Court File No. T-153-13

FEDERAL COURT

BETWEEN:

HUPACASATH FIRST NATION

APPLICANT

- and -

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

RESPONDENTS

MEMORANDUM OF FACT AND LAW OF THE APPLICANT, HUPACASATH FIRST NATION

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MEMORANDUM OF FACT AND LAW OF THE APPLICANT, HUPACASATH FIRST NATION

PART I. STATEMENT OF FACTS

A. Introduction

1. This application concerns 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, signed on September 9, 2012 (the "FIPPA"). The Applicant says that the ratification of the FIPPA would represent a material and lasting change to the resource and land management regime in Canada, by granting Chinese investors with new, substantive and enforceable rights in respect of investments which they have, or may obtain, in the traditional territories of First Nations, including that of the Applicant. The effect of these rights is to constrain the Crown's discretion deal with resources and land over which First Nations assert aboriginal rights and title, and to reduce the scope of self government powers which the Applicant will be able to exercise, whether through the exercise of its aboriginal rights, the treaty process, or the use of delegated authority from government. The jurisprudence is clear that, in such circumstances, the constitutional principle of the honour of the Crown requires consultation and potential accommodation before Canada agrees to be bound by the obligations set out in the FIPPA.

B. Background Facts

1. The Applicant

2. The Applicant, the Hupacasath First Nation (the "Hupacasath" or "HFN"), is also known as the Hupacasath Indian Band and formerly known as the Opetchesaht Indian Band. The Hupacasath Indian Band is a "band" within the meaning of the term defined in the *Indian Act*.[1] The Hupacasath Chief and Council represent

[1] *Indian Act*, R.S.C. 1985, c. I-5 (the "*Indian Act*")

approximately 285 band members and all band members are Indians as that term is defined by the *Indian Act*.[2]

3. The Hupacasath live near Port Alberni on Vancouver Island. They assert aboriginal rights and title with respect to 232,000 hectares of land in central Vancouver Island. That land has been identified in a Statement of Intent map provided by the Hupacasath under the British Columbia Treaty Process.[3]

4. The federal government is aware that the HFN assert aboriginal rights and title, including, *inter alia,* the following aboriginal rights:

a. the right to harvest, manage protect and use fish, wildlife, and other resources in HFN's traditional territory in priority to all other users, subject only to conservation;

b. the right to have access to exclusive and preferred areas to harvest or use fish, wildlife and other resources in their traditional territory;

c. the right to protect the habitats that sustain fish, wildlife and other resources which the Hupacasath have a right to harvest; and

d. 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.[4]

5. The HFN have developed a Land Use Plan that sets out where development can and cannot occur and to what standard, and also identifies areas of vital importance to the HFN. It is a living document subject to continual change and

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[2] Affidavit of Carolyne Brenda Sayers, sworn February 14, 2013 ("Sayers Affidavit"), paras. 1-2, Application Record ("AR") p. __

[3] Sayers Affidavit, para. 4, Ex. A, AR pp. __

[4] Sayers Affidavit, para. 23, AR p. __

updating. An important component of the Land Use Plan is the Cedar Access Strategy.[5]

6. The land over which the Hupacasath assert aboriginal rights and title includes land included in Tree Farm Licence (TFL) 44. In 2004, the Minister of Forests consented to the removal of 70,000 hectares of privately held lands (the "Removed Lands") from TFL 44. The Hupacasath challenged the decision, and in *Hupacasath First Nation v. British Columbia (Minister of Forests)*, Justice L. Smith held that the provincial Crown breached its duty to consult with the HFN when it approved the removal of the lands from the TFL without adequate consultation.[6]

7. A lengthy period of consultation followed the delivery of Smith J.'s decision, supervised by a court appointed mediator. That resulted in an agreement with the Province which was announced in July of 2012, and which involved, *inter alia*, various forestry licences and tenures being given to the Hupacasath, opportunities to protect cultural resources on a sacred area known as Thunder Mountain, the creation of Old Growth Management Areas, and a collaborative decision-making process to create an environment for meaningful, effective and efficient consultation.[7]

8. The Hupacasath are participating in the B.C. Treaty process, and are currently in Stage Four, which requires negotiation of an Agreement in Principle. The issues which are being negotiated include:

a. land, law-making authority, selection and access;

b. water and water resources;

c. forestry and forest resources;

d. fisheries and marine resources;

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[5] Sayers Affidavit, paras. 19 and 21, AR p. __
[6] Sayers Affidavit, para. 22, AR p. __; *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712, 51 B.C.L.R. (4th) 133 [*Hupacasath*]
[7] Sayers Affidavit, para. 22, Ex. C, AR pp. ___

e. language, heritage and culture;

f. mining and subsurface resources;

g. wildlife and migratory birds;

h. governance;

i. environmental management;

j. fiscal arrangements, and

k. general provisions.[8]

9. On November 4, 2012, The *Wall Street Journal* reported that China is preparing to invest about $100 million in timber assets mainly on Vancouver Island. The Journal said China's government wealth fund, the China Investment Corp., is negotiating with Brookfield Asset Management for a 12.5 per cent stake in Island Timberlands, which owns about 254,000 hectares of forest land.[9]

The FIPPA

10. The FIPPA was signed at Vladivostok, Russia, on September 9, 2012.[10]

11. Section 35 of the 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 the FIPPA. The Agreement shall enter into force on the first day of the following month after the second notification is received.[11]

12. The FIPPA is a bilateral investment treaty ("BIT"). The purpose of a BIT is to provide protection to a foreign country's investors, by imposing obligations on the host state with respect to foreign investments. A BIT, including the FIPPA, protects

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[8] Sayers Affidavit, para. 24, AR p. __, Affidavit of Jim Barkwell, sworn March 14, 2013 ("Barkwell Affidavit"), paras. 17, 20 and Ex. F, AR pp. __

[9] Sayers Affidavit, Ex. Q, AR p. __

[10] Affidavit #1 of Vernon McKay, sworn March 13, 2013 ("McKay Affidavit #1"), Ex. C, AR p. __

[11] McKay Affidavit #1, Ex. B, AR p. __

foreign investment by requiring all of a country's laws, polices, programs and decisions to conform with certain obligations, and giving foreign investors the right to sue the host state directly if the investor is subject to any measure that is not in compliance with the BIT obligations.[12]

13. Once ratified, the FIPPA will apply to any legislative, executive, or judicial act of any federal, provincial, municipal, or other sub-national decision-maker of the Canadian state. All such actors (including First Nations authorities and the courts themselves) form part of the unified entity of Canada as a state.[13]

14. After it comes into effect, the FIPPA has a minimum term of 15 years. The treaty can be terminated after that 15 year period by giving one year's notice. Even after the FIPPA is terminated, it will continue to apply to all existing Chinese investments in Canada for another 15 years after termination (FIPPA Article 35 (1) to (3)). Once it is ratified, the FIPPA's obligations for Canada will remain in force for at least 31 years.[14]

15. Investor claims under the FIPPA will be resolved though *ad hoc* arbitration. The arbitrators are appointed by the parties, and are not judges. There is no security of tenure, or set salary for arbitrators. The arbitrators' decisions are only subject to judicial review on limited grounds.[15]

16. Treaty-based investor-state arbitration was put into widespread use by foreign investors about fifteen years ago. In recent years there has been a dramatic increase in the number of claims. The largest known award under an investment treaty - for about $1.8 billion plus pre-award interest - was issued in September 2012. In that same month, the Chinese firm Ping An reportedly brought the largest known claim by a Chinese investor to date, against Belgium, for between $2 billion and $3 billion.

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[12] Cross-Examination on Affidavit of Vernon John MacKay, conducted on April 3, 2013 ("MacKay Cross"), Ex. 1, AR p. __

[13] Affidavit of Gus Van Harten, sworn February 13, 2013 ("Van Harten Affidavit"), Ex. C, pp. 11-13, AR pp. __

[14] Van Harten Affidavit, Ex. C, p. 11, AR p. __

[15] Van Harten Affidavit, Ex. C, pp. 5-6, AR pp. __

There are various ongoing cases, especially in the resource sector, that involve disputes over assets valued in the tens of billions of dollars.[16]

17. The FIPPA does not require a foreign investor to utilize the domestic remedies of the host state prior to bringing a claim for adjudication under FIPPA. Investment treaty arbitrators can review legislative or government decisions which remain open to adjudication in domestic courts. Investment treaty arbitrators can also make an award relating to a holding by domestic court, even if that holding is still subject to appeal.[17]

18. Unlike in state to state adjudication at the World Trade Organization, investment treaty arbitrators typically award compensation to foreign investors from the date at which the respondent state's legislature, executive, or judicial decision-maker engaged in the conduct found to have violated the treaty. Thus, the state does not have an opportunity to correct the illegality before being ordered to pay retrospective compensation.[18]

The FIPPA obligations

19. The obligations assumed by Canada under the FIPPA include:

a. a national treatment obligation (FIPPA Article 5);

b. a most-favoured-nation treatment obligation (FIPPA Article 6);

c. a minimum standard of treatment (FIPPA Article 4(1));

d. limits on performance requirements, (FIPPA Article 9);

e. a requirement for compensation for direct or indirect expropriation (FIPPA Article 10);

f. a national treatment obligation (FIPPA Article 5); and

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[16] Van Harten Affidavit, Ex. C, pp. 6-7, AR pp. __
[17] Van Harten Affidavit, Ex. C, p. 5, AR p. __
[18] Van Harten Affidavit, Ex. C, p. 5, AR p. __

g. a most-favoured-nation treatment (“MFN”) obligation (FIPPA Article 6).[19]

20. The national treatment obligation requires each party to treat foreign investors and covered foreign investments of the other party in a manner no less favourable than the party treats domestic investors and their investments, with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.

21. The MFN obligation requires each party to accord to investors of the other party, and their covered investments, treatment no less favourable than that it accords, in like circumstances, to investors of any other state with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

22. The FIPPA incorporates a reservation from these two obligations for measures that deny Chinese investors “any rights or preferences provided to aboriginal peoples.” This allows governments in Canada to continue to provide treatment to aboriginal peoples that is more favourable than that provided to Chinese investors without being in breach of the MFN or NT obligations. The reservation also applies to Article 7 of the FIPPA relating to the appointment of senior management and directors, and the entry into the country of foreign workers. It does not apply to any other of the FIPPA’s provisions.

23. The limits on performance requirements incorporate Canada’s obligations under the WTO *Agreement on Trade-Related Investment Measures* (TRIMs). These prohibit the imposition of, *inter alia*, buy local requirements.

24. The expropriation provision provides that covered investments or returns of investors of each party shall not be expropriated, nationalized or subjected to measures “having an effect equivalent to expropriation or nationalization,” unless

[19] Van Harten Affidavit, Ex. C, p. 7, AR p. __

(a) the measure is for a "public purpose", (b) the measure is in accordance with domestic "due procedures of law," (c) the measure is imposed in a non-discriminatory manner, and (d) compensation is provided. This provision protects against both direct and "indirect" expropriation. Regulatory measures which have the effect of substantially decreasing the value of an investment can constitute "indirect" expropriation.[20]

25. The requirement that a state provide covered investments with a minimum standard of treatment includes the requirement that this investment receive "fair and equitable treatment" and "full protection and security", in accordance with international law. "Fair and equitable treatment" includes a wide range of procedural and substantive protections, including a requirement for states to satisfy legitimate expectations of foreign investors and to maintain a stable legal or regulatory framework for foreign investors. Changes to legislative, policy, or legal frameworks over the lifespan of a foreign investment may trigger claims for compensation by an investor whose investment is impacted by the change.

26. Under other investment treaties, claims by foreign investors have most commonly involved decision-making about natural resources; major utilities or infrastructure; health or environmental regulation; administration of justice; taxation, financial regulation, or the monetary system; or planning and permitting decisions. For example, under other treaties, investors have brought claims against governments on the following topics:

a. Moratoriums on gas or mining activities and the corresponding non-approval or freezing of Permits;

b. Refusals of a proposed project such as a quarry or power project following an environmental assessment, public opposition, or the election of a new government;

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[20] Van Harten Affidavit, Ex. C, pp. 8-9, AR p. __

c. Local opposition to a major project such as a pipeline or waste disposal site;

d. Local opposition, including by indigenous peoples, to resource exploration/exploitation Activities;

e. New laws or regulations on the content of gasoline, exports of hazardous wastes, pesticide use, or anti-tobacco measures;

f. New mining remediation requirements to protect environmental or Native sites;

g. Implementation or revision of rules on power generation, such as under the Ontario *Green Energy Act*;

h. Hunting and fishing restrictions such as the re-issuance of Caribou tags (apparently as a conservation measure);

i. Reversal of a privatization decision;

j. Expropriation of properties, and

k. New taxes or royalties, such as in the resource sector.[21]

27. The obligations under FIPPA are similar to those found in the North American Free Trade Agreement ("NAFTA"). Many claims which have been brought under NAFTA's chapter 11 involve resource use and environmental issues. The most recent of those claims is *Windstream Energy v. Canada*, which involves a challenge by an American investor to Ontario's moratorium on offshore wind development, on the basis that the moratorium constitutes an expropriation, a breach of the right to fair and equitable treatment, and discrimination.[22]

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[21] Van Harten Affidavit, Ex. C, pp. 13-14, AR pp. ___

[22] MacKay Cross, p. 54, Ex. 4, AR p. __

28. In addition, Notices of Intent to Submit Claims to Arbitration under NAFTA have been recently filed against Canada, including one by Lone Pine Resources Inc., which challenges Quebec's moratorium on shale gas "fracking", on the basis that the moratorium constitutes an expropriation and a breach of the obligation for minimum standard of treatment.[23]

2. FIPPA and the Balance of Trade

29. BITs were historically used by developed countries to protect their investments in developing countries from arbitrary government action by the host state. Canada's other BITs are consistent with this approach. Canada presently has 24 BITs in force. In most cases, the other party has no significant investment in Canada. Argentina has some investment in Canada, amounting in 2011 to $19 million, while Canadian investment in Argentina was $2.7 billion for the same period. While there has been some Russian investment in Canada, up to $538 million, it is has declined, according to Canada's evidence.[24]

30. In contrast, Chinese investment in Canada has dramatically increased, and now significantly exceeds Canadian investment in China. Chinese investment in Canada totaled about 228 million in 2003. Since then, however, it has grown rapidly, and in 2009 exceeded $12 billion. This number increased further in 2012, with the takeover of Nexen by the Chinese state owned oil company CNOOC, valued at approximately $15 billion. This means that Chinese investment in Canada sits at something like $25 billion. Canada's investment in China is not nearly as significant. Canadian investment in China totaled $1.8 billion in 2004, and had grown to $4.46 billion by 2011. The FIPPA is the first BIT Canada has entered into when it was in a capital importing position. The only other arrangement where Canada hosts significant foreign investment and is subject to investor state arbitration is NAFTA.[25]

[23] MacKay Cross, p. 55, Ex. 5, AR p. __
[24] MacKay Affidavit #1, para. 14, Exs. H, I, AR pp. __
[25] MacKay Affidavit #1, para. 14, Exs. H, I, AR p. __; MacKay Cross, pp. 18-21, Ex. B for Identification, AR pp. __

3. Consultations on the FIPPA

31. According to Canada's materials, the Canadian government, and in particular the Department of Foreign Affairs and International Trade (DFAIT), kept the provincial and territorial governments regularly updated during the negotiation of the CCFIPA through a dedicated trade policy committee. DFAIT also consulted with private stakeholders to identify issues of specific concern during the negotiations. An Environmental Assessment Committee, which included membership from various federal departments and which was chaired by Canada's lead FIPPA negotiator, solicited input from provinces and territories, stakeholders representing business, academics and non-governmental organizations, as well as the general public.[26]

32. However, no consultations were held with First Nations in respect of the FIPPA. Indeed, no assessment was made by Canada as to (a) potential adverse impacts of the FIPPA on aboriginal rights and title, (b) the implications of Chinese investment in land or resources which might be subject to aboriginal rights and title or (c) how First Nations governance might be affected by the FIPPA.[27]

33. On October 26, 2012, the Hupacasath First Nation wrote to Prime Minster Stephen Harper expressing their concerns about the 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 RPPA being ratified. No substantive response to this correspondence has been received.[28]

34. 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 the FIPPA for First Nations, and setting out its

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[26] MacKay Affidavit #1, paras. 81-83 and Ex. AA, pp. 3-4, AR p. __
[27] MacKay Cross, pp. 7-11, AR p. __
[28] Sayers Affidavit, Ex. N and O, AR pp. __

position that Canada had failed to fulfill its fiduciary obligation to consult with First Nations. No substantive response to this letter has been received.[29]

35. On October 31, 2012, the Serpentine River First Nation wrote to Prime Minster Harper, calling on Canada to consult with First Nations prior to taking steps to ratify the FIPPA.[30]

36. On November 5, 2012, the Chiefs of Ontario (the "COO") wrote to both Prime Minster 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 RPP A. No response to this correspondence has been received. The COO represents 133 First Nations in Ontario. These First Nations are affiliated with several Treaties, including, without limitation, the Huron Superior Treaties, Treaty 3, 5, 9, and many Treaties in southern Ontario. The First Nations population of Ontario is the largest of any province or territory in Canada.[31]

37. 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 the 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").[32]

38. On that same date, the Tsawwassen First Nation wrote to Ministers Duncan, Baird, Fast and Penashue to request consultation in respect of the FIPPA so that the Tsawwassen First Nation could better understand its implications for their rights and

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[29] Affidavit #1 of Grand Chief Stewart Phillip, sworn January 29, 2013 ("Grand Chief Phillip Affidavit"), Ex. A, AR p. __

[30] Affidavit of Chief Isadore Day, sworn January 17, 2013 ("Chief Day Affidavit"), Ex. 1, AR p. __

[31] Chief Day Affidavit, para. 5, Ex. 2, AR pp. __

[32] Grand Chief Phillip Affidavit, Ex. B, AR pp. __

obligations under their Final Agreement. They have not received a substantive response.[33]

39. In early December 2012, the Special Chiefs Assembly of the Assembly of First Nations adopted Resolution No. 3712012 which directs engagement with the federal government to ensure that Canada fulfills its duty to consult and accommodate First Nations on PIPPA.

40. On December 14, 2012, the UBCIC, together with other non-governmental organizations, 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 the 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.[34]

41. On March 13, 2013, Chief James Ahnassay of the Dene Tha' First Nation wrote to the Honourable John Baird, Minister of Foreign Affairs and the Honourable Edward Fast, Minister of International Trade and Minister for the Asia-Pacific Gateway, expressing their concerns about the FIPPA. There is significant oil and gas development, including shale gas development ("fracking"), in the Traditional Territory of the Dene Tha'. The Dene Tha' are concerned about the impact of this activity on the land, water and resources which they rely upon in the exercise of their aboriginal and treaty rights. Some of this activity is being carried out by Nexen, which, as above, has recently been taken over by the Chinese state owned company CNOOC. Chief Ahnassay expressed his concern to the Ministers that FIPPA would make it more difficult to create protected spaces in the Dene Tha's Traditional Territory.[35]

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[33] Affidavit of Chief Bryce Williams, sworn January 21, 2013, Ex. A, AR p. __
[34] Grand Chief Phillip Affidavit, Ex. C, AR p. __
[35] Affidavit of Chief James Ahnassay, sworn March 13, 2013, paras. 4-12, Ex. C, AR pp. __

PART II. POINTS IN ISSUE

42. Is the act of ratifying the FIPPA subject to review by this Court on the basis that the failure to consult prior to ratification is a breach of the government's constitutional duty to consult with and, if appropriate, accommodate the HFN?

43. Does the federal government have an obligation to consult with the HFN prior to ratifying FIPPA?

PART III. SUBMISSIONS

A Issue One: Is the activity of ratifying the FIPPA subject to review by the Court?

44. The manner in which ratification of an international treaty takes place in Canada is set out in a leading international law text as follows:

> Ratification processes are an internal constitutional matter for each country and they may frequently differ from one country to another. In Canada, ratification is part of the royal prerogative and is exercised by the Executive, in this case expressed by means of an Order in Council issued by the Governor General in Council, which authorizes the Minister of Foreign Affairs to sign an instrument of ratification. Ratification is then effected by delivery to the other party (in the case of a bilateral agreement) of an instrument of ratification signed by the Minister of Foreign Affairs. An instrument called a Protocol of Exchange is customarily signed at the time the exchange of instruments of ratification takes place.[36]

45. In *Black v. Canada (Prime Minister)*,[37] the Court held that an exercise of a prerogative power may be reviewed by the court in a number of circumstances. The first is where the allegation is that the exercise of the power would be contrary to the Constitution. In *Canada (Prime Minister) v. Khadr*, the Supreme Court of Canada recently confirmed that the exercise of the prerogative power in the context of foreign affairs can be reviewed for constitutionality:

> [36] In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. It is for the executive and not the courts to

[36] reference - to be filled in
[37] *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (Ont. C.A.) [*Black*], AR pp. ___

> decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* (*Operation Dismantle*) or other constitutional norms (*Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539).
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> [37] The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged: see, e.g., *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 101-2. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283.[38]

46. In this case, the Applicant alleges that the failure to consult is a breach of the constitutional obligation to engage in consultation with First Nations in order to act in a manner consistent with the honour of the Crown. The duty to consult with First Nations on matters which may affect their rights and title is clearly a "constitutional norm."

47. In *Tzeachten First Nation v. Canada (Attorney General)*, the British Columbia Court of Appeal rejected the argument of the Attorney General that the duty to consult was not a "constitutional right or obligation." The Court stated:

> The honour of the Crown speaks to the Crown's obligation to act honourably in all its dealings aboriginal peoples. It may not lawfully act in a dishonourable way. That is a limitation on the powers of government, not to be found in any statute, that has a constitutional character because it helps to define the relationship between government and the governed.[39]

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[38] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, 1 S.C.R. 44 (emphasis added), AR p. ___

[39] *Tzeachten First Nation v. Canada (Attorney General)*, 2007 BCCA 133, 281 D.L.R. (4th) 752, para. ___, AR p. ___

48. Similarly, in *Nlaka'pamux Nation Tribal Council v. British Columbia (Project Assessment Director, Environmental Assessment Office)*,[40] the Court referred to the duty to consult as a "constitutional imperative."

49. Although the court in *Black* referred to the *Charter* and relied on the fact that s. 32(1) specifically provided that the *Charter* applied to Government of Canada in respect of all matters within the authority of Parliament, there is no doubt that the duty to consult applies to the Government of Canada in all of its activities, including those taken under the prerogative power. As the Supreme Court of Canada stated in *Haida Nation v. British Columbia (Minister of Forests)*:

> 16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41, *R v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.[41]

50. In *Black*, the Court held:

> [47] Apart from the *Charter*, the expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power. The preferable approach is that adopted by the House of Lords in the *Civil Service Unions* case, *supra*. There, the House of Lords emphasized that the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source. If, in the words of Lord Roskill, the subject matter of the prerogative power is "amenable to the judicial process", it is reviewable; if not, it is not reviewable….[42]

51. The Court found that where the exercise of the prerogative would affect private rights, or the legitimate expectations of individuals, it is reviewable. The Court stated:

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[40] *Nlaka'pamux Nation Tribal Council v. British Columbia (Project Assessment Director, Environmental Assessment Office)*, 2011 BCCA 78, 16 B.C.L.R. (5th) 197, AR p. ___

[41] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, 3 S.C.R. 511 [*Haida*], para. 16 (emphasis added), AR p. ___

[42] *Black*, para. 47 (emphasis added), AR p. __

> [50] At the core of the subject matter test is the notion of justiciability. The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. See *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Thorne's Hardware Limited v. The Queen*, [1983] 1 S.C.R. 106. Only those exercises of the prerogative that are justiciable are reviewable. The court must decide "whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 545…
>
> [51] Under the test set out by the House of Lords, the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.[43]

52. In this case, the question is whether the government has fulfilled its obligation to consult with aboriginal peoples on a measure which may affect their rights. This is a matter which the courts are clearly competent and qualified to review, indeed, they do so in other contexts on a regular basis.

53. It must be acknowledged, however, that in *Black*, the Court characterized the decision to sign a treaty as one of "high policy" that would not be amenable to judicial review. While the substantive decision of whether or not enter into an international treaty may not be reviewable, the duty to consult is largely a procedural matter.[44] It does not require any particular outcome. If the Court finds that the Crown is required to engage in consultation prior to entering into the FIPPA, this does not constitute a substantive review of the exercise of the treaty making power. In this regard, we submit that the fact that the Crown has voluntarily entered into modern day treaties which require it to engage in consultation prior to becoming bound by new legal obligations demonstrates that a review of the process of entering into such obligations may be appropriately separated from the substantive decision to assume such obligations if there is compliance with requisite process. The courts have

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[43] *Black*, paras. 50-51, AR p. ___

[44] reference – to be filled in

always been competent to decide whether the executive has complied with any conditions imposed upon the exercise of the prerogative. This is the case whether those conditions are imposed pursuant to legislation or the constitutional requirements arising from s. 35 of the *Constitution Act*, *1982*.

54. The act of sending the notice of ratification to China is an exercise of power conferred by the Order In Council, which is an order made pursuant to a prerogative power of the Crown. It is thus appropriately reviewed by this Court pursuant to s. 18.1 of the *Federal Court Act*.

B. Issue Two: Does the federal government have an obligation to consult with the HFN prior to ratifying FIPPA?

1. Introduction – The Duty to Consult

55. In *Haida*, the Supreme Court of Canada established the constitutional obligation on government to consult Aboriginal Peoples when making decisions which could potentially affect asserted Aboriginal Rights and Title. Prior to that case, consultation had been discussed primarily in the context of justification for the interference with established Aboriginal and Treaty Rights. In *Haida*, the Court determined that the protection provided for in s. 35 of the *Constitution Act, 1982* means that government is constitutionally obliged to consult with Aboriginal Peoples prior to taking steps which have the potential to adversely affect Aboriginal Rights and Title which are claimed but not yet proven. Where the consultation process determines that accommodation of those rights is appropriate, the government is constitutionally obliged to effect that accommodation.

56. The Court held that:

> 16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41, *R v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.[45]

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[45] *Haida*, para. 16, AR p. ___

57. The honour of the Crown is thus a core constitutional principle which informs all interactions between Aboriginal Peoples and government. Its origin and its purpose are both related to overarching goal of s. 35, that is, to promote reconciliation. As the Supreme Court of Canada stated in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*:

> 1 The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal people and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal peoples' concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.[46]

58. In *Haida*, the Supreme Court of Canada held that reconciliation is a process that "flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."[47]

59. As the Court noted in *Haida*: "the historical roots of the principle of the honour of the Crown suggest that it must be understood generously." In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, the Court stated that the honour of the Crown cannot be "interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)." The honour of the Crown will give rise to different duties in different circumstances.[48]

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[46] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, 3 S.C.R. 388 [*Mikisew Cree*], para. 1, AR p. ___

[47] *Haida*, paras. 32-33, AR p. ___

[48] *Haida*, para. 17, AR p. ___; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, 3 S.C.R. 550, para. 24, AR p. ___; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, 2 S.C.R. 650 [*Rio Tinto*], para. 34, AR p. ___

2. When does the duty to consult arise?

60. In *Hupacasath*, Justice L. Smith set out the three step test for determining whether a duty to consult arises:

> [138] First, in determining whether a duty to consult arises, the court must assess whether the Crown has knowledge, real or constructive, of the potential existence of the aboriginal rights. Second, the court must determine if the Crown contemplated conduct that might adversely affect those rights. If there is such knowledge and contemplated conduct, then the court must take the third step and consider the scope and content of the duty to consult and accommodate, and whether that duty has been met. Determining the scope and content of the duty necessitates a preliminary assessment of the strength of the case supporting the existence of the right, and a consideration of the seriousness of the potentially adverse effect upon the rights claimed.[49]

61. In the case at bar, the first and third parts of the test can be easily disposed of. As above, the duty arises when the Crown has real or constructive knowledge of the potential existence of aboriginal rights. Mr. Barkwell, a senior public servant in the Ministry of Aboriginal Affairs and Northern Development and one of Canada's affiants, acknowledges that he is aware of three civil actions in which the Hupacasath have asserted aboriginal rights or title. In addition, there is the civil action resulting in Justice Smith's decision in *Hupacasath*, and the Supreme Court of Canada's decision in *NTC Smokehouse* referenced therein. Madam Justice Smith also observed, and Mr. Barkwell confirms in his affidavit, that the HFN has reached Stage Four in the B.C. Treaty Process, meaning they have signed a Framework Agreement and provided a land selection. While Mr. Barkwell observes that the Hupacasath have not proven the existence of any right in Court, that is not the test for triggering a duty to consult.[50]

62. Similarly, there can be no serious dispute that the Crown has not met any duty to consult which might be found to exist. There is no evidence before the Court that the Crown consulted with the Hupacasath, or any other First Nation, in respect of the FIPPA. Where an aboriginal claim is weak or the potential for infringement is

[49] *Hupacasath*, para. 138, AR p. ___
[50] Barkwell Affidavit, paras. 15, 17, AR p. __; See also *Huu-Ay-Aht, infra*, para. 118

minimal, the only duty on the Crown may be to "give notice, disclose information, and discuss any issues raised in response to the notice." But even this most minimal level of consultation did not take place – rather, it is the Crown's position that no duty to consult First Nations arises in this case.[51]

63. The only question at issue, then, is whether the ratification of the FIPPA can be said to be Crown conduct that "might" adversely affect rights or title, to which we now turn.

3. Does the Crown contemplate conduct which might adversely impact rights or title?

64. First, it should be noted that the existence of a duty to consult is a question of law on which no deference is due. This is different than the scope of that duty or the question of whether the Crown has fulfilled that duty, which may require some deference.[52]

65. In *Mikisew Cree*, the Supreme Court of Canada held that the bar for establishing a duty to consult, as opposed to the content of that duty, is set very low:

> 34 … The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered….[53]

66. This low threshold is appropriate, given the important role of consultation in effecting reconciliation. For the same reason, the Supreme Court of Canada has mandated that the generous and purposive approach to the duty to consult must inform the consideration of what type of Crown conduct, and what kind of adverse impact, will trigger the duty.[54]

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[51] MacKay Cross, pp. 7-8, AR pp. __; *Haida*, para. 43, AR p. __
[52] *Haida*, para. 61, AR p. __
[53] *Mikisew Cree*, para. 34, AR p. __
[54] see *Rio Tinto*, paras. 43 and 46, AR p. __

67. While the obligation to consult often arises in the context of a Crown authorization to utilize a specific resource, it is clear that the duty may be triggered even where the government act at issue does not have any immediate or direct impact on the exercise of a specific aboriginal right. In *Rio Tinto*, the Supreme Court of Canada specifically stated:

> 44 Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (*Woodward*, at p. 5-41 (emphasis omitted))….[55]

68. It is sufficient to establish a *possibility* that the Crown conduct may affect rights and title in the future (*Rio Tinto*, para. 45). The effect of the government measure may not be to directly affect the rights, but rather to affect how the rights will be addressed in future decision making. As the Supreme Court of Canada stated:

> 47 Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": *Woodward*, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.[56]

69. Thus, a number of cases have held that Crown conduct which affects or changes the framework in which resource or land use will be determined will give rise to the duty to consult, even where there is no immediate or direct impact on specific land or resources.

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[55] *Rio Tinto*, para. 44, AR p. __

[56] *Rio Tinto*, para. 47, AR p. __

70. In *Hupacasath*, the Crown conduct which gave rise to the duty was the removal of certain lands from a TFL within claimed Hupacasath traditional territory. The Court held that the removal meant a "lower level of possible government intervention in the activities on the land than existed under the TFL regime." Madam Justice Smith later stated:

> 228 Although there is no evidence that the Hupacasath have experienced problems in exercising specific aboriginal rights on the land since the removal decision, the question is whether a greater potential now exists for such rights to be adversely affected than did before.[57]

71. Thus, the Court found that the removal of the lands from the TFL had the potential to affect the HFN's ability to exercise aboriginal rights because the land was now subject to a regime which permitted less government intervention. As a result, the duty to consult was triggered, notwithstanding the lack of any immediate impact on the Hupacasath's asserted rights.

72. Similarly, in *Gitxsan First Nation v. British Columbia (Minister of Forests)*, Tysoe J. held that the Minister of Forests' consent to a change in corporate control of a company which held a TFL gave rise to a duty to consult. The Court found that the change in the controlling mind of the company, as well as the fact that the effect of the change in control was to protect the company from bankruptcy, meant that there was potential for an effect on rights and title. In this sense, the change in control was not "neutral":

> [82] I do not accept the submission that the decision of the Minister to give his consent to Skeena's change in control had no impact on the Petitioners. While it is true that the change in control was neutral in the sense that it did not affect the theoretical tenure of the tree farm and forest licences or any of the conditions attached to them, the change in control was not neutral from a practical point of view. First, it changed the identity of the controlling mind of Skeena, and the philosophy of the persons making the decisions associated with the licences may have changed correspondingly. Second, Skeena was on the brink of bankruptcy and it may have gone into bankruptcy if the Minister had not given his consent by April 30. If Skeena had gone into bankruptcy, it would no longer have been able to utilize the licences. It is possible that the trustee in bankruptcy or Skeena's secured creditors would have been able to

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[57] *Hupacasath*, para. 228, AR p. __

> sell the licences but any sale would have required the Minister's consent and there can be no doubt that he would have been required to consult the Petitioners before giving his consent to any sale of the licenses. There was also a possibility that the tree farm licence would not be sold, in which case the Petitioners would have had the opportunity of pursuing their own ventures for logging some or all of the lands covered by the licence.[58]

73. In *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, Dillon J. found that the duty to consult was implicated in the Crown's application of the Forest and Range Agreement program, which took back 20% of the allowable annual cut from major replaceable forest licences and TFLs throughout the province, and allocated some of what was taken back to First Nations. The Huu-Ay-Aht objected to the province's use of a population-based formula for the allocation of the forest tenures. The Crown argued that the general management of forestry permits and approvals did not give rise to a duty to consult and accommodate aboriginal interests, rather the duty is only triggered by specific decisions that have the potential to infringe on s. 35 rights. Dillon J. did not accept this argument, and issued the requested declarations.[59]

74. In *Dene Tha' First Nation v. Canada (Minister of Environment)*, Phelan J. found that the duty to consult was breached by the exclusion of the Dene Tha' from discussions and decisions regarding the design of regulatory and environmental review processes set up to consider the environmental effects of a pipeline. Justice Phelan reviewed the purpose of the duty to consult and stated as follows:

> 80 In light of the decision in *Wewaykum*, in order for the purpose of reconciliation which underpins s. 35 of the *Constitution Act, 1982* to have meaning, there must be a broader duty on the Crown with respect to Aboriginal relations than that imposed by a fiduciary relationship. Hence, in *Haida Nation*, the Court first identified the honor of the Crown as the source of the Crown's duty to consult in good faith with First Nations, and where reasonable and necessary, make the required accommodation. As such, the Crown must consult where its honor is engaged and its honor does not require a specific Aboriginal interest to trigger a fiduciary relationship for it to be so

[58] *Gitxsan First Nation v. British Columbia (Minister of Forests)*, 2002 BCSC 1701, 10 B.C.L.R. (4th) 126 [*Gitxsan*], para. 82, AR p. __

[59] *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 at paras. 109-113 [*Huu-Ay-Aht*], AR pp. __

> engaged. Another way of formulating this difference is that a specific infringement of an Aboriginal right is no longer necessary for the Government's duty to consult to be engaged.
>
> 81 The major difference between the fiduciary duty and the honor of the Crown is that the latter can be triggered even where the Aboriginal interest is insufficiently specific to require that the Crown act in the Aboriginal group's best interest (that is, as a fiduciary). In sum, where an Aboriginal group has no fiduciary protection, the honor of the Crown fills in to insure the Crown fulfills the section 35 goal of reconciliation of "the pre-existence of aboriginal societies with the sovereignty of the Crown."
>
> 82 In assessing whether the Crown has fulfilled its duty of consultation, the goal of consultation – which is reconciliation – must be firmly kept in mind. The goal of consultation is not to be narrowly interpreted as the mitigation of adverse effects on Aboriginal rights and/or title. Rather, it is to receive a broad interpretation in light of the context of Aboriginal-Crown relationships: the facilitation of reconciliation of the pre-existence of Aboriginal peoples with the present and future sovereignty of the Crown. The goal of consultation does not also indicate any specific result in any particular case. It does not mean that the Crown must accept any particular position put forward by a First Nations people.[60]

75. In that case, there was no dispute that the construction of the pipeline itself would give rise to a duty to consult. The question was whether the setting up of the review process itself did so. Justice Phelan reasoned as follows:

> [108] The Cooperation Plan in my view is a form of "strategic planning". By itself it confers no rights, but it sets up the means by which a whole process will be managed. It is a process in which the rights of the Dene Tha' will be affected.[61]

76. In *Squamish First Nation v. British Columbia (Minister of Sustainable Resource Management)*, the Court considered whether the duty to consult was triggered by a decision to allow a change in the control of a proposed ski resort and an expansion of the proposal. The Court recognized that crucial to this issue is the question of when third parties may obtain legally enforceable rights. The Court held as follows:

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[60] *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 [*Dene Tha'*], paras. 80-82 (emphasis added), AR pp. ___

[61] *Dene Tha'*, para. 108, AR p. ___

> [74] The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions. Once important preliminary decisions have been made and relied upon by the proponent and others, there is clear momentum to allow a project. This case illustrates the importance of early consultations being an essential part of meaningful consultation. At this point, and for some time, GAS has asserted legally enforceable rights to pursue the expansion agreement even though it is aware that there has been no consultation. There is thus, the clear appearance of bias in favour of GAS's expansion plans, as GAS has issued a warning of legal proceedings against the Crown should rights they believe they now have not be realized.[62]

77. The court then set out a series of questions which are relevant to the question of whether the duty to consult is triggered. Two of these are especially relevant here:

> a) Does the decision purport to grant rights, in enforceable terms, either actual or conditional ones, in relation to lands which would be inconsistent with aboriginal title or rights?;
>
> b) Does the decision constitute the imposition of obligations or the fettering or restriction of Crown discretion over lands upon which there were duties of consultation?;[63]

78. Finally, in *Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, the applicant First Nation challenged the issue of finfish aquaculture licences to two corporate Respondents in the wake of the BC Supreme Court decision in *Morton v. British Columbia*, where the Court struck down the provincial regulatory regime for finfish farming as being *ultra vires* the provincial legislature. As a result, approximately 680 licences had to be effectively reissued by the Department of Fisheries and Oceans, including the two impugned licences at issue in the case. After reviewing the decision in *Gitxsan*, the Court held that there was an obligation to consult the applicant with respect to the issuance of the licenses, in part on the following basis:

> 107 … If the change in control from one company to another may lead to adverse consequences with respect to claimed Aboriginal rights because of differing philosophies, it is more likely to be the case when the transfer of decision-making involves two levels of government, however that may

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[62] *Squamish First Nation v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320, 34 B.C.L.R. (4th) 280 [*Squamish*], para. 74, AR p. ___

[63] *Squamish*, para. 75, AR p. ___

> happen. While this may yet be indiscernible, only time will tell whether the regulation of aquaculture will dramatically be impacted as a result of the *Morton* decision. In recognition of this fundamental shift in the management of the aquaculture industry, I believe the federal government had an obligation to consult the Applicant and all of the other First Nations present in the region.[64]

79. The Court noted "it is the indeterminacy of the principles by which the new governing entity intends to operate, that triggers the Crown's duty to consult."

80. The import of this jurisprudence can be summarized as follows. A duty to consult may be triggered even when a government decision has no immediate or direct impact on an asserted aboriginal or treaty right, if that decision may lead to a change in the scope of the Crown's future discretion to deal with lands and resources subject to aboriginal rights and title claims. The duty may arise when third parties are granted rights relating to land or resources, or where the identity of the decision maker or the body of law to be applied to land and resources is modified.

81. We submit below that the ratification of the FIPPA represents the sort of structural change that triggers the constitutional obligation to consult with First Nations, including the Applicant.

4. The Impact of the FIPPA obligations

82. The starting point in the analysis is to gain an understanding of the impact of Canada committing to be bound by the obligations set out in the FIPPA for at least 31 years.

83. The FIPPA obligations were outlined at paragraphs 19-25 above. The requirement to provide fair and equitable treatment and the rule that even indirect expropriations require full compensation are the types of obligations that, under other investment treaties, have been most likely to lead to significant awards.

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[64] *Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 FC 517, 409 F.T.R. 82, para. 107, AR p. ___

84. The extension of these rights to the whole of Chinese investment in Canada is a significant change in the legal framework applicable to land and resource regulation in Canada. The prohibition on direct and indirect expropriation without compensation is specifically designed to ensure that foreign investors are compensated in circumstances where they would not be compensated under domestic law. Under Canadian law, even direct expropriations can be done without compensation, if the Legislature is explicit that it intends to do so. The conscious decision not to include property rights in the protection afforded by the Canadian *Charter of Rights and Freedoms* has meant that Parliament remains free to determine if, when and in what manner expropriations will be accompanied by compensation.

85. However, once the FIPPA is ratified, it will no longer be open to any Canadian legislature to expropriate investments without full compensation, if those investments are owned, in part, by Chinese nationals. The protection afforded by FIPPA will last, at a minimum, for 31 years, and will be beyond the ability of any Canadian legislature or court to modify. The government will have given up a significant degree of flexibility in its ability to protect lands and resources subject to aboriginal rights and title, and to enact measures to settle claims of First Nations.

86. The FIPPA also requires compensation for indirect expropriations. The question of when regulation rises to the level of an indirect expropriation is a fact specific inquiry, focussed mainly on the impact of the regulation on the value of the investment. As Canada's expert, Mr. Thomas, confirmed, it is matter of great contention in the cases. It is clear that legitimate government measures enacted in the public interest can constitute expropriation. There is no requirement that the measures be discriminatory. One leading text summarizes the relevant principles thus:

> [International Investment Agreements] jurisprudence to date has identified a series of key principles relevant to analyzing whether there has been indirect expropriation: First, the form of the measure is not determinative, nor is the intent of the state; second, the claimant must establish that the measure in question results in a substantial deprivation; third, the character of the government measures in question must be taken into account in determining whether a police powers exception applies; fourth, the investment-backed

> legitimate expectations of the investor are relevant in assessing whether there has been an indirect expropriation; and, finally, the indirect expropriation analysis is context - and fact - specific.[65]

87. There are many cases where decisions about land use have given rise to claims for compensation under investment treaties. In *Metalclad Corp. v. United Mexican States*, the NAFTA panel defined expropriation as follows:

> 103. Thus, expropriation... includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[66]

88. In that case, an investor brought a claim against Mexico, alleging that Mexico had wrongfully refused to permit the company to operate a hazardous waste facility. The Tribunal found a breach of the provisions regarding minimum standard of treatment and expropriation. Mexico brought a judicial review of the decision in the British Columbia Supreme Court, in which Canada intervened in support of Mexico. Tysoe J. set aside the award insofar as it related to the minimum standard of treatment, in the basis that the tribunal had exceeded its jurisdiction in that it held that Mexico was in breach of a provision of NAFTA that was not part of the minimum standard of treatment provisions. However, Tysoe J. did not set aside the panel's finding that the issuance of an Ecological Decree which established a reserve for cacti constituted an expropriation, Tysoe J referred to the panel's definition of expropriation and stated:

> 99 The Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110 [of NAFTA]. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of

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[65] Newcombe and Paradell, *Law and Practice of Investment Treaties,* Wolters Kluwer ("Newcombe and Paradell"), p. 341, AR p. __

[66] *Metalclad Corp. v. The United Mexican States* (August 30, 2000), ICSID Case No. ARB(AF)/97/1 [*Metalclad*], para. 103, AR p. ___

> reasonably-to-be-expected economic benefit of property. This definition is sufficiently broad to include a legitimate rezoning by a municipality or other zoning authority. However the definition of expropriation is a question of law with which this Court is not entitled to interfere under the International CAA [British Columbia *International Commercial Arbitration Act*].[67]

89. Any form of government regulation which has a substantial impact on the investment may therefore be expropriation. International investment law also recognizes the concept of "creeping" expropriation, which occurs when a series of measures have a cumulative impact on an investment.[68]

90. Canada has paid significant amounts to settle claims based on the expropriation provisions of NAFTA. In *Ethyl Corporation*,[69] a U.S. chemical company challenged a Canadian ban on the import and interprovincial trade of MMT, a suspected neurotoxin. The claim was based on claims of expropriation, as well as national treatment and performance requirements After preliminary panel decisions against Canada, the Canadian government repealed the MMT ban, issued an apology to the company, and settled the claim for $13 million. Similarly, in *Abitibi Bowater*,[70] the company, a pulp and paper firm, announced that it was going to close its last mill in Newfoundland. The provincial government of Newfoundland and Labrador enacted legislation to return the company's water use and timber rights to the Crown and to expropriate certain of the company's lands and assets along with the resource rights. The investor claimed under the NAFTA provisions regarding national treatment, MFN, minimum standard of treatment and expropriation. Canada settled the claim for $130 million.

91. It is clear that measures taken to preserve land and resources subject to aboriginal rights and title may constitute direct or indirect expropriation, since they may have a significant impact on the value of an investment. Moratoriums on development, restrictions on harvesting or extraction rights, and conditions placed on permits, for example, may lead to a substantial impact on investors. Under the

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[67] *Mexico v. Metalclad Corp.*, 2001 BCSC 664, 89 B.C.L.R. (3d) 359, para. 99, AR p. __
[68] Newcombe and Paradell, p. 343, AR p. __
[69] Van Harten Affidavit, Ex. C, AR p. __
[70] Van Harten Affidavit, Ex. C, AR p. __

FIPPA, such measures must be accompanied by full compensation, or not enacted at all. Again, this is a significant constriction in the means available to government to protect resources and lands which are the subject of rights and title and to settle aboriginal claims.

92. The obligation to provide investors with fair and equitable treatment is the most often evoked (and perhaps the most contentious) obligation in most investment treaties.[71] As noted above, a wide range of procedural and substantive protections have been read into this obligation. These include substantive protections for the legitimate expectations of investors, and a requirement to maintain a stable regulatory framework.

93. In *S.D. Myers*,[72] a U.S. waste disposal firm challenged a temporary Canadian ban on the export of toxic PCB wastes. A NAFTA panel held that the ban was in violation of the minimum standard of treatment guarantee, as well as the promise of national treatment. Canada was ordered to pay over $6 million plus interest and costs. Canada applied for judicial review of the decision, but the application was dismissed.

94. Refusals to renew a licence based on local opposition to a waste landfill was held to be both a breach of the obligation to provide fair and equitable treatment, and an expropriation, in *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*,[73] a case brought under a bilateral investment treaty between Mexico and Spain.

95. In *Occidental v. Ecuador*,[74] a case under the US-Ecuador bilateral investment treaty, an arbitration panel made the highest award ever issued by this type of tribunal - $1.77 billion, plus pre-award interest. In that case, an oil company had a

[71] MacKay Cross, pp. 58-59, Ex. 7, AR pp. __; M.C. Porterfield "A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals" *Investment Treaty News* Issue 3, Vol. 3, March 2013, p. 3, AR p. __

[72] *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, 3 F.C.R. 368 [*S.D. Myers*], AR pp. __

[73] *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States* (May 29, 2003), ICSID Case No. ARB(AF)/00/2, AR p. __

[74] Van Harten Affidavit, Ex. C, AR p. __

contract with Ecuador's national oil company. Occidental acted in a manner contrary to Ecuadorian law, and there were public demonstrations to pressure the government to terminate its contract with the company. The panel held that although the company had engaged in wrongful conduct, the state response was disproportionate, and therefore in breach of the obligation to provide fair and equitable treatment, and also constituted an expropriation.

96. If an arbitration panel made a finding that a legislature, court or decision maker in Canada had acted in manner contrary to the FIPPA obligations regarding expropriation or fair and equitable treatment, it would not provide a defence that the measure at issue was required in order to fulfill Canada's constitutional responsibilities under s. 35 of the *Constitution Act, 1982*. Indeed, given that it is open to an investor to challenge judicial decisions under the FIPPA, it is possible that doctrines developed by Canadian courts to give effect to s. 35 could themselves be challenged as not providing a stable regulatory framework for investment.[75]

97. To illustrate the point, a Notice of Intent was recently filed by U.S. pharmaceutical company Eli Lilly, in which the company alleges that Canadian court decisions and judicial doctrines in domestic patent law amounted to violations of the minimum standard of treatment and the expropriation standard. The Notice states, *inter alia*, that:

> In a series of decisions issued since 2005, the Federal Court of Canada and the Federal Court of Appeal have created a new judicial doctrine whereby utility is assessed not by reference to the requirement in the *Patent Act* that an invention be 'useful', but rather against the 'promise' that the courts derive from the patent specification. This non-statutory 'promise doctrine' is not applied in any other jurisdiction in the world. The 'promise doctrine' not only contravenes Canada's treaty obligations, it is also discriminatory, arbitrary, unpredictable and remarkably subjective. A patentee cannot know how the promise will be construed by the Federal Courts….[76]

98. Under the FIPPA, the difficult fact specific questions about whether regulation amounts to expropriation, and the broad question of whether there has

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[75] MacKay Cross, Ex. 6, AR pp. __; Van Harten Affidavit, Ex. C, p. 12, AR p. __

[76] MacKay Cross, pp. 56-57, Ex. 6, AR pp. __

been a breach of the obligation to provide fair and equitable treatment, will be determined by arbitrators. These arbitrators are not judges, and are not provided with the hallmarks of judicial independence, such as security of tenure, a set salary, bars on concurrent work as an arbitrator and counsel, and an objective method of appointment to specific cases. Many arbitrators work as counsel while also working as arbitrators.[77]

99. The arbitrators' decisions will be subject to judicial review only on a limited basis. There is no review for error of law or error of fact. Awards can only be set aside if the tribunal decided a matter not before it, or if the award is contrary to public policy. As Kelen J. noted in *S.D. Myers*:

> 55 … "Public policy" does not refer to the political position or an international position of Canada but refers to "fundamental notions and principles of justice." Such a principle includes that a tribunal not exceed its jurisdiction in the course of an inquiry, and that such a "jurisdictional error" can be a decision which is "patently unreasonable", such as a complete disregard of the law so that the decision constitutes an abuse of authority amounting to a flagrant injustice….[78]

100. It is clear that an award which is simply incorrect will not be subject to being set aside on judicial review. Canada has participated in numerous judicial reviews where it has sought to set aside decisions of NAFTA tribunals. Apart from the *Metalclad* case, where one portion of the award was set aside but the finding on expropriation upheld, these reviews have been dismissed in their entirety.

101. Clearly, this is a significant change in the legal landscape involving the regulation of land and resource rights in Canada. While similar rights were already held by US and Mexican investors under NAFTA, the FIPPA extends these rights to many billions of dollars in additional investments, many of which are located in the natural resource sector.

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[77] Van Harten Affidavit, p. 6, AR p. __; See also: J.C. Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433 (2002)

[78] *S.D. Myers*, para. 55, AR p. __

102. The decision to "protect" these additional assets from the effects of duly enacted Canadian laws and policy decisions is a significant one, as illustrated by the fact that other developed countries have chosen not to continue to include investor-state arbitration in their bilateral investment treaties. Australia, for example, has decided to no longer provide foreign investors with rights in addition to those provided to domestic businesses, out of a concern about its ability to enact measures for public purposes[79]

5. Ratification of FIPPA Triggers the Duty to Consult

103. The ratification of the FIPPA triggers the duty to consult because it grants Chinese investors new, substantive, and enforceable rights with respect to the investments which they hold, or may obtain, in areas over which the HFN and other First Nations assert aboriginal or treaty rights. This constitutes a significant change in the legal landscape pertaining to these lands and resources. It is not yet known how Chinese investors will actually assert those rights against government decision makers, or how government decision makers will respond to the potential for significant claims which may be brought by Chinese investors. However, there is a real possibility that these new rights may be used to challenge or discourage measures which would have the effect of preserving lands and resources which are the subject of rights and title claims. The granting of these rights to Chinese investors necessarily involves a restriction of the options open to the Crown to address aboriginal and treaty claims and to protect the resources which are the subject of those claims. This constitutes a sufficient potential adverse impact to require consultation.

104. Granting these new rights to Chinese investors also has a direct impact on the scope of self-government which the HFN can achieve, either through exercising their aboriginal rights, through the treaty making process, or through the use of delegated authority from the federal or provincial government. No matter what type of

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[79] McKay Cross, Ex. 3, AR p. __

governance structure HFN utilizes, its authority will be constrained by the FIPPA disciplines. This too is an adverse impact sufficient to trigger consultation,

105. With respect to the first point, put simply, the government will have committed not to take certain types of measures which would otherwise have been open to it to address conflicts between aboriginal peoples seeking to protect lands and resources for the future, and investors seeking to carry on with development. Chinese investors will be able to hold Canada to that commitment by bringing claims to be determined in *ad hoc* arbitrations, applying international investment law.

106. Significant changes in the legislative regimes governing resource extraction which are aimed at protecting First Nations entitlements, but which have the effect of substantially interfering with the realization of expected future profits, must either be accompanied by full compensation, or risk forming the basis for a damages award by a FIPPA tribunal. Under Canadian law, prohibiting or imposing restrictions on resource extraction on Crown land by permit holders may or may not give rise to compensation – it will depend on the legislation itself. Under the FIPPA, the requirement for compensation cannot be avoided even with the clearest legislative intent.

107. In addition, such awards, or even the spectre of such awards, may well factor into the government's analysis of whether to proceed with a proposed measure to protect such rights. As Mr. MacKay confirmed under cross-examination, when taking new measures or enacting new legislation, Canada has done, and properly should do, a risk assessment to confirm whether taking a particular step would potentially lead to Canada violating any of its internal legal obligations. That would potentially include a particular measure taken to accommodate a First Nation.[80]

108. Many conflicts involving land and resources subject to aboriginal rights and title involve tensions which arise when resource companies seek to utilize resources for development. At the present time, those conflicts are resolved in Canadian courts,

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[80] MacKay Cross, pp. 17-18, 72, AR pp. __

who determine the rights of all parties with regard to the overarching principle of reconciliation enshrined in s. 35 of the *Constitution Act, 1982*.[81]

109. Under the FIPPA, Chinese investors may be able assert a right to compensation if the value of their investment is significantly impacted by measures to protect or settle rights and title. Alternatively, they could argue before a FIPPA panel that measures taken to protect unproven but asserted rights, either by the legislature, the executive or the courts, are contrary to the principle of fair and equitable treatment. A FIPPA tribunal may hold that the quashing of a development or resource extraction permit because of a failure to adequately consult or accommodate First Nations, or because such a permit authorizes development which unjustifiably infringes aboriginal or treaty rights, will give rise to damages. Such damages, especially in relation to claims involving investments in the energy sector, could be significant.

110. Such awards, or the spectre of them, may significantly alter the balancing of the public interest which Canadian courts engage in when deciding if development should be permitted to proceed prior to aboriginal rights and title issues being resolved. They may also impact what the government and the courts may consider to be a reasonable accommodation of aboriginal rights and title. If an aboriginal rights holder's preferred accommodation is one which will give rise to a very significant damages award against Canada, it is much less likely that it will be accepted by the government.

111. In *Haida*, the court noted that:

> 50 … Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.[82]

112. When deciding what constitutes appropriate accommodation, government, and the courts, will have regard to a range of relevant factors. If the protection of

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[81] *Taseko Mines Limited v. Phillips*, 2011 BCSC 1675, para. 60, AR p. __

[82] *Haida*, para. 50, AR p. __

aboriginal rights and title, or a First Nation's preferred form of accommodation will give rise to significant liability to a particular Chinese investor or group of investors, this may be a factor in determining whether such a measure is reasonable. In the result, the equation for the balancing set out in *Haida* may have changed significantly, with the result that aboriginal interests will be less likely to receive the protection which is currently required in order to maintain the honour of the Crown.

113. Providing these rights to Chinese investors, without even considering the impacts on First Nations or engaging in any consultation, is not in keeping with the honour of the Crown.

114. With respect to the second point, FIPPA's obligations are clearly intended to apply to all sub-national governments within Canada, and, pursuant to Article 2.2, to all entities which exercise delegated powers. Whether a First Nation exercises law making or governance powers pursuant to an aboriginal right, through a delegation agreement with a province and/or the federal government, or through a s. 35 protected treaty, the FIPPA will apply to all of the First Nations' decisions.

115. The federal government is fully aware of the HFN's assertion that it has governance powers and that it intends to negotiate a treaty in that regard. In the Framework Agreement signed by the HFN, Canada and the Province of British Columbia, the HFN assert that they are original governing people, with unceded title, rights, ownership and the right to govern themselves. The HFN already engages in some land use regulation through the Land Use Plan and the associated Cedar Access Strategy. The Framework Agreement provides that the parties are committed to negotiating a treaty in the BC Treaty Process, and includes the following statement:

> By negotiating a treaty, the parties seek to achieve clarity with respect to the future relationship among the Parties, <u>the jurisdiction and authority of their respective governments</u>, and the rights, title and interest to the land and resources in their Traditional Territory.[83] (emphasis added)

[83] Barkwell Affidavit, Ex. F, AR p. __

116. The Framework Agreement provides that the parties will negotiate an Agreement in Principle, and that the AIP will form the basis for negotiating a Final Agreement, which will be treaty and a land claims agreement for the purposes of ss. 25 and 35 of the *Constitution Act, 1982*. Matters to be included in the AIP include law making authority and governance.

117. Any governance rights to be included in a treaty will have to conform to Canada's international legal obligations, including those under the FIPPA. Numerous agreements concluded between First Nations and the federal, provincial or territorial governments make this clear. The Yekooche First Nation Agreement in Principle and the K'ómoks Agreement in Principle both require that any Final Agreement provide for the consistency of the First Nations' law or other exercise of power with Canada's international legal obligations. The Westbank First Nation Self-Government Agreement requires the First Nation to take all necessary steps to "ensure compliance of its laws and actions with Canada's legal obligations" and requires the Westbank First Nation to "remedy any Westbank Law or action found to be inconsistent with Canada's international legal obligations by an international treaty body or other competent tribunal."[84]

118. Final Agreements negotiated under the B.C. Treaty Process also make it clear that the first Nations laws must conform to Canada's obligations. For example, the Maa-nulth First Nations *Final Agreement* provides as follows:

> 1.7.0 INTERNATIONAL LEGAL OBLIGATIONS
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> 1.7.1 After the Effective Date, before consenting to be bound by a new International Treaty which would give rise to a new International Legal Obligation that may adversely affect a right of a Maa-nulth First Nation Government under this Agreement, Canada will Consult with that Maa-nulth First Nation Government in respect of the International Treaty either separately or through a forum that Canada determines is appropriate.
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> 1.7.2 Where Canada informs a Maa-nulth First Nation Government that it considers that a Maa-nulth First Nation Law or exercise of power of that Maa-nulth First Nation Government causes Canada to be unable to perform an International Legal Obligation, that Maa-nulth First Nation Government

[84] Sayers Affidavit, Exs. I, J and M, AR pp. __

> and Canada will discuss remedial measures to enable Canada to perform the International Legal Obligation. Subject to 1.7.3, the Maa-nulth First Nation Government will remedy the law or other exercise of power to the extent necessary to enable Canada to perform the International Legal Obligation.
>
> 1.7.3 Subject to 1.7.5, where Canada and a Maa-nulth First Nation Government disagree over whether a Maa-nulth First Nation Law or other exercise of power of that Maa-nulth First Nation Government causes Canada to be unable to perform an International Legal Obligation, the dispute will be resolved pursuant to the provisions in Chapter 25 Dispute Resolution, and if the dispute goes to arbitration, and: a. if the arbitrator, having taken into account all relevant considerations, including any reservations and exceptions taken by Canada, determines that the Maa-nulth First Nation Law or other exercise of power of the Maa-nulth First Nation Government does not cause Canada to be unable to perform the International Legal Obligation, or that the remedial measures are sufficient to enable Canada to perform the International Legal Obligation, Canada will not take any further action for this reason aimed at changing the Maa-nulth First Nation Law or other exercise of power; or b. if the arbitrator, having taken into account all relevant considerations, including any reservations and exceptions available to Canada, determines that the Maa-nulth First Nation Law or other exercise of power of that Maa-nulth First Nation Government causes Canada to be unable to perform the International Legal Obligation, or that the remedial measures are insufficient to enable Canada to perform the International Legal Obligation the Maa-nulth First Nation Government will remedy the law or other exercise of power to the extent necessary to enable Canada to perform the International Legal Obligation.
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> 1.7.4 Canada will consult the applicable Maa-nulth First Nation Government in respect of the development of positions taken by Canada before an International Tribunal where its Maa-nulth First Nation Law or other exercise of power of that Maa-nulth First Nation Government has given rise to an issue concerning the performance of an International Legal Obligation of Canada. Canada's positions before the International Tribunal will take into account the commitment of the Parties to the integrity of this Agreement.[85]

119. "International Legal Obligation" is defined as "an international obligation binding on Canada under international law, including those that are in force before, on, or after the Effective Date."[86]

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[85] Sayers Affidavit, Ex. E, AR p. __
[86] Sayers Affidavit, Ex. E, AR p. __

120. Similar provisions are found in the Tsawwassen First Nation Final Agreement, the Lheidli T'enneh Final Agreement, the Tla'amin Final Agreement, the Yale First Nation Final Agreement, and the Inuit of Labrador Land Claims Agreement.[87]

121. If the HFN is able to negotiate a treaty, it is clear that the scope of their rights under that treaty will be limited by Canada's legal obligations, including the new rights granted to Chinese investor sunder FIPPA. Thus, the HFN will be bound not to regulate in a manner which has the effect of substantially diminishing the value of an investment owned by a Chinese national without paying compensation. The HFN will be required to ensure that it provides a Chinese investor with "fair and equitable treatment" as that term has been interpreted by arbitrators. The HFN will not be able to impose performance requirements, such as regulation which requires the use of local products. While the HFN will still be able to provide preferential treatment to First Nations, it will not be able to make distinctions between other companies if some of them have Chinese investors. Moreover, these restrictions will apply to the HFN even before they have a treaty, whenever they exercise any regulatory, administrative or other governmental authority, either based on their own aboriginal rights or on any agreement delegating authority from the federal or provincial governments.

122. The Final Agreements make explicit that which flows from the common law in any event – the honour of the Crown requires Canada to consult with First Nations prior to assuming international obligations which will apply to First Nations. It does not matter that the HFN has not yet negotiated an agreement in principle or a final agreement through the BC Treaty process. The HFN has asserted an aboriginal right to govern over its traditional territory. Canada, as well as the Province and the HFN, has committed to pursuing the clarification of those rights through the treaty process. Once ratified, the FIPPA will remain in force for at least 15 years. If the FIPPA is terminated after that time, existing investments will retain its protection for another

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[87] Sayers Affidavit, Exs. F, G, H and K, AR pp. __

15 years. Whether the HFN's interest in self government is realized over the next 30 plus years through the assertion of its aboriginal right to self-government, or, as contemplated by the parties, through the treaty process, the FIPPA disciplines will affect how that interest can be given effect in Canadian law.[88]

123. One of the primary purposes of the duty to consult is to preserve the interests of First Nations while the treaty making process is ongoing. In *Haida*, the Court stated:

> 20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" [*R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771 at para. 41]. This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests....[89]

124. It is clear that a treaty involving law making power is an appropriate means of reconciling the prior occupation of aboriginal peoples with the assertion of Crown sovereignty.[90] Just as the duty to consult tries to ensure that the lands and resources subject to claims are not unduly diminished prior to the resolution of aboriginal claims in the treaty process, the duty also applies to ensure that the scope of the HFN's ability to engage in meaningful self government is not unduly diminished before it can be protected in a treaty.

125. Once the FIPPA is ratified, Canada's obligations under the FIPPA will constrain the scope of governmental authority which the HFN will be able to negotiate in any agreement. Because of Canada's agreement to be bound by the FIPPA, the HFN may be prevented from negotiating any agreement or treaty which

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[88] Chief Day Affidavit, para. 28, AR p. __
[89] *Haida*, para. 20, AR p. __
[90] *Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)*, 2013 BCCA 49, AR p. __

protects their rights to exercise their authority in the best interests of the Hupacasath people, including to conserve, manage and protect lands, resources and habitats and to engage in other governance activities, in accordance with traditional Hupacasath laws, customs and practices. The honour of the Crown requires the government to consult with aboriginal peoples prior to assuming obligations which have the effect of limiting the scope of governmental powers which can be negotiated in a treaty.

PART IV: ORDERS SOUGHT

126. The Applicants have asked for the following Orders in the Notice of Application:

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; and

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.

127. The Applicant seeks a declaration that Canada engage in a process of consultation with the Applicant. The request in the Notice of Application is framed more broadly because, in the circumstances of this case, it appears that Canada's duty to consult extends not only to the HFN, but other First Nations in Canada,

because the basis on which we have asked this Court to find that the duty exists would apply to many other First Nations as well. As a result, it may be that the nature of the consultation which is required is of a different order.

128. As set out above, Canada has agreed, in numerous treaties protected by s. 35 of the *Constitution Act, 1982*, that prior to assuming new legal obligations that may affect rights under those treaties, Canada will engage in consultations. For convenience we will repeat the relevant provision of the Maa-nulth First Nations Final Agreement:

> 1.7.1 After the Effective Date, before consenting to be bound by a new International Treaty which would give rise to a new International Legal Obligation that may adversely affect a right of a Maa-nulth First Nation Government under this Agreement, Canada will Consult with that Maa-nulth First Nation Government in respect of the International Treaty **either separately or through a forum that Canada determines is appropriate.** (emphasis added)

129. This suggests that Canada has turned its mind to the appropriate kind of forum for consulting on changes to Canada's international legal obligations, and that it may be appropriate to conduct a broader consultation process rather than individualized consultation with each First Nation. The evidence in this case demonstrates that a broad range of First Nations have expressed the need for consultation on this issue, including those represented by the Chiefs of Ontario, the B.C. Union of Indian Chiefs, and the Assembly of First Nations. Individual First Nations, both with and without treaties, have also expressed their concerns in the evidence from the Tsawwassen First Nation, the Dene Tha' First Nation, and the Serpent River First Nation.

130. While we do not accept that Canada has the authority to unilaterally determine what form and scope of consultation is appropriate in these circumstances, we recognize that there is some deference owed to Canada's assessment of what constitutes sufficient consultation (but, as set out above, not on the question of whether the duty exists). Accordingly, it would seem appropriate to provide Canada

an opportunity to develop a consultation process which will fulfill its obligations to First Nations across Canada.

131. In the alternative, the Applicants seek the order set out in (a) with the words "First Nations, including" deleted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 29, 2013

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Mark G. Underhill
and Catherine J. Boies Parker
Solicitors for the Applicant

PART V. AUTHORITIES