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

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

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, MINISTER OF FOREIGN AFFAIRS CANADA as represented by THE ATTORNEY GENERAL OF CANADA

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OVERVIEW

1. The Applicant Hupacasath First Nation ("HFN") requests that this Court take the extraordinary and unprecedented step of interfering with the Crown's prerogative to enter into an international treaty, the Canada-China Foreign Investment Promotion and Protection Agreement ("CCFIPA").[1] They claim that the ratification of the CCFIPA will adversely affect their claimed rights or title and that Canada owes them a duty to consult prior to proceeding. The Applicant's claims are without merit and are based on a misconception of the scope and operation of the CCFIPA.

2. The CCFIPA is one of many international investment agreements that Canada has entered into since 1989. These include the 24 Foreign Investment Promotion and Protection Agreements ("FIPAs") Canada has ratified with other states as well as the seminal 1994 North American Free Trade Agreement (NAFTA) upon which the CCFIPA is modeled. The CCFIPA is also part of a larger international complement of almost 3,000 other international investment treaties which have been negotiated by the majority of the world's countries.

3. The CCFIPA is designed to protect, on a reciprocal basis, Canadian investors in China, and Chinese investors in Canada from violations of basic international law principles (such as the non-discriminatory treatment of foreign investors and the minimum standard of treatment of foreign investors at international law, as well as to provide protection from expropriation without compensation). Foreign investors can bring a claim before an *ad hoc* international arbitration tribunal and obtain an enforceable award against the host country for violations of the international law obligations contained in such treaties.

4. Investor-state arbitration under the CCFIPA can be initiated only against the parties to the Agreement, that is, the Government of Canada and the People's Republic of China. Further, an investor-state arbitral tribunal established under the CCFIPA only has jurisdiction to impose monetary damages against a party to the Agreement if it determines that the party has breached

[1] Affidavit #1 of Vernon MacKay, sworn March 13, 2013, Exhibit B ["MacKay Affidavit #1"], Respondent's Record Vol I at 42-90 ["RR"].

its international obligations. It has no power to order injunctive or other relief or to rescind or amend a State's laws. In this respect, the State's sovereignty to regulate and adopt laws remains untouched.

5. Further, the CCFIPA was designed to be consistent with existing Canadian law, including Canada's international obligations. No new legislative provisions are required to implement the CCFIPA and its ratification will not result in any changes to Canadian domestic law. The CCFIPA can therefore have no adverse impact on the Hupacasath First Nation. More specifically, it does not alter:

a) the Canadian Constitution or any domestic law at either the federal or sub-national government level;
b) the regulation of resource development, including Canada's environmental laws;
c) the fact that Chinese investors are not given an unfettered right to invest in Canada and that when such investments are made, Chinese investors are required to follow the same domestic laws that Canadian and other foreign investors must comply with; and
d) the duty of the Crown to consult the Hupacasath First Nation when that duty is properly triggered by a government action that may adversely affect its asserted rights or title.

6. The HFN's allegation that the CCFIPA represents a structural change in the legal framework applicable to the lands and resources to which the HFN asserts rights and title is unsubstantiated and should be rejected. The CCFIPA has no application to the way in which land and resources are managed within Canada. It does not change, or set the stage for future changes, to these domestic regulatory regimes. The CCFIPA does not alter in any way the Crown's duty to consult where a resource management plan or project is contemplated that may adversely impact the Applicant's rights.

7. The duty to consult cannot arise in the absence of an adverse impact on the Applicant's asserted Aboriginal rights. For a duty to consult to be established in this case, there must be an actual causal link between the ratification of the CCFIPA and the alleged adverse effects on the HFN's asserted rights. Moreover, the adverse effect cannot be speculative. The Applicant has not established any causal link or any non-speculative adverse impacts.

8. The adverse impacts alleged by the Applicant to arise from the ratification of the CCFIPA, which include concerns regarding the potential impact of future arbitral claims and awards, amount to speculation and are founded upon serious misunderstandings of the scope and operation of the CCFIPA.

9. The CCFIPA is very similar to the investment provisions contained in the North American Free Trade Agreement ("NAFTA"), which came into force on January 1, 1994, as well as to those found in Canada's model FIPA. Throughout Canada's almost 25-year experience with international investment agreements, starting with the beginning of the FIPA program in 1989, there have been no claims by Aboriginal groups asserting a duty to consult in respect of these agreements. Nor has there been any arbitration against Canada challenging measures passed by Aboriginal governments or measures taken to protect Aboriginal interests.

10. In light of Canada's experience, it is highly speculative to conclude that the ratification of the CCFIPA would lead to a spate of CCFIPA claims relating to Aboriginal rights. Aboriginal groups across Canada have had law-making powers since well before US investors began to benefit from the types of rights conferred by the implementation of NAFTA. The size of US investment in Canada is almost 30-fold that of Chinese investment. Yet the number of claims that have been brought under NAFTA is relatively modest and none have involved Aboriginal rights or measures. Moreover, there is no evidence that these claims have impaired the government's ability to regulate with respect to Aboriginal interests or the public interest generally.

11. The Applicant's real concerns appear to be general and unspecified policy concerns regarding the effect of the CCFIPA on the rights of all Canadians. The Applicant also appears to

object to the establishment of a binding and enforceable international arbitration mechanism for resolving disputes between foreign investors and host States for alleged violations of the CCFIPA. A decade ago, similar concerns formed the basis of a failed constitutional challenge of the investment arbitration provisions contained within NAFTA.[2]

12. The HFN seeks an extraordinary remedy to restrain the Crown from exercising its prerogative powers to ratify an international treaty. The authority of the federal government to conduct foreign relations stems from the Crown's prerogative powers and involves matters of high policy that are generally beyond the scope of judicial scrutiny. No court has ever restrained the Crown from exercising its prerogative to enter into an international treaty. This is because in matters of foreign policy it is well recognized that the executive branch is better placed than the courts in determining how these powers are to be exercised. The court's narrow role is confined to ensuring that these powers are exercised in accordance with the Constitution. In this case, the Applicant cannot establish a duty to consult. Accordingly, there is no constitutional issue before this Court and the ratification of the CCFIPA is non-justiciable. As such, the application should be dismissed with costs.

PART I - STATEMENT OF FACTS

A. <u>The Hupacasath First Nation</u>

13. This case concerns an application for judicial review and injunctive relief brought by the HFN in respect of the ratification of the CCFIPA. The HFN allege that the federal government has a duty to consult pursuant to s. 35 of the *Constitution Act, 1982*[3] because ratification of the treaty may cause an adverse effect to the asserted Aboriginal rights of the HFN. The HFN

[2] *Council of Canadians v Canada (Attorney General)* (2006), 217 OAC 316 (QL) ["*Council of Canadians Appeal*"] (R BOA, Vol II, Tab 40) aff'g *Council of Canadians v Canada (Attorney General),* 2005] OJ No 3422 (QL) (ON SC) ["*Council of Canadians*"] (R BOA, Vol II, Tab 39), leave to appeal ref'd [2007] SCCA No 48 ["*Council of Canadians SCC*"] (R BOA, Vol II, Tab 41).

[3] *Constitution Act, 1982,* s 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11 (AR Vol IV at 899).

further request that Canada be prevented from ratifying the treaty until Canada has adequately consulted and accommodated the HFN.

14. The HFN is a "Band" as defined in the *Indian Act*, RSC 1985, c I-5.[4] The Band has 285 members and five reserves located in and around Port Alberni, located on Vancouver Island. Approximately one-half of the Band (142 of its members) live on two of these reserves.[5] Another reserve is located on an island within the Broken Island Group Unit of the Pacific Rim National Park; the other two are small unoccupied reserves (53.4 hectares and 2.02 hectares respectively) located on the bank of Alberni Inlet.[6] In addition, the HFN claims a fairly large territory over which nine neighbouring First Nations have overlapping claims.[7]

15. The HFN does not have a modern treaty with Canada and British Columbia. Their last treaty table meeting was in July 2009 and there have been no further negotiations since that time. At the time treaty negotiations were suspended, the parties had not yet reached an Agreement in Principle (Stage 4 of the six-stage treaty process).[8]

16. In the absence of a modern treaty, the HFN has limited law making authority as provided for under ss. 81 and 83 of the *Indian Act*, regarding such as matters as zoning and land use planning, business licensing and regulation.[9] Laws passed pursuant to this authority apply only on HFN reserves.[10]

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[4] *Indian Act*, RSC 1985, c I-5 ["*Indian Act*"] (R BOA, Vol I, Tab 8); Affidavit of Carolyne Brenda Sayers, sworn February 14, 2013 at para 1 ["Sayers Affidavit"] (Applicant's Record Vol I at 117) ["AR"].
[5] Transcript of Brenda Sayers Cross-Examination, April 9, 2013 at 4:37-41 ["Sayers Cross"] (RR Vol III at 918).
[6] Affidavit of Jim Barkwell, sworn March 14, 2013 at para 6 ["Barkwell Affidavit"] (RR Vol II at 765); Sayers Cross, *supra* note 5 at 3:25–4:36 (RR Vol III at 917-18).
[7] *Ibid* at para 16, Exhibit E (RR Vol II at 769 and 810-11).
[8] *Ibid* at paras 14 and 18 (RR Vol II at 766 and 769; Sayers Cross, *supra* note 5 at 1:29-2:23 (RR Vol III at 915-16).
[9] Barkwell Affidavit, *supra* note 6 at paras 7-9 (RR Vol II at 766).
[10] *R v Alfred*, [1993] BCJ No 2277, [1994] CNLR 88 (QL) at para 18 (R BOA, Vol II, Tab 27).

17. The HFN has a Land Use Plan, which is a consultation document used on a voluntary basis, with the consent and cooperation of third parties such as business groups and investors, to address development issues in the HFN's claimed territory.[11] The deponent for the HFN, Ms. Sayers, clarified on cross examination that it is common knowledge that the HFN has a Land Use Plan [12] and seeks to consult with business groups and investors with regard to any business venture that may occur on their claimed territory.[13] The plan has not been used in the HFN's dealings with the Federal government.[14]

18. Ms. Sayers has no personal knowledge of any present or future Chinese foreign investment within the HFN's claimed territory or on their reserves.[15]

19. The HFN has led no evidence that any of their by-laws, or other governmental powers, amount to a violation of the CCFIPA.[16]

20. Ms. Sayers has made appeals to the public to support this challenge to the CCFIPA on the basis that it is a treaty which impacts all Canadians, not just the HFN.[17]

B. <u>Canada's Evidence</u>

21. Canada's evidence is provided by Mr. MacKay and Mr. Barkwell. Mr. MacKay is the Acting Director of the Investment Trade Policy Division and was the lead negotiator for the CCFIPA from 2009 through the conclusion of negotiations in 2012. He also served as policy lead for the defence of investor-state claims brought pursuant to Canada's entire FIPA program and Free Trade Agreements, including NAFTA. He is currently Canada's lead negotiator with respect to the investment provisions in the proposed Canada-European Union Trade Agreement

[11] Sayers Cross, *supra* note 5 at 5:22-7:27 and 8:11-9:16 (RR Vol III at 919-21 and 922-23).
[12] *Ibid* at 7:36-8:3 (RR Vol III at 921-22).
[13] *Ibid* at 8:31-9:16 (RR Vol III at 922-23).
[14] *Ibid* at 8:31-9:16 (RR Vol III at 922-23).
[15] *Ibid* at 11:34-46 and 12:24-29 (RR Vol III at 925-926).
[16] Sayers Affidavit, *supra* note 4 (AR Vol I at 117-28).
[17] Sayers Cross, *supra* note 5, Exhibit 1 (RR Vol III at 940).

negotiations, among other agreements.[18] Mr. Barkwell is the Associate Director General of Treaties for Aboriginal Affairs and Northern Development Canada, as well as a Senior Federal representative at Canada's treaty tables with Aboriginal groups. [19]

22. Canada's expert opinion is provided by Mr. Chris Thomas, Q.C., an expert in the field of international trade and commercial law, with an emphasis on trade and investment regulation and dispute settlement. [20] He is currently a Senior Principal Research Fellow and visiting professor at the National University of Singapore's Centre for International Law. Mr. Thomas is often appointed to be an *ad hoc* arbitral tribunal member in international investment disputes.[21]

C. Negotiation and Signature of the Canada-China FIPA

23. Negotiations for the CCFIPA began in 1994 but were put aside while China completed its accession to the World Trade Organization. Negotiations resumed in September 2004 on the basis of Canada's new 2004 model FIPA.[22] An agreement-in-principle on the CCFIPA was reached in February 2012 and the agreement was signed on September 8, 2012.[23]

24. Further to the *Policy on Tabling Treaties in Parliament,* the CCFIPA was tabled in Parliament for 21 sitting days from September 26 to November 1, 2012. The 21 days provides the opportunity for the House of Commons to debate the treaty if it wishes to do so.[24] The text of Canada's 2004 model FIPA, which formed the basis for the negotiations in respect of the CCFIPA, was first made public in 2004.[25]

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[18] MacKay Affidavit #1, *supra* note 1 at paras 4-5 (RR Vol 1 at 3-4).
[19] Barkwell Affidavit, *supra* note 6 at paras 2-5 (RR Vol II at 765).
[20] Affidavit of J. Christopher Thomas, sworn March 13, 2013, Exhibit A at 2 ["Thomas Affidavit"] (RR Vol III at 825).
[21] *Ibid*.
[22] MacKay Affidavit #1, *supra* note 1 at para 35 (RR Vol I at 13).
[23] *Ibid* at para 35 (RR Vol I at 13).
[24] *Ibid* at paras 87-88 (RR Vol I at 32).
[25] *Ibid* at para 79 (RR Vol I at 29).

25. The Explanatory Memorandum attached to the CCFIPA when tabled in Parliament states that no legislative amendments are required to implement the treaty.[26]

26. The final step remaining in order for China and Canada to ratify the CCFIPA is for each to complete its respective internal procedures for concluding treaties, and exchange diplomatic notes confirming that this has been done. For Canada, this means that the Governor in Council must authorize ratification of the agreement through an Order in Council. The CCFIPA comes into force on the first day of the month following the exchange of diplomatic notes.[27]

D. Canada-China Trade Relations

27. The CCFIPA represents an important step in Canada-China relations.[28] It is the first bilateral economic agreement, relating to either investment or trade, between Canada and China.[29]

28. Both Canadian investment in China and Chinese investment in Canada have been growing. In 2011, Canada had $4.1 billion invested in China while China had $10.9 billion invested in Canada.[30] Contrary to the facts as stated in the Applicant's argument,[31] the amount of Chinese investment in Canada did not increase to $25 billion in 2013 following the purchase of the Canadian oil company, NEXEN, by the Chinese company CNOOC.[32] The assets acquired by CNOOC in the $15.1 billion purchase were mostly outside of Canada.[33]

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[26] *Ibid* at para 93 and Exhibit C (RR Vol I at 34 and 91-98).
[27] MacKay Affidavit #1, *supra* note 1 at para 91 (RR Vol I at 33).
[28] *Ibid* at paras 95 and 97 (RR Vol I at 35).
[29] Transcript of Vernon MacKay Cross-Examination, April 03, 2013 at 77:21-29 and 79:9-19 ["MacKay Cross"], AR Vol II at 541A and 541C.
[30] MacKay Affidavit #1, *supra* note 1 at para 95 (RR Vol I at 35).
[31] Applicant's Memorandum of Fact and Law at para 30 ["Applicant's Factum"] (AR Vol III at 861).
[32] MacKay Cross, *supra* note 29 at 19:41 – 20:9 (AR Vol II at 484-85).
[33] *Ibid*.

29. While growing, China's investment in Canada still represents less than 2% of total foreign direct investment in Canada, which in 2011 amounted to $607 billion.[34]

30. In 2011 the United States ("US") accounted for $326 billion, or more than half of the funds invested in Canada.[35] By comparison, Chinese investment in Canada amounts to about 3% of the US investment in Canada.

31. The CCFIPA's protections will benefit Canadian companies who have already invested, or intend to invest in China.[36] The Canadian Council of Chief Executives has publicly recognized the importance of the CCFIPA for Canadian companies operating in China.[37] Some Canadian companies have already communicated their concern to the Government that the treaty has not yet been ratified.[38]

E. The Canada-China FIPA

1. Canada's FIPA Program

a. Purpose

32. Canada initiated the bilateral FIPA program in 1989. FIPAs are designed to support Canadian investment abroad and foreign investment in Canada.[39] Since that time, Canada has been actively negotiating FIPAs with countries in which Canada has investment interests.[40]

33. FIPAs promote and protect investments in three main ways:

[34] MacKay Affidavit #1, *supra* note 1 at para 94 (RR Vol I at 34).
[35] *Ibid*.
[36] MacKay Cross, *supra* note 29 at 13:28-31 (AR Vol II at 478).
[37] MacKay Affidavit #1, *supra* note 1 at para 97 (AR Vol I at 35).
[38] MacKay Cross, *supra* note 29 at 77:38–78:9 (AR Vol II at 541A-541B).
[39] MacKay Affidavit #1, *supra* note 1 at para 9 (RR Vol I at 5-6).
[40] *Ibid* at para 17 (RR Vol I at 7-8).

a) They prohibit manifestly arbitrary treatment of one State's investors and investments in the other's territory, such as through expropriation of investments without compensation; [41]
b) They also prohibit, with some exceptions, discrimination against investors based on nationality;[42] and
c) They create a dispute settlement mechanism whereby an investor may bring a claim against a host State which may yield an enforceable international commercial arbitral award. [43]

34. A FIPA contains reciprocal obligations applicable to the two contracting States.[44] It is binding only against the contracting parties.[45]

35. A FIPA does not provide additional rights of entry to foreign investors.

b. Background of the FIPA Program

36. Canada currently has 24 FIPAs in force, with a number of other FIPAs either awaiting ratification or currently under negotiation. Six FIPA agreements based on the initial FIPA model came into force between 1989 and 1993.[46]

37. Following the signing of NAFTA,[47] Canada developed an updated FIPA model. Between 1993 and 2001, 16 more FIPAs were signed and came into force.[48]

[41] *Ibid* at para 37 (RR Vol I at 13-16).
[42] *Ibid* at para 37 and 60-64 (RR Vol I at 13 and 23-24).
[43] *Ibid* at paras 60-62 (RR Vol I at 23).
[44] *Ibid, supra* note 1, Exhibit B, Article 2 (RR Vol I at 49).
[45] *Ibid*, Exhibit B, Article 32 (RR Vol I at 75); Thomas Affidavit, *supra* note 20, Exhibit C at paras 27 and 192 (RR Vol III at 842 and 881).
[46] *Ibid* at para 17 (RR Vol I at 7-8).
[47] Thomas Affidavit, *supra* note 20, Exhibit D, Item A27 (RR Vol III at 894); MacKay Affidavit #1, *supra* note 1, Exhibit M (RR Vol I at 406).
[48] MacKay Affidavit #1, *supra* note 1 at para 20 (RR Vol I at 9).

38. Canada updated its FIPA model once again in 2004, in order to incorporate the result of its experiences with NAFTA.[49] Two more agreements have come into force since 2004.[50]

39. In particular, clarifications were made in the 2004 update of the FIPA model to incorporate the binding Note of Interpretation adopted by the NAFTA Parties in 2001.[51] In light of some international tribunals' expansive interpretation of the meaning of the "Minimum Standard of Treatment" Article in NAFTA, Canada, the US and Mexico agreed to clarify the Article.[52] Subsequent experience has shown that this clarification of the parties' intentions has resulted in a consistency of interpretation under NAFTA.[53] Based on their NAFTA experience, Canada and the US also added to their respective model FIPA and Free Trade Agreements ("FTA") an Annex to clarify the framework for determining whether an indirect expropriation has occurred.[54] The CCFIPA, like all FIPAs based on the 2004 model, incorporates these clarifications.

40. In addition to Canada's FIPA Program, Canada undertakes investment obligations that are very similar, if not identical, to those contained in the FIPA model through the investment chapters of its FTAs. In addition to NAFTA, which was signed in 1992 and came into force on January 1, 1994, Canada subsequently concluded similar FTAs with Chile, Columbia and Peru. Canada is currently negotiating a large number of FIPAs and FTAs containing investment provisions, including agreements with many African countries, the European Union, and a dozen countries within the Asia Pacific region in the context of the Trans Pacific Partnership negotiations.[55]

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[49] MacKay Affidavit #1, *supra* note 1 at para 25 (RR Vol I at 10).
[50] *Ibid* at paras 24-27 (RR Vol I at 10-11).
[51] *Ibid* at para 24 (RR Vol I at 10).
[52] *Ibid* at para 24 (RR Vol I at 10); MacKay Cross, *supra* note 29 at 42:13 to 43:23 (AR Vol II at 507-508); Transcript of J. Christopher Thomas Cross-Examination, April 5, 2013 at 23:12 – 24:24 ["Thomas Cross"] (AR Vol III at 741-42).
[53] Thomas Cross, *supra* note 52 at 60:31-61:31 (AR, Vol III at 778-779).
[54] MacKay Affidavit #1, *supra* note 1 at para 25 (RR Vol 1 at 10); MacKay Cross *supra* note 29 at 48:30–47 (AR Vol II at 513).
[55] *Ibid* at para 34 (RR Vol I at 12).

2. **The CCFIPA**

a. Obligations under the CCFIPA

41. The CCFIPA, like all FIPAs, sets out obligations that apply to government measures (such as laws or policies) relating to investors of the other Contracting Party and their investments.[56] Articles 4, 5, 6, 10 and Annex B.10 give expression to certain basic substantive principles which many states, including Canada, the United States and members of the European Union, have affirmed in order to foster and protect international investment.[57] Further details on the major substantive obligations of the CCFIPA are set out below.

i. Preamble

42. The Preamble states that CCFIPA is an agreement between the Contracting Parties, the Government of Canada and the Government of the People's Republic of China.[58]

ii. Article 2 - Scope and Application

43. According to Article 2, the CCFIPA, like all FIPAs, applies to all measures that relate to investors of the other Contracting Party and their investments.[59] Canada's and China's obligations apply to any domestic measure (federal, provincial, territorial, municipal or First Nation governments) within the State whether passed through regulatory, administrative or other governmental authority.[60]

iii. Article 4 – Minimum Standard of Treatment

44. This Article provides that investments made by the investors of one State must be treated by the host State in accordance with the minimum standard of treatment to which aliens are

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[56] *Ibid*, Exhibit B, Articles 2(1) and 2(2) (RR Vol I at 49), Exhibit C at 1 "(a) Scope of the Agreement" (RR Vol I at 92).
[57] *Ibid*, Exhibit B, Articles 2(1) and 2(2) (RR Vol I at 49), Exhibit D (RR Vol I at 99-136).
[58] *Ibid*, Exhibit B (RR Vol I at 43).
[59] *Ibid*, Exhibit C at 1 "(a) Scope of the Agreement" (RR Vol I at 92), Exhibit B, Articles 2(1) and 2(2) (RR Vol I at 49).
[60] *Ibid*, Exhibit B, Article 2 (RR Vol I at 49); Thomas Affidavit, *supra* note 20, Exhibit C at para 100 (RR Vol III at 861-62).

entitled under customary international law.[61] In this sense, it describes a baseline below which the treatment of aliens must not fall. Although this article is included in the text of FIPAs, the Minimum Standard of Treatment exists at international law even in the absence of any FIPA obligations.[62] A NAFTA tribunal recently described a breach of conduct under the standard as:

> " ... sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards."[63]

iv. Articles 5 and 6 - Most-Favoured-Nation and National Treatment

45. Articles 5 and 6 require that the host State not treat investors of the other contracting State, or their investments, in a manner that is less favourable than the treatment afforded to investors or investments of other foreign countries (for purposes of Most-Favoured-Nation Treatment)[64] or of the host State itself (for purposes of National Treatment). [65] In essence, these Articles prohibit Canada and China from discriminating against each other's investors and investments on the basis of nationality. It should be noted, however, that the CCFIPA's National Treatment obligation only applies to investments once they are made. The Article does not apply to investments before they have been established.

v. Article 7 – Senior Management and Boards of Directors

46. This Article provides rules regarding the extent to which the agreeing States can require that members of senior management or boards of directors be of any particular nationality, or that board members reside in the host state.

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[61] *Ibid*, Exhibit B at Article 4, "Minimum Standard of Treatment" (RR Vol I at 49-50).
[62] Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties – Standards of Treatment* (The Netherlands: Kluwer Law International, 2009) at 235, ss 6.3 ["Newcombe & Paradell"] (R BOA, Vol IV, Tab 95).
[63] *Glamis Gold Corporation v United States of America*, NAFTA Ch 11 Panel, Award, 9 June 2009 at para 627 ["*Glamis Gold*"] (see Thomas Affidavit, *supra* note 20, Exhibit D, Item C16: RR Vol III at 894).
[64] MacKay Affidavit #1, *supra* note 1, Exhibit B, Article 5, "Most-Favoured-Nation Treatment" (RR Vol I at 50).
[65] *Ibid*, Exhibit B, Article 6, "National Treatment Obligation" (RR Vol I at 51).

vi. Article 9 – Performance Requirements

47. This article confirms that the agreeing States will comply with their existing Performance Requirement commitments under the 1994 World Trade Organization Agreements, which prohibits participating States from implementing requirements such as "buy local goods" measures.[66] The CCFIPA does not change this existing requirement.

vii. Article 10 – Expropriation

48. Article 10 prohibits the agreeing States from taking any action which would directly or indirectly expropriate the investment of the other State's investors except in limited circumstances: the expropriation must be for a public purpose, must be made on a non-discriminatory basis in accordance with due process of law, and result in payment of adequate compensation. In this fashion, the CCFIPA sets out the same standard that applies under customary international law respecting the treatment of aliens.[67] Annex B.10 further sets out the parties' understanding as to what constitutes an indirect expropriation. It provides that States are prohibited from taking a measure or series of measures "that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure." The Annex provides that an indirect expropriation is not established merely by showing that a measure adversely affected the economic value or profits of an investment.[68] Annex B.10 clarifies that good-faith measures adopted to protect legitimate public objectives for the well-being of citizens, such as health, safety and the environment, do not constitute indirect expropriation, as long as these measures are applied in a non-discriminatory manner.[69]

b. <u>Exceptions in the CCFIPA, including the Aboriginal Reservation</u>

49. Since 1994, each FIPA Canada has entered into, including the CCFIPA, contains general exceptions to ensure that the Canadian government as well as sub-national governments within

[66] *Ibid*, Exhibit C at 2, "(b) Key Substantive Obligations – Performance Requirements" (RR Vol I at 93).
[67] Thomas Cross, *supra* note 52 at 38:33-47 and 39:1-19 (AR Vol III at 756-57).
[68] *Ibid* at 48:16-47, 49:1-47 and 50:1-6 (AR Vol III at 766-68).
[69] MacKay Affidavit #1, *supra* note 1 at para 37 (RR Vol 1 at 13-15), Exhibit B, Article 10 (RR Vol I at 54).

Canada retain policy flexibility in key areas.[70] Specific exceptions, sometimes called "reservations", are used to exempt specific matters from the application of some or all of a FIPA's obligations.[71] "General Exceptions" are typically used to carve out broad subject-matter areas from the FIPA's application.

i. Specific Exceptions within the CCFIPA

50. Under Article 8, Canada has retained policy flexibility in certain specific areas by agreeing with China that certain obligations in the CCFIPA will not apply to certain types of measures or certain sectors. For example, under Article 8, existing non-conforming measures are grandfathered against the application of Article 5 (Most-Favoured-Nation Treatment), Article 6 (National Treatment), and Article 7 (Senior Management and Board of Directors). This provision means that any legislation, regulation or practice which exists at the time of the CCFIPA's entry into force and which does not already conform to these obligations does not violate the agreement.[72]

51. Under Article 8, Canada has also reserved policy flexibility with respect to measures that may be adopted in the future pursuant to certain programs or in sensitive sectors by exempting such measures from the application of Articles 5, 6, and 7. For example, Article 8 provides that procurement and subsidies are exempted from these obligations. Through the application of Annex B.8, Article 8 also provides that Articles 5, 6, and 7 do not apply to measures relating to, among other things, social services (such as public law enforcement and correctional services, as well as to the extent they are social services established or maintained for a public purpose - income security or insurance, social security or insurance, social welfare, public education, public training, health care, and child care), minority affairs, and, most importantly for present purposes, the rights and privileges accorded to Aboriginal peoples.[73]

52. The "Aboriginal Reservation" allows all levels of domestic governments, including Aboriginal governments with legislative and regulatory powers, to provide rights and preferences

[70] *Ibid*, Exhibit E, Article 10 (RR Vol I at149-150), Exhibit B, Article 33 (RR Vol I at 77-81).
[71] *Ibid* at paras 45 and 50 (RR Vol I at 18 and 20).
[72] *Ibid* at paras 45 and 50 (RR Vol I at 18 and 20).
[73] *Ibid* at paras 47 and 53 (RR Vol I at 19 and 21), Exhibit S (RR Vol I at 648-57).

to Aboriginal people that may otherwise be inconsistent with the CCFIPA's obligations. [74] This reservation is not unique. Since 1994, Canada has ensured that policy flexibility is retained to provide preferences for Aboriginal interests with respect to these types of obligations.[75]

53. The specific exceptions in the CCFIPA, including the Aboriginal Reservation, do not apply to all of the agreement's obligations. For example, Article 9 (Performance Requirements) is not subject to the Reservation. Article 9 reiterates obligations already covered by the separate Agreement on Trade Related Investment Measures (TRIMs), an agreement to which all WTO Members are party and against which reservations may not be taken.

54. Further, the specific exceptions in Article 8 also do not apply either to Article 4 (Minimum Standard of Treatment), or to Article 10 (Expropriation). These Articles provide basic legal protection for foreign investors in the host State, such as access to justice and due process, and protect against manifestly arbitrary and confiscatory conduct against foreign investors, such as expropriation of investments without compensation.[76] Due to the fundamental nature of these basic protections, recognized by the agreeing States as reflective of customary international law, no reservations are taken against these obligations in the CCFIPA, or in any of Canada's other FIPAs or FTAs.[77]

ii. General Exceptions in the CCFIPA

55. Under Article 33, Canada has exempted various types of measures from the application of the CCFIPA's obligations generally. For example, none of the obligations in the CCFIPA apply to measures necessary to protect the environment, including measures necessary to protect human health, animal or plant life; nor do they apply to certain measures relating to the conservation of living or non-exhaustible resources.[78] Nor do any of the obligations in the

[74] *Ibid* at para 51 (RR Vol I at 21); Thomas Affidavit, *supra* note 20, Exhibit C at paras 116-19 (RR Vol III at 865).
[75] *Ibid* at paras 50-51 (RR Vol I at 20-21).
[76] MacKay Affidavit #1, *supra* note 1 at paras 57-58 (RR Vol I at 22); Thomas Affidavit, *supra* note 20, Exhibit C at para 119 (RR Vol III at 865).
[77] Thomas Affidavit, *supra* note 20, Exhibit C at para 79 (RR Vol III at 857).
[78] MacKay Affidavit #1, *supra* note 1 at para 45 (RRVol I at 18), Exhibit B, Article 33 (RR Vol I at 77-80).

CCFIPA apply to measures relating to cultural industries, measures adopted for prudential reasons in relation to the protection of Canada's financial system, or measures necessary for the protection of Canada's essential security interests.

c. Remedies under the CCFIPA - Investor-State Dispute Provisions

56. The CCFIPA provides for an investor-state dispute settlement mechanism whereby an investor can submit to arbitration a claim against the other State for an alleged breach of certain obligations under CCFIPA and seek financial compensation. Dispute settlement mechanisms of this kind reflect the norm in the context of international trade agreements. They are found in the vast majority of the over 3,000 investment treaties worldwide, including NAFTA and all of the FIPAs to which Canada is a party.[79]

57. Under Article 30 (Governing Law), an international arbitral tribunal under the CCFIPA is bound to decide disputes in accordance with the specific terms of the CCFIPA, applicable rules or international law, and any interpretation of the CCFIPA provisions as jointly agreed to by the Contracting Parties.

58. Under Article 31 (Interim Measures of Protection and Final Award), an international arbitral tribunal's powers to order relief are limited. Under the CCFIPA, a tribunal does not have jurisdiction to interfere with domestic laws and it has no power to enjoin a government measure alleged to constitute a breach of the CCFIPA, whether as an interim measure or as a final award.[80] Neither can it require a State to change any of its laws, regulations or practices.[81] Further, international arbitral tribunals do not act as courts of appeal of domestic courts and may not overturn domestic judicial decisions.[82]

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[79] Thomas Affidavit, *supra* note 20, Exhibit C at para 79 (RR Vol III at 857).
[80] *Ibid* at paras 25 and 192 (RR Vol III at 841-42 and 881).
[81] MacKay Affidavit #1, *supra* note 1 at para 60 (RR Vol I at 23), Exhibit B, Article 32, ss 2 and 3 (RR Vol I at 75-76), Exhibit E, Article 44 (RR Vol I at 170-71); Thomas Affidavit, *supra* note 20, Exhibit C at paras 25 and 192 (RR Vol III at 841-42 and 881).
[82] Thomas Affidavit, *supra* note 20, Exhibit C at para 196 (RR Vol III at 882-83). Thomas Cross, *supra* note 52 at 16:38–47 and 17:1-46 (AR Vol III at 734-35).

59. The power of an international arbitral tribunal to make a final award is limited to ordering the payment of damages against the respondent contracting party, that is, either the Government of Canada or the Government of China.[83] Article 32 (Finality and Enforcement of an Award) provides that remedies awarded by an arbitral tribunal under the CCFIPA have no binding force except as between the disputing parties.[84] Arbitration panels are not permitted to order third parties to pay damages.[85]

60. Article 32 also reflects the agreement between Canada and China that other arbitral decisions are not binding and arbitrators are not subject to the principle of *stare decisis.* This aspect of the agreement reflects the fact that international law is primarily treaty-based and that international decisions are subsidiary means for determining law.[86] In particular, awards under one treaty might not be relevant to the analysis of claims under another treaty especially since different treaties may be facially similar but actually operate in different ways.[87]

d. Terms of the CCFIPA

61. Pursuant to Article 35, the CCFIPA has a minimum term of 15 years and requires on year's notice to terminate the treaty.[88] Once terminated, the agreement would continue to apply to existing, but not to new, investments for an additional 15 years.

62. In summary:

a) the CCFIPA closely resembles Canada's FIPA model, which in turn is based on NAFTA;

b) the CCFIPA provides for international investor-state arbitration, an alternative mechanism to domestic tribunals and courts for resolving investment disputes;

[83] *Ibid* at para 25 (RR Vol III at 841-42).
[84] MacKay Affidavit #1, *supra* note 1, Exhibit B, Article 32, s 1 (RR Vol I at 75); Thomas Affidavit, *supra* note 20, Exhibit C at para 210 (RR Vol III at 886).
[85] *Ibid*, Exhibit B, Article 32, s 1 (RR Vol I at 75).
[86] Thomas Affidavit, *supra* note 20, Exhibit C at para 59 (RR Vol III at 850).
[87] *Ibid* at para 10 (RR Vol III at 839).
[88] MacKay Affidavit #1, *supra* note 1, Exhibit B, Article 35 (RR Vol I at 81).

c) CCFIPA international arbitral tribunals are to apply the CCFIPA to their decisions, as well as applicable rules of international law and interpretations issued by the Contracting Parties;

d) CCFIPA international arbitral tribunals do not have the jurisdiction to order changes to domestic law, to make determinations as to rights under domestic law or to act as plenary courts of review for domestic court decisions;

e) CCFIPA international arbitral tribunals only have the power to award monetary damages; and

f) Decisions of CCFIPA international arbitral tribunals have no binding force except as between the disputing parties and in respect of the particular case at issue; the decisions do not affect the rights of Canadians generally, including the rights of Aboriginal Groups.

F. Canada's Experience of Investor-State Arbitration and Aboriginal Self-Government

1. FIPA / NAFTA Arbitral Decisions to Date

63. No claims have ever been filed against Canada under any of its 24 FIPAs.[89]

64. Canada's only experience in respect of investment claims has been under NAFTA. Since 1994, there have been 35 notices of intent filed; of these, only 21 have resulted in an actual claim being submitted to arbitration.[90] Of the 21 claims, nine are ongoing.[91] With respect to the other 12 arbitrations, two were formally withdrawn by the claimant before an arbitral tribunal was constituted.[92] Accordingly, there are only 10 cases in which a tribunal was appointed and a decision of some sort actually issued. These 10 cases may be broken down as follows:

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[89] MacKay Affidavit #1, *supra* note 1 at para 66 (RR Vol I at 25).
[90] *Ibid* at para 67 (RR Vol I at 25). Additionally, *Windstream Energy LLC v Government of Canada* is a new NAFTA claim filed in January 2013. *See* MacKay Cross, *supra* note 29 at 54:14-33 (AR Vol II at 519).
[91] MacKay Affidavit #1, *supra* note 1 at para 67 (RR Vol I at 25).
[92] *William Jay Greiner and Malbaie River Outfitters Inc v Government of Canada*, NAFTA Ch 11 Panel, Notice of Intent, 16 September 2008 (R BOA, Vol IV, Tab 86) and *William Jay Greiner and Malbaie River Outfitters Inc v Government of Canada*, NAFTA Ch 11 Panel, Withdrawal Letter, 10 June 2011 (R BOA, Vol IV, Tab 87)*; Dow AgroSciences LLC v*

- two tribunal decisions which ruled against Canada;[93]
- three claims dismissed on the merits;[94]
- one claim dismissed for lack of jurisdiction;[95]
- one claim dismissed for failure to prosecute;[96]
- one claim settled by Canada prior to a tribunal award;[97] and

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Government of Canada, NAFTA Ch 11 Panel, Notice of Intent, 25 August 2008 (R BOA, Vol III, Tab 67) and *Dow AgroSciences LLC v Government of Canada*, NAFTA Ch 11 Panel, Settlement Agreement, 25 May 2011 (R BOA, Vol III, Tab 68).

[93] *Pope & Talbot Inc v The Government of Canada*, NAFTA Ch 11 Panel, Notice of Intent, 24 December 1998 (R BOA, Vol III, Tab 76) and *Pope & Talbot Inc v The Government of Canada*, NAFTA Ch 11 Panel, Award in Respect of Damages, 31 May 2002 (R BOA, Vol III, Tab 77); *SD Myers, Inc v Government of Canada*, NAFTA Ch 11 Panel, Notice of Intent, 21 July 1998 (R BOA, Vol III, Tab 81) and *SD Myers, Inc v Government of Canada*, NAFTA Ch 11 Panel, Partial Award, 13 November 2000 (see AR Vol IV at 923-1006).

[94] *Chemtura Corporation v Government of Canada, UNCITRAL (formerly Crompton Corporation v Government of Canada)*, NAFTA Ch 11 Panel, Notice of Intent, 6 November 2001 (R BOA, Vol III, Tab 64); *Chemtura Corporation v Government of Canada, UNCITRAL (formerly Crompton Corporation v Government of Canada)*, NAFTA Ch 11 Panel, 4 April 2002 (R BOA, Vol III, Tab 65); *Chemtura Corporation v Government of Canada, UNCITRAL (formerly Crompton Corporation v Government of Canada)*, NAFTA Ch 11 Panel, Third Notice of Intent, 19 September 2002 (R BOA, Vol III, Tab 66) and *Chemtura Corporation v Government of Canada, UNCITRAL (formerly Crompton Corporation v Government of Canada)*, NAFTA Ch 11 Panel, Award, 2 August 2010 (see Thomas Affidavit, *supra* note 20, Exhibit D, Item C11 (RR Vol III at 894); *Merrill & Ring Forestry LP v The Government of Canada*, NAFTA Ch 11 Panel, Notice of Intent, 25 September 2006 (R BOA, Vol III, Tab 73) and *Merrill & Ring Forestry LP v The Government of Canada*, NAFTA Ch 11 Panel, Award, 31 March 2000 (R BOA, Vol III, Tab 74); *United Parcel Service of America v Government of Canada*, NAFTA Ch 11 Panel, Notice of Intent, 19 January 2009 (R BOA, Vol III, Tab 82) and *United Parcel Service of America v Government of Canada*, a NAFTA Ch 11 Panel, Award on Merits, 24 May 2007 (R BOA, Vol III, Tab 83).

[95] *Vito G Gallo v The Government of Canada*, NAFTA Ch 11 Panel, Notice of Intent, 12 October 2006 (R BOA, Vol III, Tab 84) and *Vito G Gallo v The Government of Canada*, NAFTA Ch 11 Panel, Award, 15 September 2011 (R BOA, Vol III, Tab 85).

[96] *Melvin J Howard, Centurion Health Corp & Howard Family Trust v The Government of Canada*, NAFTA Ch 11 Panel, Notice of Intent, 11 July 2008 (R BOA, Vol III, Tab 71) and *Melvin J Howard, Centurion Health Corp & Howard Family Trust v The Government of Canada*, NAFTA Ch 11 Panel, Order for the Termination of the Proceedings and Award on Costs, 2 August 2010 (R BOA, Vol III, Tab 72).

[97] *AbitibiBowater Inc v Government of Canada*, NAFTA Ch 11 Panel, Notice of Intent and Statement of Claim, 23 April 2009 (R BOA, Vol III, Tab 62) and *AbitibiBowater Inc v Government of Canada*, NAFTA Ch 11 Panel, Consent Award, 24 August 2010 (R BOA, Vol III, Tab 63) ["*AbitibiBowater*"]; *Ethyl Corporation v The Government of Canada*, NAFTA Ch 11 Panel, Notice of Intent, 10 September 1996 (R BOA, Vol III, Tab 69) and *Ethyl Corporation*

- one claim withdrawn by the claimants without any damages being paid. [98]

65. In the 12 claims submitted to arbitration against Canada, claimants have sought a total of approximately $2.4 billion in damages. Judgment was obtained in only two cases, totalling 6.4 million in damages, amounting to a recovery rate of less than half of one percent. In the two cases that Canada settled, *AbitibibBowater* and *Ethyl Corp*, Canada paid a total of $143 million. If these two settlements are taken into account, the total amount paid to investors for the claims submitted to arbitration over the 19-year history of NAFTA is only $143 million out of over $2.4 billion claimed. This is a recovery rate of 6%.

66. The size of US investment in Canada is almost 30-fold that of Chinese investment; yet the number of claims that have been brought under NAFTA throughout its 19-year operation is relatively modest. Moreover, Mr. MacKay has testified that "none of the losses or monetary settlements to date have implicated or impaired Canada's ability to regulate in the public interest in a non-discriminatory manner."[99]

2. **Aboriginal Governance Powers**

67. In Canada, nineteen First Nations[100] possess, under modern treaties, some or all of the law-making powers that the Applicant's expert alleges could lead to a CCFIPA claim.[101] These

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v The Government of Canada, NAFTA Ch 11 Panel, Award on Jurisdiction, 24 June 1998 (R BOA, Vol III, Tab 70) ["*Ethyl Corp*"].

[98] *St Mary's VCNA LLC v Canada*, NAFTA Ch 11 Panel, Notice of Intent, 13 May 2011 (R BOA, Vol III, Tab 78); *St Mary's VCNA LLC v Canada*, NAFTA Ch 11 Panel, Second Notice of Intent, 23 March 2012 (R BOA, Vol III, Tab 79) and *St Mary's VCNA LLC v Canada*, NAFTA Ch 11 Panel, Consent Award, 29 March 2013 (R BOA, Vol III, Tab 80).

[99] MacKay Affidavit #1, *supra* note 1 at para 69 (RR Vol I at 26).

[100] Transcript of Gus Van Harten Cross-Examination, April 15, 2013, Exhibit F, *Cree-Naskapi (of Quebec) Act*, SC 1984, c 18, ss 45(1)(e), (k) and 46-48 ["*Cree-Naskapi Act*"] ["Van Harten Cross"] (RR Vol III at 1055-57); *Labrador Inuit Land Claims Agreement*, ss 4.8.1, 4.11.1, 17.9.4, 17.41.1, and 17.41.3 as ratified by *Labrador Inuit Land Claims Agreement Act*, SC 2005, c 27 (R BOA, Vol I, Tab 11); Van Harten Cross, *supra* note 100, Exhibit H, *Nisga'a Final Agreement*, ss 11.47(a) and (b) (RR Vol III at 1068-69); *Maa-nulth First Nations Final Agreement*, ss 5.3.1, 5.3.3, 4.1.2, 13.14.1 and 13.28.0 as ratified by *Maanulth First Nations Final Agreement Act*, SC 2009, c 19 (R BOA, Vol I, Tab 13); Van Harten Cross, *supra* note 100, Exhibit G, *Sechelt Indian Band Self-Government* Act, SC 1986, c 27, ss 14 (1) (b), (j), (k) and

powers include zoning and land use planning, renewable and non-renewable resource use on First Nation lands, protection and conservation of the environment and business licensing and regulation.

68. Aboriginal law-making powers under modern treaties date back to 1984, starting with the *Cree-Naskapi (of Quebec) Act*.[102]

69. In addition, there are 614 First Nations registered as bands under the *Indian Act*[103] whose by-law-making powers include zoning and land use planning,[104] the preservation, protection and management of animals and fish,[105] and business licensing and regulation.[106]

70. These by-law-making powers under the *Indian Act* have been in effect since 1951.[107]

(n); *Tåîchô Land Claims and Self Government Agreement*, s 7.4.2 as ratified by *Tlicho Land Claims and Self-Government Act*, SC 2005, c 1 (R BOA, Vol I, Tab 15); *Tsawwassen First Nation Final Agreement*, ss 6.1(d), 15.1 and 16.119 as ratified by *Tsawwassen First Nation Final Agreement Act*, SC 2008, c 32 ["*Tsawwassen Final Agreement*"] (R BOA, Vol II, Tab 19); *Westbank First Nation Self-Government Agreement*, ss 103, 135, 138, 148, 204, and 212 as ratified by *Westbank First Nation Self-Government Act*, SC 2004, c 17 (R BOA, Vol II, Tab 21); s 13.3 of each of the 11 self-government agreements ratified under the *Yukon First Nations Self-Government Act*, SC 1994, c 35: *The Carcross/Tagish First Nation Self-Government Agreement* (R BOA, Vol I, Tab 2); *The Champagne and Aishihik First Nations Self-Government Agreement* (R BOA, Vol I, Tab 3); *The First Nation of Nacho Nyak Dun Self-Government Agreement* (R BOA, Vol I, Tab 7); *The Kluane First Nation Self-Government Agreement* (R BOA, Vol I, Tab 9); *The Kwanlin Dun First Nation Self-Government Agreement* (R BOA, Vol I, Tab 10); *The Little Salmon/Carmacks First Nation Self-Government Agreement* (R BOA, Vol I, Tab 12); *The Selkirk First Nation Self-Government Agreement* (R BOA, Vol I, Tab 14); *The Ta'an Kwach'an Council Self-Government Agreement* (R BOA, Vol II, Tab 16); *The Teslin Tlingit Council Self-Government Agreement* (R BOA, Vol II, Tab 17); *The Tr'ondëk Hwëch'in Self-Government Agreement* (R BOA, Vol II, Tab 18); *Vuntut Gwitchin First Nation Self-Government Agreement* (R BOA, Vol II, Tab 20)

[101] Affidavit of Associate Professor Gus Van Harten, sworn February 13, 2013, Exhibit C, at 18, s 5(a) ["Van Harten Affidavit"] (AR Vol I at 93).

[102] *Cree-Naskapi Act*, *supra* note 100 (RR Vol III at 1055-57).

[103] *Indian Act*, *supra* note 4 (R BOA, Vol I, Tab 8).

[104] *Ibid*, ss 81(1)(g).

[105] *Ibid*, s 81(1)(o).

[106] *Ibid*, s 83(1)(a.1).

[107] *An Act Respecting Indians*, SC 1951, c 29 ss 80(g) and (o) (R BOA, Vol I, Tab 1); *Indian Act*, *supra* note 4, s 83(1)(a.1) (R BOA, Vol I, Tab 8).

71. No measure passed by an Aboriginal group (First Nation, Inuit or Métis) has ever been the subject of a claim, much less an award, under NAFTA or any other FTA, or any FIPA to which Canada is a party.[108]

72. Further, not one of the claims submitted under NAFTA against Canada has been based on Aboriginal rights or interests.[109] In fact, Canada's expert Mr. Christopher Thomas testified on cross-examination that to his knowledge, no investment treaty claim under any of the existing 3,000 or so investment treaties has been submitted to any international arbitral tribunal in relation to the revocation of a permit based on considerations of Aboriginal rights and title.[110]

G. Correspondence and Consultation

73. DFAIT conducted a review of the correspondence it received from September 6, 1985 to September 1, 2012. Prior to September 1, 2012, neither the HFN nor any other Aboriginal group had ever requested consultation with DFAIT with regard to any of Canada's 24 FIPAs.[111]

74. Details about the FIPA negotiations between Canada and China have been on DFAIT's website since 2008.[112] On October 14, 2011, the Minister of International Trade issued a press release stating that Canada and China had a shared ambition to complete FIPA negotiations.[113]

75. Canada responded to the October 26 and 31, 2012 letters of the HFN to Prime Minister Stephen Harper about the CCFIPA on February 19, 2013, acknowledging receipt of the correspondence and providing assurance that the comments offered on behalf of the HFN had been carefully reviewed.[114]

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[108] Thomas Affidavit, *supra* note 20, Exhibit C at para 30 (RR Vol III at 842-43); Van Harten Cross, *supra* note 100 at 52:7-10 (RR Vol III at 998).
[109] Thomas Affidavit, *supra* note 20, Exhibit C at para 30 (RR Vol III at 842-43).
[110] Thomas Cross, *supra* note 52 at 55:35-41 (AR Vol III at 773).
[111] Affidavit #2 of Vernon MacKay, sworn March 14, 2013 at paras 4-7 ["MacKay Affidavit #2] (RR Vol II at 761-62).
[112] MacKay Affidavit #1 *supra* note 1 at para 79 (RR Vol I at 29).
[113] *Ibid*.
[114] Affidavit #2 of Claudia Pace, sworn March 15, 2013 at para 3 ["Pace Affidavit #2] (RR Vol III at 904).

76. On January 31, 2013, Canada also responded to the October 31, 2012 letter of Shawn Atleo, National Chief of the Assembly of First Nations, to Prime Minister Stephen Harper about the CCFIPA. Canada advised that the Government is committed to ensuring broad levels of protection for Canadian investors and businesses operating abroad while at the same time ensuring that it retains the policy flexibility needed to manage foreign investment within Canada to ensure that such investment benefits all Canadians.[115]

PART II – STATEMENT OF POINTS IN ISSUE

77. Canada says that the proper issues for determination in this proceeding are:

a) whether the ratification of the CCFIPA, an exercise of the Crown's prerogative to conclude international treaties, has any impact on the domestic law of Canada or on the asserted s. 35 rights of the Applicant such that it could give rise to a duty to consult the HFN;
b) whether this Court should make any determinations or issue any declaration in respect of all First Nations in Canada when only the HFN is a party before the Court;
c) whether the affidavits filed on behalf of other First Nations who are not parties to this Application should be struck as irrelevant; and
d) whether, in the event this Court were to find that there was a duty to consult, it would be appropriate to order any remedy other than a declaration in favour of the Applicant.

[115] Pace Affidavit #2, *supra* note 114 at para 2 (RR Vol III at 903).

PART III – SUBMISSIONS

78. The Applicant requests relief from this Court on the premise that the government has a duty to consult with the HFN prior to exercising the Crown's prerogative to bring the CCFIPA into force. There is no scope for this Court to review the relative merits of Canada's decision to continue 25 years of government policy by entering into an investment treaty with China. The basis upon which Canada chooses to enter international agreements and the specific international obligations they agree to be bound by are matters of policy. The Court's sole task on this application is to consider whether the provisions of the CCFIPA give rise to a duty to consult with the HFN. They do not.

79. The CCFIPA is an international agreement which has no impact on Canada's domestic law. The agreement does not alter the Constitution and has no application to the way in which land and resources are managed either within Canada or, more specifically, within the Applicant's claimed traditional territories. The ratification of the CCFIPA can accordingly have no adverse effects on the Applicant's asserted s. 35 rights, including any asserted rights to manage the land and resources within their claimed territory. All of the effects alleged by the Applicant are speculative or, alternatively, too remote to establish any connection with the ratification of CCFIPA so as to trigger a duty to consult. Accordingly, as an exercise in Crown prerogative which does not engage any constitutional issues, the ratification of the CCFIPA is not open to review by the courts. This Application should be dismissed in its entirety.

A. The Ratification of the CCFIPA Does Not Give Rise to a Duty to Consult with the Hupacasath First Nation

80. The Supreme Court of Canada has made it clear that not every activity undertaken by the Crown will give rise to a duty to consult. In *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73,[116] the Supreme Court of Canada held that a duty to consult and, where appropriate, accommodate asserted or established s. 35 rights arises "when the Crown has

[116] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (QL), Court's Common List of Authorities ("CCLA") Vol 2, Part A, Tab 18 ["*Haida*"].

knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[117]

81. In *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43[118] the Supreme Court of Canada broke this test down into three elements: 1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; 2) the contemplated Crown conduct; and 3) the potential that the contemplated conduct may adversely affect an asserted or established s. 35 right.

82. The question of whether any duty to consult is owed to the Applicant must be determined solely by application of this three-part test.[119] The Applicant's alternative arguments, that the duty to consult in this case arise either from some manner of unidentified and unproven fiduciary duty that the Crown owes to the Applicant[120] or from the non-legally binding United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"),[121] should be rejected.

83. As set out below, an analysis of the Applicant's claims demonstrates why the *Haida* test has not been met in this case, and, accordingly, why the Crown has no duty to consult with the Applicant concerning the ratification of the CCFIPA.

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[117] *Ibid* at para 35 (R BOA, Vol II, Tab 44).
[118] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 (QL), CCLA Vol 2, Part C, Tab 3 at para 31 ["*Rio Tinto*"] (R BOA, Vol III, Tab 53).
[119] *Rio Tinto*, *supra* note 118 at para 31(R BOA, Vol III, Tab 53).
[120] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 (QL) at paras 49-50 and 61 ["*Manitoba Metis*"] (R BOA, Vol II, Tab 50); *Wewaykum Indian Band v Canada*, 2002 SCC 79 (QL), CCLA Vol 2, Part A, Tab 50 at para 81, 83 and 91-92 ["*Wewaykum*"] (R BOA, Vol III, Tab 61); *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 (QL) at para 36 ["*Alberta*"] (R BOA, Vol II, Tab 26).
[121] Aboriginal Affairs and Northern Development Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online: <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> ["Canada's Statement of Support"] (R BOA, Vol IV, Tab 88).

1. The Crown's Knowledge of the Applicant's Potential Claims and Rights

84. With respect to the first part of the test, as noted by the Court in *Rio Tinto*, any alleged effects must be on the asserted Aboriginal rights themselves. Alleged effects on interests not rooted in s. 35 cannot trigger a duty to consult.[122] At paragraph 6 of the HFN's Notice of Application,[123] the Applicant identifies several claimed Aboriginal rights which the Crown acknowledges have been advanced, to its knowledge, by the HFN, both in treaty negotiations and in litigation.[124] All of these asserted rights relate to the use and management of land and resources within the HFN's claimed traditional territory.

85. In this case, however, the Applicant also alleges effects on interests which do not have any foundation in s. 35. For example, at paragraphs 25 and 26 of Ms. Sayers' Affidavit, she states that she is concerned that in negotiating a treaty with Canada (and British Columbia), the HFN's position will be constrained to conform with Canada's CCFIPA obligations.[125] The HFN has not been involved in the British Columbia Treaty Process since 2009.[126] Not only is it speculative to rely on the possibility of future negotiating positions when the Applicant is not actively engaged in treaty negotiations, this is not the type of Aboriginal interest that can give rise to a duty to consult. As noted by the Supreme Court of Canada in *Rio Tinto,* impacts on the negotiating position of an Aboriginal group do not constitute adverse impacts giving rise to the duty to consult. The adverse impact must be on the present and/or future exercise of the Aboriginal right itself.[127] As also held by the Federal Court of Appeal in *Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans),* 2007 FC 567,[128] affirmed 2008 FCA 212,[129] treaty settlements are a discrete process and impacts on this process cannot trigger a duty to consult.

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[122] *Hiawatha First Nation v Ontario (Minister of the Environment),* [2007] 2 CNLR 186 (QL) at para 50 ["*Hiawatha*"] (R BOA, Vol II, Tab 45).
[123] Notice of Application, filed January 18, 2013 ["Application"] (AR Vol I at 1-11).
[124] Barkwell Affidavit, *supra* note 6 at para 15 (RR Vol II at 768-69).
[125] Sayers Affidavit, *supra* note 4 at paras 25-26 (AR Vol I at 123-24).
[126] Barkwell Affidavit, *supra* note 6 at para 18 (RR Vol II at 769).
[127] *Rio Tinto, supra* note 118 at paras 46 and 50 (R BOA, Vol III, Tab 53).
[128] *Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans),* 2007 FC 567 (QL) at para 32 ["*Ahousaht*"] (R BOA, Vol II, Tab 24).
[129] *Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans),* 2008 FCA 212 (QL) at para 37 ["*Ahousaht Appeal*"] (R BOA, Vol II, Tab 25).

86. Similarly, at paragraph 121 of their argument, the Applicant alleges an adverse effect arising from the fact that if the HFN were able to negotiate a treaty with expanded governance powers, it will be restrained from imposing a regulation which requires the use of local products. The Applicant has provided no evidence that the HFN has ever engaged in an Aboriginal practice, custom or tradition that could give rise to an Aboriginal right to impose such a requirement. Moreover, Canada's existing commitments under the 1994 World Trade Organization agreements have long prohibited such measures, commitments which until now have not been challenged by the Applicant. [130]

87. Even more significantly, the Applicant is seeking to prevent the ratification of the CCFIPA based on alleged concerns that various parties have voiced for years about such investment treaties generally. None of these concerns have ever been specifically related to s. 35 rights. The Applicant's own expert admits in his testimony that his concerns with respect to the CCFIPA use of investor state arbitration are of general nature applicable to all such treaties entered by States around the world.[131] He has also confirmed that his concerns are not related to any alleged adverse effects on the Applicant's interests under s. 35 (an area upon which he testified he has no knowledge), but rather to what he believes to be his role in educating the Canadian public.[132] In essence, the Applicant believes the CCFIPA to be bad policy.[133] That issue is irrelevant in this case. Whether or not the CCFIPA is in the interests of Canada and Canadians generally is a decision for elected officials to make.[134]

88. The analysis of whether a duty to consult with the Applicant arises from the ratification of the CCFIPA must be focused solely upon claimed Aboriginal rights. In this case, the only

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[130] MacKay Affidavit #1, *supra* note 1 at paras 41–43 and Exhibit C at 2, "(b) Key Substantive Obligations – Performance Requirements" (RR Vol I at17 and 93).
[131] Van Harten Affidavit, *supra* note 101, Exhibit C at 3, para 3 (AR Vol I at 78); Van Harten Cross, *supra* note 100 at 9:31-46, 11:36-47, 12:1-2 and 22:31-38 (RR Vol III at 955, 957, 958, 959 and 968).
[132] Van Harten Cross, *supra* note 100 at 24:15-23, 35:40-47 and 36:1-10 (RR Vol III at 970, 981 and 982).
[133] *Ibid* at 17:27-47, 18:1-34 and 19:1-16 (RR Vol III at 963, 964 and 965); Sayers Cross, *supra* note 5 at 18:30-41 (RR Vol III at 932).
[134] Van Harten Cross, *supra* note 100 at 10:45-47 and 11:1-6 (RR Vol III at 956 and 957).

relevant rights claimed by the Applicant are in relation to the use and management of land and resources within the HFN's claimed traditional territory.

2. The Contemplated Crown Conduct – the Ratification of the CCFIPA

89. With respect to the second part of the test, the Crown conduct at issue is the ratification of the CCFIPA. The ratification of the CCFIPA is an exercise of the Crown's prerogative powers,[135] and is carried out pursuant to the executive branch's exclusive power to negotiate and conclude international treaties and agreements.[136] Foreign relations and international policy are complicated areas which involve many considerations and interests that the government is best placed to assess. Courts have consistently recognized that the government must have flexibility in deciding how its duties under the Crown prerogative over foreign relations, and particularly over matters considered "high policy", are discharged.[137]

3. The Ratification of the CCFIPA Cannot, and Will Not, Adversely Affect an Asserted s. 35 Right of the Hupacasath First Nation

90. With respect to the third element, as the Supreme Court of Canada explained in *Rio Tinto,* "the Applicant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights."[138]

91. The government conduct or decision at issue may involve "high-level management decisions or structural changes to the resource's management …even if these decisions have no

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[135] Peter W Hogg, *Constitutional Law of Canada,* 5th ed Supp (Scarborough, ON: Thomson/Carswell, 2007) at 1-20 ["Hogg"] (R BOA, Vol IV, Tab 93).
[136] *Ibid* at 11-14.
[137] *Canada (Prime Minister) v Khadr*, 2010 SCC 3 (QL) at para 37 ["*Khadr*"] (R BOA, Vol II, Tab 32); *The Queen v Secretary of State for Foreign and Commonwealth Affairs Ex Parte Ronald James Everett*, [1988] EWCA Civ 7 (BAILII) at 6 ["*Secretary of State*"] (R BOA, Vol III, Tab 58); *Black v Canada (Prime Minister)*, [2001] 54 OR (3d) 215 (QL) (Ont CA) at paras 52-53 ["*Black*"] (R BOA, Vol II, Tab 30). See also *Turp v Canada (Prime Minister)*, 2012 FC 893 (QL) at para 18 ["*Turp*"] (R BOA, Vol III, Tab 60); *Copello v Canada (Minister of Foreign Affairs)*, 2003 FCA 295 (QL) at para 16 ["*Copello*"] (R BOA, Vol II, Tab 38).
[138] *Rio Tinto, supra* note 118 at para 45 (R BOA, Vol III, Tab 53).

'immediate impact on lands and resources' … because such structural changes may set the stage for further decisions that will have a direct adverse impact on land and resources." [139]

92. Contrary to what the Applicant suggests, however, the threshold for this test is not so low that every decision or action by the government will trigger a duty to consult. There must be a sufficient causal relationship between the contemplated government action and the "potential for adverse impacts."[140] As the Court reaffirmed in *Rio Tinto*, "mere speculative impacts…will not suffice." [141]

93. The Applicant here has failed to show, and indeed, cannot show, that the ratification of the CCFIPA will cause any appreciable adverse effects on their ability to exercise their asserted s. 35 rights. The Applicant's argument offers nothing more than baseless speculation and conjecture of the sort that is insufficient to meet the burden set out under the tests established by the Supreme Court of Canada.

a. <u>The Ratification of the CCFIPA Cannot Cause Adverse Affects to the Applicant's Rights</u>

94. The Applicant's challenge misconceives the scope and purpose of the CCFIPA and its relationship to Canadian law. Neither the ratification nor the operation of the CCFIPA is capable of causing an appreciable adverse impact on the Applicant's rights under Canadian law.

95. The CCFIPA is an international agreement between two states, Canada and China. It commits Canada and China to various international investment law principles, such as non-discrimination, no expropriation without compensation, and a minimum standard of treatment. As set out in the Explanatory Memorandum which was tabled in Parliament along with the text of the CCFIPA, the obligations contained in the CCFIPA are consistent with protections already provided for by the Canadian legal system, "new legislative provisions are not required to

[139] *Ibid* at para 47.
[140] *Rio Tinto, supra* note 118 at para 45 (R BOA, Vol III, Tab 53).
[141] *Ibid* at para 46.

implement the Agreement", and no existing laws or regulations are required to be changed.[142] As further explained by Canada's deponent Vernon Mackay, who was the policy lead for negotiating the NAFTA agreement and the lead negotiator for the CCFIPA:

> A It's -- perhaps there's a nuance there. Certainly, the FIPA has not been -- there's been no establishment that a FIPA leads to new investments into a developed country, such as Canada. And the rationale behind that statement is that the FIPA -- going back to what the FIPA is, it is a number of international investment law principles, such as nondiscrimination and minimum standard of treatment, as I referred to earlier in my testimony, and those are all principles that developed countries mostly satisfy. So the rule of law is not an issue in Canada. We are comfortable with taking on a commitment with respect to compensation in the event of expropriation. So what the FIPA brings, in terms of those core obligations, is really nothing new for foreign investors coming into Canada because they already get that.
> However, going the other direction, Canadian investment into partner countries, in particular if it's a developing country where there may be issues relating to the rule of law, the FIPA has a greater impact on decisions relating to whether a foreign investment is made or not.[143]

96. It is well established that international treaty obligations are not incorporated into Canadian domestic law absent domestic implementing legislation.[144] Thus, the ratification of the CCFIPA will not alter Canadian domestic law.

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[142] MacKay Affidavit #1, *supra* note 1 at paras 89-90, Exhibit C at 6 (RR Vol I at 32-33 and 97).
[143] MacKay Cross, *supra* note 29 at 12:20-43 AR Vol II at 477).
[144] *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 (QL), CCLA Vol 3, Tab 1 at para 79-80 ["*Baker*"] (R BOA, Vol II, Tab 29); Thomas Affidavit, *supra* note 20, Exhibit C at paras 190-191 (RR Vol III at 881).

97. Furthermore, neither will Canadian law be altered by the operation of the CCFIPA. An arbitral tribunal established under the CCFIPA only has jurisdiction to adjudicate on a contracting party's fulfillment of its obligations under international law. The tribunal's authority does not extend in any way into the domestic sphere.[145] It does not apply domestic law or make determinations as to rights under domestic law.[146] It has no authority to require domestic lawmakers and regulators to adopt, repeal or abstain from enforcing any particular law or regulation, even if a breach of the CCFIPA is established.[147] Instead, the remedial powers of a CCFIPA tribunal are restricted to awarding, against Canada or China, monetary damages or restitution of property; in the latter case, the Party found liable has the option of paying monetary damages in lieu of restitution.[148] As a result, in the event a measure passed by an Aboriginal Group were found by an international tribunal to be in breach of Canada's CCFIPA obligations, it would be the Government of Canada, and not the Aboriginal Group in question, that would be internationally responsible to pay damages.[149]

98. The lack of impact of international tribunals in the domestic sphere has been confirmed by the decision in *Council of Canadians*[150] a challenge very similar to the one now before this Court. In that case, a constitutional challenge was brought against the investor-state dispute provisions contained in Chapter 11 of NAFTA. The court's determination of the scope and operation of NAFTA in *Council of Canadians* is directly relevant to this case, given the similarities between NAFTA and the CCFIPA. As explained by Mr. MacKay and Mr. Thomas in their affidavits, and contrary to the contentions of the Applicant, the lineage of each provision of the CCFIPA is, with one exception,[151] directly traceable back to NAFTA's Chapter 11.[152]

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[145] *Council of Canadians*, *supra* note 2 at paras 41-42 (R BOA, Vol II, Tab 39).
[146] *Ibid*.
[147] Thomas Affidavit, *supra* note 20, Exhibit C at para 25 (RR Vol III at 841-42).
[148] MacKay Affidavit #1, *supra* note 1, Exhibit B, Article 31 and 32 (RR Vol I at 74-76).
[149] *Ibid*, Exhibit B, Article 31 (RR Vol I at 74-75); Thomas Affidavit, *supra* note 20, Exhibit C at para 27 (RR Vol III at 842).
[150] *Council of Canadians*, *supra* note 2 (R BOA, Vol II, Tab 39).
[151] The exception is *Article 3 Promotion and Admission of Investment*, see Thomas Affidavit, *supra* note 20, Exhibit C at para 19 (RR Vol III at 840).
[152] Thomas Affidavit, *supra* note 20, Exhibit C at paras 15-19 (RR Vol III at 840); MacKay Affidavit #1, *supra* note 1 at paras 20, 22-26, 32, 39-44 (RR Vol I at 9-12, 16-18).

The one exception is that the CCFIPA does not go as far as NAFTA with respect to obligations applicable to the establishment of investments. [153]

99. In *Council of Canadians* the court held that Canadian courts "do not adjudicate on international treaty rights and attendant obligations of nations."[154] The court also held that NAFTA, as an international treaty which did not alter domestic law, does not attract s. 96 of the Constitution.[155] Finally, the court also held that the conferral of authority on NAFTA tribunals could not be the foundation of a Charter breach because nothing in NAFTA compelled Canada to amend its laws and practices and the arbitration of claims could not affect or determine the rights of Canadians.[156]

100. In *Council of Canadians*, the court emphasized that its role was not to re-examine the relative or subjective merits of Canada entering into NAFTA or to remedy provisions in the agreement. Rather, the court's sole task was to consider whether the provisions of NAFTA were in violation of the Constitution. The court held that "one must recognize that a treaty is a bargain that has been negotiated among the parties."[157] The basis upon which Canada chooses to enter international agreements and the specific international obligations by which Canada agrees to be bound are matters of policy.

101. In sum, once ratified and in force, nothing in the text or operation of the CCFIPA will alter the Constitution or any of Canada's existing laws and regulations with respect to land management and resource development. The Constitution, along with all land management and resource development laws and regulations in Canada, will continue to apply fully to any Chinese investor seeking to invest in Canada, just as such laws applied prior to the ratification of the CCFIPA. Accordingly, Canada's relationship with the HFN, including the Crown's obligation to consult, and where required, accommodate when that duty is properly triggered,

[153] MacKay Affidavit#1, *supra* note 1 at para 40 (RR Vol I at 17).
[154] *Council of Canadians, supra* note 2 at para 43 (R BOA, Vol II, Tab 39).
[155] *Ibid* at para 44.
[156] *Ibid* at para 65.
[157] *Ibid* at para 31.

remains unchanged by the CCFIPA.[158] The CCFIPA simply has no role to play in the determination of the Applicant's asserted s. 35 rights and cannot, as a matter of law, trigger a duty to consult.

102. This Court need go no further to determine whether the ratification of the CCFIPA would result in an adverse impact against the HFN. However, even if this Court were to consider the issue further, it is clear that the Applicant's assertion that the ratification of the CCFIPA will cause adverse impacts on their rights is far too speculative to trigger a duty to consult.

b. <u>The Ratification of the CCFIPA Is Not a High-Level Decision or Structural Change that May Set the Stage for Future Decisions that could Lead to Adverse Impacts on the Applicant's S. 35 Rights</u>

103. While Canada accepts that, as contemplated by *Rio Tinto*, certain high level or structural decisions that set the stage for future decisions can trigger a duty to consult, the CCFIPA does not represent this type of decision or change. At paragraphs 69 to 80 of their argument, the Applicant relies on several cases for the proposition that Crown conduct that affects or changes the framework in which the management of resources or land use will be determined will give rise to a duty to consult. These cases dealt with management or regulatory regimes governing the use of land or resources in traditional lands claimed by the First Nation seeking consultation. Indeed, in each of these cases the regulatory decisions at issue were found to have an adverse impact on the way in which land or resources were managed within the specific territories claimed by the First Nation in question.

104. The Crown decisions at issue in these cases were:

- changes to tree farm licenses applicable to land within HFN claimed territory which had the effect of reducing the level of forestry management and a lesser degree of oversight; *Hupacasath First Nation v British Columbia (Minister of Forests)* 2005 BCSC 1712;[159]

[158] Thomas Affidavit, *supra* note 20, Exhibit C at paras 22-24 and 190-191 (RR Vol III at 841 and 881).
[159] *Hupacasath First Nation v British Columbia (Minister of Forests)* 2005 BCSC 1712 (QL) at paras 140, 203, 223. 225 and 230 ["*Hupacasath First Nation*"] (R BOA, Vol II, Tab 46).

- approval of the change of control of tree farm and forestry licenses covering land over which the Gitxsan and others' Aboriginal title that could result in different decisions being made regarding those licenses; *Gitxsan v British Columbia (Minister of Forests)* 2002 BCSC 1701; [160]

- management of a tree farm license covering 95% of Huu-uy-aht claimed territory pursuant to a newly implemented Forest and Range Policy which offered accommodations to First Nations on the basis of a population based formula; *Huu-ay-aht v British Columbia (Minister of Forests)* 2005 BCSC 697; [161]

- the design of the regulatory mechanisms which were to serve as the "blueprint" for the development of the Mackenzie Gas Pipeline, which was proposed to run through Dene Tha' claimed territory; *Dene Tha' First Nation v Canada (Minister of Environment),* 2006 FC 1354;[162]

- the re-issuance of aquaculture licenses in the applicant's territories by the federal government following the assumption of this jurisdiction from the provincial government after the *Morton v British Columbia (Agricultural and Lands)* 2009 BCSC 136 (QL), aff'd 2009 BCCA 481 decision;[163] the applicant claimed the licenses posed significant risks to wild fish stocks upon which the exercise of their Aboriginal fishing rights depended; *Kwicksutaineuk Ah-Kwa-Mish First Nation* 2012 FC 517; [164]and

- initial approval decisions in respect of a proposed ski and golf resort on lands over which the Squamish Nation claimed Aboriginal rights and title; *Squamish Nation et al v British Columbia (Minister of Sustainable Resource Management),* 2004 BCSC 1320. [165]

105. In contrast, the CCFIPA is neither a high-level management decision nor a structural change to the management of land and resources over which the Applicant has asserted s. 35

[160] *Gitxsan v British Columbia (Minister of Forests)* 2002 BCSC 1701 (QL) at paras 1 and 82-83 (R BOA, Vol II, Tab 43).
[161] *Huu-ay-aht v British Columbia (Minister of Forests)* 2005 BCSC 697 (QL) at para 11, 12 and 107-112 (R BOA, Vol II, Tab 47).
[162] *Dene Tha' First Nation v Canada (Minister of Environment),* 2006 FC 1354 (QL) at paras 107-108 (R BOA, Vol II, Tab 42).
[163] *Morton v British Columbia (Agricultural and Lands)* 2009 BCSC 136 (QL), aff'd 2009 BCCA 481 ["*Morton*"] (R BOA, Vol III, Tab 51).
[164] *Kwicksutaineuk Ah-Kwa-Mish First Nation,* 2012 FC 517 (QL) at paras 107-110 (R BOA, Vol II, Tab 48).
[165] *Squamish Nation et al v British Columbia (Minister of Sustainable Resource Management),* 2004 BCSC 1320 (QL) at para 83 (R BOA, Vol III, Tab 57).

rights. In particular, the subject matter of CCFIPA bears no relationship to resource management. It does not alter existing laws relating to resource developments. Nor does it set the stage for further decisions that will have a *direct* adverse impact on land and resources.

106. First, the CCFIPA is an international treaty creating a framework for the promotion and protection of foreign investment. The subject matter of the CCFIPA is not even remotely related to the management of resources along the lines of the duty to consult cases relied upon by the Applicant, all of which directly concern the regulation and management of lands and resources.[166] Even if Chinese investors do invest heavily in resource industries in Canada, the CCFIPA will not play any role in the way in which those developments are to be regulated.

107. Second, the CCFIPA does not set the stage for future decisions which will have an impact on resource management because any approval processes relating to Chinese investors or developments are matters of Canadian domestic law, and are separate from and unaltered by the CCFIPA. While one of the goals of the CCFIPA is to promote increased investment in Canada by Chinese investors generally, the CCFIPA does not in and of itself cause Chinese investors to invest in Canada.[167] The ratification of CCFIPA has no connection with the establishment or acquisition by a Chinese investor of a specific investment in Canada, including any which might be related to lands where rights are asserted by the Applicant. As such, any adverse impacts on the Applicant's ability to exercise their asserted rights within their claimed territories alleged to arise from increased Chinese investment encouraged by the CCFIPA are not only speculative, but, more importantly, have no nexus with the ratification of the CCFIPA.

108. For example, while the Applicant speculates that Chinese investors might purchase timber rights or seek to develop coal in their claimed territory, the CCFIPA would play no role in the initiation, development, approval or regulation of such acquisitions or developments. Such decisions would be made pursuant to Canadian law and regulations and, depending on the nature of the project at issue, could trigger a duty to consult. While events such as the attribution or

[166] Applicant's Factum, *supra* note 31 at paras 69-78 (AR Vol III at 874-78).
[167] MacKay Affidavit, *supra* note 1 at para 85 (RR Vol I at 31); MacKay Cross, *supra,* note 29 at 6:8-31 (AR Vol II at 471).

transfer of timber licenses, the attribution of mining rights or the design of consultation and development protocols for projects such as pipelines can set the stage for future decisions on land and resources, any duty to consult would arise from Crown conduct contemplated pursuant to the authority of the applicable domestic laws, which are unrelated to the CCFIPA.

109. The courts have been careful to confine the analysis of adverse impacts to those arising from the specific Crown action at issue. Future potential impacts that may arise from other Crown conduct not at issue before the court should not be taken into account in considering the adverse impacts of a Crown decision. In *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council),* 2012 BCCA 333,[168] the decision at issue was an Order in Council replacing one form of local government with another at a ski resort municipality.[169] No duty to consult was triggered as it was held that the Band was in no worse a position than before the incorporation. The Court of Appeal found that the court below had erred in taking into account the First Nations' speculative concerns that the company operating the ski resort would have greater control over development in the new municipality. The same principle arises in this case. This Court must look only at the ratification of the CCFIPA in assessing whether there is a sufficient nexus with the asserted Aboriginal rights, rather than consider speculative concerns regarding future Crown conduct that is not presently at issue.

c. <u>The Concerns Raised by the Applicants Are Too Speculative To Constitute Adverse Impacts</u>

110. Turning now to the specific adverse impacts that the Applicant alleges will arise from the ratification of the CCFIPA, it is clear that the alleged impacts amount to mere speculation and have no nexus to the CCFIPA. The Notice of Application contains a number of vague, overly broad allegations that are not supported by any factual evidence led in the Applicant's affidavits or elicited on cross-examination. The record of what is factually before the Court is exceedingly sparse.

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[168] *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council),* 2012 BCCA 333 (QL), leave to appeal ref'd [2012] SCCA No 425 ["*Adams Lake*"] (R BOA, Vol II, Tab 23).
[169] *Ibid* at paras 66-71.

111. Although it did not arise in the duty to consult context, the *Council of Canadians* case is instructive in that it dealt with speculative concerns arising from the ratification of NAFTA, upon which, as discussed, the CCFIPA is based. It was alleged that the government might, in response to a NAFTA arbitration decision, take legislative or administrative action that could breach Charter rights. As in the case at bar, no specific government action was impugned. The court held that this allegation amounted to speculation and refused to embark on a Charter analysis on the basis of a "factual vacuum."[170] In considering the speculative nature of these allegations, the court relied on Cory J.'s statement regarding prematurity in *Phillips v Nova Scotia (Westray Mine Inquiry),* [1995] 2 SCR 97:[171]

> **62** … [B]efore a Court will restrain government action, it must be satisfied that there is a very real likelihood that in the absence of that relief an individual's Charter rights will be prejudiced. This determination cannot be made in the abstract. Rather, the proper approach should be a contextual one, which takes into account all the surrounding circumstances, including, for example, the nature of the right said to be threatened and the extent to which the anticipated harm is susceptible of proof."[85]

112. The court in *Council of Canadians* went on to conclude that the record before it was inadequate to render the determination requested by the applicants.[172] The court stated that it failed to see the merits of the applicants' argument that the conferral of authority on NAFTA tribunals constituted a breach of the Charter:

> **65** … As already discussed in some detail, the tribunals have no authority to change Canada's domestic law or practices. Their jurisdiction is limited to the international law issues before them and the remedies available are also circumscribed. Nothing in the NAFTA compels the Canadian government to amend its laws and practices. The arbitration of claims that Canada has failed to honour its treaty obligations does not affect or determine the rights of Canadians. As such, there can be no breach of the Charter that arises simply as a result of the establishment of these tribunals. In conclusion, I agree with the Respondent's position that the Charter

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[170] *Council of Canadians, supra* note 2 at para 64 (R BOA, Vol II, Tab 39).
[171] *Phillips v Nova Scotia (Westray Mine Inquiry),* [1995] 2 SCR 97 (QL) at para 62 (R BOA, Vol ■, Tab 52).
[172] *Council of Canadians, supra* note 2 at para 64 (R BOA, Vol ■, Tab 39).

> argument asserted by the Applicants is premature. As such, there is no need to consider the remaining *Charter* issues any further. [173]

113. Likewise, here, the Applicant has put no evidence before this Court of any contemplated government action resulting from the CCFIPA that would have any impact on the exercise of their asserted Aboriginal rights. The Applicant's concerns are speculative and entirely contingent on a slippery slope of consecutive, intervening events that might never occur. There is simply no evidentiary basis upon which to conduct a duty to consult analysis.

114. In the following section, the above principles are applied to demonstrate that the specific concerns raised by the Applicant are not sufficient to trigger a duty to consult.

i. The CCFIPA's Investor-State Dispute Resolution Provisions Will Not Adversely Affect the Applicant's s. 35 Rights

115. The Applicant puts forward many speculative concerns about the perceived negative impact of future CCFIPA arbitral awards on their asserted rights.[174] However, these concerns are based on unsubstantiated and baseless speculation, ignore the nature of the CCFIPA, and misinterpret and misunderstand how its obligations are likely to be applied.

1. The Applicant's Concerns Regarding the Decisions of Arbitral Tribunals under the CCFIPA Are Too Speculative to Merit Consideration

116. Associate Professor Van Harten suggests that, in his opinion, First Nations' regulatory measures face a substantial risk of contravening the CCFIPA. [175] It is unclear on what basis Associate Professor Van Harten makes this claim, though obviously it is not based on the specific situation of the HFN. Moreover, Associate Professor Van Harten's opinion disregards Canada's 25 years of experience with international investment obligations. As explained below, based on the facts related to the HFN's assertions and Canada's experience to date, there exists no substantial probability that any claim, let alone a spate of claims, would ever be filed by a

[173] *Ibid* at para 65.
[174] Application, *supra* note 123 at para 22 (AR, Vol I at 8).
[175] Van Harten Affidavit, *supra* note 101, Exhibit C at 18-20 (AR, Vol I at 93-95).

Chinese investor challenging measures taken by the HFN or by any other level of government to protect the Applicant's s. 35 rights.[176]

117. First, while not sufficient to trigger the CCFIPA alone, a necessary condition for the CCFIPA's application is the existence of an investor or an investment in the claimed territory of the HFN that would be subject to the agreement. There is no evidence before this Court of any Chinese investment within the HFN claimed territory, let alone on HFN reserves, which could give rise to a claim under the CCFIPA. Nor has the Applicant led any evidence of a particular investment that could lead to a measure passed by the HFN that would, in turn, contravene the CCFIPA. All that the Applicant can point to is hearsay and speculation.

118. For example, at paragraph 9 of its Application, the Applicant alleges that the development of a large coal base in the HFN's claimed territory could significantly interfere with its ability to exercise its asserted Aboriginal rights. [177] Yet Ms. Sayers confirmed on cross-examination that there are no active or planned coal developments in HFN's claimed territory.[178]

119. Likewise, at paragraph 8 of the Application, the Applicant expresses speculative concerns about the possible acquisition by a Chinese investor of a timber company operating in the HFN's claimed territory.[179] The only evidence led is a series of unsubstantiated, hearsay, media articles dated November 2012 which indicates that this investment was being contemplated independently of the ratification of the CCFIPA.[180] Under cross examination, Ms. Sayers confirmed that her only source of information were these media articles and that nothing further had been announced about this potential purchase.[181] In a judicial review, hearsay evidence is not admissible and this evidence should be struck from the record.[182] Accordingly, there is no

[176] Thomas Affidavit, *supra* note 20, Exhibit C at para 30 (RR Vol III at 842-43).
[177] Application, *supra* note 123 (AR, Vol I at 1-11). See also Sayers Affidavit, *supra* note 4 at para 34 (AR, Vol I at 125).
[178] Sayers Cross, *supra* note 5 at 12:30-47 and 13:1-13 (RR Vol III 926 and 927).
[179] Application, *supra* note 123 (AR, Vol I at 5).
[180] Sayers Affidavit, *supra* note 4 at para 33, Exhibit Q (AR Vol I at 125 and 297-315).
[181] Sayers Cross, *supra* note 5 at 11:34-46 (RR Vol III at 925).
[182] *Canadian Tire Corp v PS Partsource Inc,* 2001 FCA 8 (QL) at paras 6, 18 (R BOA, Vol II, Tab 34).

evidence before this Court of any actual or proposed Chinese investment that would involve forestry activities within the HFN's claimed territory.

120. Second, in order for the CCFIPA to apply to any investment operating within the HFN's claimed territory, some level of government would be required to take measures related to that investment. The HFN has led no evidence of any existing measure that would be in conflict with the CCFIPA, and, as explained by Canada's deponent, Mr. MacKay, many of the major obligations in the CCFIPA do not apply to existing measures because of the treaty's reservations.[183] Further, the Applicant's limited lawmaking powers under the *Indian Act*, which are applicable only to their reserve lands (only two of which appear suitable for any development), combined with the CCFIPA's reservation allowing measures that permit preferential rights to Aboriginal peoples, make it unlikely that a measure, if passed, would be subject to a CCFIPA claim.

121. The speculative nature of the Applicant's concerns about potential claims is further reinforced by Canada's experience under treaties very similar to the CCFIPA over the past 25 years. There have been no claims filed in respect of any FIPA Canada has signed.[184] The only claims ever brought against Canada have been by American investors pursuant to NAFTA. However, despite annual American foreign direct investment in Canada being in the hundreds of billions of dollars[185] - compared to approximately $10 billion of Chinese investment, as discussed earlier [186] - only 21 claims have ever been submitted to arbitration in 19 years. Not one of those claims has concerned a measure implemented by an Aboriginal group or even a measure taken in relation to Aboriginal rights or interests.[187] In addition, Canada's international trade law expert Mr. Thomas testified on cross examination that to his knowledge, no claim has

[183] MacKay Affidavit, *supra* note 1 at paras 45-49 (RR Vol I at 18-20); Thomas Affidavit, *supra* note 20, Exhibit C at paras 116-117 (RR Vol III at 865).
[184] *Ibid* at para 66 (RR Vol I at 25).
[185] *Ibid* at para 94 (RR Vol I at 34-35).
[186] *Ibid* at para 95 (RR Vol I at 35).
[187] Thomas Affidavit, *supra* note 20, Exhibit C at para 30 (RR Vol III at 842-43); MacKay Affidavit, *supra* note 1 at para 69 (RR Vol I at 26).

ever been submitted to any international arbitral tribunal under any international trade agreement in relation to the revocation of a permit based on considerations of Aboriginal rights and title.[188]

122. The Applicant has offered no evidence or significant reason to believe that Canada's experience under the CCFIPA will be different than its experience to date under its other agreements, especially in light of the limited extent of current Chinese investment in Canada.

123. At paragraph 103 of its argument, the Applicant states that "it is not yet known how government decision makers will respond to the potential for significant claims which may be brought by Chinese investors."[189] Not only is this statement based on the faulty and unsupported premise that the ratification of the CCFIPA is likely to result in significant claims against Canada, it demonstrates exactly the type of speculation which this Court cannot accept as the basis for a claim - that an investment treaty which has no impacts on domestic law violates the Constitution. As noted above, a similar argument that the government may, in response to a NAFTA arbitral award, take steps that may violate Charter rights was rejected by the court in *Council of Canadians* in the absence of evidence that the government had amended any legislation as a result of NAFTA.[190] The only evidence before this Court is Mr. Mackay's statement that the "none of the losses or monetary settlements to date have implicated or impaired Canada's ability to regulate in the public interest in a non-discriminatory manner."[191] The Applicant chose not to cross-examine Mr. MacKay on this statement.

124. The Applicant's allegations boil down to a claim that, irrespective of Canada's experience so far, a Chinese investment may occur in the future, a measure may one day be adopted that relates to that investment, and that a claim by such a hypothetical investor with respect to such a hypothetical measure may one day be brought. It is possible that Chinese investments in HFN claimed territory might never occur in the future and that no relevant

[188] Thomas Cross, *supra* note 52 at 55:35-41 (AR Vol III at 773).
[189] Applicant's Factum, *supra* note 31 at para 103 (AR Vol III at 885-86).
[190] *Council of Canadians*, *supra* note 2 at para 64 (R BOA, Vol II, Tab 39).
[191] Mackay Affidavit, *supra* note 1 at para 69 (RR Vol I at 26).

measures will be adopted relating to them. In this regard, the Applicant's case rests entirely on speculation regarding hypothetical future harm and does not trigger consultation.[192]

2. The Applicant's Concerns Regarding the Decisions of Arbitral Tribunals under the CCFIPA Ignore the Nature of the CCFIPA

125. Even if a claim regarding an HFN-created measure did arise, the Applicant's argument fails to recognize that, as explained above, the CCFIPA's substantive obligations have no application in Canadian law. As a result, the arbitration of CCFIPA claims cannot affect or determine the rights of Canadians, including the rights of the HFN. As noted above, the court held in *Council of Canadians* that "[the] arbitration of claims [under NAFTA Chapter 11] that Canada has failed to honour its treaty obligations does not affect or determine the rights of Canadians."[193] Since Canada's obligations under the CCFIPA function in the same manner as those under NAFTA, Chapter 11, the rights of all Canadians at Canadian law, including those of Aboriginal groups, simply cannot be affected or determined by the CCFIPA.[194] Further, as explained above, under the CCFIPA, international responsibility for an award issued with respect to a measure passed by the Hupacasath First Nation rests solely with Canada.

3. The Applicant's Concerns Regarding the Decisions of Arbitral Tribunals Under the CCFIPA Are Based on a Misunderstanding of How its Provisions will Likely be Applied

126. The Applicant offers a number of concerns about how arbitrators might construe, or misconstrue, the provisions of the CCFIPA to allow investors to recover monetary damages against Canada. In some places, the Applicant attempts to justify their concerns by relying on decisions made under other States' treaties that appear facially similar but contain different wording, such as the decisions in *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*[195] and *Occidental v Ecuador*.[196] In others, the Applicant relies on arguments advanced by

[192] *Council of Canadians, supra* note 2 at para 62 (R BOA, Vol II, Tab 39).
[193] *Council of Canadians, supra* note 2 at para 65 (R BOA, Vol II, Tab 39).
[194] MacKay Affidavit #1, *supra* note 1 at paras 25, 32, 39-44 (RR Vol I at 10, 12, and 16-18).
[195] Applicant's Factum, *supra* note 31 at para 94 (AR Vol III at 883).
[196] *Ibid* at para 95 (AR Vol III at 883).

claimants or potential claimants under NAFTA which have not been heard or ruled upon, like *Eli Lily v Canada*.[197] As in any domestic litigation, claimants in international arbitrations may advance all manner of arguments and outlandish claims. What is proven or successful at the end of the day is often completely different from the initial claim. In still other instances, the Applicant raises a concern, but cites no authority as the basis for its allegations.[198]

127. Even where the Applicant provides arguments, these do not withstand scrutiny. For example, the Applicant contends at paragraph 96 that an international arbitration tribunal would have little regard for a defence that a challenged measure was required to fulfill Canada's constitutional responsibilities towards Aboriginal peoples. As Canada's expert explained, this is not true. When applying international treaties, tribunals do not disregard the content and operation of the State's domestic laws.[199] For example, Mr. Thomas explained how, in *Glamis Gold*, the arbitral tribunal accorded significant deference to protections accorded to Aboriginal interests under US domestic law. [200]

128. In addition, the Applicant's arguments about the potential interpretation of the CCFIPA's expropriation and indirect expropriation provisions are misleading. Paragraph 91 of the Applicant's argument contains the bald, unsupported assertion that measures taken to preserve land and resources subject to Aboriginal rights and title may constitute indirect expropriation if they result in a significant impact on the value of an investment. In voicing these concerns they rely on three NAFTA cases – *Metalclad Corp v United Mexican States*, [201] *Ethyl Corp*[202] and *SD Myers Inc*[203]

129. Their claims in this regard reflect a fundamental misunderstanding of the analytical framework for determining an indirect expropriation under the CCFIPA and ignore the fact that the ambit of the expropriation provision, and its coverage of indirect expropriation, has been

[197] *Ibid* at para 97 (AR Vol III at 884).
[198] *Ibid* at para 91 (AR Vol III at 882).
[199] Thomas Affidavit, *supra* note 20, Exhibit C at para 57 (RR Vol III at 849).
[200] *Ibid*, Exhibit C at paras 55, 199-204 (RR Vol III at 848 and 883-85).
[201] Applicant's Factum, *supra* note 31 at para 87 (AR Vol III at 880).
[202] *Ibid* at para 90 (AR Vol III at 881-82).
[203] *Ibid* at para 93 (AR Vol III at 882-83).

clarified in the CCFIPA in Annex B.10 in response to experiences under NAFTA.[204] Annex B.10 provides that "(i)ndirect expropriation results from a measure or series of measures...that has an effect equivalent to a direct expropriation....."[205] It further clarifies that "the sole fact that a measure or series of measures of a Contracting Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred" (emphasis added).[206] For an expropriation to occur, a substantial deprivation of the property is required. It is therefore misleading to refer to an investment's loss in value as the sole determining factor for ascertaining whether an indirect expropriation has occurred.[207]

130. It is also misleading to simply state, as the Applicant does at paragraph 86 of its argument, that government measures enacted in the public interest can constitute expropriation. Annex B.10 of the CCFIPA states:

> "Except in rare circumstances, such as if a measure or series of measure is so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure or series of measures of a Contracting Party that is designed and applied to protect the legitimate public objectives for the well-being of citizens, such as health, safety and the environment, does not constitute indirect expropriation." [208]

131. The CCFIPA makes it clear that *bona fide* regulation is not to be equated with indirect expropriation.[209] While the contracting parties have agreed that indirect expropriation resulting from normal regulation by the government can occur, they have also specified that the circumstances are very rare.

132. The Applicant's arguments with respect to the minimum standard treatment obligation are similarly misleading. At paragraph 92 of its argument, they claim that there is an obligation

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[204] MacKay Affidavit #1, *supra* note 1 at paras 25 and 32 (RR Vol I at 10 and 12).
[205] *Ibid*, Exhibit B, Annex B.10, s 1 (RR Vol I at 84).
[206] *Ibid*, Exhibit B, Annex B.10, s 2(a) (RR Vol I at 84).
[207] Thomas Affidavit, *supra* note 20, Exhibit C at paras 32-33 (RR Vol III at 843); Thomas Cross, *supra* note 52 at 44:1-45:22 and 48:16-26 (AR Vol III at 762:1-763:22 and 766:16-26).
[208] MacKay Affidavit #1, *supra* note 1, Exhibit B, Annex B.10 (RR Vol I at 84).
[209] Thomas Cross, *supra* note 52 at 47:37–50:6 (AR Vol III at 765:37-768:6).

on the State to provide investors with fair and equitable treatment by protecting the legitimate expectations of investors, including the requirement that the State maintain a stable regulatory framework. The minimum standard obligation does not prohibit regulatory changes even if they have a negative effect on an investor. As a recent NAFTA tribunal explained:

> This applicable standard does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change, whether to a significant or modest extent. [The standard] may protect an investor from changes that give rise to an unstable legal and business environment, but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in [the standard] to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. [The standard] is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies changes and rules change. These are facts of life with which investors and all legal and natural persons have to live with. What the foreign investor is entitled to . . . is that any changes are consistent with the requirements of customary international law on fair and equitable treatment. Those standards are set, as we have noted above, at a level which protects against egregious behavior. It is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law. The Tribunal has not been provided with any material to support the conclusion that the rules of customary international law require a legal and business environment to be maintained or set in concrete.[210]

133. The Applicant's argument about the likely interpretation of indirect expropriation and the minimum standard of treatment under CCFIPA are also not supported by the NAFTA experience. There has been no case in which a claim has been made, much less a decision

[210] *Mobil Investments Canada Inc & Murphy Oil Corporation v Canada*, NAFTA Ch 11 Panel, Decision on Liability and on Principles of Quantum, 22 May 2012 ["*Mobil*"] at para 152 (R BOA, Vol III, Tab 75).

issued, where it was alleged that measures relating to Aboriginal rights and title constituted an indirect expropriation. Further, there has never been a decision that any measure or series of measures adopted by Canada constituted an indirect expropriation or that any change in the regulatory environment constituted a failure by Canada to provide the required customary international law minimum standard of treatment.

ii. The CCFIPA Does Not Adversely Impact Hupacasath Consultation Protocols

134. In her Affidavit (see paragraphs 35(a), (c) and (e) and in paragraphs 33, of the Notice of Application), Ms. Sayers expresses the concern that the CCFIPA will diminish the prospect of meaningful consultation. At paragraph 20 of her Affidavit, she suggests that consultation protocols used by the HFN could be challenged under the CCFIPA. She points specifically to the Hupacasath Land Use Plan and Cedar Access Strategy.[211] On cross-examination, Ms. Sayers clarified that these documents set out protocols that proponents and investors agree to follow voluntarily.[212] As such, these documents are not an expression of delegated governmental authority, and therefore would not constitute a measure under the CCFIPA. Given that the CCFIPA only applies to government measures, the Applicant's concern that their protocols could be challenged is unfounded.

135. As explained above, the CCFIPA does not alter the application of s. 35 of the Constitution or Canadian domestic law. Both the federal and provincial Crowns' duty to consult remains unaltered by the CCFIPA. The Hupacasath Land Use Plan and the Cedar Access Strategy are not impacted by the CCFIPA, nor does the CCFIPA affect their application. If an actual project arose in the HFN's claimed territory, a duty to consult might be triggered and the CCFIPA would not have any role to play in how that consultation process was carried out.

iii. The CCFIPA Does Not Adversely Impact the Crown's Ability to Accommodate the Hupacasath

136. At paragraph 109 and 110 of its argument, the Applicant argues that future claims that may be made under CCFIPA may operate as a disincentive to the Crown to provide reasonable

[211] Sayers Affidavit, *supra* note 4 at paras 19-21, Exhibits B and C (AR Vol I at 121 and 131-209).
[212] Sayers Cross, *supra* note 5 at 5:11 to 7:37 (RR Vol III at 919:11-921:37).

accommodation of Aboriginal rights and title. Again, this argument fundamentally misunderstands that the CCFIPA does not alter the Constitution or Canadian domestic law regarding the duty to consult. The duty to consult, and, where appropriate, accommodate will continue to operate between the Crown and First Nations untouched.

137. Further, unlike the ministerial consent to the removal of land from the tree farm license regime which was at issue in *Hupacasath First Nation*,[213] the decision to ratify the CCFIPA does not involve a relinquishment of the Crown's ability to protect and accommodate asserted Aboriginal rights. As already noted, the CCFIPA includes an Aboriginal Reservation to permit legislative and regulatory actions, including those undertaken by the HFN, to provide rights and preferences to Aboriginal people that might otherwise be inconsistent with Canada's obligations pursuant to the CCFIPA provisions regarding national treatment, most-favoured nation treatment, performance requirements, and senior management and boards of directors.[214] For example, Canada can recognize Aboriginal fishing, hunting or harvesting rights that would not have to be extended to foreign investors; similarly, a First Nation could grant tax incentives to Aboriginal businesses. Such measures cannot properly form the subject of a claim under CCFIPA.

138. The Applicant also argues at paragraphs 84 and 85 of its argument that the CCFIPA will constrain Canada's ability to expropriate land and resources, without compensation, in order to settle Aboriginal land claims. However, no evidence has been provided to support the allegation that this is consistent with Canada's practice. To the contrary, Canada has a long-standing policy of not expropriating third party land interests in order to settle land claims. Lands held by third-parties are only ever acquired on a "willing seller, willing buyer" basis.[215]

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[213] *Hupacasath First Nation*, *supra* note 159 (R BOA, Vol II, Tab 46).
[214] MacKay Affidavit#1, *supra* note 1 at paras 50-56 (RR Vol I at 20-22); Thomas Affidavit, *supra* note 20, Exhibit C at paras 116-19 (RR Vol III at 865).
[215] Aboriginal Affairs and Northern Development Canada, "Frequently Asked Questions – Additions to Reserves" (15 September 2010), online: < http://www.aadnc-aandc.gc.ca/eng/1100100034816/1100100034817>, Question 4: How is new land added to reserve? (R BOA, Vol IV, Tab 89); Aboriginal Affairs and Northern Development Canada, "Resolving Aboriginal Claims: A Practical Guide to Canadian Experiences" (2003), online: < http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-

139. Canadian statutes and modern treaties generally provide that governments cannot expropriate without compensation.[216]

140. Moreover, there is a presumption that compensation must always been paid when land is expropriated unless the words of a statute unequivocally state otherwise; *Toronto Area Transit Operating Authority v Dell Holdings Inc*, [1997] 1 SCR 32.[217] Accordingly, while it is possible for domestic governments to expropriate without compensation if clear legislation is passed to this effect, there is a strong presumption against it in Canadian law.

141. As such, the argument that the Crown's discretion to accommodate s. 35 rights will be constrained by the CCFIPA's removal of Canada's ability to expropriate Chinese investments without compensation is purely speculative and not grounded in the usual domestic practice regarding expropriation.

iv. The CCFIPA Does Not Impair the Ability of the HFN to Govern Within Their Sphere of Jurisdiction and Responsibility

142. At paragraph 34 of the Application, the Applicant alleges that the CCFIPA will constrain the ability of First Nations to exercise their own governance rights.[218] There are two scenarios under which the Applicant could pass laws regarding the development of land and resources in their claimed territories. At present, the Applicant has limited law-making powers over their five reserves under the *Indian Act.* In the future, the Applicant may conclude a treaty which would

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text/rul_1100100014175_eng.pdf> at 35 (R BOA, Vol IV, Tab 90); Aboriginal Affairs and Northern Development Canada, "Royal Commission Report on Aboriginal Peoples (1996)" (8 February 2006), online: < http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html>, Vol 2, Part 2, Appendix A, s 2.4.45 (R BOA, Vol IV, Tab 91); BC Treaty Commission, "What's the Deal with Treaties" (2003), online: < http://www.bctreaty.net/files_3/pdf_documents/What's%20the%20Dealv3.pdf> at 16 (R BOA, Vol IV, Tab 92).

[216] For example, see *Expropriation Act*, RSC 1985, c E-21, s 25 (R BOA Vol I, Tab 4); *Expropriation Act*, RSBC 1996, c 125, s 20 (R BOA Vol I, Tab 5); *Tsawwassen Final Agreement, supra* note 100, Chap 6, 1(g) (R BOA, Vol II, Tab 19).

[217] *Toronto Area Transit Operating Authority v Dell Holdings Inc*, [1997] 1 SCR 32 (QL) at paras 20-23 (R BOA, Vol III, Tab 59).

[218] Application, *supra* note 123 at para 34 (AR Vol I at 10).

result in a grant of further law-making powers, but given that the HFN are not actively involved in the treaty process, it is far too speculative to consider what future governmental authority the HFN could acquire if they at some point conclude a modern treaty.

143. The Applicant may also claim a s. 35 right to govern the management of land and use of resources in their claimed territories. Such a right could be asserted by seeking consultation before resource management plans or developments are permitted to commence in the Applicant's claimed territories.

144. Whether the Applicant exercises control over their claimed territories through asserting a duty to be consulted, by passing laws through their authority derived from the *Indian Act* or, in the future, pursuant to a modern treaty, the CCFIPA does not constrain the HFN's asserted governance rights. The CCFIPA does not alter the Crown's duty to consult where that duty is properly triggered. Further, as described above, the substantive international law obligations embodied in the CCFIPA are based on principles similar to Canadian domestic law. For example, any governance rights that the Applicant has now, or may acquire in the future, are already subject to due process and protection against denials of justice as provided by the Canadian domestic legal system. Moreover, generally speaking, Canadian laws do not discriminate against particular nations but are of equal application, expropriations are made only with compensation, and the Canadian legal system ensures access to justice and due process. So long as these basic principles are met, laws enacted by any level of government, including by the Applicant, will not violate Canada's CCFIPA obligations.

145. Furthermore, even if a hypothetical measure were passed by the HFN and found to be in violation of CCFIPA obligations, a CCFIPA arbitral tribunal would have no power to invalidate that hypothetical measure. Again, the only possible consequence would be liability attaching to the State, not the Applicant. The opinion of Associate Professor Gus Van Harten that the federal government may take steps to recover compensation from the Applicant in response to a hypothetical award arising from a hypothetical claim with respect to a hypothetical measure of

the Applicant affecting a hypothetical Chinese investor or investment is simply too speculative to constitute an adverse impact giving rise to a duty to consult.[219]

146. The concern that the CCFIPA will constrain the Applicant's governance rights also ignores, once again, the Aboriginal Reservation in the CCFIPA, which, as discussed above, is specifically designed to permit preferences to be given to Aboriginal peoples.

4. **Conclusion on Duty to Consult**

147. In conclusion, the Applicant has failed to meet the three-step duty to consult test. In particular, the Applicant has failed to demonstrate that there is any causal nexus between the ratification of the CCFIPA and any alleged adverse impacts on the exercise of its asserted s. 35 rights which would trigger the duty to consult. Moreover, the impacts they have alleged could occur are based on a misunderstanding of the operation of the CCFIPA and are too speculative to give rise to consultation obligations. The Crown's obligation to consult the Applicant about specific development proposals, or about high level decisions or structural changes of the kind discussed in *Rio Tinto*, is in no way compromised by the ratification of the CCFIPA. Both the provincial and federal Crowns will still be subject to any obligation to consult that arises under domestic law should plans for specific resource management activities or developments be commenced.

B. <u>There is no Basis for this Court to Interfere in the Exercise of the Crown Prerogative</u>

148. The authority of the federal government to conduct foreign relations stems from the Crown's prerogative powers.[220] Under Canada's federal structure, the executive branch has exclusive power to negotiate and conclude international treaties and agreements such the CCFIPA.[221] Foreign relations and international policy are complicated areas which involve many considerations and interests that the government is best placed to assess. The government

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[219] Van Harten Affidavit, *supra* note 101, Exhibit C at 20 (AR Vol I at 95); Van Harten Cross, *supra* note 100 at 58:27 to 62:23 (RR Vol III at 1004:27-1008:23).
[220] Hogg, *supra* note 135 at 1-20 (R BOA, Vol IV, Tab 93).
[221] *Ibid* at 11-14.

must have flexibility in deciding how its duties under the Crown prerogative regarding foreign relations and matters of "high policy" are discharged.[222]

149. In *Khadr*,[223] the Supreme Court of Canada held that the role of the judiciary in relation to matters of foreign affairs is narrowly focused: "the Courts possess a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action."[224] In setting out the rationale for this limited role, the Court stated:

> **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. [225]

150. Likewise, in *Smith v Canada*, 2009 FC 228 (QL),[226] this Court has held that "the exercise of the prerogative to develop and implement diplomatic and foreign policy initiatives is generally beyond the scope of judicial scrutiny."[227] In its decision in *Turp*, in which it dismissed an application to judicially review the decision of the executive to withdraw from the Kyoto

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[222] *Khadr*, *supra* note 137 at para 37 ((R BOA, Vol II, Tab 32); *Secretary of State*, *supra* note 137 (R BOA, Vol III, Tab 58); *Black*, *supra* note 137 at paras 52-53 (R BOA, Vol II, Tab 30); *Turp*, *supra* note 137 at para 18 (R BOA, Vol III, Tab 60); *Copello*, *supra* note 137 at para 16 (R BOA, Vol II, Tab 38).
[223] *Khadr*, *supra* note 137 (R BOA, Vol II, Tab 32).
[224] *Ibid* at para 38.
[225] *Ibid* at para 37.
[226] *Smith v Canada*, 2009 FC 228 (QL) ["*Smith*"] (R BOA, Vol III, Tab 56).
[227] *Ibid* at para 28.

Protocol, the court explained "in the absence of a Charter challenge, it appears that a decision made in the exercise of prerogative powers should not be justiciable."[228]

151. The exercise of Crown prerogative over foreign affairs has been found to be justiciable only in very rare instances, in cases involving a constitutional challenge to clear state action, such as extradition, with direct impacts on an individual's specific, personal rights, privileges, or interests.[229] In such cases, the court has conducted a narrow review to ensure the constitutionality of the Crown's exercise of its prerogative and was careful to order a remedy that would not improperly interfere with, or amount to supervising, the government's conduct of foreign affairs.

152. To date, no case that has considered whether the Crown prerogative to enter into international treaties is subject to the Aboriginal duty to consult. The courts have held that the duty to consult can arise in the exercise of the Crown's prerogative to negotiate modern treaties with an Aboriginal group where the exercise of that power has an adverse impact on the asserted Aboriginal rights of a neighbouring group with an overlapping claim.[230] However, the cases on this point do not assist the Applicant because, unlike in the case at bar, the modern Aboriginal treaties in question are domestic agreements and form part of Canadian domestic law. Furthermore, the modern agreements in question were held to have direct implications for neighbouring Aboriginal groups with overlapping asserted claims in respect of lands that were the subject of the pending final agreements.

153. As explained above, the Applicant is unable to establish that ratification of the CCFIPA will have any adverse impact on its asserted s. 35 rights. As there are no constitutional rights engaged, the prerogative of the Crown to ratify the CCFIPA is non-justiciable. Accordingly, it is

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[228] *Turp, supra* note 137 at para 18 (R BOA, Vol III, Tab 60).
[229] *Abdelrazik v Canada (Attorney General*), [2010] FCJ No 1028 (QL) ["*Abdelrazik*"] (R BOA, Vol II, Tab 22); *Smith, supra* note 226 (R BOA, Vol II, Tab 56); *Khadr, supra,* note 137 (R BOA, Vol II, Tab 32).
[230] *Cook v Canada (Minister of Aboriginal Relations and Reconciliation),* 2007 BCSC 1722 (QL) at paras 53, 175-179 ["*Cook*"] (R BOA, Vol II, Tab 37); *Sambaa K'e Dene Band et al v Minister of Indian Affairs and Northern Development et al,* 2012 FC 204 (QL) at para 205 ["*Sambaa K'e*"] (R BOA, Vol III, Tab 54).

not necessary for this Court to determine whether this exercise of the Crown prerogative could give rise to a duty to consult.

C. Evidentiary Issues

1. Weight to be accorded to Gus Van Harten's Evidence

154. For many years, Associate Professor Van Harten has been a vocal critic of the investor state arbitration chapter of NAFTA, which he considers to be an illegitimate system. Much of his academic writing has been focused on seeking reforms of the international arbitration process generally, which he likewise considers to be fundamentally flawed.[231] Since the CCFIPA was made public in September 2012, he has frequently and publicly voiced his opposition to ratification of the CCFIPA, and sees it as his role to inform public debate.[232] While these views should not disqualify Associate Professor Van Harten as an expert, they do raise an issue with respect to his impartiality. By contrast, Mr. Thomas had never publically expressed his views about the CCFIPA before being retained by Canada to examine the agreement and provide his assistance to this court.[233]

155. In any event, Associate Professor Van Harten's opinion is of little assistance to this Court, as he does not specifically address the unique situation of the HFN.[234] Associate Professor Van Harten's opinion regarding the impact of the CCFIPA is based the assumption that First Nations possess such law-making powers as are found in modern Aboriginal treaties. He was not aware that the HFN does not have a modern treaty and is, rather, a Band with more limited law-making powers as under the *Indian Act*, ss. 81 and 83.[235] With respect, Associate Professor Van Harten's opinion does not assist this Court with the specific nature of the duty to consult as it relates to the HFN.

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[231] Van Harten Cross, supra note 100 at 10:28-37, 20:1-25:12 (RR Vol III at 956 and 966-69); Van Harten Affidavit, *supra* note 101, Exhibit B (AR Vol I at 67-75).
[232] Van Harten Cross, *supra* note 100 at 24:26-25:12 and 30:4-14 (RR Vol III at 970-71 and 976).
[233] Thomas Affidavit, *supra* note 20, Exhibit C at para 88 (RR Vol III at 859).
[234] Van Harten Cross, *supra* note 100 at 42:40-44:19 (RR Vol III at 988-90).
[235] *Ibid* at 50:47-51:8 (RR Vol III at 996-97).

2. **Non-Hupacasath First Nation Affidavits Should be Struck**

156. The sole issue before this Court is whether the Crown has a duty to consult with the Applicant, the HFN. However, the Applicant has tendered four affidavits from individuals who are not members of the HFN and that do not relate to any of the claimed rights of the HFN. These are the affidavits of Grand Chief Stewart Phillip, Chief Isadore Day, Chief James Ahnassay, and Chief Bryce Williams.[236]

157. The court may strike affidavits, or portions thereof, where they are clearly irrelevant: *Canada (AG) v Quadrini*, 2010 FCA 47.[237] It is clear that one must be a member of a First Nation to be able to claim rights on behalf of it, and to obtain a remedy relating to those rights. In *Clayoquot Band of Indians v British Columbia* (1986), 3 BCLR (2d) 60 (BCSC),[238] the court held that the representative for the plaintiffs, who was a member of the Clayoquot band but not of the Ahousaht band, could not represent a group of which he was not a member.[239] As the court stated, "a different person who is a member of the Ahousaht band must lend his name to these proceedings if they are to be properly constituted on behalf of the latter band."[240]

158. Ms. Sayers as a member of the HFN is able to speak to the group's asserted rights. She is not authorized to speak to the rights of other First Nations.[241] Likewise, the deponents from non-Hupacasath First Nations, or Associations or Unions of Chiefs, cannot speak on behalf of the HFN. In considering the extent to which the Applicant is entitled to a remedy relating to consultation, this Court must be specifically focused on the question of whether the ratification of CCFIPA has an adverse impact on s. 35 rights asserted by the Applicant alone.

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[236] Affidavit of Grand Chief Stewart Phillip, sworn January 29, 2013 at para 7 (AR Vol I at 49); Affidavit of Chief Isadore Day, sworn January 17, 2013 at para 6 (AR Vol I at 13); Affidavit #1 of Chief James Ahnassay, sworn March 13, 2013 at paras 1-2 (AR Vol II at 316); Affidavit of Chief Bryce Williams, sworn January 21, 2013 at para 1 (AR Vol I at 42)
[237] *Canada (AG) v Quadrini*, 2010 FCA 47 (QL) ["*Quadrini*"] (R BOA, Vol II, Tab 31).
[238] *Clayoquot Band of Indians v British Columbia* (1986), 3 BCLR (2d) 60 (QL) (BCSC) ["*Clayoquot*"] (R BOA, Vol II, Tab 36).
[239] *Ibid* at paras 11-13.
[240] *Ibid* at para 13.
[241] Sayers Affidavit, *supra* note 4 at para 2-3 (AR Vol I at 117-18).

159. It is respectfully submitted that the four non-HFN affidavits are not relevant to the resolution of the question before this Court, which is whether the ratification of the CCFIPA has triggered a duty to consult the Applicant. As such, the affidavits should be struck as irrelevant.

160. In the alternative, if the above-listed affidavits are not struck on the basis of relevance, several paragraphs of the Day affidavit should be struck on the grounds that they go beyond the requirement that affidavits be confined to the personal knowledge of the deponent and adduce facts relevant to the dispute "without gloss or explanation."[242] Paragraphs 14 (the last three sentences), 15, 16, 17, 19-28, 31, 32, 30-40, and 42 (the second to last sentence) of the Day affidavit do not assist the Court in resolving this dispute as they offer argument, impermissible opinion and speculation, and they should be struck on this basis.

161. With respect to the Sayers affidavit, Ms. Sayers admitted on cross examination that the following paragraphs are not based on her personal knowledge and stray into offering opinion and speculation: paragraph 35(c), (d) and (e).[243] Canada seeks to have these paragraphs of her affidavit struck.

D. <u>A Declaration is the Appropriate Remedy if a Breach of a Duty to Consult is Established</u>

162. It is Canada's position that no duty to consult has been triggered by the ratification of the CCFIPA. In the alternative, if this Court finds that a duty has been triggered and breached, the only appropriate remedy would be a declaration that the Crown owes a duty to consult to the HFN.

163. First, Canada notes that the Applicant seeks 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."[244] However, the Applicant did not commence a class action or bring a representative action. Nor has the Applicant served notice on all First Nations so that they could be added as Respondents. It is

[242] *Quadrini*, *supra* note 237, at para 18 (R BOA, Vol II, Tab 31).
[243] Sayers Cross, *supra* note 5, at 14:5-15:34 (RR Vol III at 928-29).
[244] Application, *supra* note 123 at 3 (AR Vol I at 3).

inappropriate to seek a declaration on behalf of all First Nations in a judicial review which is designed to provide a remedy as between the Applicant and the Respondent.[245] Remedies are only properly available to the named parties, which in this proceeding are the Attorney General of Canada and the HFN.

164. Indeed, a declaration that the Crown owes a duty to consult to all First Nations is entirely incompatible with the analytical framework set out by the courts to determine whether a duty to consult has been triggered. That framework requires an examination of the nature and content of the asserted s. 35 rights at issue and the extent to which contemplated Crown conduct may adversely impact those rights. As the court pointed out in *Sawridge Band v Canada* (1999), 164 FTR 95,[246] claims for Aboriginal and treaty rights are both Band-specific and fact-specific.[247]

165. Aboriginal rights are collective rights that cannot be advanced on an individual basis; *Canadian National Railway Co v Brant* (2009), 96 OR (3d) 734 (QL) at para 50.[248] In that case, the court struck as improper a pleading which claimed that the Canadian National Railway had violated the rights of "thousands of First Nations people residing in Canada", on the basis that the individual defendant did not have standing to advance those collective claims.[249]

166. Second, any remedy ordered in addition to a declaration, such as the requested injunction, which intrudes upon the executive's exclusive power to conduct foreign relations must be treated with the utmost circumspection. As the Supreme Court of Canada recognized in *Khadr*, the executive is better placed than the courts to conduct foreign relations "within a range of constitutional options" and "the government must have flexibility in deciding how its duties under the power are to be discharged."[250]

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[245] A "party" is defined in Rule 2 of the *Federal Court Rules*, SOR/98-106, in the context of an application, as being "an applicant or respondent".
[246] *Sawridge Band v Canada* (1999), 164 FTR 95 (QL), aff'd 2001 FCA 339 ["*Sawridge*"] (R BOA, Vol III, Tab 55).
[247] *Ibid* at para 8.
[248] *Canadian National Railway Co. v Brant* (2009), 96 OR (3d) 734 (QL) (Sup Ct J) at para 50 ["*Canadian National Railway*"] (R BOA, Vol II, Tab 33).
[249] *Ibid* at para 22.
[250] *Khadr, supra* note 137 at para 37 (R BOA, Vol II, Tab 32).

167. In *Khadr*, Canada had appealed from a judgment of the Federal Court of Appeal requiring the Canadian government to request the United States to return Omar Khadr to Canada from Guantanamo Bay. The deference accorded to the Crown prerogative was evident in the remedy granted by the Court. The Court held that while it was appropriate in the circumstances to issue a declaration that Mr. Khadr's s. 7 Charter rights had been violated by the actions of the federal government, it was not appropriate for the court below to go further in ordering the government to seek his repatriation. The Court found that granting this additional remedy gave "too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests."[251]

168. The Crown prerogative includes the making of representations to a foreign government.[252] The order sought by the Applicant to restrain the Minister from communicating with the government of China would be an unwarranted intrusion into the executive sphere and would not provide the requisite flexibility for the Crown to determine the best means to communicate with China, in keeping with its constitutional obligation to the Applicant (should this Court determine that one exists). The executive should remain free to explain to China the impact of any required consultation on the CCFIPA ratification process in a way that will best preserve the countries' diplomatic relationship.

169. In any event, it is not necessary for this Court to go beyond making a declaration that a duty to consult is owed to the Applicant. Such a declaration would be sufficiently effective, as it can be assumed that the government will comply with the law as stated by the courts. As the court observed in *Athabasca Chipewyan First Nation v Alberta (Minister of Energy),* 2009 ABQB 576 (QL), aff'd 2011 ABCA 29,[253] "[t]he absence of coercive affect has not been seen as a problem in that it is expected that government and other public authorities will respect

[251] *Ibid* at para 39.
[252] *Ibid* at para 35.
[253] *Athabasca Chipewyan First Nation v Alberta (Minister of Energy),* 2009 ABQB 576 (QL), aff'd 2011 ABCA 29 ["*Athabasca*"] (R BOA, Vol II, Tab 28).

declaratory judgments of the courts."[254] In *LeBar v Canada (FCA)*, [1989] 1 FC 322 (QL) (CA),[255] the leading case on declaratory remedies, the court stated that for this reason, a "declaration is a peculiarly apt instrument for dealing with government bodies." [256]

170. In light of these principles, should this Court find that the Crown has breached its duty to consult the Applicant, a declaration to that effect is the only remedy open to the court which would appropriately respect the fundamental divide between the executive and judicial branches of government in matters relating to the conduct of foreign relations.

[254] *Ibid* at para 33.
[255] *LeBar v Canada (FCA)*, [1989] 1 FC 322 (QL) (CA) ["*LeBar*"] (R BOA, Vol II, Tab 49).
[256] *Ibid* at para 10; *Chiasson v Canada (Attorney General)*, 2008 FC 616 (QL) at para 34 (R BOA, Vol II, Tab 35).

PART IV - ORDER SOUGHT

171. As the Applicant has not established that there is a duty to consult which has been breached, this application should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, British Columbia, this 15th day of May 2013.

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PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

1. *An Act Respecting Indians,* SC 1951, c 29.
2. *The Carcross/Tagish First Nation Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.
3. *The Champagne and Aishihik First Nations Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.
4. *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11
5. *Expropriation Act*, RSC, 1985, c E-21.
6. *Expropriation Act*, RSBC 1996, c 125.
7. *Federal Court Rules*, SOR/98-106.
8. *The First Nation of Nacho Nyak Dun Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.
9. *Indian Act,* RSC 1985, c I-5.
10. *The Kluane First Nation Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.
11. *The Kwanlin Dun First Nation Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.
12. *Labrador Inuit Land Claims Agreement* as ratified by *Labrador Inuit Land Claims Agreement Act,* SC 2005, c 27.
13. *The Little Salmon/Carmacks First Nation Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.
14. Maa-*nulth First Nations Final Agreement* as ratified by *Maanulth First Nations Final Agreement Act*, SC 2009, c 19.
15. *The Selkirk First Nation Self-Government Agreement*, the Selkirk First Nation and Her Majesty the Queen in Right of Canada and the Government of the Yukon, 21 July 1997 (enabling as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.

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19. *The Tr'ondëk Hwëch'in Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.
20. *Tsawwassen First Nation Final Agreement* as ratified by *Tsawwassen First Nation Final Agreement Act*, SC 2008, c 32.
21. *Vuntut Gwitchin First Nation Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.
22. *Westbank First Nation Self-Government Agreement* as ratified by *Westbank First Nation Self-Government Act*, SC 2004, c 17.

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24. *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council)*, 2012 BCCA 333 (QL).
25. *Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, 2007 FC 567 (QL).
26. *Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212 (QL).
27. *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 (QL).
28. *R v Alfred*, [1993] BCJ No 2277, [1994] CNLR 88 (QL).
29. *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*, 2009 ABQB 576 (QL).
30. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (QL).
31. *Black v Canada (Prime Minister)*, [2001] 54 OR (3d) 215 (QL) (Ont CA).

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33. *Canada (Prime Minister) v Khadr*, 2010 SCC 3 (QL).
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37. *Clayoquot Band of Indians v British Columbia* (1986), 3 BCLR (2d) 60 (QL) (BCSC).
38. *Cook v Canada (Minister of Aboriginal Relations and Reconciliation)*, 2007 BCSC 1722 (QL).
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58. *Squamish Nation et al v British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320 (QL).
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60. *Toronto Area Transit Operating Authority v Dell Holdings Ltd*, [1997] 1 SCR 32 (QL).
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64. *AbitibiBowater Inc v Government of Canada*, NAFTA Ch 11 Panel, Consent Award, 24 August 2010.
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