

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

ENTERED
7-13-2016 H&S
Sault Ste. Marie
Chippewa Tribal Court of Appeals

COURT OF APPEALS

Isaac McKechnie v. The Election Committee of the Sault Ste. Marie Tribe of Chippewa Indians

APP-16-05

Decided: July 12, 2016

BEFORE: DIETZ, FINCH, HARPER, JUMP and WICHTMAN Appellate Judges.

**Order Granting Leave to Jennifer McLeod and Michael McKerchie
to File Amicus Curiae Briefs**

Wichtman, Karrie, Chief Appellate Judge, who is joined by Appellate Judges Dietz, Finch, Harper and Jump.

On July 8, 2016 Jennifer McLeod (“Director McLeod”) and Michael McKerchie (“Mr. McKerchie”) filed documents with this Court in the above-captioned matter. After review of the documents and discussion regarding the same, this Court will address the filings of movant’s Director McLeod and Mr. McKerchie interpreted by this Court to constitute motions for leave to file amicus curiae briefs in order to communicate information or positions each party felt would serve the interests of justice and aid this Court in reaching disposition of this matter. As discussed below, the Court grants leave to each movant to file his or her amicus brief, respectively, considers the July 8, 2016 filings the complete filing of the amicus curiae briefs of Director McLeod and Mr. McKerchie, and will apply appropriate weight to both movant’s briefs to the extent said briefs are necessary to aid in the decision-making of this Court.

Intervenors and Amicus Curiae, generally.

Tribal Code and Court Rules are silent as to Intervenors or the filing of Amicus Curiae briefs in a matter pending before the Sault Tribe Court of Appeals. Although not binding on this Court, Federal Rule of Civil Procedure (FRCP) 24 and Federal Rule of Appellate Procedure (FRAP) 29 are instructive as to when a movant filing to intervene or file an amicus curiae brief should allowed. FRCP 24 related to Intervention states as follows:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

- (1) is given an unconditional right to intervene by a federal statute; or
- (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

- (1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

FRAP 29 specifies (in relevant part) that:

(a) When Permitted. The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) Motion for Leave to File. The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

...

(f) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(g) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.

Likewise, a sister tribal court, the White Earth Band of Ojibway, has developed and implemented Rules of Appellate Procedure which closely track FRCP 24 and FRAP 29 and can also be looked to for guidance regarding intervenors and amicus curiae briefing as follows:

(A) Intervention:

1. A person may, upon timely motion with the permission of the appellate court, intervene and be treated in all respects as a party to an appeal where:

a. The movant claims an interest relating to the property or transaction which is the subject of the appeal; and

- b. The movant is situated such that the disposition of the appeal may as a practical matter impair or impede the movant's ability to protect that interest; and
 - c. The movant's interest is not adequately addressed by the existing parties.
2. A person may, upon timely motion and with the permission of the appellate court, intervene in an appeal when the movant's claim or defense and the main appeal have a question of law or fact in common.
3. A person desiring to intervene shall serve a motion to intervene upon the parties to the main action. This motion shall state the grounds upon which intervention is sought and shall be accompanied by a brief setting forth the arguments for which intervention is sought.

(B) Amicus Curiae (Friend of the Court): A person who is not a party to a case but has some interest in the outcome of an appellate case may, upon a timely motion and with permission of the appellate court, submit an amicus curiae brief in support of one party to the action or to supplement the arguments of a party.

Rule 8, White Earth Band of Ojibway Rules of Appellate Procedure (in relevant part).

Discussion

Requests of movants related to intervention and amicus curiae briefing is a matter of first impression for this Court. Intervention and amicus curiae briefing are procedural matters typically properly addressed by court rule. Tribal Code Section 83.211 allows this Court to incorporate any necessary procedural matters into Subsection 2 of Chapter 82 which would arguably include those procedures relating to intervenors and amicus curiae. Tribal Code Section 82.123 further contemplates the filing of motions which generally serve as procedural mechanisms to narrow issues, answer questions, and define the scope of review of the Court of Appeals. Thus, in the absence of Tribal law or court rule that would guide its decisions, and while not binding on this Court this Court finds that FRCP 24, FRAP 29 and Rule 8 of the White Earth Band of Ojibway Rules of Appellate Procedure can be looked to for guidance as this Court's considers whether a movant may intervene or file an amicus curiae brief in a matter before this Court. For purposes of responding to Director McLeod and Mr. McKerchie's July 8, 2016 filings, this Court hereby adopts the language of Rule 8 of the White Earth Band of Ojibway Rules of Appellate Procedure as provided herein as its own for purposes of this and future appeals in which requests for intervention or filing of amicus curiae briefs are filed with the Court.

While neither Director McLeod nor Mr. McKerchie fashioned their filings in typical motion and brief format, Director McLeod indicates that she is filing "as an interested party without legal representation" and McKerchie acknowledges his "inexperience and non-legal terminology" and that he "completed the brief on his own with only one day notice." This Court recognizes Director McLeod's and Mr. McKerchie's lack of legal training and in the interest of time, and the nature of the pending matter will, therefore not worry form over substance. Therefore, this Court considers the July 8, 2016 filings of Director McLeod and Mr. McKerchie as a request for leave to file an amicus curiae brief with brief attached.

The Court addresses the July 8, 2016 filings in turn dealing first with the filing of Director McLeod. Director McLeod filed documents with this Court in her capacity as a Unit 1 Director for the purpose of “apprising the court of the social, and economic implications” related to the above-captioned matter. Director McLeod indicates that she is not filing as an intervenor but rather requests this Court consider her filing as an amicus curiae brief seeking affirmance of the Election Committee June 29, 2016 decision. Therefore, this Court applies the language of Rule 8(B) as indicated above in determining Director McLeod’s request. The Court finds that Director McLeod’s filing was timely (was received prior to the Appellee’s response as directed by the July 7, Scheduling Order) and does not otherwise unduly delay or prejudice the pending appeal. It is clear that as a Unit 1 Director, and elected leader of the Tribe, Director McLeod and her constituents would be interested in the outcome of this matter. This Court finds that Director McLeod has met the standard adopted herein by this Court to file an amicus curiae brief.

Likewise, Mr. Michael McKerchie filed documents with this Court on July 8, 2016, and while less clear than Director McLeod’s filing as to whether he seeks to file as an intervenor or just to file an amicus curiae brief, this Court interprets his filing as the latter and applies the standard for amicus curiae filing as set forth in Rule 8(B). This Court finds that Mr. McKerchie’s filing was timely (also received prior to the Appellee’s response as directed by the July 7, Scheduling Order) and does not unduly delay or prejudice the pending appeal. This Court also finds that Mr. McKerchie has an interest as a newly elected but unsworn Director to the Sault Tribe Board of Directors and his knowledge as former Chairman of the Election Committee of 13 years may be helpful to this Court in disposing of the aforementioned matter. This Court finds that Mr. McKerchie has also met the standard adopted herein by this Court to file an amicus curiae brief.

ORDER

For the reasons specified above, the July 8, 2016 filings requesting leave to file amicus curiae briefs in the above-caption matter of both Director McLeod and Mr. McKerchie are **GRANTED** and each will be given proper weight as determined by this Court in deciding the present matter before the Court.

For the avoidance of doubt, the filings of July 8, 2016 constitute the amicus curiae briefs that will be accepted from Director McLeod and Mr. McKerchie. No supplemental filings from Director McLeod, Mr. McKerchie or any other interested person are authorized pursuant to this Order.

For purposes of oral argument scheduled for July 14, 2016 at 2:00 p.m. neither Director McLeod nor Mr. McKerchie are granted permission to participate or address the Court.

It is SO ORDERED.