



**Little River Band of Ottawa Indians
Tribal Court of Appeals**

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**LARRY ROMANELLI AS OGEMA OF THE
LITTLE RIVER BAND OF OTTAWA INDIANS
& ISRAEL STONE**

Appellees/Plaintiffs,

Case Number: 20-051-AP

Hon. Melissa L. Pope, Chief Justice
Hon. Berni Carlson, Associate Justice
Hon. Joseph LaPorte, Associate Justice

v.

**LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COUNCIL,**
Appellant/Defendant.

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ORDER AND OPINION

INTRODUCTION AND STATEMENT OF FACTS

This case involves the consolidated cases of Tribal Court Case No. CV 16308GC and Tribal Court Case No. CV 16206GC in which Appellee/Plaintiff Larry Romanelli in his official capacity as Ogema of the Little River Band of Ottawa Indians ("Appellee/Plaintiff Romanelli") and Appellee/Plaintiff Israel Stone ("Appellee/Plaintiff Stone") brought suit against Appellant/Defendant Little River Band of Ottawa Indians Tribal Council ("Appellant/Defendant Tribal Council"). The Trial Court issued multiple *Orders* from

October 15, 2018 to March 2, 2020 that, in very general terms, held that Appellant/Defendant Tribal Council exercised powers that the Little River Band of Ottawa Indians ("LRBOI") Constitution did not delegate to Appellant/Defendant Tribal Council in violation of the separation of powers, the Administrative Procedures Act, and the Unified Legal Department Act of 2015. Initially, Appellant/Defendant Tribal Council filed two appeals in relation to these Trial Court Orders. On March 16, 2020, the Chief Justice issued the *Order for Amended Comprehensive Notice of Appeal*, consolidating the two appellate cases, requiring the filing of an amended notice of appeal that included all of the issues being appealed with the cases consolidated, and ordering return of the filing fee enclosed with the second Notice of Appeal submitted by the Appellant/Defendant Tribal Council. On March 31, 2020, the Chief Justice issued the *Order for Amended Comprehensive Notice of Appeal – First Amended* to extend the deadline due to the ongoing impact of the COVID-19 Pandemic. The Appellant/Defendant Tribal Council filed its Amended Comprehensive Notice of Appeal on or about May 8, 2020.

On May 22, 2020, the Chief Justice issued the *Notice & Order for Appellate Scheduling Conference*. On June 5, 2020, the Appellate Scheduling Conference was held by phone with all parties, by and through their attorneys, appearing. On June 12, 2020, the Chief Justice issued the *Order After June 5, 2020 Appellate Scheduling Conference* that set forth the motion briefing scheduled as agreed upon by the parties at the June 5, 2020 Appellate Scheduling Conference.

On September 1, 2020, the Court issued the *Opinion on Appellate Motions* denying the Appellant's Petition to Stay Execution of Trial Court Judgments and Appellee/Plaintiff Stone's Motion Objecting to Defendant-Appellant's Filing of Appeal based on the parties' Briefs as it was agreed upon at the Appellate Scheduling Conference that oral argument would not be held.

On September 2, 2020, the Chief Justice issued the *Notice and Order for Second Appellate Scheduling Conference*. On September 18, 2020, the second Appellate Scheduling Conference was held via Zoom with all parties, by and through their attorneys, appearing. That same day, the Chief Justice issued the *Order After September 18, 2020 Second Appellate Scheduling Conference* that set forth the briefing scheduled on the substantive issues presented as agreed upon by the parties at the September 18, 2020 Appellate Scheduling Conference. The parties submitted their Briefs pursuant to this Order.

Upon the request of the Chief Justice, the Tribal Court Administrator worked with the parties, and the Chief Justice with the Appellate Justices, to select a date available to

all for Oral Argument. On January 22, 2021, the Chief Justice issued the *Notice and Order for Oral Argument*. Oral Argument was held before the Court of Appeals with the Justices and parties appearing via Zoom. The Court of Appeals now issues this unanimous *Order and Opinion*.

JURISDICTION

This case involves the determination of whether Tribal Council had the Constitutional authority to take the actions that are the subject of this consolidated action. The jurisdiction of this Court is defined in Article VI § 8 of the LRBOI Constitution as follows:

Section 8 – Jurisdiction and Powers of the Tribal Courts. The jurisdiction and judicial powers of the Little River Band of Ottawa Indians shall extend to all cases and matters in law and equity arising under the Tribal Constitution or under the laws and ordinances applicable to the Little River Band of Ottawa Indians. Such powers shall include, but are not limited to,

- a) To adjudicate all civil and criminal matters arising within the territorial or membership-based jurisdiction of the Tribe.
- b) To review ordinances and resolutions of the Tribal Council or General Membership to ensure that they are consistent with this Constitution and rule void those ordinances and resolutions deemed inconsistent with this Constitution.
- c) To hear cases based on ordinances and laws of the Tribe for purposes of determining innocence or guilt where trial by jury has been waived.
- d) To assign fines and penalties as allowed by Tribal and Federal law.
- e) To grant warrants for search to enforcement officers when just cause is shown.
- f) To grant warrants, writs, injunctions and orders not inconsistent with this Constitution.
- g) To swear in Tribal Council members and the Tribal Ogema by administering the oath of office.
- h) To establish, by general rules, the practice and procedures for all courts of the Little River Band.
- i) To prepare and present to the Tribal Ogema and Tribal Council a budget requesting an appropriation of funds to permit the Tribal Courts to employ personnel or to retain by contract such independent contractors, professional services and whatever other services may be necessary to carry out the dictates of this Constitution, the Tribal Court Ordinance and all Ordinances creating lower courts of limited jurisdiction.
- j) To preside over all suits for declaratory or injunctive relief as provided for in accordance with Article XI of this Constitution.

The Tribal Council actions that serve as the basis for the original cases that have consolidated in this case relate to the Emergency Adoption of Amendments to the Gaming

Enterprise Board of Directors Ordinance, Ordinance No. 10-800-03, and Renaming the Act the Gaming Enterprise(s) Oversight Act, Resolution No. 16-0810-228 and 250. This Court, therefore, has jurisdiction over this matter pursuant to Article VI § 8 (a) “[t]o adjudicate all civil and criminal matters arising within the territorial or membership-based jurisdiction of the Tribe” and (b) “[t]o review ordinances and resolutions of the Tribal Council or General Membership to ensure that they are consistent with this Constitution and rule void those ordinances and resolutions deemed inconsistent with this Constitution”.

THE COVID-19 PANDEMIC

In December 2019, individuals in countries outside of the United States began to present symptoms of what is now known as the coronavirus or COVID-19.¹ On January 21, 2020, the United States had its first confirmed case of COVID-19.² On January 30, 2020, the World Health Organization (WHO) Director-General issued the Statement of the International Health Regulations (IHR) Emergency Committee that declared a public health emergency of international concern.³

On March 10, 2020, Michigan Governor Gretchen Whitmer declared a state of emergency in Executive Order No. 2020-4 with the announcement that Michigan had its first confirmed cases of COVID-19, a woman from Oakland County who had traveled internationally and a man from Wayne County who had traveled domestically⁴. The first person in Michigan, a man in his fifties from Southgate, walked on due to COVID-19.⁵

The Canadian – U.S. Border closed to non-essential travel on March 21, 2020 with that closure still in effect at the time that this Order and Opinion was issued.⁶

The State of Michigan simultaneously developed statewide policies and procedures to slow the spread of COVID-19 with Governor Whitmer issuing the first of

¹ See: <https://www.who.int/news/item/29-06-2020-covid-timeline> &

<https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165>

² <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165>

³ [https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov))

⁴ https://cdn.knightlab.com/libs/timeline3/latest/embed/index.html?source=1F3yB-Sm5-6t_K2yvZ06uBPjurEfH1uQzxb3zwpY_tIA&font=Default&lang=en&initial_zoom=2&height=650

⁵ https://cdn.knightlab.com/libs/timeline3/latest/embed/index.html?source=1F3yB-Sm5-6t_K2yvZ06uBPjurEfH1uQzxb3zwpY_tIA&font=Default&lang=en&initial_zoom=2&height=650

⁶ Executive Order 2020-21 available at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html See also:

https://cdn.knightlab.com/libs/timeline3/latest/embed/index.html?source=1F3yB-Sm5-6t_K2yvZ06uBPjurEfH1uQzxb3zwpY_tIA&font=Default&lang=en&initial_zoom=2&height=650 & <https://www.voanews.com/covid-19-pandemic/one-year-after-closing-us-canada-border-remains-closed>

many Executive Orders on March 23, 2020, referred to generally as the “Stay Home, Stay Safe” Order, to protect Michigan residents as the number of COVID-19 cases – and COVID-19 deaths – increased throughout the State of Michigan. Once the time-frame for emergency powers expired, the Michigan Legislature and Governor have been responsible for collectively managing the Pandemic, along with the heads of various Michigan Departments, to implement statewide safety protocols, administer the two-dose vaccine, provide economic relief, develop strategies for access to critical services, and develop other strategies for managing the Pandemic.

It is critical to note that the primary strategies for reducing the spread of COVID-19 has been to wear a mask, keep at least six feet (6') distance from all other people which is referred to now as “social distancing”, frequent sanitization of surfaces, and frequent washing of and using sanitizers on hands. It should also be noted that the requirement for social distancing has an impact on all places where people gather through reduced maximum capacities for these locations, from businesses like gaming enterprises and restaurants to essential services like courts. All of these strategies remain in place, in part due to the individuals who have made the personal decision to decline to get the vaccine for a multitude of reasons ranging from the scientific uncertainty of the long-term impact on the health of those receiving the vaccine to those who do not believe that the COVID-19 Pandemic is a public health crisis with the number of people declining the vaccine a significant population in Michigan, and the ongoing appearance of variants, some of which appear to pose an even greater risk for death.

The Little River Band of Ottawa Indians is a federally recognized American Indian Tribe that is governed by the LRBOI Constitution and the three branches of government – the Ogema as the Executive Branch, Tribal Council as the Legislative Branch, and the Tribal Court as the Judicial Branch – that are created within that Constitution. As a sovereign Native Nation, LRBOI has the responsibility to protect all those within its jurisdiction.

Ogema Larry Romanelli has utilized Executive Orders and worked cooperatively in government-to-government relationships throughout the Pandemic to manage the impact of the Pandemic on the Tribal Government and promote the safety of Tribal Citizens, Employees, and the public within the jurisdiction of the LRBOI. With the Pandemic continuing in Michigan, both through the periodic surges of individuals testing positive for COVID-19 that have occurred throughout the Pandemic and the appearance of COVID-19 variants that continue to emerge, the Ogema posts the current Executive Order to the LRBOI website.

Associate Judge Angela K. Sherigan has issued Administrative Orders on the operation of the Court throughout the Pandemic pursuant to the applicable guidelines implemented by Ogema Romanelli. Chief Justice Melissa L. Pope, in consultation with Associate Justice Berni Carlson and Associate Justice Joseph LaPorte, has also issued Administrative Orders specific to management of the Court of Appeals. Whenever applicable, these Administrative Orders are available on the Tribal Court website.

The Justices of this Court of Appeals offer prayers for all those who have lost their lives to the COVID-19 Pandemic and to their loved ones. We also offer prayers for all those who have suffered, are suffering, or will suffer from the impact of this Pandemic with the knowledge that this suffering includes: food insecurity; loss of employment; homelessness; lack of access to essential services due to not having the financial resources for remote access or living in an area where access to technology is limited, not reliable, or nonexistent; the increase in the crime of domestic violence, as well as the severity of the violence being committed against domestic violence victims; the overall increase in violence, including hate crimes committed against Asian Americans and Pacific Islanders; lack of access to medical treatment; and isolation, to name some of the difficult circumstances that Tribal Citizens, Michigan residents, U.S. residents, and communities world side are experiencing. This Court of Appeals remains committed to continuing meaningful access to justice and caring for Tribal Citizens, employees, and the public as we collectively respond to the ongoing COVID-19 Pandemic.

ANALYSIS

This case involves compliance with the most important Little River Band of Ottawa Indians document – the supreme law of this Native Nation – the Constitution. The actions reviewed for compliance with this Constitution are those of the entities established in that Constitution to govern this Native Nation pursuant to the powers and duties that the Constitution mandates.

The LRBOI Court Rules of Appellate Procedure § 5.902 provides the standard of review in appellate matters as follows:

5.902 Standard of Review. The following standards apply to the Tribal Court of Appeals when deciding an appeal, unless a clear miscarriage of justice would result:

- (A) **Finding of Fact by a Judge.** A finding of fact by a judge shall be sustained unless clearly erroneous. The trial court's decision will not be changed unless the Appellate Court is definitely and firmly convinced

that a mistake has been made. In other words, it is not enough that the Appellate Court may have weighed the evidence differently and/or reached a different conclusion; the trial court's decision will only be reversed if it is implausible in light of all the evidence.

- (B) Finding of Fact by a Jury. A finding of fact by a jury shall be sustained if there is any credible evidence to support it.
- (C) Factual Inference. A factual inference drawn by a judge or jury shall be reviewed as a finding of fact if more than one reasonable inference can be drawn from the fact(s).
- (D) §5.902 (D) Witness Credibility. Any finding, whether explicit or implicit, of witness credibility shall be reviewed as a finding of fact.
- (E) Conclusion of Law. A conclusion of law shall be reviewed by the Tribal Court of Appeals de novo, meaning that the Appellate Court shall review it as though it is the first time a court has ruled on this matter.
- (F) Contracts. An unambiguous contract term is reviewed as a conclusion of law.
- (G) Mixture of Law and Fact. A matter which is a mixture of law and fact is reviewed by the standard applicable to each element.
- (H) Discretion of the Court. A matter which is determined to be within the Tribal Court's discretion shall be sustained if it is apparent from the record that the Tribal Court exercised its discretionary authority and applied the appropriate legal standard to the fact(s).
- (I) Sentence or Penalty. A sentence and the imposition of fine, forfeiture, and/or penalty, excluding the assessment of damages, shall be reviewed as a discretionary determination by the Tribal Court of Appeals.
- (J) Substituted Judgment. A matter committed to the discretion of the Tribal Court shall not be subject to the substituted judgment of the Tribal Court of Appeals.

The present case involves review of both findings of facts and conclusions of law. Pursuant to § 5.902 (G), "a matter which is a mixture of law and fact is reviewed by the standard applicable to each element" with § 5.902 (A) providing that "[a] finding of fact by a judge shall be sustained unless clearly erroneous" and § 5.902 (E) providing that "[a] conclusion of law shall be reviewed by the Tribal Court of Appeals de novo, meaning that the Appellate Court shall review it as though it is the first time a court has ruled on this matter". The Court notes that § 5.902 (A) provides additional guidance in reviewing findings of by a judges in that "[t]he trial court's decision will not be changed unless the Appellate Court is definitely and firmly convinced that a mistake has been made" meaning

that "it is not enough that the Appellate Court may have weighed the evidence differently and/or reached a different conclusion", mandating that "the trial court's decision will only be reversed if it is implausible in light of all the evidence".

In some respects, this is a complicated case. The Trial Court issued multiple *Orders* in this case on the individual issues presented with each *Order* representing review by the Tribal Court of arguments presented, in writing and at hearings, as well as the review of evidence presented by the parties. The Trial Court was deliberate in its approach of peeling back each layer to reach the center of this case: the actions taken by the LRBOI Tribal Council as it relates to the management of the Little River Casino Resort. In other respects, however, this case is a straightforward analysis of whether the actions taken by Tribal Council violated the separation of powers, as well as the Administrative Procedures Act and the Unified Legal Department Act, with the focus of these actions – although not the sole actions reviewed – rooted in the legislation enacted by the Appellant/Defendant Tribal Council.

The Appellant/Defendant Tribal Council initially raised the following three questions in the Amended Notice of Appeal, along with the initial Brief and the Reply Brief on the Appellant's Petition to Stay Execution of Trial Court Judgments filed, with these questions again noted in the Appellant's Brief and the Appellant's Reply Brief filed after this Court's *Opinion on Appellate Motions*:

Whether the Tribal Council acted in accordance with Sections 5.01 and 5.02 of the APA and its constitutional powers when passing Resolution Nos. 16-810-228 and 16-829-250

Whether the Tribal Council acted in accordance with Section 6.01 of the Unified Legal Department Act of 2015 when hiring Dykema Gosset

Whether the Tribal Council acted in accordance with LRBOI separation of powers principles with passing the Gaming Enterprise(s) Oversight Act and creating the Oversight Task Force

After this Court of Appeals denied the Appellant/Defendant Tribal Council's request for a stay of the Trial Court's *Orders* and Appellee/Plaintiff Stone's Motion Objecting to Defendant-Appellant's Filing of Appeal in the September 1, 2020 *Opinion on Appellate Motions*, the Appellant/Defendant restated these questions with responses that reframed review of the case and added the following new allegation:

That the Tribal Court Failed to Fully Dispose of the Separation of Powers Claim Against the Tribal Council, Frustrating a Proper Appeal (Appellant Brief at 16)

Although the Appellant/Defendant Tribal Council provides specific arguments for each of the original and new questions raised, the underlying argument in the Appellant's Brief, Appellant's Reply Brief, and at Oral Argument, is that Tribal Council has been denied due process by the decision-making process of the Trial Court.

The Trial Court was required to navigate through a complex maze of topics and procedures to decide the issues in this case. One aspect of this complex maze involved determination that the two original cases filed against the Appellant/Defendant Tribal Council be consolidated into one case. The parties presented a significant amount of evidence to the Trial Court. The testimony presented – including witnesses that not only testified to the arguments put forth by the Appellant/Defendant Tribal Council but were hostile to the Appellees/Plaintiffs Ogema Romanelli and Stone – was extensive. Also extensive were the opportunities for the parties to be heard, both in writing and in court, throughout the process.

The allegation that the Trial Court denied the Appellant/Defendant Tribal Council due process protections is not supported by the facts nor history of this case. The Appellant/Defendant, as well as the Appellee/Plaintiffs, had a multitude of opportunities to be heard in this case, even if not in the specific procedural approach desired by the Appellant/Defendant. The Appellant/Defendant Tribal Council's arguments alleging it did not have the opportunity to be heard are procedural and based in the form of a motion, reference to a directed verdict, or wording in an order. The newest argument of the Appellant/Defendant Tribal Council demonstrates the lack of merit to their allegations when the Trial Court clearly found that Tribal Council violated the separation of powers but simply did not include the numbers of the specific Counts.

This Court will not deprive the Citizens of this Native Nation with a resolution to this case nor will it fail to fulfill its own Constitutional mandate in Article VI § 8 (b) "[t]o review ordinances and resolutions of the Tribal Council or General Membership to ensure that they are consistent with this Constitution and rule void those ordinances and resolutions deemed inconsistent with this Constitution". The parties were presented with numerous opportunities to be heard and this Court will decide the substantive issues presented.

Although questions of law are present and reviewed de novo, the findings of fact by the Trial Court Judge in this case – with review of those findings of fact made pursuant

to the clearly erroneous standard – guide the review by this Court of the Trial Court's decision-making process.

All issues relate to Resolutions that the Appellant/Defendant Tribal Council enacted regarding governance of the Little River Casino Resort, specifically Resolution No. 16-0810-228, Emergency Adoption of Amendments to the Gaming Enterprise Board of Directors Ordinance, Ordinance No. 10-800-03, and Renaming the Act the Gaming Enterprise(s) Oversight Act that was enacted on or about August 10, 2016, and Emergency Resolution No. 16-0829-250 that was enacted on or about August 29, 2016.

The LRBOI Constitution establishes three branches of government: the Ogema as the Executive Branch; Tribal Council as the Legislative Branch; and the Tribal Court as the Judicial Branch. This Court has recognized that these are three distinct branches in previous *Opinions*, including one of its earliest cases, *In re: Waitner v. Guenthardt*, 98/95-1001-1-8.3. The Citizens of this Nation directly elect the individuals for each branch of government, unlike in some Tribes where Citizens elect the members of Tribal Council and then the executive is chosen by some other avenue, such as elected by the other members of Tribal Council or positions assigned pursuant to the number of votes each elected member of Tribal Council received in the election. The direct election of each branch by the Tribal Citizens of this Nation is important to both this case and the ongoing operation of the LRBOI Tribal Government.

Also important to this analysis is that the LRBOI Constitution mandates the powers and duties of each branch of government. The Appellees/Plaintiffs make the following argument:

While the LRBOI Tribal Court of Appeals has correctly held that the separation of powers between the executive and legislative branches are not absolute in *Willis v. Tribal Council*, Case #01034MR/01034APP(2001), pp 4-6, the Court of Appeals did not fully reject the concept of separate powers. Rather it spoke to the need for communication and cooperation between the two branches. To take the position that the holding in *Willis* means that Tribal Council has the power to manage all facets of the operation of the LRBOI would render the powers given to the Ogema in Article V of the Constitution a nullity. (Appellee/Plaintiff Brief at 20).

This Court agrees. A government where the executive and legislative branches do not communicate or work in cooperation with each other deprives Tribal Citizens of the rights they are guaranteed under the Constitution, including the operation of their Tribal Government by the individuals they elected to serve fulfilling the Constitutionally mandated duties of their position. The Tribal Citizens of this Native Nation established the powers

and duties for each branch of government. For the LRBOI Government to operate as LRBOI Citizens intended, the duties and powers of these position must be respected by the individuals who are elected to fulfill them.

The arguments presented by the parties, as well as the actions of the Appellant/Defendant Tribal Council, indicate that this Court must be clear and concise to facilitate the operation of this Tribal Government pursuant to the Constitution adopted by LRBOI Tribal Citizens. The creation of three branches of government in the Constitution – the Ogema, Tribal Council, and this Court – with the powers and duties of each branch enumerated in that Constitution requires the separation of powers to ensure governance of the Little River Band of Ottawa Indians as enacted by the Tribal Citizens who comprise this Native Nation.

In the present case, the Trial Court had to determine whether Appellant/Defendant Tribal Council violated the separation of powers doctrine when it assumed management of the Little River Casino Resort through enactment of Resolution No. 16-0810-228. The Appellant/Defendant Tribal Council argues that it enacted Resolution No. 16-0810-228 due to the emergency circumstances of the U.S. Supreme Court denying the Tribe's petition for writ of certiorari in *Little River Band of Ottawa Indians v. NLRB*, 136 S. Ct. 2508. The quotation from the Appellee/Plaintiff's Brief below summarizes the facts in a manner this Court finds helpful, including retaining the emphasis of the text underlined by the Appellee/Plaintiff:

The preamble to the resolution focused exclusively on the denial of an application for a writ of *certiorari* to the Supreme Court of the United States from a decision of the United States Court of Appeals for the 6th Circuit. The preamble continued by raising the concern that the particular case '...has given rise to a false perception that the Tribe's gaming enterprise is commercial in nature, rather than an arm of the tribal government, leading to an increased willingness of third parties to challenge the sovereign status of the Gaming Enterprise...' Without further documentation, Tribal Council made a finding '...that the perceived separation of the Gaming Enterprise from the Tribe's government is exacerbated by the scope of authority provided to the intermediate layer of the Gaming Enterprise Board of Directors, and specifically to those members of the Gaming Board of Directors who are not elected officials of the Tribe...' (Emphasis in Appellee/Plaintiff Brief)

The Tribal Council continued with findings that the Gaming Enterprise Board of Directors should be eliminated, 'replaced in part by the elected officials of the Tribe, then, at Tribal Council's election, by a Interim Oversight Task Force, and the responsibilities and duties of the General Manager revised accordingly.' (Emphasis in Appellee/Plaintiff Brief)

Resolution 16-810-228 continued by making findings that oversight of the gaming enterprise should be vested in the hands of elected officials 'or in the hands of an Interim Oversight Task Force (OTF) on which the Tribe's elected officials have a voting role...'

The Gaming Enterprise Board of Directors was eliminated without prior notice on or about August 29, 2016.

(Appellee/Plaintiff Brief at 3-4).

The first issue is whether an emergency actually existed. According to the text of the Resolution, the denial of the petition for writ in *Little River Band of Ottawa Indians v. NLRB* created an emergency that required an immediate response. The testimony, however, did not support this assertion. The individuals who testified were individuals who had first-hand knowledge of the considerations for the alleged emergency requiring Tribal Council to seize control of the Little River Casino Resort. While the parties interpret some of this testimony differently, these witnesses articulated various considerations for seizing control that were not consistent with Appellant/Defendant Tribal Council's stated reason of the denial of the petition for writ in certiorari, including an investigation by the National Indian Gaming Commission and a report by an outside agency. In addition, there was testimony that planning for Tribal Council to take control of management of the LRCR had been going on for a significant period of time, perhaps as long as two years.

The Appellant/Defendant Tribal Council argues that the evidence presented does not detract from the emergency circumstances. At Oral Argument, Appellant/Defendant Tribal Council admitted that the Resolutions could have been better written but argue the lack of information does not create a critical defect.

When addressing the fact that Tribal Council had been making preparations for seizing control of the management of the Little River Casino Resort for a significant period of time, the Appellant/Defendant compared the planning that Tribal Council engaged in as similar to that as emergency preparedness. The argument would be that a body must develop a detailed plan for an emergency, such as a natural disaster, so that the plan can be immediately implemented if a natural disaster occurs. The Appellant/Defendant Tribal Council argued planning for the potential outcomes in the case of *Little River Band of Ottawa Indians v. NLRB* supports the emergency circumstances:

Nevertheless, the Ogema misapprehends the import of the fact that the Tribal Council had been preparing these Resolutions for a long time. Instead of demonstrating the lack of emergency, the prior preparations of the Tribal Council ahead of the denial of certiorari in the NLRB case is

strong evidence that the Tribal Council viewed that possibility as a true emergency for the Tribe and its enterprises, and that the Tribal Council believed it needed to be prepared for that emergency should it come to pass. (Appellant/Defendant Reply Brief at 6-7).

While a valiant effort to legitimize the preparation that Tribal Council engaged in to assume control over managing the Little River Casino Resort – and then actually seizing that control – the arguments of the Appellant/Defendant Tribal Council fail on all counts. To begin, when emergency protocols are engaged, it is critical to include detailed information relating to both the circumstances creating the emergency and the actions being taken to address that emergency. Had Tribal Council been engaging in planning for issues relating to the possible outcomes of the *Little River Band of Ottawa Indians v. NLRB* – even for a few months – it is reasonable to expect that the language would be clear, concise, and comprehensive. It is not.

It is also reasonable to expect consistency among the individuals voting on an emergency action. The array of reasoning that the witnesses testified to demonstrates that Tribal Council was not responding to the sole “emergency” articulated in the body of the Resolution of the denial of the petition for writ of certiorari. If it was, the language itself was not sufficient.

This Court of Appeals takes pause at this point to highlight that the standard for review of the Trial Court finding of facts is that “[a] finding of fact by a judge shall be sustained unless clearly erroneous” pursuant to LRBOI Tribal Court Rules § 5.902 (A). In applying the remainder of this standard to the facts discussed thus far, “[t]he trial court’s decision will not be changed unless the Appellate Court is definitely and firmly convinced that a mistake has been made”. While this Court does not appear to have “weighed the evidence differently and/or reached a different conclusion”, even if it did, this Court of Appeals could not reverse the Trial Court as the findings made are not “implausible in light of all the evidence”.

The last consideration of this Court for determining that the Appellant/Defendant Tribal Council did not take control over management of the Little River Casino Resort in response to an emergency relates directly to the separation of powers doctrine. If engaging in a process akin to emergency preparedness in advance of the emergency occurring, especially in a situation such as this case presents when the specific outcomes have been narrowed down in the written *Opinion* of the Sixth Circuit Court of Appeals, all stakeholders would be engaged in the planning process. Here, Tribal Council did not

engage the Ogema despite the powers and duties of the position of Ogema as provided in pertinent part in Article V:

LRBOI in Article V § 5 (a) (8)

To manage the economic affairs, enterprises, property (both real and personal) and other interests of the Tribe, consistent with ordinances and resolutions enacted by the Tribal Council.

The Appellant/Defendant Tribal Council points to the enumerated authorities and duties of Tribal Council in Article IV of the Constitution as the source of authority for Tribal Council assuming management of the Little River Casino Resort:

Article IV § 7 (f)

To create by ordinance regulatory commissions or subordinate organizations and to delegate to such organizations the manage the affairs and enterprises of the Little River Band, provided that no such commission or subordinate organization shall exercise powers of the Tribal Council unless they are expressly delegated by Tribal Council

These two Articles in the Constitution do not grant the same authority to both the Ogema and Tribal Council. Article V § 5 (a) (8) grants the authority "[t]o manage the economic affairs, enterprises, property (both real and personal) and other interests of the Tribe" to the Ogema. This provision also requires the Ogema to provide that management in a manner that is "consistent with ordinances and resolutions enacted by the Tribal Council". Tribal Council is authorized in Article IV § 7 (f) of the Constitution "[t]o create by ordinance regulatory commissions or subordinate organizations", as well as delegate powers to the regulatory commissions or subordinate organizations it creates provided that any powers are "expressly delegated". This Constitutional provision only permits the delegation of powers that Tribal Council has pursuant to the Constitution.

As stated earlier in this *Opinion*, the Constitution creates three branches of government with the powers and duties of each branch enumerated within this Constitution. There are specific circumstances where individual branches may delegate some powers of that branch. However, a branch of government may only exercise or delegate the powers that the Constitution establishes that it has. No branch of government may exercise what it does not have, including the enumerated powers of another branch.

In assuming and exercising control of the management of the Little River Casino Resort, both initially and with subsequent Resolutions discussed in this *Opinion*, the Appellant/Defendant Tribal Council violated the separation of powers doctrine as it

usurped the authority the Constitution entrusts to the office of Ogema in Article V § 5 (a) (8) "[t]o manage the economic affairs, enterprises, property (both real and personal) and other interests of the Tribe".

As indicated at the start of this *Opinion*, this Court will not permit procedural technicalities to hinder resolution of the substantive issues in this case. In reviewing the other findings of the Trial Court as they relate to the separation of powers, the Appellant/Defendant Tribal Council argues that the Trial Court only references one of the two separation of powers claims, thereby depriving a full appeal. Whether Counts IV and V are both referenced in the Trial Court Order is a technicality as the Court discusses the content of both claims. The Appellee/Plaintiff Ogema explains this well in his Brief:

Paragraphs 48 through 51 of Count IV of the Ogema's First Amended Complaint address the issues of granting Tribal Council the power to hire the General [M]anager of the LRCR, granting the power to create an Oversight Task Force, failing to create the Oversight Task Force, and diluting the constitutional authority of the Ogema.

Paragraphs 53 through 59 of Count V of the Ogema's First Amended Complaint address the issue of membership on the Oversight Task Force, removal of members of the Oversight Task Force, management of the LRCR by the Tribal Council, imposing a duty on the General Manager to present corrective action plans to Tribal Council within 3 days of any default, the micromanagement of the LRCR by the Tribal Council in usurpation of the Ogema's Constitutional powers, and the unconstitutional use of closed sessions to address such corrective actions.

The trial court found that the Gaming Oversight Act designated that all members of the Oversight Task Force are Primary Management Officials of the LRCR, and that the Oversight Task Force has not been created, thus leaving the Tribal Council in the position of the Oversight Task Force, thereby usurping the powers of the Ogema. The Court additionally found that the Tribal Council had given itself the power to remove members of the Oversight Task Force, thus violating the separation of powers.

The trial court went on to find that requiring the General Manager to submit corrective action plans for consideration during closed sessions of the Tribal Council violates Article IV, Section 6(d) of the LRBOI Constitution. The trial court also found that the mandate to report corrective action plans to the Tribal Council violates the separation of powers. Lastly, the trial court specifically held that, 'Tribal Council does not have the Constitutional authority to manages the affairs of the enterprises'. (Appellee/Plaintiff Ogema's Brief at 17-18).

In addressing the substantive matters presented in this case, this Court began by finding that the creation of three separate and distinct branches of government with the

powers and duties enumerated for each in the LRBOI Constitution establishes the requirement for the separation of powers within the LRBOI Tribal Government. Within this doctrine is the mandate that each branch only exercise the authority enumerated in the Constitution, thus all branches of government are prohibited from exercising the Constitutional authority of another branch, usurping the power of another branch, or otherwise encroaching upon the enumerated powers of another branch. The Court then found that Article V § 5 (a) (8) grants the authority “[t]o manage the economic affairs, enterprises, property (both real and personal) and other interests of the Tribe” to the Ogema and not Tribal Council. This Court intentionally analyzed this power first as an avenue for facilitating analysis of the remainder of the separation of powers findings by the Trial Court. To review the other findings of fact by the Trial Court Judge, we return to the standard of review in LRBOI Tribal Court Rule § 5.902 (A) that establishes that “[a] finding of fact by a judge shall be sustained unless clearly erroneous”. In reviewing the findings of fact by the Trial Court, these findings are not only plausible, but supported by the weight of the evidence.

This Court also intentionally cites the Appellee/Plaintiff Ogema’s Brief as it provides information relating to Count IV and Count V of the Ogema’s First Amended Complaint and the Trial Court *Order*. This excerpt highlights that the Trial Court addressed the content of both Count IV and Count V in the Ogema’s First Amended Complaint although it did not specifically state the term “Count V”. Sending this issue back to the Trial Court will only cause unnecessary delays that harm this Tribe when the Trial Court fully considered the issues and evidence presented. All of the information was available for review. If the Appellant/Defendant Tribal Council failed to make any arguments simply because the term “Count V” was not in the Trial Court *Order*, that is the fault of the Appellant/Defendant and not the Trial Court or this Court of Appeals. To be clear, this Court of Appeals affirms the Trial Court in finding that Tribal Council violated the separation of powers as alleged in both Count IV and Count V of the Ogema’s First Amended Complaint.

For the reasons already discussed in this *Opinion*, this Court affirms the Trial Court findings that that Tribal Council violated the Administrative Procedures Act (“APA”) when enacting Resolution No. 16-0810-228 and Emergency Resolution No. 16-0829-250 because no emergency existed. In addition to the analysis already conducted, this Court further notes that an “emergency” resolution like Emergency Resolution No. 16-0829-250 that does not state any information on the emergency alleged or reasoning for the emergency action being taken is not likely to pass this Court’s review. While the

Appellant/Defendant Tribal Council presented other evidence relating to the emergency it alleged made the Resolution necessary, the information necessitating an emergency resolution should be in the resolution itself.

The final issue to address is the Appellant/Defendant's allegation that the Trial Court process for finding that Tribal Council violated the Unified Legal Department Act did not provide sufficient due process protections to the Appellant/Defendant Tribal Council because of when and how the Ogema's motion was made and the Trial Court titling the decision a "directed verdict". The Appellant/Defendant Tribal Council raises the issue of fundamental fairness in the motion being decided, or directed verdict being issued, at the close of the Ogema's presentation of evidence. The Appellant/Defendant states in its Brief the following: "The Tribal Court clearly relied on the evidence presented at the hearing to determine that the contract was not negotiated, without allowing Tribal Council to present any contrary evidence. The Court's action in granting Ogema Romanelli's improper motion violated the fundamental due process rights of Tribal Council and should be reversed." (Appellant/Defendant Tribal Council Brief at 13).

There is also disagreement among the parties as to whether the "directed verdict" was granted on the pleadings or the pleadings and the evidence presented over a two-day period. While the Appellant/Defendant focuses on the Trial Court's reliance on evidence presented at the Hearing, it does not openly oppose the argument that a decision could be made on the briefs and/or other pleadings filed with the Court. It does contest the Appellee/Plaintiff Ogema's assertion that the Trial Court stated that the Appellant/Defendant made a general denial in the pleadings as he did not provide a citation for this reference.

This Court does not deny that a "motion for a directed verdict" or that a new or renewed "motion for summary disposition" may be most appropriate after the close of the opponent's evidence. This Court also recognizes that Tribal Council objected to the Trial Court's approach of addressing this issue in hope that it may impact the Trial Court's finding of facts regarding whether the Ogema negotiated the contract with Dykema Gosset.

The Court purposefully placed this issue at the end of this *Opinion* to analyze the fundamental fairness of the Trial Court's decision within the full context of this case. This case began with Tribal Council enacting Resolutions that usurped the Constitutional authority of the Ogema "[t]o manage the economic affairs, enterprises, property (both real and personal) and other interests of the Tribe, consistent with ordinances and resolutions enacted by the Tribal Council" in violation of the separation of powers. These Resolutions

were enacted under the premise of an emergency that the evidence showed did not exist with Tribal Council having planned this unconstitutional seizure of power to manage the Little River Casino Resort over a significant period of time that was not focused on the emergency alleged nor include the Ogema as the position Constitutionally authorized to manage the Little River Casino Resort as an enterprise of the Tribe. It is within this context of violating the separation of powers and Administrative Procedures Act by stripping the Ogema of the Constitutionally mandated authority of managing the Little River Casino Resort under the premise of an emergency that did not exist, that the Appellant/Defendant Tribal Council placed the Ogema into the position of having to “negotiate” a contract by engaging outside counsel.

This Court also notes that the Tribal Council actions being held as violations of the separation of powers and other Ordinances occurred almost five years ago. This is not a criticism on the process for reviewing these actions, but rather, acknowledgement of the careful presentation and consideration of all of the issues presented, as well as an acknowledgement of the impact of the ongoing COVID-19 Pandemic over this past year. Although understandable, five years is a long time for final resolution of the critical issues presented that include Constitutional analyses crucial to the operation of the LRBOI Tribal Government – and management of the Little River Casino Resort as a fundamental source of funds for operation of that Tribal Government – so that the LRBOI Tribal Government operates pursuant to the LRBOI Constitution adopted by Tribal Citizens to ensure that the LRBOI Tribal Government cares for Tribal Citizens now and in the Seventh Generation to come.

It is within this context of Tribal Council seizing control of managing the Little River Casino Resort, without final resolution since Tribal Council took these unconstitutional actions in 2016, that this Court reviews the fundamental fairness of the procedural challenges of the Appellant/Defendant Tribal Council to the Trial Court finding that Tribal Council violated the Unified Legal Department Act. The Trial Court issued its decision following a Hearing where the Appellant/Defendant was present, participated, and made arguments to the Court, regardless of whether these arguments swayed the Court. Although the Appellant/Defendant appears to have evidence it wanted to present, the Court notes that the individual most likely to be key to findings of fact about whether Ogema Romanelli negotiated the contract with Dykema Gosset is Ogema Romanelli. In addition, the Appellant/Defendant Tribal Council had the opportunity to challenge the evidence that was presented by the Ogema.

Further, when reviewing the decision of the Trial Court within the context of all of the evidence presented – a fair approach due to the amount of evidence that has now been presented by all parties – and the standard of review for findings of fact, this Court cannot find that the Trial Court was “clearly erroneous” when finding that Tribal Council violated the Unified Legal Department Act based on the evidence presented, including the testimony of the Ogema that he did not negotiate the contract with Dykema Gosset. Finally, it would not be fundamentally fair to set aside the Trial Court finding that Tribal Council violated the Unified Legal Department Act and remand the issue to the Trial Court with the Tribe then subject to the continuing harm of not having a final resolution to this case and further increasing the cost already paid for outside counsel when taking into consideration that this Court has upheld the Trial Court’s findings of fact from that evidence.

CONCLUSION

This Court began analysis of the substantive issues in this case by finding that the creation of three separate and distinct branches of government – the Ogema, Tribal Council, and this Court – with the powers and duties enumerated for each branch in the LRBOI Constitution, and Tribal Citizens directly electing the positions governing these three branches, establishes the separation of powers within the LRBOI Tribal Government. Within the separation of powers doctrine is the mandate that each branch only exercise the authority it has as enumerated in the Constitution, thus all branches of government are prohibited from exercising the Constitutional authority of another branch, usurping the power of another branch, or otherwise encroaching upon the enumerated powers of another branch.

In finding that a branch of government may delegate some powers when authorized by the Constitution to do so, this Court also held that a branch may only delegate the powers that the Constitution designates to that branch. The Court found that the Constitution does not grant the same authority to both the Ogema and Tribal Council in relation to management of the economic enterprises of the Tribe. Specifically, Article V § 5 (a) (8) grants the authority “[t]o manage the economic affairs, enterprises, property (both real and personal) and other interests of the Tribe” to the Ogema. This provision also requires the Ogema to provide that management in a manner that is “consistent with ordinances and resolutions enacted by the Tribal Council”. Tribal Council is authorized in Article IV § 7 (f) of the Constitution “[t]o create by ordinance regulatory commissions or subordinate organizations”, as well as delegate powers to the regulatory commissions or

subordinate organizations it creates provided that any powers are “expressly delegated”, but not usurp the Constitutionally mandated authority of the Ogema “[t]o manage the economic affairs, enterprises, property (both real and personal) and other interests of the Tribe”

The Court noted that it had intentionally analyzed the authority of the Ogema and Tribal Council in relation to management of the Little River Casino Resort as an avenue for facilitating analysis of the remainder of the separation of powers findings by the Trial Court. This Court emphasized that LRBOI Tribal Court Rule § 5.902 (A) establishes that “[a] finding of fact by a judge shall be sustained unless clearly erroneous”.

This Court found that the Appellant/Defendant Tribal Council violated the separation of powers doctrine as it usurped the authority the Constitution entrusts to the office of Ogema in Article V § 5 (a) (8) “[t]o manage the economic affairs, enterprises, property (both real and personal) and other interests of the Tribe” when it assumed and exercised control of the management of the Little River Casino Resort, both initially and with subsequent Resolutions.

This Court went on to affirm the Trial Court in finding that Tribal Council violated the separation of powers as alleged in both Count IV and Count V of the Ogema’s First Amended Complaint, finding that not including the term of “Count V” as the Trial Court fully considered the issues and evidence presented.

This Court affirmed the Trial Court findings that Tribal Council violated the Administrative Procedures Act (“APA”) when enacting Resolution No. 16-0810-228 and Emergency Resolution No. 16-0829-250 because no emergency existed, noting that an “emergency” resolution that does not state any information on the emergency alleged or reasoning for the emergency action being taken is not likely to pass this Court’s review.

The Court stated that it purposefully addressed review of the Trial Court’s finding that Appellant/Defendant Tribal Council violated the Unified Legal Department Act at the end of the *Opinion* to analyze the fundamental fairness of the Trial Court’s decision within the full context of this case. This context was discussed in relation to the time required for briefs, hearings where evidence was presented, and decisions of the Trial Court on each of the complicated issues presented, and then the process before this Court of Appeals with the original actions requiring filing of this consolidated case being Tribal Council seizing control of managing the Little River Casino Resort in violation of the Constitution in 2016. This Court further noted that the Trial Court issued its decision following a Hearing where the Appellant/Defendant was present, participated, and made arguments to the Court with the testimony of Ogema Romanelli – testimony the Appellant/Defendant Tribal

Council had the opportunity to challenge – being key to whether Ogema Romanelli negotiated the contract with Dykema Gosset, protecting the fundamental fairness of the proceedings.

For all of these reasons, this Court unanimously upholds the Trial Court. With these Constitutional issues now fully resolved, the Trial Court may proceed with the remaining issue of attorney fees.

ON BEHALF OF THE UNANIMOUS COURT OF APPEALS, IT IS HEREBY ORDERED:



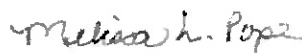
Hon. Berni Carlson, Associate Justice

5/10/2021
Date



Hon. Joseph LaPorte, Associate Justice

5-10-2021
Date



Hon. Melissa L. Pope, Chief Justice

May 10, 2021
Date