



Waganakising Odawak
Little Traverse Bay Bands of Odawa Indians
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Executive Veto of the *Tribal Citizen and North American Indian Preference in Tribal Employment Statute* as passed by Tribal Council on June 28, 2009

On July 28, 2009 the Executive vetoed the *Tribal Citizen and North American Indian Preference in Tribal Employment Statute* as passed by Tribal Council on June 28, 2009 and received in the Executive Office on June 30th, 2009. The following statement outlines the reasoning for that veto.

Our existing preference statute offers a preference of employment to, "Other federally recognized members of North American Indian tribes." This type of preference is legal because on its face it is based on the political relationship between the United States government and other North American Indian tribes, not race. The proposed statute offers a preference that on its face is based on race. The proposed statute offers a preference to, "Other North American Indians, who meet the definition as stated in this Statute." Section II (E) of the statute then defines "North American Indian" as, "a person who is one-quarter (1/4) or more North American Indian blood quantum." Standing alone, blood quantum becomes an illegal proxy for race.

Article 2, Section 8 of the LTBB Constitution states, "The Little Traverse Bay Bands of Odawa Indians, in exercising powers of self-governance, shall not [d]eny to any person within its jurisdiction equal protection of its laws..." This article of the LTBB Constitution was modeled after the 14th Amendment to the United States Constitution. A long history of court cases interpreting the meaning of the 14th amendment led the Supreme Court of the United States to establish in *Brown v. Board of Education* that legal policies based on race are inherently unconstitutional. Although decisions of the US Supreme Court and other US courts are not binding on the LTBB Tribal Courts, in the absence of Tribal law, LTBB courts regularly find such decisions persuasive. *See Carey v. Victories Casino*, A-004-0606, (Appell. March 27, 2007) ("[A]lthough the opinions of other jurisdictions are not binding on questions involving interpretations of the Tribe's constitution, such opinions are often helpful guideposts that may provide effective methods for resolving legal questions that arise under the Tribe's constitution.") *See also Carey v. Victories Casino*, A-005-0507, (Appell. May 5, 2008); *TBA Credit Union v. Giem*, A-010-0708 (Appell. March 3, 2009); *Milligan v. LTBB GRC*, GRL-002-1206, (June 7, 2007). Therefore, it is likely that our Court would find that the LTBB Constitution also prohibits legal policies based on race.

What makes our current practice of Tribal preference legal is the fact that it is based on political relationships, not race. For example, the United States government has

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the right to grant preference in employment to United States citizens over noncitizens so long as that preference applies to people regardless of their genetic makeup. Consequently, we can offer our own Tribal citizens preference over noncitizens. Additionally, the United States can offer a preference in employment to citizens of political allies like England, over citizens of political enemies like Iran. It would be illegal, however, to offer Caucasian citizens of England preference over citizens of England with African heritage. Therefore, we can offer citizens of the Sault Ste. Marie Band of Chippewa Indians preference in hiring, but we cannot only offer preference to those we classify as "Indian." We can offer a preference to all citizens of other tribal nations or none, but we cannot pick and choose based on race which citizens of another sovereign we prefer.

We could choose to offer a preference in employment to spouses of Tribal citizens so long as we offered the preference regardless of race. If the purpose of the preference is to provide financial support for households that include LTBB citizens (political classification), then there is a legal political purpose for the preference. The United States offers a similar preference. Noncitizen spouses of United States citizens can jump line and can get US Visa work permits more easily than other noncitizens. This preference is legal because its purpose is political; it is not based on race.

An additional article in the LTBB Constitution could be determined to prohibit Section II (E) of the proposed statute. ARTICLE VI., Section A. of the LTBB Constitution states that LTBB, "recognizes the inherent right of other peoples, nations and governments throughout the world [and]... we recognize their sovereignty." A sovereign nation's right to determine citizenship is one of the most respected aspects of sovereignty and we have agreed in our Constitution to respect it. Therefore, if another sovereign chooses to allow persons with a low Indian blood quantum citizenship, LTBB should respect that decision.

Additionally, the statute conflicts with the LTBB Constitution's understanding of "North American Indian." The proposed statute states that the, "'Degree of North American Indian Blood" means the total degree of North American Indian blood of all tribes recognized by the United States Federal Government or by the Canadian Federal Government plus the degree of North American Indian blood derived from non-federally recognized tribes that is able to be certified by the Bureau of Indian Affairs.'" LTBB's Constitution, like the rest of the modern world recognizes that Mexico is part of North America. It was probably an oversight in the new statute that left Mexican Indians out of the definition, but the oversight is nonetheless in conflict with our constitution.

"We, the Little Traverse Bay Bands of Odawa Indians, speak through this document to assert that we are a distinct nation of Anishinaabek of North America that possess the right to: self-determination; freely determine our political status; freely pursue our economic, social, religious and cultural development, and determine our membership, without external interference.

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These same rights and principles the Little Traverse Bay Bands of Odawa Indians acknowledge to be inherent among other peoples, nations and governments throughout the world. We recognize their sovereignty and pledge to maintain relations with those peoples, nations and governments who acknowledge those same fundamental human rights and principles, and who recognize the sovereignty of the Little Traverse Bay Bands of Odawa Indians.”

As a Tribe we have done much work on this issue. I support Tribal preference in hiring and also support nearly all of the provisions within this revised preference statute as passed by Tribal Council. However for the reasons stated above I exercised the Executive authority under the constitution and vetoed the statute due to what the Executive believes are unconstitutional provisions contained within the language of the revised statute.

Once again I must state, as I did in last February's veto of the previously passed revised preference statute, that while not rising to the level of causing a veto, the issue of preference for non-tribal spouses of tribal citizens is one that reflects the concerns of the Tribal community. Tribal Council held a public hearing on Tribal Preference on February 22nd and 23rd, 2008. I attended this hearing and took notes on the comments presented from a standing room only crowd of members of the Tribal community. I believe that there was overwhelming support for including spouses in the provisions of a Tribal preference law. Such a preference could be expressed in such a way that spouses would get preference behind LTBB citizens and behind citizens of other tribes but before hiring non-tribal applicants. The strong support for this provision was not heeded by Council and is missing from the version that we are now considering.

Prepared and signed August 7, 2009


Frank Ettawageshik, Tribal Chairman

WAGANAKISING ODAWAK STATUTE 2009-016

**TRIBAL CITIZEN AND NORTH AMERICAN INDIAN
PREFERENCE IN TRIBAL EMPLOYMENT**

SECTION I. PURPOSE

This Statute rescinds and replaces Waganakising Odawak Statute WOS 2002-004, 1998015, 1996-002 and any previous statutes or amendments. This Statute is hereby enacted to mandate the preferential employment, promotion, training, mentoring and retention of Little Traverse Bay Bands of Odawa Indians Tribal Citizens and other North American Indians, by the Tribe and its business enterprises, as permitted and promoted under federal law based on the unique political relationship between Indian tribes and the United States.

SECTION II. DEFINITIONS

- A.** “Applicant” means a person applying for employment with the Little Traverse Bay Bands of Odawa Indians and its business enterprises.
- B.** “Employee” means a person employed by the Little Traverse Bay Bands of Odawa Indians and its business enterprises.
- C.** “Job Description” means the written detailed analysis and definition of a job that includes all the duties, responsibilities, and conditions required in the performance of a particular job.
- D.** “Job Posting” means the posted notice of a position available.
- E.** “North American Indian” means a person who is one-quarter (1/4) or more North American Indian blood quantum.
- F.** “Degree of North American Indian Blood” means the total degree of North American Indian blood of all tribes recognized by the United States Federal Government or by the Canadian Federal Government plus the degree of North American Indian blood derived from non-federally recognized tribes that is able to be certified by the Bureau of Indian Affairs.
- G.** “Tribe” means the Little Traverse Bay Bands of Odawa Indians.

SECTION III. JOB POSTING AND JOB DESCRIPTIONS

- A. All available positions within the Tribe shall be posted.
- B. Each job posting shall include a Job Description.
- C. Job Postings/Descriptions shall set-forth the minimal qualifications of what is necessary to perform the tasks of the job.
- D. When an applicant or employee meets the minimal qualifications of the Job Description, preference shall apply.

SECTION IV. PREFERENCE

- A. Applicants and Employees. Preference shall be given for hiring, promotion, training, mentoring, and retention to the following persons in the following order:
 - 1. Citizens of the Little Traverse Bay Bands of Odawa Indians,
 - 2. Other North American Indians, who meet the definition as stated in this Statute.
- B. Contractors and Subcontractors. The Tribe and its business enterprises shall adhere to the above stated preferences in the hiring, promoting, training, mentoring and retention of Contractors and Subcontractors.

SECTION V. LIMITED WAIVER OF SOVEREIGN IMMUNITY

- A. The Tribe clearly and expressly waives its sovereign immunity to the limited remedies as set forth in this Statute.
- B. Officials, individual employees and/or managers of the Tribe, who act beyond the scope of their duties and authority in which the actions include either acting with malice or with reckless indifference are not immune from suit.

SECTION VI. LIMITED REMEDIES BEFORE THE TRIBAL COURT FOR VIOLATIONS

- A. Any charge of violation must be filed with the Tribal Court within one-hundred and eighty (180) days of the alleged violation.

B. In any action filed under this Statute, the Tribal Court may grant the following remedies set forth:

1. *Equitable Remedies.* If the Tribal Court finds a violation occurred, its judgment must specify an appropriate remedy or remedies for that violation. The remedies may include, but are not limited to:

a) An order to cease and desist from the unlawful practices specified in the order;

b) An order to employ or reinstate the employee, with or without back pay or reasonable front pay if reinstatement is unfeasible;

2. *Damages.* If the Tribal Court finds a blatant violation, the Tribal Court may additionally award compensatory, punitive damages or fines.

3. The total sum of compensatory, punitive damages and/or fines may not exceed \$50,000, excluding the amount for actual loss of wages.

4. The Tribal Court may award reasonable attorney fees and costs in its discretion to the prevailing party.

5. The Tribal Court may charge the non-prevailing party court costs.

6. If the Tribal Court finds that the non-prevailing party's claims were frivolous, the Court may fine the party and may order any other appropriate remedies as the Tribal Court deems.

SECTION VII. EXCLUSIVE JURISDICTION AND SOVEREIGN IMMUNITY

A. Exclusive Tribal Jurisdiction. The Tribal Court shall have exclusive jurisdiction over claims or actions of any kind allowed pursuant to this Statute.

B. No Waiver as to Other Forums. Nothing herein shall be construed as a waiver of the sovereign immunity of the Tribe from any suit or action in state, federal or any other tribal court, before any state, federal or tribal agency or in any other forum or context whatsoever.

C. No Waiver as to Claim Defended by United States. Notwithstanding any other provision of this Statute, there shall be no waiver of sovereign immunity as to any claim of injury which is defended by the United States because such claim is deemed a claim against the United States under the Indian Self-Determination and Education Assistance Act, the Federal Tort Claims Act, or any other federal law. Upon certification by the Enjinaaknegeng that defense of any claim of injury has been tendered

to the United States, any action or proceeding on such claim shall be stayed by order of the Tribal Court without bond. The action or proceeding in Tribal Court shall be dismissed, after notice to the parties and opportunity for a hearing, upon receipt of notice satisfactory to the Tribal Court that the United States has assumed defense of the claim of injury. The stay shall be dissolved and an order directing further proceedings in the action or proceeding on the claim of injury shall be entered by the tribal Court, after notice and hearing thereon, upon receipt of notice satisfactory to the Tribal Court that the United States has declined to assume defense of the claim of injury.

SECTION VIII. REGULATIONS

The Executive may develop Regulations as it deems necessary for the implementation of the intent of this Statute and shall forward such Regulations to the Tribal Council for approval.

SECTION IX. SAVINGS CLAUSE

In the event that any phrase, provision, part, paragraph, subsection or section of this statute is found by a court of competent jurisdiction to violate the Constitution, laws or ordinances of the Little Traverse Bay Bands of Odawa Indians, such phrase, provision, part, paragraph, subsection or section shall be considered to stand alone and to be deleted from this statute, the entirety of the balance of the statute to remain in full and binding force and effect.

SECTION X. EFFECTIVE DATE

Effective upon signature of the Executive or 30 days from Tribal Council approval which ever comes first or if the Executive vetoes the legislation, then upon Tribal Council override of the veto.

CERTIFICATION

As the Tribal Council Legislative Leader and Tribal Council Secretary, we certify that this Statute was duly passed by the Tribal Council of the Little Traverse Bay Bands of Odawa Indians at a regular meeting of the Tribal Council held on June 28, 2009 at which a quorum was present, by a vote of 7 in favor, 1 opposed, 0 abstentions, and 1 absent as recorded by this roll call:

	In Favor	Opposed	Abstained	Absent
Fred Harrington, Jr.	X			
Melvin L. Kiogima	X			
Dexter McNamara	X			
Marvin Mulholland		X		
Rita Shananaquet	X			
Alice Yellowbank	X			
Gerald V. Chingwa				X
Regina Gasco Bentley	X			
Beatrice A. Law	X			

Date: 6/28/09 Beatrice A. Law
Beatrice Law, Legislative Leader

Date: 6-28-09 Regina Gasco Bentley
Regina Gasco Bentley, Secretary

Received by the Executive Office on 6-30-09 by Rita Flynn

Pursuant to Article VII, Section D, Subsection 1 of the Little Traverse Bay Bands of Odawa Indians Constitution adopted on February 1, 2005 the Executive concurs in this action of the Tribal Council.

Date: 7-28-09 Frank Ettawageshik
Frank Ettawageshik, Tribal Chairperson

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