LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

TRIBAL JUDICIARY

LITTLE TRAVERSE BAY BANDS
OF ODAWA INDIANS,
Petitioner.

File No. AO-001-0803

James Bransky (P-38713)
Attorney for Petitioner
Government Center
7500 Odawa Circle
Harbor Springs, MI 49740
Telephone: (231) 242-1405

JUSTICE SINGEL, with whom JUSTICES BUDNICK and SHEPARD and JUDGE PETOSKEY join.

Issue

The Tribal Council of the Little Traverse Bay Bands of Odawa Indians filed a petition on August 26, 2003 in Tribal Court requesting an advisory opinion to determine whether the Tribal Council has the retained authority to overturn an individual licensing decision by the Gaming Regulatory Commission. The Tribal Council's request was submitted in accordance with the Judiciary's Appellate Procedure Rule 7.302, which provides for the issuance of advisory opinions in the event certain specified conditions are met.

After extensive discussion among the entire Tribal Judiciary,[1] and to assist the Judiciary's deliberation of the Tribal Council's request, the Judiciary requested a brief from the Tribal Council and any other interested community members on two questions.

The first question was whether the Judiciary has the jurisdiction to issue advisory opinions, given the scope of the Judiciary's power as defined by Section 1.202(A) and (B) of Chapter 2 of the Tribal Code, and given that Section 1.206 of Chapter 2 of the Tribal Code mandates that the Tribal Judiciary shall be independent from the legislative and executive functions of the Tribal government.

The second question presumed that Appellate Procedure Rule 7.302 was valid, and asked whether the Tribal Council's request for an advisory opinion satisfied the rule's requirement that the request meet the Court's jurisdictional standards, including standing, ripeness, mootness and injury in fact.

The Tribal Council declined to respond to the Judiciary's request for briefing, and stated that it was willing to defer to the Judiciary's decision on both questions. No other comments were submitted.

Background

Before we begin our analysis, it is important to note the historical context of the Judiciary's review of the legal issues presented here. When this matter arose, the Tribe was governed by an earlier constitution that was in place when the Tribe's sovereignty was reaffirmed by the federal government on September 21, 1994.[2]

---

[1] Since the Appellate Procedures of the Tribal Court provide that advisory opinions may be issued upon acceptance by a unanimous decision of the "Judiciary Judges," all members of the Judiciary, including the Appellate Justices and the Trial Court Judge, participated in this opinion.

[2] Public Law 103-324, 25 U.S.C. § 1300k.

After the tribe was reaffirmed, the Tribe began work on deliberating over the appropriate text for a new constitution. On September 11, 2005, the new Constitution of the Little Traverse Bay Bands of Odawa Indians took effect. Prior to the effective date of the new Constitution, however, the original constitution ("Interim Constitution") remained the Tribe's principal governing document.

Since the Interim Constitution originally served as the constitution of the tribal government before the federal government reaffirmed its status as a sovereign nation, it had certain unique qualities. Most notably, the Interim Constitution did not establish a Judiciary as an independent and separate branch of government. Instead, it provided that the "Board of Directors," meaning the Tribal Council, had the authority to establish a reservation court and define its duties and powers.[3] In 1995, the Tribal Council acted pursuant to this court-making authority by enacting a statute that established a court system and defined the scope of the court system's powers.[4] Thus, under the Interim Constitution, the substance and scope of the Judiciary's power was a statutory rather than constitutional matter.

Our analysis of the issues addressed in this opinion applies the law of the Tribe under the Interim Constitution because this matter arose and was brought to the court when the Interim Constitution served as the Tribe's governing document. At the same time, this opinion also clarifies through a series of parallel citations and footnotes that its analysis and ultimate holding are not changed by the implementation of the new Constitution.

Analysis

[3] Article VII, section 7 of Constitution and By-laws.
[4] WOS 1995020, December 17, 1995.

We first look to whether the Judiciary has the authority to issue an advisory opinion in response to the Tribal Council's petition.[5] The Appellate Procedures of the Tribal Appellate Court presume that it does, since it provides a procedure for issuing such opinions. Rule 7.302 of the Appellate Procedures provides the following:

> 7.302 Advisory Opinions.
>
> (A) Limited Acceptance. Requests for Advisory Opinions will only be accepted by a unanimous decision of the Judiciary Judges of the Tribal Court. The request may not involve a case in controversy. The request must meet the Court's jurisdictional standards, including standing, ripeness, mootness, and injury in fact.
>
> (B) Discretionary. The Tribal Appellate Court may decide at any time [sic] decline acceptance or [sic] issuing an opinion. The Tribal Appellate Court in making its decision will consider such facts and circumstances that will lead to a fair and equitable result based on justice and protection of the tribe's sovereignty and future.
>
> (C) Notice. The request will be held with the Tribal Court Clerk and notice shall be to all members of the Tribal Judiciary.

If the Judiciary as a whole accepted Rule 7.302 as a valid appellate procedure, the Court would immediately proceed to weigh the factors identified in the rule and vote to determine whether the issuance of an advisory opinion in this instance had unanimous Judiciary support. Here, however, the Tribal Judiciary is split and does not agree on whether Rule 7.302 can be accepted as a valid appellate procedure.

JUSTICE SINGEL, with whom JUDGE PETOSKEY joins.

The validity of Rule 7.302 of the Appellate Procedures relies on the initial premise that the Judiciary has the jurisdiction to issue advisory opinions if it chooses to

[5] In accordance with Rule 7.302, which requires that all members of the Tribal Judiciary receive notice of a request for an advisory opinion and vote to determine whether to issue one, this opinion is rendered by the Tribal Court as a whole, including the Court's three Appellate Justices and the Court's Trial Court Judge.

do so. This premise is flawed because it fails to take into account several limitations on the Judiciary's jurisdiction that were imposed by various provisions of the Tribal Code enforced under the Interim Constitution. These statutory limitations required that the Judiciary act as an independent body apart from the Tribal Council, that the Judiciary reserve its resources for actual cases, and that the Judiciary reserve its resources for disputes in which its opinion will be final and binding.

I. Section 1.206 of the Tribal Code requires separation of powers.

Section 1.206 of the Tribal Code provided the following:

> The Tribal Judiciary shall be *independent* from the legislative and executive functions of the Tribal government and no person exercising the powers of the legislative or executive functions of government shall exercise powers properly belonging to the judicial branch of government.[6]

The mandate that the Tribal Judiciary shall be independent from the other functions of Tribal government creates a separation of powers between the Judiciary and the Tribal Council. This separation means that the courts and the legislative and executive branches of government should each refrain from encroaching on the other's sphere of responsibility. We note, however, that the framework of the Interim Constitution made a complete separation of powers impossible. This is because the Interim Constitution provided that the Tribal Council had the authority to create the Court and define its powers. Regardless of this distinction, however, the Judiciary is bound to give the fullest effect possible to all constitutional provisions of the Tribal Code under the

[6] WOS 1995020, December 17, 1995, Section VI (emphasis added).

Interim Constitution for all matters that were governed by and that arose during the effectiveness of the Interim Constitution.

Furthermore, the policy furthered by Section 1.206 of the Tribal Code is one which we strongly support. The rule of judicial independence is one of the bedrock principles of good government, since it helps to ensure that the court will serve its function with fairness and objectivity, free of prejudice against or in favor of either party. An independent court helps to keep politics out of the solemn determination of a person's rights. It conserves resources to ensure that scarce court funds remain available for matters that absolutely require judicial involvement. Judicial independence also maintains the Judiciary's credibility in the eyes of the public.

Under Rule 7.302 of the Judiciary's Appellate Procedures, the Judiciary has the discretion to issue advisory opinions in certain limited instances. If the Court were to actively issue such opinions, it would abrogate the judicial independence and separation of powers mandated by the Tribal Code. Particularly if the Court were to issue advisory opinions for the Tribal Council, as the Tribal Council has requested in this matter, the Court would appear to act as a private legal advisor for the Tribal Council rather than as an independent branch of government. If the Judiciary made a regular practice of offering advisory opinions for the Council, its independence would slowly but surely erode since it would become deeply ingrained in the Tribal Council's political function. Such involvement would divert judicial resources from legitimate court business. It would also prejudice the Judiciary, since it would prematurely expose the Court to legal questions framed exclusively by the Tribal Council. Since requests for advisory opinions are typically posed by a single party, the Court would also receive the benefit of briefing

on only one side of the issue. As a result, if the same or a similar issue arose later in litigation, the Court would be less likely to view the issue with fresh eyes and complete neutrality. Rather than place the Judiciary in this position, the Tribal Council should pose legal questions to its own legal staff, which is retained by the Tribal Council for the express purpose of advising it on such matters.

The analysis above is also the same under the new Constitution. Unlike the Interim Constitution, Article IX of the new Constitution establishes the Judiciary as a separate branch of government with complete independence from the executive and legislative branches of government. This separation of powers is embodied within the Constitution itself, rather than added as an enactment of the Tribal Council, so its requirements are more forceful and enduring. Like Section 1.206 of the Tribal Code under the Interim Constitution, Article IX, Part H, Section 1 of the new Constitution provides for separation of powers and requires that the Judiciary be independent from the executive and legislative branches. The language of Article IX, Part H, Section 1 is nearly identical to the language of the original Section 1.206 of the Tribal Code:

> **Independent Branch of Government.** The Judicial Branch shall be independent from the Legislative and Executive branches of the Tribal government and no person exercising the powers of any of the other two (2) branches of government shall exercise powers properly belonging to the Judicial Branch of Tribal government.

Since the new Constitution imposes the same requirement of judicial independence as the governing law under the Interim Constitution, the analysis in this part of the opinion is the same under both the Interim Constitution and the new Constitution. In both cases, tribal law requires that the Judiciary act

independently, and since this need for independence would be undermined if the Judiciary provided advisory opinions to the Tribal Council, the Judiciary may not offer them.

II. Section 1.202 of the Tribal Code also limits judicial decision-making authority to cases.

Section 1.202(B) of the Tribal Code provided the following:

> The judicial power shall extend to all *cases* arising under the Tribal Constitution, statutes, ordinances, regulations, or judicial decisions, and all *cases* for which the Tribal Court is the appropriate forum based on the Tribe's inherent sovereignty, traditional custom or Federal law.[7]

This provision effectively defined the extent of judicial power to hear disputes under the Interim Constitution. In other words, it defined the scope of the Judiciary's jurisdiction. To give meaning to this provision, we must first determine the meaning of the term "cases." The term "cases" is not specifically defined in Section 1.202, so it is the Judiciary's role to enunciate the meaning of this term. Under the commonly-accepted rules of statutory construction, a court that is faced with interpreting the meaning of a term in a statute should first look to the statute itself to determine if the term is expressly defined. If the statute does not define the term, we presume that the drafters of the law intended to apply the term's ordinary, obvious or typical meaning, or its generally accepted contemporary meaning. Where a term is not defined in a statute and its

[7] WOS 1995020, subsection B, December 17, 1995, Section II (emphasis added). The new Constitution has a nearly identical provision. It provides in Article IX, Part C, Section 1 that "[t]he judicial power of the Tribal Court shall extend to all civil and criminal cases arising under this Tribal Constitution, statutes, regulations or judicial decisions of the Little Traverse Bay Bands of Odawa Indians. This jurisdiction is based on the Tribe's inherent sovereignty, traditional custom, and Federal law." Since the new Constitution also limits the Judiciary's power to cases, the analysis in this portion of the opinion is the same under both the Interim Constitution and the new Constitution.

meaning is unclear, evidence of the drafters' intended meaning for the term can also assist the Judiciary's interpretation.

In this instance, the statute does not define the term "cases." In addition, the Judiciary has received no evidence from the Tribal Council or from any other party on the meaning that the drafters of Section 1.202(B) may have intended to apply to the term "cases." However, there is strong evidence that the term "case" has a generally accepted contemporary meaning. This evidence consists of the many opinions from tribal, federal, and international courts that have examined the meaning of similar delegations of judicial power that limit jurisdiction to "cases." Although these cases are not controlling in the Little Traverse Bay Bands courts, they nevertheless provide useful examples of the meaning commonly ascribed to the term "cases."

The Tribal Court of the Grand Traverse Band of Ottawa and Chippewa Indians interpreted the meaning of "case" in *In Re: Russell* as "a controversy between adverse parties which requires a declaration of the parties' rights."[8] It further stated that this requirement is satisfied when "a suit is brought in pursuance of an honest and actual antagonistic assertion of rights by one party against another, and valuable legal rights will be directly affected to a specific and substantial degree by the Court's decision."[9] The court concluded that advisory opinions did not constitute cases and therefore should not be issued.

The Confederated Tribes of the Grand Ronde Community of Oregon Tribal Court interpreted the meaning of "cases" and "controversies" in *Flood v. Ryan* as actual cases

---

[8] In Re: Russell, Case No. 96-03-025-CV, Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court, April 2, 1996.
[9] *Id.*

which were not abstract or hypothetical.[10] The court held that "[t]he exercise of this Court's jurisdiction . . . requires the existence of an actual case or controversy, as opposed to the presentation of an abstract or hypothetical question."[11]

The International Court of Justice also appears to define cases as separate and apart from advisory opinions. Article 36 of the Statute of the International Court of Justice provides that "[t]he jurisdiction of the court comprises of all *cases* which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Article 65 of the same statute provides that the ICJ can issue advisory opinions. This specific authorization for advisory opinions separate from the statute's authorization for review of cases shows an implied assumption cases and questions requesting advisory opinions are separate concepts.

The Supreme Court defines the use of the word "case" in the U.S. Constitution as a matter "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[12] In *North Carolina v. Rice*, the Supreme Court further stated that the term case as used in the U.S. Constitution refers to "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[13]

The opinions cited above indicate that the term "case" is generally accepted to mean a controversy between adverse parties that is capable of resolution by a conclusive decree that touches the rights of the parties. They also indicate that the term "case"

---

[10] Flood v. Ryan, 27 Indian L. Rep. 6119, 6119-6120 (Conf. Tribes of the Grand Ronde Comm. of Oregon Tribal Ct. 2000).
[11] *Id.* at 6119.
[12] Flast v. Cohen, 392 U.S. 83, 95 (1968).
[13] North Carolina v. Rice, 404 U.S. 244, 246 (1971).

generally excludes requests for advisory opinions because such requests are generally hypothetical, abstract and nonbinding rather than actual disputes between adverse parties that require a final resolution of the parties' legal rights. Since we are not aware of any evidence, textual or otherwise, that indicates that the Tribal Council intended an alternative meaning of the term "case" to apply when it drafted and enacted Section 1.202 of the Tribal Code, and we have received no evidence that the term "case" has a different meaning as a matter of tribal custom, we decline to construe the term differently. As a result, the term "case" as used in Section 1.202 of the Tribal Code means a controversy between adverse parties that is capable of resolution by a conclusive decree that touches the rights of the parties. Since a request for an advisory opinion does not involve a controversy that is capable of resolution by a conclusive decree that touches the rights of the parties because advisory opinions are merely advisory and not conclusive as to the parties' rights, we therefore find that a request for an advisory opinion cannot fairly be considered a "case" under the Tribal Code.

The following opinion submitted by Justices Budnick and Shepard concludes that the term "cases" has a broader meaning that permits the Judiciary to consider requests for advisory opinions. Justices Budnick and Shepard rely on the legislative intent of the Tribal Council and cultural differences between the Odawa and western court systems to support their conclusion. In addition, Justices Budnick and Shepard challenge the notion that the word "cases" has an ordinary, obvious or typical meaning, or generally accepted contemporary meaning.

First, we disagree that the term "cases" should be interpreted differently as a result of legislative intent. In this instance, the Judiciary has received no evidence,

written or oral, indicating what the Tribal Council's intent was at the time Section 1.202 of the Tribal Code was enacted.[14] In the absence of any such evidence regarding legislative intent, we decline to insert or impose our own personal suppositions.

Second, we also disagree that the term "cases" should be interpreted differently as a result of the cultural differences between Odawa and western court systems. In our review of the questions presented in this matter, the Judiciary has not received any evidence that Odawa traditional customs support a different result than the one we reach here. While there may be many other instances when the traditional customs and beliefs of the Odawa community require that we interpret the law differently than other courts in non-Odawa settings, we decline to do so where we have no support for a different interpretation and where a different interpretation would create an unnecessary conflict with express provisions in the Tribal Code.

Third, we disagree with Justices Budnick and Shepard's statement that a word such as "cases" can never have an ordinary, obvious or typical meaning, or a generally accepted contemporary meaning. Justices Budnick and Shepard state that "[p]lain meaning is never plain." On the contrary, we maintain that there are many instances where a term has an ordinary or typical meaning, and it is the court's responsibility and essential function to remain faithful and give meaning to such ordinary and typical meanings of words used in Tribal laws. If the Judiciary did not respect and honor a commitment to assigning words their ordinary and typical meaning in the absence of special statutory definitions, then the Tribal Council would lack any certainty that its

[14] After the Judiciary received the Tribal Council's request for an advisory opinion in this matter, it requested that the Tribal Council brief the issue of whether the Judiciary has the authority to issue advisory opinions. The Judiciary also posted a public notice requesting that any interested community member submit a brief on the subject. No briefing was submitted in response to either request.

enactments would be interpreted in a consistent and predictable fashion. This result would cripple the Tribal Council's ability to draft laws, since it would always remain uncertain what meaning the Judiciary would assign to its words.

Justices Budnick and Shepard also conclude that the meaning of the term "cases" in Section 1.202(B) of the Tribal Code is different than the meaning assigned to the term in other jurisdictions because this provision of the Code also permits judicial review of "all cases for which the Tribal Court is the appropriate forum based on the Tribe's inherent sovereignty, traditional custom or Federal law."[15] We disagree with this interpretation. Instead, we find that this sentence and its reference to inherent sovereignty, traditional custom and federal law do not alter the *definition* of cases to remove the need for a concrete controversy between adverse parties that is capable of resolution by a conclusive decree that touches the rights of the parties. Rather, this sentence expands the *types* of cases that may be eligible for judicial review. Since the first sentence of Section 1.202(B) permits judicial review of cases arising under person might question whether the Judiciary also has authority to review cases involving substantive rights not explicitly recognized in the Constitution, statutes, ordinances, regulations or judicial decisions of the Tribe. For example, a person might wonder whether the court has the power to review a case involving the impingement of a right recognized as a matter of traditional custom but not as a matter of written law. Section 1.202(B)'s second sentence would permit judicial review of this type of question, since it expands the classes of cases eligible for review to include cases involving matters of traditional custom, inherent sovereignty and federal law.

[15] WOS 1995020, subsection B, December 17, 1995, Section II.

The opinion submitted by Justices Budnick and Shepard also concludes that advisory opinions should be permitted because "[t]he Appellate statute has criteria as to when advisory opinions could be issued; using this criteria would prevent the Judiciary from inappropriate interference or actions."[16] This statement confuses the Appellate Procedures of the Judiciary with statutes enacted by the Tribal Council. In fact, the Appellate Procedures are rules established by the Judiciary, and they do not have the force of tribal statutory law. Furthermore, since the Judiciary was not established as a fully separate branch of government under the Interim Constitution, but was instead created by Sections 1.201 – 1.210 of the Tribal Code enacted by the Tribal Council, all rules and procedures of the Judiciary in force under the period of the Interim Constitution were required to comply with the Tribal Code as their ultimate authority. Therefore, to the extent the rules of Appellate Procedure are inconsistent with or violate the Tribal Code, the Tribal Code must control.[17]

III. Section 1.202(A) of the Tribal Code requires that decisions be final and binding.

Section 1.202(A) of the Tribal Code also requires that "[r]ulings of the Tribal Appellate Court are final and binding."[18] This provision requires that rulings of the Tribal Appellate Court must offer conclusive resolution of legal issues, and they must

---

[16] *See infra* p. 19.

[17] Under the new Constitution, the Judiciary's Appellate Procedures must comport with the new Constitution's requirements, including the new Constitution's requirements for judicial independence, the limitation of judicial power to cases, and the requirement that opinions be final and binding.

[18] WOS 1995020, subsection A, December 17, 1995, Section II (emphasis added). The new Constitution has a nearly identical provision. It provides in Article IX, Part C, Section 7 that "[r]ulings of the Tribal Appellate Court are final and binding and cannot be appealed to the Tribal Council, Tribal Membership or any other jurisdiction." Since the new Constitution also requires that the Judiciary's rulings be final and binding, the analysis in this portion of the opinion is the same under both the Interim Constitution and the new Constitution.

touch the legal rights of the parties before it. An advisory opinion would not satisfy this requirement of the Tribal Code. A party who obtains an advisory opinion is free to comply with it or ignore it and risk further liability or prosecution. Since the opinion is merely "advisory", it is not binding and therefore in violation of this provision of the Tribal Code. In addition, a party who obtains an advisory opinion or a person who did not participate in a request for an advisory opinion is free to pursue further legal resolution of the issue by bringing a suit in court. As a result, advisory opinions also fail to satisfy the Tribal Code's requirement that they be final.

Since the Tribal Code was the ultimate authority on the powers of the Judiciary under the Interim Constitution, the Judiciary is obligated to comply with the requirement of Section 1.202(A) in this matter.

IV. Response to Additional Statements in the Opinion of Justices Budnick and Shepard.

Finally, the opinion of our respected colleagues Justices Budnick and Shepard states that "we would not want to prevent future generations from having the ability to adapt to the growing needs of the community." They conclude that the Judiciary should issue advisory opinions because they may be beneficial to the community. Our esteemed colleagues also express concern that this opinion will preclude the Judiciary from performing marriages, voluntary adoptions, guardianships, and other matters, and will prevent the court from developing traditional court forums.

Contrary to the opinion of Justices Budnick and Shepard, limiting the Judiciary's authority to the unambiguous mandates provided by tribal law does not have a harmful effect on future generations of Tribal members. Instead, by paying close attention to the

Interim Constitution and the statutes enacted by the Tribal Council, this Court builds a solid foundation of respect for the Tribe's Constitution and the lawmaking function of the Tribal legislative body. This foundation will create a solid footing for future Tribal legislation, ensuring the Tribal membership that the laws created by the Tribal Council will not be ignored or overturned by the Judiciary unless they are unconstitutional or otherwise unlawful. We believe that the creation of such a solid legal foundation is the best way for the Court to benefit future generations.

In addition, we also note that this opinion does not absolutely prevent the issuance of advisory opinions by the Judiciary. If the Tribal Council had enacted a constitutional statute that permitted advisory opinions under the Interim Constitution, the Judiciary would have been bound to give effect to such a law. Similarly, under the new Constitution, the Judiciary is bound to interpret its power to issue advisory opinions in light of the new Constitution's provisions.

In response to Justices Budnick and Shepard's statement that this opinion will prevent the Court from performing marriage ceremonies or voluntary adoptions and will prevent the Tribe from developing other traditional dispute resolution forums, we reply that this opinion will have no such effect.

First, the performance of marriage ceremonies by members of the Judiciary is not an exercise of the court's judicial power, so such ceremonies are not limited by the constitutional provision that limits the exercise of the Judiciary's judicial power to "cases." Rather, the performance of a marriage ceremony by a judge is an extra-judicial function that can be carried on outside of the courtroom and during times that fall outside the court's normal hours of operation. Even if marriage ceremonies are performed in the

courtroom, such ceremonies must be scheduled to accommodate the judicial duties of the court, such as court hearings and conferences. Furthermore, marriage ceremonies do not require the exercise of the court's adjudicatory powers, since such ceremonies only require that the officiating judge ensure that the *technical* requirements of the preparation of a marriage license and the proper solemnization of a marriage take place. As a result, the fact that the Judiciary's judicial power is limited to "cases" does not prevent the Tribe from authorizing the Judiciary to perform marriage ceremonies.

Second, the Court's ability to perform voluntary adoptions is not necessarily impeded by the constitutional limitation of the Judiciary's judicial power to "cases." This issue is not squarely before the Court at this time, however, and is best addressed if and when a case presenting this issue is heard by the Court.

Third, the Tribe's ability to establish traditional dispute resolution forums is also not impeded by the constitutional limitation of the Judiciary's judicial power to "cases." Such traditional forums would not be operated by the Judiciary, so their functions would not be limited to the constitutional limitations that apply to the Judiciary.

Finally, this opinion does not leave an interested person or entity with standing without a remedy. Under existing law, other legal proceedings could be initiated instead of a request for an advisory opinion to accomplish the same result. For example, a person with standing could bring a lawsuit seeking a declaratory judgment declaring the rights of the parties. Such a lawsuit would satisfy the requirement of the Tribal Code, since it would establish an actual case between adversarial parties, it would allow the Judiciary to act in its ordinary adjudicative capacity and preserve its independence, and it would result in a holding which, if appealed, would be final and binding. Such a lawsuit would also

allow the Judiciary to apply the tasks which it is uniquely competent to perform. It would allow the Court to hear arguments and accept evidence from two adverse parties, ensuring that it received all relevant facts from both sides of the issue. It would also allow the court to apply the law to a concrete factual situation. For this reason, we do not believe that the Court's opinion leaves the Tribal Council or other persons interested in advisory opinions without recourse or a remedy in the event they seek a clarification of their rights.

Based on the analysis in parts I – IV above, we find that Rule 7.302 should be repealed because the Judiciary does not have the authority to issue advisory opinions.

JUSTICE BUDNICK, with whom JUSTICE SHEPARD joins.

Analysis

The main issue that splits the Judiciary on this decision is whether we should use a strict interpretation of wording of the Interim Constitution or whether we should look at the overall intent and the impact on public policy and the future of the tribe.

I. Ambiguity of the word "Cases":

Section 1.202(B) of the Tribal Code provides the following:

> The judicial power shall extend to all *cases* arising under the Tribal Constitution, statutes, ordinances, regulations, or judicial decisions, and all *cases* for which the Tribal Court is the appropriate forum based on the Tribe's inherent sovereignty, traditional custom or Federal law. *17 WOS 1995020 Subsection B, December 17, 195, Section II* (emphasis added).

The *plain meaning rule* is a legal concept that certain words have a face value and should be interpreted as such. One could look at the word "cases" and interpret it to imply that there must be an element of controversy or *cases* could also be interpreted to

mean a more generic term and not a legal limitation on the jurisdiction of the Judiciary. We see the word as ambiguous because it has more than one meaning. The plain meaning rule dictates that when there are two meanings for a particular word, the intent of the law must decide the appropriate interpretation.

Contextually, the definition of a case as a broad issue or matter acknowledges the American Indian cultural framework and is consistent with the Tribal Constitution. Especially so, when read in its entirety: "The judicial power shall extend to all *cases* arising under the Tribal Constitution, statutes, ordinances, regulations, or judicial decisions, and all *cases* for which the Tribal Court is the appropriate forum based on the Tribe's inherent sovereignty, traditional custom or Federal law."

Our interpretation of the framers' intent was to be able to seek remedies through the Tribal Court unless the court would be inappropriate. We respectfully see the word "cases" as a generic term and not a legal limitation on the jurisdiction of the Judiciary.

The Appellate statute has criteria as to when advisory opinions could be issued; using this criteria would prevent the Judiciary from inappropriate interference or actions.

Further, the phrase "based on the Tribe's inherent sovereignty, traditional custom or Federal law" is very broad language. It appears that the Tribal Court has jurisdiction to provide remedies beyond what would normally be considered by a Western Court (traditional custom), thus allowing the Judiciary to grow and provide adequate services to the tribal community as new needs develop.

The "plain meaning rule" is a Western legal construction that attempts to get to the true meaning of a word. The legal rule states that a court must accept the commonly accepted meaning of a word or phrase. Even the Western legal tradition is divided about

when to use the plain meaning rule. Plain meaning is never plain. American and English judges have clashed about when and how a term should be defined by its common usage.

There are also exceptions to the "plain meaning rule".

> *". . .plain meaning of such words may be followed when they are sufficient in and of themselves to determine the purpose, but court may look beyond such words to the purpose when the plain meaning leads to absurd or futile results, or an unreasonable result . . ."* United States et al. v. American Trucking Associations, Inc., et al., 310 US 534, 60 StCt 1059, 84 L.Ed. 1345 (1940); Haggar Co. v Helvering, 308 US 389, 60 SCt 337, 84 L.Ed 340 (1940); Armstrong Paint & Varnish Works v Nu-Enamel Corp. 305 US 315, 59SCT 191, 83 L.Ed 195 (1938); Sorrells v United States, 387 US 435, 53 SCT 210, 77 L. Ed 413 (1932); United States v Katz, 271 US 354, 46 SCT 513, 70 L.Ed 986 (1925)

The "commonly-accepted rules of legal construction" also state that the plain meaning rule does not apply when the meaning of a word is ambiguous or there is an absurd or unworkable result. Here, both of those would occur. If we applied "cases" in its narrowest sense the results would go against public policy thus creating an absurd and unworkable result. Further, if the Judiciary determined that we could only hear cases in controversy, this could potentially limit the court from performing marriage ceremonies, voluntary adoptions, guardianship and many other matters. This line of thinking could also prevent the Judiciary from developing other traditional court forums where the parties are not involved with a controversy, i.e. Youth Wellness Court, Indigenous Peacemaking Practices, or other areas where a formal case is not filed with the court. Based on Justices Petoskey and Singel's reasoning, using the narrow construction of the word "cases" to mean "cases in controversy", any code or law that was passed, i.e. marriage statute, would be seen as unconstitutional, since it would be beyond the jurisdiction and powers of the court as set forth in the constitution. The Court cannot exercise powers that have not been given to it by the people through the constitution. We

cannot agree with this line of reasoning, and believe that the intention, as outlined in the LTBB Constitution, is to have a full-service court that meets the needs of the tribal members and is not limited to an adversarial system of justice.

II. Impact on Public Policy and Future Generations

Within Odawa culture, it is important to recognize that our actions today may impact our children of tomorrow. We would not want to prevent future generations from having the ability to adapt to the growing needs of the community. Binding future generations to something that may not fit their needs or lives is precisely what we must seek to avoid.

Resorting to the objective legal rules of Western society is incompatible with the traditional values we have struggled to preserve. Injecting objectivity where it does not belong will ensure that future generations cannot distinguish between Western values and our own. Despite all of this, however, we believe that advisory opinions are acceptable even using Western legal thought.

Advisory opinions are well within the range of appropriate responsibilities for the judiciary and do not infringe on either separation of powers or independence. The controversy regarding advisory opinions cannot be evaluated without considering their particular purpose. We do not set forth that advisory opinions are binding. Instead, they are opinions issued by the Tribal Court for the benefit of the Tribal Council and Tribal members. Advisory opinions can be ignored. The Tribal Council has the ability to proceed with a particular action, or follow the advice of the opinion or some hybrid of the two. In some cases, an advisory opinion may provide the Tribal Council with insight as to how the judiciary views a particular social, economic or legislative matter. In other

cases, advisory opinions may provide guidance as to how the judiciary will interpret certain laws. There are many possibilities.

By providing insight into the minds of the justices, advisory opinions have an enormous potential to improve the efficiency of tribal governance and create open communication between branches. As the tribal government grows and begins fulfilling more of the needs of the tribal members, such discourse may be a useful tool for both the Tribal Council and the Tribal Court. Such interactions will likely have positive effects in creating ties between the people and the judiciary as well as ensure vigilance in dividing responsibilities between branches.

The Tribal Court is not meant to be an apolitical body. Instead, the Tribal Court is meant to enforce the laws of the Tribal Council while respecting and upholding tribal culture, traditions and beliefs. Pretending that words, phrases or even entire laws have objective meanings will serve to alienate the public and create discontent in our governance. By acknowledging that laws are based on interpretation, advisory opinions may help to strengthen respect for law and government.

At the very least, there is no harm in reserving the option of advisory opinions. Even if they are infrequently issued and sometimes denied, advisory opinions may have unique value for future generations. Closing the door will make it difficult for our children to revisit as issue. The Tribal Court has a responsibility to allow our culture to evolve and flourish in the way future generations see fit.

Additionally, no vital resources will be lost. The only resource required to write an advisory opinion is time. While time is a precious commodity, in the case of many advisory opinions, the time to write the opinion is an investment in good governance. If

there is a shortage of resources, the judiciary always has the option of turning down or delaying an advisory opinion. There is no reason to believe that we will be faced with a massive influx of requests for advisory opinions. On the contrary, justices may be unwilling to accept many requests for advisory opinions because they have not completely formed their opinions about certain laws or seen them in practice. Nonetheless, it is important to have the option of issuing the advisory opinion if the need should arise. Finally, advisory opinions do not impair the functioning of an independent judiciary for the reason stated above.

JUSTICE BUDNICK, with whom JUSTICES SINGEL and SHEPARD and JUDGE PETOSKEY join.

The Judiciary also finds that even if Appellate Procedure 7.302 were valid, it would still refuse to issue an advisory opinion on the basis that the Tribal Council's request fails to meet the Court's jurisdictional standard of mootness.

Rule 7.302 provides:

> Advisory Opinions.
>
> (D) Limited Acceptance. Requests for Advisory Opinions will only be accepted by a unanimous decision of the Judiciary Judges of the Tribal Court. The request may not involve a case in controversy. The request must meet the Court's jurisdictional standards, including standing, ripeness, mootness, and injury in fact.

The doctrine of mootness prevents courts from hearing cases when events subsequent to the institution of the request deprived the plaintiff of a stake in the action. This would generally occur when a matter has already been settled either by revised legislation or another means. In other words, the request is brought too late. The exception would be where the issue for one particular person or group has been settled

but the issue raised is capable of repetition. An example would be pregnant women, that at the time of the request are no longer pregnant.

Here, the Tribal Council has submitted a request for an advisory opinion as to whether the Tribal Council has retained authority to overturn an individual licensing decision by the Gaming Regulatory Commission. We hold that this request is moot because the Tribal Council made a decision and motion to reinstate the license in question during its March 2, 2003 meeting. Since the matter has already been acted upon, the request is no longer hypothetical and appropriate for an advisory opinion. If the Tribal Council or an interested person with standing wished to challenge the Tribal Council's action at this stage, the Tribal Council or interested person could identify a cause of action and bring an actual case before the court to request declaratory or other appropriate relief.

Conclusion

For the reasons expressed above, the Judiciary as a whole declines to issue the advisory opinion requested by the Tribal Council.

Appellate Justice Wenona Singel