2015-2016 NATIONAL NALSA MOOT COURT QUESTION

Michiconsin, petitioner and cross-respondent v. The High End Hotel, respondent and cross-petitioner, No. 15-1122.

The following paragraphs are taken from the findings of fact in the lower court opinions in the consolidated case described above.

The Makadewaa Aki Indian Nation (M-A Nation) is a federally-recognized Indian tribe with a reservation of 850 square miles within the limits of reservation boundaries described in a treaty with the tribe ratified by Congress in 1868. The Makadewaa Aki reservation is located within the State of Michiconsin, the 51st state of the United States.

In 1965, Michiconsin opted to assume state jurisdiction over all Indian Country within the state to the fullest extent possible under Section 7 of Public Law 280. For the next three decades, residents of the reservation complained frequently about the law enforcement in their community. Many complained that local law enforcement was known for poor response times, inadequate staffing, and prejudicial treatment of tribal members. In 1995, the M-A Nation began to lobby the Michiconsin legislature for a retrocession of PL 280 jurisdiction. After five years of unsuccessful lobbying of the legislature, in 2000 the Michiconsin Governor took matters into her own hands and issued a proclamation declaring that the state agreed to retrocede the jurisdiction that it had accepted in 1965. The proclamation was delivered to the US Department of Interior, where it was flagged as requiring review to determine the availability of federal funding for law enforcement services on Indian Country in Michiconsin. Since the year 2000, the tribe has repeatedly inquired with the Department of Interior officials regarding the status of Michiconsin's agreement to retrocede PL 280 jurisdiction. In December of 2007, the Tribe received a letter from the Assistant Secretary for Indian Affairs apologizing for the delay. The letter stated that the tribe should treat the Department of Interior's inaction as acquiescence in Michiconsin's retrocession of jurisdiction.

In 2008, the US Department of Justice awarded a grant of $250,000 to support the tribe in the development of its tribal court and tribal law enforcement capacity. Since 2009, the M-A Nation tribal police officers and tribal court system and BIA law enforcement officers have been active in fostering a comprehensive system of criminal justice that meets the needs of the reservation community.

While the M-A Nation tribal police and the BIA worked to provide law enforcement for the M-A Nation's reservation, the local county sheriff's office continued to assert criminal jurisdiction on the reservation. This office, known as the Grant County Sherriff's Office, includes officers which have continued to patrol the reservation up to the present day. Fred Hoover, Sheriff of Grant County, has made several public statements claiming that the state of Michiconsin continues to possess criminal jurisdiction on the M-A reservation. In 2010, Sheriff Hoover was quoted in the Grant Press stating that, "As County Sheriff, I am

the conservator of peace within all areas of Grant County, whether within or outside the boundaries of any Indian reservation."

In February of 2014, the state of Michiconsin adopted the "Hemp Development Act," a statute that prohibits all cultivation of industrial hemp, but that authorizes higher education institutions to grow or cultivate industrial hemp if: (1) the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and 2) the pilot program studies the growth, cultivation, or marketing of industrial hemp. Section 2 of the statute defines "hemp" as "all parts of any plant of the genus Cannabis containing no more than 0.3 percent delta-9 tetrahydrocannabinol." The Hemp Development Act is codified at MCL 4.20, and its violation carries a penalty of up to $10,000 and up to two years imprisonment. In addition, under Michiconsin statute 5.43, the cultivation of or sale or distribution of any amount of cannabis in Michiconsin is a felony carrying a maximum sentence of 5 years imprisonment and a $10,000 fine. MCL 5.43 defines "cannabis" as:

> all or part of any plant of the genus Cannabis; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. The term does not include "hemp" as defined in MCL 4.20.

The Makadewaa Aki Indian Nation is the sole owner of a Section 17 economic development corporation chartered under the I.R.A. The MAIN EDC, as the corporation is informally called, wholly owns several enterprises including a commercial fishery, a hotel and restaurant, a saw mill, four gas stations and convenience stores, and a 5,000 acre farm. All of the MAIN EDC enterprises are located on trust lands within the M-A Nation's reservation. In addition, all of the officers of the MAIN EDC are tribal members.

In October 2014, the M-A Nation Tribal Council, which also consists exclusively of tribal members, enacted an ordinance titled the Marijuana Control, Legalization, and Revenue Act. The MCLRA states the following:

> § 1. Cannabis. The use of cannabis by adults, 21 years of age and older, including the cultivation, distribution, on-site consumption, processing, production, retail sale, manufacture of concentrated marijuana, and manufacture of body products, shall be lawful if conducted in accordance with this Act within the Indian Country of the M-A Nation.
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> § 2. Definition. "Cannabis" includes all or part of any plant of the genus Cannabis; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. The term "cannabis" shall apply without regard to the percentage content of delta-9 tetrahydrocannabinol.

§ 3. Penalties. Violations of this Act or any other statute or regulation enacted or promulgated to implement this Act shall be subject to a civil fine of $100 – $10,000 and additional penalties, including confiscation.

§ 4. Licensing. Cannabis may only be cultivated, distributed, processed, produced, sold at retail, manufactured into concentrated marijuana, and manufactured into products by an entity licensed by the M-A Nation.

§ 5. Severability. The provisions of this Act are severable. If any provision of this Act or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application.

On November 1, 2014, the MAIN EDC incorporated a new entity under tribal law called "The High End Hotel." On November 10, the MAIN EDC and The High End Hotel received a license from the M-A Nation Tribal Council to cultivate, distribute, process, produce, sell at retail, manufacture into concentrated marijuana, and manufacture into body products cannabis, including both high-THC marijuana and low-THC hemp variants of cannabis. The High End Hotel is operated at the tribe's 100 room hotel, which, as noted above, is located on trust land within the M-A reservation. The hotel re-opened under its new name on February 6, 2015. Using the MAIN EDC's farm land, the hotel cultivates, processes, and sells a wide variety of marijuana products with a THC content ranging from 7% to 28% for on-site recreational use within the hotel. The hotel also cultivates industrial hemp containing no more than 0.3 percent delta-9 THC content. The hotel processes the industrial hemp on-site into hemp body products that are also offered for sale in a boutique on the hotel premises.

On December 31, 2015, the Grant County Sheriff's Office raided the High End Hotel and seized 500 cannabis plants, 75 pounds of processed marijuana, and $3000 worth of hemp body products from the hotel premises. Fifty percent of the cannabis plants contained a THC content in excess of 0.3%, the processed marijuana contained a THC content ranging from 7% - 28%, and none of the hemp body products contained levels of THC content in excess of 0.3%. The Grant County Prosecutor filed criminal charges against the individuals who form the M-A Tribal Council and the officers of the MAIN EDC in an action titled *People of Grant County vs. Tribal Chairperson Nimkee Chippewa et al.*

After a criminal trial, the judge of the Grant County Court concluded that the State of Michiconsin possessed criminal jurisdiction over the defendant's actions, which included cultivating, selling, and distributing high-THC content cannabis as well as low-THC content hemp. The Judge concluded that the defendants were guilty of violating both the Hemp Development Act and MCL 5.43, and it imposed the maximum sentence on all members of the M-A Nation Tribal Council and the officers of the MAIN EDC.

On appeal, the Michiconsin Court of Appeals affirmed. The M-A Tribal Council and the officers of the MAIN EDC appealed to the Supreme Court of Michiconsin, which also affirmed. The M-A Tribal Council and the officers of the MAIN EDC filed a petition for a writ of certiorari to the United States Supreme Court, seeking review of the following issues 1) whether the State of Michiconsin has criminal

jurisdiction over the actions of the M-A Tribal Council and the officers of the MAIN EDC within the M-A Nation's Indian Country; and 2) if the State of Michiconsin has criminal jurisdiction over the defendants, whether prosecution of the defendants under the Hemp Development Act and MCL 5.43 is nevertheless barred as an impermissible exercise of civil regulatory jurisdiction over the defendants.

In addition, during the raid, one of the law enforcement officers named Charles Taylor engaged in confiscating the cannabis at The High End Hotel reported that he experienced burns and ulceration of the mouth, stomach, and lower GI tract following the burning of the cannabis as required for its confiscation. Later tests indicated that the cannabis was treated with a common pesticide called Vulture, which is safe when used on agricultural products not intended for burning, but which produces highly carcinogenic toxins when burned. When the State Attorney General's office learned of the use of Vulture on the cannabis at The High End Hotel, the State Attorney General also filed a tort claim in state court against the hotel for harm to Officer Taylor as well as harm to state residents who experienced injury from smoking cannabis sprayed with Vulture at the hotel.

Without reaching the merits, the state court dismissed the case of *Michiconsin v. The High End Hotel*, finding that the Attorney General's tort claim was barred by the M-A Nation's sovereign immunity, and that regardless, the state lacks jurisdiction to apply state common law tort doctrine to the tribe's on-reservation activities. On appeal, the Michiconsin Court of Appeals and the State of Michiconsin Supreme Court affirmed. The State Attorney General filed a petition for writ of certiorari to the United States Supreme Court for review of the issue of whether the M-A Nation's sovereign immunity deprives the Michiconsin courts of jurisdiction when the tribe is engaged in selling a product which causes tortious injury to state residents who burn it, as in the case of Officer Taylor, or, as in the case of customers at the hotel, who purchase and consume it for a recreational high. The State Attorney General's petition for writ of certiorari also requested review of whether Michiconsin courts have jurisdiction to apply state common law tort doctrine to the on-reservation activities of the MAIN EDC.

On November 1, 2015, the US Supreme Court announced that it had voted to grant review in the consolidated cases of both *People of Grant County v. Chippewa et al.* and *Michiconsin v. The High End Hotel*. The consolidated case is docketed as *Michiconsin and Grant County, petitioner and cross-respondent v. The High End Hotel and Chippewa et al., respondent and cross-petitioner*.