CHIPPEWAS OF MNJIKANING FIRST NATION V ONTARIO (MINISTER OF NATIVE AFFAIRS)

Ontario Court of Appeal (D.R. O'Connor ACJO, RA Blair and RG Juriansz JJA)
22 January, 2010.
[2010] ONCA 47

Canada – contract law – agreements between the Crown and First Nation reserves – building of casinos – revenue sharing between Ontario First Nations – whether there was a failure to give sufficient reasons to explain findings and conclusions – whether there was the making of palpable and overriding factual errors – whether there was an apprehended bias from excessive and improper intervention – whether there was a failure to consider a fiduciary duty between the appellant and the respondent – whether there was a misapprehension of the legal status and relationship between the appellant and respondent – whether there was a misapprehension of the Aboriginal cultural context

Facts:

In the early 1990s the Government of Ontario began negotiations with Ontario First Nations communities for the development of casino gambling on a single First Nation site, to be established as a pilot project with revenue sharing to benefit all Ontario First Nations. A Site Selection Process ('SSP') was developed and an independent Selection Panel constituted in order to select the host of the first casino. The appellant, Chippewas of Mnjikaning First Nation ('MNF'), was chosen to host.

The appellants argued that this SSP gave rise to a binding contract with the Government of Ontario in which it would receive 35% of the net profits of the casino, which they set out in their proposal submitted to the Selection Panel in November 1994. They alternatively argued that the independent panel overseeing the SSP was mandated to negotiate the revenue-sharing components of the proposal, which resulted in a firm agreement in respect of the apellants share of the net gaming revenues. Finally, the appellants argued that the proposal process was akin to a request for proposal ('RFP'), whereby the successful proponent could negotiate its contract up until the time of the final selection. The provincial Crown, the Ontario Lottery and Gaming Corporation, the Chiefs of Ontario and the Ontario First Nations Limited Partnership opposed these claims. They argued that the SSP did not encompass a revenue sharing agreement, which was to be negotiated in a separate round of negotiations that included a broader and more representative group of First Nations interests.

The trial judge found that a reasonable person viewing the evidence objectively would not have concluded that a binding agreement on revenue sharing would result from the SSP. In addition it was found that the appellant's representatives never subjectively believed they had such a contract. The Ontario Court of appeal was asked to evaluate the ensuing claims by the appellant that the trial judge had committed numerous factual and legal errors, and that in making his judgement he intervened in the trial process in such a way that it was irreparably tainted with unfairness. The legal errors asserted relate to: the law of fiduciary obligations, the application of contract and tender law jurisprudence, the lack of appreciation of the unique Aboriginal perspective of MFN's witnesses and the insufficiency of reasons.

Held, per curiam, dismissing the appeal:

1. The reasons given by the trial judge are sufficient to explain the findings and conclusion. They provide ample clarity and transparency to facilitate meaningful appellate review: [74]; *R v Sheppard* [2002] 1 SCR 869, cited.

2. There are no palpable and overriding factual errors. There is no basis for holding that the trial judge made any significant findings that conflicted with any accepted evidence, improperly weighed or assessed the evidence, or misapplied the hearsay rule. The appellant's documentary

evidence of an agreement on revenue sharing, between MFN and the Ontario Government, is ambiguous and the testimony of the appellant's witnesses is refuted by other evidence; it was, therefore, open to the trial judge to make the findings he did: [79]–[80], [175]–[176].

3. The law of tender and RFP was neither misapprehended nor misapplied. The judge was correct in finding that the SSP is outside of the legal paradigm of tenders or RFPs, and did not constitute a process whereby a binding agreement arose – in relation to MFN's 35% revenue splitting offer: [177]–[178].

4. The trial judge properly applied the objective test when concluding that a contract did not exist. There was no offer and acceptance during the SSP, nor did the parties intend that the SSP would result in a binding agreement in relation to revenue sharing. Further, a reasonable person, objectively looking at the circumstances surrounding the SSP, would not conclude that the parties intended to enter into a binding contract on revenue sharing. Neither was there a contract formed by subsequent ratification on the Ontario Governments part: [192]–[194]; *Olivieri v Sherman* (2007) 86 OR (3d) 778, cited.

5. There is no failure to consider an underlying fiduciary duty owed to the appellant by the Crown. A fiduciary duty did not arise as a result of the *sui generis* duties owed by the Crown to Aboriginals in any dealings for the use of reserve land, nor did a fiduciary duty arise because the parties were engaged in a 'partnered initiative'. The parties were engaged in an arm's length transaction of a commercial nature, albeit the proceeds were to be used for ameliorative social and economic purposes. Nevertheless, if Ontario did owe a fiduciary duty to MFN in connection with the casino project, it would be owed to all First Nations collectively. The preferential treatment of MFN would then constitute a breach of their broader fiduciary obligation to the others: [199], [207], [209]–[211]; *Guerin v The Queen* [1984] 2 SCR 355, distinguished; *Lovelace v Ontario* [2000] 1 SCR 950, distinguished; *Hodgkinson v Simms* [1994] 3 SCR 377, cited.

6. There is no misapprehension of the legal context of the dispute, by misapprehending the Aboriginal cultural context. The judge was aware of the argument that contractual terms were to be liberally construed and any ambiguities resolved in favour of the appellant as an Aboriginal litigant, due to the importance placed on the *sui generis* obligation owed by the federal Crown to First Nations in relation to dealings with First Nation's land. However, the *Nowegijick* and *Guirin* line of cases do not support such a proposition. The trial judge was not required to resolve conflicting evidence in favour of Aboriginals: [212]–[216], [220]; *Nowegijick v The Queen* [1983] 1 SCR 29, considered; *Guirin v The Queen* [1984] 2 SCR 335, considered.

7. The trial judge did not misapprehend the law relating to the legal status of First Nations, and their relationship with each other and with the Province. The judge's comments are not to be construed as a suggestion that the appellants sovereignty or autonomy is limited by other First Nations or Ontario, as they are merely an acknowledgement of the 'political reality' that issues such as revenue sharing are matters to be decided by First Nations collectively, after proper consultation and consideration: [221]–[224].

8. The trial judge did not engage in excessive and improper intervention in the presentation of evidence and during closing argument to give rise to a reasonable apprehension that he was biased in favour of the respondents. The test for reasonable apprehension of bias is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.' The inquiry is fact-specific and must be related to the facts and circumstances of the trial. In looking at the trial as a whole and the effect of the interventions on the entire proceedings, the trial judge's interventions are properly directed at managing the trial and controlling the process. An objective observer would not reasonably have the impression that the trial judge is biased in favour of the respondents: [229]–[230], [252], [257], [264]; *Committee for Justice and Liberty v Canada (National Energy Board)* [1978] 1 SCR 369, applied; *R v Valley* (1986) 26 CCC (3d) 207 (Ont CA), followed; *R v Stucky* (2009), 240 CCC (3d) 141 (Ont CA), followed.