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FOR B. TR. COURT

J. COURT  
THE  
BANDS OF ODAWA INDIANS

JAMES T. DECKROW,  
Plaintiff,

Case No. C-006-0398

v.

Ruling on Defendant's  
Motion To Dismiss

LITTLE TRAVERSE BAY BANDS  
OF ODAWA INDIANS,  
Defendant.

**RULING ON DEFENDANT'S MOTION TO DISMISS**

This matter comes before the Tribal Court on remand from the Tribal Appellate Court. The Tribal Court entered an Order of Dismissal in this matter on May 27, 1998 after Plaintiff failed to appear at the Hearing on Defendant's Motion For Summary Disposition held that day. Plaintiff appealed the dismissal and it was overturned by the Appellate Court on October 22, 1998. The second time the matter was scheduled for a hearing on Defendant's Motion For Summary Disposition on December 11, 1998 Plaintiff did appear.

Defendants raise several affirmative defenses in their Answer to Plaintiff's Complaint.

Those defenses are that:

- (1) the claims of the Plaintiff are barred by his failure to exhaust the administrative remedies provided by tribal election ordinances;
- (2) the claims are barred by the sovereign immunity of the Defendant;
- (3) the Court lacks jurisdiction over Plaintiff's claims;
- (4) the Court lacks jurisdiction over the Defendant; and
- (5) the Plaintiff has failed to state a claim upon which relief can be granted.

Received 9-7-07 in Court Hearing  
200

The Court will address these defenses one-by-one:

(1) *Plaintiff's failure to exhaust administrative remedies* - Defendant argues that Plaintiff is barred from seeking relief from the Court because he failed to seek the relief provided by the tribal election ordinances. The reasons for the requirement of administrative exhaustion as a condition precedent to access to the courts are well-established in the laws of other jurisdictions. This Court should at least consider those underpinnings. The primary underpinning is that deference ought to be given to these particular bodies because they have focused, limited responsibilities. Through that limited focus it has developed expertise by its specialization. This specialization creates competence and efficiencies in government. The courts should not be put into the position of "second-guessing" each and every administrative decision or action. That kind of micro-management is not conducive to the development of administrative body capacity to realize their potential to serve the community. If there is a problem or complaint with a particular body or its actions, that body ought to have the first opportunity to address any concerns raised. If the administrative body cannot resolve the concern then, and only then, should the matter be pursued elsewhere.

It appears to the Court that confusion existed about how tribal members could get answers to questions they might have had about the election. Not all questions are created equal. They simply are not all the same. For example, some questions about tribal elections are procedural questions, i.e. about the election process itself or how the election is conducted, while other questions may be about the substance or content of the ballot choices. It is very important to distinguish between what is procedural and what is

substantive. This distinction is critical in tribal election matters because only the Election Board can answer procedural election questions while, on the other hand, only the Tribal Council can answer questions about the content of a ballot proposal like the one present in a referendum. The Election Board is delegated sole responsibility to conduct tribal elections. The delegation is made to insulate the election process from political influences. Only the Election Board can answer questions about the process. On the other hand, the Tribal Council has complete providence over the political affairs of the Tribe. Only that body can answer the substantive, content-related political questions that arise in a referendum. Thus, the distinction is critical. Effective referral and address of questions require an understanding and implementation of the distinction.

It is said that hindsight is 20/20. Well, maybe sometimes, but taking advantage of opportunities to improve and fix our government should be given every consideration based upon "lessons learned" and the principle of continuous improvement. Therefore, this Court respectfully suggests that it might be helpful to adopt this distinction and incorporate it in future elections and their documents, when and where appropriate.

In the instant matter, only full fact-finding will provide the Court the opportunity to determine whether the questions of the Plaintiff were procedural, substantive, or both; distinguish between the types; and determine what actions each of the parties took to ask and answer Plaintiff's questions.

This matter cannot be dismissed for failure to exhaust administrative remedies because of the apparent lack of clarity of how election questions should be presented and who could answer them.

(2) *The claims are barred by sovereign immunity* - Defendant argues that it is immune from suit because it is a federally-recognized Indian tribe. Indian tribes enjoy sovereign immunity under federal law unless the immunity has been expressly waived by the U.S. Congress or by the tribe itself. The issue that must be addressed by courts is whether there has been an express waiver either by Congress or the Tribe.

Sovereign immunity is an English-law doctrine that "the king can do no wrong." One cannot sue the king. This ancient doctrine came to this country with the adoption of English law as the legal foundation for the development of law in the new United States. A new country was superimposed over numerous indigenous Native communities. Each with their own political structure and tribal law. Since that earlier time, many non-Native governments have waived their immunity in various areas to provide redress for government negligence and wrongdoing. Reasons for the various waivers might be generalized to say that the people of a representative democracy realize that "the king" can do wrong and does make mistakes. After all, government is a human institution and the maxim "to err is human" is undisputed. Fundamental fairness requires that there be an opportunity for redress, surely in everyone's book. However, on the other hand, governmental immunity ensures that no one can "break the bank" by a bank-breaking award of tribal assets. No one wants to see the government bankrupted. It seems reasonable to expect the Tribal Council to look at these various considerations and develop well-reasoned positions on immunity as it relates to this tribal community. After all, this is not England. We do give a lot of lip service to the fact that Indian communities are different than those of dominant society. We point out that our judicial and legal

systems need not be mirror-images of those of dominant society. If that is truly the case, why should tribal government adopt the Anglo-American concept of sovereign immunity? Rather, why shouldn't tribal sovereign immunity mirror tribal culture? It is difficult to imagine that an outdated ancient English doctrine fits this tribe's needs. Importantly, the Court recognizes that these policy questions are political questions that can only be addressed by the Tribe's political body. Thus, the Court respectfully suggests that Tribal Council duly deliberate on these issues, rather than relying on the Tribal Court to simply dismiss everything based upon arguments of sovereign immunity.

**ARTICLE VIII of the Tribe's Interim Constitution entitled "Bill of Rights" expressly provides that members have "... the right to petition for action or the redress of grievances ..."** This is the supreme law of Tribe because the Tribal Constitution is the supreme law. It is the people's expression of its delegation of power to the government. The right to petition for action or redress would be rendered meaningless if sovereign immunity is deemed to be a bar. If the provision is meaningless, why the expression of a right? Why bother? The expression must have a purpose; otherwise the language would not be included. Thus, the Court construes the cited constitutional provision to be an express waiver of sovereign immunity by the Tribe. Whether the "Bill of Rights" provision of the Interim Tribal Constitution is construed a reservation of the power in the people or a waiver of immunity by those who drafted its provisions is not significant for the purposes of deciding the instant matter. It is still an express waiver. For all of the foregoing, sovereign immunity is not a bar to this action.

(3) *The Court lacks jurisdiction over Plaintiff's claims* - Defendant argues that the Court has no authority to hear the claims raised by the Plaintiff. However, the LTBB Tribal Court Statute, enacted December 17, 1995, which establishes the Tribal Judiciary gives it jurisdiction over claims like that of Plaintiff. The statute creates "... a court of general jurisdiction." See Section II(A). As such, the Court's jurisdiction is not limited to hearing only certain kinds of cases or controversies. The Court is empowered to hear "... all cases arising ..." (bold added for emphasis) under tribal law or based upon the Tribe's inherent jurisdiction. Thus, the Court has the authority to hear this matter.

(4) *The Court lacks jurisdiction over the Defendant* - Defendant argues that the Court has no power over it. This is the same argument that the Tribe is immune from suit. That argument is addressed by the Court above. The Court incorporates its reasoning and ruling to the second affirmative defense above. Thus, this affirmative defense fails.

(5) *Plaintiff has failed to state a claim on which relief can be granted* - Defendant argues that the Plaintiff has failed to state a claim on which relief can be granted. Plaintiff's claim is that the ballot language was "ambiguous" and "confusing" thereby depriving him of the opportunity to cast an informed vote. The Court incorporates its reasoning and ruling to the third and fourth affirmative defense above. Thus, this affirmative defense fails.



LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS  
TRIBAL COURT  
CIVIL DIVISION

JAMES T. DECKROW,  
Plaintiff,

v

Honorable Michael Petoskey  
Case No: C-006-0398

LITTLE TRAVERSE BAY  
BANDS OF ODAWA INDIANS,  
Defendant.

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James T. Deckrow, Plaintiff  
In Pro Per  
3572 Annis Road  
Mason, Michigan 48854  
(517)589-5065

Gregory G. Justis (P27148)  
Attorney for Defendant  
616 Petoskey St., P.O. Box 426  
Petoskey, Michigan 49770  
(616)347-6580

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**ORDER OF DISMISSAL**

This matter came before the Little Traverse Bay Bands Tribal Court for pre-hearing on Wednesday, May 27, 1998. The Plaintiff, James T. Deckrow, failed to appear. The Defendant appeared, through counsel, and moved for entry of an Order of Dismissal. The Court determined, for reasons stated on the record herein, that Defendant's motion should be granted. Now, Therefore,

IT IS ORDERED that the above-named action is hereby dismissed.

Date Entered: 5/27/98

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HONORABLE MICHAEL PETOSKEY  
Tribal Court Judge