CITATION: Chippewas of Mnjikaning First Nation v. Chiefs of Ontario, 2010 ONCA 47
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COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Blair and Juriansz JJ.A.

BETWEEN

The Chippewas of Mnjikaning First Nation

Plaintiff (Appellant)

and

Her Majesty the Queen in Right of Ontario, as represented by the Minister Responsible for Native Affairs, the Minister of Consumer and Commercial Relations, the Chair of the Management Board of Cabinet, and the Attorney General of Ontario, and the Ontario Lottery and Gaming Corporation, the Chiefs of Ontario, and Ontario First Nations Limited Partnership

Defendants (Respondents)

M. Philip Tunley, Gavin MacKenzie, Brendan Van Niejenhuis, Katherine Hensel and Andrea Gonsalves, for the appellant

Sheila R. Block, David Outerbridge, Lisa Talbot and Jana Stettner, for the respondents, the Chiefs of Ontario and Ontario First Nations Limited Partnership

Dennis Brown, Q.C., Malliha Wilson, Edmund Huang and William MacLarkey, for the respondent, Her Majesty the Queen in Right of Ontario

Heard: September 8 & 9, 2009

On appeal from the judgment of Justice Arthur M. Gans of the Superior Court of Justice, dated September 15, 2008, with reasons reported at 2008 CanLII 46333.

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O'Connor A.C.J.O. and Blair J.A.:

I. INTRODUCTION

[1] Casino Rama is the only commercial casino located on a First Nation reserve in Ontario. It was established as a pilot project to benefit all Ontario First Nations economically, the intention being that one First Nation would be selected as the host site but that the revenues would be shared among all First Nations in the province. How that revenue sharing was to be effected is the underlying theme in these proceedings.

[2] Since opening to the public on July 31, 1996, Casino Rama has generated gross revenues in excess of *$5.2 billion* and net profits in excess of *$1.2 billion*.[1] The Chippewas of Mnjikaning First Nation ("MFN")[2] – the casino's host with a population of approximately 1,500 people – claims to be entitled to 35% of the net profits, in perpetuity, as well as to a portion of the gross revenues representing its share of operating compensation. It claims that the Site Selection Process in which it was chosen as the host site gave rise to a binding contract with the Government of Ontario that it would receive 35% of the net profits, as set out in its proposal submitted to the Selection Panel in November 1994.[3]

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[1] These totals represent audited financial information through the fiscal year ended March 31, 2007, the latest financial information available on the record.

[2] At the time of trial, the proper name of the plaintiff/appellant was the Chippewas of Mnjikaning First Nation, and it was referred to at trial as "Mnjikaning" or "MFN". Its name was subsequently changed to the Chippewas of Rama First Nation, the name it held from 1993 to 1996, when the events leading up to the establishment of the casino took place. We shall refer to the appellant as "MFN" or, sometimes, as "the First Nation", in these Reasons.

[3] While the issue is whether there was a contract with the Province, Ontario does not assert a claim to any of the monies at issue in this proceeding. It accepts that the monies do not belong to the Crown, but belong to the collective First Nations.

[3] MFN is one of 134 First Nations in Ontario. The remaining 133 First Nations, represented by the Chiefs of Ontario and the Ontario First Nations Limited Partnership, oppose MFN's claim. They argue that the Site Selection Process was just that – a site selection process – and that revenue sharing as between all of Ontario's First Nations, including the host's share, was to be negotiated in a separate round of negotiations following site selection that would embrace a broader and more representative group of First Nation interests.

[4] After a 47-day trial, Justice Gans dismissed MFN's action. He found in essence that the Site Selection Process did not result in a binding agreement between MFN and Ontario entitling MFN to a 35% share of net revenues from Casino Rama. In that regard, he found that a reasonable person, viewing the evidence objectively, would not have concluded that a binding agreement on revenue sharing was to, or did, result from the Site Selection Process. In addition, he found that MFN's representatives never subjectively believed they had such a contract. He also rejected MFN's fiduciary duty argument.

[5] In an all-out onslaught, MFN attacks virtually every factual finding the trial judge made and argues that the trial judge created a perception of bias and that he intervened in the conduct of the trial in such a way that the trial process itself was irreparably tainted with unfairness. MFN also asserts numerous legal errors, including those relating to the law of fiduciary obligations and the application of contractual and tender law jurisprudence, the trial judge's alleged failure to consider and appreciate the cultural

background and unique Aboriginal perspective of MFN's witnesses, and the insufficiency of his reasons.

[6] After careful consideration, we are satisfied that there is no merit in any of the grounds of appeal advanced and, for the reasons that follow, we dismiss the appeal.

II. BACKGROUND AND FACTS

[7] Because of the appellant's all-out attack on the trial judge's findings, it is necessary to review the facts at some length.

A. The Agreed Statement of Facts

[8] At the beginning of trial, the parties filed an Agreed Statement of Facts from which the setting for their dispute emerges.

[9] In the early 1990s, the Government of Ontario began negotiations with First Nations for the development of casino gambling on a First Nation site. The purpose was to generate revenues and to establish a vehicle to enhance the growth and capacity of all Ontario First Nations in the areas of economic development, community development, cultural development, health, education, training and management.

[10] Ontario had entered the field of commercial casino gambling in 1992, announcing the first pilot casino for the City of Windsor and enacting the *Gaming Control Act, 1992*, S.O. 1992, c. 24. In part, the Government's initiative was in response to concerns raised by municipalities throughout the province over the perceived lack of control over

commercial gaming and the perceived growth of unlicensed gambling, including gambling on *Indian Act* reserves.

[11] In April 1993, the Government decided to take the initiative a step further. It announced that it would enter into negotiations with Ontario's First Nations to permit casino gambling on First Nation reserves, that the negotiations would take place collectively under an "umbrella structure," and that items subject to negotiation would include the number of casinos that would be established, the regulatory framework governing them, and revenue sharing.

[12] The negotiations took place between May 1993 and February 1994. Although not described as such in the Agreed Statement, they evolved in the context of what were known as the Aboriginal Gaming Section ("AGS") meetings. From September 1993 onwards, the AGS meetings were chaired by the principal Government representative, John Rabeau. Rabeau's negotiating authority came directly from (and was circumscribed by) Cabinet decisions.

[13] While the issues at trial centred on what contractual rights and obligations arose as between MFN and Ontario respecting revenue sharing, if any, from the negotiations, there is no dispute that there was ultimate agreement that the establishment of the pilot First Nation casino would proceed on the following grounds:

a) there would be one pilot First Nations casino, located on an *Indian Act* reserve;

b) the host site would be selected by an independent panel based on selection criteria developed through negotiation with Ontario;

c) the casino would be conducted and managed by Ontario[4]; and

d) the casino was to benefit First Nations by giving all First Nations a share of the funds generated by the casino.

[14] How the "share of the funds generated by the casino" was to be divided between the host First Nation and all First Nations is at the heart of the lawsuit.

[15] Ontario initially took the position that it anticipated receiving some of the net revenue from the casino beyond cost recovery. However, it subsequently retreated from that position when Rabeau announced, at an AGS meeting in February 1994, that Ontario would be "revenue neutral" with respect to casino profits. Minister Churley, the Minister of Consumer and Commercial Relations at the time, and Minister Wildman, then Minister of Native Affairs, confirmed that position at a later meeting.

[16] The parties also agree that through the negotiations, Ontario and the participating First Nations agreed upon a set of selection criteria, to be applied by an independent selection panel (the "Selection Panel") in deciding which First Nation would be the host of the pilot First Nation casino. What they do not agree upon is whether those selection criteria dictated that the host First Nation's revenue share was to be determined by the Selection Panel as part of the site selection process.

[4] Section 207 of the *Criminal Code* authorizes provincial governments to conduct and manage commercial casinos, as an exception to the general prohibition against commercial gaming set out in s. 206 of the *Code*.

[17] The Selection Panel was an independent body composed of four members chosen from nominees put forward by First Nations and approved by Ontario.

[18] The deadline for proposals from interested First Nations was February 28, 1994. Fourteen proposals were submitted, including one from MFN and, in May 1994, the Selection Panel began the process of considering and evaluating them. We shall examine the events leading up to the submission of proposals and the interchanges between MFN and the Selection Panel in greater detail as these Reasons evolve.

[19] On December 5, 1994, the Selection Panel announced it had selected MFN as the host site of the First Nations casino on lands forming part of MFN's reserve.

B. The AGS Meetings & the Rabeau Criteria

[20] Ten AGS meetings took place between May 1993 and the end of February 1994. They dealt with many topics relating to casino gambling and the commercial participation of First Nations in the project, but for purposes of this appeal, the most pertinent topics were the Selection Panel's mandate and the site selection criteria it was to apply.

[21] As previously noted, Ontario's key representative at the AGS meetings was John Rabeau. Although all First Nations were invited to attend, the meetings were attended primarily by representatives of First Nations seeking to become host nations, but, as the trial judge noted, "not every one, and not all the time". Grand Chief Joe Miskokomon of

the Union of Ontario Indians ("UOI")[5], and the member of the Chiefs of Ontario executive responsible for the gaming portfolio at the time, was the lead negotiator for the First Nations. The Regional Chief of all First Nations in Ontario at the time, Gordon Peters, was also involved, as was Ted Williams, MFN's Band Manager.[6]

[22] Summaries or minutes of the AGS meetings were kept. They were made exhibits by agreement, and played a prominent role at trial. They were admitted into evidence by agreement not only for their authenticity but also for the fact that the statements attributed to the various participants were actually made by them. At the end of the day, however, the trial judge found the evidence to be "undoubtedly of some assistance" but not "dispositive, in all respects of what happened at [the] meetings". As this finding is controversial, we shall return to it later.

[23] We shall not review what transpired at the AGS meetings in full detail, as the trial judge gave them fulsome consideration. However, some of the events are significant for purposes of the appeal.

[24] Revenue sharing between the host and other First Nations was a prominent subject of discussion at the AGS meeting of October 20, 1993. One representative – Joe Hare of the West Bay First Nation – held out for the U.S. model of Aboriginal gaming, namely one where the host First Nation keeps most, if not all, the revenues. This proposal was

[5] The UOI is one of the four Ontario Provincial-Territorial Organizations ("PTOs"). Each of the PTOs has a Grand Chief that represents, facilitates and communicates issues of concern on behalf of its bands.
[6] The Ontario Regional Chief co-ordinates, facilitates, and deals with the Province on issues of common concern to First Nations.

completely unacceptable to Ontario, partly because of Ontario's policy of limiting the number of commercial Aboriginal gaming casinos to the single pilot site to be determined. It was also unacceptable to others at the meeting.

[25] The trial judge found that prior to this meeting there was no consensus on the extent of revenue sharing, or on how any specific plans for revenue sharing would play out in the proposal process itself. He also found that at the end of the meeting, no agreement had been reached on whether the revenue sharing formula would include a pre-determined share for the host First Nation, since the Province never accepted such a concept.

[26] What happened following the October 20 meeting is important. The First Nations negotiating team, through Deputy Grand Chief Vernon Roote of the UOI, circulated a letter professing to confirm an agreement reached at the meeting and attaching a list of criteria with certain descriptors for the Site Selection Process. Rabeau responded by letter dated October 27, 1993. In it, he noted the following:

> While agreement in principle was reached on the site selection categories set out in [Deputy Grand Chief Roote's letter], some First Nations expressed concern with a number of individual recommendations. Specifically, First Nations suggested that the descriptions of several of the recommendations were too specific and would disqualify any First Nation that could not meet them from submitting a casino proposal. [Emphasis in original.]

[27] Attached to this letter was a table setting out Rabeau's list of criteria and descriptors pertaining to the Site Selection Process (together "Exhibit 25"). The table had

two columns – a left-hand column entitled "Criteria Categories" and a right-hand column entitled "Suggested Criteria Elements for Evaluation Purposes". We shall refer to the "Criteria Categories" in the left-hand column, as the "Rabeau Criteria". They became a central feature of the evidence because the trial judge relied on them in arriving at his factual finding that revenue sharing remained an issue to be determined after the Site Selection Process had been completed.

[28] The table contained the same criteria as had been set out in Deputy Grand Chief Roote's letter, along with an additional "First Nation cooperation" criterion, but there were some differences in the descriptions of various criteria (the right-hand column items), as well as a key difference in the reference to the "revenue sharing" criterion in the left-hand column. The Rabeau Criteria incorporated a significant, and controversial, "qualifier" in the left-hand column of the revenue sharing criterion:

CRITERIA CATEGORIES	SUGGESTED CRITERIA ELEMENTS FOR EVALUATION PURPOSES
REVENUE SHARING (Revenue sharing must be addressed in submissions from First Nations interested in establishing a casino. *The issue, however, will be subject to ongoing negotiations*.) [Emphasis added.]	how will profits be shared among First Nations? with the province? what economic benefits will accrue to surrounding communities?

[29] At trial, the parties appear to have accepted that the items in the left-hand column of the table represented the criteria to be applied by the Selection Panel and that the contents of the right-hand column represented descriptors of those criteria that the Selection Panel could consider. There was robust disagreement, however – to which we will return – over whether the italicized reference to revenue sharing being "subject to ongoing negotiations" ("the Qualifier") was something to which the parties had agreed.

[30] The Rabeau Criteria were circulated to the AGS meeting participants and were the subject of much discussion at two subsequent AGS meetings on November 18 and December 14, 1993. We will return to a further discussion of the evidence relating to the Rabeau Criteria and the Qualifier later in these Reasons.

[31] Another important document was circulated prior to the December 14 AGS meeting. AGS staff prepared and distributed a document entitled "Policy Objectives, Site Selection Criteria and Other Issues for a First Pilot Casino in Ontario" (the "Policy Objectives"). This document was marked as Exhibit 45 and became a focal point at trial; the trial judge cited it at length. For present purposes, we need only refer to the following statement that it contained about the site selection criteria:

> An impartial selection panel is being established from nominations submitted by First Nations. The selection panel will use the policy objectives and criteria (in the left hand column *of the attached document*) to evaluate site proposals. The right hand column contains <u>suggested</u> elements of the criteria which were provided by First Nations. The elements are intended to provide additional <u>suggested</u> guidance to the panel.

…

> Some issues remain to be negotiated between Ontario and First Nations. [Underlining in original; italics added.]

[32] The attached document referred to in the foregoing statement was the table from Exhibit 25 containing the Rabeau Criteria.

[33] Williams agreed that the Policy Objectives were an "accurate reflection of those discussions that took place [at the November 18 AGS Meeting]" where the Rabeau Criteria were first discussed. This, even though he had earlier rejected the suggestion that the Rabeau Criteria had been agreed to. At trial, Gordon Baker, the lawyer who had advised MFN in its casino dealings, testified that the Policy Objectives – including the attached Rabeau Criteria – constituted the request for proposal ("RFP") upon which the appellant founded its RFP/tender argument. In closing submissions at trial, MFN's counsel described the Policy Objectives and their attachment as "the most accurate and authoritative 'criteria document' in evidence." The trial judge found that MFN accepted the validity of the Rabeau Criteria and that the Policy Objectives document was sent to all First Nations as the authoritative criteria document.

[34] Two AGS meetings in February 1994 are important in helping to set the stage for our analysis of the issues raised by the appellant. They were held on February 8 and February 24. These meetings were not devoted to the issue of the criteria for the Site Selection Process. Instead, they dealt with a number of issues, including a proposal put forward by Rabeau at the February 8 meeting that Ontario would take a share of the net

profits from the casino revenues. This proposal created what the trial judge referred to as a "firestorm" and, at the February 24 meeting, Rabeau backed off, declaring that Ontario would remain "revenue neutral" with respect to the profits and would look only for recovery of costs actually incurred.

[35] The trial judge found that Rabeau reiterated a number of themes at the February meetings that he maintained throughout his discussions with the First Nations, and throughout his evidence, namely that: (i) gaming profits would not accrue exclusively to the host First Nation but would be shared among all First Nations according to a formula to be developed by the First Nations without interference from Ontario; (ii) revenue sharing would only apply to gaming revenues and the host First Nation would be entitled to retain all non-gaming revenues; and (iii) the host would benefit from other spin-offs, including employment opportunities for members of the community and additions and improvements to reserve infrastructure.

C. The MFN Proposal

[36] MFN submitted its proposal to host the pilot First Nations casino on February 28, 1994 (the "February Proposal"), the deadline established in the AGS meetings. Thirteen other aspiring host First Nations did as well. Some of these proposals contained a specific revenue sharing formula showing the percentage of profit the proponent was prepared to allocate to all First Nations and the percentage it would retain. Tellingly, MFN's February Proposal did not contain any such formula.

[37] The February Proposal was more than 100 pages in length and was primarily prepared by Bally's, a U.S. casino operator and MFN's advisor on casino matters at the time. It addressed all the Rabeau Criteria except one – revenue sharing. As the trial judge succinctly put it, the February Proposal was "singularly silent" on that subject. In particular, it said nothing about MFN receiving 35% – or any amount – of the net revenues from the casino. MFN was content to leave revenue sharing to a couple of oblique references in accompanying letters to Minister Churley and to Rabeau concerning MFN's willingness to distribute gaming profits equitably with other First Nations. We shall return to the February Proposal's silence on revenue sharing later.

D. The Minister's Statement and the May 4, 1994 Meeting

[38] In a meeting with Aboriginal leaders on April 26, 1994 and in a confirming letter sent the following day to Chief Peters, Minister Churley confirmed that Ontario would not be taking any share of the casino revenues by way of a tax.[7] She also advanced the notion of a First Nations' "fund" that would become "the mechanism for ensuring the sharing of revenues among First Nations throughout Ontario." Minister Churley's speaking notes from the meeting state:

> Obviously substantial work needs to be done to develop the appropriate mechanism to ensure that this sharing takes place on a fair and objective basis. I believe the negotiating table for this fund **must represent** the interests of all First Nations. I look forward to working with you in establishing this negotiating table. [Emphasis in original.]

[7] When a newly-elected government came to power, the Province changed its position and imposed a 20% win tax. As noted later in these reasons, the new tax led to litigation between the Government and Ontario's First Nations.

[39] This statement was reflective of Ontario's position that 100% of the gaming profits were to be shared among all First Nations and that the host would be compensated out of operating costs. In addition, Minister Churley announced that Ontario would not agree to the establishment of a separate Aboriginal Gaming Commission, another issue of contention at the AGS meetings.

[40] Whether in response to the rejection of the Aboriginal Gaming Commission concept or to the notion of the 100% fund is not clear, but these statements by Minister Churley led to Grand Chief Miskokomon calling a further meeting of Aboriginal leaders held in Sault Ste. Marie on May 4, 1994. John Rabeau was at the meeting. He took considerable heat from those in attendance both over the Minister's decision that First Nations' gaming would not be controlled by First Nations and over her stated position that 100% of the casino profits would go to a fund for distribution among all First Nations. The meeting with Rabeau was followed by another in the afternoon, involving First Nation representatives only.

[41] The May 4 meetings were recorded and a transcript was prepared for the assistance of the trial judge. The trial judge made a number of findings concerning the meetings, based upon his review of the tape and transcript, together with his assessment of the evidence of Chief Nora Bothwell-Sawyer and Chief Stinson (MFN's witnesses) and of the evidence of Grand Chief Miskokomon and Rabeau. He found for example, that:

(i) Not unlike the AGS meetings, there were discussions that appeared to be at cross-purposes;

(ii) At least one chief, Joe Hare, expressed the view that revenue sharing was to be dealt with in the initial proposal, that it was not to be negotiated thereafter, and that it formed an integral part of a proponent's submission (Chief Hare continued to advocate the adoption of the U.S. tribal casino model, whereby most of the gaming revenues would inure to the host First Nation);

(iii) The "Hare position" on the proposal process was endorsed by at least two UOI functionaries or technicians in attendance, although Grand Chief Miskokomon, if not others, thought Chief Hare was merely posturing for future negotiations in the event that his First Nation's proposal was accepted;

(iv) The MFN representative, Chief Stinson, while appearing to take issue with Rabeau's suggestion that revenue sharing was to be a matter for First Nations negotiation after the Site Selection Process was complete, gave no indication

that MFN understood negotiations would take place only between the individual proponent and the Selection Panel, and only during the Site Selection Process itself;

(v) Chief Stinson did complain that the now-expressed Ontario position had worked a hardship on the proponents, including MFN, in terms of costs incurred to that point in the process;

(vi) Rabeau, while acknowledging that revenue sharing should have been addressed in the proposals, did not agree that once a position was expressed, it would then be determinative of that issue. Instead, he maintained the position that gaming profits would be shared among First Nations, that the host would be entitled to a reasonable return on its investment, that the payments received by the host would come out of the casino's operations, and not out of net revenues, and that the determination of the shares among the nations would be a First Nations decision, which would not be interfered with by the Province;

(vii) Rabeau further suggested that the Province's role would be limited to oversight to ensure that the process was fair, transparent and representative of all First Nations;

(viii) Grand Chief Miskokomon reiterated the Province's position on revenue sharing to those in attendance at the afternoon caucus, which engendered a wide range of responses, and a sense among some participants that the Province's now-asserted position was another in a long line of broken promises;

(ix) There was discussion thereafter, without conclusion, about a variety of potential strategies, from an all-out assault upon Minister Churley, to the assertion of an informal legal position expressed by the UOI solicitor, to formal and informal entreaties to Premier Rae; and that

(x) Nothing further was done by the Province, the UOI, or the other First Nations in the wake of the Province's announcement that 100% of the net gaming

revenues was to be shared by decision of a First Nations committee after site selection.

E. The Selection Panel, Its Mandate and Process

[42] Shortly after the May 4 meeting, the Selection Panel was struck and began its work of assessing the proposals. It developed "Terms of Reference" and held an informal explanatory meeting for representatives of the 14 proponents. MFN did not attend. At that meeting, the chair, Altin Paulson, explained the process the Selection Panel would follow. It would assess the proposals using the Rabeau Criteria and, while it would be guided by those criteria, it would develop its own protocol for reviewing proposals and would call for more information from proponents as required.

[43] As the mandate of the Selection Panel was a matter of dispute at trial, the Terms of Reference are of some importance. In part, they state:

Terms of Reference
Site Selection Panel: First Nations Casino

Background

The fundamental principle identified with respect to the First Nations casino initiative is the sharing of First Nation casino profits among First Nations. The economic benefits associated with the First Nation casino will not accrue solely to the host community but will be broadly accessible to Ontario's First Nations.

The mechanism by which these profits are made available for the use of First Nations and aboriginal people *has yet to be determined*…

Objectives

The objective of the selection process is to select from among the 14 proposals submitted *the site* of

> the single First Nations casino…
>
> ...
>
> ***Selection Criteria***
>
> The negotiation process between Ontario and First Nations resulted in jointly developed site selection criteria which will be used to determine where the First Nations casino will be located. The criteria included the economic, infrastructure and social considerations important to the selection of a suitable site for a commercial casino operation.
>
> *The selection criteria used by the Selection Panel relate directly to the issue of where the First Nation casino is best located* and do not relate to the selection of the operator of the casino. *The decision of the Selection Panel is also limited to the selection of the site* of the First Nations casino and does not extend to the operator of that facility.
>
> [Emphasis added.]

[44] Paulson was very clear in his evidence that the Selection Panel's mandate related solely to the selection of the site and did not extend to negotiating or entering into an agreement on behalf of Ontario with the successful proponent regarding the host First Nation's share of revenues. Rabeau, Grand Chief Miskokomon and Chief Peters all testified to the same effect. Chief Peters observed that "[i]t would be unreasonable for us to believe that a technician and three Americans [i.e., the members of the Selection Panel] would have the ability to make any kind of decisions [about revenue sharing] in that role." Williams testified to the contrary, on behalf of MFN, taking the position that the Selection Panel was authorized to decide the host's share of gaming profits. The trial judge accepted the evidence of Paulson, Rabeau, Grand Chief Miskokomon and Chief

Peters on this issue and held ultimately that it was "the Panel's published and expressed mandate that it would decide on site selection only."

[45] By June, the Selection Panel had pared the number of proponents down to seven, including MFN. In assessing MFN's proposal, the Selection Panel noted that it "talk[ed] about a commitment to the philosophy of sharing but there are no formulas or figures provided."

[46] After reducing the number of proponents to seven, the Selection Panel announced that it would be visiting each of the proposed sites. It attended at the MFN reserve on two occasions – July 14 and November 18, 2004 (the latter after the number of proponents had been reduced to a short list of three).

(1) The July 14, 2004 Site Visit and Proposal

[47] Before the July 14 site visit, the Selection Panel wrote to MFN asking that it address a number of issues including revenue sharing – in particular, that MFN explain its proposal for revenue sharing with other First Nations and the philosophy behind it. The Selection Panel asked for this information, Paulson said, because it was important for the Selection Panel to select a site that would benefit all First Nations.

[48] During the site visit, MFN presented what Paulson described as "a full-blown dog and pony show" – one of the most elaborate presentations they had had from any First Nation. With respect to revenue sharing, however, Paulson testified that Chief Stinson simply "gave a little overview and kind of generally said, yeah, we're hoping to get it [the

casino], and we're willing to share some of this with our First Nations brothers and sisters." No numbers or percentages were presented.

[49] That was not what the Selection Panel was looking for, though. Paulson testified the members wanted a little more clarity about what MFN meant by its superlatives concerning its commitment to "sharing for the common good." He explained:

> Well, we're not looking for necessarily numbers, we're looking for what's in their [MFN's] head. Are they going to share 20 per cent of it, 50 per cent of it, hundred per cent, 90 per cent? What's in their mind? We have one shot at this.

[50] Following the July 14 site visit, Bally's lawyer sent a letter to the Selection Panel on behalf of MFN addressing the Selection Panel's request for more specifics (the "July Proposal"). The letter proposed a revenue sharing formula that would have the net revenues from the casino divided 30%/70% – 30% to the operator of the casino (which Bally's naturally hoped it would be) and 70% to the First Nations (of which half would go to MFN and the other half would go to the other First Nations).

[51] Bally's lawyer stressed that the revenue sharing proposal was not determinative, but merely "a basis for discussion" and that all parties "wish[ed] to remain flexible". MFN had little input into the preparation of this revenue sharing proposal. Williams – the Band Manager and point man for the site selection negotiations – acknowledged that he had no input and had not seen the letter until after it was submitted. Chief Stinson testified that the split suggested between MFN and the other First Nations was "very

generous and very good for everybody involved at the time", but that the overall proposal was "very scary" because of the amount of the revenues going to the operator.

(2) A Change of Council and the MFN Plebiscite

[52] In October 1994, the Selection Panel announced that MFN was one of three finalists for the position of host First Nation. In the meantime, two significant events occurred. First, Chief Stinson and MFN's Council were replaced in office by Chief Lorraine McRae and a new Council. Chief McRae was not a supporter of the casino quest but committed to be bound by a plebiscite on the issue. In the plebiscite, the community answered "yes" to the question: "Do you want a casino-resort operating on the Chippewas (Mnjikaning) of Rama First Nation?"

[53] There is little evidence of any discussions about the July Proposal put forward by Bally's at the various community meetings held during this process. While the trial judge found "some evidence that the 35% figure was bandied about from time to time," it was unhelpful because it was unclear against what benchmark the percentage was being applied (gross or net revenues) and the trial judge was not satisfied that anyone really understood "the math, the economic impact the casino would have on the community, or whether [as MFN's witness, Byron Styles, testified] the revenue discussion was merely 'pie in the sky'."

[54] The second event was that Bally's and MFN parted company, freeing MFN of a potentially onerous split of net revenues with its operator.

(3) The November 18, 1994 Site Visit and Proposal

[55] On November 18, 1994, MFN received its second, and last, site visit from the Selection Panel. During that visit, the Selection Panel was presented with a revised MFN revenue sharing proposal (the "November Proposal"). The spreadsheet included in the November Proposal contained a revenue sharing formula. It was prepared by Williams and MFN's financial officer, Jeff Craik, and quickly approved by Chief McRae during the site visit, and then presented to the Selection Panel as they were leaving. There was no discussion with the Selection Panel about the spreadsheet, which included the following revenue sharing formula:

> Gross Revenues
> - 25% to other First Nations
> - 2.75% to the operator
>
> Funds for distribution (net profits)
> - 60% to other First Nations
> - 35% to MFN [as host]
> - 5% to the operator

[56] The formula also provided for MFN to receive set payments of $750,000 per year for ground rent and at least $3 million per year for municipal services.

[57] This revised revenue sharing formula as set out in the November Proposal, *in its entirety*, became the document upon which MFN ultimately based its contract theory at trial.

(4) Selection of the Host Site

[58] On December 5, 1994, the Selection Panel announced that it had chosen MFN as the host of the First Nations casino. MFN alleges that by choosing it as the host, the Selection Panel accepted its revenue sharing formula as contained in the November Proposal, thus constituting a binding contract.

F. Events Following the Site Selection Announcement

[59] Many things remained to be done following the choice of MFN as the host First Nation. In general, these involved: (i) the development of a RFP process for the selection of a casino operator; (ii) the negotiation and completion of the Development and Operating Agreement of March 1996, respecting the operation of the casino (the "DOA"); and (iii) various meetings and consultations among Ontario's First Nations about how the net revenues from the casino were to be distributed among them, including the host First Nation (the "Revenue Sharing Meetings").

[60] The respondents relied at trial, and continue to do so here, on numerous acts and statements of MFN representatives during these events that they allege are inconsistent with MFN's contractual argument and with its professed belief that it had a binding agreement to receive 35% of the net revenues as a result of being selected as the host First Nation.

[61] We shall return in some greater detail to this part of the story in the Analysis portion of these Reasons. Suffice it to say, for the moment, that the highlighted actions

and statements relied upon by the respondents include: (i) MFN's lack of adherence to many aspects of its November Proposal; (ii) its position before the Supreme Court of Canada in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950; (iii) MFN's actions during various Revenue Sharing Meetings between December 1994 and mid-1997; (iv) various MFN statements in documentation prepared for purposes of the selection of the casino operator and the operation of the casino; and (v) its position at the annual All Ontario Chiefs Conferences (the "AOCCs") between 1996 and 2001.

[62] The Revenue Sharing Meetings stretched on through 1997. As we shall outline later, MFN failed to articulate at any of the Revenue Sharing Meetings that it had anything other than a "draft" proposal – subject to negotiation – whereby it would receive a 35% share of net revenues from the casino operations.

[63] During this period, MFN and Ontario – through the Ontario Casino Corporation – were working out matters relating to the operation of the casino, including the choice of operator. The documentation prepared in this regard – with MFN's direct input – included a draft and a final RFP for the selection of the operator, a draft tripartite Memorandum of Agreement designed to confirm the role and responsibilities of the parties involved in the casino, and the final DOA with an accompanying "Side Letter" (of which more will be said later).

[64] The DOA contained a list of compensation MFN was to receive out of casino revenues:

> Ground Rent and Rent – $3,500,000 annually, adjusted for inflation (as compared to the $750,000 referred to in the November Proposal)
>
> Rama Allocation – $4,500,000 annually, adjusted for inflation (not referred to in the November Proposal)
>
> Specific Local Services – Payments for the provision of local services such as policing, water treatment, sewage, garbage disposal, and snow removal (contemplated, but not particularized, in the November Proposal)

[65] The DOA expressly stated that:

> The Parties agree that the Rama Allocation and the payments to be made under the Ground Lease are intended to be the entire compensation to the Rama Entities *for all services to be provided by any of them in connection with the development and operation of the Complex* (including any profit from services to be provided in respect of parking) other than [payment for the Specific Local Services]. [Emphasis added.]

[66] In 1996 and 1997, the revenue sharing issues came to a head at the AOCCs. In June 1996, MFN asked for the Chiefs' approval of a 35%/65% split of net revenues, and after much debate a declaration was passed at the AOCC to that effect. The duration of that agreement was left for further discussion and, at the June 1997 AOCC, a deal was reached among First Nations that MFN was to receive 35% of net revenues for a five-year period. Ontario ultimately accepted that arrangement.

[67] The following year, MFN intervened in the *Lovelace* case in the Supreme Court of Canada, opposing an application by Ontario non-status Indian Bands and Ontario Métis

to be included in the distribution of the net revenues from the casino.[8] In her affidavit in support of the motion for intervenor status, Chief MacRae testified that the 35% of net revenues sought after site selection was a "request of the [MFN]" which the other First Nations agreed to support.

[68] The issue was revisited at the 2001 AOCC, and the Chiefs rejected MFN's request that it continue to receive a preferential share of net revenues. Instead they passed a resolution that all net revenues would be shared equitably among all First Nations on a going-forward basis.

[69] This lawsuit resulted.

III. THE ISSUES

[70] Against this background, we are asked to resolve the following issues. Did the trial judge err:

a) By failing to give sufficient reasons to explain his findings and conclusions?

b) By making palpable and overriding factual errors in almost every finding he made?

c) By misapprehending and misapplying the law of tender and RFPs?

d) By misapprehending the legal context of the dispute and, in particular, by

    (i) failing to consider the fiduciary duty of the Province to First Nations;

    (ii) misapprehending the legal status and relationship of First Nations; or

[8] In 1996, the Province announced that the revenues flowing from Casino Rama would be shared only by Ontario First Nation Communities registered as bands under the *Indian Act*.

(iii) misapprehending the Aboriginal cultural context? or

e) By engaging in excessive and improper intervention in the presentation of evidence and during closing argument?

[71] We would answer each of these questions in the negative.

IV. LAW AND ANALYSIS

[72] On appeal, MFN launched what can fairly be described as a scorched-earth attack on the trial judge's findings of fact, his legal conclusions, the sufficiency of his reasons and his conduct of the trial. We shall deal with the trial judge's legal conclusions and his comportment during the trial later in these Reasons. First, we turn to the attack on his reasons and findings of fact.

A. Sufficiency of Reasons

[73] In connection with MFN's factual attack, the appellant raises an insufficiency of reasons argument, contending that the trial judge's reasons are "so cryptic or incomplete as to provide little insight into the fact-finding process." It submits the reasons "suggest either that the trial judge failed to grapple with the admittedly complex evidence before him, or he did not adequately disclose his reasoning."

[74] This argument is without merit. The trial judge's reasons are careful, thorough and analytical. MFN may not like the result, but it is surely able to understand why its action was dismissed, and the reasons provide ample clarity and transparency to facilitate meaningful appellate review: see *R. v. Sheppard*, [2002], 1 S.C.R. 869, at para. 55; *R. v.*

Braich, [2002] 1 S.C.R. 903, at paras. 40-41; *R. v. R.E.M.*, [2008] 3 S.C.R. 3, at paras. 52-57.

B. Alleged Fact-Finding Errors

[75] Mr. Tunley submits, on behalf of MFN, that the trial judge made errors both in his primary findings of fact, flowing directly from his assessment of the evidence, and in the inferences he drew from those primary findings. He concedes that each type of error is reviewable on a standard of "palpable and overriding error": *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at para. 10: *Waxman v. Waxman* (2004), 44 B.L.R. (3d) 165, at para. 291 (Ont. C.A.), leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 291.

[76] The trial judge made four essential findings: (1) there was no agreement between Ontario and First Nations to have the Selection Panel determine the share of casino revenues to flow to the successful host First Nation; (2) conversely, there was an agreement that revenue sharing between the host First Nation and the other First Nations would be negotiated separately, after site selection, at a different negotiating table with a larger representation of First Nations; (3) there was no contract entered into between MFN and Ontario as a result of the AGS meetings and the Site Selection Process, or thereafter, entitling MFN to a 35% share of net revenues from the casino; and (4) MFN's representatives had neither an objective nor a subjective belief contrary to any of the foregoing.

[77] MFN argues on the appeal that these findings constitute palpable and overriding errors of fact, and that the trial judge made numerous other palpable and overriding errors of fact in arriving at them. MFN seeks to rest its attack on the trial judge's conclusions on a wide variety of alleged evidence-addressing errors. For purposes of this analysis, however, the designated errors may conveniently be gathered into three categories. MFN says that the trial judge erred by:

a) misapplying the hearsay rule;
b) making findings that conflict with accepted evidence, including evidence that was the subject of agreement between the parties and admissions by the respondents' witnesses on discovery and at trial; and
c) improperly weighing and assessing the evidence:
    i. by making of findings that were unsupported by or contrary to the evidence,
    ii. by making findings that were based on speculation or on the consideration of irrelevant evidence,
    iii. by misapprehending the evidence, or
    iv. by failing to make findings that were relevant and necessary to the proper determination of the case.

[78] The appellant submits that the sea of fact-finding errors allegedly made by the trial judge – globally and cumulatively and, in some cases, individually – serve to undermine the four critical findings summarized above. In addressing these concerns, we do not

propose to examine every one of the more than 100 fact-finding errors raised. Nor will we address them by legal category because the numerous errors invoked by the appellant – particularly in the various "heads" of evidence-weighing and evidence-assessing flaws – are common to a number of areas. Rather, we will begin with some general observations respecting the fact-finding errors and follow those observations with an analysis of some of the more robustly contested conclusions made by the trial judge, in the context of the four principal findings outlined above.

(1) General Observations

[79] We say at the outset that in our view the record amply confirms the findings of fact and credibility made by the trial judge. The appellant's essential complaint is the trial judge's failure to accept MFN's interpretation of the evidence. In substance, MFN seeks to have us retry the case, something an appellate court is not entitled to do. As this Court explained in *Waxman*, at paras. 294-295, deference to the findings of fact made by the trial judge is particularly important in lengthy and factually complex cases:

> [A]ppellate judges are very much like the blind men in the parable of the blind men and the elephant. Counsel invite the court to carefully examine isolated parts of the evidence, but the court cannot possibly see and comprehend the whole of the narrative. Like the inapt comparisons to the whole of the elephant made by the blind men who felt only one small part of the beast, appellate fact-finding is not likely to reflect an accurate appreciation of the entirety of the narrative. This case demonstrates that the "palpable and overriding" standard of review is a realistic reflection of the limitations and pitfalls inherent in appellate fact-finding.

> Despite the benefit of detailed reasons for judgment, lengthy and effective argument by counsel, and many hours of study, we are entirely satisfied that we cannot possibly know and understand this trial record in the way that the trial judge came to know and understand it. Her factual determinations are much more likely to be accurate than any that we might make.

[80] None of the documentary evidence relied upon by MFN reflects the existence of an agreement with Ontario on revenue sharing. The words relied upon by MFN in the documents are ambiguous and capable of being interpreted in multiple ways. As we will explain later, it does not follow in this *Aboriginal versus Aboriginal* litigation that these ambiguities must be resolved in favour of MFN. Moreover, the testimony of the MFN witnesses (which the trial judge did not accept) was refuted by other evidence from the main players involved in the AGS meetings and the Site Selection Process (much of it from other Aboriginal witnesses, whose testimony the trial judge did accept). It was therefore open to the trial judge to make the findings that he did.

[81] We move now to some of the specific contested findings raised by the appellant.

(2) No Agreement to Have the Selection Panel Determine Revenue Sharing/ Agreement That Revenue Sharing Would be Negotiated Separately, After Site Selection

[82] The greater part of the appellant's fact-finding complaints pertain to the trial judge's key related findings:

a) that there was no agreement the Selection Panel would determine revenue sharing as part of the Site Selection Process, but in fact

b) that the revenue sharing agreement would be negotiated separately, after site selection, at a representative table comprised of all First Nations.

[83] A number of the areas of dispute revolve around the AGS meetings, the subsequent Site Selection Process and the post-selection period. We are satisfied the evidence, read as a whole, confirms the trial judge's findings. In support of their contention to the contrary, however, MFN points to several particular alleged errors. The following are some of the more contentious.

a) The "Qualifier" on Revenue Sharing in the Rabeau Criteria

[84] MFN submits the trial judge erred in finding that the Rabeau Criteria relating to revenue sharing "purported to include a qualifier," namely that revenue sharing "*[would] be subject to ongoing negotiations*" (emphasis added). The appellant contends that the criterion was "Revenue Sharing" simply, and that this meant revenue sharing as determined in the Site Selection Process. Its position is set out in para. 39 of its factum as follows:

> Williams testified that, at the AGS Meeting of October 20, 1993, all parties agreed that "Revenue Sharing" would be dealt with through site proposals. In other words, the proportion of revenue that a bidding First Nation was prepared to contribute to other First Nations through the "Fund" would be expressed in their proposals, and evaluated by the body appointed to select a winner.

[85] We note in passing that MFN did not adhere to this apparent requisite when it submitted its February Proposal.

[86] It is true that there was some evidence with respect to the AGS meeting process that might have supported the appellant's contention. But the trial judge did not accept it. MFN argues, nonetheless, that he committed a palpable and overriding error in finding that the Qualifier applied to the "Revenue Sharing" criterion and that there was an agreement that revenue sharing would be dealt with later, through First Nations' negotiations at a more broadly constituted table. It says this is so principally because the trial judge failed to take into account Rabeau's admission on discovery (which was read in at trial) that the "Qualifier" was never agreed to by the First Nations. They contend that the error tainted the balance of the trial judge's analysis in other respects.

[87] This attack cannot survive a careful reading of the alleged admission and the evidence given at trial.

[88] On discovery, Rabeau was asked about the Qualifier and his letter of October 27, 1993, in comparison to the predecessor letter from Deputy Grand Chief Roote dated October 22, 1993. He was asked these questions in the context of matters arising out of the October 20, 1993 AGS meeting. The central question he was asked that gives rise to the alleged admission was, "[w]ould you agree with me, sir, that there was no agreement *at the October 20th meeting* that that language would be included in the site selection criteria?" (Emphasis added).

[89] Rabeau agreed. His answer was correct. There was no such agreement at the October 20 meeting. Both Deputy Grand Chief Roote's October 22 letter and Rabeau's

October 27 letter postdate that meeting. The agreement respecting the Rabeau Criteria could only have developed later. MFN argues that none did, except for revenue sharing (unqualified with respect to subsequent negotiations) as one of the "broad criteria."

[90] Counsel for MFN returned to this same subject on other occasions during Rabeau's discovery. And indeed, there are portions of Rabeau's testimony both on discovery (as read in at trial) and at trial that are capable of supporting a finding that he conceded there was no agreement on the Qualifier. Equally, however, there was ample basis in Rabeau's testimony, and the evidence as a whole, to support the conclusion that revenue sharing was to be the subject of further negotiation, as the Qualifier stated.

[91] For example, Rabeau said in cross-examination that where they ended up, in his view, was that there was acceptance of the left-hand side of the Rabeau list, with "a sort of permissive approach on the other side." He and Grand Chief Miskokomon both testified that the criteria in the left-hand column of the table – including the Qualifier – were accepted by the First Nations, although they agreed there were discussions during this period about the descriptors in the right-hand column. Rabeau's evidence was that he heard "not one thing from anybody on that parenthetical reference [the Qualifier]." The criteria described in the table became the operative criteria, he said.

[92] Grand Chief Miskokomon echoed Rabeau's evidence on this point and acknowledged that revenue sharing was to be the subject of future negotiations. "While revenue sharing … may very well be addressed in the submissions," and "proponents

might be able to give us some guidance on how they saw [revenue sharing]", he said, at the end of the day:

> [W]e knew that [it] had to all be vetted and it would all have to be examined and it would all have to be discussed and debated, and in the end it would, in [all] likelihood, culminate in an All Ontario Chiefs meeting where there would be, again, debate and discussion and other proposals perhaps put forward, and subcommittees for that, but eventually we would have to come to a decision which would be the Chiefs of Ontario which would make that finalized decision.

[93] Other documentation subsequent to the October correspondence and the November 18 AGS meeting – including the Policy Objectives circulated prior to the AGS meeting on December 14 – supported agreement on the Rabeau Criteria as well.

[94] MFN further submits the trial judge erred in finding that "[n]one of the First Nations representatives took issue" with the Qualifier at the AGS meeting on November 18, 1993. Counsel points to the minutes of the meeting and to the testimony confirming that Deputy Grand Chief Roote indicated at the meeting "that the UOI did not agree with the descriptions of the criteria in the revised working document" (i.e., the Rabeau letter of October 27 and attached table containing the criteria) and that "it required further clarification". Indeed, MFN says that Rabeau himself acknowledged this in a follow up letter dated November 25, 1993, where he wrote, "[w]hile some First Nations indicated concern or disagreement with the document's proposed description of certain criteria elements, Ontario and First Nations did agree in principle that the broad categories … should form the basis of proposals."

[95] However, as the respondents point out, that evidence referred to a disagreement over the *descriptions* of the criteria contained in the right-hand column of the Rabeau Criteria, not over the criteria themselves, as listed in the left-hand column. The Rabeau and Miskokomon testimony cited above confirms this, and the trial judge was entitled to accept that evidence.

[96] The trial judge recognized that "[t]he parties' understanding of [the Qualifier], and whether [it] formed part of the agreed-upon criteria, were central issues in [the] lawsuit." He addressed the issue directly.

[97] We are satisfied on a reading of the Rabeau evidence as a whole – taken together with the abundance of other evidence accepted by the trial judge – that the trial judge made no error in finding, as he did, that there was ultimate agreement on the Rabeau Criteria (including the Qualifier), and that revenue sharing would be the subject of post-selection negotiations among First Nations at a more representative negotiating table. In our view, the "admission" relied upon by the appellant is not clear, when taken in its entire context, and the trial judge was entitled to proceed by resolving the Qualifier issue on the basis of his assessment of the conflicting testimony he had in front of him and in making the credibility findings and factual findings that he did.

b) The December 3, 1993 "Consensus Draft"

[98] In conjunction with the "Qualifier" point, MFN asserts that the trial judge erred by ignoring what it calls a "consensus draft" on the site selection criteria, prepared by First

Nations representatives on December 3, 1993. Counsel submits this was an important piece of evidence confirming an agreement that revenue sharing was an important criterion with no qualifying language. This document listed "revenue sharing" as one of the three "major elements" of the site selection criteria, the other two being marketability and profitability, and suggested proposed weightings for the various criteria. With respect to the revenue sharing criteria, it proposed a weighting scale of 1 to 50 and said: "[t]he casino project must apply a certain percentage (i.e. 20% net profit) to a capital development fund for the First Nations to access for infrastructure development."

[99] There was no evidence at trial that the December 3 document was a "consensus draft", however. The document was a product of a technical committee meeting. The Grand Chief of the UOI at the time, Joe Miskokomon, described the document as "just part of an ongoing debate". Rabeau said the proposed weightings were not accepted at the AGS meetings, and Williams agreed that the Selection Panel "wouldn't be bound by [the] December 3rd draft."

[100] The trial judge did not ignore the December 3 document, as MFN contends. He addressed it directly in his reasons, concluding that, while the document was the subject of much discussion at the AGS meeting in December, "it [did] not appear that it was given to, or relied on, by the Panel during the course of its deliberations." We see no error in this regard.

c) Inconsistent Resort to the Hearsay Rule

[101] MFN raises four examples of ways in which the trial judge erred in his fact-finding function by erroneously (and inconsistently) applying the hearsay rule. These complaints are said to undercut the trial judge's findings on the manner in which revenue sharing was to be determined. A close examination of the alleged errors does not bear out the appellant's concern, however, and, in any event, there was ample other evidence in the record to support the findings the trial judge made.

(i) *Hearsay: The September 22, 1994 UOI Meeting*

[102] In September 1994, there was a UOI-organized meeting of First Nations to address concerns raised by representatives of the Georgina Island First Nation arising out of its early elimination from the Site Selection Process. The complaint was that Georgina Island had understood there would be a two-step process – the first focusing on selection of the physical site and the second on the other criteria including revenue sharing. The representatives at the meeting were polled about their understanding concerning the "two-staged" process and, according to Williams, who was at the meeting, all proponents, except the Georgina Island representatives, agreed on a single process, leading to a single decision, based on "full-blown proposals."

[103] This and other evidence about that meeting, argues MFN, support its position about the site selection and RFP process, but the trial judge, without reasoning or explanation, "rejected the MFN witnesses' interpretation" of the meeting as hearsay that was "of little or no moment." The appellant contends that the evidence was not hearsay.

[104] The context in which the trial judge's remarks were made was with respect to his finding about the Selection Panel's mandate – an important finding, to be sure. He writes:

> Finally, I accept the evidence of Altin Paulson, the Panel chairperson, as it relates to his understanding of the Panel's mandate. Mr. Paulson testified that he understood and believed that his mandate was limited to site selection, albeit based on a consideration and application of the negotiated Rabeau Criteria, and that the Panel had no mandate to negotiate a revenue-sharing agreement. I have come to this conclusion based on his evidence taken as a whole, and considered in light of the documentary evidence to which I previously made reference. In so doing, I have rejected the MFN witnesses' interpretation of a September 1994 meeting, at which members of the Georgina Island proposed group ("Consortium") were heard to complain about their early elimination from the selection process. *The hearsay evidence I received was, in the final analysis, of little or no moment in discerning the collective mindset of the Consortium,* which was, as well, not assisted by the evidence of then Chief Nora Bothwell-Sawyer, whose First Nation was a party to that bid. [Emphasis added.]

[105] We make the following observations about that finding. First, it was open to the trial judge to accept Paulson's testimony based on his testimony as a whole, supported as it was by the documentary and other evidence on the record. Secondly, it was open to him to reject the MFN witnesses' interpretation of what went on at the meeting, based on the same and other evidence. Thirdly, the evidence consisted of testimony given by Williams and Chief Bothwell-Sawyer about statements made by others at the meeting who were not called as witnesses; it was, indeed, hearsay.

[106] In any event, the trial judge does not appear to have rejected the testimony of the MFN witnesses regarding the meeting and the whole question of the Selection Panel's mandate on the basis of that hearsay evidence; rather, he found it of little assistance in helping him determine the mindset of the Georgina Island consortium.

[107] Finally, there was ample evidence on the record from other sources to justify his overall finding on the mandate point, rendering the hearsay "of little or no moment" on the point.

(ii) ***Hearsay: The December 14, 1994 Planning & Priorities Committee Meeting***

[108] MFN's second "hearsay" complaint is that the trial judge relied on the minutes of a December 14, 1994 Planning & Priorities Committee ("PPC") meeting to conclude that MFN Councillor Arnold Ingersoll had told the PPC that "a 'draft' profit-sharing formula had been developed, which would see 25% of the gross revenues and 60% of the net revenues distributed to the other First Nations." The PPC (now called the Political Confederacy) is the lead policy development and implementation committee within the Chiefs of Ontario and is comprised of Grand Chiefs, Regional Chiefs and Elders.

[109] The PPC minutes record Ingersoll as saying, "[a] draft profit-sharing formula has been developed – 25% off the top and 60% off the bottom for First Nations. i.e., if the profit for one year is $300M, that would be about 33-35% or $100M to other First Nations."

[110] MFN says Ingersoll's evidence was that he did not believe he had used the word "draft," and there was no evidence from anyone else that he had. The minutes were hearsay which the trial judge should not have relied upon. MFN cites this as another example where the trial judge ignored evidence in its favour and relied on hearsay to buttress his findings against it.

[111] However, Ingersoll conceded in cross-examination that he could not remember whether he had used the word "draft" or not, and that the note taker at the meeting had been left with the impression he had. Chief Peters, who was also at the meeting, testified that he understood the Ingersoll formula to be just one of the proposals that people were floating on the revenue sharing issue. The trial judge's conclusion that Ingersoll had used the word "draft" as recorded in the minutes was not just based on the minutes. It was supported by Chief Peters' testimony about the meeting, by Ingersoll's own uncertainty, and by Ingersoll's overall lack of credibility (the trial judge found "that his evidence relating to what happened left [him] more puzzled than not").

(iii) ***Hearsay: The Alfieri Letter of October 31, 1995***

[112] Thirdly, MFN argues that the trial judge improperly relied upon the contents of a letter dated October 31, 1995 from Dominic Alfieri, president of the Ontario Casino Commission, to Ted Williams. The letter was part of an exchange that followed a meeting the previous week attended by Williams, Baker and Alfieri with a representative of the new casino operator. At that meeting, Williams took the position asserted by MFN in this lawsuit, namely that MFN had a deal to receive 35% of the net revenues. In a

letter to Alfieri dated October 26, 1995, Williams reiterated the position, and he and Baker assembled and sent to Alfieri a package of materials designed to support MFN's position.

[113] Alfieri's responding letter of October 31, in turn, reiterated Ontario's position that revenue sharing was a matter to be dealt with in post-site selection negotiations and that the host First Nation was not to receive a preferential share of gaming revenues. He observed that the Ontario Casino Corporation had agreed to fund certain community facilities as part of the project based on "the principle that the host First Nation would not receive a direct share of the gaming revenues or any other revenues from activities that form an integrated part of the casino operations." Williams, Craik and Baker all denied this latter suggestion at trial, and MFN argues that the trial judge erred in accepting Alfieri's statement in the letter for the truth of its contents.

[114] MFN's criticism is, again, based on a misapprehension. The October 31 letter formed part of the agreed documentation filed at trial, its authenticity admitted. Williams received and read it. The statements in the letter are not hearsay to the extent that they articulate the Ontario Casino Corporation's position (and, therefore, Ontario's). They are therefore relevant and admissible – as the respondents argue – on the issue of MFN's state of mind, and whether it had an objective or subjective belief, based on Ontario's conduct, about its contractual rights. On the issue of the truth of the statements themselves, the trial judge's reference to the letter was part of his description of the narrative, and appears to have been of little moment in the end. He ultimately dismissed

the "paper war" between Williams and Alfieri on the basis that "Alfieri washed his hands of the debate and told MFN that it had to deal with [the Minister], as the matter was not within Alfieri's bailiwick."

(iv) ***Hearsay: First Nations Revenue Sharing Committee Meeting, 1996***

[115] In late 1995, the Chiefs of Ontario established a Revenue Sharing Committee, chaired by Chief William McCue of the Georgina Island First Nation. The McCue Committee met on January 29, 1996. Chief McRae and Arnold Ingersoll attended for MFN and Ingersoll made a presentation concerning revenue sharing that contemplated a distribution on the basis that MFN would receive 35% of net revenues, the operator 5%, and the other First Nations 60%. MFN argues that the trial judge impermissibly relied upon a hearsay note in the draft minutes of that meeting indicating that Ingersoll had said that this split was "still to be negotiated" between MFN, the other First Nations and the operator. In doing so, the trial judge noted, "[i]n other words, he was never heard to affirm the position advanced in this lawsuit, namely that the sharing of the net revenue, if not the gross, had already been accomplished by the Global Proposal [MFN's proposal submitted to the Selection Panel]."

[116] Two things may be said about this reference by the trial judge to the "still to be negotiated" remark. First, the use to which he put the reference was accurate: Ingersoll is not recorded as having told the meeting that the revenue sharing of which he was speaking had already been accomplished or agreed to, nor did he say in his testimony that he had done so. Secondly, while Ingersoll did testify in chief that he thought he said it

was only the other First Nations' portion of the split that remained open to negotiation, he acknowledged in cross-examination that he "[was] not clarifying the division as between [MFN] and the First Nations in this meeting". Hence, to the extent the "still to be negotiated" note was hearsay, the trial judge's conclusion is nonetheless supported by inferences drawn from the testimony given by Ingersoll at trial.

d) Whether the Trial Judge Failed to Abide by Agreed Facts and Admissions

[117] The appellant submits that the trial judge did not take into account agreed facts and admissions. Its two principal examples relate to his treatment of the AGS meeting minutes and to his treatment of the *Lovelace* decision.

(i) ***Agreed Facts and Admissions: The AGS Meeting Minutes Were "Of Assistance" But Not "Dispositive"***

[118] MFN quarrels with the trial judge's conclusion that the minutes of the AGS meetings were "of some assistance" but not "dispositive." The parties filed an Agreement as to Authenticity of Documents. They agreed, in addition, that the documents referred to would be admitted not only for the proof of their authenticity (as provided in the *Rules of Civil Procedure*) but also as proof that the statements were actually made by those identified as having made them.

[119] The view that this agreement required the trial judge to accept what was actually said at the meetings as necessarily defining what was actually agreed to at the meetings is mistaken in our view, however. The trial judge was entitled, on the totality of the record before him, to consider them "of some assistance, [but] not dispositive, in all respects, of

what transpired at [the AGS meetings]". He gave four specific reasons for this conclusion:

1) He had not heard from any of the note takers of the summaries and so he could not determine whether the notes were intended to capture the sense of the discussions or the actual words and phrases used;
2) There was a caveat on the minutes stating they were not intended to be a verbatim record of what had taken place, but a re-creation "from notes taken during the meeting";
3) The discussions were wide-ranging, holistic, non-linear, and discursive, and the participants seemed at times to be talking at cross-purposes; and
4) The participants seemed to be engaged in politicking or posturing.

[120] We agree with the appellant that the trial judge's interpretation of the minutes was central to his task of assessing the objective outcome of the negotiations, but we do not accept that he erred in that interpretation or in the effect he gave to them. He clearly took the minutes into account, but measured them as well – as he said – against the other proof he had before him. Nor do we accept that his description of them as "discursive" or "non-linear", or as "mere posturing" or "politicking", was either inaccurate or indicative of a failure to understand the cultural context he was dealing with. He was entitled to treat the minutes in the fashion that he did.

(ii) ***Agreed Facts and Admissions: The "Findings" of the Supreme Court of Canada in Lovelace***

[121] MFN argues that the trial judge's "*declared* refusal" to be bound by the findings of the Supreme Court of Canada in *Lovelace* is a particularly glaring example of his failure to take into account uncontested facts, facts the parties had agreed to, and the respondents' admissions. This, too, undermined his overall findings. The passage that MFN alleges the trial judge particularly disregarded appears in *Lovelace*, at para. 26:

> [AGS] Meetings continued between Ontario and the band and, in 1993, this process resulted in the *mutually agreed upon site selection criteria* and the striking of an independent First Nations panel to review site proposals. [Emphasis added.]

[122] The trial judge observed that, while there was no dispute about the details of this passage when *Lovelace* was decided, eight years later that passage had become central to the dispute before him. "I am asked now to consider whether there were in fact 'mutually agreed upon site selection criteria'," he went on to say, and "what those criteria were, and what they meant." MFN asserts, in effect, that the trial judge was bound by *Lovelace*, and was not entitled to re-open the selection criteria issue.

[123] This position is not tenable for two reasons, at least. First, the Supreme Court of Canada could not have expected that it was resolving the facts in a future case that was not before it. As noted, the issue in *Lovelace* was whether non-status Indians and Métis would be entitled to share in the casino revenues, something quite different than the issues arising in this action. Secondly, the issue here is not so much whether there was

agreement on site selection criteria (everyone concedes there was), but rather the meaning of the "revenue sharing" component of those accepted criteria.

[124] We do not see the trial judge's treatment of *Lovelace* as ignoring or failing to give effect either to the *Lovelace* precedent or to some agreement, admission or common understanding between the parties as to the basis upon which the trial was to proceed.

(iii) *"Accepted as a Given"*

[125] MFN submits that the trial judge made a palpable and overriding error in holding that "it was accepted as a given" that there would be a competitive selection process and an independent selection panel. The point made is that, while this was eventually agreed to, it was only after robust negotiations over the course of the AGS meetings.

[126] Nothing turns on this point, however. While the trial judge may have misspoken when he observed that "[d]uring the discussions between the First Nations participants and the Province" these concepts were "accepted as a given", the important factor is that they were accepted as a given *for the purposes of the trial*. Indeed, they were incorporated into the Agreed Statement of Facts.

e) The Finding that the MFN Proposal was Silent on Revenue Sharing

[127] MFN vigorously contests the trial judge's finding that its February Proposal "was singularly silent on revenue sharing" and contained no "plan" for revenue sharing. The finding is significant because it cuts against MFN's primary argument at trial, namely that MFN reasonably understood the decision of the Selection Panel would be final and

binding, not just as to the site of the pilot casino, but also as to all of the terms of the proposal related to that purpose, including the revenue sharing formula.

[128] MFN contends that this finding is contrary to the evidence, is based on a misinterpretation of the February Proposal and a failure to analyze the "true context", and is the product of an improperly drawn adverse interest against MFN based on the trial judge's personal speculation, using hindsight, as to why the February Proposal did not contain a more detailed revenue sharing formula. We do not agree.

[129] The February Proposal itself was, indeed, "singularly silent" on revenue sharing. There was a vague reference to MFN's general acceptance of profit sharing in the accompanying covering letter from Chief Stinson to Minister Churley:

> We have no way of knowing what the economic terms will be with regard to this gaming operation but *would suggest that the Chippewas of Rama are quite willing to [ensure] that there is an equitable distribution of the gaming profits*, recognizing, of course, that it is our Tribal lands that will be the vehicle for the generation of those revenues. [Emphasis added.]

[130] A separate letter from Chief Stinson to Rabeau on the same date also contained what the trial judge characterized as "a further oblique reference to revenue sharing":

> Our plan recognizes our own First Nation responsibilities and provides for some generous and meaningful uses of gaming-generated revenues for use by other First Nations of Ontario. Just as importantly, we propose to institute benefit-sharing programs designed for First Nation people.
>
> …

> The Chippewa of Rama First Nation look forward to continuing a dialogue with the Aboriginal Gaming Site Selection Committee and any official of your ministry, for the purpose of clarifying the mutual interests of Ontario and the First Nations of Ontario in implementing the Rama Casino Proposal.

[131] MFN's witnesses gave four explanations for the failure to include a specific revenue sharing formula in its February Proposal. First, they said that Ontario's commitment to remain revenue neutral had been given only four days prior to the deadline for submissions (at the February 24 AGS meeting) and Bally's (which had primarily prepared the February Proposal) was not aware of it. Secondly, the recent MFN election had resulted in three new members to the MFN Council who needed to be brought up to speed. Thirdly, the bulk of the February Proposal had been prepared by Bally's, with little input from MFN, and the Chief and Council had had very little time to review it prior to submission. The fourth, and the appellant says "[m]ost important" reason provided by MFN's witnesses, was that they expected (correctly, as it turned out) that the Selection Panel would not make a final decision solely on the basis of the written proposals, but rather would use a phased process, hold site visits, and request additional information.

[132] At the same time, however, Williams testified that MFN believed it was "putting its best foot forward" with its February Proposal. It was the reason they had submitted such a "complete package." MFN looked at its submission as being "a one-shot deal." MFN "stood or fell" on it.

[133] The trial judge did not accept MFN's explanations for the February Proposal's silence about revenue sharing. He did not ignore the evidence, but rather, he concluded that the reasons for the February Proposal being silent about revenue sharing "were never explained to [his] satisfaction." Indeed, he made specific reference to the oddity that MFN would fail to specify its revenue sharing proposal when there was no guarantee of a further meeting with the Selection Panel or any evidence that such a meeting was even contemplated at that time.

[134] Nor did the trial judge misinterpret the February Proposal by failing to consider it in context – particularly in the context of the accompanying letters to the Selection Panel, Rabeau, and Minister Churley. He was well aware of the context. Given, however, how pivotal the February Proposal and the Site Selection Process were to MFN's position that the process constituted a tender or RFP and that the revenue sharing deal was to be struck with the Selection Panel, we find it inconceivable, as did the trial judge, that the February Proposal itself would not provide any details of the appellant's "plan" for revenue sharing, and that its position would be left to vague references about a general willingness to share equitably in accompanying correspondence.

[135] We conclude that the trial judge did not improperly draw an adverse inference. It was open to him on the record and was not based on personal and hindsight-based speculation.

f) MFN's Post-Selection Conduct and Statements

[136] As noted in the factual portion of these Reasons, the parties' attention turned to negotiations respecting the operation of the casino, including the selection of the commercial operator, and to a continued round of discussions concerning revenue sharing, following the selection of MFN as the host site in December 1994. The respondents argue that MFN's conduct and the statements of its representatives throughout this period contradict both the existence of any contract as alleged by the appellant and the reality of any objective or subjective belief on the part of MFN that such a contract existed.

[137] The following are some of the examples highlighted.

(i) *Lack of Adherence to Site Proposal*

[138] MFN's position at trial was that the November Proposal in its entirety formed the basis for MFN's contractual relationship with Ontario. But, say the respondents, the evidence shows that MFN never treated either the revenue sharing spreadsheet or the site proposal contained in the November Proposal as contractually binding.

[139] For example, other First Nations did not receive 60% of net revenues. Bally's, the proposed operator, was not chosen; instead, after an RFP process, MFN and Ontario selected CHC Casinos Canada Limited. The yearly ground rent ($750,000 under the November Proposal) more than quadrupled after negotiation (to $3.5 million in the DOA). In addition, MFN never built a Lake Couchiching waterfront casino as proposed

– the attractive waterfront destination resort concept that had influenced the Selection Panel in making its choice. The casino was built away from the waterfront. Finally, the November Proposal called for 50% of the casino's employees to be drawn from First Nations. Eight years later, only 18% of employees were from First Nations.

(ii) ***MFN's Position in Lovelace***

[140] As noted earlier in these Reasons, the respondents submit the position adopted by MFN in *Lovelace* is inconsistent with MFN's argument that it had a 35% deal upon site selection. We agree.

[141] Chief MacRae's evidence was that the 35% was a "request" made of Ontario that the other First Nations supported. The reasons for the request, she said, were that MFN needed the money to provide financing for the remaining phases of the casino and needed the money to develop the casino to make it a destination resort. This was consistent with the position MFN representatives had taken at the various Revenue Sharing Meetings following site selection and at the AOCCs, where an agreement was made to permit MFN to receive a 35% share for a five-year period.

[142] MFN's factum on the intervenor motion states:

> It is clear on the evidence that Mnjikaning First Nation knew, *when it committed its reserve lands* to the Casino Rama Project, it would be required to share the profits of the project with other reserve-based First Nations *on a negotiated basis*. The expectation of all parties was that *those negotiations would be with other reserve-based First Nations, as represented by the Chiefs of Ontario*... [Emphasis added.]

[143] And in its ultimate factum on the *Lovelace* appeal, MFN told the Supreme Court that there had been tripartite negotiations between Ontario, MFN and the Chiefs of Ontario about revenue sharing, and that "[b]y July 1996" a consensus was reached that MFN would receive 35% of net revenues from the casino and the other First Nations would receive 65%. Again, the position is inconsistent with MFN's argument that it was contractually entitled to 35% at the conclusion of the Site Section Process.

(iii) *The AOCCs and Other Revenue Sharing Meetings*

[144] The references in Chief McRae's affidavit, and the position taken by MFN in *Lovelace*, reflected an agreement that emerged out of the 1996 and 1997 AOCCs. Those meetings followed a lengthy period of negotiations between First Nations about revenue sharing in various other venues. In none of these meetings or negotiations did MFN representatives assert that they had a fixed contractual right to 35% of the net revenues as a result of MFN having been chosen as host First Nation by the Selection Panel, based on the November Proposal (or on anything else).

[145] For example, as previously noted in discussing the hearsay issue, at a December 19, 1994 PPC Meeting, Ingersoll – the then lead for MFN in communicating with other First Nations about revenue sharing – is noted as saying that "a *draft* profit-sharing formula has been developed – 25% off the top and 60% off the bottom for First Nations" (emphasis added). There was no evidence that he said anything about a 35% cut of net revenues for MFN or of a revenue sharing contract already entered into with Ontario.

[146] At a May 1995 meeting of a committee headed by then Southeast Regional Chief of the UOI, Nora Bothwell-Sawyer, Ingersoll advised that the amount to be shared among First Nations was "20% off the top" because that was what was in the RFP respecting the casino operator. It appears that no one at that meeting was aware of the November Proposal.

[147] Meanwhile, in March 1995, MFN prepared a preliminary draft of a proposed tripartite Memorandum of Agreement with Ontario and the Ontario Casino Corporation designed to confirm the roles and responsibilities of the parties involved in the casino. Article 3.4 of the draft proposed:

> The First Nation [MFN] *shall enter into a revenue/profit sharing agreement with all other First Nations in Ontario for an equitable sharing of the revenues/profits* of the lottery schemes conducted at the casino on the Reserve. The revenue/profit sharing agreement *shall be negotiated between the First Nation and the other First Nations* without the intervention or participation of Ontario or the Corporation. [Emphasis added.]

[148] In March 1995, as well, MFN's Director of Finance, Jeff Craik, prepared a draft RFP document for use in the process for selecting a commercial operator. It stated:

> The Chippewas of Mnjikaning were selected by the Province of Ontario as the site for the Aboriginal Casino Pilot Project. One of the selection criteria was *a commitment to share the proceeds of the Casino with all of the First Nations of Ontario*. All finalists in the selection process were required to submit a proposed Revenue Sharing Formula which indicated their willingness to share the profits of the casino operation.

> *The Revenue Sharing Formula will be determined through a series of negotiations with the other First Nations in Ontario*. [Emphasis added.]

[149] MFN argues that the trial judge wrongly interpreted these documents as being inconsistent with MFN's claim. To the contrary, it says, that is not "how [they were] prepared or understood on the evidence." The MFN witnesses testified that the wording in the documents related only to the sharing of revenues as between the other First Nations, not with MFN, and to whether the negotiations would involve Ontario or just the First Nations. The trial judge therefore erred in drawing inferences against MFN's position from the documentation, the argument goes.

[150] The documentation *could* support the interpretation sought to be put on them by the appellant, perhaps. But it is not the only interpretation open on their wording, when considered in the context of other evidence and other documentation prepared on behalf of MFN and in circulation during this period. There is an equally plausible, if not more plausible, interpretation – which the trial judge adopted, having considered the other evidence and documentation – namely, that the documents referred to a yet-to-be-held set of negotiations among First Nations that would determine the allocation of net revenues as between MFN and the other First Nations and as among all First Nations.

[151] This interpretation is buttressed, for example, by a briefing note prepared by Craik in June 1995, to be used by MFN's Chief and Council in responding to questions from other First Nations. In that note, MFN's "official position" regarding revenue sharing was stated to be:

> The Chief & Council of The Chippewas of Rama First Nation are committed to providing the majority of profits from the Casino Operation to the other First Nations of Ontario. At the present time, *the exact percentages to be allocated* and the mechanism to do so *have not been determined*.
>
> *The allocation formula will be determined* through a series of negotiations between the Chippewas of Rama First Nation and the other 130 First Nations of Ontario. [Emphasis added.]

[152] This language is only consistent with an interpretation that the allocation formula – both as to MFN's share and as to the share among the First Nations collectively – remained to be negotiated.

[153] Moreover, at numerous MFN Council meetings held in 1995 and 1996, no reference was made to a contractual right to a 35% share of net revenues. Instead, the focus appears to have been on a 20% of gross revenue figure (not 25%, as stated in the November Proposal) and on whether 5% of that should go to MFN with the remaining 15% to the other First Nations.

[154] In February 1996, Ingersoll sought approval from MFN's Council to put forward two potential revenue sharing proposals at an upcoming meeting of the PPC two days later: (i) 20% gross to other First Nations, 5% gross to MFN; or (ii) 16% gross to other First Nations, 4% gross to MFN. Neither was consistent with the November Proposal. While the February PPC meeting did not occur, Ingersoll's preparatory notes for it are also inconsistent with the appellant's position. Ingersoll added a third option of his own: 20% of net revenues to go to the other First Nations and 75% to MFN.

[155] The DOA was signed in March 1996. As set out in our discussion of the facts, it defined the compensation MFN was to receive out of casino revenues. Under the DOA, MFN's "entire compensation .. for services to be provided … in connection with the development and operation of the [casino complex]" was limited to the ground rent ($3.5 million annually, adjusted for inflation), the Rama Allocation ($4.5 million annually, adjusted for inflation), and the revenue from Specific Local Services.

[156] The DOA was accompanied by a "Side Letter" which confirms this position. The Side Letter was provided to cover off MFN's position in another battle it was having with Ontario at the time over the newly-elected government's decision to take a 20% win-tax on gross casino revenues for itself. The Side Letter ensured that MFN's execution of the DOA was without prejudice to its position in that other dispute. Nonetheless, MFN acknowledged in the Side Letter that, pursuant to the terms of the DOA, it was only entitled to the Rama Allocation and any payments received pursuant to the ground lease and the Specific Local Services.

[157] Both Baker and Craik acknowledged that there was no explicit reference in any of the documentation they prepared to the fact that MFN already had a contractual claim to 35% of net revenues. Indeed, Baker prepared a memorandum to the MFN Chief and Council outlining the features of the DOA which specifically stated, "[t]he agreement provides for Rama, in addition to ground rent, obtaining what is called the Rama fee. *It is proposed in the agreement that this fee is in lieu of any participation in the net income*" (emphasis added).

[158] The trial judge did not ignore the evidence of the MFN witnesses, or MFN's position, on this point, as the appellant asserts. He observed that "[w]hen confronted with statements such as this,[9] the MFN witnesses, including Williams, took the position that the negotiations anticipated in this and similar documents related only to the 'distribution of revenues for all of the other First Nations and not Mnjikaning'." When the evidence and the documentation are considered in context, there is no basis for concluding that the trial judge drew inferences that were not open to him on the record or failed properly to assess the evidence. He simply declined to accept the interpretation put forward by the appellant and its view of the evidence.

[159] In June 1996, MFN went to the AOCC and requested the Chiefs' approval of a 35%/65% split of net revenues. The case was presented on the basis that MFN was at risk financially and that it had incurred massive debt in connection with the casino and needed the 35% to make sure it did not run into financial trouble. MFN did not say it already had an agreement for the 35%. As previously noted, a consensus ultimately developed at the meeting and a declaration was passed by the AOCC providing for a 35%/65% split.

[160] Discussions continued in various forums thereafter respecting the duration of this distribution. In none of them did MFN take the position it had a contractual entitlement to 35%.

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[9] He was referring to the statements made in the documentation referred to above.

[161] The issue was finalized at the 1997 AOCC. In support of MFN's need for the 35% over a five-year period, Chief McRae argued that MFN had incurred administrative costs, increased staffing needs, legal fees and debt responsibilities, and that MFN needed the funds to develop a destination resort. She said nothing about a contractual entitlement to 35% of gross revenues. The meeting ultimately reached a consensus in favour of a five-year period for the 35%/65% revenue allocation (i.e., 1996-2001), subject to review. A declaration was issued to that effect. At no time did MFN protest the Chiefs' authority to determine its share of revenues. It asked for and obtained the assistance of other First Nation negotiators in seeking Ontario's approval of the five-year deal, which Ontario ultimately gave.

[162] The significance of the many inconsistencies in MFN's post-selection conduct and statements is twofold. First, they are of some relevance and assistance in informing the trial judge's conclusion that there was no contract as alleged by MFN, but rather an agreement that revenue sharing would be negotiated separately, after site selection. Subsequent conduct may be of assistance in determining which of two reasonable interpretations should be accepted: *Canadian National Railways v. Canadian Pacific Ltd*., (1979), 95 D.L.R. (3d) 242 (B.C.C.A), at p. 262, aff'd [1979] 2 S.C.R. 668; *Montreal Trust Company Co. of Canada v. Birmingham Lodge Ltd*. (1995), 24 O.R. (3d) 97 (C.A.), at p. 108. MFN's subsequent conduct is overwhelmingly consistent only with the trial judge's interpretation.

[163] Secondly, the inconsistent conduct is of considerable relevance in demonstrating MFN's state of mind regarding the agreement that had been made and the objectivity of that belief. It buttressed the trial judge's conclusion that MFN did not believe – objectively or subjectively – that the selection of the host First Nation secured for that First Nation whatever preferential share of casino net revenues it had included in its site proposal or put forward during the Site Selection Process – in MFN's case, a contract for a 35% share of net revenues. We turn to this latter issue now.

g) The Finding of Lack of Objective and Subjective Belief

[164] MFN submits the trial judge erred in accepting the position that *all* net gaming revenues from the casino would fall into a fund for purposes of revenue sharing between the First Nations – including revenue sharing between the selected host and other First Nations – and that the fund would be distributed on a basis to be negotiated and agreed upon later. This conclusion was central to the trial judge's disposition of the case. MFN contends there was no evidence to support such a view and, indeed, that such a view was contrary to other admitted and undisputed evidence. The error was therefore palpable and overriding.

[165] We see it differently.

[166] Rabeau did acknowledge in cross-examination that at various times during the AGS meetings some First Nations, including MFN, expressed the view that the host should be entitled to some percentage of net profits after operational expenses. He also

acknowledged that he "did not, in fact, say 100 per cent revenue share to the First Nations during the AGS meetings", but that was in the context of distinguishing between 100% of all revenues and 100% of all gaming revenues.

[167] Rabeau also testified – and the trial judge accepted – that he repeatedly expressed at the AGS meetings Ontario's position that: (a) there would be no special share of casino revenues for the host First Nation beyond the return on investment to be paid out of operating costs, and the potentially significant benefits arising from the non-gaming revenues, spinoff businesses and employment; (b) the casino profits were to be shared equitably among all First Nations, through a formula to be developed by First Nation representatives after site selection; and (c) the First Nations had the discretion to decide among themselves, when they eventually developed a revenue sharing formula, to give the host a preferential share of profits if they wished to do so.

[168] On these findings, MFN could have had no doubt about Ontario's position on these issues.

[169] That the First Nations were aware of Ontario's expressed position is reflected in various minutes, and in various oral and written statements made by First Nations' representatives. For example, at the May 4, 1994 Sault Ste. Marie meeting, then Grand Chief Miskokomon acknowledged Ontario's position: "[R]evenue sharing, we already know what that means, 100% in their eyes". In a letter to Chief Stinson, dated August 10, 1994, Chief Glen Hare of the West Bay First Nation described "the provincial

expectation of 100% net [r]evenue [s]haring." The written summary of an October 24, 1994 meeting between Rabeau, Minister Churley, and Grand Chief Joe Hare (who had replaced Miskokomon as Grand Chief earlier that year) – while not expressing agreement on the issues – acknowledges the Ontario position:

> *The present sharing of revenues option presented by the province (100% revenues to all first nations)* will not work. This issue will require further discussions and other options need to be designed to be distributed more fairly. This will begin once the first Nation site has been chosen and the First Nation awarded the site is prepared to explore this item. [Emphasis added.]

[170] As Ms. Block submits, therefore, regardless of whether the First Nations agreed with Ontario's position on revenue sharing respecting the host, the Ontario position had been clearly and consistently conveyed to the First Nations throughout the negotiations, and was understood by the participants – including MFN – at the AGS meetings. A reasonable First Nations person at that negotiating table would have understood that Ontario did not authorize the Selection Panel to determine the host First Nation's share of casino revenues, as would a reasonable MFN representative. There was ample evidence to support the trial judge's acceptance of Rabeau's evidence on this point and to support the findings made by the trial judge with respect to the objective and subjective beliefs of MFN in this regard.

[171] MFN further contends that in making his findings with respect to a lack of objective or subjective belief, the trial judge ignored the evidence of four members of MFN's leadership (Chief Stinson, Chief McRae, Williams, and Ingersoll) and two of its

key advisors (Baker and Craik) to the effect that they each understood that MFN had a binding entitlement to 35% of the net revenues based on the selection of their proposal. In addition, the appellant says the trial judge ignored the evidence that other representatives of other First Nations held similar views.

[172] We are not persuaded that the trial judge failed to consider this evidence. The five specific reasons he gave for rejecting the subjective or mistaken belief argument demonstrate that he was alive to all of the evidence, including the testimony given by MFN witnesses. He explained:

> In addition, I am not persuaded that MFN subjectively held, or mistakenly believed in, the view that it is now propounding, for the following reasons:
>
> 1. If revenue sharing was to be fixed by proposal, why would the MFN submission be singularly silent on the issue, but for a mere expression of interest to meet and discuss the matter at a later date? This approach is particularly puzzling when one considers that there was no guarantee that a meeting with the Panel would be undertaken with any one proponent or was even contemplated at the time of the Submission Date.
>
> 2. If revenue sharing was to be negotiated with the Panel during the selection process, why would MFN not have prepared some form of strategic plan with input from Chief and Council, or else the consultants then on board, as a precursor to the either the July or November Visits with the Panel? Such lack of activity was more consistent with the Panel's published and expressed mandate that it would decide on site selection only.
>
> 3. If Ted Williams and Chief McRae believed that the Panel was engaged in some form of revenue-sharing negotiation during the November Visit, why was the number-crunching

> exercise undertaken in such a hurried fashion, without any involvement of Council, and with only minimal input from Chief McRae and the consultants, the latter of whom were not physically present to assist in the process?
>
> 4. If the revenue-sharing aspect of the Global Proposal was so fundamental to MFN granting access to its ancestral lands for casino purposes, at the risk of seeming overly harsh, why was there a fundamental lack of understanding of constituent elements of the November Amendments on the part of the Chief and the members of Council from whom I heard?
>
> 5. If the Global Proposal represented a contract, it was a contract that included not only 35% of net revenues for MFN, but also 25% of gross revenues and 60% of net revenues for other First Nations, as MFN conceded before me. If MFN subjectively believed that the Global Proposal was a binding contract, then why did it take MFN until the later stages of this trial, more than a decade after the contract was purportedly formed, to begin to fulfill its obligation to distribute the balance after the win-tax, namely 5% of the gross revenue from Casino Rama to other First Nations? [Footnotes omitted.]

[173] Other evidence fully supported the trial judge's findings of MFN's lack of objective or subjective belief. While the reasons for the findings were cast in a rhetorical format, they cannot be dismissed as "speculation" or the application of "hindsight" or "circular" reasoning, as the appellant seeks to do.

[174] There was ample evidence to confirm the trial judge's finding. Ontario had persistently maintained, and repeatedly expressed – through Rabeau and Minister Churley and others – its position that 100% of the net revenues would go to all First Nations. No document specified that revenue sharing would be determined as a result of

the Site Selection Process. Indeed, as outlined above, many indicated to the contrary. The Rabeau Criteria attached to the Policy Objectives (Exhibit 45) expressly state that revenue sharing was to be the subject of ongoing negotiations. The conduct and statements of MFN representatives following site selection, as well as the documentation they presented, belie the position the appellant now asserts.

(3) Conclusion With Respect to the Alleged Fact-Finding Errors

[175] This concludes our examination of the alleged fact-finding errors raised on behalf of the appellant. To repeat, the record amply confirms the findings of fact and of credibility made by the trial judge. We find no basis for holding that he made any significant findings that conflicted with accepted evidence, improperly weighed or assessed the evidence, or misapplied the hearsay rule. The appellant's essential complaint is the trial judge's failure to accept MFN's interpretation of the evidence and the documentation.

[176] While the appellant is able to point to some isolated instances where the trial judge failed to refer to certain bits of evidence that might have supported the testimony of its witnesses, the trial judge was not obliged to make reference to every stitch of evidence before him. He gave thorough and careful reasons, and it is not apparent to us that he failed to consider any material aspects of the record before him. It was open to him to make the findings he did.

C. Contract: Did the Site Selection Process Constitute a Binding Tender/RFP Process?

[177] The Site Selection Process, on MFN's theory at trial, was tantamount to a tender process with certain features of an RFP process. Practically speaking, MFN conflated the two concepts. By selecting MFN as the host site, the theory went, the Selection Panel – on behalf of Ontario – accepted MFN's 35% revenue-splitting tender or offer as set out in the November Proposal, thereby creating a binding contract to that effect. As counsel put it at para. 239 of MFN's factum:

> The basic question to be answered was: would the words and conduct of the Province and the Panel lead a reasonable First Nation proponent to believe that the share of the profits they would receive if selected to host a provincial casino on their reserve would be finalized, as a contractual right, by the final decision in the Selection Process?

[178] The trial judge concluded – correctly, in our view – that the Site Selection Process did not fall within the legal paradigm of a tender contract. As he noted, MFN's position regarding its contractual argument was "something of a moving target", changing as the trial progressed to one that treated the notion of "tender" interchangeably with the notion that the Site Selection Process was akin to a RFP. In the end, the trial judge determined "that the AGS meetings, viewed objectively, [did not lead] to an agreement between First Nations and the Province that the proposed process gave rise to either a tender or formal request for proposal, although it had some aspects of the latter". We agree.

(1) Tender

[179] Without probing too deeply into the complexities of the law of tendering, suffice it to say that it is built around the "Contract A/Contract B" analysis articulated by the Supreme Court of Canada in *Ontario v. Ron Engineering*, [1981] 1 S.C.R. 111, as revised in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619. The submission of a bid, or "tender," in response to an invitation to tender, may result in initial contractual obligations (Contract A), if the parties intend this to be the case. The terms of Contract A are governed by the terms of the tender call but generally include the obligation to enter into a second contract (Contract B), upon acceptance of a compliant bid, in the terms of that bid.

[180] Here, as the trial judge observed, there is nothing in the Site Selection Process that falls easily into that legal paradigm. Ontario arguably issued an "invitation to tender" by asking interested First Nations to make a proposal for selection as the site for the single First Nation casino. But there is no document coming from MFN that fits comfortably into the concept of a "tender" (Contract A) which, if accepted by Ontario (or the Selection Panel on behalf of Ontario), could be transformed into a performance contract (Contract B) containing the terms of the tender, as required in tender law.

[181] MFN's February Proposal does not qualify: it contained no revenue sharing formula.

[182] Only the November Proposal has any of the characteristics of a tender or proposal document. It was presented by MFN. It contained a revenue sharing proposal. Even at that, however, the revenue sharing "proposal" was tempered by the suggestion that MFN was "open to increasing other First Nations share".

[183] Moreover, the revenue sharing proposal created problems for MFN if it were to be accepted as a tender or proposal document. First, the circumstances in which the November Proposal was prepared – found by the trial judge and accurately described by the Chiefs in their factum as "MFN's hurried number crunching exercise during the site visit on November 18, 1994, without the involvement of MFN Council and with minimal input from Chief McRae and MFN's consultants" – do not lend themselves to the conclusion that the November Proposal was considered by MFN to be a tender or a response to an RFP, as opposed to something put together in a hurry for purposes of negotiation. Altin Paulson's testimony, accepted by the trial judge, was that the Selection Panel's November 18 site visit was not a revenue sharing discussion.

[184] Secondly – and more importantly – MFN did not consider itself bound by any provision in the revenue sharing formula other than the proviso that it receive a 35% preferential share of net revenues. Recall that the formula in the November Proposal provided not only for MFN to receive 35% of net revenues, but also for "other First Nations" to receive 25% of gross revenues along with 60% of net revenues, and for the operator to receive 2.75% of gross revenues and 5% of net revenues.

[185] In addition, MFN was to receive set payments of $3 million per year for municipal services and $750,000 for ground rent. None of these measures were ever given effect. The 25% of gross revenues for other First Nations became 20% in the following negotiations and remained that way until the issue was pressed at the end of trial and MFN agreed to pay the additional 5%. MFN negotiated a ground rent of more than the above amount ($3.5 million) plus the Rama Allocation of $4.5 million per year in addition to an unrestricted amount in payments for municipal and other local services.

(2) An RFP Process

[186] An RFP process differs from a tender process. As noted above, the Contract A/Contract B analysis may not always be triggered. It depends upon whether the parties intend to initiate contractual relations by the submission of a bid in response to the invitation to tender: *M.J.B. Enterprises*, at para. 23. In some cases, depending upon the wording of the request for proposals, the successful proponent may acquire a contract with the party calling for tenders on some matters, and the right to negotiate with the owner on others. In other cases, the only effect of being selected as winning bidder is to position the bidder as a negotiating party, with the content of the winning proposal serving simply to outline the bidder's opening negotiating position Authors Paul Sandori and William M. Pigott explain these principles as follows in *Bidding and Tendering: What is the Law?*, 2d ed. (Toronto: Butterworths, 2000), at p. 239:

> The owner that wants submissions from interested parties but does not wish to create Contract A,[10] may choose to issue a request for proposals (RFP). Properly drawn, an RFP asks parties for expressions of interest and sets out the owner's intention to consider those expressions of interest and then to undertake *negotiations* with one or more parties whose proposal(s) appeal to the owner.

[187] This statement was adopted by the Manitoba Court of Appeal in *Mellco Developments Ltd. v. Portage la Prairie (City)* (2002), 222 D.L.R. (4th) 67, at para. 72; leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 502. Gordon Baker, who testified on behalf of MFN, has considerable expertise in the area of RFPs, having written academically on the subject. He agreed in cross-examination that in many instances the RFP and the bid are essentially the starting negotiating positions of the parties.

[188] The Site Selection Process here might be seen as something akin to an RFP, as the trial judge noted. Ontario called for proposals respecting the selection of a host site. Site selection criteria (the Rabeau Criteria) were established during the AGS meetings and provided the framework for the presentation of such proposals. Taking the November Proposal as MFN's pitch in the context of revenue sharing, the parameters of a negotiation are in place.

[189] And that is precisely what happened. Negotiations continued throughout 1995, 1996 and 1997, following MFN's selection as host First Nation in December 1994 – particularly through the Revenue Sharing Meetings and the AOCCs described earlier in these Reasons. Throughout these negotiations, the First Nations attempted to reach a

[10] This refers to the *Ron Engineering* analysis.

consensus on revenue sharing between the First Nations as a collective and between MFN, as host, and the other First Nations as a collective. This process – strained and interrupted as it was by the Government's change in position in imposing the 20% win-tax – ultimately resulted in the agreement that MFN would be entitled to a 35% share of net revenues for a period of five years. Having achieved a consensus, the First Nations came to Ontario and elicited the Province's approval of the deal, which was granted.

[190] When the five-year term of the agreement expired and the agreement was not renewed, however, this lawsuit was inevitable.

[191] Accepting, without necessarily agreeing, that the Site Selection Process was somewhat "RFP-like" in nature, we agree with the trial judge that it did not constitute a process whereby there was to be a binding agreement on revenue sharing, negotiated with the Selection Panel, and settled once the Selection Panel had chosen the host First Nation. The trial judge concluded:

> At best, the evidence supports the proposition that the proposals had to address each of the agreed upon criteria, which included revenue sharing. This requirement may have amounted to an informal request that the proposals touch on, as Altin Paulson testified, the proponents' general philosophy toward revenue sharing. But it cannot be elevated to a formal request that proponents provide hard numbers *as a precursor to negotiation with the Panel, which would then lead to a binding agreement*. [Emphasis added.]

(3) Contract Theory

[192] In *Olivieri v. Sherman* (2007), 86 O.R. (3d) 778, at para. 44, this Court confirmed the objective test for determining whether a contract exists. It does not depend on an inquiry into the actual state of mind of the parties or on the parole evidence of one party's subjective intention. Rather, it depends on whether the words or acts of the parties, judged by a reasonable standard, manifest an intention to agree with respect to the matter in question. The trial judge properly applied this test and concluded that MFN had not established the agreement for which it contended.

[193] At the end of the day, MFN's contract argument fails because there was never any offer or acceptance – in classic contract terms – during the Site Selection Process, nor, given the trial judge's findings, did the parties ever intend that site selection would result in a binding agreement with respect to revenue sharing. A reasonable person, looking at the circumstances surrounding the alleged contract objectively, would conclude that the parties did not intend to enter into a binding contract on revenue sharing as a result of the Site Selection Process: see *Olivieri*; *UBS Securities Canada Inc v. Sands Brothers Canada Ltd.* (2009), 95 O.R. (3d) 93 (C.A.), at para. 88.

[194] Nor is there any merit in the appellant's argument that, even if tender/RFP law does not apply, a contract was nonetheless formed by subsequent ratification on Ontario's part. Even if there exists a concept of "contract *formation* by ratification" – about which we make no comment – the facts as found by the trial judge preclude any such conclusion here. At most, Ontario might be said to have "ratified" – i.e., accepted – the First

Nations' collective decision, made at the AOCCs in 1996 and 1997, to allocate a 35% share of net revenues to MFN for a five-year period.

D. The Legal Context of the Dispute: Fiduciary Duty, the Aboriginal Context and the Relationship between the Parties

[195] MFN contends that the trial judge completely misapprehended the legal context and the legal relationships among the parties in his analysis of the dispute. This affected both his substantive conclusions and his assessment of the evidence. In particular, MFN submits that the trial judge:

a) failed to consider the underlying fiduciary relationship of the Province to First Nations, both as a separate, substantive ground for relief, and as a legal standard by which the Province's conduct was to be measured:

b) misapprehended the legal status of First Nations and their relationships to one another, particularly in assessing MFN's expectations; and

c) failed to take proper account of the Aboriginal context.

[196] We would not give effect to any of these submissions.

[197] The trial judge did not resolve the fiduciary arguments. He concluded:

> Further, as no contract arose, I need not consider MFN's argument that any ambiguity in a contract arrived at in this context must be resolved in favour of the Aboriginal litigant. Additionally, the above factual decision precludes any need to opine on MFN's argument that the circumstances of the negotiations attendant to the matters in issue gave rise to a fiduciary relationship between the Crown, in right of the Province of Ontario, and Aboriginal peoples, as discussed in *Guerin v. The Queen*. [Footnotes omitted.]

[198] We agree. After a careful review of all of the evidence, the trial judge concluded: (a) that the events in question, viewed objectively, did not lead MFN reasonably to conclude that the Site Selection Process resulted in agreement on a firm revenue sharing formula, or that the Selection Panel had a mandate to negotiate such a formula; (b) that MFN had no subjective belief that such was the case; and (c) that in any event, the parties had not achieved *consensus ad idem* on such matters. Given those findings, the fiduciary arguments fall away, as we explain below.

(1) The Stand-Alone Fiduciary Duty Argument

[199] Notwithstanding the trial judge's findings, MFN argues that Ontario's breach of fiduciary duty is an independent and alternative basis for its claim. The fiduciary duty is said to arise (i) from the *sui generis* duties owed by the Crown to Aboriginals in any dealings for the use of reserve land, and (ii) because MFN and Ontario were engaged in a "partnered initiative" or joint venture and, therefore, as partners or participants in a joint business venture, owed each other fiduciary duties during their negotiations.

[200] We reject these arguments for the following reasons.

[201] First, the appellant's *sui generis* argument is primarily based on the application of *Guerin v. The Queen*, [1984] 2 S.C.R. 335. *Guerin*, however, is distinguishable on the facts. There, a First Nation agreed to surrender a portion of its reserve lands for purposes of a lease to be granted to a Vancouver golf club. The Crown represented that the lease would contain certain terms and the First Nation agreed to the surrender on the basis of

those terms. However, when the lease was executed it contained terms that were considerably less favourable to the First Nation.

[202] The Supreme Court of Canada found that the Crown owed a *sui generis* fiduciary duty to Indians in relation to the surrender of their lands and concluded that the Crown had breached its duty by ignoring the oral terms which the Band understood would be embodied in the lease. The Crown's oral misrepresentations formed the backdrop against which the Crown's discharge of its fiduciary obligation must be measured.

[203] Contrary to the appellant's submissions, this case is not analogous. It does not involve the surrender of lands *vis-à-vis* the Crown in right of Ontario. More importantly – and this is the Achilles heel of the appellant's argument on this point – the trial judge found that MFN's representatives did not have an understanding (objectively *or* subjectively) that was contrary to what Ontario was saying and doing or from what ultimately happened. There were therefore no Crown misrepresentations to form the backdrop against which the Crown's discharge of its duties was to be measured. That being the case, the fiduciary argument, based on the *Guerin* approach, fails.

[204] In any event, while it is unnecessary to decide the point in this case, there is some authority to suggest it is the federal Crown, as opposed to the Crown in the right of a province, that owes the *sui generis* fiduciary duty to Aboriginals based on the special historical relationship that exists between the federal Crown and Aboriginal people and the constitutional capacity to look after the best interests of Aboriginal people.

[205] For example, in *Bear Island Foundation v. Ontario* (1999), 126 O.A.C. 385, at para. 34, this Court said:

> I am doubtful whether the provincial Crown owes fiduciary duties to aboriginal people that, on breach, would allow for the transfer of land. The fiduciary duty of the Crown to aboriginal people is fundamentally a duty of the federal Crown. It is the federal government that has legislative responsibility for Indians and lands reserved for Indians under *s. 91(24) of the Constitution Act, 1867*. As the Supreme Court said in *Mitchell v. Peguis Indian Band*: "The provincial Crown bears no responsibility to provide for the welfare and protection of native peoples." [Footnotes omitted.]

See also *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at p. 183; *St. Catherine's Milling & Lumber Co. v. Ontario (Attorney General)* (1888), 6 L.T. 197, C.R. [10] A.C. 13 (Ont. P.C.).

[206] Whether or not the Crown in right of a province may owe a *sui generis* fiduciary to Aboriginals, we do not say that it may never owe a fiduciary duty to Aboriginals.[11] Fiduciary duties may arise from the particular conduct of the provincial Crown in specific situations, but, as we shall explain, no such duty arises on the facts here.

[207] The record does not support the contention that MFN and Ontario were engaged in some sort of "partnered initiative," or joint venture, in the selection, development and operation of the casino. MFN's submission in this regard takes its life from the Supreme Court of Canada's comment in *Lovelace* about a "partnered initiative" in relation to the casino. In *Lovelace*, however, the Court was not dealing with fiduciary duties, nor was it

[11] Provincial Crowns must comply, of course, with the requirements of s. 35 of the *Constitution Act, 1982*, but that is not an issue on this appeal.

dealing with the specific relationship between Ontario and MFN. The "partnered initiative" description was used in connection with the relationship between Ontario and Ontario First Nations collectively, and was made for the purpose of distinguishing the casino project, as a partnered ameliorative program, from other projects that could be described as universal or generally comprehensive benefits programs: *Lovelace*, at para. 82. We do not read *Lovelace* as making a binding declaration of partnership that would govern the facts of a relationship not before it.

[208] Given the trial judge's findings, there is nothing in the record that would support the existence of a partnership or a joint venture between MFN and Ontario in relation to the casino project. There is no agreement to that effect. Nobody treated – or spoke of – the relationship in those terms. Nothing suggests that Ontario pledged itself to act in the best interests of MFN, to the exclusion of the interests of the other 133 First Nations, much less to the exclusion of its own interests.

[209] As La Forest J. stated in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 409, outside the established categories of fiduciary relationships, what is required to establish a fiduciary relationship "is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party." He also noted at p. 414 that "[c]ommercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very anti-thesis of self-interest".

[210] Here, the parties were engaged in what was essentially an arm's length transaction of a commercial nature, albeit that the proceeds were to be used for ameliorative social and economic purposes.

[211] We would add that, if Ontario did owe a fiduciary duty in connection with the casino project, it would be a fiduciary duty owed to all Ontario First Nations collectively, and not just to MFN alone. Any preferential treatment of MFN, to the detriment of the other First Nations, would have placed Ontario in breach of its broader fiduciary obligation to the others.

(2) *Nowegijick, Guerin,* and the Honour of the Crown

[212] Apart from its stand-alone fiduciary argument, MFN asserts that the fiduciary duty plays an additional role in these circumstances. It says the fiduciary duty sets the legal standard by which the Province's words and actions during the negotiations are to be assessed and that the trial judge's failure to recognize this undermined his fact-finding exercise. The honour of the Crown is at stake in all dealings with Aboriginal peoples, MFN contends, and this notion "is not mere incantation, but rather a core precept that finds its application in concrete practices": *Haida Nation v. British Columbia (Minster of Forests)*, [2004] 3 S.C.R. 511, at para. 17. Accordingly, MFN asserts that:

a) ambiguities in the words or conduct of Crown representatives are to be interpreted broadly, in a manner consistent with interests and understanding of the First Nation parties, and not in a narrow technical manner that favours the

Crown's interests: *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; and that

b) the Crown is bound to observe both oral and written terms that the First Nation understand are embodied in an arrangement concerning the use of reserve lands: *Guerin.*

[213] There are several reasons these arguments cannot prevail.

[214] First, neither the existence or non-existence of a fiduciary duty nor the Aboriginal nature of these proceedings has any bearing on whether there were or were not ambiguities in the words or conduct of the Crown's representatives during the AGS meetings or the Site Selection Process. The trial judge found there were none. He held that the Crown's position – as articulated by Ontario's various representatives – was consistent, and clear, throughout: (i) there would be only one commercial Aboriginal casino; (ii) the net gaming revenues from the operation of that casino would be shared equitably among all First Nations; (iv) the host First Nation would be compensated out of operating costs (with additional compensation from ground rent, municipal services, and spin-off benefits like employment); and (v) revenue sharing would be determined by the First Nations in negotiations at a more broadly representative negotiation table following site selection.

[215] Secondly, the trial judge was alive to MFN's argument that contracts are to be given a broad and liberal interpretation and, if necessary, any ambiguity must be resolved

in favour of the Aboriginal litigant. He referred to it specifically at the outset of his reasons and was acutely aware that he was dealing with an Aboriginal case involving Aboriginal witnesses whose cultural background differed from his own. He took care to ensure he understood the witnesses' evidence. His treatment of former Chief McRae during her testimony – although subject to criticism by the appellant – in fact demonstrated his sensibility to the cultural and other interests underlying the proceedings.

[216] MFN does not say clearly how the trial judge should have permitted the fiduciary duty to inform his perspective of the evidence-weighing process. But, in any event, we do not accept that he interpreted the words and conduct of the Crown representatives "in a narrow technical manner that [favoured] the Crown's interests", as the appellant contends. Nor did he make credibility findings against MFN witnesses because he was insensitive to First Nations and their culture, or oblivious to the notion of fiduciary obligations. He did not accept their evidence because he preferred the evidence of the other First Nation witnesses and of the other witnesses called by the respondents. As we have noted on several occasions, these findings were amply supported on the record.

[217] It must be remembered that the evidence of the MFN witnesses was disputed at many levels by other Aboriginal witnesses – Atlin Paulson and former Grand Chiefs Miskokomon and Peters, in particular. The trial judge measured the Crown's words and conduct against all of this evidence in arriving at his conclusions, as he was bound to do.

[218] In addition, the argument that the trial judge failed to consider the manner in which a First Nations person would understand Ontario's words and conduct ignores the substantial evidence – referred to earlier in these Reasons – that the First Nations, including MFN, understood exactly what Ontario was saying.

[219] MFN's thesis is tantamount to suggesting that the trial judge was required to apply some different manner of scrutiny to the two sets of Aboriginal witnesses because of an alleged fiduciary duty which, if anything, was owed to the all of them. To make the statement is to refute it. Nor should we lose sight of the fact that, while the formal *lis* here is between MFN and Ontario, the dispute is nonetheless *only* about the sharing of casino revenues among First Nations.

[220] MFN's argument in this respect is essentially an attempt to persuade the court that because the Supreme Court of Canada has underscored the importance of the *sui generis* fiduciary obligation owed by the federal Crown to First Nations with respect to dealings involving First Nations' lands – and has stated that "*treaties and statutes* relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians" (*Nowegijick*, at p. 36) – the trial judge must resolve *conflicting testimony* about the words and conduct of parties in favour of Aboriginals on the same basis. We do not read the *Nowegijick* and *Guerin* line of cases as standing for such a proposition. A trial judge must weigh and assess conflicting evidence in the same way as he or she always does – dispassionately, against the record as a whole, and with due consideration for any

particular sensibilities (cultural or otherwise) that may impact upon a witness's testimony. The trial judge did just that.

(3) The Legal Status and Relationships of First Nations

[221] MFN's contention that the trial judge fundamentally misapprehended the law relating to the legal status of First Nations, and their relationships with each other and with the Province, can be disposed of quickly. He made no such error.

[222] The root of this complaint lies in a number of the trial judge's comments that MFN takes to have revealed insensitivity to the sovereignty and autonomy of First Nations, which is recognized in the 1991 Statement of Political Relationship, signed by the Province and Ontario's First Nations, acknowledging their inherent right of self-government.

[223] For example, he commented on the reality of the Province's imposition of the 20% win-tax. MFN points out that there remains an outstanding constitutional challenge on this "nation-to-nation" issue. The trial judge observed that provincial oversight of the revenue sharing negotiation process "struck [him] as something of a mandatory political construct". This was "patronizing" and suggested First Nations were incapable of making decisions on their own, MFN says. The trial judge attributed to the First Nations' own extra-legal political and co-ordinating bodies – e.g., the COO, UOI, PTOs, and AOCC – what amounts to a veto over the individual First Nation's autonomy, and remarked that he could not "imagine that this multiple-stage [PTO and AOCC] process

would not be followed" for revenue sharing. These observations are said to suggest that a First Nation does not have the autonomy to enter into an agreement with the Province on its own.

[224] However, there was never any issue at trial – and the trial judge made no such suggestion in his reasons – that MFN did not have the authority to deal with, and contract with, Ontario with respect to the development and operation of the casino on its own. Nor was it disputed at trial that Ontario insisted on being involved in the revenue sharing negotiations following site selection, although not in the First Nations' decisions about how the revenue was to be allocated. In making these comments, it seems to us, the trial judge was merely acknowledging the evidence he had heard from Regional Chief Peters and Grand Chief Miskokomon that issues such as revenue sharing, which affected all First Nations in the Province, were matters that had to be decided by the First Nations collectively, after proper consultation and consideration. That was the political reality. At no time did he ever suggest that MFN's sovereignty or autonomy as a First Nation was in any way limited by other First Nations, or by Ontario.

E. Interventions by the Trial Judge

[225] Finally, MFN submits that the trial judge's conduct of the trial created a reasonable apprehension that he was biased in favour of the respondents' case. It argues that the trial judge intervened in the trial on an extraordinary number of occasions and that the cumulative effect of those interventions created the impression that he was receptive to the respondents' case and dismissive of the appellant's.

[226] MFN points to instances where the trial judge intervened during the examination of witnesses and during its closing argument. It contends that, on occasion, the trial judge assumed the role of counsel by asking witnesses questions that went beyond what is permissible for a trial judge, that he improperly commented on what evidence he expected the respondents to lead, that he made comments that exhibited impatience with MFN's case, and gave the impression that he had prejudged issues of fact and credibility. In addition, MFN alleges that the trial judge treated its counsel with less respect than counsel for the respondents.

[227] In oral argument, MFN emphasized that this ground of appeal is not an attack on the personal integrity of the trial judge. It does not allege that the trial judge was actually biased against its case or that he in fact prejudged the case. Nor does MFN argue that the trial judge's interventions prevented it from presenting its case, calling the relevant witnesses or adducing relevant evidence. Further, MFN does not argue that this Court should intervene because the trial judge did not act civilly. MFN accepts that while the trial judge was impatient from time to time and sometimes spoke harshly to counsel for MFN, that for the most part he was considerate to witnesses and counsel.

[228] The core of MFN's complaint is that the trial judge's interventions throughout the trial and during closing argument created an appearance of unfairness. From the outset, he seemed antagonistic to MFN's case and on occasion to its counsel, it says. MFN argues that the cumulative effect of the trial judge's interventions and comments were

such that an objective observer would reasonably conclude that the trial judge had made up his mind before the trial had been completed.

(1) The Law

[229] The often repeated test for a reasonable apprehension of bias is found in de Grandpré J.'s dissenting opinion in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at pp. 394-95. It is as follows:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> …
>
> The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[230] A determination of whether a trial judge's interventions give rise to a reasonable apprehension of unfairness is a fact-specific inquiry and must be assessed in relation to the facts and circumstances of a particular trial. The test is an objective one. Thus, the trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a

reasonable observer throughout the trial: see *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.) at p. 232, leave to appeal to S.C.C. refused, [1986] 1 S.C.R. xiii; and *R. v. Stucky* (2009), 240 C.C.C. (3d) 141 (Ont. C.A.), at paras. 68, 70, 72.

[231] An examination of whether a trial judge has unduly intervened in a trial must begin with the recognition that there are many proper reasons why a trial judge may intervene by making comments, giving directions or asking questions during the course of a trial. A trial judge has an inherent authority to control the court's process and, in exercising that authority, a trial judge will often be required to intervene in the proceedings.

[232] In *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), at para. 40, this Court said:

> [40] Whatever may have been the case in the past, it is no longer possible to view the trial judge as little more than a referee who must sit passively while counsel call the case in any fashion they please. Until relatively recently a long trial lasted for one week, possibly two. Now, it is not unusual for trials to last for many months, if not years. Early in the trial or in the course of a trial, counsel may make decisions that unduly lengthen the trial or lead to a proceeding that is almost unmanageable. It would undermine the administration of justice if a trial judge had no power to intervene at an appropriate time and, like this trial judge, after hearing submissions, make directions necessary to ensure that the trial proceeds in an orderly manner. I do not see this power as a limited one resting solely on the court's power to intervene to prevent an abuse of its process. Rather, the power is founded on the court's inherent jurisdiction to control its own process.

[233] The reasons a trial judge may properly intervene include the need to focus the evidence on the matters in issue, to clarify evidence, to avoid irrelevant or repetitive

evidence, to dispense with proof of obvious or agreed matters and to ensure that the way a witness is answering or not answering questions does not unduly hamper the progress of the trial.

[234] In short, a trial judge has the authority to prevent a trial from being unnecessarily protracted and "is entitled to manage the trial and control the procedure to ensure the trial is effective, efficient and fair to both sides": see *R. v. Snow* (2004), 73 O.R. (3d) 40 (C.A.), at para. 24.

[235] In its 2009 publication, "Principles of Civility for Advocates", available online at «http://www.advocates.ca», the Advocates' Society includes a section entitled, "What Advocates are Entitled to Expect of the Judiciary". Under that heading, principle 73 reads: "Advocates are entitled to expect judges to maintain firm control of court proceedings and ensure that they are conducted in an orderly, efficient and civil manner by counsel and others engaged in the process."

[236] We agree with that principle. We would add that the parties and the public are also entitled to have these same expectations of trial judges.

[237] For the most part, trial judges can manage the trial process by asking questions of counsel, making comments or giving directions about the course of the trial.[12] Trial judges should be careful about trying to control a trial by examining witnesses. In the normal course, "the trial Judge should confine himself [or herself] as much as possible to

[12] We note that effective January 1, 2010, Rule 1.04(1.1) of the *Rules of Civil Procedure* directs that, in applying the Rules, "the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding."

his [or her] own responsibilities and leave to counsel … [his or her] … function:" *R. v. Torbiak and Campbell* (1974), 18 C.C.C. (2d) 229 (Ont. C.A.), at pp. 230-31; see also *Valley*, at p. 231.

[238] On occasion, trial judges may be required to play a more active role in asking witnesses questions. However, when they do, it is important that they use care and not create an impression through the questioning process of having adopted a position on the facts, issues or credibility.

[239] When a trial judge has questions for a witness being examined by counsel, it is generally best to leave the questions to a point during the evidence where counsel has completed a particular area or to the end of the witness's evidence. In that way, the judge avoids interfering with the organization and flow of the evidence. Excessive judicial intervention in the examination of a witness, whether in-chief or on cross-examination, may hamper counsel from following a well thought-out and organized line of inquiry.

[240] When trial judges do intervene, it is important that they do so in a judicious manner. They should avoid expressions of annoyance, impatience and sarcasm. Judges should provide leadership by example in promoting civil behaviour by those involved in the court processes. Judges cannot expect lawyers to behave civilly if they do not themselves.

[241] In the "Principles of Civility" referred to above, the Advocates' Society set out the two further principles that are worth repeating:

> 71. Advocates are entitled to expect judges to treat everyone before the courts with appropriate courtesy.
>
> 74. Advocates are entitled to expect that judges will not engage in unjustified reprimands of counsel, insulting or improper remarks about litigants and witnesses, statements evidencing prejudgment and intemperate or impatient behaviour.

[242] Again, we would add that everyone involved in a trial is entitled to these expectations.

[243] All of that said, appellate courts are reluctant to intervene on the basis that a trial judge "entered the arena" and improperly intervened in a trial. There is a strong presumption that judges have conducted themselves fairly and impartially. Isolated expressions of impatience or annoyance by a trial judge as a result of frustrations, particularly with counsel, do not of themselves create unfairness: see *Kelly v. Palazzo* (2008), 89 O.R. (3d) 111 (C.A.), at paras. 20-21; *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at paras. 12-14; and *Confectionately Yours, Inc. (Re)* (2000), 219 D.L.R. (4th) 72 (Ont. C.A.), at para. 28. Similarly, a trial judge's willingness to debate with counsel openly over relevant factual and legal issues should not serve as a basis for a reasonable apprehension of bias. In the end, an appellate court should only intervene if satisfied that the trial judge's interventions, considered in the context of the entire trial, created a reasonable apprehension that the trial judge was biased.

(2) Interventions During the Hearing of Evidence

[244] On this appeal, MFN points to literally dozens of interventions that it says taken together create the impression that the trial judge favoured the respondents' case. We have reviewed those interventions carefully. In our view, the large majority of the trial judge's interventions were appropriate and constituted a proper exercise of his authority to control the trial.

[245] There were, however, some instances where the trial judge's comments or questions to witnesses were ill chosen and should not have been made. On occasion, the trial judge expressed his impatience in unfortunate language. A few times he used sharp language in rebuking MFN's counsel during the course of exchanges between them. In addition, the trial judge asked many questions of witnesses and at times asked questions of some of the MFN's witnesses, such as Williams, that were in the form of cross-examination.

[246] The trial judge's missteps, however, were relatively few and must be viewed in the context of this particular trial.

[247] At the outset, the parties provided the trial judge with written copies of their opening statements and briefs of the important documents. The parties also made oral openings. Thus, by the time the first witness was called, the trial judge had a considerable amount of information about the issues, the parties' positions and the anticipated evidence. He was in a good position to engage counsel in discussions about

how the trial was unfolding and to provide direction about what was helpful and what was not.

[248] The trial got off to a slow start. MFN's first witness was examined in-chief for nine days. The trial judge intervened on many occasions. By and large, his interventions were directed at focusing the evidence on the issues and clarifying matters that were difficult to follow. He became impatient with the pace of the trial occasionally and also with what he viewed to be attempts to introduce irrelevant or unnecessary documents. His comments, however, were directed at MFN's counsel, not at the witness.

[249] After the first witness, the trial judge's practice of intervening continued. There is no question that the trial judge was "an active judge". He intervened more often than many other judges might have.

[250] That said, this was a trial that needed a firm hand. While there was an enormous amount of money at stake, that by itself does not necessarily translate into a more extensive trial. As can be seen from the issues raised on this appeal, the core of this case turned on whether MFN was able to establish that there was an agreement that it would receive 35% of the net revenues of the casino operation at the time it was selected as the site for the casino. There was a discrete and limited body of evidence that bore on this critical issue.

[251] This turned out to be a lengthy trial – 47 days long. The trial judge was understandably concerned that the trial proceed efficiently and effectively. He knew the

issues, followed the evidence carefully and was having difficulty making sense of some of MFN's evidence and, in some instances, with MFN's theory of its case. A fair reading of his interventions shows that he was concerned appropriately that he fully understand the evidence and MFN's positions on the factual and legal issues.

[252] As we point out above, when assessing allegations that a trial judge has unduly intervened in the conduct of a trial, it is essential to look at the trial as a whole and the effect of the interventions on the entire proceeding. We have done that. We are satisfied that to a large extent, the trial judge's interventions in this case were properly directed at managing the trial and controlling the process. As it was, even with the trial judge's interventions, this trial took a long time. Had he not played such an active role, it could have taken longer. That would have been unfortunate.

[253] In addition, there are several factors in this case that tend to reduce any concern that the trial judge's interventions created perceptions of unfairness.

[254] First, it is worth noting that throughout the trial, experienced counsel who acted for MFN did not object that the trial judge was being too interventionist. On the contrary, counsel invited the trial judge to intervene and ask questions as he saw fit. While the failure of a party to object to what it later alleges were undue interventions is not fatal to succeeding on such an argument, it is certainly relevant. Here, over the course of a 47-day trial, one might reasonably expect that counsel for MFN would have raised some objection if the trial judge's interventions were creating the perception of unfairness that

it now alleges. Objections of this sort can be made in a measured and respectful way and need not result in confrontation between counsel and a trial judge.

[255] Secondly, in assessing the impact of the trial judge's interventions, it is also important to bear in mind that throughout he demonstrated sensitivity to, and was solicitous of, the witnesses. The trial judge explained the nature of the process to many of the witnesses and showed patience with the witnesses when there was confusion or when additional time was required to lead the evidence. As an example, he permitted one of MFN's witnesses to speak with her counsel during cross-examination to better enable the witness to understand the line of questioning. As mentioned above, the complaints raised on this appeal with respect to improper interventions are largely directed at interventions or comments made to MFN's counsel and not to the witnesses.

[256] Finally, we do not accept MFN's argument that the trial judge improperly commented on what evidence he expected the respondents to lead in answer to MFN's evidence, thereby assisting the respondents and diminishing the evidence of MFN's witnesses. In our view, in making the impugned comments, the trial judge did nothing more than attempt to help the parties focus their positions, narrow the issues and identify the areas in which he saw the differences in their positions. The parties at trial were represented by senior and experienced counsel. Undoubtedly, they knew their cases well and were able to form their own judgments as to what evidence needed to be called. We see nothing improper in these remarks.

[257] We have considered those instances where the trial judge's comments or questions might be viewed as unduly harsh or inappropriate and, if taken alone, could possibly create the impression that he favoured respondents' counsel over the appellant's or the respondents' case over the appellant's. However, we are not satisfied that when those comments are viewed in the context of the trial, as a whole, that they would cause a reasonable person to have the impression that the trial judge was biased in the way he approached his task of deciding the issues in the case.

[258] In the result, we are of the view that the trial judge's interventions during the hearing of evidence fell short of warranting intervention by this Court.

(3) Interventions During the Closing Arguments

[259] MFN argues further that the trial judge unduly encumbered its presentation of its closing argument. We do not accept this argument.

[260] As acknowledged by MFN, a trial judge is afforded more latitude in intervening during argument by counsel than during the course of hearing evidence: *R. v. Brown* (2003), 64 O.R. (3d) 161 (C.A.), at para. 96. Closing arguments serve at least two important purposes. They allow the parties to present their positions and enable the court to pose questions about those positions so as to test their strength. Questions during closing argument are useful to counsel and provide a good opportunity to address the court's concerns. They are also useful to trial judges to help them focus their own

analysis and reasoning: see *R. v. Stewart* (1991), 62 C.C.C. (3d) 289 (Ont. C.A.), at p. 319.

[261] In this case, the parties filed lengthy closing submissions in writing. The trial judge read them before oral argument began. There can be no doubt that the trial judge was fully aware of the parties' positions.

[262] Before oral argument, the trial judge prepared and provided to counsel a list of specific questions and concerns. Both counsel agreed to address the matters raised by the trial judge. Not surprisingly, the trial judge asked many questions during closing arguments. However, we are satisfied that MFN had full opportunity to provide its closing submissions (in writing or orally), including a lengthy reply, even if it was not in the manner that counsel had planned. At no time did MFN's counsel seek an extension of time to complete his submissions.

[263] Finally, MFN argues that the trial judge erred when he expressed concern during closing argument that MFN, which maintained that the November 18, 1994 revenue sharing formula was binding, had not paid the significant gross revenue distribution to the other First Nations contemplated by that formula. In our view, the trial judge was entitled to raise the matter. It was consistent with the position taken by MFN at trial. We see no error in his raising this matter during closing argument.

[264] In the result, we see no basis to interfere with the result at trial based on the allegation that the trial judge's interventions throughout the trial and during the closing

created an appearance of unfairness such that an objective observer would reasonably conclude that the trial judge had made up his mind before the trial had been completed.

V. DISPOSITION

[265] For the foregoing reasons, we dismiss the appeal.

[266] Counsel may file brief written submissions regarding costs. The respondents shall file their submissions within 30 days of the release of these Reasons and the appellant within 30 days thereafter.

[267] We conclude our reasons by thanking counsel for their thorough and helpful submissions.

RELEASED: January 22, 2010
"DOC"

"D. O'Connor A.C.J.O."
"R.A. Blair J.A."
"I agree R.G. Juriansz J.A."