, Attorney General Javits responded:

> In the instant situation, the establishment of the [PBA] was construed as falling within the field of . . . an "agreement" or "compact" and approval of the Dominion of Canada and consent of the Congress of the United States were accordingly obtained . . . .
>
> While it has been recognized that unilateral legislation by a state in furtherance of an interstate compact or agreement does not require consents of the participating parties and of the Congress, such consents are required where changes in the agreement are unilaterally proposed or attempted to be made by one of the parties . . . . In the instant situation, Chapter 870 of the Laws of 1955, insofar as it affects the [PBA] and the Peace Bridge is not, in my opinion, unilateral implementation of the 1933-1934 agreement.
>
> Under the conditions in this case, which include an arrangement between the State of New York and the Dominion of Canada and not between the State of New York and another state, it is my opinion that Chapter 870 of the Laws of 1955 proposes to change and modify the agreement of 1933-1934 and that such chapter is of such character as to require approval of the Dominion of Canada and the consent of the Congress of the United States before it may become operative with respect to the [PBA] and the Peace Bridge

> [citing Virginia v. Tennessee, 148 U.S. 503, 519 (1893); Holmes v. Jennison, 39 U.S. 540 (1840); cf. Lake Ontario Land Dev. & Beach Protection Ass'n v. Fed. Power Comm'n, 212 F.2d 227, 232-33 (1954)].
>
> . . . [T]he provisions of [the] Laws of 1955, Chapter 870, which affect the [PBA] and the Peace Bridge, are inoperative without the approval and consent of the Dominion of Canada and the Congress of the United States. Accordingly, the consolidation and transfer of jurisdiction provided for by Public Authorities Law section 1534 may not take place under the circumstances covered by your question until such approval and consent of the Dominion and the Congress are given.

Id. at 245-46 (emphasis added).

In response to Attorney General Javits' opinion, New York State obtained Congress' approval of the new Section 1534 of the Public Authorities Law (H.R.J. Res. 549, 84th Congress, 2nd sess., July 27, 1956, attached as **Exhibit F**), but was unsuccessful in securing the consent of the Government of Canada. New York State consequently abandoned implementation of Section 1534, and commenced negotiations that resulted in continuation of the PBA and amendment of its governing compact. That amendment took effect after it was duly approved in 1957 by New York State (L.1957, c. 259, attached as **Exhibit G**), by Canada (6 Elizabeth II, Chapter 10 (1957), attached as **Exhibit H**), and by the United States Congress (H.J. Res. 342, 85th Congress, 1st sess., Aug. 14, 1957, attached as **Exhibit I**) as has several of the basic governing documents of the PBA for the last 50 years.

Such would be necessary to change the PBA's governing compact today. Pursuant to the International Bridge Act of 1972, Congress has given consent to the States or their subdivisions to make agreements "with the Government of Canada, a Canadian Province, or a subdivision or instrumentality of either, in the case of a bridge connecting

the United States and Canada . . . for the construction, operation and maintenance of such bridge" upon the approval of the United States Secretary of State. 33 U.S.C. § 535a. Any amendment or repeal of the PBA compact, therefore, would require the consent of New York State, the United States Secretary of State (pursuant to the authority expressly delegated by Congress in 1972), and the Government of Canada. Absent such consent, any unilateral effort by the New York State Legislature to enact a law that would claim to dissolve the PBA or compromise its powers would be of no effect.

Very truly yours,

Phillips Lytle LLP

By Craig R. Bucki

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CRBpjs
Attachments
cc: Adam S. Walters, Esq.

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