

# **A Restatement Of The Law Of The Little Traverse Bay Bands Of Odawa Indians, 2018 Volume**

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I. Introduction to the Restatement

*BACKGROUND taken from the 2015 Restatement<sup>2</sup>*

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. Most of the Tribe’s more than 4,000 enrolled citizens reside in the State’s Charlevoix and Emmet Counties. 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. 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.

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. 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.

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

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<sup>2</sup> Restatement of the Law of the Little Traverse Bay Bands of Odawa (2015)

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. 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. 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.

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 Tribal law, including statutes codified in the Tribal Code, 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.

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## **§1.00 Restrictions on Appropriations by Tribal Membership**

### §1.01 Restrictions on Appropriations by Tribal Membership

Tribal Membership is constitutionally prohibited from entering onto ballots, initiatives that entail appropriations or establish Tribal budgets. Separating gaming revenues into separate categories, one for per capita, one for government services, is considered an attempt at directing appropriations of Tribal funds and is unconstitutional.

#### Comment:

Under the LTBB Constitution, as drafted by the Tribal membership, it is the Tribal Council's role to appropriate Tribal Funds. Art. 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:

Tribal Membership proposes an increase of per capita payments from \$599.00, to \$2,500. Tribal membership, aware of the potential unconstitutionality of the initiative, argues that the initiative does not address appropriations for Tribal institutions or establish Tribal budget. But rather, provides for separating certain Tribal resources by priority, resources specifically being net gaming revenues, into one part for per capita distribution, leaving the remainder as a second part for use as the Tribal government shall decide. The court is not swayed by this argument and rules against it, since separating funds for certain uses is essentially the same as budgeting and appropriating funds.

#### Case and Statutory Citations:

*LTBB of Odawa Indians Tribal Council and Tribal Chairperson v. LTBB of Odawa Indians Election Board*, No. C-209-0715 (Little Traverse Bay Bands of Odawa Indians Tribal Ct. Aug. 25, 2015).

Little Traverse Bay Band of Odawa Indians Constitution.

## **§ 2.0 Family Law**

### § 2.01 Ex-Parte Divorce Hearings

The Tribal Court may conduct an ex-parte dispositional hearing on the distribution of property in a divorce on a date that was scheduled for a pretrial hearing if the appearance of both parties in future hearings would be impossible or highly impractical. However, the Court should make an effort to dutifully rely on any written response (if available) by the party not present.

Comment:

In *Lyons v. Lee*, The Tribal Court decided whether the Appellant's due process was violated by holding an ex-parte dispositional hearing on the merits on a date that was scheduled for a mere pretrial hearing. Waganakising Odawak Tribal Code of Law (WOTCL) 13.205(10) reads (in regards to divorce hearings) "at the hearing, both parties shall have the opportunity to testify, call witnesses, present evidence and cross-examine their spouse and any other witnesses." This is not an absolute statute, but allows both parties to have the opportunity to participate in the process described in the statute. If a party is incarcerated, he or she faces an impediment to full participation in Tribal Court processes, however since this results from his or her own uniquely restrictive circumstances, the Tribal Court may proceed with the hearing.

Illustration:

X's spouse files for divorce while X is incarcerated. X should be given adequate notice of the hearing. X should be given a chance to submit a written statement that the court should dutifully consider. Tribal Court may let X phone in to the hearing if X will be unable to make it to court, but only if it would not cause undue harm to the other party, such as in a situation where domestic violence had been committed by X toward the other party.

Case and Statutory Regulations:

Waganakising Odawa Tribal Code of Law, Title XIII. Ch. 2 § 13.205.

*Michael LaVerne Lyons v. Amy Louise Mary Lee*, A-029-1015 (C-207-0515) (Little Traverse Bay Band of Odawa Tribal Court Feb. 16, 2017).

2.02 Guardianship over Incapacitated Adult

Guardianship over an incapacitated adult requires that the ward either resides on Tribal lands or intends to reside on Tribal lands in the near future. The LTBB Tribe can still intervene on the behalf of incapacitated adults by providing services to disabled members regardless of their place of residence.

Comment:

This rule ensures that even if there may be a need to place a Tribal member under guardianship, the Tribal Court does not over step its jurisdictional powers and run into conflict with other courts.

Illustration:

An LTBB Tribal citizen wants legal guardianship over an LTBB Tribal Citizen adult relative because the relative demonstrates a disability/mental impairment/etc., substantial enough to limit their ability to survive in the world on their own. The Tribe is unable to grant this request if both parties do not live within the exterior boundaries of the LTBB Reservation or on Tribal Trust Lands.

Case and Statutory Citations:

Waganakising Odawa Tribal Code, Title XI. Ch. 9 § 11.901, 11.904 (Oct. 12, 2015)

*In the matter of: Gage Anthony Skippergosh No. GA-010-0617* (Little Traverse Bay Bands of Odawa Indians Tribal Ct. July 12, 2018).

§2.03 Jurisdiction over non-member parent with non-member child

The Tribal Court is instructed to apply the proper factors and tests for both subject matter and personal jurisdiction when deciding whether it has authority over a non-LTBB parent who conceived a non-LTBB member child with a LTBB member and lives off LTBB land. The Tribal Court must guarantee substantive due process and protect against the exercise of personal and subject matter jurisdiction when the exercise would be fundamentally unfair to the parties.

Comment/Illustration:

In *Nicole Moore v. Martin Serva*, No. A-031-1215 (C-213-0915) (Little Traverse Bay Bands of Odawa Indians App. Ct. Feb. 15, 2017) The question arose whether the Court had jurisdiction over a non-LTBB mother who moved outside the Tribe's territorial reservation boundaries after the birth of the child with the father who was a Little Traverse Bay Bands of Odawa Indians Tribal citizen. Although the parties eventually agreed to move the case to a county court, the Tribal Court instructed that the following factors and tests should be applied should a similar situation arise again. For deciding personal jurisdiction, a minimal contacts test as found in *Kerry Steel v. Paragon*, 106 F. 3d 147 (6<sup>th</sup> Cir. 1997) and a reasonableness test as found in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) should be used. In addition to personal jurisdiction, the Tribal Court must also possess subject matter jurisdiction, consisting of regulatory and adjudicatory jurisdiction as consistent with the rules set forth in *Montana v. Unites States*, 450 U.S. 544 (1981).

Case and Statutory Citations:

*Nicole Moore v. Martin Serva*, No. A-031-1215 (C-213-0915) (Little Traverse Bay Bands of Odawa Indians App. Ct. Feb. 15, 2017).

Waganakising Odawak Statute 2015-010, Paternity and Custody, Sec. III (2015).

*Montana v. United States*, 450 U.S. 544 (1981).

*Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

*Kerry Steel v. Paragon*, 106 F. 3d 147 (6<sup>th</sup> Cir. 1997).

#### §2.04 Parental Rights and Sexual Abuse

The Child Protection Statute (CPS) commits exclusive discretion to the Tribal Court to determine whether termination of parental rights pursuant to CPS §XXIV(C) is consistent with the philosophy that the statutory procedures are used only as a last resort, where all efforts have failed to avoid termination and termination is in the best interest of the child concerned and of the Tribe.

#### Comment:

Where preserving the unity of the family is at odds with protecting the rights of, and interests of children, Section XXIV of the Child Protection statute provides for the termination of parental rights. Section XXIV (A) does not impose independent requirements that must be satisfied as a precondition for termination of parental rights. As such, the order's best interest's analysis is not subject to the erroneous standard of review set forth in subsection XXIV (I), because the discretion is left to the court.

#### Case and Statutory Citations:

*In the Matter of: Mshkoadekewe, Joy, McKenzie, Cameron and Jacob Kiogima* No. A-033-0716 (Little Traverse Bay Bands of Odawa Indians App. Ct. March 31, 2017).

Waganakising Odawak Statute 2012-010 *Child Protection Statute* WOS XXIV.

#### **§ 3.00 De Novo Review in Workman's Compensation Cases**

LTBB Workman's Comp Statute (WCS) § 25 establishes that the Tribal Court exercises a *de novo* standard of review, and it customizes the definition for its own purposes. The customized definition serves the equitable purposes of LTBB WCS as it allow the Court to act as a neutral mediator through substantial powers of review and discovery, and if warranted, by allowing it to

come to a decision different from the Administrators or to incorporate the administrators decision into the Courts decision.

Comment:

*De novo* review occurs when a court decides an issue without deference to a previous court's decision. However, the phrase “as provided,” in conjunction with the other sub-sections in Section WCS XXV, allows the court to utilize lower court’s findings. Workman’s Compensation Statute Section XXV (A) contains “The Tribal Court shall conduct a *de novo* hearing on the appeal as provided in this section.” “As provided in this section” allows the Court to look to other provisions in XXV, such as subsection D. “The Tribal Court shall not be bound by the rules of evidence or by technical or formal rules of procedure and may conduct investigations in such a manner as in his or her judgement is best calculated ...” Or in subsection C. “. . . perform such discovery activity as may be deemed necessary to fully explore all aspects surrounding the occurrence and injury.”

Illustration:

Defendant, employer, filed a motion for judgment on the pleadings concerning Plaintiff’s/ employee’s, claim against it for unjust and unlawful determination on his/her worker’s compensation benefits claim. Defendant argued that Plaintiff failed to file an appropriate pleading. Upon leave of the Court, Plaintiff replied with an amended pleading. In the same order granting Plaintiff’s leave to amend, the Court submitted a question to the parties asking them to each delineate the Court’s scope of review in reviewing decisions of the administrator. Following Plaintiff’s and Defendant’s timely submission of briefs in response to the question, the Court issued an order with the Court’s resolution to the question. In this case and (in future cases), LTBB WCS’s *de novo* standard of review will treat the Administrator’s findings and decisions on a worker’s compensation claim as *prima facie* valid, placing burden of proof on the appellant. But the appellant and the Tribal Court may engage in discovery and new findings may be made. In making new findings, the Tribal Court’s powers of discovery extend far beyond what they normally would, even in a *de novo* hearing. Additionally, the Tribal Court may review the existing record to determine if the Administrator abused its discretion. Any new findings and review may be used by the Court to interpret the law and come to an equitable outcome. If findings made in review or in discovery and investigation satisfy the appellant’s burden of proof, the Tribal Court will make its own decision. On the other hand, if findings in review or in discovery and investigation do not satisfy the appellant’s burden of proof, the Tribal Court shall defer to the Administrator’s decision.

Case and Statutory law:

*Judith Kuebler vs. Odawa Casino Resort*, No. C-211-0815 (Little Traverse Bay Bands of Odawa Indians Tribal Ct. July 05, 2016).

Waganakising Odawa Statute 2013-005, *Workers Compensation Statute* (2013).

*De Novo*, LII Staff - [https://www.law.cornell.edu/wex/de\\_novo](https://www.law.cornell.edu/wex/de_novo).

#### **§4.00 Gaming Fines**

The LTBB Gaming Regulatory Commission (GRC) 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 maximum penalty is not appropriate.

##### Comment/Illustration:

In *LTBB Gaming Commission v. Odawa Casino Resort*, OCR failed to submit fee worksheets to NIGC which could have resulted in a fine of \$1,104.09 from NIGC. GRC instead fined OCR for \$5,000 (penalty amount stipulated in GRC regulations) to correct the behavior, and also to keep Tribal monies within Tribal coffers as opposed to being paid to a Federal Government body. This fine was later reduced to \$1,104.09 in line with what NIGC could have fined OCR had the behavior not been timely corrected and properly punished.

##### Case and Statutory Citations:

*The Little Traverse Bay Bands of Odawa Indians Gaming Regulatory Commission v. Odawa Casino Resort*, No. GRL-009-1115 (Little Traverse Bay Bands of Odawa Indians Tribal Ct. Jan. 26, 2016).

Waganakising Odawa Statute 2011-005, *Gaming Regulatory Commission Regulations* (2011).

National Indian Gaming Commission, CFR Title 25, Ch. III A, 514 Fees.

#### **§ 5.00 Contempt of Court**

Proving guilt does not require proving willful state of mind in a negligent Civil Contempt Case.

##### Comment:

Consistent with other negligence standards in other jurisdictions,<sup>3</sup> the prosecution does not have to prove willful state of mind for negligent civil contempt of court.

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<sup>3</sup> *Commodity Futures Trading Comm'n v. Premex, Inc.*, 655 F. 2d 779, 785 n. 11 (7<sup>th</sup> Cir. 1981).

Illustration:

Defendant failed to pick up his children for parenting time and stated that he could not fulfill his parenting time obligations because he could not schedule childcare over the weekend. Defendant was found guilty of negligent civil contempt because it was not required that he willfully refused to see his children, it was enough that he knew about the requirement, failed to do so and provided no reasonable explanation as to why.

Case and Statutory Citations:

*Bobbie Marie Zeff v. Isaac Gene Dillard*, No. C-192-0214 (Little Traverse Bay Bands of Odawa Indians Tribal Ct. Aug. 01, 2018).

*Commodity Futures Trading Comm'n v. Premex, Inc.*, 655 F. 2d 779, 785 n. 11 (7<sup>th</sup> Cir. 1981).

Waganakising Odawa Tribal Code, Ch. 12, § 11.1106 F (April 6, 2018).