

## INTERVIEW

### **P.J. HERNE, CHIEF JUDGE, ST. REGIS MOHAWK TRIBAL COURT, AKWESASNE, NEW YORK**

*P.J. Herne was appointed in 2008 to serve as Chief Judge of the St. Regis Mohawk Tribe. The St. Regis Mohawk Indian Reservation (SRMIR) straddles the U.S.-Canadian border at the St. Lawrence River. The U.S. portion of the SRMIR is located in Franklin County in northern New York. The Canadian portion is located across the intersection of Ontario and Quebec. In June 2009, Judge Herne spoke about the challenges of expanding a tribal justice system and opening lines of communication between tribal and state courts.*

*Interviewed by Aaron Arnold\* and  
Robert V. Wolf\*\**

#### **Prior to becoming Chief Judge, you worked in state courts. Can you tell us about your experience?**

My first job was in criminal defense so when I joined the District Attorney's Office, I'd already had close to 10-years experience on the other side of the aisle. It was a pretty big role reversal, but learning the ropes on the other side was a good experience. I've also worked for tribal government with our Tribal Gaming Commission, and I have been in private practice.

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\* Aaron Arnold is director of the Tribal Justice Exchange at the Center for Court Innovation.

\*\* Robert V. Wolf is director of communications at the Center for Court Innovation.

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**You're in the process of building your tribal court system. What institutions are currently in place?**

Historically, our tribal council has had the power to decide issues such as land disputes and other matters.<sup>1</sup> But in the last 30 years we've had a population explosion. So we're trying to get a forum in place that can handle the caseload that's now being created.

We have the basic parameters of civil procedure law in place.<sup>2</sup> We have a fully functioning traffic court,<sup>3</sup> which opened in 2000 and is doing well. The traffic court had to be accepted by the community at first, but that eventually has happened and the traffic court is actually starting to generate revenue.

Our next project is family court.<sup>4</sup> We're developing a court to handle child support issues. And in a recent referendum, we asked our community whether they wanted our tribal council to handle land disputes or if they'd prefer the tribal court to handle them, and, in this instance, they preferred that the tribal court be involved. So next on the agenda are land issues. I envision that pretty soon, when we have an ordinance in place governing land issues, we'll have a lot of cases generated by land disputes.

**What is the most common misconception that practitioners in state courts have about tribal courts?**

Many in the practicing bar think we have to follow New York law, but that's not the case. Far from it. We can make our own laws. So practitioners need to become educated. Our main body of laws can be found at: [www.srmt-nsn.gov/tribalcourts.htm](http://www.srmt-nsn.gov/tribalcourts.htm).

**What do you see as the biggest obstacles to the optimal functioning of tribal courts?**

Historically when we've tried to build a court system, we've had stops and starts. We're trying to avoid that this

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1. See ST. REGIS MOHAWK TRIBE CONST. art. I, § 3, available at [http://www.tribalresourcecenter.org/ccfolder/saint\\_regis\\_mohawk\\_const.htm](http://www.tribalresourcecenter.org/ccfolder/saint_regis_mohawk_const.htm).

2. See ST. REGIS MOHAWK TRIBE R. CIV. P., available at <http://www.srmt-nsn.gov/LawsOrdinances/RulesOfCivilProcedure.pdf>.

3. See ST. REGIS. MOHAWK TRIBE, TRIBAL TRAFFIC CODE (1998), available at [http://www.tribalresourcecenter.org/ccfolder/st\\_regis\\_traffic.htm](http://www.tribalresourcecenter.org/ccfolder/st_regis_traffic.htm).

4. See Press Release, St. Regis Mohawk Tribe, Tribal Court to Establish Family Court (Apr. 20, 2009), available at [http://srmt-nsn.gov/press\\_releases/TribalCourtToEstablishFamilyCourt\\_042009.pdf](http://srmt-nsn.gov/press_releases/TribalCourtToEstablishFamilyCourt_042009.pdf).

time. We're proceeding slowly, making sure we're operational and get accepted.

Getting some of the state agencies comfortable that there will be a tribal court coming on-line, that will handle cases that they'd typically see the state county courts handle, is another challenge. We're going department by department, but it isn't always easy. New York is a multi-headed type dragon, agency-wise. You need to deal with one agency on one issue, and then on another issue, you have to contact another agency even though the issue is very similar to the first issue.

We have multiple agreements on a number of issues, such as policing. Setting up our family court has required us to examine and strengthen our own tribal Department of Social Services, by repatriating services that are eligible for direct funding; and, we're looking at different funding issues to provide services in the territory. We still have a lot of structures we want to put in place. If you were to get elected to a family court position in New York State, everything you needed would be in place. Up here, we're trying to develop everything and implement as we go. So we're trying to move slowly. Right now, we're looking at issues we can address early and gain experience in. We need time to build knowledge and garner acceptance in our community.

**In general, how do you think tribal members perceive the tribal justice system?**

I think right now there's some hesitation. They clearly don't want a forum that will merely apply New York law. They want to see the work product behind it, and people like myself need to earn the acceptance and respect of the people, which is obvious. And what I keep reminding them is, "Look, if we're not doing this, the state courts will end up doing it for us."

We have a local radio station, and I've gone on the air to announce that we're considering doing a tribal child support unit, and it didn't take long before we had more than 40 questions from the community, which we answered. We plan to do another radio show soon.

It's a misnomer to think that because we're all Indian, we have a homogenous viewpoint. That's 180 degrees from the

truth. We're probably some of the most diverse communities anywhere, but diversity brings a lot of good ideas to the table, and we try to keep communication open and listen to all those ideas.

**Why did the St. Regis Mohawk tribe decide to start a family court?**

There were a couple of factors. For one thing, when you look at local level judges doing family court work, they're working locally. They're elected locally,<sup>5</sup> and serving a local population. We wanted the same thing. A state judge in family court is held accountable to his or her community and we'd want it no differently for us. We want the community to be able to see and respond to what the judge is doing. In our family court, my position will be elected like all the judges in the state.

The other thing we're looking at is having the Tribal Nation establish the guidelines and procedures it wants. Our guidelines might be consistent with New York, or they might be different. When I first came on as Chief Judge, we conducted an assessment to help us decide whether or not to establish a child support court, and we learned that other Tribal Nations throughout the country are accepting in-kind contributions for child support, like provision of firewood, or grandma or grandpa daycare, or products of hunting and fishing to provide for your family. That kind of in-kind payment is not at all accepted in the state courts, which is why I recommended to our tribal council to establish our own child support system.

**Why did you decide to tackle child support first?**

We reviewed a lot of case decisions out there, and we ranked them according to how they'd be accepted. Tribal child support laws are the most widely accepted off the reservation because states are federally required to give tribal court child support orders full faith and credit.<sup>6</sup> For that reason, child support is one of the easiest areas to implement.

In addition, when we surveyed the local state courts, we found over 300 open child support cases from our community alone, so we're certain there's a workload there. And with

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5. See N.Y. CONST. art. VI, § 13(a).

6. See 28 U.S.C. § 1738B (2006).

child support, there are always other things involved, like health care costs from birthing, housing, access to benefits like Medicaid, etc. Appropriate child support has a big impact on people's lives.

**What other initiatives do you hope to pursue as Chief Judge of the St. Regis Mohawk tribal court?**

I'm trying to introduce, along with our family court, a family drug court. In doing research for that, I came across the Leech Lake Band of Ojibwe Tribal Court [in Cass Lake, Minnesota].<sup>7</sup> They have a drug court with a joint powers agreement with the Cass County District Court, allowing the Tribal Nation court judge and local county court judge to sit on a case together and better deliver services. You can avoid some forum shopping that way and end jurisdictional disputes that might arise.

The drug court model is the kind of thing we're looking for. The shared decision-making aspect of it appeals to us. To bring more minds to the table is something that really makes sense to us in our communities.

Next would be the New York Federal-State-Tribal Courts Forum,<sup>8</sup> which was created in 2004 and every six months brings together representatives from the various court systems, including interested members of all nine state-recognized Indian Nations and tribes, in an attempt to promote communication and collaboration between tribal and non-tribal courts within New York. This effort is important for state and tribal court systems to begin developing a positive relationship. One of the great things they've done is they've agreed not to talk about issues that would break down a conversation, like land claims and gaming.

I think the key is in keeping the lines of communication open and looking for ways to work with state courts. Recently,

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7. See Leech Lake Band of Ojibwe Tribal Court, <http://www.llojibwe.org/legal/tribalcourt.html> (last visited Jan. 20, 2010). [Ed. Note – This issue contains an interview with Korey Wahwassuck, who currently serves as Associate Judge of the Leech Lake Band of Ojibwe Tribal Court.]

8. See N.Y. Federal-State-Tribal Courts and Indian Nations Justice Forum, <http://www.nyfedstatetribalcourtsforum.org/> (last visited Jan. 20, 2010). [Ed. Note – for a complete description of the N.Y. Federal-State-Tribal Courts and Indian Nations Justice Forum, see Paul Stenzel, *Full Faith and Credit and Cooperation Between State and Tribal Courts: Catching Up to the Law*, in this issue.]

those of us in the forum were talking about getting our tribal marriage certificates recognized within the state.

**They're not?**

Some are and some aren't. The rules governing state acceptance are about as clear as mud. We've gotten great assistance from the participants in the forum, including Judge Marcy L. Kahn and Judge Edward M. Davidowitz, who co-chair the forum.

**The Akwesasne reservation sits across the border of the United States and Canada. What special challenges does this unique geographic position pose for the tribe's justice system?**

Our southern border is in New York and our northern border is in Quebec and Ontario. It's far more problematic for those governments to handle legal matters and far easier for us. We'd be far more effective in working out things with ourselves. With regard to a child support matter, imagine if one parent was living in the northern portion in Canada and the other parent was in New York. It would be far easier for us to resolve than anyone else. Right now, it's a pretty fragmented approach.

**Have you surveyed other tribal justice systems to get ideas?**

We do as much research as we can. Doing research and looking at other models has never been easier, thanks to the internet. That's how we found out about what they're doing in Leech Lake.

**What can state courts learn about the administration of justice from tribal courts? Can you think of any examples of tribal court practices that state courts might explore?**

When I was in the District Attorney's Office, I tried to bring restorative justice practice to the table. As a prosecutor you get a lot of defense attorneys or defendants saying, "How can I resolve this? What can I do so that you will agree to reduce this?" I'd say, "Make it right what you've made wrong and we can talk about a plea." It was a fairly effective approach. We were able to resolve a lot of cases that way. Victims might feel better if they were paid back or restored and be more willing to let the case go.

**Innovation is sometimes hard to foster in state court systems.  
How common is innovation in tribal systems?**

I think trying to make innovation and tradition work together is a goal. One goal we have is to make our court user-friendly. What I've seen on the outside is that a lot of courts were losing their user-friendliness or have lost that, so we're trying to keep that goal in mind here. On the innovation side, my court administrator/court attorney is trying to take advantage of technology, like implementing electronic filing. Fortunately, we have the benefit of being able to take what the state has had to learn expensively or painfully over the years and adopt it, like doing an appearance over the phone.