COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT **STATE OF MINNESOTA**

Shakopee Mdewakanton Sioux Community
Gaming Enterprise,

Plaintiff,

vs. Court File No. 436-00

Leonard Prescott,

Defendant.

Memorandum Decision

During an April 8, 2008 telephonic scheduling conference, I invited counsel for the parties to submit written comments as to whether I should recuse myself from participating further in this matter[1]. I explained that I recently had learned that Plaintiff's attorneys have begun representing certain parties at the Lower Sioux Indian Community whom I had represented in the recent past, and who I believe my former law firm[2], Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C., continues to represent. I have had no dealings of any sort with Plaintiff's counsel concerning their work at the Lower Sioux Reservation; but I raised the matter because I think it is essential for the

[1] Using the first person pronoun in this opinion, though unusual in judicial writing, will vastly simplify the process of explaining the situation confronting me; I therefore, this once, will employ that odd usage.

[2] At the end of October, 2007, I retired as a shareholder in Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C. I continue, however, to be of counsel to the firm.

functioning of this Court, within the Shakopee Mdewakanton Sioux Community and in the larger world, to have transparency in the Court's business.

In response to my suggestion, Defendant's counsel has submitted two letter briefs, urging me to recuse myself. Neither brief actually discusses the matter which caused me to ask for counsel's views on my continued participation; but the Defendant's arguments and views nonetheless should be addressed.

In the first brief, filed on April 16, 2008, he argues that recusal is appropriate in light of several documents attached to the brief. Among the attachments are materials, of uncertain date but certainly a number of years old, reflecting the then-current staffing of various Tribal Courts in Minnesota (staffing which, as a matter of public record, has significantly changed – Plaintiff's legal counsel no longer sits on any of the Minnesota Tribal Courts). Also among the attachments is a motion that earlier counsel for the Defendant filed with this Court, in 1994, seeking the recusal of all then-sitting judges, in proceedings captioned In re Leonard Louis Prescott Appeal from 7/1/94 Gaming Commission Final Order, Court File No. 041-94.

In his second brief, filed on April 30, 2008 (actually responding to the Plaintiff's Motion for an Order to Show Cause, but also discussing whether any of the Court's judges can properly hear the Motion), the Defendant calls attention to the fact that Judge Vanya Hogen, who joined this Court in February, 2007, represented the Plaintiff, prior to joining the Court, while she was in private practice with the Faegre & Benson law firm. In light of that fact, and given the totality of the circumstances, the Defendant argues that "the current members of the Court cannot possibly claim total independence in this matter", and therefore asks "that this Court not hear Plaintiff's motion or that an outside

Judge be appointed to hear this matter." (Defendant's April 30, 2008 Memorandum in Response to Plaintiff's Motion for Order to Show Cause, at 2 – 3.)

Having reflected on these arguments, I am not without sympathy to the Defendant's views; and if this Court could, in fact, appoint other judges to hear matters of this sort, I might well consider doing so. But neither I nor any other judge of this Court has such power[3], and I therefore am firmly convinced that I should not recuse myself.

In large measure, the Court of Appeals of the Shakopee Mdewakanton Sioux (Dakota) Community dealt with the Defendant's arguments in 1994, in response to the very motion that Defendant's present counsel has attached to his first brief. I think it is worth quoting the Court of Appeals' response to that motion at some length:

> This Court takes very seriously any suggestion that its decisions may be regarded by litigants, or members of the Community, or the public generally, as being biased. But in our admittedly subjective view, that suggestion, in the cases at bar, is unfounded. And, perhaps more compellingly, from an objective standpoint it is pointless, because, as the trial judge correctly concluded, if the judges of this Court do not hear the [Mr. Prescott's] cases, there is no judicial remedy available to [Mr. Prescott] within the Community's government.
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> It is undeniably true that, for historical and other reasons, the size of the bar which practices for Indian tribes in this nation is relatively small, and attorneys who serve tribes may tend to encounter one another more frequently than, perhaps, attorneys in other areas of practice. It is true that each of the judges of this Court has encountered, and may in the future encounter, in different contexts, the attorneys who serve as counsel for the [Shakopee Mdewakanton Sioux Community Business Council and Gaming Commission]. Neither the judges of this Court nor the attorneys for [the Business Council and Gaming Commission] have attempted to hide this fact. Indeed the facts were the subject of a formal "Letter of Disclosure", dated May 31, 1994, which appears in the record of this matter.
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> It also bears noting that this phenomenon, where one or more judges has encountered attorneys and parties in other contexts, is not one-sided, in these two cases. One of the judges of the Court, Judge Jacobson, in the past served as co-counsel, for a different client, with one of the attorneys who represents [Mr. Prescott]. And before he was appointed to this Court, Judge Jacobson also

represented [Mr. Prescott] himself, in certain matters unrelated to the facts of these cases. At a different level of connection, two of the judges of this Court, including the trial judge in these cases [Judge Buffalo], were appointed to the Court at a time when [Mr. Prescott] was Chairman of the Community.

But no judge of this Court has evinced any personal bias with respect to any party to these cases. None of the judges of the Court have served as counsel to either party concerning these cases[4], nor are any judges a material witness concerning these cases. And no judge, and no family member of a judge, has any interest in these cases, financial or otherwise. Therefore, there clearly is no requirement that any judge must disqualify himself under the provisions of Rule 32(b) of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux Community.

But [Mr. Prescott] asserts that, nonetheless, Rule 32(a) of the Rules, requires each of us to disqualify ourselves, because the impartiality of each of us "might be reasonably be questioned".

We do not agree—for the reasons we have just set forth. But even if we did agree, the matter would be moot, because we clearly are the only judges which the Community has, and we have no power to appoint other or substitute judges.

In re: Leonard Louis Prescott, Appeal from July 1, 1994 Gaming Commission Final Order, and Prescott v. Shakopee Mdewakanton Sioux (Dakota) Community Business Council, 1 Shak. A.C. 11, at 15 – 17 (1995).

The Court of Appeals went on at some length to parse the Community's law with respect to the number of judges who serve on this Court and the manner of their appointment. The opinion concluded that the law is unambiguous: this Court has a maximum of three judges, and neither those judges nor anyone else has the power to appoint additional or ancillary judges for any purpose.

[4] This statement certainly was true in 1995; but as the Defendant notes, with the appointment of Judge Hogen to the Court, it no longer is true; and in ruling as I do with respect to my own continued participation in this matter I express no opinion with respect to the appropriateness of Judge Hogen's participation in any part of these proceedings – and since no aspect of the matter presently is before Judge Hogen, any argument with respect to that question, by any party, is both premature and speculative.

The circumstances that confront me today resemble the circumstances that confronted each of the judges of the Court thirteen years ago: the history of my service as Mr. Prescott's legal counsel is unchanged; the Plaintiff's legal counsel no longer serve as judges for any of the tribes that I or my former firm represent, but the Plaintiff's legal counsel now does represent a party that my former firm also represents; neither I nor anyone else on this Court has the power to appoint additional judges; I have no bias toward or against any party in this matter; I have no financial interest in this matter; and I have not participated as legal counsel with respect to any aspect of this matter.

If I were to recuse myself, the Plaintiff's motion necessarily would be heard either by Judge Buffalo, whose relationship to this matter is virtually identical to my own, or by Judge Hogen, who in fact has participated as legal counsel in matters ancillary to this proceeding. Hence, no purpose whatever would be served by my recusal.

Before ending my discussion of this matter, I think it is worth recalling what the Supreme Court of the State of Minnesota said, when it was discussing the necessities that on occasion require judges to decide cases that, in other circumstances, they might wish not to decide:

> ...we must frankly admit that there is such an indirect interest [in the case at bar] that were it possible to do so we should all be happy to declare ourselves disqualified. Nothing is better established than the principle that no judge or tribunal should sit in any case where he is directly or indirectly interested. [citations omitted]. However, this principle must yield to the stern necessities of the case; and when there is no other tribunal that can determine the matter, it is the duty of the Court, which would ordinarily be disqualified, to hear and determine the case, however disagreeable it may be to do so. The judicial function of courts may not be abdicated even on the grounds of interest when there is no other court that can act.
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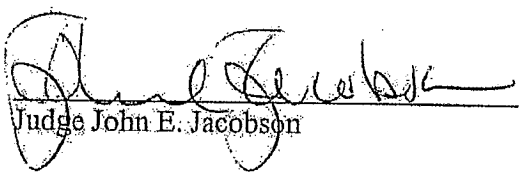
> State ex rel. Gardner v. Holm, 62 No.W. 2d 52, at 53-54 (1954).

I do not consider that I have even an indirect interest in this case, and the relationships that I do have, or have had, with the Defendant and with the Plaintiff's counsel, are minimal and will not affect my judgment. Still, for appearances' sake I would dearly love to recuse myself. But the "stern necessities" that confronted the Gardner Court also confront me, and so I will hear the Plaintiff's motion.

May 5, 2008



Judge John E. Jacobson