

TITLE 20. MASHANTUCKET PEQUOT CIVIL RIGHTS CODE

CHAPTER 1

20 M.P.T.L. ch. 1 § 1

§ 1. Civil Rights

a. The Tribe shall not:

(1) make or enforce any law prohibiting the free exercise of religion or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense under tribal law to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself or herself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him or her, to have compulsory process for obtaining witnesses in his or her favor, and at his or her own expense to have the assistance of counsel for his or her defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000 or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or criminal ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

b. The tribal court shall interpret the rights enumerated under this Title in a manner that is consistent with tribal custom, practice and tradition. The tribal court is not bound by interpretations by state and federal courts of

similar language found in state and federal constitutions.

20 M.P.T.L. ch. 1 § 2

§ 2. Jurisdiction and Waiver of Sovereign Immunity From Suit

a. The tribal court shall have jurisdiction over claims alleging a violation or violations of the rights enumerated under Section 1 of this Title.

b. The Tribe hereby expressly waives its sovereign immunity from suit in the tribal court for claims against the Tribe alleging a violation(s) of the rights enumerated in Section 1, as provided for and defined in this Title. Nothing herein shall be construed as a waiver of the sovereign immunity of the Tribe from suit in state or federal court or in any action before any state or federal agency, or in any other forum or context.

c. There shall be no cause of action in the tribal court under this Title relating to, or which may affect, activities of the Elders Council or Peacemakers Council.

d. There shall be no cause of action in the tribal court under this Title relating to, or which may affect Title 33, M.P.T.L., the Mashantucket Pequot Tribal and Native American Preference Law.

e. There shall be no cause of action in the tribal court under this Title relating to the Second Chance Program.

20 M.P.T.L. ch. 1 § 3

§ 3. Claims Against the Tribe

a. Claim. Any person, whether a tribal member or non-member, may bring an action against the Tribe for violations of the rights enumerated in Section 1 of this Title.

b. Tribe as Defendant. Claims under this Title shall be brought only against the Tribe and there shall be no separate cause of action against any division, agency, committee, office, entity or instrumentality of the Tribe, or against any officer, agent, servant or employee of the Tribe; provided that, an action against the Tribe may be based upon the actions of an officer, agent, servant or employee of the Tribe or of a division, agency, committee, office, entity or instrumentality of the Tribe, including the Gaming Enterprise.

c. Complaint. A claim brought under this Title shall be brought by the filing of a complaint which complies in all aspects with the Mashantucket Pequot Rules of Civil Procedure and which also shall allege, with specificity, the following:

- (1) the act or acts which resulted in the violation of rights enumerated in Section 1;

(2) the date or dates of the alleged violation(s);

(3) the specific acts which resulted in the alleged violation and the officer, agent, servant, or employee or, the division, agency, committee, office, entity or instrumentality of the Tribe which committed or is alleged to be responsible for such acts;

(4) the specific right or rights which have been violated with citations to the section or sections of this Title; and

(5) the date on which the Notice of Claim, required under Section 3(d) of this Title, was filed with a copy of the Notice of Claim attached to the complaint.

d. Notice of Claim. Claims brought under this Title shall be preceded by a written notice of claim filed with the tribal clerk by the claimant or the claimant's representative within 180 days after the claim accrues. Claims are deemed to accrue on the date of the alleged violation of rights under this Title. The Notice of Claim shall contain the following information: (1) the name and address of the claimant and the name and address of the claimant's attorney, if any; (2) a concise statement of the factual basis of the claim, including the date, time, place, and circumstances of the alleged violation(s) of right(s) complained of; (3) a concise statement of the nature and extent of the injury claimed to have been suffered; (4) a statement of the amount of monetary damages that is being requested and whether declaratory relief is being requested; and (5) the name of any officer, agent, servant, employee or the division, agency, committee, office, entity or instrumentality of the Tribe involved, if known.

e. Awards. In a judgment under this Title, the court may enter an award as follows:

(1) The court may enter an award for actual damages resulting from a violation of the rights enumerated in Section 1 of this Title.

(2) In addition to an award of actual damages, the court may enter an award for pain and suffering or mental anguish provided that, in no event shall the total award of actual damages plus pain and suffering for injuries arising from the set of facts and circumstances alleged in the complaint exceed the amount of \$250,000.

(3) Attorney's fees may be awarded in the discretion of the court to the prevailing party against the Tribe only when the court determines that the action(s) of the Tribe were wholly unreasonable and particularly egregious. If the Tribe is the prevailing party, the court shall award attorney's fees only upon a finding that the plaintiff's claim is frivolous, unreasonable or without foundation in the law or fact. An award of attorney's fees must be supported by contemporaneous records of hours billed and the billing rate(s) charged which must be consistent with prevailing billing rates of attorneys practicing before the tribal court. In no event shall an award of attorney's fees exceed 25% of the total damage award.

(4) The court may enter a judgment for declaratory relief.

(5) The court shall not enter any other award or judgment under this Title, including:

(i) no award based upon any rule of law imposing absolute or strict liability;

(ii) no award or other judgment imposing punitive or exemplary damages;

(iii) no award based upon a claim for loss of consortium; and

(iv) no award, order or judgment for injunctive relief, whether restraining action or commanding positive action be taken.

f. Statute of Limitations. No claim under this Title shall be brought but within one year from the date of the violation(s) of right(s) complained of.

20 M.P.T.L. ch. 1 § 4

§ 4. Miscellaneous

a. All actions against the Tribe shall be tried to the court and not to a jury. No costs shall be taxed against the Tribe.

b. In all actions where it is alleged that the liability of the Tribe is based upon the action of an officer, agent, servant, or employee acting within the scope of his or her employment there shall be no separate cause of action against the officer, agent, servant or employee. Nothing in this Law shall be construed to waive the sovereign immunity of the Tribe to the extent that sovereign immunity would be applicable to such individual.

20 M.P.T.L. ch. 1 § 5

§ 5. Application of Law

This law shall be applicable to claims accruing after the enactment date. For claims arising prior to the enactment of this law or pending in the tribal court on the date of enactment, there shall be no cause of action recognized under tribal law, except as provided in Section 6 of this Title.

20 M.P.T.L. ch. 1 § 6

§ 6. Repeal of Prior Law

The sections of tribal law entitled "Indian Civil Rights Act" and "Waiver of Tribal Sovereign Immunity" contained in the tribal law concerning the criminal court, formerly codified at Title I, Chapter 3, Sections 10 and 11 of the Mashantucket Pequot Tribal Laws, are hereby repealed and are of no further force and effect, except that:

(a) any claims alleged pursuant to those sections, and which are pending in the tribal court on the date of the enactment of this Title, shall be recognized as claims under this Title; and

(b) any claim pursuant to those sections, which accrued within one year prior to the enactment of this law, may be brought under this Title by filing the notice and complaint required hereunder within 180 days after the enactment of this Title.

LEGISLATIVE HISTORY—MASHANTUCKET PEQUOT CIVIL RIGHTS CODE AND FOR AMENDMENTS TO TITLE 8. EMPLOYMENT REVIEW CODE

20 M.P.T.L. Leg. History

I. Introduction

Civil rights or civil liberties, in the context of state and federal law, mean "personal, natural rights guaranteed and protected by Constitution," including freedom of speech, free exercise of religion, freedom from discrimination or the unequal treatment under the law based upon race, gender, age, religion, etc. In the state and federal constitutions, most of the rights and liberties guaranteed to individuals are defined in terms of restraints on the government. The state and federal constitutions do not restrict or restrain action by tribal governments, since tribes pre-date these constitutions and do not derive their sovereignty from either the state or federal governments—tribes being inherently sovereign.

In 1968, Congress enacted the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (the "ICRA"), which imposes restraints on Indian tribes when "exercising powers of self-government." The ICRA, also called the Indian Bill of Rights, is similar but not identical to the Bill of Rights (the first ten amendments to the federal Constitution) in the U.S. Constitution.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the U.S. Supreme Court reviewed the ICRA and found that the only type of claim an individual could pursue in the federal courts to enforce the rights enumerated in the ICRA was under the habeas corpus provision. An individual may bring a claim under the habeas provision to "test the legality of detention by order of an Indian tribe." 25 U.S.C. § 1303. Other than challenging an order of detention by an Indian tribe, an individual who believes that his or her rights have been violated by the action of a tribal government may not bring suit against the tribal government in federal (and certainly not in state) court. However, in *Santa Clara Pueblo*, the U.S. Supreme Court stated that "tribal forums are available to vindicate rights created by the ICRA and [25 U.S.C.] § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply." *Id.* at 65.

Tribes have addressed civil rights in different ways. Some tribes have incorporated the enumerated rights in the ICRA (some in a modified fashion) in a tribal constitution (examples include: Poarch Band of Creek Indians, Menominee Tribe, Gay Head Wampanoag Tribe), while others have adopted laws addressing civil rights. Tribal courts have come to different conclusions concerning whether an individual may sue an Indian tribe in tribal court

pursuant to the ICRA, or whether the tribe must expressly waive its immunity from suit in the tribal court for claims under the ICRA. For example, in *Winnebago Tribe of Nebraska v. Bigfire*, 24 Indian L. Rptr. 6232 (Winnebago Tribal Ct. 1997), the court opined that an express waiver of tribal immunity is necessary before an ICRA claim may be brought in tribal court, while the Inter-Tribal Court of Appeals of Nevada has determined that a civil rights action could proceed in the tribal court because the ICRA constituted a waiver in the tribal forum. See *Works v. Fallon Paiute-Shoshone Tribe*, 24 Indian L. Rptr. 6078 (Inter-Tribal Court of App., Nev. 1997).

Presently, the Mashantucket Pequot Tribal Laws do not affirmatively protect an individual's rights vis-à-vis tribal governmental action, with the exception of a provision in Title 1 addressing actions by the tribal police. See 1 M.P.T.L. ch. 3, Sections 10 & 11. In a chapter addressing the court's jurisdiction over criminal matters, the law adopts the Indian Civil Rights Act and states that it shall be applied in tribal court. That provision also contains a waiver of sovereign immunity but only for an "action taken by the tribal police alleging a violation of the Indian Civil Rights Act provided the alleged violation occurred within the nation lands." The limitation of awards under this waiver is set at a total award of \$500,000 per incident and the law prohibits any award for punitive damages, for loss of consortium, and limits an award for pain and suffering to 50% of the award for actual damages, all similar to the tort law originally enacted.

To date, there have been no claims brought in the tribal court against the tribal police under this provision. However, litigants and the court have used these provisions to incorporate the ICRA into other areas, and to provide a forum for claims against the Gaming Enterprise particularly in the employment context.

The Mashantucket Pequot Civil Rights Code is being adopted as a new title of the Mashantucket Pequot Tribal Laws to address civil rights of individuals as they relate to the tribal government and the various entities organized as arms of the tribal government. In passing this Code, the Tribal Council recognizes the rights of individuals and provides a cause of action in the Mashantucket Pequot Tribal Court to enforce these rights.

II. Section by Section Analysis of Civil Rights Code

1. Section 1. Civil Rights

Section 1 of the Tribal Civil Rights Code provides an enumeration of rights which is similar, but not identical to those provided in the Indian Civil Rights Act. One difference is the insertion of the word "criminal" before "ex post facto" in Section 1(a)(9). This change is meant to clarify that this prohibition is relevant only in the criminal context and does not apply in the civil context. In addition, the words "under tribal law" have been inserted in Section 1(a)(3) (concerning double jeopardy) to clarify that this pertains to prosecutions under tribal law and would not pertain to prosecutions by separate sovereigns, such as the federal government and tribal government.

The enumerated rights are framed as a prohibition against the Tribe taking

action, such as making or enforcing any law prohibiting the free exercise of religion or abridging the freedom of speech. The one significant difference between Section 1 of the Tribe's Civil Rights Code and the ICRA is that the proposed law does not contain the language "when exercising powers of self-government," which the ICRA does contain. The ICRA provides that the tribe shall not do certain enumerated things, when exercising powers of self-government and self-government is defined in the ICRA. The tribal law offers broader protections to individual rights because it does not contain this language. This language was deleted in order to make clear that this law would cover claims based upon alleged actions taken by the Gaming Enterprise or the Museum and Research Center for example, such as a discrimination claim by an employee. Although the Gaming Enterprise and the Museum are arms of tribal government, there may be confusion or disagreement concerning whether actions taken by these entities would or their officers, agents and employees would be covered as exercises of "self government," which is generally understood to encompass legislative and judicial acts of the tribal government, but may not necessarily include actions taken by an arm of tribal government.

Section 1 of this law also contains a provision directing the tribal court to interpret this law in a manner which is consistent with tribal custom, practice and tradition. The Tribal Council expressly has provided that the tribal court shall not be bound by interpretations of similar language by state and federal courts, leaving the tribal court free to interpret these provisions under tribal law.

2. Section 2. Jurisdiction and Waiver of Sovereign Immunity from Suit

Section 2 provides an express grant to the court of jurisdiction over the defined civil rights claims and provides a waiver of the Tribe's sovereign immunity for such claims. Additionally, this Section expressly states that this law does not create a cause of action which would affect actions of the Elders Council or the Peacemakers Council, which is intended to give deference to the decisions of those forums. It is not the intent of Council to provide a cause of action allowing challenges to the decisions of the Elders or Peacemakers Council pursuant to this Law. Section 2(d) clarifies that this law does not provide any cause of action based upon the Tribe's Indian preference policy. This provision was added to clarify that the "equal protection" of tribal laws provided for in Section 1(a)(8) does not affect or modify, in any manner, the Tribe's policies and laws concerning Indian preference, and the enforcement of the Indian preference policy shall not be considered a violation of any rights enumerated in this law and shall not form the basis of any action under this law.

3. Section 3. Claims Against the Tribe

Section 3 describes how the claim may be brought under this Title. This Section specifies that the claim may be brought only against the Tribe and cannot be brought against a separate arm, agency, department or subdivision of the Tribe or against an officer, agent or employee of the Tribe or of an arm, agency, department or subdivision. Further, this Section specifies the information that must be contained in a complaint to commence the action in tribal court; requires that a Notice of Claim be filed within 180 days after the claimed violation of rights occurred; and describes the type of awards which the court may enter.

More particularly, the law allows the court to enter an award of money damages for actual damages incurred and an award for pain and suffering; however, the law limits the total award for actual damages and pain and suffering to \$250,000. However, this total limitation of \$250,000 is intended to cover any claims relating to a set of facts and circumstances which form the basis of the claim. It is not the intent to allow \$250,000 for each claimed violation of rights under this Title. Therefore, if one set of facts and circumstances allegedly gives rise to several alleged violations of rights, the total recovery is limited to \$250,000.

This law allows the court to award attorneys' fees to the prevailing party. However, the standard that a party must meet in order for the court to make such an award is difficult. To award attorney's fees against the Tribe, a party must show that the Tribe's action was "wholly unreasonable and particularly egregious," and if a plaintiff's claim is frivolous, unreasonable or without foundation in the law or fact, the court may award attorney's fees against a plaintiff and in favor of the Tribe.

Similar to tribal law for torts against the Tribe, Title 12 (Civil Actions Law), a claimant must bring his or her claim within one year after the violation of rights occurred, while maintaining a requirement that the plaintiff file a notice of claim within 180 days of the violation. It is intended that this notice requirement and statute of limitations be strictly construed and be interpreted as a substantive, rather than a procedural, requirement.

The law provides that the court may order declaratory relief, but prohibits an order or award for injunctive relief. Injunctive relief expressly includes both an order to take positive action and orders restraining action. Similar to provisions in Title 4 (Tort Law/Gaming Enterprise) and Title 12 (Civil Actions Law), the court may not enter awards based upon strict or absolute liability theories; or to impose punitive or exemplary damages; or for loss of consortium claims.

4. Section 4. Miscellaneous

Section 4, called "Miscellaneous," provides that actions against the Tribe under this law must be tried by the court (a judge) and not a jury; no costs shall be assessed against the Tribe; and suits in which a claimant is complaining about the action of an officer, agent, servant or employee acting within the scope of employment, the claimant cannot bring an action against the individual. These provisions are identical to provisions in tribal law addressing tort and contract claims.

5. Section 5. Application of Law

Section 5 states that this law shall apply only to claims arising after its enactment date and does not provide for a cause of action if the violation of rights occurred prior to the enactment of the law. This applies even if a claimant has a pending action in the tribal court. The only exception made to this rule (in Section 6 of the proposed law) is if a claimant has an action pending in the tribal court pursuant to the present tribal law regarding civil rights claims against the tribal police, or if such a person has a claim

against the tribal police which arose within one year prior to the enactment of the law. In that case, such a claimant could pursue the claim under this title. If there is such a claim, the claimant must file a notice of claim and a complaint within 180 days after the enactment of the law.

6. Section 6. Repeal of Prior Law

Section 6 also repeals the prior law concerning the tribal police, since those types of claims would now be governed by this Title.

The issue of an individual's rights, whether a tribal member or nonmember, in relation to the Tribal government is an important issue throughout Indian country. A review of decisions in the *Indian Law Reporter* and of commentaries by legal scholars demonstrates the complexity of the issues and the struggle within Indian communities to address these issues in a manner consistent with the community's practices, customs and traditions. Much of the debate or controversy focuses on whether the ICRA, a law imposed upon tribes by Congress, is enforceable in tribal courts and the interpretation of its provisions. One theme running through much of the commentary and some of the decisions is that tribes themselves must address these issues either through the enactment of tribal law or inclusion of rights within tribal constitutions. The concern is that if the tribes do not affirmatively address the issue of civil rights, Congress may review the issue again and impose legislation more intrusive on tribal sovereignty.

At Mashantucket, the only tribal law that specifically had addressed civil rights concerned the Tribal Police. However, ICRA claims and issues have been raised by litigants in tribal court in matters involving employment actions at the Gaming Enterprise. For example, in the *Johnson* case, the court ruled that the ICRA required the Gaming Enterprise to allow employees to be represented by counsel in the Board of Review process. That case arose in the context of Title 8 Employment, governing the tribal court's review of final decisions by the President/CEO of the Gaming Enterprise and the chief human resources officer. From that decision, the court expanded into independent claims of ICRA violations in several other cases. The adoption of a tribal law addressing civil rights claims allows the Tribal Council to define the rights and the remedies afforded in tribal court.

III. Amendments to Title 8 Employee Review Code

The Tribal Council is aware of litigation in the employment context concerning civil rights. Within the employment context, the tribal court has discussed rights such as due process and equal protection. In most cases, these claims have been brought pursuant to Title 8. Employment, which provides an appeal process from a final decision regarding disciplinary actions, including terminations from employment. Many of these decisions have addressed civil rights through a discussion of the Indian Civil Rights Act. The Tribal Council, in connection with the enactment of the Tribal Civil Rights Code, has determined that it is necessary to amend Title 8 to allow for claims concerning violations of "procedural due process rights" in the employment context. The amendments add new subsections (d), (e), and (f) to Section 3 of Title 8. These new subsections provide that an employee who has progressed through the Board of Review process and has received a final decision from the President/CEO or from the chief human resources officer, may seek a review in

tribal court of what an employee claims to be a violation of procedural due process rights, as that term is defined in the law.

The new subsection 3(d) provides that an employee may seek review of a violation of procedural due process rights in an appeal brought under Title 8, but in order to do so, the employee must allege such a claim in the Notice of Appeal and provide the information as described in subsection 3(d). This requirement is mandatory and an employee should not be allowed to pursue such claims unless the information required is provided.

In subsection 3(e), the law states that the tribal court may only review, under Title 8, whether an employee's procedural due process rights were violated, and may not consider any other claimed violation of civil rights in an Appeal under Title 8. Any claim alleging a violation of rights, other than procedural due process rights, must be pursued under the new Civil Rights Title.

Subsection 3(f) defines "procedural due process rights" to mean the right to adequate notice, a meaningful opportunity to be heard, and the right to representation at the employee's option and expense. These rights have been generally recognized by the tribal court in the employment context.

It is the intent of the Council in adopting these amendments to specifically provide employees with the right to raise issues of procedural due process in the Board of Review process within the context of an Appeal. At the same time, the Council recognizes that in order to make such a claim, the employee must provide detailed information in the Notice of Appeal, describing the claimed violations. It is also the intent to give the employee an opportunity to raise all issues concerning the Disciplinary Action in the Appeal, without the necessity of commencing a separate action under a separate title.