Court File No. A-324-13

FEDERAL COURT OF APPEAL

BETWEEN:

HUPACASATH FIRST NATION

APPELLANT
(Applicant)

- and -

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

RESPONDENTS

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

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

PART I. STATEMENT OF FACTS

Introduction and Overview

1. This is an appeal from a decision of the Learned Chief Justice dismissing an application for judicial review regarding the pending ratification of the *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* ("CCFIPPA").

2. The Appellant, the Hupacasath First Nation ("HFN"), seeks a declaration that Canada is required to engage in a process of consultation and, if necessary, accommodation with the HFN prior to ratifying or taking other steps that will bind Canada under CCFIPPA.

3. The Court below dismissed the application, holding that the adverse effects that the ratification of CCFIPPA may have upon the Appellant's Aboriginal Rights are "non-appreciable" and "speculative," and that they therefore do not give rise to a duty to consult with the Appellant.

4. Below, the Appellant argued that the ratification of CCFIPPA may have an adverse effect on its Aboriginal Rights in two distinct ways. First, the obligations imposed by CCFIPPA may impact on or constrain Canada's ability or willingness to take steps to regulate or prevent the use by Chinese investors of lands and resources that are the subject of the Appellant's Rights and Title claims (the "regulatory chill" effect) by investors entitled to the protection of CCFIPPA. Second, the ratification of CCFIPPA will constrain the exercise of the Appellant's rights of self-government.

5. The Court below held that both of these adverse effects were "speculative" and therefore insufficient to trigger the duty to consult. It should be first noted that it is not the case, as the Learned Chief Justice stated below, that the regulatory chill effect is the Appellant's "principal concern." Both effects stand on equal but independent footing, and if the Appellant can demonstrate that either of these impacts are

"possible," and not "merely speculative," it is sufficient to trigger the duty to consult.

6. The Appellant says that three principal errors underlie the Court's findings that these effects were too speculative. First, those findings were based, at least in part, on conclusions about the content of the obligations assumed by Canada upon the ratification of CCFIPPA. Those conclusions, however, are based on a fundamental misapprehension of the evidence about those obligations. The Learned Chief Justice repeatedly stated that the Appellant had failed to lead critical evidence about other treaties which would materially affect Canada's obligations under CCFIPPA, and that he was left to "speculate" about the possible existence of such agreements. In fact, the provisions of those treaties were in evidence, and the subject of argument, but were entirely overlooked by the Court. This is an error of law or, alternatively, a palpable and overriding error of fact, which goes to the core of the decision.

7. Second, the Learned Chief Justice misapprehended the Appellant's argument about the impact of ratification on its rights of self-government. The reasons below address arguments not relied on by the Appellant and fail to substantively address the substance of the Appellant's argument, which is that by agreeing to be bound by the obligations in CCFIPPA, Canada has also agreed to ensure that the Appellant's exercise of its rights of self-government will be constrained by those same obligations.

8. Finally, the Learned Chief Justice erred in applying the wrong legal test when he held that the adverse effects identified by the Appellant were "speculative" and too insufficient or "non-appreciable" to trigger the duty to consult. Given the very low threshold to trigger the duty to consult, the Court erred in requiring the Appellant to provide actual evidence of a chilling effect, as opposed to reliance on logic and common sense to make inferences from known facts. As the courts have held, a chilling effect is not susceptible to easy proof, particularly for the Appellant, and the Learned Chief Justice erred in requiring such proof.

9. The Court below also erred by confounding the concepts of prematurity and speculation in concluding that the Appellant required evidence of the presence of

investors on its traditional territory with rights under CCFIPPA, and that either Canada or HFN were contemplating measures which would impact on those rights. The Appellant's claim cannot be characterized as either premature or speculative in light of the fact that the obligations under CCFIPPA will extend for at least 30 years, and cannot be set aside by any government or Canadian court during that period. The Learned Chief Justice erred in finding that such a high level structural change, which cannot be undone, and which could have a profound impact on Aboriginal Rights and Title at a future date, did not trigger the duty to consult.

Background Facts

10. The HFN Chief and Council represent approximately 285 band members, all of whom are Indians as defined in the *Indian Act.* The Appellant's members live on two reserves near Port Alberni on Vancouver Island. These reserves are located on the banks of the Alberni Inlet, and are approximately 53.4 and 2.6 ha, respectively, in size. The Appellant has three additional reserves in that territory which are not occupied, due to the lack of infrastructure. In total, the Appellant asserts Aboriginal Rights and Title with respect to approximately 232,000 ha of land in central Vancouver Island.[1]

11. The federal government is aware that the Appellant asserts Aboriginal Rights and Title including, *inter alia*, the right to use, conserve, protect and manage resources in accordance with traditional HFN laws, customs and practices both in their traditional and modern form.[2]

12. The CCFIPPA was signed at Vladivostok, Russia, on September 9, 2012, and will enter into force after the parties notify each other through diplomatic channels that they have completed the internal legal procedures for the entry into force of their agreement. After ratification, CCFIPPA will remain in force for a period of at least 15 years. After the expiration of the initial 15 year period, either party may terminate CCFIPPA with

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[1] Reasons for Order & Order of the Honourable Chief Justice Crampton dated August 26, 2013 ("Reasons"), ¶¶16-17, Appeal Book ("AB") Vol. 1, p. 20

[2] Reasons, ¶52, AB Vol. 1, p. 32; Affidavit of Carolyne Brenda Sayers sworn February 14, 2013 ("Sayers Affidavit"), ¶23, AB Vol. 1, pp. 205-06

one year's notice. However, the agreement will continue to be effective for an additional 15 year period with respect to investments made prior to its termination. This is in contrast to the North American Free Trade Agreement ("NAFTA"), which can be terminated by any party on one year's notice.[3]

13. The CCFIPPA is a bilateral investment treaty ("BIT"). The purpose of a BIT is to provide protection to a foreign country's investors by imposing obligations on the host state with respect to foreign investments. A BIT, including CCFIPPA, protects foreign investment by requiring all of a country's laws, polices, programs and decisions to conform with certain obligations, and giving foreign investors the right to sue the host state directly if the investor is subject to any measure that is not in compliance with the BIT obligations.[4] The CCFIPPA is the first BIT that Canada has entered into when it was in a capital importing position. The only other arrangement where Canada hosts significant foreign investment and is subject to investor state arbitration is NAFTA.[5]

14. Once ratified, CCFIPPA will apply to any legislative, executive or judicial act of any federal, provincial, municipal or other sub-national decision-maker of the Canadian state. All such actors (including First Nations governments and the courts themselves) form part of the unified entity of Canada as a state.[6] Investor claims under the FIPPA will be resolved though *ad hoc* arbitration. The arbitrators are appointed by the parties, and are not judges. There is no security of tenure, or set salary for arbitrators. The arbitrators' decisions are only subject to judicial review on limited grounds.[7]

15. Treaty-based investor-state arbitration was put into widespread use by foreign

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[3] Reasons, ¶¶6, 7, 85, AB Vol. 1, pp. 17, 47
[4] Cross-Examination on Affidavit of Vernon John MacKay, conducted on April 3, 2013 ("MacKay Cross"), Ex. 1, AB Vol. 7, pp. 1450-56
[5] Affidavit of Vernon MacKay sworn March 13, 2013("MacKay Affidavit"), ¶14, Ex. H, I, AB Vol. 2, p. 468, Vol. 3, pp. 809-24; MacKay Cross, pp. 18-21, Ex. B for Identification, AB Vol. 7, pp. 1391-94, 1461-67
[6] Affidavit of Gus Van Harten, sworn February 13, 2013 ("Van Harten Affidavit"), Ex. C, pp. 11-13, AB Vol. 1, pp. 169-71

investors about 15 years ago. In recent years there has been a dramatic increase in the number of claims. The largest known award under an investment treaty - for about $1.8 billion plus pre-award interest - was issued in September 2012. In that same month, the Chinese firm Ping An reportedly brought the largest known claim by a Chinese investor to date, against Belgium, for between $2 billion and $3 billion. There are various ongoing cases, especially in the resource sector, that involve disputes over assets valued in the tens of billions of dollars.[8]

16. The CCFIPPA does not require a foreign investor to utilize the domestic remedies of the host state prior to bringing a claim for adjudication under CCFIPPA. Investment treaty arbitrators can review legislative or government decisions which remain open to adjudication in domestic courts. Investment treaty arbitrators can also make an award relating to a holding by domestic court, even if that holding is still subject to appeal.[9] Unlike in state to state adjudication at the World Trade Organization, investment treaty arbitrators typically award compensation to foreign investors from the date at which the respondent state's legislature, executive, or judicial decision-maker engaged in the conduct found to have violated the treaty. Thus, the state does not have an opportunity to correct the illegality before being ordered to pay retrospective compensation.[10]

17. The obligations assumed by Canada under CCFIPPA include: a national treatment obligation (CCFIPPA Art. 5); a most-favoured-nation treatment obligation (CCFIPPA Art. 6); a minimum standard of treatment (CCFIPPA Art. 4(1)); limits on performance requirements (CCFIPPA Art. 9); and a requirement for compensation for direct or indirect expropriation (CCFIPPA Art. 10).

18. The CCFIPPA incorporates a reservation from the national treatment and the Most Favoured Nation ("MFN") obligations for measures that deny Chinese investors "any rights or preferences provided to aboriginal peoples." The reservation

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[7] Van Harten Affidavit, Ex. C, pp. 5-6, AB Vol. 1, pp. 163-64
[8] Van Harten Affidavit, Ex. C, pp. 6-7, AB Vol. 1, pp. 164-65
[9] Van Harten Affidavit, Ex. C, p. 5, AB Vol. 1, p. 163

also applies to Art. 7 of the FIPPA relating to the appointment of senior management and directors, and the entry into the country of foreign workers. However, it does not apply to any of CCFIPPA's other provisions.

19. Under other investment treaties, claims by foreign investors have involved decision-making about natural resources, major utilities or infrastructure, health or environmental regulation and planning and permitting decisions. For example, under other treaties, investors have brought claims challenging moratoriums on gas or mining activities and the corresponding non-approval or freezing of permits; refusals of a proposed project or resource exploration/exploitation permits following an environmental assessment, public opposition, or the election of a new government; new mining remediation requirements to protect environmental values or Native sites; and new taxes or royalties.[11]

20. The obligations under CCFIPPA are similar to those found in NAFTA. Many claims which have been brought under NAFTA's Chapter Eleven involve resource use and environmental issues. Recent claims include a challenge by an American investor to Ontario's moratorium on offshore wind development, on the basis that the moratorium constitutes an expropriation, a breach of the right to fair and equitable treatment, and discrimination;[12] and a challenge to Quebec's moratorium on shale gas "fracking," on the basis that the moratorium constitutes an expropriation and a breach of the obligation for minimum standard of treatment.[13]

21. Canada, in particular, the Department of Foreign Affairs and International Trade, kept the provincial and territorial governments regularly updated during the negotiation of CCFIPPA, and consulted with private stakeholders to identify issues of specific concern during the negotiations. An Environmental Assessment Committee solicited input from provinces and territories, stakeholders representing business, academics and non-governmental organizations, as well as the general

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[10] Van Harten Affidavit, Ex. C, p. 5, AB Vol. 1, p. 163
[11] Van Harten Affidavit, Ex. C, pp. 13-14, AB Vol. 1, pp. 171-72
[12] MacKay Cross, p. 55, Ex. 5, AB Vol. 7, pp. 1428, 1531-47

public.[14]

22. However, no consultations were held with First Nations in respect of CCFIPPA. Indeed, no assessment was made by Canada as to (a) potential adverse impacts of CCFIPPA on Aboriginal Rights and Title, (b) the implications of Chinese investment in land or resources which might be subject to Aboriginal Rights and Title or (c) how First Nations governance might be affected by CCFIPPA.[15]

23. The HFN, the Union of BC Indian Chiefs, the Serpentine River First Nation, the Tsawwassen First Nation, the Dene Tha' First Nation and the Chiefs of Ontario have all written to the federal government expressing their concerns about CCFIPPA and asking the federal government to fulfill its constitutional obligation to consult with First Nations prior to ratification.[16]

PART II. STATEMENT OF POINTS IN ISSUE

24. We submit that the Learned Chief Justice erred in holding that the adverse effects that the ratification of CCFIPPA may have upon the HFN's Aboriginal and Treaty rights are non-appreciable, speculative, and do not give rise to a duty to consult with the Appellant. This finding was based on the following errors:

a. The Court below fundamentally misapprehended the evidence about the content of the obligations imposed by CCFIPPA, by failing to have regard to a key piece of evidence before him. This constitutes an error of law or, alternatively, a palpable and overriding error of fact.

b. The Court below misapprehended and failed to address the Appellant's

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[13] MacKay Cross, p. 54, Ex. 4, AB Vol. 7, pp. 1427, 1513-30
[14] MacKay Affidavit, ¶¶81-83, Ex. AA, pp. 3-4, AB Vol. 2, pp. 490-91, Vol. 4, 1167-68
[15] MacKay Cross, pp. 7-11, AB Vol. 7, pp. 1380-84
[16] Sayers Affidavit, ¶33, Ex. N, O, AB Vol. 1, pp. 208, Vol. 2, pp. 428-30; Affidavit of Grand Chief Stewart Phillip, sworn January 29, 2013, Ex. A- C, AB Vol. 1, pp. 131-39; Affidavit of Chief Isadore Day, sworn January 17, 2013, ¶5, Ex. 1 and 2, AB Vol. 1, pp. 96, 109-14; Affidavit of Chief Bryce Williams, sworn January 21, 2013, Ex. A, ("Williams Affidavit"); AB Vol. 1, pp. 135-36; Affidavit of Chief James Ahnassay, sworn March 13, 2013 ("Ahnassay Affidavit"), ¶¶4-12, Ex. C, AB Vol. 2, pp. 454-55, 461

arguments on the effect of the ratification of FIPPA of the Appellant's rights of self-government; and

c. The Court below erred in applying the wrong legal test for determining when the duty to consult is triggered.

PART III. STATEMENT OF SUBMISSIONS

The Learned Chief Judge failed to have regard to a key piece of evidence regarding the content of CCFIPPA obligations assumed by Canada

25. The Appellant's argument about regulatory chill is based on a concern that measures taken to regulate or protect land and resources which are the subject of the Appellant's Aboriginal Rights and Title may be considered contrary to the provisions of CCFIPPA, specifically the provisions regarding the minimum standard of treatment of investments ("MST"), and the prohibition on indirect expropriation without compensation. The Court below concluded that there was no appreciable or non-speculative risk that any such measures would be considered contrary to CCFIPPA. This was based on the Learned Chief Justice's conclusions that the MST provision provides only a "very low baseline" for measuring state action, and that only in "rare circumstances" will the prohibition on indirect expropriation apply to measures enacted for a valid public purpose. These conclusions are, in turn, based on his finding that CCFIPPA provides only those protections which are consistent with Canada's 2004 Model FIPA.

26. The Court's conclusions in this regard flow from a fundamental misapprehension of the evidence. In the Court below, the Respondent argued that the expropriation and MST provisions should be given the restrictive interpretation which the Learned Chief Justice ultimately adopted. The Appellant, on the other hand, argued that because of the MFN provision in Art. 5 of CCFIPPA, the content of the substantive obligations relating to MST and expropriation must be determined with reference to treaties concluded by Canada between 1993 and 2004 that give more generous protection to investors than the text of CCFIPPA itself. The Learned Chief Justice held that there was no evidence before him of any earlier, more

investor friendly treaty provisions. At ¶¶103 and 117, he stated that he could only "speculate" about the possibility of the existence of such provisions. As a result, he held that he was not required to consider the Appellant's arguments about the impact of CCFIPPA provisions as modified by those earlier treaties, because they were too "speculative."

27. In fact, the evidence of the earlier treaty provisions was before the Court, in the affidavit of Canada's deponent Vernon MacKay. Mr. MacKay deposed that there were at least 16 FIPAs signed by Canada in the period between 1993 and 2001. Mr. MacKay attached one of these treaties, the *Agreement between the Government of Canada and the Government of Croatia for the Promotion and Protection of Investments* (the "Canada/Croatia FIPA") as an example of Canada's treaties concluded during this period. On cross-examination, Mr. MacKay confirmed that the provisions of these treaties relating to the minimum standard of treatment (MST) and expropriation were not subject to the same restrictive language that Canada had adopted in CCFIPPA. Given that the chambers judge based his determination of the content of CCFIPPA obligations on his erroneous understanding that this evidence was not before him, his conclusion about the effect of CCFIPPA cannot be sustained.[17]

28. The implications of the Learned Chief Justice's error are significant. Canada's own evidence is that language similar to that found in the Canada/Croatia FIPA led to interpretations of the MST and expropriation provisions of NAFTA that were of serious concern to Canada because of their potential to interfere with *bona fide* regulation. In response, Canada developed a 2004 Model FIPA, aimed at avoiding these concerns. The Learned Chief Justice's decision is based on his assumption that CCFIPPA provides only those protections set out in the 2004 Model FIPA, which were designed to address Canada's concerns. Once the existence of the Canada/Croatia and other similar Agreements are considered, however, it becomes obvious that the protections provided to investors by CCFIPPA are precisely of the

[17] MacKay Affidavit, paras. 22-25, Ex. N, AB Vol. 2, pp. 470-71, Vol. 4, pp. 889-901

kind which caused Canada concern. It is clearly possible that measures undertaken by Canada to protect lands and resources subject to Aboriginal Rights and Title, will be found to be inconsistent with these protections. As a result, the basis for the Court's determination that the Appellant's claim is "too speculative" falls away.

29. In his affidavit and cross-examination, Mr. MacKay explained that CCFIPPA was modeled on Canada's 2004 Model FIPA, found at Ex. E to his affidavit. He also explained that the 2004 Model FIPA was developed in response to Canada's experience with the implementation and operation of NAFTA Chapter Eleven and its dispute settlement provisions. Mr. MacKay stated that early cases under NAFTA adopted "expansive" interpretations of some of the investment protection obligations, including the MST provision. This led to the parties to NAFTA issuing a binding Note of Interpretation in 2001 (the "Note of Interpretation"). Mr. MacKay stated:

> A There were some early experiences under NAFTA investor-state where investors and their legal counsel made claims based on a very expansive interpretation of what "fair and equitable treatment" meant under the treaty, and, you know, arguing things such as a violation of an article in the agreement, not just the investment chapter but in the NAFTA itself, could rise to the level of a breach of fair and equitable treatment. There have been other attempts by investors to say that, you know, mere variances in administrative procedures with respect to, you know, a regulatory process in relation to a foreign investment, that, you know, a delay in issuing a permit or lack of full transparency rose to a level of a breach of the fair and equitable treatment standard, which we completely disagree with. That is not the intent of the treaty, and therefore we felt it necessary - all parties felt it necessary to make that clarification so that, going forward, the tribunals would be guided by what was the intention of the parties.
>
> Q And just for clarity, you had spoken about efforts or claims being made by investors, and the problem, I take it, is the tribunals were accepting those claims and arguments. That's what -
>
> A Yeah, in a couple of cases, they did. Since the - since the note of interpretation, though, we've been quite satisfied under the NAFTA with the decisions.
>
> Q But I take it it was the tribunal decisions or at least some of those tribunal decisions that led to the need for the note of interpretation. Is that fair?

A Yes, that's fair.[18]

30. The Court below characterized the MST guarantee as one which Canada's actions are unlikely to breach, because of its very minimal content. But it is important to remember that prior to the Note of Interpretation, NAFTA panels did find that Canada was in breach of its obligations under NAFTA's MST provision. In *S.D. Myers*,[19] a U.S. waste disposal firm challenged a temporary Canadian ban on the export of toxic PCB wastes. Canada argued that it had enacted the measure because Canada believed that PCBs are a significant danger to health and the environment when exported without appropriate assurances of safe transportation and destruction, and that the measure was part of fulfilling Canada's obligations under the Basel Convention. The NAFTA Panel held that the ban constituted a breach of the minimum standard of treatment requirement, as well as the national treatment provision. Canada's application for judicial review of the arbitral panel's decision was dismissed. Canada was also found to be in breach of the MST obligation of NAFTA in the arbitral award in *Pope & Talbot*. That case involved interactions between an investor and Canada's Softwood Lumber Division. The state activities found to constitute a breach of the MST provision include "assertions of non-existent policy reasons for forcing them to comply with the very burdensome demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment's export quotas, serious misrepresentations of fact in memoranda to the minister concerning the Investor's and the Investment's actions and even suggestions of criminal investigation of the investment's conduct."[20]

31. Mr. MacKay explained that the Note of Interpretation sought to limit the scope of the MST provision, by providing that it "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment

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[18] MacKay Cross, p. 43, AB Vol. 7, p. 1416

[19] *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38; *S.D. Myers, Inc. v. Canada*, Partial Award (November 13, 2000)

to be afforded investments of investors of another party." While Canada's position had always been that this was all that was meant by the MST guarantee in NAFTA, that position had been rejected by previous panels. It is not Canada's own view of the NAFTA and CCFIPPA provisions, but that which may be adopted by any international panel, that are relevant to the question before this Court. Since the Note of Interpretation has been issued, Canada has not been found to be in breach of the MST provision.[21]

32. Mr. MacKay deposed that the language of the Note of Interpretation was incorporated into Canada's 2004 Model FIPA, and that all FIPAs concluded by Canada after 2004 include the language limiting the scope of the MST provision.[22]

33. The 2004 Model FIPA also contains an MFN provision in Art. 4, which requires a state party to provide investors of the other party treatment no less favourable than the state party accords, in like circumstances, to investors of a non-party. However Art. 9 and Annex III of the 2004 Model FIPA provide that the MFN provision "will not apply to treatment accorded under bilateral or multilateral agreements in force or signed prior to the date of entry into force of this Agreement." In this way, the 2004 Model FIPPA ensures that investors do not take advantage of provisions in earlier treaties, which may not contain the limiting language set out in the 2004 Model FIPA.

34. CCFIPPA tracks the 2004 model in many ways, including by containing the language which would limit the MST guarantee to that which is required by the customary international law minimum standard of treatment of aliens. It also contains an MFN provision, set out in Art. 5. However, it does not provide the same limitation on the MFN provision as is set out in the 2004 Model FIPPA. Instead, in Art. 8, it limits the MFN guarantee to those Agreements entered into after 1994. As a result, unlike the 2004 Model FIPPA, CCFIPPA allows investors access to

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[20] *Pope & Talbot and Government of Canada*, Award in Respect of Damages by Arbitral Tribunal (May 31, 2002), ¶¶68-69

[21] MacKay Affidavit, para. 24, AB Vol. 2, p. 471

provisions in treaties concluded between 1994 and 2004, provisions that are not consistent with the 2004 Model FIPPA.

35. The Learned Chief Justice addressed this as follows:

> [103] In my view, the evidence on this point is inconclusive. I accept HFN's position that there is some uncertainty as to whether a Chinese investor may be able to persuade an arbitral tribunal constituted under the CCFIPPA to give it the benefit of any MST obligation negotiated in another, post-1993 investment protection treaty, which does not contain the limiting language set forth in Article 4. However, HFN led no evidence to demonstrate that there is any more favourable language in the MST provisions of other agreements that are within the scope of Article 5. As a result, I am left speculating as to whether this may in fact be the case.[23]

36. First, it should be noted that there is no contradictory evidence about whether investors covered by FIPPA can take advantage of post-1993 agreements. On cross examination, Mr. MacKay said this:

> Now your question is this: Could a Chinese investor make the case that treatment pursuant to the bilateral investment treaty with, let's say, Thailand, which I think was concluded in 1997, could they import treatment pursuant to that? And the answer is "yes." And on the minimum standard of treatment, the provision in earlier FIPA's such as the FIPA with Thailand, it refers to fair and equitable treatment and accords with international law, so it is not explicitly modified or clarified by the notice of interpretation that applies to the NAFTA. But as I said earlier, it is Canada's position that they are the same. We interpret them the same.[24]

37. The applications judge, at ¶102, refers to Mr. Thomas' evidence about the impact of the specific provisions on expropriation. But Mr. Thomas did not suggest and could not have suggested that an investor under CCFIPPA could not take advantage of the different provisions relating to the minimum standard of treatment. The MFN provision, and the specific departure from the 2004 Model FIPPA which limits the scope of the MFN obligation, make that clear.

38. Moreover, the Learned Chief Justice clearly errs when he finds that it is a matter

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[22] MacKay Affidavit, paras. 22-26, AB Vol. 2, pp. 470-72
[23] Reasons, ¶103, AB Vol. 1, p. 55
[24] MacKay Cross, p. 45, AB Vol. 7, p. 1415

of "speculation" whether there was more favourable language in post 1994 agreements. As above, the Canada/Coatia FIPA appended to Mr. MacKay's affidavit provides, in Art. II, that "Each contracting Party shall grant to investments and returns of investors of the other Contracting Part: (a) Fair and equitable treatment in accordance with the principles of international law and (b) full protection and security."[25]

39. This guarantee is more favourable to investors than that set out in CCFIPPA, since it does not limit the guarantee to "that which is required by the customary international law minimum standard of treatment." It does not include the limiting language found in the Note of Interpretation, CCFIPPA, or the 2004 Model FIPA. It is exactly the kind of language which led to the expansive interpretation found in early NAFTA decisions. It is not "mere speculation" to suggest that it may be interpreted in a similar way, giving rise to the concerns expressed by Mr. MacKay.[26]

40. The Learned Chief Justice entirely overlooked this key piece of evidence, and appears to have rejected the evidence of the Appellant's expert, Professor Van Harten, on this issue because he did not specifically reference one of the treaties in his expert report.[27] The Court erred in rejecting his evidence on this point, and more generally, on the basis that Professor Van Harten has been critical in his academic and public writings of investor state arbitration provisions in investment treaties, including those in CCFIPPA. Those criticisms, grounded in legitimate and widely discussed concerns over independence and impartiality, do not properly cast doubt on Professor Van Harten's role as an impartial expert, particularly when his decision to maintain academic objectivity by refusing paid work in the arbitration field is contrasted with income derived by the Respondent's expert. At the least, as on this issue, Professor Van Harten's evidence should have been given weight where it did

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[25] MacKay Affidavit, Ex. N, AB Vol. 4, pp. 889-901

[26] See also: M.C. Porterfield "A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals" *Investment Treaty News* Issue 3, Vol. 3, March 2013, p. 3; Dugan et al., *Investor-State Arbitration* (New York: Oxford University Press, 2008) pp. 501-23

[27] Reasons, ¶100, AB Vol. 1, p. 54

not conflict with the evidence of Mr. Thomas.[28]

41. Because the Learned Judge entirely disregarded the evidence before him, his analysis of the impact of the MST provision is fatally flawed. If he had recognized the existence of the Canada/Croatia FIPA which was before him he would have had to consider the impact not just of Art. 4 as written, which he found to provide a "very low baseline," but of the provision set out in the Canada Croatia agreement, if applied to Chinese investment. Because he overlooked that evidence, however, he apparently found that it was not necessary to consider the Appellant's argument about how those more investor friendly provisions which pre-date 2004 might be applied by a tribunal interpreting CCFIPPA. Instead, he proceeded as if the MST protection available to Chinese investors is the same as that provided by NAFTA after the Note of Interpretation had been issued. We submit that if he had had regard to the evidence, however, he would have had to address the Appellant's submissions that the more generous interpretation of the MST provision, as applied in the pre-interpretive note cases, was the one more likely to be enjoyed by Chinese investors under CCFIPPA.

42. The Court made the same error when considering the expropriation provision of CCFIPPA. As noted by the Court below, Canada relied on Annex B.10 of CCFIPPA to argue that the circumstances in which *bona fide* regulation will constitute indirect expropriation will be rare. Again, Mr. MacKay testified that Annex B.10's language was incorporated into the 2004 Model FIPA, and subsequently into CCFIPPA, specifically to address concerns which arose with respect to the interpretation of the expropriation provisions under NAFTA.[29]

43. The Learned Chief Justice noted the Appellant's argument that the MFN

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[28] Van Harten Affidavit, Ex. C, p. 6, AB Vol. 1, p. 164; Cross-examination on Affidavit of John Christopher Thomas, conducted on April 5, 2013 ("Thomas Cross"), pp. 68-71, AB Vol. 8, pp. 1694-67; See also: J.C. Thomas, *A Reply to Professor Brower*, 40 *Colum. J. Transnat'l L.* 433 (2002); L.E. Trakman, "Choosing Domestic Courts Over Investor-State Arbitration: Australia's Repudiation of the Status Quo", 35 *U.N.S.W.L.J.* 979 (2012)

[29] MacKay Affidavit, para. 25, AB Vol. 2, p. 471

provision would negate Annex B.10, by enabling an investor to take advantage of prohibitions on indirect expropriation in earlier treaties which do not include the language of Annex B.10. Again, however, the Court wrongly stated that that there was no evidence of such provisions before him. The Canada/Croatia FIPPA specifically provides, in Art. VIII, for expropriation language similar to NAFTA, without the limiting language of Annex B.10.

44. Without that limiting language, it is clear that indirect expropriation can include regulation with a valid public purpose which has the effect of depriving an owner of the ability to use its property in a way which will provide a particular economic benefit. In *Metalclad Corp. v. United Mexican States*, the NAFTA panel defined expropriation as follows:

> 103. Thus, expropriation... includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[30]

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

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[30] *Metalclad Corp. v. The United Mexican States* (August 30, 2000), ICSID Case No. ARB(AF)/97/1, ¶103 (emphasis added)

authority."[31]

46. Any form of government regulation which has a substantial impact on the investment may therefore be expropriation. International investment law also recognizes the concept of "creeping" expropriation, which occurs when a series of measures have a cumulative impact on an investment.[32]

47. Canada has paid significant amounts to settle claims based on the expropriation provisions of NAFTA. In *Ethyl Corporation*,[33] a U.S. chemical company challenged a Canadian ban on the import and interprovincial trade of MMT, a suspected neurotoxin. The claim was based on claims of expropriation, as well as national treatment and performance requirements. After preliminary panel decisions against Canada, the Canadian government repealed the MMT ban, issued an apology to the company, and settled the claim for $13 million. Similarly, in *Abitibi Bowater*,[34] the company, a pulp and paper firm, announced that it was going to close its last mill in Newfoundland. The provincial government of Newfoundland and Labrador enacted legislation to return the company's water use and timber rights to the Crown and to expropriate certain of the company's lands and assets along with the resource rights. The investor claimed under the NAFTA provisions regarding national treatment, MFN, minimum standard of treatment and expropriation. Canada settled the claim for $130 million.

48. Because the court below overlooked the evidence which established that a Chinese investor could take advantage of an expropriation provision which was not qualified by Annex B.10, the court did not consider the impact of such an expropriation provision on the Appellant's rights. In these circumstances, the

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[31] *Mexico v. Metalclad Corp.*, 2001 BCSC 664, ¶99 (emphasis added)
[32] Newcombe and Paradell, *Law and Practice of Investment Treaties*, Wolters Kluwer, pp. 341-43; See also: A. Newcombe, "The Boundaries of Regulatory Expropriation in International Law" 20:1 *ICSID Review - FILJ* 1 (2005); J. Elcombe, "Regulatory Powers vs. Investment Protections Under NAFTA's Chapter 1110: Metalclad, Methanex and Glamis Gold", 68 *U. Toronto Fac. L. Rev.* 71 (2010); R. Young, "A Canadian Commentary on Constructive Expropriation Law under NAFTA Article 1110", 43 *Alta. L. Rev.* 1001 (2005-2006)
[33] Van Harten Affidavit, Ex. C, pp. 14-15, AB Vol. 1, pp. 172-73

conclusion at ¶120 that there is no potential for an arbitral tribunal to find that measures designed to protect or accommodate the Appellant's asserted Aboriginal interests contravene the expropriation provisions which can be relied on by investors entitled to the benefit of CCFIPPA cannot be upheld.

49. The Learned Chief Justice's failure to have regard to key evidence about the content of CCFIPPA provisions constitutes an error of law.[35]In the alternative, the trial judge committed a palpable and overriding error of fact. It is palpable because it is obvious. It is overriding because it goes to the core of the judge's finding that the Appellant's claim was "too speculative."

The Learned Chief Judge misapprehended the Appellant's arguments about the impact of ratification of CCFIPPA on their rights of self-government

50. Ratification of CCFIPPA will restrict not only the measures which Canada may adopt, but those which the Appellant may adopt. The impact on the Appellant in this regard is not "mere speculation." Canada's ratification of CCFIPPA will require Canada not only to conform to CCFIPPA's disciplines in its own governance activities, but also to ensure that all other governments in Canada conform to those obligations. By ratifying CCFIPPA, Canada gives up its ability to agree with the Appellant, in a treaty or any shared decision making process, that the Appellant can exercise its self-government rights in a manner inconsistent with CCFIPPA disciplines.

51. In *Council of Canadians*, the Court cited the following quote with approval:

> Treaties are a restriction on sovereignty. All treaties, all international agreements, are a compromise of sovereignty. They are first an exercise of sovereignty. But they represent agreements by the state parties to do or not to do certain things. A promise not to conduct oneself in a particular way is a restriction on one's future action. So to that extent, NAFTA and every other international agreement does represent a restriction on the exercise of sovereignty.[36]

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[34] Van Harten Affidavit, Ex. C, pp. 14-15 and 20, AB Vol. 1, pp. 172-73, 178
[35] *Padget v. Edmonton (City)*, 2013 ABQB 48
[36] *Council of Canadians v. Canada*, [2005] O.J. No. 3422, ¶33

52. If Canada ratifies CCFIPPA, it will commit both itself, and any other government in Canada "not to conduct itself in a particular way." This is "a restriction on one's future action." This restriction will apply to the federal, provincial and First Nations governments. According to Canada, it engaged in discussions with provincial governments to keep them informed throughout the negotiation of CCFIPPA. No discussions, however, have ever been held with First Nations at any time during those negotiations.

53. With respect, the Court below appears to have fundamentally misunderstood the nature of the Appellant's argument in this regard. At ¶142, the Court refers to the evidence, put forward by the HFN, that Final Agreements and Agreements in Principle entered into by Canada and B.C. with First Nations require that governance rights under any Final Agreement must conform with Canada's international legal obligations.[37] The Court goes on, at ¶¶143 and 144, to suggest that the Appellant's argument was that ratification of CCFIPPA "increases, to a non -trivial degree, the probability that these types of provisions will be required to be included in any Final Agreement or other treaty that it may ultimately negotiate with Canada." He also refers to an argument that the ratification of CCFIPPA will reduce the scope for HFN to avoid having to agree to these types of provisions, or to negotiate alternative positions. He holds that these arguments cannot be supported by the evidence and concludes that the "HFN has not established any causal link between the ratification of CCFIPPA and the types of treaty provisions it has identified."

54. With respect, these were not the HFN's arguments. As the Learned Chief Justice noted, at ¶143, the HFN repeatedly asserted that Canada will insist on the inclusion of these types of provisions in any Final Agreement or other governance agreement it may negotiate with the HFN. Indeed, as a matter of international law, Canada is likely required to insist on the inclusion of such provisions. The Appellant did not argue that ratification of CCFIPPA makes it more likely that these provisions will be included in any treaty. Rather, it is in large part <u>because</u> these provisions will be

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[37] Sayers Affidavit, Ex. E-M, AB Vol. 2, pp. 350-427

included in any treaty between Canada and the Appellant that ratification of CCFIPPA will adversely affect the Appellant.

55. At ¶140, the Learned Chief Justice stated that "It is important to distinguish between potential adverse effects on Aboriginal rights and potential adverse effects on a First Nations negotiating position." This is linked to his misapprehension of the nature of the Appellant's claim. The Appellant's argument is not that the ratification of CCFIPPA will weaken the Appellant's bargaining position vis-à-vis the federal government, and that this will lead to the Appellant having to agree to or conform to CCFIPPA disciplines. Rather, the requirement that the Appellant conform flows directly from the nature of the obligations which Canada assumes when it ratifies CCFIPPA, which extend to any other government in Canada.

56. The Court below also suggested, at ¶141, that the Appellant's argument in this regard relies on adverse effects on the "best interests of the Hupacasath people" and "other governance activities" which he says "do not directly concern HFN's asserted aboriginal rights." This is linked to the Learned Chief Justice's erroneous statement at ¶91 that it is "common ground" between the parties that "the HFN's existing law making powers are limited to the authority provided under sections 81 and 83 of the *Indian Act*, above." In fact, as the Court earlier noted at ¶53, the federal government is fully aware of the HFN's assertion that it has governance powers and that it intends to negotiate a treaty in that regard. In the Framework Agreement signed by the HFN, Canada and the Province of British Columbia, and put into evidence by Canada, the HFN assert that they are an original governing people, with unceded title, rights, ownership and the right to govern themselves. The Framework Agreement provides that the parties are committed to negotiating a treaty in the BC Treaty Process, and includes the following statement:

> By negotiating a treaty, the parties seek to achieve clarity with respect to the future relationship among the Parties, the jurisdiction and authority of their respective governments, and the rights, title and interest to the land and resources in their Traditional Territory.[38]

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[38] Affidavit of Jim Barkwell sworn March 14, 2013, Ex. F, AB Vol. 6, pp. 1352-60 (emphasis added)

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

58. As the Court below recognized, it is practically inevitable that any Final Agreement which the Appellant is able to negotiate with the government will contain provisions similar to those found in the Final Agreements in evidence in the Court below. These specifically provide that if an International Tribunal, such as an arbitral panel established under CCFIPPA, finds that Canada is in breach of its international legal obligation as a result of any law or exercise of a treaty right of governance by the First Nation, the First Nation will, at the request of Canada, remedy the law or exercise of power, unless there is an equivalent federal or provincial law in existence at the time.[39] This specifically contemplates First Nations' laws and other governance activities being reviewed by international tribunals for consistency with Canada's international legal obligations, and the requirement to remedy any inconsistency being imposed on the First Nation.

59. Thus, as Canada assumes additional international legal obligations which limit the scope of its own ability to enact certain types of measures, it also subjects the authority of First Nations subject to those Final Agreements to the same constraints.[40] It is for this reason that the Final Agreements referred to above provide that Canada will consult with First Nations prior to entering into new international legal obligations that may adversely affect the right of a First Nation under the Final Agreement. Significantly, however, Canada has refused to consult about CCFIPPA even with a First Nation who already has treaty rights to self government under a

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[39] Sayers Affidavit, Ex. E, AB Vol. 2, p. 353

[40] See, generally, A. Debevoise Ostby, "Will Foreign Investors Regulate Indigenous Peoples' Right to Self-Determination?", 21 *Wis., Int'l L.J.* 223 (Winter 2003); B. Choudhury, "Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights", 46 *Alta. L. Rev.* 983 (2008-2009)

Final Agreement with the consultation clause.[41]

60. At ¶145 of his decision, the Learned Chief Justice did articulate the argument made by the Appellant with respect to the impact on the scope of self government. He addressed this argument briefly as follows:

> … However, once again, HFN did not adduce any evidence to suggest that there is a non-speculative and appreciable prospect that, in the absence of the CCFIPPA, HFN may have somehow legislated in a manner that (i) is inconsistent with one or more of the obligations contemplated in the CCFIPPA but (ii) nevertheless respects Canada's existing obligations to investors from NAFTA countries and the 24 countries with which Canada has entered into a FIPA (*Ahousaht*, FCA, above).[42]

Thus, the only basis for rejecting the Appellant's actual argument regarding the limitation on the scope of self government seems to have been the Court's conclusion that CCFIPPA would not lead to any further restriction on Canada's, or the Appellant's, ability to exercise governance powers than are already imposed by NAFTA and FIPAs concluded by Canada with other countries.

61. For the reasons set out in ¶¶25-49 above, the Court below erred in holding that there was no evidence that CCFIPPA will be interpreted to apply a different and more expansive level of investor protection than under NAFTA. The NAFTA MST provision is currently limited by the language in the Note of Interpretation, while investors entitled to the benefit of CCFIPPA can rely on the broader MST guarantee set out in the 1994-2004 FIPAs, which are not qualified by the language in the interpretive note.

62. With respect to the other FIPAs, the Court below failed to recognize the significance of the fact that CCFIPPA is the first FIPA Canada has entered into when it was in a capital importing position. While Canada has entered into 24 FIPAs, in most cases the other party has no significant investment in Canada. Ex. H to Mr. MacKay's affidavit sets out the amount of foreign direct investment in Canada

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[41] Williams Affidavit, Ex. A, B, AB Vol. I, pp. 135-38
[42] Reasons, ¶146, AB Vol. 1, p. 79

of various countries up until 2011. Of the 16 FIPAs entered into between 1993 and 2001, which would have provisions similar to those in the Canada/Croatia Agreement, 15 of the counties had no investment in Canada in 2011. Only Barbados had any investment at all in Canada, in the amount of $889 million.[43]

63. In contrast, Chinese investment in Canada has dramatically increased, and now significantly exceeds Canadian investment in China. Chinese investment in Canada totaled about $228 million in 2003. Since then, however, it has grown rapidly, and in 2009 exceeded $12 billion. This number increased further in 2012, with the takeover of Nexen by the Chinese state owned oil company CNOOC, valued at approximately $15 billion. Canada's investment in China is not nearly as significant. Canadian investment in China totaled $1.8 billion in 2004, and had grown to $4.46 billion by 2011.[44]

64. While the various FIPAs may impose obligations on Canada and the Appellant in a theoretical sense, if there are no covered investments in Canada, there is no practical constraint. For this reason, it was error for the trial judge to rely on the fact that Canada has never been the subject of a claim under its others FIPAs as demonstrating that any claim will ever be made under CCFIPPA.

65. For the same reason, it was an error to hold that there is no non-speculative, and appreciable prospect that Canada or the Appellant may want to legislate or take other measures in a manner that is contrary to CCFIPPA obligations, but which would nevertheless have no impact on the obligations owed to investors from other countries who have little or no investment in Canada. There is clearly an appreciable difference between being constrained with respect to the scope of investments covered by CCFIPPA and those foreign investments covered by other FIPAs.

66. Even if the obligations in CCFIPPA were the same as set out in NAFTA, being restricted or constrained with respect to a significant number of additional investors

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[43] MacKay Affidavit, Ex. H, AB Vol. 4, pp. 809-16

constitutes an appreciable change. The Learned Chief Justice, at ¶133(e) dismisses this concern as "speculative" on the basis that there is no evidence that there is, at this time, an investor in the HFN's territory that is entitled to the benefit of CCFIPPA. As set out below, this confounds the question of whether the Appellant's claim is "merely speculative" with the question of ripeness or prematurity.

The Court misapplied the law for determining when the duty to consult is triggered

67. The existence of a duty to consult is a question of law on which no deference is due. This is different than the scope of that duty or the question of whether the Crown has fulfilled that duty, which may require some deference.[45]

68. It is clear that there is no need to prove that Crown conduct will have an adverse impact on Aboriginal rights in order to trigger the duty to consult. In *Haida*, the Court stated:

> The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)* , [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.[46]

69. In *Rio Tinto,* the Court referred to the need to consult on matters that "may affect Aboriginal and treaty rights" and stated that "[t]he third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right." At the same time, the Court held that "mere speculative impacts" would not suffice to trigger the duty to consult.[47]

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

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[44] MacKay Affidavit, Ex. H, AB Vol. 4, pp. 809-16; MacKay Cross, pp. 18-21, Ex. B, AB Vol. 7, pp. 1391-94, 1461-67
[45] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*], ¶61
[46] *Haida*, ¶35 (emphasis added)
[47] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*], ¶45

"flexibility lies not in the trigger ('might adversely affect it') but in the variable content of the duty once triggered."[48]

71. This low threshold is appropriate, given the important role of consultation in effecting reconciliation. For the same reason, the Supreme Court of Canada has mandated that the generous and purposive approach to the duty to consult must inform the consideration of what type of Crown conduct, and what kind of adverse impact, will trigger the duty.[49]

72. Given that the test is not whether the Crown conduct has already had an impact on the rights in question, or whether it has been proven that a future impact will occur, there is always some element of "speculation" or conjecture, about whether the impacts will occur. The reference to "mere speculative impacts" in *Rio Tinto* does not *mean that only* those impacts which are imminent, inevitable, certain or even probable to occur can trigger the duty to consult. Rather, "mere speculative impacts" refers to impacts for which there is no reasonable basis to conclude that they might occur.

73. In this case, the Court below dismissed the Appellant's concerns as "speculative" on three bases. The first was his erroneous understanding that he was being asked to "speculate" on whether there were treaty provisions in FIPAs concluded between 1994 and 2004 that were more favourable to investors than those set out in CCFIPPA. This was discussed at ¶¶25-49 *infra*.

74. The second basis on which the Court held that the Appellant's claim was "speculative" was in regard to the argument about the "chilling effect" of the ratification of CCFIPPA. The Court held that there was no evidence that demonstrated that Canada would be reluctant to enact measures to protect Aboriginal rights if those measures would be contrary to CCFIPPA.

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[48] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, ¶34 (emphasis added)
[49] See *Rio Tinto*, ¶¶43 and 46

75. It is not always necessary to call evidence in order to demonstrate a chilling effect. The Supreme Court of Canada made this clear in *R. v. Khawaja*, 2012 SCC 69 at ¶79.

76. It is well understood that concerns about financial liability can have a chilling effect on government activity, including policy making activities and activities aimed at protecting individual rights.[50]

77. In this case, it is only logical to assume that Canada will be more reluctant to enact measures if it believes that it will be subject to litigation and ultimately a damages award under CCFIPPA as a result. It is hardly "mere speculation" to assume that government will consider the fiscal implications of measures before it adopts them. Indeed, it is likely required to do so.

78. Moreover, it should be assumed that Canada will act in accordance with its international legal obligations. As the Court below noted, Mr. MacKay confirmed on cross-examination that Canada is required to and does consider whether any of its proposed actions are consistent with its international obligations. In these circumstances, it is hard to see how it could be "mere speculation" to assert that Canada will be discouraged from implementing measures which are contrary to those obligations.

79. In any event, the proposition on which the Appellant's claim is based; namely, that Canada will be influenced in its decision whether or not to enact measures based on the prospect of litigation under CCFIPPA, is likely not one that is susceptible of proof on the basis of concrete evidence, and certainly not on evidence which would be available to the Appellant. If the burden on the Appellant was to prove that the adverse effects will occur, the fact that proposed effects may not be susceptible of proof might be fatal to the claim. But where the test is whether the adverse effects might occur, it is sufficient to rely on logic and common sense to infer that there may

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[50] *Vancouver (City) v. Ward*, 2010 SCC 27, ¶40; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, ¶50, *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, ¶74

be an adverse effect.[51] The Appellant has discharged that burden in this case.

80. Finally, in regard to both the regulatory chill and the self-government arguments, the Court below held that the claims were too speculative on the basis that the Appellant could not point to a specific identifiable decision regarding the protection of the its rights which would be affected by the obligations set out in CCFIPPA. While the Learned Chief Justice recognized that the duty to consult applies to high level, strategic decisions which have no immediate impact on rights and title, he held that the cases addressing these types of decisions were distinguishable, on the basis that CCFIPPA does not address only specific lands, projects or resources.[52]

81. With respect, it cannot be the case that because CCFIPPA will apply across Canada, the Crown is relieved of its obligations to consult with First Nations, if those First Nations assert rights which may be impacted by the rights granted to Chinese investors under the Agreement. Indeed, the fact that CCFIPPA has such a broad application underscores its significance, and the importance of consultation. It cannot be the case that no consultation is required on CCFIPPA because of its far ranging impacts, while a less significant arrangement would require consultation with those affected.

82. As Justice Phelan has noted, "a specific infringement of an Aboriginal right is no longer necessary for the Government's duty to consult to be engaged."[53] Strategic decisions which affect the manner in which Aboriginal rights interact with other rights trigger the duty to consult. As in other cases where early consultation is required, waiting until a specific right aboriginal is threatened by the operation of CCFIPPA will be too late for effective consultation.[54]

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[51] *R. v. Bryan*, 2007 SCC 12, ¶¶100-02
[52] Reasons, ¶78, AB Vol. 1, p. 44
[53] *Dene Tha' First Nation v. Canada (Minister of the Environment)*, 2006 FC 1354, at ¶80 [*Dene Tha'*]
[54] See *Dene Tha'*; *Gitxsan First Nation v. British Columbia (Minister of Forests)*, 2002 BCSC 1701, ¶82; *Huu-Ay-Aht First Nation v. British Columbia, (Minister of Forests)*, 2005 BCSC 697, ¶¶109-13, *Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 FC 517

83. We acknowledge that it may be that the form of consultation required in this case may be different than that which would be required by a more limited, site specific change. It is notable that in the Final Agreements which require consultation by Canada prior to taking on new international obligations, the terms of the Final Agreements specifically provide that such consultation shall take place "either separately or through a forum that Canada determines is appropriate." This suggests that Canada has contemplated that a broader form of consultation may be appropriate. Canada has designed such processes in other contexts[55] and in this case would need to take into account the fact that investment treaties continue to be negotiated. What that process should like, and the specific content of the duty to consult, is properly left for another day.

84. The Court below also considered the Appellant's claim to be "speculative" because the Appellant did not identify an investor already present in its territory who would currently be able to rely on the terms of CCFIPPA, or a measure currently being considered by either the Appellant or another level of government which might be held to be contrary to CCFIPPA obligations. We submit that this confuses the notion of "mere speculative impacts", which will be insufficient to trigger the duty consult, with the problem of prematurity. "Mere speculative impacts" does not just refer to the fact that the effects are uncertain; as noted above, it is implicit in the test for when the duty to consult is triggered that there will often be uncertainty about whether the Crown conduct will in fact have negative impacts. Rather, an impact is "merely speculative" when it is highly unlikely that any adverse effects will occur, given the factual matrix in which the Crown conduct will operate.

85. This is to be distinguished from the case where Crown conduct has a continuing impact, and this impact may have a negative effect on Aboriginal rights only if certain factual conditions manifest in the future. Normally, in such a case, a claim for

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[*Kwicksutaineuk*], ¶107; *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320, ¶¶74-75; *Hupacasath First Nation v. British Columbia (Minister of Forests*), 2005 BCSC 1712, ¶228; *Rio Tinto*, ¶¶43-47

[55] See *Kwicksutaineuk*, ¶¶20 *et seq.*

consultation may be premature. However, CCFIPPA raises a novel situation because of the length of time in which the agreement will be in effect, and because of the inability of the Crown to modify the obligations once assumed. In this case, the factual context in which the Agreement will operate is largely unknown. As a result, the fact that circumstances may indeed manifest in which the current Crown conduct will have an adverse effect is sufficient to trigger the duty to consult.

86. In any case, there was evidence in the Court below that other First Nations had identifiable Chinese investment in their traditional territory. The Dene Tha' First Nation has a Chinese investor in their territory, engaged in fracking, which the Dene Tha' are very concerned may impact on the exercise of their rights.[56] A moratorium on fracking is the subject of a recent NAFTA complaint against Canada.[57] However, Canada did not engage in any consultation with the Dene Tha', despite their request for it. Thus, there is no principled basis for concluding that the duty to consult is not triggered because of the specific circumstances of the HFN.

87. Similarly, the Court below erred in holding that the fact that there has never previously been a successful challenge under NAFTA or Canada's other FIPAs to measures taken to protect aboriginal and treaty rights, means that the Appellant's claims are too "speculative." The evidence of Canada's own expert is that there was an "explosion" in the number of claims under investment protection treaties in recent years. The law regarding the government's obligations to act to protect First Nations continues to change quickly. The scope of governance powers exercised by First Nations in Canada under various instruments is rapidly evolving. In these circumstances, it cannot be assumed that because previous cases have not addressed the exercise of First Nations governance powers, or government measures to protect Aboriginal rights, that there is no realistic possibility that cases involving such claims may arise in the future. Finally, it must be recognized that the scope of the awards made under investment law treaties can be so large that even one award can

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[56] Ahnassay Affidavit, ¶¶9-13, Ex. C
[57] MacKay Cross, Ex. 5, AB Vol. 7, pp. 1531-47

significantly influence the regulatory environment.[58]

88. Finally, it should be noted that the Court below referred to *Glamis Gold*, a case which did involve regulatory measures to protect aboriginal interests, as providing a "good example of how such interests would be taken into consideration by an arbitral panel applying the standards set out in CCFIPPA." *Glamis Gold* involved a claim for indirect expropriation as well as for breach of the minimum standard of treatment, respecting regulation to protect Native sacred sites in California. The tribunal found that in that case there was no expropriation, but only because there because there was not a sufficient impact on the investment. The tribunal **did not** determine that there could be no expropriation because the legislation was aimed at protecting aboriginal concerns. If the mining had not just become more expensive, but had instead been made impossible because the permit had been revoked, it may very well have constituted expropriation.[59]

PART IV. ORDERS SOUGHT

89. The Appellants ask that the Appeal be allowed, that this Court issue a declaration that Canada is required to engage in a process of consultation and, if necessary, accommodation with the HFN prior to ratifying or taking other steps that will bind Canada under CCFIPPA, and that costs be awarded to the Appellants here and in the Court below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: January 29, 2014

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

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[58] See Thomas Cross, p. 10, AB Vol. 8, p. 1636
[59] Reasons, ¶119, AB, Vol. 1, p. 61; M.C. Ryan, "*Glamis Gold, Ltd. v. The United States* and the Fair and Equitable Treatment Standard", (2011) 56:4 McGill L.J. 919

PART V. LIST OF AUTHORITIES

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