

A Restatement of the Law of the Little Traverse Bay Bands of Odawa Indians, 2019 Volume

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I. Introduction to the Restatement

*BACKGROUND taken from the 2015 Restatement*⁴

The Little Traverse Bay Bands of Odawa Indians (“LTBB” or “Tribe”) is a federally-recognized American Indian tribe of Odawa Indians located primarily in the Great Lakes region of the State of Michigan.⁵ Most of the Tribe’s more than 4,000 enrolled citizens reside in the State’s Charlevoix and Emmet Counties.⁶ The Tribe is one of several federally-recognized and distinct Odawa political entities located within the territorial boundaries of Michigan; others include the Little River Band of Ottawa Indians and the Grand Traverse Band of Ottawa and Chippewa Indians, located on ceded lands in present-day Manistee, Michigan and Peshawbestown, Michigan, respectively.

Like many other American Indian peoples and tribes in what is now the United States, the LTBB have been the subject of government-sponsored removal and discriminatory education efforts.⁷ These efforts resulted early on in many Odawak being removed from their homelands—often being relocated to the southern United States—and, in more recent history, in Odawa children being removed from their families to obtain a western education and upbringing.⁸

Apart from imposing removal and discriminatory education practices on the Odawak, the United States has also failed to faithfully enforce the spirit and text of its 1855 Treaty with the Odawa, specifically declining to recognize the Tribe for over 150 years.⁹ Over the past 150 years, however, the Tribe has made great strides to regaining its sovereignty, with these efforts culminating in the Federal government reaffirming its government-to-government relationship with the Tribe in 1994.¹⁰

⁴ Restatement of the Law of the Little Traverse Bay Bands of Odawa Indians (2015).

⁵ A Tribal History and Timeline of the Little Traverse Bay Bands of Odawa Indians 1 (2011).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*; See Renee A. Cramer, *Cash, Color and Colonialism: The Politics of Tribal Acknowledgement* 44 (2005). Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act, 25 USC § 1300k *et seq.*

While the Tribe recognizes that its efforts to regain sovereignty are expensive, Tribal leaders and elders have nonetheless aggressively moved to provide resources for their fellow citizens. Of these efforts, the Tribal Judicial system is a good example of the level of dedication that the Tribe puts into providing resources to Tribal citizens. Established in its current form under the Tribe's 2005 Constitution as one of three separate branches of government, the Tribal Judicial system is comprised of a Tribal Court, which is a court of general jurisdiction overseen by the Tribe's Chief Judge and Associate Judge; an Appellate Court, on which three appellate justices sit; and other lower courts that the Tribal Council may establish.¹¹ The Tribal Judicial system is charged with interpreting and applying the laws of the Tribe, which gives the Tribal courts the ability to significantly impact the lives of Tribal citizens.¹² This impact is seen daily in matters and cases ranging from general quality of life issues to complex contractual disputes to substance abuse and child welfare matters.

This Restatement of the Law of the Little Traverse Bay Bands of Odawa Indians is part of a continuing effort to provide resources and information to Tribal Citizens and others who rely on the Tribal government, including non-Tribal attorneys litigating cases and others, whether American Indians or not, utilizing the LTBB Judicial system.

I hope that this restatement will serve to improve, through increased knowledge of the Tribe's law and custom, collaboration and cooperation between the Tribe and the state and local governments that often work with the Tribe.

METHODS

This restatement was compiled following extensive research of the Tribe's Appellate Court decisions effective under the 2005 Tribal Constitution as well as opinions issued by the Tribal Court before that time until the present. Consistent with other restatement projects, the Appellate Court and Tribal Court decisions were reviewed for their legal conclusions, including conclusions that expand the Tribal Judiciary's and Tribal citizenry's understanding and application of codified law. Special care was taken to identify and account for conflicting legal conclusions as a means of presenting the Appellate Court's and Tribal Court's clearest interpretations of the law. It should be noted, however, that this project serves as a restatement of the Tribe's law, and includes interpretations of statutory and constitutional law by the Appellate Court and Tribal Court. This restatement does not represent an exhaustive listing of the law applicable to the Tribe, and persons reviewing the restatement should always check the relevant

¹¹ LTBB Const. art. IX, § A(1)–(3).

¹² LTBB Const. art. VI, § C.

Tribal law, including statutes codified in the Tribal Code,¹³ for legal provisions and theories not noted by the Appellate Court and Tribal Court, but that which may still be pertinent to an issue at hand.

While this project has key similarities to traditional restatement projects, there are key differences that must be discussed. Specifically, unlike other restatement projects, which may cover one subject matter rather exhaustively—for instance, the Restatement (Second) of Torts—this restatement of the law covers multiple subject areas, acknowledging the many and varied legal realities present in the LTBB system of law. Such an extensive inclusion of various legal principles is possible, in part, due to the relatively young history of the LTBB since its government-to-government relationship with the United States was reaffirmed in 1994. As the LTBB continues to grow and develop its law, further restatement projects may very well cover single areas of the law in more narrowly-focused editions.

Those reviewing the restatement project will note that, in addition to the various legal subject areas covered in the project, care is taken to assist the reader in better understanding the meaning of legal principles and how they apply in the real world. As such, subsections of the restatement may contain comments and, where appropriate, illustrations of why and how certain legal principles apply. Some comments restate the rationale for adopting certain legal principles as articulated by LTBB courts, while others may additionally or separately discuss practical implications of the adoption of certain legal principles. Illustrations provide basic examples, which should not be accepted as certain outcomes for potential cases heard in LTBB courts—though some illustrations follow cited actual cases heard in LTBB courts rather closely—of how the legal principles at issue have or may be applied in LTBB courts. Still, not every subsection contains comments and or illustrations as they may not require them in order for readers to understand the legal principles within and how they apply.

It is my hope that this project continues to be regularly updated to reflect the ongoing development of LTBB law.

¹³ The Little Traverse Bay Bands of Odawa Indians Tribal Code may be found online at <http://www.ltbbodawa-nsn.gov/TribalCode.pdf>.

2019 ORGANIZATIONAL NOTE

This version of the Restatement adopts an organizational scheme which categorizes rules alongside similar legal principles, rather than by the context in which they appear. For example, a principle related to counting time in election appeals is listed in Court Procedure rather than Election Law, even if that is the only context in which it has been applied. Only those rules which are categorically context-dependent – such as a rule governing the scope of the Election Board’s discretion – are placed in topic-oriented sections. This macro-organizational scheme is designed for ease of reference, but comes with an important caveat: This Restatement takes no position on whether the court will apply the rule similarly in different contexts. Readers are encouraged to take careful note of the Commentary and Case Citations for more information about the source and previous applications of each rule.

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III. A Restatement of the Law of the Little Traverse Bay Bands of Odawa Indians

§ 1 Sources of Authority

§ 1.01 Incorporating Traditional Values into Tribal Court Decisions

When deciding cases before it, the Court may take into account not only written decisions, statutes, and procedures, but traditional Odawa values as well.

Comment:

1. *See* Comment 1 to Section 4.06, *infra*.

Case Citations:

1. *Carey v. Victories Casino*, No. A-005-0507 (LTBB Ct. App. May 5, 2008).
2. *Blanz v. Odawa Casino Resort*, No. C-136-1011 (LTBB Tribal Ct. Aug. 2, 2012).

§ 1.02 The Role of Justice and Fairness in Traditional Practice

Following traditional Odawa culture and practice, maintaining justice and preserving fairness are of paramount importance to the Tribe.

Comment:

1. *See* Comment 1 to Section 4.06, *infra*.

Illustration:

1. X slips and falls while patronizing Odawa Casino Buffett. In an action against the LTBB for which sovereign immunity is not a bar, X seeks unspecified damages from the Tribe. It is uncontested that X's injuries are the result, in part, of his own negligence. Under the theory of contributory negligence as adopted by some jurisdictions, a plaintiff may not recover from a defendant where a plaintiff's injuries are due, in part, to the plaintiff's own negligence. Comparative negligence, on the other hand, merely reduces the amount of damages a plaintiff can recover in a suit based on the degree to which the plaintiff's own negligence contributed to the plaintiff's injury. As LTBB codified law is silent on the matter, attorneys for the LTBB request that the Court adopt as common law of the Tribe the theory of contributory negligence, and, based on the plaintiff's negligence in this case, bar recovery. Attorneys for X seek an adoption of the comparative negligence doctrine by the Court. Upon a review by the Court of LTBB traditional law on conflict resolution, the Court determines that the doctrine of contributory negligence is inconsistent with traditional Tribal values of ensuring justice. Accordingly, the Court, in keeping with traditional LTBB values of justice, rejects the doctrine of contributory negligence and adopts the doctrine comparative negligence as Tribal common law.

Case Citations:

1. *Northern Anesthesia Providers, Inc. v. Welles*, No. FC-233-0812 (LTBB Tribal Ct. July 23, 2013).
2. *Blanz v. Odawa Casino Resort*, No. C-136-1011 (LTBB Tribal Ct. Aug. 2, 2012).

§ 1.03 Precedential Value of Appellate Court Decisions

The Appellate Court's determination of a legal issue is binding on the Tribal Court, and is binding on the Appellate Court when the Appellate Court is faced with a subsequent appeal given the same case and substantially the same facts.

Case Citation:

1. *Carey v. Espinosa*, No. A-011-1008 (LTBB Ct. App. May 2, 2011).

§ 1.04 Effect of Foreign Law on Tribal Court Decisions

Although not binding on the Court, the law and opinions of other jurisdictions can serve as persuasive authority.

Comment:

1. This rule recognizes that LTBB courts, as they currently exist following the Tribe's government-to-government relationship with the Federal government being reaffirmed in 1994, are still developing the common law of the Tribe. During this period, neither the Judicial branch, through the adoption of common law and interpretation of statutory law, nor the Executive and Legislative branches, through adoption of statutory provisions, have accounted for every matter and factual pattern that may come before the courts. By looking to other jurisdictions that have already developed and interpreted laws on issues that the Tribe has not, LTBB courts are able to incorporate legal principles that are not inconsistent with the LTBB Constitution or values without reinventing the wheel. The Tribe maintains its sovereignty through this process as it is not required by the Federal government as a general matter to adopt particular foreign legal principles.

Illustration:

1. X files a suit against Y for breach of contract. Although Y has admitted its liability for breach of contract, the parties disagree over which interest rate should apply for damages or over whether one should apply at all; the contract, which is the result of a court settlement, is silent on an interest rate. Tribal statutory and common law is silent on the issue. After deciding that interest for damages is a common expectation for breach of contract cases, and acknowledging that Tribal law is silent on the issue, the Court looks to foreign law—in this case, Michigan law—to determine whether foreign law contains guidance on the matter that is not inconsistent with Tribal law and values. Although the Court is not required to adopt foreign law, the Court, persuaded that the foreign law is fair and not inconsistent with Tribal law and values, chooses to adopt the foreign law as Tribal common law.

Case Citations:

1. *Blanz v. Odawa Casino Resort*, No. C-136-1011 (LTBB Tribal Ct. Aug. 2, 2012).

2. *Northern Anesthesia Providers, Inc. v. Welles*, No. FC-233-0812 (LTBB Tribal Ct. July 23, 2013).
3. *Target Nat'l Bank v. Kiogima*, No. FC-246-1213 (LTBB Tribal Ct. Dec. 30, 2013).
4. *Northern Shores Loan Fund, Inc. v. Lah Lah's Preloved Clothing Boutique*, No. C-196-0414 (LTBB Tribal Ct. July 1, 2014) (citing *Chelsea Inv. Grp. LLC v. Chelsea*, 792 N.W.2d 781, 789 (Mich. Ct. App. 2010)); MCL 600.6013(8); and *Babcock v. Diebolt*, 2009 WL 6430839 (Mich. Cir. Ct. 2009).

§ 2 Jurisdiction

§ 2.01 Due Process Protections for Non-Residents, Generally

Regardless of any statutory grant of jurisdiction, read together, the jurisdictional components and due process clause of the LTBB Constitution imply a substantive due process protection against the exercise of personal jurisdiction over non-members when to exercise such jurisdiction would be fundamentally unfair.

Comment:

1. The LTBB Constitution recognizes the inherent sovereignty of LTBB, granting the Tribe jurisdiction over “all territory set forth in Section (A) of this Article and to any and all persons or activities therein.”¹⁴ However, the Constitution also contains a substantive due process protection, and the Court has interpreted this as protecting individuals from the exercise of Tribal jurisdiction where that exercise would be fundamentally unfair.

Illustration:

1. See Illustration 1 to Section 2.02[A], *supra*.

Case Citations:

¹⁴ LTBB Const. art. IV, § B.

1. *Moore v. Serva*, No. A-031-1215 (LTBB Ct. App. Feb. 15, 2017).

§ 2.02 Personal Jurisdiction

§ 2.02[A] Personal Jurisdiction over Non-Residents, Minimum Contacts Test

In order for LTBB to exercise personal jurisdiction over a non-resident, the defendant must have minimum contacts with LTBB:

1. The defendant must purposely avail him or herself of the privilege of acting in the jurisdiction of LTBB or causing a consequence in the jurisdiction of LTBB;
2. The cause of action must arise from the defendant's activities in the jurisdiction of LTBB; and
3. The acts of the defendant or consequences caused by the defendant must have a substantial enough connection with LTBB to make exercise of jurisdiction over the defendant reasonable.

Comment:

1. After determining that the Court could not exercise jurisdiction over a non-resident when to do so would be fundamentally unfair, *see* Comment 1 to Section 2.02, the Court turned to the issue of the test. Finding similarity between the due process protections offered by the LTBB and U.S. Constitutions, the Court chose to adopt the minimum contacts test from federal common law.

Illustration:

1. X is a non-resident mother involved in a custody dispute with Y, a resident father. Employing the minimum contacts test, if the Court finds, after proper fact-finding procedures, that the mother purposely availed herself of the privileges of acting within LTBB during her previous residence, conceived and temporarily reared the child in the jurisdiction of LTBB (providing the connection required for the second component), and the connection was substantial enough, the Court may exercise *personal* jurisdiction over the mother.
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Case Citations:

1. *Moore v. Serva*, No. A-031-1215 (LTBB Ct. App. Feb. 15, 2017).

§ 2.02[B] Personal Jurisdiction over Non-Residents, Reasonableness Requirement

There is a further implied reasonableness requirement in the minimum contacts test. In determining whether it would be fundamentally unfair to exercise personal jurisdiction, the Tribal Court should consider:

1. The burden on the defendant
2. The interests of LTBB
3. The plaintiff's interest in obtaining relief
4. The inter-jurisdictional judicial system's interest in obtaining the most efficient resolution of controversies
5. The shared interest of the several sovereign entities in furthering fundamental substantive social policies

Comment:

1. In the further interest of fundamental fairness, *see* § 2.01, the Court should weigh whether or not it would be reasonable to exercise personal jurisdiction over a non-resident, considering the above factors. This rule reflects the range of factors which impact fundamental fairness and the complexity of the multi-jurisdictional legal system.

Case Citations:

1. *Moore v. Serva*, No. A-031-1215 (LTBB Ct. App. Feb. 15, 2017).

§ 2.03 Subject Matter Jurisdiction

§ 2.03[A] Subject Matter Jurisdiction over Non-Members, Generally

LTBB's subject matter jurisdiction over non-members has been limited to cases where:

1. The defendant has entered into a consensual relationship with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements, and the case has a sufficient nexus to the parties' consensual relationship; or
2. The conduct in question occurred on fee lands within the jurisdiction of LTBB, and the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Comment:

1. The U.S. Supreme Court severely limited Tribal jurisdiction over non-Indians in *Montana v. United States*, holding that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."¹⁵ The *Montana* Court then provided the two avenues to jurisdiction listed above. Later cases extended these restrictions from their initial application in regulatory matters to include judicial matters as well as.¹⁶ Faced with a decision about whether to extend Tribal subject matter jurisdiction over a non-member, the Court should apply the *Montana* test.

Case Citations:

1. *Moore v. Serva*, No. A-031-1215 (LTBB Ct. App. Feb. 15, 2017).

§ 2.03[B] Subject Matter Jurisdiction over Non-Members, Outside Scope of Duties/Authority

Where an LTBB employee who is non-Indian acts outside the scope of their duties and authority, the court does not have jurisdiction for those acts under the *Montana* doctrine, and the issue of sovereign immunity becomes irrelevant.

¹⁵ *Montana v. U.S.*, 540 U.S. 544, 565-66 (1981).

¹⁶ *See Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

Comment:

1. Part 1 of the *Montana* test allows for the exercise of jurisdiction over non-members when they have entered into a consensual relationship with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements, and the case has a sufficient nexus to the parties' consensual relationship. If a party acts outside of the scope of their duties and authority under the contract, the actions cannot be said to have a sufficient nexus to the parties' consensual relationship, and the issue of sovereign immunity is not reached as the Tribe does not have subject-matter jurisdiction.

Illustration:

1. X, a non-member, is engaged with LTBB to provide health services to Tribal members. X acts outside of the scope of their duties and authority and provides prescription drugs to Y, a tribal member, without a prescription. Y suffers injury and files suit against X in Tribal Court. Because the actions in question were outside the scope of the consensual relationship between X and the Tribe, the Tribal Court does not have subject matter jurisdiction to hear the case and must dismiss.

Case Citations:

1. *Lyons v. Holland*, No. A-034-1117 (LTBB Ct. App. Mar. 13, 2019).

§ 2.04 Dismissal for Lack of Subject Matter Jurisdiction, Obligation to Compile Record

The Court may not dispose of a case before it until all parties have been served and provided an opportunity to answer and compile a record.

Comment:

1. Prior to the Appellate Court's clarification on this issue, it was an open question whether LTBB courts could, on their own accord, dismiss a case before them for a lack of subject matter jurisdiction. The LTBB Rules of Civil Procedure are silent on this point, only addressing the fact that parties may seek dismissal of a case for a lack of subject matter

jurisdiction, among other reasons.¹⁷ In clarifying acceptable practice under similar circumstances, however, the Appellate Court did not foreclose the possibility of LTBB courts, acting on their own accord, dismissing matters before them for a lack of subject matter jurisdiction. Yet, in what the Appellate Court referred to as a “minimum” requirement of constitutional due process, it is clear that LTBB courts must allow parties to be served and provide them with an opportunity to answer, regardless of whether a petition is, on its face, deficient for a lack of subject matter jurisdiction.

Case Citation:

1. *LaCroix v. Snyder*, No. A-024-1014 (LTBB Ct. App. Dec. 12, 2014).

§ 2.05 Failure to File within Time Limit Set by Statute

Failure to file a claim within the limit set by a statutory cause of action should result in dismissal of the case for lack of jurisdiction.

Illustration:

1. X files suit against officials from the LTBB Gaming Enterprise Board, arguing that they failed to follow the procedures required in the Contracting Statute. The statute provides for suits by private parties, but only if they are filed within 180 days of the alleged violation. X files her claim after the deadline. The Tribal Court dismisses X’s claim for lack of jurisdiction.

Case Citations:

1. *Shananaquet v. LTBB Gaming Bd.*, No. C-229-0318 (LTBB Tribal Ct. June 27, 2018).

¹⁷ Little Traverse Bay Bands of Odawa Indians Rules of Civil Procedure, *available at* [http://www.ltbbodawa-nsn.gov/Tribal%20Court/civilrules%20\(addition%20of%204-21-11\).pdf](http://www.ltbbodawa-nsn.gov/Tribal%20Court/civilrules%20(addition%20of%204-21-11).pdf).

§ 3 Sovereign Immunity

§ 3.01 Tribal Sovereign Immunity, Generally

Sovereign immunity is a threshold issue that must be determined before any Tribal court can review the merits of the parties' arguments.

Unless expressly waived by Tribal Council, or abrogated by the Congress of the United States, sovereign immunity is an absolute bar to lawsuits against the Tribe. However, Tribal members have a right to due process through administrative hearings.

Waivers of sovereign immunity must be strictly construed in deference to Tribal Council's determination about the scope of the waiver. The court may not overrule the Constitutional grant of sovereign immunity even where traditional Odawa values favor adjudication.

Comment:

1. Sovereign immunity is a legal doctrine that establishes that a sovereign entity, in this case the LTBB, can do no wrong and is immune from suit. The doctrine, as adopted by the LTBB, is a Western legal concept. Under United States case law, the Supreme Court has held numerous times that tribal sovereign immunity exists as an inherent part of tribal sovereignty that was not divested by treaties between tribes and the United States.¹⁸ This legal framework has given tribal governments, including the LTBB, a powerful tool with which to engage in the intricacies of governance without interference from unauthorized parties, thereby maintaining some semblance of traditional tribal sovereignty.
2. Tribal sovereign immunity, and indeed ultimate tribal sovereignty, however, is severely limited in that Congress, in addition to tribal governments themselves, may unilaterally abrogate it, thereby exposing tribal governments to suit. Moreover, in a further sign of the erosion of traditional tribal sovereignty, tribal sovereign immunity is never a bar to legal actions taken in which the United States is a party nor does it prevent lawsuits against tribal officials in their official capacities.¹⁹ Functionally, however, tribal sovereign immunity has an extensive reach, preventing lawsuits against tribes, unless such

¹⁸ See, eg, *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024 (2014).

¹⁹ *Id.*

immunity is otherwise waived by the tribe itself or abrogated by Congress, in both tribal courts as well as Federal and state courts.²⁰

Illustrations:

1. X, an employee of the LTBB, brings suit against the LTBB, alleging negligent upkeep of gaming appliances that have resulted in X being severely injured. X seeks unspecified monetary damages. Neither the LTBB nor Congress has waived tribal sovereign immunity in such an instance. Accordingly, as a threshold matter, the Court must dismiss the case for lack of subject matter jurisdiction.
2. X, an employee of the LTBB, brings suit against the LTBB, alleging negligent upkeep of Tribal gaming appliances that have resulted in X being severely injured. X seeks unspecified monetary damages. While the LTBB has not waived sovereign immunity in this instance, Congress, in an express abrogation of tribal sovereign immunity, has enacted legislation allowing plaintiffs to maintain actions against tribal governments under similar circumstances and to seek up to \$50,000.00 in damages. Under the circumstances, the LTBB may not use the defense of sovereign immunity to have the lawsuit dismissed.

Case and Statutory Citations:

1. *Carey v. Victories Casino*, No. A-004-0606 (LTBB Ct. App. Mar. 27, 2007).
2. *LTBB v. Harrington*, No. A-008-1007 (LTBB Ct. App. May 18, 2009).
3. *Carey v. Victories Casino*, No. C-062-1005 (LTBB Tribal Ct. April 20, 2006).
4. *LTBB Tribal Council Members: Belinda Bardwell et al. v. Harrington*, No. A-022-1212 (LTBB Ct. App. July 9, 2014).
5. *McGraw v. Estate of Colby*, No. A-030-0115 (LTBB Ct. App. Sept. 6, 2017).
6. *LTBB Gaming Regulatory Comm'n v. Roberts*, No. A-018-0811 (LTBB Ct. App. Dec. 20, 2012)

²⁰ *Id.*

7. LTBB Const. art. XVIII, §§ A, B.

§ 3.02 Waiver of Sovereign Immunity, Burden of Proof

The burden for establishing a waiver of sovereign immunity is on the petitioner.

Case Citations:

1. *Harrington v. LTBB Election Bd.*, No. C-086-0310 (LTBB Tribal Ct. April 23, 2010).

§ 3.03 Statutory Waiver of Sovereign Immunity, Limits of Waiver

§ 3.03[A] Statutory Waiver of Sovereign Immunity, Time Limitation

Where an LTBB statute waives sovereign immunity for certain specified claims filed in advance of a deadline, and claims are filed late, this deprives the court of subject matter jurisdiction to hear the case. Equitable tolling does not apply.

Comment:

1. This rule balances the traditional values that favor adjudication against the need to strictly construe limited waivers of sovereign immunity provided by statute. The Court defers to Tribal Council to enact a more expansive waiver should it choose to do so.

Illustration:

1. X files suit against Y, an entity of LTBB, under the Fair Employment Statute, which waives immunity for 180 days following the incident that is the source of the claim. X files suit on day 200, as she was not aware of the 180 day rule. The Court should dismiss the claim for lack of jurisdiction.

Case Citations:

1. *McGraw v. Estate of Colby*, No. A-030-0115 (LTBB Ct. App. Sept. 6, 2017).

§ 3.03[B] Statutory Waiver of Sovereign Immunity, Party Identity Limitation

When a statute waives sovereign immunity for certain government officials or entities, that waiver applies strictly to only those parties specified in the statute.

Comment:

1. *See* Comment 1 to Section 3.03[A]

Illustration:

1. X, an LTBB private citizen, files a claim against the LTBB Gaming Enterprise Board and various officials in their official capacities, alleging violations of the LTBB Contracting Statute. The Contracting Statute waives immunity for “officials” who enter contracts without following the statutory process. Because the Gaming Enterprise Board is not itself an “official,” the court should dismiss the case with respect to the Board.

Case Citations:

1. *Shananaquet v. LTBB Gaming Bd.*, No. C-229-0318 (LTBB Tribal Ct. June 27, 2018).

§ 3.04 Waiver of Sovereign Immunity, Constitutional/Statutory Authorization as a Threshold Issue

Employees and officials of the Tribe acting within the scope of their duties or authority shall be immune from suit, except as otherwise waived by Tribal law.

Actions taken by Tribal employees and officials under the authority of an unconstitutional law or without constitutional or statutory authority are outside of the employees’ and officials’ scope of duties and authority, and subject the employees and officials to suit.

For the purposes of determining whether sovereign immunity is a jurisdictional bar to claims against Tribal employees and officials, the Tribal Court must make a threshold determination concerning whether the allegations of the complaint demonstrate that it is sufficiently likely that

the complained of actions were made under color of authority of an unconstitutional law or without constitutional or statutory authorization.

Comment:

1. This rule establishes a formal and orderly process for overcoming the jurisdictional bar imposed by sovereign immunity as applied to LTBB officials and employees acting outside of the scope of their duties and authority. Prior to the establishment of this principle, there was not a clear and concise test for Tribal courts to initially determine whether certain alleged actions were outside of LTBB officials and employees scope of duty and authority. Such a reality also meant that some parties appearing before Tribal courts lacked clarity on what to argue and present to the courts as a means of overcoming the jurisdictional bar inherent in the LTBB's sovereign immunity. This was particularly true for parties who were not represented by legal counsel and who, subsequently, had little guidance on the subject. Even with this principle, however, it is still unclear to what extent, outside of the formal legal process, that LTBB officials have inherent supervisory authority to direct certain employees under them in a manner that creates official duties and authority within the employees.

Illustration:

1. Tribal Council is empowered by the LTBB Constitution to allocate funds, but must do so within the formal legislative process which allows the Tribal Chairperson an opportunity to approve or veto the proposed allocation. Tribal Council begins allocating funds by simple motion, thus depriving the Tribal Chairperson of their constitutional role in the legislative process. The Tribal Chairperson files suit against Tribal Council alleging that the allocation of funds by simple motion is unconstitutional. The LTBB court should make a threshold determination of whether it is sufficiently likely that the allegations constitute actions without constitutional authority. If so, sovereign immunity does not serve as a jurisdictional bar to the claims by the Tribal Chairperson.

Case Citations:

1. *Carey v. Espinosa*, No. A-011-1008 (LTBB Ct. App. May 2, 2011).
2. *See LTBB Tribal Council Members: Belinda Bardwell et al. v. Harrington*, No. C-120-0411 (LTBB Tribal Ct. Nov. 22, 2012).
3. *LTBB Tribal Council Members: Belinda Bardwell et al. v. Harrington*, No. A-022-1212 (LTBB Ct. App. July 9, 2014).

4. *Wemigwase v. Cook*, No. A-032-0516 (LTBB Ct. App. Oct. 10, 2017).

5. *Lyons v. Holland*, No. A-034-1117 (LTBB Ct. App. Mar. 13, 2019).

§ 3.05 Sovereign Immunity for Employees Acting Within the Scope of Their Duties and Authority

§ 3.05[A] Sovereign Immunity for Employees Acting Within the Scope of Their Duties and Authority, Generally

When deciding whether an employee or official's conduct is within the scope of their duties or authority, the Court looks to whether or not the type of action is within the employee or official's scope of duties and authority in the abstract, not to the alleged circumstances of a particular action.

Absent an additional statutory waiver, LTBB employees acting within the scope of their duties and authority retain sovereign immunity in both their official and personal capacities for those actions.

Comment:

1. The choice to focus on the scope of the employee's duties and authority in the abstract reflects the rationale that sovereign immunity is designed to allow government officials to exercise discretionary functions without fear of legal repercussions when they reach the wrong decision. Focusing on the specific actions of employees in the case at issue would undermine this goal.

Illustration:

1. X is an employee of Odawa Casino Resort, which is regulated by the Gaming Regulatory Commission. Exercising her discretionary powers, Y suspends X's license when he pleads guilty to a *civil* infraction. The regulations provide that licenses can be suspended when the employee has pled guilty or no contest to a *criminal* offense. Because Y was acting within the scope of her discretionary powers, the court does not evaluate whether or not she made the correct decision.

Case Citations:

1. *Wemigwase v. Cook*, No. A-032-0516 (LTBB Ct. App. Oct. 10, 2017).
2. *Lyons v. Holland*, No. A-034-1117 (LTBB Ct. App. Mar. 13, 2019).
3. *Carey v. Espinosa*, No. A-011-1008 (LTBB Ct. App. May 2, 2011).

§ 3.05[B] Sovereign Immunity for Employees Acting Within the Scope of Their Duties and Authority, Discretionary Duties

Discretionary duties, such as the ethical obligation state-licensed mental health counselors have to use discretion in determining whether to report threats to authorities, fall within the purview of sovereign immunity, even if the reporting itself is not mandatory.

Comment:

1. *See* Comment 1 to Section 3.05[A]. Mental health professionals are bound by ethical obligations to engage in discretionary reporting when they receive information that individuals may present a threat to themselves or others. Protecting this discretion is consistent with the aims of sovereign immunity.

Illustration:

1. X, a mental health professional working for LTBB, receives information from Y that her former boyfriend, Z, made repeated threats against a public official. Exercising her professional discretion, X reports the threats to the police who conduct an investigation. In a suit filed by Z against X, alleging defamation, the Court should dismiss the claims on sovereign immunity grounds.

Case Citations:

1. *Lyons v. Holland*, No. A-034-1117 (LTBB Ct. App. Mar. 13, 2019).

§ 3.05[C] Sovereign Immunity for Employees Acting Within the Scope of Their Duties and Authority, Mistake

Employees do not act outside of the scope of their duties and authority when they operate under a valid law yet reach a mistaken conclusion in the exercise of their discretionary functions.

Comment:

1. *See* Comment 1 to Section 3.05[A].

Illustration:

1. *See* Illustration 1 to Section 3.05[A]

Case Citations:

1. *Wemigwase v. Cook*, No. A-032-0516 (LTBB Ct. App. Oct. 10, 2017).

§ 3.05[D] Employees Acting Outside the Scope of Duties and Authority, Scope of Relief

Unless otherwise explicitly authorized by Tribal Council or otherwise applicable law, suits against the Tribe or employees and officials acting outside of the scope of their duties and authority shall be limited to injunctive, not monetary, relief.

Comment:

1. This rule recognizes that, as a matter of LTBB constitutional law, waivers of sovereign immunity against the Tribe or employees and officials acting outside of the scope of their duties and authority are designed to protect individual rights and to protect against constitutional abuses. Monetary damages are not necessary to protect individual rights as well as protect individuals against abuses; indeed, monetary relief would go beyond what is necessary to protect individual rights and, instead, serves to compensate injured parties.

Therefore, only Tribal Council, or the Congress of the United States, may waive the LTBB’s sovereign immunity to provide for monetary damages.

Illustration:

1. X was terminated by the LTBB Law Enforcement Department and claims that the statute authorizing his termination was unconstitutionally enacted. Apart from seeking a permanent injunction against the Tribal Chairperson from enforcing the statute in question, X seeks damages for pain and suffering and wrongful termination under un-adopted common law principles; neither Tribal Council nor Congress have explicitly waived the LTBB’s sovereign immunity for monetary damages for suits of this nature. The LTBB Court makes a threshold determination that sovereign immunity does not serve as a jurisdictional bar for the suit against the Tribal Chairperson, who is an LTBB official. On the other hand, however, the LTBB Court is required to dismiss the portion of the complaint seeking monetary damages on sovereign immunity grounds.

Case Citations:

1. *See LTBB Tribal Council Members: Belinda Bardwell et al. v. Harrington*, No. C-120-0411 (LTBB Tribal Ct. Nov. 22, 2012).
2. *LTBB Tribal Council Members: Belinda Bardwell et al. v. Harrington*, No. A-022-1212 (LTBB Ct. App. July 9, 2014).

§ 4 Court Procedure

§ 4.01 Pleading Requirements, Request for Relief

In determining whether a civil complaint meets the pleading requirements established by RCP VIII, the Court will not “guess” what relief plaintiffs are requesting.

Illustration:

1. X files a civil claim against Y in Tribal Court. The complaint outlines grievances X has against Y but does not explain which law or rule establishes jurisdiction, what kind of

claim X is making (torts, defamation, etc), or what relief X desires from the Court. Rather than attempt to fit X's allegations to a cause of action, the Court dismisses the complaint for failure to state a claim on which relief may be granted.

Case Citations:

1. *Munson v. Bernard*, No. C-223-0716 (LTBB Tribal Ct. Aug. 16, 2016) (order dismissing civil complaint).

§ 4.02 Burden of Proof for Summary Disposition

In a motion for Summary Disposition:

1. The court must consider the pleadings, affidavits, depositions, admissions, other documentary evidence, and the inferences that can be drawn therefrom in the light most favorable to the nonmoving party.
2. The initial burden is on the moving party to produce sufficient evidence to state a claim on which relief can be granted.²¹ The burden then shifts to the opposing party to establish a genuine dispute of fact.
3. If the burden of proof at trial is on the non-moving party, they must go beyond the mere allegations or denials in the pleadings and must set forth specific facts showing that a genuine issue of material fact exists.

Comment:

1. LTBBRCP XVII says that a court shall grant a motion for summary disposition “if it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”²² The rule, however, does not articulate what

²¹ Or, if the defendant is the moving party, that there is no genuinely disputed fact which, if resolved in favor of the plaintiff, would allow the plaintiff to make out a valid claim.

²² LTBBRCP XVII.

that legal standard should be. Finding that Rule XVII was nearly identical to the parallel Michigan Court Rule, the court used Michigan case law to identify the legal standard.

Illustration:

1. X, an LTBB citizen, files a civil complaint in Tribal Court against Y, another Tribal Citizen who is X's neighbor, on a claim of Trespass to Land. Y disputes that he ever entered X's property, but argues that if he did, he had consent from X to do so, and therefore has an affirmative defense. Y moves for summary disposition, arguing that the issue of consent was undisputed in the initial pleadings and that therefore the disputed facts as to the trespass itself are not relevant to the outcome of the case. X, as the party with the burden of proof at trial, must present specific facts showing a genuine dispute of fact as to the lack of consent.

Case Citations:

1. *McGraw v. Estate of Colby*, No. A-030-0115 (LTBB Ct. App. Sept. 6, 2017).

§ 4.03 Standard of Proof for Civil Cases

A plaintiff prevails in a civil suit if the plaintiff shows by a preponderance of the evidence that the defendant has violated the statute or order of the Court.

Comment:

1. When the Court adopted the preponderance of the evidence standard of proof in civil cases, it maintained consistency with other jurisdictions on the issue. Prior to the adoption of the standard, LTBB law did not set a general standard of proof in civil cases; Tribal Council is free to do so, even to the extent that it means overriding the standard of proof established by the Court. The adoption of the preponderance of the evidence standard of proof in civil actions underscores the understanding that there should not be an unreasonable bar to proving violations of law or court orders for which one is not seeking punitive relief. This is in direct contrast to more demanding standards of proof,

such as beyond a reasonable doubt for criminal matters, which warrant a higher standard of proof as one's individual liberty is often at issue.

Case Citations:

1. *Swiss v. Emery*, No. PPO-019-0612 (LTBB Tribal Ct. July 20, 2012).
2. *LTBB Tribal Court v. Lopez*, No. TR-017-0414 (Little Traverse Bay Bands of Odawa Indians Tribal Ct. June 16, 2014).
3. *Northern Shores Loan Fund, Inc. v. Lah Lah's Preloved Clothing Boutique*, No. C-196-0414 (LTBB Tribal Ct. July 1, 2014) (citing *Chelsea Inv. Grp. LLC v. Chelsea*, 792 N.W.2d 781, 789 (Mich. Ct. App. 2010)); MCL 600.6013(8); and *Babcock v. Diebolt*, 2009 WL 6430839 (Mich. Cir. Ct. 2009).

§ 4.04 Improper Service of Process

When process is not properly served, and part of the responsibility for the failure to properly serve falls on the Court, the case is remanded with a second opportunity for the plaintiff to serve process.

The Court, however, shall not dismiss a suit where the service of process is improper, but the defendant received actual notice of suit.

Comment:

1. This rule balances the equities between dismissing an action where proper service of process has not been followed and allowing the suit to continue where an objecting party has received actual notice of the suit. Any rule to the contrary would raise questions of basic fairness and would seem to go against the intent behind formal notice requirements, which are in place to ensure that opposing parties are timely made aware of the other's filings with the Court so that they are able to offer a timely response and prepare for trial. If one has received actual and timely notice of disputed filings, however, then the purpose and intent of the court rules have been met, regardless of whether the notice has conformed strictly to the requirements of the rules.

Illustration:

1. LTBB Court Rules require that parties serve by first class mail on the opposing party any filings made with the Court within 14 days of a hearing. When filing a motion and brief to dismiss an action, X fails to adhere to the filing deadline and, in fact, fails to file the motion and brief with the opposing counsel at all. Due to diligent investigation by counsel for the opposing party (Y), Y receives actual notice and a copy of X's motion and brief within 14 days of the hearing on the motion. Because Y received actual notice of X's motion and brief within 14 days of the hearing on the motion and, thus, had ample time to prepare to respond to the filing, the Court should overrule efforts by Y to dismiss X's motion and brief for failure to comply with court rules.

Case Citations:

1. *Carey v. Victories Casino*, No. A-004-0606 (LTBB Ct. App. Mar. 27, 2007).
2. *Carey v. Victories Casino*, No. A-005-0507 (LTBB Ct. App. May 5, 2008).

§ 4.05 Failure to Prosecute in a Timely Manner

The Court has inherent authority to dismiss an action with prejudice if there has been a failure to prosecute within a reasonable amount of time.

Comment:

1. The courts of the LTBB have inherent authority to dismiss actions with prejudice where there has been a failure to prosecute within a reasonable amount of time. This authority addresses concerns over the ability of the courts to promote docket efficiency, as well as to ensure that respondents' due process rights are not violated. While the existing case law outlining the failure to prosecute doctrine deals exclusively with civil matters, the doctrine would seem to apply equally, if not more powerfully, to criminal matters in light of the LTBB's constitutional guarantee of a speedy trial in criminal cases.²³ In both civil and criminal cases, however, it is not clear how much time would have to pass with a failure to prosecute before the delay would lead to a dismissal of an action with prejudice

²³ LTBB Const. art. II, § 6.

and, indeed, fixing such a cut-off point may be impractical due to the varied fact patterns that arise in each case.

Illustration:

1. X is a respondent to a suit brought against her by Y for fraudulent misrepresentation. After 6 years with limited activity in the case, including over 4 consecutive years with no activity, Y continues with her efforts against X in the civil matter. Due to Y's prolonged and lengthy period of inactivity in the case, the Court would be justified in dismissing Y's complaint with prejudice for failure to prosecute.

Case Citation:

1. *LTBB v. Harrington*, No. A-009-1007 (LTBB Ct. App. Apr. 23, 2009).

§ 4.06 Definition of Calendar Year

When the LTBB Constitution states that an event can happen only once in a calendar year, the event cannot reoccur for another 365 days from the date of the event itself.

Comment:

1. In defining the meaning of "calendar year" in the Tribe's constitution, the LTBB Appellate Court was faced with a choice of adopting the Gregorian understanding of what constitutes a calendar year, which runs from January 1 to December 31, versus what constitutes a calendar year in traditional Odawa culture, in which time is continuous. Although the LTBB Constitution adopts some western values, it directs the different branches of government to promote the preservation and realization of "Anishinaabemowin and Anishinaabe culture,"²⁴ indicating that the Tribe's traditional values still have a special place in matters of constitutional interpretation. What is

²⁴ LTBB Const. art. I, § B.

unclear, however, and an open matter of debate where not otherwise clarified, is the extent and circumstances under which western values should replace Odawa traditions in matters of constitutional interpretation. Note that this issue is possibly clearer for interpretations of inferior LTBB statutes as the courts can look to recently compiled legislative records to ascertain the intent of Tribal Council on the matter.

Case Citation:

1. *Harrington v. LTBB Election Bd.*, No. A-019-1011 (LTBB Indians Ct. App. Feb. 16, 2012).

§ 4.07 Interpretation of Deadlines

§ 4.07[A] Interpretation of Deadlines, Counting Days

When the LTBB Constitution, Waganakising Odawa Statutes, LTBBRCP, or other rules, statutes, or regulations state a deadline to file an item with the LTBB Tribal Court is within a certain number of days, the term “days” means calendar days. However, should the final day to file fall on a Saturday, Sunday, holiday, or any other day the Tribal Court Offices are closed, the final day is not counted, and the deadline is extended to the close of business on the next day that the Tribal Court offices are open. For all other instances however, the word “days” without any other descriptors means calendar days.

Comment:

1. When the final day of a deadline to file set by Article XII, § F of the LTBB Constitution fell on a day that the Tribal Court Offices were not open, the LTBB Appellate Court ruled that the final day should not be counted within the limitations period, and the deadline extended. Because the court was not accessible due to closure, the deadline to file was extended to the next time the Court was accessible. Even though other means are provided for the submission of materials without a physical presence being necessary, because the Court was not physically accessible the deadline was extended to the next time that it was. The Court also took into account that the intention of the statute was to protect the interests of voters to challenge elections; the extension allowed this to happen, without violating the competing need to give finality to the proceedings.

2. The above rule also applies outside of appealing election results. The LTBB Appellate Court has applied the rule when parties file an appeal. In a case involving §7.401 of the LTBB Appellate Procedures, when an appeal was turned in 35 days after the original decision of the Tribal Court, outside of the 28 day deadline to file under the rule, the LTBB Appellate Court cited the *Kiogima* case and applied its holding outside of an election context, extending it to all filings of appeals. Even with the extended deadline, the filing in question was ultimately deemed untimely, as the Tribal Court had been open on the 28th day, as well as for several days afterwards.

Illustration:

1. An LTBB election is scheduled and held on June 23rd, 2015. A losing candidate wishes to challenge the result that was posted on that same day. They attempt to file their claim on July 3rd, the tenth day from the end of the election. However, the Tribal Offices are closed for the 4th of July holiday. Because the 10th day was a Saturday, Sunday, or holiday, the filing deadline is extended to the first day the offices are open again, in this case, Monday July 6th.

Case Citations:

1. *Kiogima v. LTBB Election Bd.*, No. A-025-1214 (LTBB Ct. App. Mar. 13, 2015).
2. *LaCroix v Snyder*, No. A-026-0415 (LTBB Ct. App. May 22, 2015).

§ 4.07[B] Interpretation of Deadlines, Meaning of “no less than”

When interpreting an election rule on deadlines, the phrase “no less than [x] days” implies the ballots may be mailed any time before that deadline, rather than on the deadline date exactly.

Illustration:

1. LTBB Election code says that election ballots must be mailed to all registered voters no less than 30 days prior to the election. The Election Board mails the ballots 31 days prior

to the election and one of the candidates brings a challenge in LTBB Tribal Court. The claim should fail as the phrase “no less than” implies that as long as the ballots are mailed at least 30 days prior to the election, the Board has complied with the rule.

Case Citations:

1. *Gokee v. LTBB Election Bd.*, No. C-208-0515 (LTBB Tribal Ct. June 10, 2015).

§ 4.07[C] Interpretation of Deadlines, Equitable Tolling

Equitable tolling does not apply absent exceptional circumstances.

Comment:

1. This rule reflects the principle that equitable tolling should not be available when the Plaintiff’s own excusable neglect has caused the delay. Cases where equitable tolling has been permitted outside of LTBB courts include where there was trickery or concealment on the part of the opposing party, and where there was bureaucratic delay outside the plaintiff’s control.
-

Illustration:

1. X files a Fair Employment Statute (FES) claim against Y, arguing that Y altered the terms of X’s employment contract impermissibly as a result of their romantic relationship. The FES requires claims to be filed within 180 days, but X misses the deadline because he is uninformed about the statute. There are no exceptional circumstances so the court should dismiss the claim for lack of jurisdiction.
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Case Citations:

1. *McGraw v. Estate of Colby*, No. A-030-0115 (LTBB Ct. App. Sept. 6, 2017).

§ 4.07[D] Interpretation of Deadlines, Docket Management Guidelines

Rules concerning the length of time a court has to issue an order are designed to promote judicial efficiency; failure to conform to these limits should not be construed as having any substantive impact on the rules for appeal.

Comment:

1. Time limits set on the amount of time a court has to issue an order are designed to promote judicial efficiency. If a judge issues an order after such a deadline, the proper remedy is review of judicial systems to improve efficiency, but the lateness does not impact the procedural rules for appeal (e.g., time limits for appeal still apply).

Illustration:

1. X is an attorney practicing in LTBB Tribal Court who is found to be in Civil Contempt. The order following the contempt ruling is issued more than 45 days after the show-cause hearing (after the deadline for issuing orders set out in the LTBB Rules of Civil Procedure). X then files an appeal 200 days following the order, long after the 28-day appeals period has expired. The Court rejects X's argument that the lateness of the contempt order excuses the lateness of the appeal.

Case Citations:

1. *Beck v. LTBB*, No. A-028-0815 (LTBB Ct. App. Feb. 13, 2017).

§ 4.08 Settlements

§ 4.08[A] Settlements, Authority to Enter Settlement Agreements

Unless otherwise prohibited by law, parties to a dispute are free to negotiate and agree to terms that will dissolve the dispute. The Court may, at the parties' request, bind them to such terms in the form of a settlement order, which may or may not be confidential.

Comment:

1. This rule recognizes that members of the public are generally free to enter into contracts with each other and that civil court actions are generally voluntary and continue only to the extent that there is a will by parties to pursue a claim. The rule also has a practical impact on the parties' and Court resources. Specifically, should parties to a case decide to settle a dispute and seek a settlement order disposing of the case, Court resources are freed up and the parties have an opportunity to save time and money on litigation.

Illustration:

1. X and Y have been engaged in an ongoing legal dispute involving breach of contract claims. Through the original petition and subsequent counterclaim, both X and Y seek hundreds of thousands of dollars in damages from the other. Before the Court has had the opportunity to reach a decision in the case on the merits, X and Y, through their attorneys, agree to settle out of court for an undisclosed amount of money. X and Y subsequently bring their agreement to the Court for approval and request a settlement order disposing of the case, which the Court grants.

Case Citations:

1. *See, e.g., Northern Shores Loan Fund, Inc. v. Lah Lah's Preloved Clothing Boutique*, No. C-149-0912 (LTBB Tribal Ct. Oct. 10, 2012).

§ 4.08[B] Settlements, Effect on Prior Contractual Obligations

Unless otherwise prohibited by law or ordered by the Court, a binding settlement agreement shall replace the terms and conditions of a previous contract at issue in a dispute between parties to a suit.

Comment:

1. This rule acknowledges that settlement agreements made to resolve litigation generally serve as contracts that supersede and replace prior contractual obligations of parties to a

dispute. Assuming that all parties to a settlement have willingly accepted the terms of the agreement, consideration for which was presumably, at a minimum, an agreement to withdraw legal complaints, the requirements of contract have been met. Such a conclusion, however, would be inappropriate where the settlement agreement stipulated that a failure to adhere to the terms of the agreement would resurrect the former contract(s) that was at issue in the initial litigation. Barring such terms or other legal authorization, however, the initial contract is void and suits for violating the settlement agreement must proceed under the settlement agreement rather than the original contract.

Illustration:

1. X sued Y for breach of contract under a loan agreement where X loaned Y \$12,000 and Y agreed to repay X with regular monthly payments over 10 years at 12% interest per annum. The contract also stated that, under any failure to make a timely payment as agreed to in the contract, Y defaulted on the contract and X was authorized to take immediate action in Tribal courts to collect on the outstanding balance with interest. After making regular payments under the contract for some time, Y abruptly stopped making payments, and X initiated court proceedings to collect on the outstanding debt plus interest. Under undisputed calculations, Y's outstanding debt plus interest owed to X was in excess of \$7,000. After weighing the likelihood of ever collecting on the substantial outstanding debt against the cost for paying for attorneys to seek collection, X and Y entered into a binding, Court-approved settlement agreement whereby Y agreed to pay X \$4,500 within one week to forever resolve the dispute. Unfortunately for X, Y failed to follow through on his obligations under the settlement agreement. As a result, X filed suit seeking repayment of \$7,000+ under the initial contract. Reasoning that the settlement agreement replaced the initial contract, the Court entered judgment in favor of X, but under the terms of the settlement agreement, for an amount of \$4,500 with interest to accrue until the debt is satisfied.

Case Citation:

1. *Northern Shores Loan Fund, Inc. v. Lah Lah's Preloved Clothing Boutique*, No. C-149-0912 (LTBB Tribal Ct. Oct. 10, 2012).

§ 4.08[C] Settlements, Calculating Interest

Where the settlement order is silent as to applicable interest rate for awarding damages to the injured party, the Court shall award interest under Michigan law for calculating interest rates for

money judgments. Under this practice, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of the filing of the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1. Interest awarded under this formula shall continue to accrue from the date that the judgment is signed until the judgment is rendered in full.

Comment:

1. As a developing tribal government, the LTBB is still in the process of establishing areas of common and statutory law that cover the range of incidents which impact the lives of Tribal Citizens. When creating or expanding upon the law, however, Tribal authorities must take care to ensure that any new legislation or legal principles are consistent with the LTBB Constitution and tribal customs. Given that the LTBB did not initially establish rules for calculating interest for damages awarded in money judgments where the judgment is silent as to an interest rate, the Tribe looked to foreign law, specifically that of Michigan, in adopting such a principle. Given the familiarity with Michigan law among the peoples practicing in Tribal courts and the unique relationship the Tribe maintains with the State, Tribal courts have often looked to Michigan law for guidance on issues that Tribal law is silent on. Although the historic rate for calculating interest on money judgments in Michigan has not been unjustly high by most standards, it remains an open question whether future exorbitant rates would be unconscionable or violate some other principle of Tribal law or custom. Under such a scenario, the Court would have to determine whether to modify or maintain the current rate.

Illustration:

1. X obtained a money judgment via settlement order against Y in the amount of \$5,000; the complaint was filed on December 1, 2013, and the order was entered on December 15, 2013. While the agreement was silent as to an interest rate, the order required Y to make immediate payment to X, thereby making the inclusion of an interest rate unnecessary at the time. Contrary to the terms of the order, however, Y failed to pay X until March 1, 2014. On July 1, 2013, the average interest rate paid at auctions of 5-year United States treasury notes was 1%, with the rate increasing to 2% on January 1, 2014. Using the formula that has been adopted as part of the Tribe's common law, the interest rate for the money judgment would be consistently 2% (1% + 1%), as only 3 months passed from the time that the complaint was filed until the day that the judgment was satisfied. Given that

the formula calls for calculating interest at 6 month intervals from the date that the complaint was filed using July 1 and January 1 interest rates, the interest rate calculation would not be 3% (2% + 1%) unless and until payment on the judgment was delayed more than 6 months after the complaint was filed, which would be June 1, 2014 at the January 1, 2014 interest rate calculation; even here, the increased interest rate would only apply to the balance outstanding as of June 1. Assuming that there was further delay in satisfying the judgment, the rate would not change again until 6 months after June 1, 2014.

Case Citation:

1. *Northern Shores Loan Fund, Inc. v. Lah Lah's Preloved Clothing Boutique*, No. C-196-0414 (LTBB Tribal Ct. July 1, 2014) (citing *Chelsea Inv. Grp. LLC v. Chelsea*, 792 N.W.2d 781, 789 (Mich. Ct. App. 2010)); MCL 600.6013(8); and *Babcock v. Diebolt*, 2009 WL 6430839 (Mich. Cir. Ct. 2009).

§ 4.09 Effect of Nolo Contendere Plea

A nolo contendere plea carries the weight of a conviction for the same offense where the relevant court rules require the judge to hold a hearing to establish support for a finding that the defendant is guilty of the offense to which the defendant is pleading.

Comment:

1. In the case where a judge must make findings of fact that would support a guilty plea in order for the defendant to plead nolo contendere, these facts support using treating the nolo contendere plea as if it is a conviction.

Case Citation:

1. *In re Kiogima*, No. A-033-0716 (LTBB Ct. App. Mar. 31, 2017).

§ 5 Fairness and Justice in LTBB Courts

§ 5.01 Judicial Disqualification or Recusal

§ 5.01[A] Standards for Judicial Disqualification or Recusal

When a party seeks to disqualify a judge, disqualification or recusal is only appropriate in cases where the judge's impartiality might reasonably be questioned.

Case Citation:

1. *See, e.g., Carey v. Espinosa*, No. A-011-1008 (LTBB Ct. App. May 2, 2011).

§ 5.01[B] Removal of Tribal Court Judge on Showing of Lack of Impartiality

Where serious questions of impartiality on a particular case exist for a Tribal Court judge, the Appellate Court may remove the judge in question and transfer the case to another Tribal Court judge.

Case Citation:

1. *TBA Credit Union v. Giem*, No. A-010-0708 (LTBB Ct. App. June 17, 2009).

§ 5.02 Duty of Candor

§ 5.02[A] Duty to the Court

In addition to agreeing to abide by the laws and customs of the Tribe, attorneys and others licensed to practice before the courts of the Tribe owe a duty of candor to the courts.

§ 5.02[B] Breach of Duty of Candor

Where attorneys or others licensed to practice before the courts of the Tribe breach their duty of candor, the courts may, in the interest of justice, take appropriate action to remedy the breach.

Comment:

1. These rules touch on the duties that individuals who are licensed to practice before LTBB courts owe to the judicial system and process. Breach of these responsibilities and duties raises different questions for LTBB courts exercising their inherent disciplinary authority, depending on the identity of the practitioner in question. On the one hand, if an individual licensed to practice before LTBB courts is a member of a federally-recognized Indian tribe, LTBB courts may exercise criminal and civil jurisdiction over that individual should he breach his duty owed to the courts. If, on the other hand, the attorney or another licensed to practice before Tribal courts is not a member of a federally-recognized tribe (and is not eligible for membership in a federally-recognized Indian tribe), LTBB courts may only initiate civil proceedings against that individual if they have entered into “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” or if they have engaged in conduct that “threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”²⁵ Criminal jurisdiction over non-Indians is disallowed unless such authority is explicitly granted by Congress.²⁶ As a result, while the duties owed by individuals licensed to practice in Tribal courts remain the same regardless of their tribal affiliation, the courts’ authority to take corrective action against them may be severely weakened depending on their lack of tribal affiliation.
2. Apart from the disciplinary procedures that provide a means for maintaining order and the integrity of the judicial process, Tribal courts may amend judgments where an incorrect decision was reached as a result of a party or their licensed representative’s dishonesty before the courts. Tribal courts may take such corrective measures on their own accord, particularly where the aggrieved party is not represented by counsel, in the name of ensuring justice. Such authority is consistent with traditional Tribal understanding of fairness and justice.

²⁵ *Montana*, 540 U.S. at 565-66.

²⁶ *See, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (noting that modern government-to-government relationships between Indian tribes and the Federal government divested Indian tribes of the authority to exercise criminal jurisdiction over non-Indians, unless authorized to do so by Congress).

Illustration:

1. X is an attorney licensed to practice before Tribal courts but is not a member of a federally-recognized tribe. As part of X's application for admission to the Tribal Bar, X agreed to adhere to the laws of the Tribe and to show respect to the Tribal courts, which includes a duty of candor. While representing his client, Z, in a suit against Y, who was not represented by counsel, X lied to the court in an effort to achieve a favorable result for Z. In the normal course of business, and after entering a verdict in favor of Z, influenced in large part by X's dishonesty, the Court discovers that X has been untruthful on the central point. After the Court convenes a rehearing on its own accord, X's dishonesty is proven on the record. As a result of X's established dishonesty, which led the Court to issue an incorrect ruling, the Court amends its original order and enters judgment in favor of Y. Additionally, the Court initiates contempt proceedings against X for violating his duty of candor owed to the Court. Because X is not a member of a federally-recognized Indian tribe, however, the Court may only initiate civil contempt proceedings against X.

Case Citations:

1. *Northern Anesthesia Providers, Inc. v. Welles*, No. FC-233-0812 (LTBB Tribal Ct. July 23, 2013).
2. *People v. Beck*, No. C-185-0713 (LTBB Tribal Ct. Dec. 29, 2014).

§ 5.03 Contempt of Court

§ 5.03[A] Contempt of Court, Civil Contempt

The Court may find an individual it has jurisdiction over to be in Civil Contempt of Court for failure to comply with an order of the Court, if the individual's act or omission was fully contemptuous, or the act was preceded by a clear warning by the Court that the conduct in question was improper. Proving guilt does not require proving willful state of mind in a Negligent Civil Contempt case.

Comment:

1. The LTBB’s law of civil contempt provides its courts with tools to regulate individual conduct before the Court as well as compliance with Court orders generally. While contempt proceedings may be initiated against any person that the Court has jurisdiction over, United States Supreme Court precedent has limited the civil authority of Indian tribes over non-Indians. Under Supreme Court jurisprudence, Indian tribes may only exercise civil jurisdiction over non-Indians who enter into “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” or where conduct by non-Indians “threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”²⁷ Although the Supreme Court’s pronouncement, in theory, grants tribes expansive authority over Indians and non-Indians alike, in practice the doctrine has eroded the historic legal authority that Indian tribes had over outsiders conducting business within their territories.²⁸

Illustrations:

1. A member of a federally-recognized tribe appearing before the LTBB Court has been instructed by the Court to refrain from engaging in certain specified conduct. Despite clear warnings from the Court on the matter, however, the member engages in the behavior anyway. As a result, the Court is authorized to hold the member in Civil Contempt of Court.
2. A non-Indian attorney who has been admitted to practice law before LTBB courts, and as such has agreed to follow the laws of the LTBB and to show respect to its courts and legal process, is dishonest to the Court, thus violating the attorney’s duty of candor to the tribunal. The attorney’s admission to practice before the Court, which serves as a contractual obligation on the attorney to follow LTBB law and to respect the Court, authorizes the Court to initiate Civil Contempt proceedings against the attorney.

²⁷ *Montana*, 540 U.S. at 565-566.

²⁸ *See, e.g., Oliphant*, 435 U.S. 191.

Case and Statutory Citations:

1. *LTBB Tribal Ct. v. Rodriguez*, No. C-154-1112 (LTBB Tribal Ct. Dec. 6, 2012).
2. *LTBB Tribal Ct. v. Lopez*, No. TR-017-0414 (LTBB Tribal Ct. June 16, 2014).
3. *People v. Beck*, No. C-185-0713 (LTBB Tribal Ct. Dec. 29, 2014)
4. *Zeeff v. Dillard*, No. C-192-0214 (LTBB Tribal Ct. Aug. 1, 2018).
5. Waganakising Odawak Statute 2010-004, February 21, 2010, §§ V(A)(3)(7), V(B).

§ 5.03[B] Contempt of Court, Criminal Contempt

The Court may find an individual it has jurisdiction over in Criminal Contempt of Court where the individual intentionally and unjustifiably disrupts, obstructs, or otherwise interferes with the conduct of any proceeding of the Court, including disobedience or resistance to, or interference with, any lawful summons, subpoena, process, order, rule, term of probation, sentence, decree, or command of the Court, including failure to appear for a court date.

Comment:

1. The LTBB's law of Criminal Contempt provides its courts with tools to regulate individual conduct before the Court as well as compliance with Court orders generally. Consistent with the law of civil contempt, LTBB courts may initiate contempt proceedings against any Indian under their jurisdiction. Unlike the law of Civil Contempt, however, Tribal courts may not initiate criminal proceedings against non-Indians unless explicitly authorized by Congress to do so.²⁹ The lack of criminal authority is a clear limit on the Court's ability to use deterrence in ensuring compliance with its orders by non-Indian defendants or other non-Indians appearing before the Court.

²⁹ See, e.g., *Oliphant*, 435 U.S. 191.

Illustrations:

1. A member of a federally-recognized tribe who is under the LTBB Court's jurisdiction has been ordered to comply with terms as established in an order of the Court. Following a finding beyond a reasonable doubt that the member intentionally and unjustifiably disregarded the Court's order, the Court may hold the member in Criminal Contempt of Court.
2. Tribal law enforcement officers arrest and charge with a crime an individual whom they have reason to believe is a member of a federally-recognized tribe. Operating under the same mistaken belief, the Tribal Prosecutor brings criminal charges against the offender under tribal law. While before the Court, the offender intentionally and unjustifiably disrupts the proceeding, and the Court initiates Criminal Contempt proceedings against the individual. Before sentencing the individual on Criminal Contempt charges, however, the Court discovers that the individual is not a member of a federally-recognized tribe. Under such circumstances, the Court is obligated to dismiss the contempt proceedings and the underlying criminal matter for want of jurisdiction over the individual.

Case and Statutory Citations:

1. *See, e.g., LTBB Tribal Ct. v. Shalifoe*, CR-086-0812 (LTBB Tribal Ct. Aug. 2, 2012).
2. WOTC § 9.107, Criminal Contempt of Court.

§ 5.04 Fee Shifting

When citizens bring claims to enforce the laws of LTBB, fee shifting should not occur unless there is evidence that the suit was filed in bad faith or for the purposes of harassment. Defendants who have unclean hands should refrain from requesting attorney's fees absent evidence of these conditions.

Comment:

1. LTBBRCP XXIII provides for the award of attorney's fees when it "has been clearly and convincingly shown that the case has been prosecuted in bad faith for purposes of

harassment only, and that there was no reasonable expectation of success on the part of the affirmatively claiming party.”³⁰ When an LTBB citizen undertakes to protect the Tribe by filing suit when they uncover violations of the law, the opposing party should not request attorney’s fees absent clear evidence that satisfies LTBBRCP XXIII. This is especially true when the defendants have unclean hands and prevail in the underlying matter on procedural grounds.

Illustration:

1. X, an LTBB citizen, discovers that the LTBB Gaming Board executed an employment contract without following the procedures outlined in the Contracting Statute. However, X files suit 280 days after the contract was executed, outside the time limit covered by the limited waiver of sovereign immunity authorized by the statute. X’s complaint is therefore dismissed due to lack of timeliness. The Gaming Board, despite admitting the alleged violations, requested attorney’s fees. The Court denies the request.

Case Citations:

1. *Shananaquet v. LTBB Gaming Bd.*, No. C-229-0318 (LTBB Tribal Ct. June 27, 2018).

§ 6 Appellate Procedure

§ 6.01 When an Appeal is Properly Before the Court

The Appeals Court may only review that which has already occurred following a Tribal Court hearing.

An appeal is properly brought before the Court if the judgment, order or decision of the Tribal Court is final, the appeal involved an order denying an appellant’s motion for disqualification of a justice, or the appeal involves an order affecting a substantial right or claim which disposes of the matter as to that participant.

Case Citation:

1. *McFall v. Victories Casino*, No. A-003-1203 (LTBB Ct. App. Dec. 12, 2005).

³⁰ LTBBRCP XXIII.

§ 6.02 Intervention in a Legal Action Before the Appellate Court

Where an individual has sufficient basis for intervening in an appeal under LTBBRCP Rule X(a), the individual also meets the requirement for standing to pursue an appeal.

Case Citation:

1. *LTBB Tribal Council Members: Belinda Bardwell et al. v. Harrington*, No. A-022-1212 (LTBB Ct. App. July 9, 2014).

§ 6.03 Equitable Waiver of Timeliness Requirement

The Appellate Court has discretion to equitably waive the requirement of timeliness for an appeal when the appellant can show merit in the appeal and the lateness was not due to the appellant's (or their attorney's) own negligence.

Case and Statutory Citations:

1. *Beck v. LTBB*, No. A-028-0815 (LTBB Ct. App. Feb. 13, 2017).

§ 6.04 Bar on Requests for Reconsideration

Per LTBB Tribal Court Rule 7.504, no request of reconsideration of a final decision by the Tribal Appellate Court will be permitted.

Comment:

1. Rule 7.504 was amended to prohibit reconsideration of Appellate decisions in 2015.

Citation:

1. LTBB Tribal Court Rule 7.504.

§ 6.05 Standard of Appellate Review

§ 6.05[A] Standard of Review, Factual Omissions

If the Tribal Court makes glaring omissions of fact that are clearly material to the matter or which have the power to determine the case's outcome, then the Appellate Court can reverse findings.

Comment:

1. This rule acknowledges, by setting a high standard, that trial courts are generally best equipped to make findings of fact that the Appellate Court generally may not disturb. Indeed, trial courts are in unique positions to guide the compilation of a trial record and to judge witness credibility, etc. Where trial courts fail in their responsibility to adequately compile a factual record that justifies their legal conclusions, however, the Appellate Court's deference to the trial courts' factual record is, in the interest of justice, lessened. Under such circumstances, the Appellate Court has generally declined to issue a ruling on the merits, and has, instead, remanded cases back to the Tribal Court to make appropriate findings of fact before issuing conclusions of law.

Case Citations:

1. *McFall v. Victories Casino*, No. A-003-1203 (LTBB Ct. App. Dec. 12, 2005).
2. *Northern Shores Loan Fund, Inc. v. Harbor Wear of Boyne, Inc.*, No. A-021-0312 (LTBB Ct. App. Nov. 6, 2012).

§ 6.05[B] Standard of Review, Witness Credibility

The Appellate Court will defer to the Tribal Court's conclusions regarding the oral testimony of witnesses before the Court.

Comment:

1. *See* Comment 1 to Section 6.05[A].

Case Citations:

1. *McFall v. Victories Casino*, No. A-003-1203 (LTBB Ct. App. Feb. 9, 2011).
2. *See Northern Shores Loan Fund, Inc. v. Harbor Wear of Boyne, Inc.*, No. A-021-0312 (LTBB Ct. App. Nov. 6, 2012).

§ 7 Constitutional Law

§ 7.01 Pleading Requirements for Constitutional Claims

In order for a constitutional individual rights claim to proceed, a plaintiff must assert that the plaintiff's case meets the specific parameters of the constitutional right in question.

Case Citation:

1. *Carey v. Victories Casino*, No. A-004-0606 (LTBB Ct. App. Mar. 27, 2007).

§ 7.02 Due Process

The LTBB Constitution guarantees an individual's right to due process of law.

In a case alleging a denial of due process of law, the plaintiff must establish that they are a person, within the Tribe's jurisdiction, who has been deprived of either a liberty or property interest, and that they have been denied due process of law in connection with that deprivation.

Case and Statutory Citations:

1. *Carey v. Victories Casino*, No. A-004-0606 (LTBB Ct. App. Mar. 27, 2007).
2. *LaCroix v. Snyder*, No. A-024-1014 (LTBB Ct. App. Dec. 12, 2014).
3. LTBB Const. art. II, § 8.

§ 7.03 Due Process Applied, Evictions

§ 7.03[A] Proof of Service, Notice of Evictions

Proof of service of a notice of an eviction may be made by affidavit or any adult person stating that he or she has complied fully with the requirements of either of the methods of service.

§ 7.03[B] Failure to Properly Notice

Where a defendant is not properly noticed, the defendant cannot be found guilty of unlawful detainer and cannot be evicted.

Comment:

1. These rules address potential concerns that an eviction from Tribal property without proper notice would violate the evicted individual's due process rights. Notice and an opportunity for an aggrieved party to be heard are crucial to the fairness and justice aspects inherent in due process. While in this case, Tribal Council has adopted the notice requirements in legislation, even in situations where due process requirements are not incorporated into statute, Tribal courts are well-equipped and situated under the LTBB Constitution to mandate such notice requirements. Developing LTBB case law waiving sovereign immunity when officials act outside the scope and duties of their authority (e.g., when they act pursuant to an unconstitutional law), suggests such legal actions would not automatically be barred by the Tribe's sovereign immunity. It remains unclear, however, what the LTBB Constitution's due process clause requires in terms of minimum notice.

Illustration:

1. X is a resident of Odawa Housing, which is owned and operated by the Tribe. X has fallen one month behind in her rent. Under legislation passed by Tribal Council and signed into law by the Tribal Chairperson, the Tribe's Housing Department is authorized to evict residents for a failure to timely pay rent, among other reasons. The legislation requires the Tribe's Housing Department to give notice at least 14 days before an eviction hearing. Contrary to the statutory requirements, however, the Housing Department first notices X of its intent to seek her eviction only 10 days prior to the hearing. X files a motion to dismiss the action against her for failure to properly notice. Based on the statutory definition, alone, the Court must grant X's motion and the Tribal Housing Department must properly notice X before moving forward.

Case Citation:

1. *LTBB Housing Dep't v. King*, No. C-128-0811 (LTBB Tribal Ct. Dec. 12, 2011).

§ 7.04 Powers of Tribal Council

§ 7.04[A] Powers of Tribal Council Generally

Tribal Council is empowered by the Constitution as the Tribe's legislative body to make laws and appropriate funds, among other responsibilities. In exercising its legislative duties, Tribal Council is prohibited from making laws that are inconsistent with the Constitution and may not exercise any powers not granted to it by the Constitution.

Comment:

1. *See* Comment 1 to Section 9.02, *infra*.

Illustration:

1. *See* Illustration 1 to Section 3.04.
-

Case and Statutory Citations:

1. *See, e.g., LTBB Tribal Council Members: Belinda Bardwell et al. v. Harrington*, No. A-022-1212 (LTBB Ct. App. July 9, 2014).
2. LTBB Const. art. VI, § C, art. VII, §§ D(1) and E.

§ 7.04[B] Powers of Tribal Council to Bind Executive Branch

Actions of the Tribal Council are only binding on the Executive Branch if they are properly adopted through the legislative process.

Comment:

1. *See* Comment 1 to Section 9.02, *infra*.

Illustration:

1. *See* Illustration 1 to Section 3.04.

Case Citation:

1. *LTBB Tribal Council Members: Belinda Bardwell et al. v. Harrington*, No. A-022-1212 (LTBB Ct. App. July 9, 2014).

§ 7.05 Prohibition on Ballot Initiatives for Appropriations and Budgeting

Under the LTBB Constitution, statutes that entail appropriations or establish Tribal budgets may not be enacted through Tribal Membership ballot initiative.

Comment:

1. Under the LTBB Constitution, as drafted by the Tribal membership, it is the Tribal Council's exclusive role to appropriate Tribal Funds. Article XIV § (A)(1) of the LTBB Constitution provides that the LTBB membership has the power to propose laws by initiative. However, the initiative exemption in Article XIV § (A)(1) specifically recognizes and reinforces the separation of membership's power to propose legislation by initiative from Tribal Council's power to appropriate funds.

Illustration:

1. Tribal Membership files a petition for a ballot initiative which provides for an increase of per capita payments from \$599.00, to \$2,500. Tribal membership argues that the initiative neither constitutes appropriations nor establishes a Tribal budget, but rather, that it provides for separating certain gaming revenue by priority. Under the proposal, part of the gaming revenue is set aside for per capita distribution, while the remainder is available for use as determined by Tribal government. The court is not swayed by this argument and rules against it, finding that separating funds in this manner is essentially the same as budgeting and appropriating, and therefore may not be accomplished by ballot initiative.

Case Citations:

1. *LTBB Tribal Council v. LTBB Election Bd.*, No. C-209-0715 (LTBB Tribal Ct. Aug. 25, 2015).

§ 7.06 Authority for Adopting Membership Law

The Court has no authority to adopt substantive provisions of law that relate to Tribal membership; only Tribal Council, within the limits established by the Tribal Constitution, may do so.

Comment:

1. This rule respects the constitutional roles of the different branches of Tribal government. Under this system, Tribal Council has the authority to adopt substantive provisions of law that relate to Tribal membership, and it is not the role of the LTBB courts to evaluate the wisdom of Tribal Council's decisions. LTBB courts, however, do serve as a powerful check on Tribal Council's authority in this area, as they are empowered to determine whether membership legislation runs afoul of the LTBB Constitution.

Illustrations:

1. Tribal Council passes legislation amending the LTBB's membership law, which affords membership, in part, based on one's relationship to an ancestor on the Durant Roll. Prior to the new legislation being enacted, the law recognized a rebuttable presumption that members listed on the Durant Roll were 4/4 Odawa; the LTBB Constitution mandates that members have at least 1/4 Indian ancestry and trace to the historic villages of the Odawak from the Little Traverse Bay area. Under the new legislation, however, Tribal Council targeted certain townships, based on newly discovered information, and lowered the presumptive blood quantum of members on the Durant Roll from these townships to 1/2 Odawa. The result of the legislative change was to revoke LTBB citizenship rights to approximately one-third of the Tribe's membership. LTBB courts must dismiss any claims made by the affected members against the Tribal Councilors as they acted within the scope of their constitutional authority and there is no judicially reviewable issue.
2. The LTBB Constitution requires that citizens of the Tribe be at least 1/4 North American Indian or Alaska Native, among other requirements. Tribal Council passes legislation that prohibits the Tribal Enrollment Department from processing membership applications of individuals who have less than 1/2 North American Indian or Alaska Native blood quantum. In an action against the Tribal Chairperson seeking to prevent enforcement of the law, LTBB courts are empowered to strike down the statute and prevent the Chairperson from enforcing this or any similar statute as it is inconsistent with the LTBB Constitution. Such legislation should only be upheld if a constitutional amendment was adopted increasing the blood quantum requirement for membership.

Case Citation:

1. *See, e.g., Startup v. LTBB*, No. C-060-0705 (LTBB Tribal Ct. Sep. 30, 2006).

§ 7.07 Constitutional Avoidance

LTBB courts are not required to reach a decision on any constitutional issue raised in a case if the case can be resolved in full by the application of an inferior Tribal statute.

Comment:

1. This doctrine recognizes the importance and broad implications of LTBB courts interpreting the Tribe's Constitution compared with the more limited impact of interpreting an inferior statute. If courts are able to rule on an issue as a matter of Tribal statute, then the ruling applies only to cases arising under that statute, which Tribal Council is free to modify or replace as part of the general legislative process. On the other hand, if courts rule on an issue under the Tribe's Constitution, the ruling has more permanency and can only be modified by a future decision of the courts or by a constitutional amendment. The doctrine shows a preference for limited rulings, preserving a simpler avenue for the people and their representatives to shape the law.

Illustration:

1. X brings suit against the Tribal Chairperson, alleging that they have allocated non-dispersed funds to a special arts project, in violation of both legislation prohibiting such action and contrary to a constitutional provision preventing the Tribal Chairperson from allocating non-dispersed funds without the approval of a super-majority of the Tribal Council. If the Court is convinced by a reading of the statutory and constitutional provisions at issue that the Tribal Chairperson is prohibited by both from taking the complained-of action, it should adjudicate the issue by ruling on the statutory provision alone. Under the constitutional avoidance doctrine, the Court, under the circumstances, need not address the constitutional claim.

Case Citations:

1. *See In re J.C.W.*, No. A-014-0410 (LTBB Ct. App. Feb. 9, 2011).
2. *In re J.C.W.*, No. A-015-0910 (LTBB Ct. App. Mar. 30, 2011).

§ 7.08 Conflict of Laws, Supremacy

When there are multiple possible interpretations of a subordinate text, and one interpretation conflicts with a superior text (i.e., a statute conflicts with a constitutional provision or a regulation conflicts with a statute), the court should read the subordinate text as consistent with the superior text absent explicit statement to the contrary.

If it is not possible to reconcile the provisions, the provision in the superior text prevails.

Comment:

1. This principle recognizes the supremacy of the LTBB Constitution over inferior laws passed by Tribal Council, and the supremacy of statutes passed by the elected members of Tribal Council over regulations created by agencies. Through such a legal framework, the Tribal citizenry remain better protected against excesses of Tribal government that threaten to violate rights enumerated and retained by the citizenry. It is important to note, however, that Tribal sovereignty is limited by the United States Congress' plenary authority over tribal governments, which grants Congress significant authority over these governments that cannot be limited by tribal constitutions.³¹
2. Tribal Council, in passing legislation, and LTBB agencies, in creating regulations, are presumed to act in accordance with superior laws.

Illustration:

1. X brings suit against the LTBB Department of Human Services to prevent enforcement of a statute that threatens her with termination of her parental rights, claiming that the provisions of the statute violate her constitutional guarantee of due process. The evidence at hand supports the Tribe's position that X's parental rights should be terminated under the statute, but the court finds the statutory process to be in conflict with the LTBB Constitution. Under the conflict of laws doctrine, the court should invalidate the statutory

³¹ *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991).

provision as it contradicts the LTBB Constitution. The inferior statutory provisions must give way to the supreme law of the Tribe.

2. X, an employee of Odawa Casino Resort (OCR), has his license suspended. X believes the suspension was done improperly, and brings suit under a number of statutory provisions, including the Fair Employment Statute. The gaming regulations provide for a remedy related to suspensions, which OCR argues is exclusive, though the regulation is not explicit on that matter. The court, declining to read the regulation in a way that abrogates the statutory remedy, allows the statutory claims to go forward.

Case and Statutory Citations:

1. *Harrington v. LTBB Election Bd.*, No. A-019-1011 (LTBB Ct. App. Feb. 16, 2012).
2. *LTBB Tribal Council Members: Belinda Bardwell et al. v. Harrington*, No. C-120-0411 (LTBB Tribal Ct. Nov. 22, 2012).
3. *LTBB Tribal Council Members: Belinda Bardwell et al. v. Harrington*, No. A-022-1212 (LTBB Ct. App. July 9, 2014).
4. *Wemigwase v. Cook*, No. A-032-0516 (LTBB Ct. App. Oct. 10, 2017).
5. LTBB Const. art. VI, § E.

§ 7.09 Textual Interpretation, Plain Meaning

In the absence of a textual definition of terms provided for in codified law, the Court applies the ordinary meaning to the terms.

Case Citation:

1. *LTBB Indians Gaming Regulatory Comm'n v. Roberts*, No. A-018-0811 (LTBB Ct. App. Dec. 20, 2012).
2. *See LTBB Nat. Res. Dep't v. Whittaker*, No. H-075-1112 (LTBB Tribal Ct. April 8, 2013).
3. *LTBB Nat. Res. Dep't v. Houghton*, No. H-085-0914 (LTBB Tribal Ct. Sep. 8, 2014).

§ 8 Administrative Law

§ 8.01 Deference to Agency Actions

The Court should give deference to agency actions, but only after concluding that an agency acted within the scope of its lawful authority. Within the bounds of their statutory authority, agencies generally have flexibility to determine how to achieve their regulatory obligations.

Comment:

1. This rule recognizes that agencies, in exercising their lawful responsibilities, accumulate expertise on certain subject matters that courts do not generally have. Thus, LTBB courts will give great deference to agency decisions, particularly agency rulemaking. With such a rule, it is important that LTBB agencies have some guiding principles as they conduct their business; otherwise, in the name of giving deference, LTBB courts would invite LTBB agencies to overstep their legal authority. This principle is not, however, absolute, as an LTBB agency's authority, as well as the power of LTBB courts to review agency decisions, can be broadly or narrowly refined and defined by statute or the LTBB Constitution.

Case Citations:

1. *LTBB v. Milligan*, No. A-006-0707 (LTBB Ct. App. Oct. 1, 2008)
2. *Gasco v. LTBB Indians Election Bd.*, No. A-017-0711 (LTBB Ct. App. Sep. 12, 2011).
3. *See LTBB Indians Gaming Regulatory Comm'n v. Roberts*, No. A-018-0811 (LTBB Ct. App. Dec. 20, 2012).
4. *Wemigwase v. Cook*, No. A-032-0516 (LTBB Ct. App. Oct. 10, 2017).

§ 8.02 Reasonable Reliance on Inaccurate Statements Made by LTBB Officials

§ 8.02[A] Inaccurate Statements Made by Officials Do Not Have the Force of Law

In general, inaccurate statements made by Tribal officials cannot alter or excuse the application of Tribal laws or constitutional provisions.

§ 8.02[B] Remedy for Detrimental Reliance

If an individual detrimentally relies upon the inaccurate statements of a government officer, the Court must look at the complete context to ascertain whether the reliance was reasonable. If the Court determines that the reliance was in fact reasonable, it must then determine the appropriate remedy, which may or may not include giving effect to the statement made by the government official.

Comment:

1. The narrow exception provided in Part B allows the court to consider equitable relief when an individual has reasonably relied to their detriment on inaccurate statements made by LTBB officials. While the rule provides the basis for giving effect to the statements in these limited circumstances, the court may or may not elect to do so.
2. There is a strong presumption that reliance is unreasonable when the official statement conflicts with a constitutional or statutory provision. While such a rule may lead to harsh results, it is nonetheless necessary to preserve the Tribe's constitutional structure and rule of law. Otherwise, LTBB officials would, in effect, be able to change the meaning of the law unilaterally and outside of the scope of their authority.

Case Citation:

1. *Harrington v. LTBB Election Bd.*, No. A-019-1011 (LTBB Ct. App. Feb. 16, 2012).

§ 8.03 Administrative Remedies and Exhaustion

Plaintiffs in employment disputes generally are required to exhaust administrative remedies, such as those provided in regulations or the LTBB employee handbook, before pursuing claims before the Tribal Court. However, when the administrative remedies do not provide the relevant type of review or relief, the claims in Tribal Court are not barred for failure to exhaust.

Comment:

1. This rule has so far only been applied in the context of the Gaming Regulations.
2. In general, administrative remedies are valuable as they provide an avenue to address many grievances without having to involve the parties in a protracted and expensive legal dispute. This is the source of the general exhaustion requirement. However, it would be futile for a plaintiff to pursue administrative remedies when the remedies available do not address the harm claimed by the plaintiff. In these cases, it is inefficient to require the plaintiff to exhaust and they may proceed directly to Tribal Court.

Illustration:

1. X is an employee of the Odawa Casino Resort who had his license suspended and files a claim in Tribal Court. The administrative appeals process available under the Gaming Regulations only allows for appeals based on procedural error that resulted in significant prejudice. The Court had in fact previously held that any additional review or remedy was improper. X, however, is not asserting a procedural defect but that his license was impermissibly suspended by the defendants in the first place. Because the Commission cannot address the plaintiff's grievances through the administrative remedies available, an appeal would be futile and there is no exhaustion required before X can bring his statutory claims.

Case Citations:

1. *LTBB v. Harrington*, No. A-008-1007 (LTBB Ct. App. May 18, 2009).
2. *Wemigwase v. Cook*, No. A-032-0516 (LTBB Ct. App. Oct. 10, 2017).

§ 9 Elections

§ 9.01 Tribal Council Oversight of Elections

The Tribal Council has the authority to enact laws that govern elections that are not inconsistent with the LTBB Constitution's specific election requirements.

Comment:

1. See Comment 1 to Section 9.02, *infra*.

Case Citation:

Gasco v. LTBB Election Bd., No. A-017-0711 (LTBB Ct. App. Sep. 12, 2011).

§ 9.02 Authority of the Tribal Election Board

In exercising its power to conduct elections, the Tribal Election Board may direct and take part in the operation and management of elections, and may develop rules and regulations for elections.

In exercising its authority to enact rules and regulations governing elections, the Election Board is limited to promulgating rules that fill in the gaps of relevant election law statutes and constitutional provisions.

Comment:

1. This interpretation clarifies the powers of Tribal Council and the Election Board, an independent Tribal entity under the LTBB Constitution, in regulating elections. The Election Board is tasked with conducting elections and adopting “rules and regulations governing elections,” while Tribal Council, despite not having a specific enumerated power to conduct elections, is tasked with making laws not “inconsistent” with the LTBB Constitution. Given that Tribal Council has legislative authority over the affairs of the LTBB and the Election Board is explicitly not granted any legislative authority, it reasonably follows that the Election Board’s “rules and regulations” power does not undercut Tribal Council’s legislative authority in Tribal election matters. This rule is consistent with the general constitutional language that prevents LTBB government branches from exercising powers granted to other LTBB government branches.

Illustrations:

1. Tribal Council passes legislation that sets the date for the upcoming primary election. As part of the legislation, Council mandates that the election be “rescheduled within a reasonable amount of time if polling stations are closed due to inclement weather.”

Exercising its discretionary authority under the legislation, the Election Board promulgates rules and regulations defining “reasonable time” to mean “no more than one week after an inclement weather event has passed.” A devastating snow storm is forecast to arrive on the night before the primary election, which prompts the Election Board to postpone the election by four days. In a legal challenge by a candidate against the Election Board’s authority to promulgate such rules and regulations, the Court dismisses the complaint and holds that the Election Board’s actions are permitted as gap fillers that clarify the legislation passed by Tribal Council.

2. Tribal election law clearly states that ballots may not be counted until three days following an election in order to provide time for the return of absentee ballots. Despite this statutory language, the Election Board promulgates and implements a rule allowing it to count ballots one day after an election has concluded. In an action against the Election Board, the Court should invalidate the rule, as it is inconsistent with the Board’s constitutional authority to enact only rules that fill in gaps and clarify existing legislation. Because the relevant ballot counting measures are clearly and unambiguously outlined in statute, there are no gaps for the Election Board to fill in on this issue.

Case and Statute Citations:

1. *Gasco v. LTBB Election Bd.*, No. A-017-0711 (LTBB Ct. App. Sep. 12, 2011).
2. *See* WOS 2010-019, §§ XII(C)-(D), Tribal Elections and Election Board.

§ 9.03 Citizen Claims Against the Election Board; Election Challenges

§ 9.03[A] Citizen Claims Against the Election Board, Generally

To establish a claim against the Election Board or election process, a Tribal Citizen with standing must show that any part of the election process was inconsistent with the Tribal Constitution, Tribal Code, or Tribal Regulations.

The Elections section of the LTBB Constitution creates an implicit presumption that the Election Board performed its duties as required. Challengers seeking a new election must allege facts with sufficient specificity that the challenge is plausible on its face and not merely conceivable – in particular, that the board failed to perform its duties as required and this failure impacted the election results.

Comment:

1. When the Election Board acts in a spontaneous ad hoc fashion that does not comport with the scope of its authority, the Court shall decline to defer to the Board's judgment.
2. See Comment 1 to Section 8.01.

Case Citations:

1. *Chingwa v. LTBB Indians Election Bd.*, No. C-158-0713 (LTBB Tribal Ct. July 22, 2013).
2. *Gasco v. LTBB Election Bd.*, No. A-017-0711 (LTBB Ct. App. Sep. 12, 2011).
3. *Okuly-Shananaquet v. LTBB Election Bd.*, No. C-226-0517 (LTBB Tribal Ct. May 30, 2017).

§ 9.03[B] Citizen Claims Against the Election Board, Impact on Election Outcome

In determining whether an error in the election process was harmless, the court considers whether the error influenced the election outcome.

Comment:

1. This rule balances the need for integrity in the election process with the reality that ordering a new election is an extreme remedy which should only be employed when there is evidence of an impact on the election outcome.

Illustration:

1. The Election Board produces and mails a ballot where the candidate's first name is spelled incorrectly. The misspelling is phonetically identical to the correct spelling ("John" vs. "Jon"). The Board becomes aware of the error and sends a revised ballot with the correct spelling, giving voters the opportunity to use either version. There is no evidence that voters were confused by the error and no sign of reduced turnout. As there is no evidence of an impact on the election outcome, the Court is justified in declining to order a new election.

Case Citations:

1. *Gokee v. LTBB Election Bd.*, No. C-208-0515 (LTBB Tribal Ct. June 10, 2015).

§ 9.04 Election Rules and Regulations

§ 9.04[A] No Amendment to Rules or Regulations During an Election

The Election Board may not amend current rules or regulations while an election is in progress. However, a rule is not considered amended unless the existing framework is altered in some way.

§ 9.04[B] Discretion to Act when Rules and Regulations are Silent

When the election rules and regulations are silent on how the Election Board should proceed under the circumstances, the board may act as needed to resolve the issue, provided they do not violate or amend the current rules and regulations for elections.

Comment:

1. Tribal election regulations prohibit the Election Board from amending existing rules and regulations while an election is in progress. However, the Election Board does retain the power to address situations as they arise, and may act as they see fit when the existing framework does not account for the current circumstances.

Illustration:

1. The Election Board produces and mails a ballot where the candidate's first name is spelled incorrectly. The existing regulations do not provide for what the Board should do in this situation, and the Board acts by sending a corrected ballot. As the solution is not prohibited by the regulations or inconsistent with the existing framework, the Court finds that no violation took place.
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Case Citations:

1. *Gokee v. LTBB Election Bd.*, No. C-208-0515 (LTBB Tribal Ct. June 10, 2015).

§ 10 Gaming

§ 10.01 Compliance with Regulations, Reasonable Notice

1. When an entity regulated by the LTBB Gaming Regulatory Commission has actual notice and understanding of what is required to comply with the regulations and simply makes an error, it is no defense that the regulations are inconsistent and confusing on their face.

Illustration:

1. X, an entity regulated by the LTBB Gaming Regulatory Commission (GRC), commits a technical violation of a provision in the Gaming Regulatory Statute, and is fined by the GRC. X admits to the violation but argues that it should not be held responsible as the statute and regulations involved are inconsistent and confusing. The Court agrees that the statute and regulations are confusing, but finds that X knew what was required for compliance, despite the confusing language, and simply made an error. The Court rejects the defense of insufficient notice.

Case Citations:

1. *LTBB Gaming Regulatory Comm'n v. Odawa Casino Resort*, No. GRL-009-1115 (LTBB Tribal Ct. Jan. 7, 2016) (order following objection hearing).

§ 10.02 Gaming Fines

The LTBB Gaming Regulatory Commission can preemptively assess fines against Odawa Casino Resort (OCR) to prevent running afoul of National Indian Gaming Commission (NIGC) Regulations. Fines should be reduced if the totality of circumstances dictates that the penalty imposed is not appropriate.

Illustration:

1. X, an entity regulated by the LTBB Gaming Regulatory Commission (GRC), failed to submit fee worksheets to the National Indian Gaming Commission, which could have resulted in a fine of \$1,104.09 from NIGC. GRC instead fines X \$5,000 (the penalty amount stipulated in GRC regulations) to correct the behavior, but also to keep Tribal monies within the Tribe as opposed to being paid to a Federal Government body. The Court finds that the primary purpose of the GRC fine is to keep the monies internal to LTBB and reduces the fine to \$1,104.09, the amount NIGC could have fined OCR had the behavior not been timely corrected and properly punished.

Case Citations:

1. *LTBB Gaming Regulatory Comm'n v. Odawa Casino Resort*, No. GRL-009-1115 (LTBB Tribal Ct. Jan. 7, 2016) (order following objection hearing).
2. WOS 2011-005, *Gaming Regulatory Commission Regulations* (2011).
3. National Indian Gaming Commission, CFR Title 25, Ch. III A, 514 Fees.

§ 10.03 Authority to Suspend Licenses

Employees of the Gaming Regulatory Commission (GRC) are authorized to assist the Commission in its regulatory powers, including the power to suspend licenses.

Comment:

1. The GRC, including its staff, bears the power and the responsibility to ensure all key employees and primary management officials are eligible and suitable for employment. The statute establishing the GRC explicitly authorizes employees to assist in fulfilling the required regulatory duties of the Commission. Allowing employees to take temporary actions on pressing concerns allows the Commission to meet its regulatory duties in the interim period before the full Commission can take final action.

Case Citations:

1. *Wemigwase v. Cook*, No. A-032-0516 (LTBB Ct. App. Oct. 10, 2017).

§ 10.04 Remedial Scheme for Gaming Employees

The remedial scheme provided by the Gaming Regulations is not designed to be the exclusive remedy for gaming employees.

Comment:

1. The Gaming Regulations provide a specific and limited remedy of pay back for employees who have had their licenses suspended. This is in contrast to the U.S. Civil Service Reform Act, which provides a much more comprehensive system of remedies for federal employees. Because of the limited remedy involved, the Court held that it was not designed to be the exclusive remedy for gaming employees.

Case Citations:

1. 1. *Wemigwase v. Cook*, No. A-032-0516 (LTBB Ct. App. Oct. 10, 2017).

§ 11 Family Law

§ 11.01 Divorce, Due Process

§ 11.01[A] Divorce, Due Process Requirements

In divorce proceedings, due process entitles both parties to notice and an opportunity to be heard. However, there is no absolute right to testify in person, call witnesses, and cross-examine the other party and witnesses. When one party is unable to appear before the court due to their own uniquely restrictive circumstances, their written response can serve as their opportunity to be heard.

Comment:

1. In general, the opportunity to be heard encompassed in due process includes the ability to appear before the court to testify, present evidence, and confront the evidence against you. However, this right is not absolute and the court is not required to guarantee it in the face of uniquely restrictive circumstances of one party. For example, the court is not required to hold a hearing on the weekend when one party travels during the week for work. This may be particularly true when the uniquely restrictive circumstances are not

limited to the date in question but are expected to persist for some time. In these cases, the party's written response can serve as their opportunity to be heard as long as it is fully considered by the court.

2. In proceeding with a hearing without one party, the Court should make factual findings regarding the reason for the party's absence.

Illustration:

1. X and Y are parties in a divorce proceeding, but Y is unable to appear at a pretrial hearing due to his incarceration for domestic violence against X. Y has received notice and has filed a detailed written response on the issues for disposition. Reasoning that Y will not be able to appear before the court even at a rescheduled hearing, and wanting to protect X from future victimization, the Court proceeds to hold a dispositional hearing, relying on Y's written responses.

Case Citations:

1. *Lyons v. Lee*, No. A-029-1015 (LTBB Ct. App. Feb. 16, 2017).

§ 11.01[B] Divorce, Ex-Parte Proceedings

In divorce proceedings, the Tribal Court has discretion to hold an ex-parte dispositional hearing on a date that was scheduled for a pretrial hearing when the equities of the case require quick action and due process requirements have been satisfied.

Comment:

1. *See* Comment 1 to Section 11.01[A].
2. When circumstances make it impracticable for one party to appear and other equities of the case suggest it would be advantageous to resolve the case immediately – for example, a need to prevent future victimization of a divorce petitioner who has experienced domestic violence from the absent respondent – an ex parte dispositional hearing may be appropriate. However, the respondent retains their due process rights, so the Court must ensure these are satisfied before they proceed with the hearing.

Illustration:

1. See Illustration 1 to Section 11.01[A].
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Case Citations:

1. *Lyons v. Lee*, No. A-029-1015 (LTBB Ct. App. Feb. 16, 2017).

§ 11.02 Divorce, Equitable Division of Property and Debts

In divorce proceedings, the Tribal Court is not bound by the laws in other jurisdictions regarding division of property and debts; instead, equitable division must be “just” and “based in fairness rather than legal technicalities.”

Comment:

1. See Comment 1 to Section 1.04 (while LTBB courts *may* find authority from other jurisdictions instructive or persuasive, they are not bound by it unless it has been adopted by LTBB, either by statute or as common law).
-

Illustration:

1. The LTBB statute governing division of property in divorce proceedings says that such division must be “equitable,” but does not specify further definition of what equity requires. The LTBB Tribal Court makes a division of property and debts which includes \$2,000 to compensate the petitioner for the respondent’s unpaid share of the household rent. The respondent appeals the decision, arguing that Michigan law would not allow the \$2,000 payment. As the Court has not adopted Michigan law in this matter, the respondent’s argument should fail.
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Case Citations:

1. *Lyons v. Lee*, No. A-029-1015 (LTBB Ct. App. Feb. 16, 2017).

§ 11.03 Parental Rights Termination, Best Interests

The provision in CPS §XXIV(A) that states “all efforts to avoid termination have failed and termination is in the best interest of the child concerned and the tribe” expresses the Tribe’s philosophy on termination and does not impose an independent legal requirement that that court must find beyond a reasonable doubt.

The Tribal Court has exclusive discretion to determine whether termination is consistent with the guiding philosophy that it should be used only as a last resort; this finding is not reviewable on appeal.

Comment:

1. This provision appears in the Purpose section of the Child Protection Statute. It follows language stating “this Section shall be construed in a manner consistent with the philosophy...” The Appellate Court interpreted this statutory language to serve as a guide for the Tribal Court’s analysis, but not as an independent legal requirement. As a result, any best interests analysis is not subject to the clearly erroneous standard of review – full discretion is with the Tribal Court.

Illustration:

1. Considering the evidence before it, the Tribal Court makes the factual findings required for termination of X’s parental rights, and also finds that to do so is in the best interests of the children involved and of LTBB. The Appellate Court agrees with the finding that termination is permitted under the statute, but disagrees that it is in the best interests of the children. Since full discretion on the best interests analysis sits with the Tribal Court, the Appellate Court affirms the decision.

Case Citations:

1. *In re Kiogima*, No. A-033-0716 (LTBB Indians Ct. App. Mar. 31, 2017).

§ 11.04 Parental Rights Termination, Due Process

Where there are independent grounds for termination as a matter of law (e.g., a prior felony conviction), failure to allow the respondent to present testimony, admit evidence, or cross-examine witnesses on a second ground for termination does not constitute denial of due process.

Comment:

1. The LTBB Child Protection Statute provides for termination in a number of different circumstances. Some provisions require a fact-intensive analysis, such as a finding that future abuse is likely to occur. Other provisions do not require extensive fact-finding, such as that which allows for termination when the parent is convicted of a violent or criminal sex crime. When the judge finds the latter provision is satisfied as a matter of law, failure to provide an opportunity to be heard on the former provision is a harmless error that does not constitute a denial of due process.

Case Citations:

1. *In re Kiogima*, No. A-033-0716 (LTBB Ct. App. Mar. 31, 2017).

§ 11.05 Guardianship, Jurisdiction Based on Residency

The Tribal Court does not have jurisdiction to grant guardianship over an incapacitated adult when the proposed ward does not reside on Tribal lands or intend to reside on Tribal lands in the near future, even where they are a Tribal member.

Comment:

1. Residency within the exterior boundaries of the LTBB Reservation or within Tribal Trust Lands is required for jurisdiction by statute.³²

Illustration:

³² WOS 2015-017, § IV.

1. X is an LTBB member petitioning for guardianship over her grandson Y, who is also an LTBB member. However, Y does not live within the LTBB Reservation or Tribal Trust Lands and is not expected to live there in the future. The Court dismisses the petition due to lack of jurisdiction over Y.

Case Citations:

1. *In re Skippergosh*, No. GA-010-0617 (LTBB Tribal Ct. July 12, 2017) (order of dismissal after hearing on guardianship).

§ 12 Torts

§ 12.01 Premises Liability

§ 12.01[A] Premises Liability, Limit to Hidden Dangers

Owners and occupiers of land do not have a duty to protect Invitees from dangers that are not hidden.

Comment:

1. The LTBB Torts Statute (WOS 2014-012) provides that “Owners and occupiers of land are liable to invitees that are injured because of a hidden condition on the land that the occupier either knew existed or could have discovered with reasonable inspection.”³³ There is therefore no duty to protect invitees from conditions which are not hidden, and plaintiff’s failure to prove that the condition was hidden should result in failure to satisfy the duty element of the cause of action. In such a case, the Court need not reach the issue of comparative negligence.

Illustration:

1. X is on the premises of Y, a business owned and operated by LTBB. Another patron at Y drops their beverage on the floor, but the spill is clearly visible from X’s viewpoint. Despite this fact, X goes over to investigate the spill and falls, injuring her ankle. In a

³³ WOS 2014-012, § IV(F)(4)(c).

premises liability case against Y, the court should grant judgment for Y based on the fact that the spill was not hidden and the duty element is not satisfied. It need not engage in an analysis of the comparative negligence of X and Y as it should not reach that issue.

Case Citations:

1. *Duynslager v. Odawa Casino Resort*, No. C-210-0815 (LTBB Tribal Ct. May 10, 2016).

§ 12.01[B] Premises Liability, No Breach with Reasonable Efforts to Mitigate Danger

Owners and occupiers of land do not breach their duty of care when they make reasonable efforts to eliminate or respond to dangerous conditions on their property.

Comment:

1. LTBB's premise's liability statute does not create strict liability for owners and occupiers of land. As long as the owner or occupier makes reasonable efforts to respond to dangerous conditions, the breach element of the cause of action is not satisfied.
-

Illustration:

1. X is on the premises of Y, a business owned and operated by LTBB. Another patron at Y drops their beverage on the floor, creating a risk that other patrons may slip and fall. Staff at Y notice the spill immediately and begin taking action to clean it up. While they are retrieving the mop, X walks through the spill and falls, injuring her ankle. Y should prevail in a premises liability suit filed by X, as staff responded reasonably to the dangerous condition.
-

Case Citations:

1. *Duynslager v. Odawa Casino Resort*, No. C-210-0815 (LTBB Tribal Ct. May 10, 2016).

§ 12.02 Intentional Infliction of Emotional Distress

In adjudicating Intentional Infliction of Emotional Distress (IIED) claims, the court does not reach the issue of whether emotional distress was severe unless the outrageous conduct element is satisfied.

The relationships that are listed in the statute – such as those between supervisors and employees – are not per se outrageous, but meet the standard when they are accompanied by behavior that “exceed[s] all bounds of decency” and is “utterly intolerable in a civilized community.”

Comment:

1. The LTBB Torts Statute defines outrageous conduct as “conduct without just cause or excuse and exceeds all bounds of decency. Such conduct can be proven by a showing of continuous and repetitive conduct, conduct by a superior or someone in a supervisory position . . . or any other conduct that a reasonable person would consider to be outrageous.”³⁴ Reasoning that not all interactions between supervisors and their employees should be classified as outrageous, the Court held that such conduct is only outrageous when it also exceeds all bounds of decency. The fact that conduct occurred in the context of a supervisory relationship may contribute to its outrageous character, but it does not make it per se outrageous.

Illustration:

1. X is Y’s supervisor and they engage in a consensual romantic relationship. However, X begins pressuring Y to quit her job and in that context, yells at her. Y files suit, alleging Intentional Infliction of Emotional Distress (IIED). Considering the totality of circumstances, including the existence of the supervisory relationship, the Court finds the conduct was not outrageous, and therefore dismisses the IIED claim.

Case Citations:

1. *McGraw v. Estate of Colby*, No. A-030-0115 (LTBB Ct. App. Sept. 6, 2017).

³⁴ WOS 2014-012, § IV(A)(4)(b)

