

Nuts and Bolts — Appellate Judging

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5 Parts of an Opinion

1. Order

The appellate judiciary comes to this matter late, a newcomer to this years-long matter that has traversed the courts of all three American sovereigns. We come to this matter with a great deal of dbaadendizwin, humility, toward the work done by all of the adults and the work yet to be done. We are also humbled by the opportunity and duty to perform this work in the best interests of the Anishinaabe Binoojiinh, to whom we and all others involved are dedicated.

IT IS ORDERED that the order of June 22, 2016 in the matter of No. 2015-2524-CV-CW is VACATED. The trial court is ordered to schedule a hearing and issue an order in conformance with 10 GTBC § 122 and this Order as soon as possible, preferably within the 30-day window described in § 122(b)(1).

IT IS FURTHER ORDERED that the Anishinaabe Binoojiinh are barred from testifying in the matter of No. 2015-2524-CV-CW. The Guardian ad Litem is authorized by 10 GTBC § 108(d)(2) to advocate for the best interests of the Anishinaabe Binoojiinh.

2. Questions Presented

We are called here today to determine whether the law of the Nottawaseppi Huron Band of the Potawatomi provides authority for the tribal court to issue personal protection orders involving the defendant and appellant in this matter, Joy Spurr, a non-Indian who resides outside of the boundaries of Nottawaseppi Huron Band Indian country.

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We hold that the law of the Nottawaseppi Huron Band of the Potawatomi does provide that authorization.¹



We are further asked to determine whether the trial judge abused her discretion in both finding a factual basis for a personal protection order against Joy Spurr and in crafting the scope of the order itself. We hold that the trial judge did not abuse her discretion.

3. Procedural History

I. Factual Background and Procedural History

In a letter dated May 6, 2008, the Chairman of the Poarch Band of Creek Indians informed Judge Earnest Ray White that the Poarch Band tribal council had removed him as judge in accordance with Poarch Band Tribal Code § 3-1-8. Other than the reference to this code section, the tribal council and the Chairman offered no reason for Judge White's removal.

Nearly one year later, on May 1, 2009, Judge White filed a complaint against the Poarch Band of Creek Indians and six tribal council members in their individual capacities in Poarch Band tribal court seeking compensatory and punitive damages for his removal, and equitable relief ordering his reinstatement to the bench. He based his claims on both the tribal constitution and the Indian Civil Rights Act, 25 U.S.C. § 1302. On May 26, 2009, the Poarch Band filed a motion to dismiss the complaint. After briefing by the parties, the tribal court, per Judge William R. Gordon, dismissed the complaint on May 11, 2010.

On May 21, 2010, Judge White filed both a notice of appeal and a motion seeking reconsideration of Judge Gordon's order. We stayed the appeal on June 16, 2010 pending the disposition by Judge Gordon of the motion to reconsider. In the interim, on July 7, 2010, Judge White filed an amended complaint. Judge Gordon rejected the claims made in the motion for reconsideration, and reaffirmed his earlier order on November 19, 2010. He declined to rule on the defendants' motion to strike the second amended complaint. Judge White appeals.

4. Facts

On July 9, 2012, the Hoopa Valley Tribal Council petitioned the Tribal Court for an order to exclude Arthur Pliny Jones from the Hoopa Valley Indian Reservation under both sections 1 and 4 of the Hoopa Valley Tribal Exclusion Ordinance. The Tribal Council alleged that Jones was excludable because he had “repeated commission of a crime” and, in doing so, had committed an “unauthorized entry into tribal...lands,” as follows: Jones was arrested on September 7, 2011 “within the Reservation boundaries for the possession of 7 pounds of processed marijuana, 5 1/2 ounces of methamphetamine, drug-related packing materials, a loaded semi-automatic handgun, and \$43,100 cash.” The Tribal Council alleged that Jones thereupon pled guilty in Humboldt County Superior Court to two felony violations: transportation of a controlled substance and possession of a controlled substance for sale. The Tribal Council also alleged that Jones had pled guilty in Humboldt County Superior Court in 1987 to a felony violation for possession of a controlled substance.

5. Legal Analysis

This Court's jurisdiction appears to be broader than the jurisdiction of courts of limited jurisdiction such as the federal courts and tribal courts like those of the Mashantucket Pequot. The Constitution of the Lac du Flambeau Band of Lake Superior Chippewa Indians establishes the authority of this court. Article X, Section 2 of the Constitution vests the "judicial power" of the Band in the tribal judiciary. The judicial power includes the powers "to interpret and apply the Constitution and laws of the Lac du Flambeau Band...." *Id.* Section 3 empowers the tribal judiciary to decide "all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, customs, and traditions of the Lac du Flambeau Band ... and cases in which the Tribe, or its officials and employees shall be a party." *See also* LAC DU FLAMBEAU BAND TRIBAL CODE § 80.102 (same). As such, this Court declares that it has subject matter jurisdiction over all cases and controversies in which the Tribe is a party, and those cases and controversies that involve a tribal law question. *Cf.* 5B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3rd ed.) ("A Rule 12(b)(1) motion most typically is employed when the movant believes that the claim asserted by the plaintiff does not involve a federal question....").

Here, the parties entered into an agreement that very specifically and forcefully bars the court from “deem[ing] or constru[ing]” any provision in the Dissolution Agreement as a waiver of tribal sovereign immunity. According to the terms of Section 10 of the Dissolution Agreement, no suit may proceed against the tribe, “their officials, entities, or employees acting within their official and individual capacities.” Section 10 effectively strips this court of jurisdiction over the tribe for any purpose under the Dissolution Agreement. *Rowland*, 2 NICS App. at 186. That language is dispositive, and Bernardo’s suit against the tribe cannot proceed.

Notes on Introducing Tribal Customary Law

There is a concept that expresses the egalitarian views of our culture. In our language we have a concept, *mino-bimaadziwin*, which essentially means to live a good life and to live in balance. But what you're really saying is much different, much larger than that; it's an articulation of a worldview. Simply said, if you were to be standing in your own center, then out from that, of course, are the circles of your immediate family. And then out from that your extended family, and out from that your clan. And then out from that other people within your tribe. And out from that people, other human beings within the world, other races of people, all of us here in the room. And out from that, the other living beings . . . the animals, the plants, the water, the stars, the moon and the sun, and out from that, the spirits, or the *manitous*, the various spiritual forces within the world. So when you say that, *mino-bimaadziwin*, you're saying that a person lives a life that has really dependently arisen within the web of life. If you're saying that a person is a good person, that means that they are holding that connection, that connectedness within their family, and within their extended family, within their community.

Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women's Reflections*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* at 39, 47-48 (Angela R. Riley, Matthew L.M. Fletcher, and Kristen A. Carpenter, eds. 2012) (quoting Eva Petoskey, Address, Michigan State University College of Law, Indigenous Law and Policy Center 5th Annual Indigenous Law Conference (October 10-11, 2008)). The historical record of the Nottawaseppi Huron Band offers examples:

MnoBmadzewen is not a legal doctrine, but forms the implicit basis for much of tribal custom and tradition, and serves as a form of fundamental law. We are careful, however, not to equate customary and traditional law as a common law basis for the decision in all cases before this Court. We again emphasize our holding that the Constitution and tribal code offers little or no guidance on how Article IX elections should be governed, nor is there an enumerated statement of fundamental constitutional rights principles. Today, MnoBmadzewen guides our common law analysis of clarifying the outer boundaries of acceptable governmental conduct in administering Article IX elections.

There are many trickster tales told by the Anishinaabek involving the godlike character Nanabozho. One story relevant to the present matter is a story that is sometimes referred to as “The Duck Dinner.” *See, e.g.,* JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* 47-49 (2002); Charles Kawbawgam, *Nanabozho in a Time of Famine*, in OJIBWA NARRATIVES OF CHARLES AND CHARLOTTE KAWBAWGAM AND JACQUES LEPIQUE, 1893-1895, at 33 (Arthur P. Bourgeois, ed. 1994); Beatrice Blackwood, *Tales of the Chippewa Indians*, 40 *FOLKLORE* 315, 337-38 (1929). There are many, many versions of this story, but in most versions, Nanabozho is hungry, as usual. After a series of failures in convincing (tricking) the woodpecker and muskrat spirits into being meals, Nanabozho convinces (tricks) several ducks and kills them by decapitating them. He eats his fill, saves the rest for later, and takes a nap. He orders his buttocks to wake him if anyone comes along threatening to steal the rest of

his duck dinner. During the night, men approach. Nanabozho’s buttocks warn him twice: “Wake up, Nanabozho. Men are coming.” KAWBAWGAM, *supra*, at 35. Nanabozho ignores his buttocks and continues to sleep. When he awakens to find the remainder of his food stolen, he is angry. But he does

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not blame himself. Instead, he builds up his fire and burns his buttocks as punishment for their failure to warn him. To some extent, the trick has come back to haunt Nanabozho – and in the end, with his short-sightedness, he burns his own body.



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