

ST. REGIS MOHAWK TRIBAL COURT

Harvey Thompson et.al,)	
Plaintiff)	
)	Case No.: 10-LND-00010
v.)	
)	
Jennifer Smoke)	
Defendant)	

DECISION AND ORDER

I. PROCEDURAL HISTORY

Harvey Thompson, Evelyn Day, and Margaret Thompson [herein Thompson et. al.], filed this appeal on September 1, 2010 against Jennifer Smoke from a Tribal Council opinion dated September 19th, 2000. Thompson et.al, Appellant, sent the 20-day summons and Complaint to the Respondent via certified return receipt, which was returned unclaimed. Appellant then hired a Process Server, who was having a hard time trying to serve the Appellant, Ms Smoke.

The Court sent the parties a Notice of Pre Trial Conference to appear before the Court on August 24th, 2011. At which time, both Parties appeared. At this meeting the Court disclosed to the parties that the Appellant had spoken to the now, Chief Judge, in or about 2005, concerning this dispute when he was in private practice. In addition, the Court found in the file, a letter from the Mohawk Nation Council of Chiefs (MNCC) dated January 13, 2006 that was signed by Barbara Gray, the then MNCC Administrator, who is now the SRMT Court Attorney. The Court adjourned until October 5th, 2011, to research whether or not any Conflict of Interest exists that would require recusal.

II. DISCUSSION

The Saint Regis Mohawk Tribe, TCR 2008-19, Tribal Civil Code [herein after SRMT Civ. Code] specifically lays out, in a hierarchal fashion, the choice of law to be applied by the SRMT Court. The Court must first determine by examining § V (A) (1)-(6), in sequence, to determine which law is controlling in the case at bar.¹ While, incidentally, there is no SRMT Law regarding

¹ See, 1.Such portions of the Constitution of the United States and federal law are clearly applicable in Mohawk Indian Country; 2.Written Mohawk laws adopted by the recognized governmental system of the Mohawk Tribe; 3.Unwritten Mohawk laws, and written and unwritten Mohawk customs, traditions and practices; 4. Generally

conflict of interest; nevertheless, it is clear that federal law applies. As such, disqualification of a Tribal Court Judge and Court Attorney is governed by 28 U.S.C § 455.

28 U.S.C §455 contains various grounds for a Judge's recusal and is divided into two parts. §455(b) addresses scenarios when recusal is required. Recusal of Judge is required:

Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding (§455(b)(1));

Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it (§455(b)(2));

Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy (§455(b)(3));

He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding (§455(b)(4));

He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) Is a party to the proceeding, or an officer, director, or trustee of a party; (ii) Is acting as a lawyer in the proceeding; (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv.) Is to the judge's knowledge likely to be a material witness in the proceeding. (§455(b)(4)).

§455(a) is a broad recusal provision, which states: any federal judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned [underline added for emphasis]. Disqualification of a judge is required when a reasonable person, knowing all the facts, would question the judge's impartiality. See *Hewlett-Packard Co.*, 882 F.2d at 1568 (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858 n.7, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988)); *Aronson III, supra* (citing *Edelstein v. Wilentz*, 812 F.2d 128, 131 (3rd Cir.

recognized principles of the law of contracts as reflected by the most recent Restatement of Contracts or in such expert treatises as the Court may choose to recognize or as the Court may otherwise determine; 5. Generally recognized principles of the law of torts, as reflected by the most recent Restatement of Torts or in such expert treatises as the Court may choose to recognize or as the Court may otherwise determine; 6. New York State law (but only if) consistent with principles of Tribal sovereignty, self-government, and self-determination and it is consistent with the aforementioned. § V (A) (1)-(6).

1987), for the same proposition). In applying that standard, "it is critically important . . . to identify the facts that might reasonably cause an objective observer to question [the judge's] impartiality." *Hewlett-Packard Co.*, 882 F.2d at 1568 (quoting *Liljeberg*, 486 U.S. at 865). Courts have stressed that "section 455(a) must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of [the appearance of] personal bias or prejudice". *Cooley, supra* (citing *Franks v. Nimmo*, 796 F.2d 1230, 1234 (10th Cir. 1986) (quoting *United States v. Hines*, 696 F.2d 722, 729 (10th Cir. 1982))).

The Supreme Court in *Liteky v. United States*, 127 L. Ed. 2d 474, 114 S. Ct. 1147, 1157 (1994), held that under § 455(a) the cause of apparent partiality must almost always be from an "extrajudicial source". Such a source is "a source outside the judicial proceedings at hand". *Liteky*, 114 S. Ct. at 1152.

The Chief Judge, prior to being elected to the Court, was an attorney with a private practice. It was in this private practice that the Appellant sought the legal advice of the now Chief Judge. At this time a legal document was prepared for the Appellant regarding the same matter as is now before this court. Pursuant to 28 U.S.C. §455(b) recusal of the Chief Judge in the matter at bar is required for conflict of interest and cannot be waived. However, if the issue at bar was an unrelated matter recusal would not have been necessary.

The Code of Conduct for Judicial Employees §320 (F) lists when recusal is necessary for a judicial employee to avoid the appearance of, or an actual conflict of interest. Pursuant to §320(F) (2)(V) a judicial employees must recuse themselves when:

He or she has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

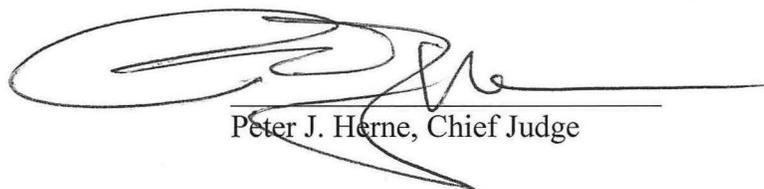
Here, the Court Attorney Dr. Gray, who while she is not a member of the bar, does have a J.D. from an accredited law school. Dr. Gray in her capacity as Administrator for the Mohawk Nation Council of Chiefs assisted the Council by advising them and providing legal research. Appellant, who at the time was involved in the same dispute as now before the Court, asked the MNCC in 2006 to provide a letter to the SRMT Council who was hearing the land dispute. The

Appellant in particular was concerned about making sure that the SRMT knew about customary law concerning the Ten-Day Feast. As instructed, Dr. Gray researched the issues, advised the MNCC as to her findings, expressed her opinion on the issue, and drafted the letter that was sent to the SRMT Council. (*See*, MNCC dated January 13, 2006). The MNCC passed the letter over the fire, decided Dr. Gray would sign it, and send it to the SRMT, which was done. Pursuant to §320(F)(2)(V) of the Code of Conduct for Judicial Employees recusal of the Court Attorney, Dr. Gray, is necessary to avoid any conflict of interest. However, if the issue at bar was an unrelated matter recusal would not have been necessary

IT IS ORDERED

Based upon the aforementioned reasons, the Court finds that conflict of interest exists, which requires the recusal of both the sitting Judge and Court Attorney, Dr. Gray.

Entered by my hand on this the 4th day of October 2011



Peter J. Herne, Chief Judge