Court File No.: A-324-13

FEDERAL COURT OF APPEAL

BETWEEN:

HUPUCASATH FIRST NATION

Appellant

and

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

Respondents

MEMORANDUM OF FACT AND LAW OF THE RESPONDENTS

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OVERVIEW

1. In the fall of 2012, China and Canada signed the *Agreement between the Government of Canada and the Government of the Peoples' Republic of China for the Promotion and Reciprocal Protection of Investments* ("CCFIPA"). While it is yet to be ratified, the CCFIPA is similar in form and substance to over two-dozen other international treaties that Canada has signed since 1989 with States around the world.

2. The Appellant claims that the Crown owes a duty to consult with them before ratifying this particular international treaty. The Chief Justice of the Federal Court disagreed, holding that the Appellant's assertions of potential adverse impacts to their asserted Aboriginal rights and title were entirely speculative in nature. He further held that the Appellant had not established any causal link between ratification of the CCFIPA and those potential adverse impacts.

3. In their submissions to this court, the Appellant concludes that the Chief Justice must have missed relevant evidence and misinterpreted or misapplied the relevant law. The Chief Justice did neither. In essence, the Appellant asks this court to reweigh and reassess the evidence, and to do so based on a novel and unworkable test for what is and is not a speculative impact. The invitation should be rejected.

4. There was ample evidence to support the Chief Justice's findings. The Appellant has not shown that the Chief Justice made any reviewable errors that would justify this Court re-assessing the weight and relevance of that evidence or otherwise interfering with the Chief Justice's conclusions. Accordingly, the appeal should be dismissed.

PART I STATEMENT OF FACTS

5. The Appellant's facts are incomplete and inaccurate in material respects. The Respondent provides, below, the relevant facts necessary for determining the appeal.

A. The current status of the Hupacasath First Nation

6. The Appellant is a band under the *Indian Act*[1] with approximately 285 members living on two reserves that cover, in total, approximately 56 acres of land on Vancouver Island.[2] The Appellant's existing law-making powers[3] extend to their reserves under the *Indian Act*.[4] The Appellant also asserts Aboriginal rights and title, including rights to engage in governance activities, with respect to nearly 232,000 hectares of land in central Vancouver Island.[5] Their claimed territory overlaps with the claimed territory of nine other First Nations.[6] There is no evidence of any current Chinese foreign investment located in the Appellant's claimed territory, and nothing but a single piece of hearsay evidence from the Wall Street Journal about even a potential Chinese investiment.[7]

B. Overview of the CCFIPA

7. The Chief Justice acknowledged that CCFIPPA is similar in many respects to 24 other Foreign Investment Promotion and Protection Agreements (FIPAs) that Canada has entered into since 1989 and contains provisions that are highly similar to some of those found in the *North American Free Trade Agreement* (NAFTA).[8]

8. The CCFIPA is designed to promote and protect investment by obligating Canada and China to, among other things, treat investors from the other State, and their investments, in accordance with such basic principles as non-discriminatory treatment

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[1] *Indian Act,* RSC 1985, c I-5 [*Indian Act*]; *An Act Respecting Indians*, SC 1951, c.29.
[2] Reasons for Judgment and Judgment of Crampton, CJ at para 16 and 17 ["Reasons"] (Appeal Book, Vol 1 at 15-83) ["AB"].
[3] Reasons, at para. 133 (i); Affidavit of Jim Barkwell, sworn March 14, 2013 at paras 6-9 (AB, Vol 6 at 1306-1307) ["*Barkwell Affidavit*"].
[4] Reasons at para 91 (AB , Vol 1 at 49).
[5] Reasons at paras 17, 18, 139 ;; AB, Vol. 1, pp. 205 – 206, paras. 23-24
[6] Reasons at para 133 (k) (AB, Vol 1 at 73).
[7] Reasons at paras. 133 (e) (AB, Vol 1 at 73); Transcript of Cross Examination of Carolyne Brenda Sayers at pp. 11:02-13:14 (AB, Vol 8 at 1768-1770) ["*Sayers Cross*"]
[8] Reasons at para 8, 15 (AB, Vol 1 at 17, 19-20); AF at para 20; Affidavit #1 of Vernon MacKay, sworn March 13, 2013 at para 36 (AB, Vol 2 at 474) ["*MacKay Affidavit*"); Affidavit of Christopher Thomas at paras 14-16 (AB, Vol 6 at 1239) ["*Thomas Affidavit*"].

and protection from expropriation without compensation.[9] Pursuant to the CCFIPA, Canadian and Chinese investors can, under certain conditions, bring particular claims before an arbitration tribunal. If they can prove violations of certain provisions of the agreement, they can obtain monetary awards against the host country.[10] Arbitral tribunals cannot issue awards against any sub-national level of government, including a First Nations government. Nor can they require any government to change or discontinue a measure found to breach the CCFIPA.

9. The CCFIPA was signed on September 9, 2012[11] and will enter into force after both Canada and China notify each other that their respective internal legal procedures for the agreement to enter into force are complete.[12] Once ratified, the CCFIPA can be unilaterally terminated by either party after 15 years, though it will continue to be effective for a further 15 years for investments made prior to termination.[13] No legislation is required for the CCFIPA to enter into force in Canada.[14]

10. A more detailed overview of the CCFIPA is set out in the Affidavit of Vernon MacKay,[15] but the following Articles about how the parties are to treat each other's investors and investments are the most relevant to these proceedings:

> a) **Article 4 – Minimum Standard of Treatment (MST):** the host State must treat investments made by the investors of the other State in accordance with the customary international law minimum standard of treatment of aliens.[16]
>
> b) **Article 5 – Most-Favoured-Nation Treatment (MFN):** the host State must accord investors of the other State, and their investments, treatment that is no less favourable than the treatment the host state accords, in like circumstances, to investors or investments of other foreign countries.[17] Pursuant to Article 8, treatment accorded to

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[9] Reasons at paras. 9-10 (AB, Vol 1 at 18-19); MacKay Affidavit at paras 7-39 (AB, Vol 2 at 466-477).
[10] MacKay Affidavit at paras 15-17 (AB, Vol 2 at 468-469).
[11] Reasons at para 5 (AB, Vol 1 at 17).
[12] Reasons at para 6 (AB, Vol 1 at 17).
[13] Reasons at para 7 (AB, Vol 1 at 17).
[14] Reasons at para 14 (AB, Vol 1 at 19).
[15] MacKay Affidavit at paras 35-76 (AB, Vol 2 at 474- 489).
[16] MacKay Affidavit, Exhibit B (AB, Vol 3 at 510-11, Article 4).
[17] MacKay Affidavit, Exhibit B (AB, Vol 3 at 511, Article 5).

investors and investments under other international agreements that came into force prior January 1, 1994 cannot be used for the purposes of establishing a violation of Article 5.[18]

c) **Article 8 – Aboriginal Reservation:** pursuant to Article 8(3) and Annex B.8, Canada has the right to provide rights and preferences to Aboriginal people that may be inconsistent with certain CCFIPA obligations, including Article 5.[19]

d) **Article 10 – Expropriation**: the host State may only directly or indirectly expropriate an investment of an investor of the other State for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and upon payment of compensation.[20]

Annex B.10 clarifies that good-faith and non-discriminatory measures designed and applied to protect legitimate public policy objectives, such as health, safety and the environment, do not constitute indirect expropriation.[21] It also clarifies that an indirect expropriation is not established merely by showing that a measure adversely affected economic values or profits of an investment.[22]

e) **Article 33 – General Exceptions**: the host State may take measures, including environmental measures, necessary to protect human, animal or plant life or health, provided that the measures are not applied in an arbitrary or unjustifiable manner and are not a disguised restriction on trade or investment.[23]

f) **Part C – Investor-State Arbitration**: the host State consents, subject to certain conditions, to arbitrate any claim by an investor of the other State that the host State has violated certain of its obligations under the CCFIPA.[24] In resolving any disputes, the arbitral tribunal can award monetary compensation against the host State itself (not against any sub-national entity like the Appellant).[25] It cannot order, direct, or

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[18] MacKay Affidavit, Exhibit B (AB, Vol 3 at 513, Article 8, (1)(b)).

[19] MacKay Affidavit at paras 51-55 (AB, Vol 2 at 482-483) and Exhibit S (AB, Vol 5 at 1109-1110).

[20] MacKay Affidavit, Exhibit B (AB, Vol 3 at 515, Article 10, s.1). Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties – Standards of Treatment* (The Netherlands: Kluwer Law International, 2009) at Ch. 7).

[21] MacKay Affidavit, Exhibit B (AB, Vol 3 at 545, Annex B.10(3)).

[22] MacKay Affidavit, Exhibit B (AB, Vol 3 at 545, Annex B.10(2)(a)).

[23] MacKay Affidavit, Exhibit B (AB, Vol 3 at 538-539, Article 33(2)).

[24] MacKay Affidavit, Exhibit B (AB, Vol 3 at 525-537, Part C, Articles 19-32).

[25] Reasons at para 87 (AB, Vol 1 at 48); MacKay Affidavit at para 61 (AB, Vol. 2 at 484); Thomas Affidavit at paras 25, 126, 192 (AB, Vol 6 at 1240-1241, 1266, 1280); Article 31 (2) "Interim Measures of Protection and Final Award"; Mackay Cross, Vol 3 at 535-536); MacKay Cross (AB, Vol 7 at1444:31-1444:38) and Appellant's evidence at Van Harten Cross, AB, Vol. 8 p. 1796:45 – 1797:2)

compel any change to domestic law or invalidate any measure adopted by any level of government. [26]

11. The Chief Justice found there is no evidence of any current or proposed federal or sub-national measure, including of the Appellant, that conflicts with the obligations in the CCFIPA.[27] In fact, there has only been one notice of claim against Canada under any of its similar treaties with respect to a measure involving Aboriginal interests, and it was dropped before an arbitral tribunal was constituted.[28] The one claim involving Aboriginal interests against the United States under NAFTA, but it was rejected.[29]

C. The Proceedings Below

12. The issue in the court below was whether the government's contemplation of the ratification of the CCFIPA triggered a duty to consult.[30]

13. The Chief Justice had before him a broad range of evidence, including evidence of Canada's treaties similar to the CCFIPA, decisions of international arbitration tribunals in respect to them and Canada's experience under NAFTA.[31]

14. He also had before him the evidence of two expert witnesses.

15. The Appellant put forward the affidavit of Mr. Van Harten, an Associate Professor at Osgood Hall Law School in York University.[32] The Respondent put forward the affidavit of Mr. Chris Thomas, Q.C., Senior Principal Research Fellow at

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[26] Reasons at paras 87, 133(h) (AB Vol 1 at 48, 72); MacKay Affidavit at para 61 (AB, Vol 2 at 484); Thomas Affidavit at para 25, 192 (AB, Vol 6 at 1241, 1280) and Exhibit C at paras 27, 126 (AB, Vol 6 at 1241, 1266).
[27] Reasons at para 133(f) (AB, Vol 1 at 71).
[28] Reasons at para 133(a) (AB, Vol 1 at 68); Thomas Affidavit, Exhibit C at paras 30-31, 37-38, 57, 198-204 (AB, Vol 6 at 1241-43, 1248, 1282-1284).
[29] Reasons at para 119, 133 (a) (AB, Vol 1 at 61, 68); Thomas Affidavit at paras 199-204 (AB, Vol 6 at 1282-1284).
[30] Reasons at paras 49-50 (AB, Vol 1 at 31-32).
[31] MacKay Affidavit at paras 67-69 (AB, Vol 2 at 486-487); Thomas Affidavit, Exhibit D (AB, Vol 6 at 1291-1296).
[32] Reasons at paras 34-35 (AB, Vol 1 at 27); Affidavit of Gus Van Harten, sworn February 13, 2013 (AB, Vol 1 at 140-199) ["*Van Harten Affidavit*"]; Van Harten Cross (AB, Vol. 8 at 1781-1849).

the National University of Singapore's Center for International Law.[33] Mr. Thomas has, among other things, practiced in the field of international economic law for over 25 years, taught at two Canadian universities, and practiced as an international trade dispute panelist and an international arbitrator.[34]

16. These experts provided opinion evidence about potential interpretations of the CCFIPA, the potential for those interpretations to result in adverse awards against the Crown, and the potential for such adverse awards to influence the Crown's subsequent actions in relations with the Appellant with regard to asserted Aboriginal rights and title. They provided expert opinion evidence on:

> a) whether the CCFIPA differs from Canada's past FIPAs or NAFTA;
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> b) the intersection, if any, between domestic law and remedies that may be granted by an international arbitral tribunal;
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> c) how the CCFIPA will and will not intersect with measures passed by federal, provincial and First Nations' government, including whether it would prevent governments from addressing environmental or natural resource issues or making changes to domestic laws; and
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> d) the extent to which Canada could be held internationally responsible for domestic legislative or judicial decisions regarding the Appellant.[35]

17. The Chief Justice exercised his discretion and concluded that Mr. Van Harten's evidence should be accorded reduced weight because of impartiality concerns.[36] However, the Chief Justice also found that Mr. Van Harten's evidence did not materially assist the Appellant because "to a large extent" his "assertions on key issues were baldly stated and unsubstantiated."[37] In contrast, the Chief Justice found Mr. Thomas to be "more neutral, factually rigorous and persuasive."[38]

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[33] Thomas Affidavit (AB, Vol 6 at 1220-1301); Thomas Cross (AB, Vol. 8 at 1625-99)
[34] Reasons at para 39-41 (AB, Vol 1 at 28-29); AB, Vol. 6, pp. 1222- 1230
[35] Reasons at para 36, 41 (AB, Vol 1 at 27, 28-29); AB, p. 1237, "B. Questions Posed".
[36] Reasons at paras 37-38 (AB, Vol 1 at 27-28).
[37] Reasons at para 42 (AB, Vol 1 at 29).
[38] Reasons at para 42 and see 37 for the Chief Justice's additional, *but not exclusive,* concerns about Mr. Van Harten's evidence. (AB, Vol 1 at 29, 27).

18. As a result, the Chief Justice generally accepted Mr. Thomas' evidence over Mr. Van Harten's when they conflicted,[39] but he did give some weight to Mr. Van Harten's opinions.[40]

The Chief Justice Concluded that the Appellant's claims were speculative

19. Considering all of this evidence, including the conflicting evidence regarding the interpretation of similar provisions under NAFTA and Canada's other FIPAs,[41] the Chief Justice made various findings about the likely interpretations of the CCFIPA articles and obligations. For example, he found that the MST obligation provided for only a "very low baseline" standard of State conduct, and that only in rare circumstances would measures designed and applied to protect legitimate public objectives breach the prohibition on indirect expropriation.[42] He acknowledged that there was some uncertainty about how the relevant obligations would be interpreted by arbitral tribunals under the CCFIPA.[43]

20. Nevertheless, the Chief Justice concluded that the Appellant had not proven that the alleged potential adverse impacts of the CCFIPA were anything more than speculation.[44] In particular, he was not persuaded that the Appellant offered sufficient, non-speculative evidence to support the following claims:

a) That the Appellant would face potential adverse impacts arising from tribunal decisions with respect to Article 4 (MST);[45]
b) that Canada may have, absent the prohibition in Article 10 (Expropriation) of the CCFIPA, been prepared to expropriate land, and particularly land owned by Chinese investors, without compensation in order to settle the Appellant's Aboriginal claims;[46]

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[39] Reasons at para 42 (AB, Vol 1 at 29).
See for example Reasons at para. 86
[41] Reasons at paras 106-120 (AB, Vol 1 at 56-61).
[42] Reasons at para 95, 119 (AB, Vol 1 at 51, 61); AF at para 25.
[43] Reasons at para 103, 104, 117, 118, 127 (AB, Vol 1 at 55-56, 60, 64)
[44] Reasons at para 134, 146, 147 (AB, Vol 1 at 73, 79)
[45] Reasons at paras 100-105 (AB, Vol 1 at 54-56).
[46] Reasons at para 108-110 (AB, Vol 1 at 56-57); *Expropriation Act*, RSC 1985, c E-21, s 25; *Expropriation Act*, RSBC 1996, c 125, s 20; *Tsawwassen First Nation Final Agreement,* Chap 6, 1(g) and AANDC Policies: Aboriginal Affairs and Northern Development Canada, "Frequently Asked Questions – Additions to Reserves" (15 September 2010), Question 4: How is new land added to reserve?; AANDC, "Resolving

c) that measures designed to protect or accommodate the Appellant's asserted Aboriginal rights would be found by a tribunal to contravene Article 10 (Expropriation);[47]
d) that Canada's actions would be "chilled", or it would otherwise refrain from taking measures to protect the Appellant's asserted rights, due to a fear of significant damage awards[48] (or that any government in Canada – at any level – had been chilled from legislating in the public interest due to NAFTA or Canada's 24 other FIPAs);[49]
e) that Canada has not retained sufficient policy flexibility through the general and specific exemptions to the agreement to avoid potential adverse impacts upon the Appellant's asserted interests;[50] and
f) that any existing federal or sub-national government's measures, including any established by the Appellant, might contravene or be in conflict with any of the obligations in the CCFIPA;[51]

21. Based on the overall evidence presented, the Chief Justice found that Canada's NAFTA/FIPA experience was the "best available" for assessing the potential adverse impacts on the Appellant. In this regard, the Chief Justice found that the NAFTA experience was more relevant than the international experience under agreements to which Canada is not a party[52], including those relied on by the Appellant as grounds to overturn the Chief Justice's conclusion.[53]

22. The Chief Justice also reviewed the entire spectrum of NAFTA decisions referenced by the Appellant in this appeal, including decisions both before and after the 2001 clarifications to NAFTA.[54] He noted that the evidence of Canada's experience to date under NAFTA suggested a lack of any realistic potential for adverse impacts from

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Aboriginal Claims: A Practical Guide to Canadian Experiences" (2003); AANDC "Royal Commission Report on Aboriginal Peoples (1996)" (8 February 2006), Vol 2, Part 2, Appendix A, s 2.4.45; BC Treaty Commission, "What's the Deal with Treaties" (2003), at 16.

[47] Reasons at paras 110, 120 and generally at 106-120 (AB, Vol 1 at 57,61, 56-61).
[48] Reasons at paras 82-84, 106-129, 132, 133(d) (AB, Vol 1 at 45-46, 56-66, 67, 71).
[49] Reasons at para 133 (d) (AB, Vol 1 at 71).
[50] Reasons at paras 121-131 (AB, Vol 1 at 62).
[51] Reasons at para 133 (f) (AB, Vol 1 at 71).
[52] Reasons at para 133 (a) (AB, Vol 1 at 68).
[53] AF at paras 15, 19, citing the Affidavit of Mr. Van Harten.
[54] AF at paras 30, 44, 45, 47; Reasons at paras 93-105, 111-113, 119 (AB, Vol 1 at 50-56, 58-59, 61).

the CCFIPA. In particular, paragraph 133 a. of his Reasons note that he found as particularly compelling, the evidence of Mr. MacKay and Mr. Thomas that:

a) There had been an extremely small number of successful challenges based on MST obligations in NAFTA;

b) only two damage awards have ever been made against Canada under NAFTA, totaling $7 million, and Canada has settled two claims for a total of approximately $160 million; and

c) there has been no evidence of regulatory chill created by these damage awards under NAFTA and the evidence of recent claims made under NAFTA with respect to measures taken by Ontario and Quebec[55] suggests the opposite

d) no domestic Court has ever found that the MST or expropriation provisions in any international agreement to which Canada is a party have ever violated an Aboriginal claim or right; and

e) no tribunal has ever found a violation of obligations under NAFTA due to measures taken by any level of government in relation to Aboriginal rights; (the only claim ever brought in that regard in the United States, *Glamis Gold*, was rejected.)[56]

23. In respect to this latter conclusion, the Chief Justice had a significant number of examples of existing types of law-making authority that have been exercised by First Nations[57] and yet have never lead to adverse arbitral awards under a FIPA. The

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[55] App. Factum, at para. 20

[56] See also, Reasons at para 133 (a) (AB, Vol 1 at 68) and Thomas Affidavit, at AB, p. 1242, para. 31, pp. 1282-1284 at paras. 199- 204.

[57] Transcript of Gus Van Harten Cross Examination ("*Van Harten Cross*"), 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*"] (AB, Vol 8 at 1872-76) *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; Van Harten Cross, Exhibit H, *Nisga'a Final Agreement*, ss 11.47(a) and (b) (AB, Vol 8 at 1886-1888); *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; Van Harten Cross, Exhibit G, *Sechelt Indian Band Self-Government* Act, SC 1986, c 27, ss 14 (1) (b), (j), (k) and (n) (AB, Vol 8 at 1877-1885); *Tâîchô Land Claims and Self Government Agreement*, s 7.4.2 as ratified by *Tlicho Land Claims and Self-Government Act*, SC 2005, c 1; *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, *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; s 13.3 of each of the 11

examples included Aboriginal law-making powers dating back to 1984, starting with the *Cree-Naskapi (of Quebec) Act*, and exercised by nineteen First Nations.

24. The Chief Justice also considered the evidence and the Appellant's assertions regarding overall Chinese investment in Canada. He considered the fact that in 2011 the amount of Chinese investment was only 1/30th the amount of US investment protected under NAFTA,[58] the likelihood of the amount of Chinese investment increasing,[59] and the extension of the provisions of FIPA-type agreements to Chinese investors.[60] He did not accept the Appellant's assertion, repeated in this appeal,[61] that Chinese investment in Canada had increased by an additional $15 billion in 2012.[62]

25. In summary, the Chief Justice concluded that the Appellant had not demonstrated that Canada's experience under the CCFIPA was likely to be any different than it has been under NAFTA.[63]. It was for all of these reasons that he concluded that the potential for adverse impacts resulting from the CCFIPA is speculative.[64]

The Chief Justice found no adverse impact on the scope for self-governance

26. The Chief Justice assessed the Appellant's argument that ratification of the CCFIPA could adversely impact the scope of self-government which the Appellant can

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self-government agreements ratified under the *Yukon First Nations Self-Government Act*, SC 1994, c 35: *The Carcross/Tagish First Nation Self-Government Agreement* ; *The Champagne and Aishihik First Nations Self-Government Agreement* ; *The First Nation of Nacho Nyak Dun Self-Government Agreement*; *The Kluane First Nation Self-Government Agreement*; *The Kwanlin Dun First Nation Self-Government Agreement*; *The Little Salmon/Carmacks First Nation Self-Government Agreement*; *The Selkirk First Nation Self-Government Agreement*; *The Ta'an Kwach'an Council Self-Government Agreement*; *The Teslin Tlingit Council Self-Government Agreement* ; *The Tr'ondëk Hwëch'in Self-Government Agreement*; *Vuntut Gwitchin First Nation Self-Government Agreement*

[58] Reasons at para 133(b) (AB, Vol 1 at 70).

[59] Reasons at para 133(g) (AB, Vol 1 at 71-72).

[60] Reasons at paras 145-146 (AB, Vol 1 at 78-79).

[61] App. Factum at para. 63

[62] Reasons, at para. 133(b) (AB, Vol 1 at 70); Cross Examination on Affidavit of Vernon MacKay conducted on April 3, 2013 ("MacKay Cross Examination") at 19:20-20:9 (AB, Vol 7 at 1392-1393)

[63] Reasons, at para. 133(c) (AB, Vol 1 at 70).

[64] Reasons, at para. 105

achieve, either through (i) the exercise of their asserted Aboriginal rights, (ii) the treaty-making process or (iii) the exercise of delegated authority.[65]

27. The Chief Justice concluded that the Appellant had failed to prove that the likelihood of a provision requiring the Appellant to confirm to Canada's international legal obligations being included in a future treaty was affected by the ratification of the CCFIPA,[66] a finding that the Appellant does not appear to dispute.[67] He found that the provision is likely to be required by Canada even if the CCFIPA is not signed.

28. As a result of that finding of fact, he then concluded that there was no causal link between ratification of the CCFIPA and the alleged potential impacts from having the international legal obligation provision being part of any self-governance agreement with the Appellant. He observed that the Appellant would likely have to exercise its treaty rights in a manner consistent with the type of obligations contained in the CCFIPA in any event, given the highly similar obligation in Canada's existing FIPAs and NAFTA.[68]

29. The Chief Justice also considered the numerous ways in which the Appellant alleged that the CCFIPA could constrain its scope for self-government, in light of the substantive obligations contained in the CCFIPA.[69] Ultimately, he concluded that the Appellant had not established that there was a non-speculative and appreciable prospect that ratification would adversely affect the scope of self-government that the Appellant could achieve, whether through the exercise of its Aboriginal rights, under a treaty, or through the exercise of delegated authority.[70]

Overall conclusion that alleged impacts are non-appreciable and Speculative

30. With respect to the alleged impact of the CCFIPA itself[71], including in regard to how it may influence the Crown's conduct towards the Appellant in all respects, the

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[65] Reasons paras 135 to 142 (AB, Vol 1 at 56).
[66] Reasons para 143 (AB, Vol 1 at 77).
[67] App. Factum at para. 58
[68] Reasons at paras 144, 148 (AB, Vol 1 at 78, 79).
[69] Reasons at para 145 (AB, Vol 1 at 78).
[70] Reasons at paras 146, 148 (AB, Vol 1 at 79).
[71] Reasons at para 68 (AB, Vol 1 at 38-39)

Chief Justice found (1) that the alleged potential adverse impacts on the Appellant's asserted Aboriginal interests were non-appreciable and speculative, and (2) that the Appellant had not established the required causal link between the CCFIPA and those alleged impacts.[72]

PART II POINTS IN ISSUE

31. The Respondent's position on each of the issues raised by the Appellant is that the Chief Justice committed none of the reviewable errors alleged and, specifically:

(1) the Chief Justice had regard to the evidence before him and did not err in fact or law with respect to his findings regarding the likely interpretation of the CCFIPA or the lack of any negative impacts asserted based on those likely interpretations;

(2) he made no error, whether of law, fact or mixed fact and law, in determining that no causal link existed between the ratification of the CCFIPA and alleged impacts on the scope of self-government the Appellant might achieve, or in further determining that there was no non-speculative and appreciable risk of such an impact; and

(3) he made no reviewable error in identifying or applying the legal test for determining whether a duty to consult was triggered.

PART III SUBMISSIONS

32. An appeal is not a forum for re-weighing all of the evidence that was before the court below and thereafter re-applying to it the legal tests at issue.[73] A trial judge's findings or inferences of fact, of mixed fact and law, or discretionary decisions are not to be disturbed on appeal unless the judge made a palpable and overriding error in his assessment of the facts or misdirected himself as to the applicable law.[74]

33. The case under appeal required the Chief Justice to assess the weight and implications of an extensive body of circumstantial evidence placed before him by the

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[72] Reasons at paras 3, 147, 148 (AB, Vol 1 at 16, 79)

[73] *Talsky v. Talsky*, [1976] 2 SCR 292 at pg. 294; *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 SCR 491 at pgs 503-4; See also *Lans v. Canada* 2011 DTC 5082, 420 NR 119;

[74] *Housen v. Nikolaisen* 2002 SCC 33 at paras. 10- 36 (*Housen*); *British Columbia (Min. of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371; *Berhad et al. v. Canada et al.*, 2005 FCA 267, at para. 21

Appellant. The Appellant has failed to demonstrate any palpable or overriding error in the Chief Justice's findings of fact or mixed fact and law when assessing that evidence. The record before him provided ample basis for such findings, and it does not support a conclusion that the Chief Justice committed any of the errors alleged. The Appellant has further failed to demonstrate any error in the Chief Justice's identification of the appropriate legal test or his assessment of any independent or extricable questions of law when applying the facts to that test.

Issue #1: The Chief Justice did not "fail to appreciate" the CCFIPA obligations

34. The Appellant's first ground of appeal is that the Chief Justice overlooked a single piece of evidence, resulting, they allege, in a fundamental misapprehension of the content of Canada's obligations under the CCFIPA.[75] They allege that this amounts to a palpable and over-riding error and/or an error of law.[76] The Appellant is wrong in suggesting that the judge overlooked this evidence.

35. The evidence at issue is the 2001 *Agreement between the Government of Canada and the Government of Croatia for the Promotion and Protection of Investments* ("Croatia FIPA"), and specifically its articles on the Minimum Standard of Treatment (MST) and expropriation. The Appellant argues that the Croatia FIPA contains more favourable investor protection under these two provisions than is accorded to investors under the CCFIPA. As such, the Appellant argues that Chinese investors can use the MFN provision in the CCFIPA to access the Croatia FIPA's allegedly more extensive protections.

36. This alleged ground of appeal is not supported in law or on the facts of this case. To begin with, the Appellant's argument overlooks the high standard of review applicable for such an allegation on appeal. Further, the passage of the Reasons relied upon by the Appellant does not support the allegation that the Chief Justice must have overlooked the Croatia FIPA. Moreover, even if Canada-Croatia FIPPA was overlooked, which the Respondent denies, the evidence and Reasons do not suggest that

[75] App. Factum, paras. 25-27.
[76] App. Factum, at para. 49

consideration of the Croatia FIPA would have altered the Chief Justice's conclusions regarding the scope of CCFIPA obligations, let alone the overall potential for adverse effects on the Appellant's asserted Aboriginal rights.

The Standard of Review is Palpable and Over-riding Error

37. Whether there was an evidentiary omission relevant to a finding of fact or mixed fact and law is a question of fact, which the Appellant has the burden of proving. However, a mere allegation of such an evidentiary error, or even a suspicion that it "may" have occurred, does not provide an appellate court with a mandate to review the evidence anew;[77] An appellant must demonstrate that the court below *must* have forgotten, ignored, or misconceived the relevant evidence.

> When a question of mixed fact and law is at issue, the findings of a trial judge should be deferred to unless it is possible to extricate a legal error (*Housen*, at para. 37). Within this narrow scope of review, an appellate court may "reconsider the evidence" proffered at trial when there is a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his [or her] conclusion" and thereby erred in law (*Van de Perre*, at para. 15).[78] (*Emphasis added*)

There is no basis to conclude that the Chief Justice must have missed the Croatia FIPA

38. The Chief Justice had no obligation to refer to every bit of evidence he considered in reaching his decision. That he did not expressly refer to the Croatia FIPA is not grounds for concluding he "must have" forgotten, ignored or missed it. However, based on a single statement in the Reasons,[79] the Appellant argues that he must have.[80] That statement is found in paragraph 103 of the Reasons:

> 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 CCFIPA to give it the benefit of any MST obligation negotiated in another, post-1993 investment protection treaty, which

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[77] *Housen, supra note 74,* at paras. 39 – 49.
[78] *Sharbern Holding Inc v. Vancouver Airport Centre* 2011 SCC 23 (CanLII) at para. 71.
[79] App. Factum, at para 26, referring paragraphs 103 and 117 in the Reasons, the second of which simply says "For essentially the same reasons,..." as the first.
[80] App. Factum, at para. 38.

> 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. *(Emphasis added)*

39. On its face, the Chief Justice's statement refers to what evidence the Appellant failed to lead. His statement is simply a fact – and a fact that the Appellant does not dispute. Furthermore, it was never tendered in evidence as an example of language that has been or would likely be interpreted as providing more favourable treatment than found in the CCFIPA. The expert opinion report from the Appellant's expert, Mr. Van Harten, does not discussion or opine whatsoever about the existence of the Croatia FIPA or its terms. It was the Respondent, not the Appellant, who "led" the Croatia FIPPA as evidence, and for a different purpose.[81]

40. More fundamentally, the passages above speak not to what the Chief Justice heard or read during this lengthy process, but rather his view of what the evidence fails to *demonstrate*. The equally, if not more appropriate inference is that he simply rejected the Appellant's arguments about the implications of the Croatia FIPA in regard to the questions before him based on all of the evidence.

41. The Appellant's position implicitly, and incorrectly, presumes that bare differences between the language used in the Croatia FIPA and the CCFIPA regarding MST or expropriation conclusively prove that the Croatia FIPA offers more favourable treatment to investors.[82] This proposition ignores the evidence that was before the Chief Justice to the effect that a bare difference in treaty language does not necessarily mean that another treaty offers "more favourable treatment" than the CCFIPA.[83]

42. In contrast, the Chief Justice acknowledged Mr. MacKay's evidence that variations in the MST provisions across Canada's treaties were merely to clarify a

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[81] Mackay Affidavit, at para. 21 (The agreement itself was an exhibit to the MacKay Affidavit, expressly offered as an example of the FIPAs that came into force between 1995 – 2001)
[82] App. Factum, at paras. 38- 39.
[83] Reasons at paras 101, 102 (AB, Vol 1 at 54-55).

standard that has been the same in substance since NAFTA in 1994.[84] Both Mr. MacKay and Mr. Thomas gave evidence to the same effect regarding the expropriation obligation, stating that new text on indirect expropriation found within more recent treaties, such as the CCFIPA, simply clarifies the legal standard that has always been present in Canadian investment treaties since NAFTA in 1994.[85]

43. Mr. Thomas also gave evidence that arbitral tribunals have rejected investors' arguments that facially different language in other treaties actually accorded more favourable treatment.[86] His evidence was that detailed consideration of a treaty's construction is required to determine if it actually offers more favourable treatment.[87] Thus, there was evidence before the Chief Justice, that he reasonably could have accepted, that bare differences in treaty language do not automatically amount to a difference in substance.

44. Further, the impugned statement of the Chief Justice also refers to whether the language of another treaty would be "within the scope of Article 5," which is the CCFIPA's MFN provision. The Chief Justice was keenly aware of the operation of MFN, and considered at length the Appellant's arguments regarding the potential for MFN to be invoked.[88] However, he did not accept Mr. Van Harten's view that a tribunal was *likely* to interpret MFN in a way that would benefit Chinese investors.[89]

45. Rather, he referred to the evidence of the Respondent's expert, Mr. Thomas, that even where another treaty contains "more favourable language," it will not necessarily

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[84] Reasons at para 101 (AB, Vol 1 at 54); MacKay Affidavit, AB Vol. 2 pg. 471 para.24 and pg.473 at para. 32; MacKay Cross at 9:31-9:38; 11:34-11:38; 37:15-37:23; 45:21-45:22; 53:3-53:6 (AB, Vol 7 at 1382, 1384, 1410, 1418, 1426).

[85] See MacKay Affidavit (AB, Vol 2, p. 471, para 25), p. 473, para. 32; MacKay Cross at 37:8-37:12; 53:3-53:6 (AB, Vol 7, at 1410, 1426); Cross Examination on Affidavit of John Christopher Thomas conducted on April 5, 2013 ("Thomas Cross Examination") Thomas Cross at 51:14-51:17; 51:45-52:5 (AB, Vol 8 at 1677,1678).

[86] Thomas Cross at 26:20-27:9 (AB, Vol 8 at 1652, 1653).

[87] Thomas Cross at 3:1, 3:21-3:29 (AB, Vol 8 at 1629)

[88] Reasons at paras 99-104; 117-118 (AB, Vol 1 at 53-56, 60); App. Factum paras. 42-49.

[89] Reasons at para 100,103, 116-118 (AB, Vol 1 at 54, 55, 60).

trigger an MFN provision.[90] Mr. Thomas opined that an arbitral tribunal would give "very serious consideration" to the specific language in the CCFIPA, and that it may ultimately "be given priority to the MFN clause".[91] While raised with respect to the CCFIPA expropriation obligation, the logic is equally applicable to the specific limiting language used in the CCFIPA's MST obligation. Indeed, the Chief Justice appears to have drawn this connection, raising Mr. Thomas' evidence on this point in his discussion of MST.[92]

46. The logical conclusion is that notwithstanding the fact that the bare text of the Croatia FIPA was in evidence, the Chief Justice did not accept that it included "more favourable language" and would be "within the scope" of the MFN provision in the CCFIPA. Accordingly, the impugned sentence does not, even on its face, support the proposition that the Chief Justice must have ignored or forgotten the Croatia FIPA.

Even if the Croatia FIPA had been missed, this would not be an overriding error

47. Even if the Chief Justice was unaware of the language in the Croatia FIPA, which is denied, the Appellant has not demonstrated that this constitutes an over-riding error warranting further review by the court. The burden in that regard is on the Appellant to show that the error goes to the core of the entire case.[93]

48. At most, the implication of the alleged error is that there might be marginally greater uncertainty over whether the CCFIPA will be interpreted in a different way than NAFTA. The Chief Justice clearly acknowledged uncertainty over the interpretation of the provisions of the CCFIPA.[94] He simply did not agree that such uncertainty was significant enough to in and of itself create a non-speculative potential adverse impact on the Appellant's asserted Aboriginal rights.[95]

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[90] Reasons at at para 102 (AB, Vol 1 at 54).
[91] Reasons at para 102 (AB, Vol 1 at 54); Thomas Cross at 53:13-53:28; 53:40-53:43; 54:1-54:5 and generally 52:20-54:5 (AB, Vol 8, at 1679, 1680, 1678-1680).
[92] Reasons at para 102 (AB, Vol 1 at 54).
[93] *Canada v. South Yukon Forest Corp.* 2012 FCA 165 at para. 46.
[94] Reasons at paras 103, 104, 117, 118 (AB, Vol 1 at 55, 56, 60).
[95] Reasons at paras 105 and 120 (AB, Vol 1 at 56, 61).

49. Indeed, the Chief Justice even considered the Appellant's proffered scenario, in which an arbitral panel gives a Chinese investor the benefit of a broader MST standard[96] and still concluded that the Appellant had not demonstrated a non-speculative and appreciable adverse impact on their asserted aboriginal rights.[97]

50. Further, the Croatia FIPA was just one of many factors that, cumulatively, may have been relevant to the Chief Justice to his conclusion. It is not tenable to suggest that the mere knowledge of the existence of the Croatia FIPA – even if one accepted that it contained "more favourable language", and that it was "within the scope" of the CCFIPA MFN provision – would have had more than a *de minimus* impact on the Chief Justice's key conclusions. As explained by the Chief Justice, the possible interpretation of MST is just one of a series of speculative intervening events that would need to occur before arriving at a potential adverse impact.[98]

Issue #2: The Court Appreciated the Appellant's Self-Governance Arguments

51. The Appellant contends that the Chief Justice misunderstood it to be arguing merely that ratification of the CCFIPA increases the likelihood of a clause requiring compliance with Canada's international obligations being included in any treaty or self-governance agreement they might conclude with Canada. The Appellant argues that, in contrast, they actually raised two distinct points: that (i) it was a certainty that these clauses would have to be included in such agreements or treaties, and (ii) once included, it was the operation of these clauses which would have the negative impact at issue.[99] The Appellant has failed to establish that the Chief Justice committed any such error.

Standard of Review and Burden of Proof

52. On its face, on this ground of appeal, the Appellant is asking this court to rule on an argument that was not resolved by the court below. Even if the assertion were proven, the remedy would be to remit it back to the Chief Justice for determination.

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[96] Reasons para 104 (AB, Vol 1 at 55-56).
[97] Reasons at para 104, 105 (AB, Vol 1 at 55-56).
[98] Reasons at para 134 (AB, Vol 1 at 73).
[99] App. Factum, at paras. 54 and 59

53. However, this ground of appeal can be dismissed on the basis that it is merely challenging the Chief Justice's conclusion that the Appellant failed to prove the alleged adverse impacts related to self-governance were causally linked to the ratification of the CCFIPA. That is a conclusion of mixed fact and law to which deference is owed, and which can only be set aside upon demonstrating palpable and over-riding error.[100] Further, either way it is examined, the Appellant has not demonstrated any error.

The Reasons demonstrate the Chief Justice understood the self-governance argument

54. As a preliminary issue, the Appellant alleges that the Chief Justice mischaracterized the scope of the rights that could trigger a duty to consult and inappropriately required some direct link to land and resources.[101] No such error is demonstrated on the record.

55. In relation to the Appellant's self-governance claims, the Chief Justice correctly described the Appellant's aboriginal rights related to the "use, management and conservation of land and resources" within the Appellant's claimed territory.[102] He did not limit his consideration to just the Appellant's governance powers under the *Indian Act*, as alleged by the Appellant.[103] In any event, even if he was in error on this point, which is denied, it would not undermine his finding that there was no causation between the ratification of the CCFIPA and the Appellant's self-governance concern.

56. The Appellant also alleges that the Chief Justice committed two errors:

(1) he failed to comprehend that their argument was not that the CCFIPA increased the potential that the international legal obligation clauses "might" be included in such agreements or treaties, but that they "would" be included; and

(2) he failed to realize that their subsequent argument was that once included in these agreements and treaties, the clauses would thereafter have their own negative implications on the Appellant's members' asserted

[100] *Housen*, *supra*, note 74 at paras 27-37, 39-49.
[101] App. Factum, at para 56.
[102] Reasons at para 54 (AB, Vol 1 at 33).
[103] App. Factum, at para. 56

> Aboriginal interests, for example, by constraining the scope of their self-government.[104]

57. Regarding the Appellant's first argument, no potentially reviewable error has been identified since the Chief Justice agreed with the Appellant that the international legal obligation clauses would likely be included in a future treaty.[105]

58. Regarding the Appellant's second argument, the Chief Justice's reasons show that he expressly considered the alleged potential adverse effects of the CCFIPA on the scope of self-governance that the Appellant would be able to achieve, including under a Final Agreement that includes an international legal obligation clause such as has been included in other treaties. Indeed, the Appellant concedes that the Chief Justice properly articulated its argument on self-governance.[106]

59. The Chief Justice then considered the Appellant's concern about potential impact on self-government in detail.[107] He explicitly acknowledged that the Appellant was concerned that the CCFIPA would constrain its authority, no matter what type of governance structure it uses.[108] While the Chief Justice doesn't quote the specific portions of Ms. Sayers' affidavit that describe the concern in more detail[109], it is highly likely he had seen and was aware of them as he did refer to other related parts of her affidavit in his Reasons.[110]

60. The reasons of the Chief Justice go on to enumerate various ways in which the Appellant argued their capacity for self-governance would be constrained by the obligations in the CCFIPA. He specifically acknowledged the Appellant's concern that they would be bound by the CCFIPA's obligations regarding expropriation and MST in any governance actions.[111]

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[104] App. Factum, at para. 54 (referencing para. 143 of the Reasons)
[105] Reasons at para 143, 144 (AB, Vol 1 at 77-78).
[106] App. Factum, at para 60
[107] Reasons at paras 135-142, 145 -146 (AB, Vol 1 at 73-77, 78-79).
[108] Reasons at para 135 (AB, Vol 1 at 73-74).
[109] Affidavit of Carolyne Brenda Sayers at para 26, 32, 35 (AB, Vol 1 at 207-209)
[110] Reasons at para 137 (AB, Vol 1 at 74-75).
[111] Reasons at para 145 (AB, Vol 1 at 78).

61. The passage of his Reasons footnoted above shows that the Chief Justice was well aware of the Appellant's arguments, and also links his reasoning on the Appellant's self-governance argument with his earlier conclusions on the substantive obligations in the CCFIPA.[112] As such, his conclusions that the MST and expropriation provisions of CCFIPA contain only basic standards that are unlikely to be breached by regulations pursuing legitimate public policy objectives are also relevant to his conclusions regarding the highly speculative nature of the alleged affect the CCFIPA could have on the scope for aboriginal self-government.[113]

62. The Chief Justice went even further and pointed to the lack of any causal link between the CCFIPA and the content of any future treaty or self-government agreement. In particular, he concluded that since Canada would likely require a consistency clause in any future Final Agreement, the Appellant would be required to exercise their treaty rights in a manner that is consistent with the obligations in all of Canada's existing international agreements (whose obligations are similar to the CCFIPA) regardless of whether the CCFIPA was ratified or not.[114] He committed no reviewable error in reaching this conclusion.

63. He also committed no error in having regard to the absence of any evidence of any sub-national governments in Canada having ever been fettered or "chilled" from acting in the public interest as a result of Canada's international treaties. He also correctly noted the existence of examples of provincial government action which suggests no such adverse impact arises.[115]

Issue #3: The Chief Justice Committed No Error Of Law Regarding The Legal Test

64. The Appellant alleges the Chief Justice erred in law with respect to the legal test for what is and what is not a "speculative" impact when assessing whether a duty to consult arose. However, the Appellant's submissions demonstrate that, in reality, what

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[112] Reasons at para 145, generally referencing conclusions at 87, 95, 105, 119, 120, 123, 130-132 (AB, Vol 1 at 48, 51, 56, 61, 63, 66-67).
[113] Reasons at paras 95, 119 (AB, Vol 1 at 51-61).
[114] Reasons at paras 144- 146 (AB, Vol 1 at 78-79).
[115] Reasons at para 133(d) (AB, Vol 1 at 71)

they are challenging is how the Chief Justice applied the law to the evidence before him.

65. The existence of the duty to consult is a legal question in the sense that it defines a legal duty, but it is typically premised on an assessment of the facts.[116] To the extent that the Chief Justice considered legal questions, such as setting out the test regarding the type of impacts that may trigger a duty to consult, the standard of review is correctness. However, to the extent that he applied the test to the evidence before him, the issue becomes a question of mixed fact and law to which deference is owed.[117]

66. In that regard, the Chief Justice made no reviewable error in:

(1) defining the legal test for determining whether a potential adverse impact is speculative in nature; nor
(2) in applying the legal test to the evidence, including in not accepting the "inference" of a chilling effect to find a non-speculative adverse impact.

The Chief Justice applied the correct legal test for the duty to consult

67. The parties agree that the Chief Justice correctly noted the legal test most recently outlined by the Supreme Court of Canada ("SCC") in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council* for determining potential adverse impacts. That test has two considerations. First, the court must assess "the degree to which the conduct contemplated by the Crown would adversely affect the asserted right." [118] A generous and purposive approach is required in conducting the assessment, but mere speculative impacts will not suffice.[119] There must be an appreciable adverse effect on the ability to exercise the right.[120] Second, the court must determine that the claimant has established "a

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[116] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 at para. 61 (Haida); *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* , 2010 SCC 43 at para. 89 (Rio Tinto).
[117] *Housen,* supra at note 74, paras 26-37.
[118] Reasons at para 56 (AB, Vol 1 at 34), citing *Mikisew Cree First Nation v. Canada* 2005 SCC 69 at para 34 *(Mikisew)*; *Rio Tinto*, supra, note 116 at paras 45, 46.
[119] Reasons at para 56 (AB, Vol 1 at 34) citing *Rio Tinto* at para 46.
[120] Reasons at para 56 (AB, Vol 1 at 34) citing *Rio Tinto* at para 45.

causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights".[121]

68. In this appeal, the Appellant challenges the Chief Justice's findings on the first consideration, the speculative nature of the potential adverse impacts. However, the Appellant does not appear to challenge any of the Chief Justice's specific findings with respect to the second consideration, the lack of causal relationship between the potential adverse impacts and the Appellant's asserted Aboriginal rights. However, if it did and the balance of the Chief Justice's assessment was to be considered, the Appellant has still not demonstrated any reviewable error with respect to the legal test.

The Chief Justice properly distinguished other cases

69. In his Reasons, the Chief Justice examined the entire line of authorities confirming that high-level management decisions or structural changes that may adversely affect asserted Aboriginal rights and title in the future can also trigger a duty to consult.[122] He acknowledged that the Appellant's case was based in part on the assertion that the CCFIPA fell under this line of cases.[123]

70. The Chief Justice correctly noted that the Crown conduct in those cases involved high-level or structural changes "which directly concerned the applicant First Nations's claimed territories or the resources situated upon those territories"[124]. Contrary to paragraph 80 of the Appellant's argument, the Chief Justice did not err in his characterization of those authorities, and the appelleant offered no non-speculative evidence that their claims were analogous.

71. In any event, the test articulated by the Supreme Court in *Rio Tinto* does suggest there is a requisite link between the impugned Crown conduct in making high-level management decisions and the lands or resources claimed by the Aboriginal group.[125]

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[121] Reasons at para 56 (AB, Vol 1 at 34) referring to *Rio Tinto*, at para 45)
[122] Reasons at para 57 (AB, Vol 1 at 34-35)
[123] Reasons at para 58 (AB, Vol 1 at 35)
[124] Reasons at para 78, and generally, see paras 72-78 (AB, Vol 1 at 44, 40-44).
[125] *Rio Tinto*, supra, note 116 at para 47

72. In contrast, the subject matter of the CCFIPA bears no relationship to resource management. It does not alter existing laws relating to resource developments. Like the decision at issue in *Rio Tinto* – which was found not to trigger a duty to consult -- CCFIPA does not "approve, transfer or change control" of an authorization nor effect management changes with respect to such lands or resources.[126]

73. The Chief Justice found as a matter of fact that the CCFIPA did not "directly or even broadly" relate to lands and resources.[127] Accordingly, the Chief Justice properly concluded these authorities were not directly analogous to or determinative of the case before him.

The Chief Justice did not err in concluding the duty to consult was not triggered

74. The Chief Justice did not stop after determining that the cases relied upon by the Appellant were not determinative. Rather, he went on to examine the specific evidence before him to determine the degree to which the Appellant had established the specific potential adverse impacts alleged.

75. In carrying out his assessment, the Chief Justice did not confuse speculation with prematurity, as the Appellant alleges,[128] but merely noted the additional speculation involved when assessing potential impacts without an existing factual basis. In that regard, it is undeniable that the Appellant's entire argument is based on the premise that potential adverse impacts may arise at some point in the future because of the mere asserted potential for a series of future events that may or may not occur during the duration of the CCFIPPA.

76. In arguing that such future potential adverse impacts are sufficient, the Appellant asks this court to define speculative in a manner which encompasses only impacts for which "there is ***no reasonable basis*** to conclude that they ***might*** occur."[129] While it is true that all potential impacts have a degree of uncertainty in them and yet can trigger a duty to consult, the Appellant's definition is inconsistent with the traditional definition of

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[126] Rio Tinto, supra note 116 at paras 83, 87, 93
[127] Reasons at para 73 (AB, Vol 1 at 40-41).
[128] App. Factum, at para 84.
[129] App. Factum, at para 72

the term and, more significantly, is inconsistent with the manner in which it was used by the Supreme Court and essentially renders the term devoid of any practical effect.

77. For example, the standard dictionary definition of speculative means "based on conjecture or incomplete facts or information."[130] The Supreme Court clearly indicated that the threshold was something beyond "mere speculation" (i.e. beyond "conjecture based on incomplete facts or information") and put the onus on the Aboriginal group to demonstrate the existence of potential adverse impacts.[131] In contrast, the proposed definition renders this part of the test so low that almost every decision or action by government would trigger it unless the Crown could produce evidence to prove that there is no possible it ever even "might" occur. This cannot be what the Supreme Court intended.

78. In this context, Canada notes that at paragraph 82 of the Appellant's argument, the Appellant mischaracterizes Mr. Justice Phelan's comments in *Dene Tha' First Nation v Canada (Minister of the Environment)* 2006 FC 1354 at 80 regarding the trigger for the duty to consult. In that case, Justice Phelan did not, as the Appellant asserts, say that that the duty could be triggered merely by an Aboriginal group asserting rights in an area where another group may also have rights. He was referring to recent developments in the law that clarified that a specific fiduciary duty no longer needed to be identified in order to trigger the duty.

79. The Chief Justice in the case at bar considered the speculative nature of the Appellant's assertions and found that the impacts were just too remote to trigger a duty to consult. It was not sufficient for the Appellant to simply make an assertion of possible future impacts based on a series of suppositions. The Appellant had to prove, in the proceedings below, a real potential that they may arise. In this case, the Chief Justice accepted that there was some uncertainty about how the CCFIPA would operate,[132] but he did not accept their layers upon layers of speculation could support more than a speculative impact.

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[130] *Encarta Webster's Dictionary of the English Language*, Bloomsbury Publishing Plc, New York 2004

[131] *Rio Tinto*, note 116 at para. 45

[132] Reasons at paras 103, 104, 117, 118, 127 (AB, Vol 1 at 55, 56, 60, 64)

80. One example of these speculative layers is seen in the Chief Justice's assessment of the CCFIPA's alleged interference with the Appellant's asserted law-making authority, for example, in respect of moratorium on some sort of resource development. [133] In support of his conclusion that the impacts of the CCFIPA are speculative in that regard, the Chief Justice notes that there was no evidence that:

(1) The Appellant is considering passing such a moratorium;

(2) Any such moratorium might adversely impact a potential Chinese investment in their territory ("potential" since there is no such investment now);

(3) there would be a non-speculative possibility of the moratorium being found by an arbitral tribunal to contravene the CCFIPA; and

(4) Canada would not retain sufficient policy flexibility to avoid potential adverse impacts.

81. The Appellant's argument also has similarities to an argument previously rejected by the Supreme Court in *Rio Tinto* and the Federal Court in *Brokenhead Ojibway First Nation v Canada (Attorney General).*[134] In *Rio Tinto*, the Supreme Court found that no duty was triggered as there was no demonstrable causal relationship between an agreement to purchase energy generated by the water flows of a dam and the First Nation's asserted fishery.[135] Similarly, the Federal Court in *Brokenhead* did not agree with that First Nation's argument that they did not need to identify a tangible causal link between the proposed government conduct and the First Nation's treaty rights. It affirmed that there must be "some unresolved non-negligible impact arising from such a development to engage the Crown's duty to consult."[136]

82. Similarly to the situations in *Rio Tinto* and *Brokenhead* the Chief Justice found here that the CCFIPA is "simply a broad national framework agreement that provides legal protections to Chinese investors in Canada, and Canadian investors in China".[137] He

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[133] Reasons at para 131(AB, Vol 1 at 67).
[134] *Brokenhead Ojibway First Nation v Canada (Attorney General)* 2009 FC 484 ("*Brokenhead*") at paras. 30 – 34.
[135] *Rio Tinto*, supra, note 116 at para. 93 and generally 85-93.
[136] *Brokenhead*, supra, note 134 at para. 34.
[137] Reasons at para 78 (AB, Vol 1 at 44).

found that the Appellant had not demonstrated that CCFIPA bears any relationship to the lands in which the Appellant asserts their Aboriginal interests.

83. On this point, the Appellant incorrectly asserts that the Chief Justice found that the CCFIPA did not trigger the duty to consult because it is national in scope. [138] The Chief Justice actually found that the CCFIPA does not trigger the duty because it does not have an appreciable and non-speculative adverse effect on the asserted rights of the Appellant. The national or local scope of the CCFIPA was irrelevant. More specifically, the Chief Justice found, among other things, that the evidence did not show that the CCFIPA:

a) contravened or contradicted any domestic law at either the federal or sub-national government level;[139]
b) changed the way in which the Appellant could exercise their rights under a future treaty;[140] or
c) gave arbitral tribunals the power to invalidate any measures that may be adopted by the Appellant or Canada in future to protect the Appellant's asserted Aboriginal rights.[141]

84. There is no basis to interfere with any of these findings. Ultimately, and considering the totality of the evidence, including the NAFTA experience, the Chief Justice appropriately found that the potential for the CCFIPA to cause adverse impacts to arise was too remote and speculative to trigger the duty:

> I agree with the Respondents that HFN's submissions ultimately may be reduced to the assertions that, irrespective of Canada's experience to date under the NAFTA and the 24 other FIPAs to which it is a party, and with Chinese investment in Canada in general, (i) such investment in its territory may occur in the future, (ii) a measure may one day be adopted in relation to that investment, (iii) a claim may be brought against Canada by the hypothetical investor, (iv) an award will be made against Canada in respect of the measure in question, notwithstanding the basic nature of the obligations in the CCFIPA, the Aboriginal Reservation, and the other exceptions therein, and (v) Canada's ability to protect and accommodate HFN's asserted Aboriginal interests will be diminished, either as a result of that award, because Canada would be chilled by the prospect of such an award. HFN has

[138] AF, at para. 81
[139] Reasons at para 133(f) (AB, Vol 1 at 71).
[140] Reasons at para 144 (AB, Vol 1 at 78).
[141] Reasons at para 87 (AB, Vol 1 at 48).

failed to demonstrate that this scenario is anything other than speculative and remote.[142] (Emphasis added).

85. The Appellant suggests that the Chief Justice dismissed their arguments with respect to the potential adverse impacts of Chinese investment simply because there was no Chinese investment at present in the Appellant's claimed territory.[143] As is shown by the above language, the lack of current investment was merely one factor among many considered by the Chief Justice. The Chief Justice found the Appellant's arguments to be speculative based on the totality of the evidence and the substantive content of the CCFIPA.

The Chief Justice properly declined to draw an inference of "regulatory chill"

86. The Appellant raises the spectre of regulatory chill as part of their argument that the Chief Justice erred in applying the legal test. They acknowledge that the potential for such a chill rests first on a presumption that their earlier arguments about the likely interpretation of the MST, MFN and expropriation provisions in the CCFIPA leading to negative arbitral awards against Canada are proven.[144] Then, the Appellant relies on case law from the *Charter* context for three propositions: (1) actual evidence is not required to establish a regulatory chill; (2) a regulatory chill can be inferred from logic and reason alone; and (3) damage awards are known to have a deterrent effect on government behaviour.

87. The *Charter* context[145] is not particularly relevant here as *Charter* remedies are distinguishable from remedies available under a FIPA. Unlike the multiple goals of tort and *Charter* relief, awards under NAFTA or FIPAs are not aimed at changing behaviour at the domestic level, let alone at a specific "deterrence". They are based merely on ensuring compensation is available for losses suffered as a result of a breach of the treaties substantive obligations: a risk Canada is aware of and has accepted.[146]

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[142] Reasons at para 134 (AB, Vol 1 at 73).
[143] App. Factum, at para. 66
[144] App. Factum, at para. 25
[145] *Vancouver v Ward,* 2010 SCC 27 at para. 40
[146] See for example MacKay Cross 12:24-12:37 (AB, Vol 7 at 1385)

88. Moreover, even the basic principles and authorities relied upon by the Appellant do not support a finding that the Chief Justice committed any reviewable error in rejecting the Appellant's argument to infer a regulatory chill in this case.

89. The authorities actually identify limited circumstances under which a court can legitimately make such inferences in the absence of any evidence, circumstances which do not exist in the case at bar. The majority of the Supreme Court in *R. v. Bryan* explain that a court may resort that a court my result to inference from logic and reason in those circumstances where there was a paucity of evidence and an empirical or causal connection was difficult to measure scientifically.[147] In *R v. Khawaja*, the Court declined to infer regulatory chill without evidence, suggesting that the inference would have to be obvious and self-evident in order to be appropriate.[148]

90. Second, even if one could resort to inferences of some facts in appropriate cases, it would not be appropriate to rely on inference to found a claim of potential unconstitutional conduct by the Crown as a result of the CCFIPA or otherwise. As noted by the Federal Court in *Gitxaala Nation v. Canada*, 2012 FC 1336, it is inappropriate to make a decision about Crown conduct towards Aboriginal peoples based on an unsubstantiated assumption that the Crown will act in a way that contravenes Aboriginal rights.[149]

91. The Chief Justice did not require proof from the Appellant of a chilling effect before he would consider their argument as being more than speculation. Rather, the evidence before him suggested that there had been no chill under the NAFTA experience and there was no reason to believe that it would be different under the CCFIPA.[150]

92. For example, the record revealed that throughout Canada's almost 25-year experience with international investment agreements, there has never been an arbitration against Canada challenging measures passed by Aboriginal governments or measures

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[147] *R. v. Bryan*, 2007 SCC 12 at para. 20.
[148] *R. v. Khawaja* 2012 3 SCR 79 - 81
[149] *Gitxaala Nation v. Canada*, 2012 FC 1336 at para 54
[150] Reasons, at para. 133(a),(c), (d) and MacKay Affidavit at para 69 (AB Vol. 2, at 487)

taken to protect Aboriginal interests.[151] Moreover, there was no evidence before the Chief Justice that any of the claims brought under any of Canada's international investment agreements have impaired the ability of any level of government to regulate with respect to Aboriginal interests or the public interest generally.

93. Accordingly, the Chief Justice committed no error in relying upon the evidence with respect to the lack of any chill caused by NAFTA,[152] and the lack of supporting evidence provided by the Appellant, as grounds to reject the Appellant's request to infer a chill would result from the CCFIPA.[153]

REMEDY

94. In the alternative, if this court agrees that a duty to consult the Appellant has arisen as result of contemplation of ratifying the CCFIPA, as the Appellant conceded before the Chief Justice,[154] a declaration to that effect is the only remedy required.

PART IV - ORDER SOUGHT

95. The Respondent submits that the appeal should be dismissed, with costs to the Respondents.

All of which is respectfully submitted this 17th day of March, 2014

Lorne Lachance,
Counsel for the Attorney General of Canada

[151] McKay Affidavit at 69 (AB, Vol 2 at 487)
[152] Reasons at para 133(a)(d) (AB, Vol 1 at 69, 71)
[153] Reasons at paras 79- 83, 133 (a)-(d) (AB, Vol 1 at 44-46, 67-71).
[154] Reasons at paras 19-21 (AB, Vol 1 at 22-23).

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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. *The First Nation of Nacho Nyak Dun Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.
8. *Indian Act,* RSC 1985, c I-5.
9. *The Kluane First Nation Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.
10. *The Kwanlin Dun First Nation Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.
11. *Labrador Inuit Land Claims Agreement* as ratified by *Labrador Inuit Land Claims Agreement Act*, SC 2005, c 27.
12. *The Little Salmon/Carmacks First Nation Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.
13. Maa-*nulth First Nations Final Agreement* as ratified by *Maanulth First Nations Final Agreement Act*, SC 2009, c 19.
14. *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.
15. *Tåîchô Land Claims and Self Government Agreement* as ratified by *Tlicho Land Claims and Self-Government Act*, SC 2005, c 1.

16. *The Ta'an Kwach'an Council Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.

17. *The Teslin Tlingit Council Self-Government Agreement*, the Teslin Tlingit Council as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.

18. *The Tr'ondëk Hwëch'in Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.

19. *Tsawwassen First Nation Final Agreement* as ratified by *Tsawwassen First Nation Final Agreement Act*, SC 2008, c 32.

20. *Vuntut Gwitchin First Nation Self-Government Agreement* as ratified by *Yukon First Nations Self-Government Act*, SC 1994, c 35.

21. *Westbank First Nation Self-Government Agreement* as ratified by *Westbank First Nation Self-Government Act*, SC 2004, c 17.

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22. *Budisukma Puncak Sendirian Berhad v. Canada,* 2005 FCA 267 (QL).

23. *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 (QL).

24. *Brokenhead Ojibway First Nation v. Canada (Attorney General)* 2009 FC 484 (QL).

25. *South Yukon Forest Corp. v. Canada,* 2012 FCA 165 (QL).

26. *Dene Tha' First Nation v Canada (Minister of Environment),* 2006 FC 1354 (QL).

27. *Gitxaala Nation v. Canada (Minister of Transport, Infrastructure and Communities)*, 2012 FC 1336 (QL)

28. *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 (QL)

29. *Housen v. Nikolaisen,* 2002 SCC 33 (QL).

30. *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 SCR 491 (QL).

31. *Lans v. CRA*, 2011 FCA 160 (QL).

32. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (QL)

33. *R. v. Bryan*, 2007 SCC 12

34. *R. v. Khawaja*, 2012 SCC 69.

35. *Rio Tinto Alcan Inc v. Carrier Sekani Tribal Council*, 2010 SCC 43 (QL), CCLA Vol 2, Part C, Tab 3.

36. *Sharbern Holding Inc. v. Vancouver Airport Centre*, 2011 SCC 23 (QL).

37. *Talsky v. Talsky*, [1976] 2 S.C.R. 292.

38. *Vancouver (City) v. Ward*, 2010 SCC 27.

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42. BC Treaty Commission, "What's the Deal with Treaties" (2003), online: < http://www.bctreaty.net/files_3/pdf_documents/What's%20the%20Dealv3.pdf>.

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