

Court File No. \_\_\_\_\_

**FEDERAL COURT**

BETWEEN:

HUPACASATH FIRST NATION

APPLICANT

- and -

THE MINISTER OF FOREIGN AFFAIRS CANADA and THE ATTORNEY  
GENERAL OF CANADA

RESPONDENT

APPLICATION UNDER THE *FEDERAL COURTS ACT*,  
R.S.C. 1985, c. F-7, s. 18.1

**NOTICE OF APPLICATION**

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

- 2 -

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

January 18, 2013

Issued by: \_\_\_\_\_  
(Registry Officer)

Address of local office: Federal Court, Vancouver Office  
Pacific Centre \_\_\_\_\_  
P.O. Box 10065  
701 West Georgia Street  
Vancouver BC V7Y 1B6

TO: The Minister of Foreign Affairs Canada  
as represented by The Attorney General of Canada  
Department of Justice  
900 – 840 Howe Street  
Vancouver BC V6Z 2L2

## APPLICATION

(Where the application is an application for judicial review)

This is an application for judicial review in respect of the ratification of the Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments ("FIPPA"), and the sending of a letter from the Government of Canada to the People's Republic of China stating that Canada has completed the internal legal procedures for the entry into force of FIPPA.

The applicant makes application for:

- (a) A declaration that Canada is required to engage in a process of consultation and accommodation with First Nations, including the applicant, prior to taking steps which will bind Canada under FIPPA,
- (b) An order restraining the Minister of Foreign Affairs or any other official or representative of the Government of Canada from sending a letter to the People's Republic of China stating that Canada has completed the internal legal procedures for the entry into force of FIPPA, until the appropriate consultation and accommodation has been carried out;
- (c) An interlocutory injunction restraining the Minister of Foreign Affairs or any other official or representative of the Government of Canada from sending a letter to the People's Republic of China stating that Canada has completed the internal legal procedures for the entry into force of FIPPA, until this application has been heard and determined by the Court.

The grounds for the application are:

### **The Hupacasath First Nation**

1. The Applicant, the Hupacasath First Nation, is also known as the Hupacasath Indian Band and formerly known as the Opetchesah Indian Band. The Hupacasath Indian Band

- 4 -

is a "band" within the meaning of the term defined in the *Indian Act*, R.S.C. 1985, c. I-5. (the "*Indian Act*").

2. The Hupacasath Chief and Council represent approximately 285 band members and all band members are Indians as that term is defined by the *Indian Act*.
3. Hupacasath territory consists of approximately 232,000 hectares in and beyond the Alberni Valley on Vancouver Island, British Columbia. The Hupacasath have established their residence in Hupacasath territory since time immemorial.
4. The Hupacasath have protected and maintained the boundaries of their traditional territory and exercised their rights within those boundaries. Hupacasath have expressed their ownership of the traditional territory through our oral traditions, ceremonies, regalia, history, legends and songs. They have also confirmed their ownership and rights of the territory through their practices, pictographs, markers, according to Hupacasath laws, customs and practices.
5. Hupacasath practices and activities have continued to the present day to the extent they have not been restricted or prevented by interference from the federal and provincial governments, settlers and third parties in the territory. These practices and activities are integral to the distinctive culture of the Hupacasath and constitute aboriginal rights.
6. The federal government is aware that the Hupacasath assert a number of aboriginal rights, including the following:
  - i. the right to harvest, manage and protect and use fish, wildlife and other resources in their Territory in priority to all other users, subject only to conservation;
  - ii. rights to the commercial sale of fish, wildlife and other resources to earn a moderate livelihood;
  - iii. the right to harvest or use fish, wildlife and other resources in locations preferred by Hupacasath First Nation members within and beyond the Territory;

- 5 -

- iv. the right to have access to exclusive and preferred areas to harvest or use fish, wildlife and other resources;
  - v. the right to build, maintain and occupy structures incidental to harvesting, using, managing or conserving fish, wildlife and other resources in the Territory;
  - vi. the right to harvest and consume fish, wildlife and other resources to maintain the spiritual, cultural and physical health of Hupacasath First Nation members; and
  - vii. the right to harvest, use and conserve fish, wildlife, and other resources and to protect and manage the habitat of fish, wildlife and other resources in accordance with traditional Hupacasath laws, customs and practices both in their traditional and their modern form.
7. The Hupacasath participate in land use planning and regulation of the use of their traditional territories through agreements with the federal and provincial government.
  8. Island Timberlands is a privately owned company which has a large forestry operation on fee simple lands within the Hupacasath territory. This operation is active over approximately 70,000 hectares of Hupacasath traditional territory. China's government wealth fund, the China Investment Corp. ("CIC"), has been negotiating with Toronto-based Brookfield Asset Management for a 12.5 per cent stake in Island Timberlands.
  9. Hupacasath Territory also contains a large coal base. Development of this resource could significantly interfere with the Hupacasath's ability to exercise their aboriginal rights.
  10. The Hupacasath are engaged in the British Columbia Treaty Process. The issues which are being negotiated include: land; law-making authority; water and water resources; forestry and forest resources; fisheries and marine resources; language, heritage and culture; mining and subsurface resources; wildlife and migratory birds; governance; environmental management, fiscal arrangements, and general provisions.
  11. Some modern treaties negotiated with British Columbia and Canada address Canada's obligation to consult prior to entering into international agreements which may affect

- 6 -

treaty rights. Those treaties also require First Nations to “remedy” any of their laws, or the exercise of their powers under their treaties, to conform to Canada’s present and future international legal obligations. For example, on April 3, 2009, members of the Tsawwassen First Nation ratified the *Tsawwassen Final Agreement*. Clauses 30 and 31 in Chapter 2-General Provisions, provide as follows:

### **INTERNATIONAL LEGAL OBLIGATIONS**

30. After the Effective Date, before consenting to be bound by a new International Treaty that would give rise to a new International Legal Obligation that may adversely affect a right of Tsawwassen First Nation under this Agreement, Canada will Consult with Tsawwassen First Nation in respect of the International Treaty, either separately or through a forum that Canada determines is appropriate.

31. Where Canada informs Tsawwassen First Nation that it considers that a Tsawwassen Law or other exercise of power by Tsawwassen First Nation causes Canada to be unable to perform an International Legal Obligation, Tsawwassen First Nation and Canada will discuss remedial measures to enable Canada to perform the International Legal Obligation. Subject to clause 32, Tsawwassen First Nation will remedy the Tsawwassen Law or other exercise of power to the extent necessary to enable Canada to perform the International Legal Obligation.

12. Clause 32 under Chapter 2 provides that where there is a disagreement over whether a Tsawwassen Law or other exercise of power by Tsawwassen First Nation causes Canada to be unable to perform an International Legal Obligation, the parties will avail themselves of the dispute resolution mechanism contained in Chapter 22. Further, Clause 6 under Chapter 22 provides that the dispute resolution mechanism applies to any breach or anticipated breach of the Final Agreement.
13. Similar provisions are found in numerous other modern day treaties.

### **The FIPPA**

14. FIPPA was signed at Vladivostok, Russia, on September 9, 2012, by Canada’s Minister of International Trade and Minister for the Asia-Pacific Gateway, Ed Fast, and China’s Minister of Commerce, Chen Deming.

- 7 -

15. Section 35 of FIPPA provides that the parties will notify each other through diplomatic channels that they have completed the internal legal procedures for the entry into force of FIPPA. The Agreement shall enter into force on the first day of the following month after the second notification is received.
16. Pursuant to s. 10 of the *Department of Foreign Affairs and International Trade Act* (R.S.C. 1985, c. E-22), the Minister of Foreign Affairs is responsible for all official communications between Canada and the government of another country.
17. FIPPA is the first trade or investment treaty signed by Canada since NAFTA that incorporates an investor-state arbitration mechanism and that would apply to over ten billion dollars of foreign-owned assets in Canada.
18. If it is ratified and comes into effect, FIPPA will apply to government decisions at all levels in Canada in relation to a large volume of foreign-owned assets in the economy. FIPPA's provisions apply to legislatures, executive actors, and courts in Canada, and will be actionable directly by Chinese investors based on their right to arbitrate claims against Canada (FIPPA Article 20). Thus, the Canada-China FIPPA creates new fiscal liabilities and effective legal constraints for governments to an extent that other FIPPAs do not.
19. The FIPPA puts various disciplines on governments, including First Nations decision-makers. A violation of any one of the disciplines provides a basis for a damages award against Canada. The disciplines include requirements for:
  - a. a minimum standard of treatment (including "fair and equitable treatment" and "full protection and security") (FIPPA Article 4(1)),
  - b. national treatment (FIPPA Article 5),
  - c. most-favoured-nation treatment (FIPPA Article 6),
  - d. limits on performance requirements (FIPPA Article 9), and
  - e. compensation for direct or indirect expropriation (FIPPA Article 10).

- 8 -

20. FIPPA incorporates a reservation for measures that deny Chinese investors any rights or preferences provided to aboriginal peoples (FIPPA Article 8(3); FIPPA Annex B.8(1); Canada-Peru Annex II). However, FIPPA does not extend this reservation to all of its the treaty disciplines. In particular, it does not extend the reservation to the minimum standard of treatment (FIPPA Article 4) and the expropriation standard (FIPPA Article 10). These are the treaty disciplines relied on most frequently by arbitration tribunals to award damages against states.
21. The disciplines on governments in investment treaties have been interpreted very expansively by tribunals in numerous cases. In particular, tribunals have incorporated into the concepts of "fair and equitable treatment" and "full protection and security" a requirement for states to meet the legitimate expectations of investors and to ensure a stable business or regulatory framework. Also, tribunals have incorporated broad conceptions of indirect takings as part of the expropriation standard. Canadian domestic law would not require compensation for investors in circumstances where the relevant treaty disciplines, as interpreted by arbitration tribunals, would require payment of compensation.
22. If federal or provincial government measures to protect aboriginal and treaty rights have the effect of rendering the investments of Chinese companies or individuals less profitable, those measures may be held to be contrary to Canada's international obligations under FIPPA. Such measures could render the federal government directly liable to Chinese investors for significant monetary damages. Canadian court decisions which protect aboriginal and treaty rights may also give rise to financial liability on the part of Canada.
23. Once it is ratified and comes into effect, FIPPA has a minimum term of 15 years, requires an additional one-year's notice to terminate the treaty after the minimum term, and would then continue to apply to existing Chinese investments in Canada for another 15 years after termination (FIPPA Article 35 (1) to (3)). Thus, once it comes into effect, FIPPA's legal consequences for First Nations and other governments in Canada would endure for 31 years beyond the authority of any Canadian government or court.



**Consultation on FIPPA**

24. To the Applicant's knowledge, no consultations have occurred with First Nations in Canada with respect to FIPPA.
25. On October 26, 2012, the Hupacasath First Nation wrote to Prime Minister Stephen Harper expressing their concerns about FIPPA. On October 31, 2012, the Hupacasath again wrote to Prime Minister Harper, and stated their position that there must be consultation with First Nations, including the Hupacasath First Nation, prior to FIPPA being ratified. No response to this correspondence has been received.
26. On October 30, 2012, the Union of British Columbia Indian Chiefs (UBCIC) sent an open letter to Prime Minister Stephen Harper expressing concerns about the implications of FIPPA for First Nations, and setting out its position that Canada had failed to fulfill its fiduciary obligation to consult with First Nations. No response to this letter has been received.
27. On October 31, 2012, the Serpentine River First Nation wrote to Prime Minister Harper, calling on Canada to consult with First Nations prior to taking steps to ratify FIPPA.
28. On November 5, 2012, the Chiefs of Ontario wrote to both Prime Minister Harper and His Excellency Zhang Junsai, Ambassador of the People's Republic of China, setting out their position that Canada has constitutional and fiduciary obligation to consult with First Nations prior to entering into FIPPA. No response to this correspondence has been received.
29. On November 29, 2012 the Chiefs Council of the Union of BC Indian Chiefs passed by consensus, Resolution 2012-59, Canada-China Foreign Investment Promotion and Protection Agreement (FIPPA), calling on the federal government to ensure that Canada fulfills its duty to consult and accommodate with First Nations on FIPPA consistent with the principles of Free, Prior and Informed Consent as identified in Article 19 of the United Nations Declaration on the Rights of *Indigenous Peoples* ("UNDRIP").

- 10 -

30. In early December 2012, the Special Chiefs Assembly of the Assembly of First Nations adopted Resolution No. 37/2012 which directs engagement with the federal government to ensure that Canada fulfills its duty to consult and accommodate First Nations on FIPPA.
31. On December 14, 2012, the UBCIC, together with the Council of Canadians and Leadnow, issued a joint press release in which Grand Chief Stewart Phillip asked Prime Minister Harper to fulfill Canada's obligation to consult with First Nations regarding FIPPA. In that release, Grand Chief Phillip stated that efforts to ratify without consultation would adversely impact First Nations rights and territories and would require First Nations to take legal action.
32. On December 17, 2012, legal counsel wrote on behalf of the Applicant to the Clerk of the Privy Council, putting him on further notice of the Applicant's intent to bring legal proceedings to prevent ratification of FIPPA prior to consultation being carried out with First Nations.
33. The entry into force of FIPPA may affect the Aboriginal rights of the Hupacasath, and the Aboriginal and Treaty rights of many other First Nations across Canada, in several ways. The disciplines imposed by FIPPA may interfere with the protection of Aboriginal and Treaty rights, and impair the ability of Federal and Provincial governments to fulfill their constitutional obligation to respect and accommodate First Nations' rights. FIPPA will significantly diminish the prospect of meaningful consultation and accommodation with respect to treaty and aboriginal rights, and impede the adoption of legislative and policy measures which seek to preserve and protect lands and resources over which rights and title are asserted.
34. FIPPA will also constrain the ability of First Nations to exercise their own governance rights, including rights under treaties.
35. Because of these potential impacts, s. 35 of the *Constitution Act, 1982*, the honour of the Crown, the Crown's fiduciary obligations towards First Nations, and the United Nations Declaration on the Rights of Indigenous Peoples require Canada to engage in

- 11 -

consultations with First Nations, including the Applicant, prior to Canada agreeing to become bound by FIPPA.

This application will be supported by the following material:

1. The Affidavit of Carolyn Brenda Sayers, to be sworn;
2. The Affidavit of Grand Chief Stewart Phillip, to be sworn;
3. The Affidavit of Chief Isadore Day, Wiindawtegowinini to be sworn;
4. The Affidavit of Professor Gus Van Harten, to be sworn; and
5. Such other material as counsel may advise.

January 18, 2013

"Mark G. Underhill"  
Solicitor for the Applicant,  
Hupacasath First Nation  
Mark G. Underhill  
Underhill, Boies Parker  
1320 – 355 Burrard Street  
Vancouver BC V6C 2G8  
Telephone: 604.696.9828  
Fax: 1.888.575.3281