

Washington Supreme Court Gets it “Wright”: Upholds Immunity for Tribal Corporations

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[Note: This originally appeared in the “Indian Law Newsletter” published by the Indian Law Section of the Washington State Bar Association in January 2007. (Vol. 15, No. 1)]

On December 7, 2006, the Washington State Supreme Court handed down its most important decision on tribal rights in decades. The state’s highest court ruled in *Wright v. Colville Tribal Enter. Corp.*, that Indian corporations owned by tribal governments and created under tribal law stand immune from suit, absent express waiver of that immunity by the tribe or U.S. Congress. See No. 7758-3, Slip Op.(Dec.7, 2006).

But as discussed below, *Wright* did not come without warning: tribal governments must avoid forming businesses under state law. Rather, tribes should develop their own corporate codes and charter corporations pursuant to such tribal law. Tribes should consider passing employment laws that allow employees the opportunity to file a grievance or even seek limited redress in tribal court. And, in this day and age of Indian economic development, tribes must think twice before asserting their sovereign immunity in tort litigation.

Background

In July 2002, Colville Tribal Services Corporation (CTSC), a subsidiary of Colville Tribal Enterprise Corporation (CTEC), hired Christopher Wright, a non-Indian, as a pipe-layer and equipment operator. Both CTEC and CTSC are wholly owned by the Confederated Tribes of the Colville Reservation (“Tribe”) and, importantly, chartered under the Tribe’s corporate code. Mr. Wright worked on a project to construct a waterline for a U.S. Navy housing development in Oak Harbor, Washington.

Mr. Wright alleged racial harassment and resigned in February 2003. He could have filed a grievance and sought relief with the Colville Tribal Employment Rights Office, or filed suit in tribal court pursuant to the Colville Civil Rights Act, but apparently he did not.

In November 2003, Mr. Wright sued CTEC, CTSC and his former supervisor in Island County Superior Court, alleging race discrimination, racial harassment, hostile work environment, negligent supervision, and negligent infliction of emotional distress. CTEC and CTSC successfully moved the Superior Court to dismiss his lawsuit with prejudice for lack of subject matter jurisdiction. The court record (naturally) does not indicate whether the Tribe’s insurance defense counsel considered alternatives to dismissal motion practice that would not place tribal sovereignty squarely before the state judiciary; alternatives such as reaching an early, nominal settlement with Mr. Wright, or allowing him to prove his case on the merits through *limited* consent to suit.

The Washington Court of Appeals Division One reversed the trial court, finding in pertinent part that tribal sovereign immunity did not protect CTEC or CTSC. See *Wright v. Colville Tribal Enter. Corp.*, 127 Wn. App. 644, 111 P.3d 1244 (2005). CTEC and CTSC petitioned for review (against the advice of some tribal lawyers), which the

Supreme Court granted. *See* 156 Wn.2d 1020 (2006). The Tribe appeared as amicus curiae, or “friend of the court.” The court heard oral argument on May 16, 2006.

Ruling

The Washington Supreme Court’s four-justice majority decision in *Wright* began with a recitation of well-established U.S. Supreme Court case law on Indian sovereign immunity:

Tribal sovereign immunity protects a tribal corporation owned by a tribe and created under its own laws, absent express waiver of immunity by the tribe or Congressional abrogation.... Under federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and ‘unequivocal’ waiver or abrogation. ... Tribal sovereign immunity protects tribes from suits involving both ‘governmental and commercial activities,’ whether conducted ‘on or off a reservation.’

See Slip Op., at 4-6 (citations omitted).

The court then concluded that “tribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe, and created under its own laws. ... unless the tribe waives or Congress abrogates immunity” *Id.* at 7-8. And, since the immunity of CTEC and CTSC was “neither waived nor abrogated,” the State Supreme Court over-ruled Division One’s decision and thereby reinstated the trial court’s dismissal of Mr. Wright’s lawsuit with prejudice.

According to the *Spokesman-Review*, Mr. Wright is considering whether to appeal the Washington Supreme Court’s decision to the United States Supreme Court.

Lessons

Wright is certainly a big win for Indian country, particularly tribes who engage in “commercial activities” – on or off the reservation. But the decision was not rendered without warning to tribes. The Washington Supreme Court did suggest that the tribal act of incorporating an enterprise under state law, rather than tribal law, “may” waive that business’ immunity and thus subject the enterprise to suit. It was inconsistent for the court to assert on the one hand that a tribe that merely files corporate formation papers with the Secretary of State may waive the company’s immunity; yet on the other, to acknowledge that an immunity waiver “will not be implied but must be unequivocally expressed” by the tribe. *Id.* at 8-9.

Notwithstanding, *Wright* should be taken as a warning to tribal governments to create corporate codes and charter tribally owned businesses under those tribal codes, or risk having Indian businesses be sued – very possibly in state court. In addition to affording Indian businesses immunity protection, chartering such businesses under tribal law would mitigate against state adjudicatory jurisdiction over claims against such companies (assuming the tribe or Congress *clearly* waives the business’ immunity protection).

Moreover, reading between the lines of the two-justice concurrence in *Wright*, tribes should consider promulgating and following employment laws that confer employees’ grievance rights and perhaps even allow them to seek limited redress (e.g., equitable relief such as reinstatement) in Tribal court. *See Id.* (Madsen, concurrence), at

16. Why? Because tribal, state and federal judges increasingly “doubt the wisdom of perpetuating the [immunity] doctrine,” suggesting to Congress “a need to abrogate tribal immunity.” *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751, 758 (U.S. 1998). Courts believe it unfair for reservation-goers to be deprived of rights to grieve or have their case aired before a trier of fact, particularly in situations that involve “unknowing” non-Indian patrons or employees (like Mr. Wright) and/or arise out of Indian “commercial” enterprises (like CTEC/CTSC).

Tribes must also realize that once a dismissal motion is filed, the tribe relinquishes control over the outcome of a lawsuit to the judicial system. In *Wright*, the fate of tribal immunity in Washington (and beyond) was left to the state’s appellate courts.

For these reasons, tribes can no longer automatically assert their sovereign immunity in tort litigation. Tribes must carefully consider all of their legal options before moving to dismiss – e.g., reinstating or reassigning an aggrieved employee; reaching a nominal monetary settlement, perhaps with insurance proceeds; or allowing a plaintiff to prove his/her case on the merits by consenting to suit through a *limited* waiver.

Thankfully for Washington tribes and tribal businesses, and all of Indian country, the Colville Tribes fought the tough appellate fight – and the *Wright* court got it right.

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