Federal Court of Appeal | Cour d'appel fédérale

Date: 20150109

Docket: A-324-13

Citation: 2015 FCA 4

CORAM: **NADON J.A.**
STRATAS J.A.
SCOTT J.A.

BETWEEN:

HUPACASATH FIRST NATION

Appellant

and

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

Respondents

Heard at Vancouver, British Columbia, on June 10, 2014.

Judgment delivered at Ottawa, Ontario, on January 9, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] In the Federal Court, the appellant, Hupacasath First Nation, alleged that a foreign investment promotion and protection agreement between Canada and the People's Republic of China might affect Aboriginal rights and interests it has asserted over certain lands in British

Columbia. Due to that potential effect, the appellant submitted that, as a matter of law, the Minister of Foreign Affairs Canada and the Attorney General of Canada ("Canada") had to consult with it and, if necessary, accommodate its concerns before causing the agreement to come into force. Canada did not do this and so, the appellants said, Canada failed to fulfil its duty.

[2] By judgment dated August 26, 2013, the Federal Court (*per* Crampton C.J.) ruled against the appellant: 2013 FC 900. It found that the agreement could not potentially cause harm to the appellant's asserted rights and interests. The Federal Court added that any effect on the appellant's asserted rights and interests was "non-appreciable" and "speculative."

[3] The appellant appeals to this Court.

[4] During oral argument in this Court, an issue arose concerning the jurisdiction of the Federal Courts to entertain this matter. Decisions by Canada to enter into international agreements and treaties are exercises of federal Crown prerogative power. A decision of the Court of Appeal for Ontario suggests that the Federal Courts do not have jurisdiction to review exercises of prerogative power. We invited the parties to provide written submissions on this after the hearing. We have now reviewed and considered those submissions.

[5] In those submissions, Canada also raises a new objection. It says that the appellant's case, directed at an exercise of Crown prerogative power, is not justiciable and should not be heard.

[6] Following oral argument, while this matter was under reserve, the Supreme Court of Canada released its decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44. On some Aboriginal law issues, the decision is rather sweeping. So we invited the parties to provide supplementary written submissions on its effect on this appeal. We have now reviewed and considered those submissions too.

[7] In my view, the Federal Courts system has the jurisdiction to review exercises of federal Crown prerogative power. Accordingly, the Federal Court and this Court have jurisdiction over this matter. I would also reject Canada's submission that the appellant's case is not justiciable.

[8] On the merits of the appeal, I agree with the result and much of the reasoning of the Federal Court. It applied proper legal principles to the evidence before it. The recent case of *Tsilhqot'in Nation* does not alter those legal principles. The Federal Court's overall conclusions – that the appellant had not established a causal relationship between the effects of the foreign investment promotion and protection agreement upon the appellant and its asserted rights and interests and that any effects upon the appellant were "non-appreciable" and "speculative" – were predominantly factual in nature and deserve deference. These conclusions were amply supported by the evidentiary record.

[9] Accordingly, Canada did not have to consult with the appellant before entering into the foreign investment promotion and protection agreement.

[10] Therefore, I would dismiss the appeal with costs.

B. Basic facts

[11] The appellant is a band under the *Indian Act*, R.S.C. 1985, c. I-5. Its 285 members live on two reserves covering roughly 56 acres of land on Vancouver Island. However, it asserts Aboriginal rights, including self-government rights, and title over roughly 573,000 acres of land on Vancouver Island, an area that overlaps with the territory claimed by nine other First Nations.

[12] On September 9, 2012, Canada announced that it had signed a foreign investment promotion and protection agreement with the People's Republic of China. This agreement is known as 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* (hereafter "Agreement"). The Agreement is similar to twenty-four other foreign investment promotion and protection agreements Canada has signed with other nations.

[13] Under the Agreement, Canada and the People's Republic of China must, among other things, treat investors from the other country and their investments in accordance with principles of non-discriminatory treatment and protection from expropriation without compensation. The Agreement implements these principles in the following provisions:

- *Article 4 (Minimum Standard of Treatment).* The host country must treat investments made by the investors of the other country in accordance with the customary international law minimum treatment of aliens.

- Article 5 (Most-Favoured Nation Treatment). The host country must accord investors of the other country, and their investments, treatment that is no less favourable than the treatment the host country accords, in like circumstances, to investors or investments of other countries.

- *Article 8 (Aboriginal Reservation).* Under Article 8(3) and Annex B.8, Canada has the right to provide rights and preferences to Aboriginal peoples that may be inconsistent with certain obligations under the Agreement; the appellant says this narrow exception, applicable only to articles 5-7, does nothing to prevent harm to the rights and interests of Aboriginal peoples.

- *Article 10 (Expropriation).* The host country may only directly or indirectly expropriate an investment of an investor of the other country for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and upon payment of compensation. 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.

- *Article 33 (General Exceptions).* The host country 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.

[14] In certain circumstances, violations of the Agreement can result in proceedings before an arbitral tribunal: see Part C, articles 19-32. Violations of certain provisions can result in monetary awards against the host country: article 31(2) and see the Federal Court's reasons at paragraphs 87 and 133(h).

[15] The Agreement does not empower any awards against a sub-national government, such as a First Nations government. Nor does it require a government to change or discontinue a measure that breaches the Agreement. In particular, an arbitral tribunal established under the Agreement cannot stop Canada from fully complying with its obligations to Aboriginal peoples.

[16] Broadly speaking, the appellant says that the Agreement changes the landscape in the sense that it creates incentives for Canada to act in a manner that avoids breaches of the Agreement and resulting monetary awards. This, it says, may cause Canada to act in a manner that injures the appellant and its interests.

[17] On the law set out in cases such as *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, and *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, the appellant says that Canada became obligated in these circumstances to consult with it and accommodate its rights and interests. Before signing the Agreement and, indeed, before the matter was heard in the Federal Court, Canada did not consult with the appellant. The appellant maintains that had Canada consulted with it, Canada would have had to protect the appellant's rights in the Agreement. But Canada did not.

[18] Before the Federal Court, the parties adduced expert evidence concerning the interpretation and effects of the Agreement. The Federal Court assigned less weight to the expert evidence tendered by the appellant because of impartiality concerns (at paragraphs 37-38) and the presence of "assertions on key issues" that "were baldly stated and unsubstantiated" (at paragraph 42).

[19] The Federal Court found uncertainty on how arbitral tribunals might interpret the Agreement. But overall, largely based on the expert evidence it preferred – that tendered by Canada – the Federal Court found no conflict, actual or potential, between the provisions of the Agreement on the one hand and the appellant's asserted rights, interests and title on the other (at paragraphs 133, 147-148).

[20] Among other things, it found that the Appellant had not offered sufficient evidence, beyond the speculative, that:

- the appellant would face potential adverse impacts arising from arbitral decisions (at paragraphs 100-105);

- absent article 10, Canada would have been prepared to expropriate land, and particularly land owned by Chinese investors, without compensation in order to settle the appellant's Aboriginal claims (at paragraphs 108-110);

- arbitral tribunals would rule that measures designed to protect or accommodate the appellant's asserted Aboriginal rights contravene article 10 (at paragraphs 106-120);

- Canada would refrain from taking measures to protect the appellant's asserted Aboriginal rights due to a fear of monetary awards made by arbitral tribunals under the Agreement (at paragraph 133(d));

- Canada has not retained sufficient policy flexibility through the exemptions under the Agreement to prevent or avoid potential adverse impacts upon the appellant's asserted Aboriginal rights (at paragraphs 121-131);

- any existing measures, including any enacted by the appellant, might contravene or conflict with any of the obligations under the Agreement (at paragraph 133(f)).

[21] In reaching these conclusions, the Federal Court drew in part upon Canada's experience under the twenty-four other similar foreign investment promotion and protection agreements it has entered into, particularly the *North American Free Trade Agreement*: at paragraph 133(a). The Federal Court concluded that the appellant had not shown that Canada's experience under the Agreement would be different: at paragraph 133(c).

[22] Overall, the Federal Court concluded that Canada did not fall under a duty to consult the appellant because the alleged potential adverse impacts on its asserted interests were "non-

appreciable" and "speculative" and the appellant had not established the required causal link between the Agreement and those alleged impacts: at paragraphs 3, 147 and 148.

C. Analysis

(1) The matter under review and the nature of the jurisdictional issue

[23] The matter under review is the coming into effect of the Agreement. This, the appellant says, will happen without consultation with it, thereby violating its rights.

[24] How does this Agreement come into effect? The parties agree that this happens in two steps.

[25] First, the Governor in Council passes an order in council authorizing the Minister of Foreign Affairs to take the actions necessary to have the Agreement come into effect. At the time of the appellant's judicial review, this had not been done.

[26] Second, the Agreement comes into effect when the Minister signs an instrument of ratification and Canada delivers it to the People's Republic of China, confirming that all of Canada's internal legal procedures for bringing the Agreement into effect have been met. See Hugh M. Kindred *et al.*, eds., *International Law Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery 2006) at pages 120-121.

[27] This process is reflected in section 35 of the Agreement. It provides that the parties will notify each other through diplomatic channels that they have completed the internal legal procedures for the entry into force of the Agreement.

[28] While this matter was under reserve, the parties advised us that Canada has now taken the above steps and the Agreement is now in effect. This development does not affect our analysis of the issues in this appeal.

[29] In the Federal Court, the appellant primarily sought two forms of relief. First, it sought a declaration that "Canada is required to engage in a process of consultation and accommodation with First Nations, including the appellant, prior to taking steps which will bind Canada under the [Agreement]." Second, it sought an order restraining the Minister or any other official from taking steps to bring the Agreement into effect.

[30] Unlike the present case, in cases seeking review of orders or decisions made under legislation, this Court indisputably has jurisdiction. Under section 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, this Court can review the actions of federal boards, commissions or other tribunals. The Governor in Council is a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the *Federal Courts Act* – it is exercising "jurisdiction or powers conferred by or under an Act of Parliament …".

[31] In this case, however, the Governor in Council's power to make the order is not conferred by or under an Act of Parliament. What is the source of its power?

[32] The Governor in Council's power to make the order comes from the Crown's prerogative powers. These are the Crown's remaining inherent or historical powers as the common law has shaped them: Peter W. Hogg, Q.C., *et al.*, *Liability of the Crown*, 4th ed. (Toronto: Carswell, 2011) at pages 19-20. Looking at it another way, prerogative powers are "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": A.V. Dicey, *Law of the Constitution*, 10th ed. (1959) at page 424.

[33] The conduct of foreign affairs is one area where the Crown holds some prerogative powers. These include the power to enter into treaties and international agreements. Properly understood then, to bring the Agreement into effect, the Crown, acting through the Governor in Council, uses its prerogative power to make an order instructing the Minister of Foreign Affairs to issue an instrument of ratification. In turn, the Minister of Foreign Affairs complies with that order.

[34] In principle, exercises of pure Crown prerogative, such as the Governor in Council's exercise of power in this case, can be judicially reviewed: *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374, [1984] 3 All E.R. 935 (H.L.). However, in Canada, in the case of the federal Crown prerogative, the question is where that review can take place. Do the Federal Courts have the power under the *Federal Courts Act* to review exercises of pure Crown prerogative? If not, provincial superior courts have that power by default because of their inherent jurisdiction.

[35] The only appellate authority in Canada on this question is *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.). And that authority suggests that the Federal Courts do not have the power under the *Federal Courts Act* to review exercises of pure Crown prerogative. If *Black* is still good law, the appellant should not have gone to the Federal Courts to restrain or challenge the Governor in Council's exercise of pure Crown prerogative – here, its power to sign the Agreement and cause it to come into effect.

(2) Analysis of the jurisdictional issue

[36] In their memoranda of fact and law submitted prior to this appeal, the parties did not address the jurisdiction of the Federal Courts to entertain this matter. Both assumed that the Federal Courts had jurisdiction.

[37] In response to questioning at the hearing of this appeal, both agreed that the Federal Courts had jurisdiction. However, both, understandably, were not fully prepared to address the authority of *Black*, a case neither had cited in its memorandum.

[38] Regardless of the parties' agreement that this Court has jurisdiction, this Court cannot proceed unless it is persuaded that it has jurisdiction. Therefore, at the hearing of this appeal, we heard full argument on the merits of the appeal but we also asked the parties to make further written submissions on the issue of jurisdiction.

[39] The parties have done so, and the Court has received and considered the parties submissions. The Court thanks the parties for their thorough, helpful submissions.

[40] As evident from the preliminary discussion, above, the jurisdiction of this Court turns upon two provisions of the *Federal Courts Act*, subsections 2(1) and 18.1(3). Subsection 18.1(3) provides as follows:

18.1. (3) On an application for judicial review, the Federal Court may	**18.1.** (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut.
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[41] As can be seen, the Federal Courts can only exercise these powers if they are reviewing a "federal board, commission or other tribunal." Subsection 2(1) defines that term:

2. (1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une

Crown… prérogative royale…

[42] Above, I noted that the making of an order by the Governor in Council authorizing the Minister of Foreign Affairs to issue an instrument of ratification is one founded upon the Crown prerogative and nothing else. When federal officials act purely under the federal Crown prerogative and nothing else, are they exercising a power "conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" within the meaning of subsection 2(1) of the *Federal Courts Act*?

[43] *Black*, *supra* arose from the British government's nomination of Black, then a Canadian citizen, for a peerage. Acting under the Canadian Crown prerogative relating to the bestowal of honours, the then Prime Minister of Canada advised the Queen to block the peerage, advising that it was against Canadian law. As a result, Black did not become a peer. In the Ontario Superior Court of Justice, Black brought an action for damages against the Prime Minister, alleging that the Prime Minister wrongly interfered with the Queen and blocked his peerage.

[44] In *Black*, all agreed that the Federal Courts and provincial superior courts had concurrent jurisdiction over actions against the federal Crown and its servants: *Federal Courts Act*, *supra*, subsection 17(1). However, Canada, seeking to strike out Black's action, argued that the action was really a review of a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the *Federal Court Act*. Under subsection 18(1) of the *Federal Court Act*, the Federal Court alone has jurisdiction to conduct such a review. Therefore, said Canada, Black was barred from bringing his proceeding anywhere but the Federal Court.

[45] The Court of Appeal for Ontario disagreed, adopting a purely textual approach to subsection 2(1) of the *Federal Courts Act*. It held (at paragraphs 69-76) that the Prime Minister's actions were an exercise of the pure prerogative power of the Crown relating to honours. In its view, subsection 2(1) does not empower the Federal Courts to review exercises of pure prerogative power. It only authorizes reviews of conduct under an "order made pursuant to a prerogative of the Crown." As there was no order under which the Prime Minister was acting, the Federal Courts could not entertain the matter. Only the Ontario Court system with its inherent jurisdiction could.

[46] Today, on the facts of *Black*, it might not have been necessary for the Court of Appeal for Ontario to consider the definition of "federal board, commission or other tribunal" and define it as narrowly as it did. We now know that in certain circumstances, an action against the federal Crown may be brought in a provincial superior court even where the conduct of a "federal board, commission or other tribunal" is bound up in it in some way: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585. Through today's lens, the Ontario Courts may well have had jurisdiction over Black's action even though the conduct of the Prime Minister was very much part of it. I would distinguish *Black* on that basis.

[47] However, it is important to clarify matters of jurisdiction where possible and ensure that the law on such a fundamental point is clear: *Steel v. Canada (Attorney General)*, 2011 FCA 153, [2011] 1 F.C. 143 at paragraphs 62-73. In my view, certain jurisprudential developments have overtaken the reasoning of the Court of Appeal in *Black*. Its conclusion that the Federal Courts cannot review exercises of federal Crown prerogative power can stand no longer.

[48] The Supreme Court of Canada has emphasized that in interpreting legislative provisions one must look at the text, context and purpose of the provision: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559. In a case postdating *Black*, the Supreme Court has emphasized that while the text of the provision may predominate in the analysis, the analysis cannot stop with the text as it did in *Black*. Instead, one must go on to examine the context of that text in the wider statute and its purpose: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.

[49] I begin with the text. I agree that the text of subsection 2(1) of the *Federal Courts Act* can be construed in the manner done by the Court of Appeal in *Black*. However, it can also be construed in a manner that supports the jurisdiction of the Federal Courts to review pure exercises of federal Crown prerogative.

[50] As mentioned above, the issue in this case is whether federal officials exercising a pure prerogative power are exercising a power "conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" within the meaning of subsection 2(1) of the *Federal Courts Act*. The answer is yes if we construe subsection 2(1) as allowing reviews of powers "conferred…by…a prerogative of the Crown." The rival interpretation of subsection 2(1), adopted in *Black*, is that "by or under" modifies "an order" and so unless an official is acting under an order made under the prerogative, this Court does not have jurisdiction.

[51] Either reading of the text of subsection 2(1) is plausible. So to decide the matter, we must consider the context of subsection 2(1) and its purpose.

[52] Parliament intended to grant to the Federal Courts general administrative, supervisory jurisdiction over all federal decision makers: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at paragraph 36; *M.N.R. v. Derakhshani*, 2009 FCA 190, 400 N.R. 311 at paragraphs 10-11. Parliament established the Federal Courts under the *Federal Courts Act* to supervise federal administrative decision-makers to ensure consistency across the country: *Southam Inc. v. Canada (Attorney General)*, [1990] 3 F.C. 465 at page 481 (C.A.); *Canada v. Tremblay*, 2004 FCA 172, [2004] 4 F.C. 165 at paragraph 10 (C.A.).

[53] It is true that provincial superior courts have inherent jurisdiction. But, as the Supreme Court has held, "[t]he doctrine of inherent jurisdiction raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court." Nor does it justify reading "statutes which purport to grant jurisdiction to [the Federal Court]…narrowly so as to protect the jurisdiction of the superior court": *Canadian Liberty Net*, *supra* at paragraphs 32 and 34. The Supreme Court has also emphasized that gaps should not be found in the *Federal Courts Act* unless the "words clearly created them": *Canadian Liberty Net*, *supra* at paragraph 34. Given these authoritative statements from the Supreme Court, unless there are clear words to the contrary, the text of the *Federal Courts Act* must be interpreted to achieve its purposes.

[54] An interpretation that the Federal Court has the power to review federal exercises of pure prerogative power is consistent with the Parliament's aim to have the Federal Courts review all federal administrative decisions. The contrary interpretation would carve out from the Federal Courts a wide swath of administrative decisions that stem from the federal prerogative, some of which can have large national impact: for a list of the federal prerogative powers, see Peter W. Hogg, Q.C., *et al.*, *Liability of the Crown*, *supra* at pages 23-24 and S. Payne, "The Royal Prerogative" in M. Sunkin and S. Payne, eds., *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999).

[55] One must also appreciate the wider context surrounding the nature of the federal Crown prerogative. It can be exercised through a variety of instruments and means: A. Berriedale Keith, *The King and the Imperial Crown* (London: Longmans, Green and Co., 1936) at page 68. The particular language used in section 2 of the *Federal Courts Act* to capture the exercise of the prerogative can be explained as merely an attempt to mirror the way that the prerogative is habitually or commonly understood to be exercised, *i.e.*, by officials acting under an order made under the prerogative. Or it can be interpreted in the manner I have done in paragraph 49, above or in the manner done by the Federal Court in *Khadr v. Canada (Attorney General)*, 2006 FC 727, [2007] 2 F.C. 218.

[56] The contrary interpretation – an interpretation that hives off exercises of federal prerogative power from exercises of powers under orders made by or under the prerogative power – is a technical distinction that serves only to trap the unwary and obstruct access to justice. In *TeleZone*, *supra*, a case postdating *Black*, the Supreme Court underscored (at

paragraphs 18-19 and 32) the need to interpret these provisions with a view to avoiding these concerns.

[57] In the case at bar, these concerns are very much in play. If the contrary interpretation is adopted, the Governor in Council's making of the order in this case authorizing the Minister to issue the instrument of ratification – a pure exercise of prerogative power – would have to be reviewed in the provincial superior courts. But the Minister's issuance of the instrument of ratification in this case – an exercise of power "by or under an order made under the prerogative" under subsection 2(1) of the *Federal Courts Act* – would have to be reviewed under this Court's exclusive jurisdiction under subsection 18 (1) of the *Federal Courts Act*. There would have to be two separate proceedings in two separate courts, with every potential for unnecessary expense, delay, confusion and inconsistency.

[58] In light of the foregoing, I conclude that the Federal Courts can review exercises of jurisdiction or power rooted solely in the federal Crown prerogative.

(3) The justiciability issue

[59] In the course of its written submissions on this Court's jurisdiction, Canada says that if exercises of pure federal Crown prerogative are potentially reviewable, then this Court still cannot consider them. The subject-matter, being policy-oriented and concerned with foreign relations, is not justiciable, *i.e.*, it is not appropriately reviewable in a court of law.

[60] In support of this, Canada submits that exercises of pure federal Crown prerogative are reviewable only where Charter rights are in issue. They cite *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paragraphs 36-37 and *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.

[61] It is true that these cases do stand for the narrow proposition that Charter cases are justiciable regardless of the nature of the government action, be it an exercise of the Crown prerogative or otherwise. But these cases do not stand for the broad proposition that all other exercises of the Crown prerogative are not justiciable. In fact, as I shall demonstrate, some are.

[62] Justiciability, sometimes called the "political questions objection," concerns the appropriateness and ability of a court to deal with an issue before it. Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.

[63] Whether the question before the Court is justiciable bears no relation to the source of the government power: *R. v. Ministry of Defence, ex parte Smith*, [1995] 4 All E.R. 427, aff'd [1996] Q.B. 517, [1996] 1 All E.R. 257 (C.A.). For some time now, it has been accepted that for the purposes of judicial review there is no principled distinction between legislative sources of power and prerogative sources of power: *Council of Civil Service Unions, supra*. I agree with the following passage from Lord Roskill's speech in that case (at page 417 A.C.):

> If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the

> exercise of that power may be challenged on one or more…grounds…. If the executive instead of acting under a statutory power acts under a prerogative power…I am unable to see…that there is any logical reason why the fact that the source of the power is the prerogative and not statute should deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.

[64] I also agree with the Court of Appeal for Ontario in *Black*, *supra* at paragraph 44 that "the source of the power – statute or prerogative – should not determine whether the action complained of is reviewable."

[65] So what is or is not justiciable?

[66] In judicial review, courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paragraph 70. Usually when a judicial review of executive action is brought, the courts are institutionally capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility, and that assessment is the proper role of the courts within the constitutional separation of powers: *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In rare cases, however, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers. For example, it is hard to

conceive of a court reviewing in wartime a general's strategic decision to deploy military forces in a particular way. See generally *Operation Dismantle, supra* at pages 459-460 and 465; *Canada (Auditor General)*, [1989] 2 S.C.R. 49 at pages 90-91; *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at page 545; *Black*, *supra* at paragraphs 50-51.

[67] These cases show that the category of non-justiciable cases is very small. Even in judicial reviews of subordinate legislation motivated by economic considerations and other difficult public interest concerns, courts will still assess the acceptability and defensibility of government decision-making, often granting the decision-maker a very large margin of appreciation. For that reason, it is often said that in such cases an applicant must establish an "egregious" case: see, *e.g.*, *Thorne's Hardware v. Canada*, [1983] 1 S.C.R. 106 at page 111, 143 D.L.R. (3d) 577; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 at paragraph 28. But the matter is still justiciable.

[68] There are authorities suggesting that executive decisions to sign a treaty, without more, are not justiciable: see, e.g., *R. v. Secretary of State for Foreign and Commonwealth Affairs, Ex. P. Everett*, [1989] 1 All E.R. 655 at page 690, [1989] Q.B. 811, cited in *Black*, *supra* at paragraph 52. This makes sense, as the factors underlying a decision to sign a treaty are beyond the courts' ken or capability to assess, and any assessment of them would take courts beyond their proper role within the separation of powers.

[69] But here the gist of the appellant's challenge is different. It alleges that, regardless of the factors prompting the Agreement, the decision of the executive to bring the Agreement into

effect would be unacceptable and indefensible because the appellant has enforceable legal rights to be consulted before that happens. In this case, acceptability and defensibility turns on whether or not the appellant has those legal rights.

[70] Assessing whether or not legal rights exist on the facts of a case lies at the core of what courts do. Under the constitutional separation of powers, determining this is squarely within our province. Canada's justiciability objection has no merit.

(4) The standard of review in this Court

[71] At the outset, we must assess the true or real nature of the appellant's application: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] DTC 5001 at paragraph 50.

[72] In reality, the appellant's request for a declaration arises in the context of a decision made by the Government of Canada. The Government of Canada decided, implicitly or explicitly in the face of the appellant's stated position, that it could bring the Agreement into effect without consulting with the appellant or other Aboriginal peoples. Through the use of a declaration, the appellant seeks to invalidate that decision. The appellant also seeks an order restraining Canada from taking steps that would bring the Agreement into effect.

[73] I need not consider whether the standard of review of the decision is correctness or reasonableness. If the standard of review is reasonableness, the only acceptable and defensible

outcome available to the Government of Canada in this case is compliance with the law concerning the duty of consultation. The question before us is a binary one. Either there is a duty or there is not, and since Canada did not consult, Canada's decision either stands or falls on that question alone.

[74] As will be evident from the discussion below, in the course of its reasons, the Federal Court made certain findings heavily suffused by its appreciation of the evidence. In this Court, what standard of review applies to those sorts of findings?

[75] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, 2013 SCC 36 at paragraph 46 stands for the proposition that we are to stand in the shoes and consider whether the Federal Court properly applied the standard of review. I do not believe that this allows us to substitute our factual findings for those made by the Federal Court.

[76] In my view, as is the case in all areas of appellate review, absent some extricable legal principle, we are to defer to findings that are heavily suffused by the first instance court's appreciation of the evidence, not second-guess them. Only palpable and overriding error can vitiate such findings. In the context of the existence of Aboriginal title, the Supreme Court held to similar effect in *Tsilhqot'in Nation*, *supra* at paragraph 52.

[77] In other words, in this case, absent legal error, deference is owed to the Federal Court's largely factual findings described above in paragraphs 13-15 and 18-22.

[78] However, in this case, nothing turns on this. As is evident from some of the discussion below, had I been in the Federal Court's position I would have made the same factual findings.

(5) Was a duty to consult triggered?

[79] The parties agree that the Federal Court identified the correct law concerning what triggers the duty to consult and, if necessary, accommodate Aboriginal rights and title which have been asserted but not yet proven. That law is found in *Rio Tinto*, *Mikisew*, and *Haida Nation*, all *supra*.

[80] As mentioned above, while this matter was under reserve the Supreme Court of Canada released *Tsilhqot'in Nation*, *supra*. We asked for further submissions. Having considered those submissions, I conclude that *Tsilhqot'in Nation* has not changed the law concerning when Canada's duty to consult is triggered. Indeed, it confirms that *Rio Tinto*, *Mikisew*, and *Haida*, all *supra*, still set out the correct law on this point: see *Tsilhqot'in Nation* at paragraphs 78, 80 and 89.

[81] Of the three cases, *Rio Tinto* comes later and incorporates the earlier holdings in *Mikisew* and *Haida* concerning the duty to consult. In *Rio Tinto*, the Supreme Court set out specific elements that must be present to trigger the duty to consult. However, it also set out certain aims the duty is meant to fulfil. These aims are best kept front of mind when assessing whether the specific elements are present.

[82] The Supreme Court identified two aims the duty to consult is meant to further. First is "the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests": *Rio Tinto*, *supra* at paragraph 50. Second is the need to "recognize that actions affecting unproven Aboriginal title or rights or Agreement rights can have irreversible [adverse] effects that are not in keeping with the honour of the Crown": *Rio Tinto*, *supra* at paragraph 46.

[83] This last-mentioned idea – that the duty is aimed at preventing a present, real possibility of harm caused by dishonourable conduct that cannot be addressed later – is key:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of [Agreement] negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

(*Haida*, *supra* at paragraph 27.)

[84] Given those aims, the Supreme Court in *Rio Tinto*, *supra* at paragraphs 40-50 has told us three elements must be present for the duty to consult to be triggered:

- a "real or constructive knowledge of [an Aboriginal] claim to the resource or land to which it attaches" (at paragraph 40);

- "Crown conduct or a Crown decision that engages a potential Aboriginal right," meaning conduct even at the level of "strategic, higher level decisions" (at paragraph 44) that "may adversely impact on the claim or right in question" (at paragraph 42) or create a "potential for adverse impact" (at paragraph 44);

- a "possibility that the Crown conduct may affect the Aboriginal claim or right" in the sense of "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights" (at paragraph 45).

[85] Both before the Federal Court and in this Court, the central issue was whether the third of these requirements – a causal relationship between the Crown conduct and potential adverse impacts on pending Aboriginal claims or rights – was met. The degree of causal relationship and whether it has been met in this case lies at the core of the debate between the parties.

[86] On this, the parties agree that the Federal Court accurately identified the law concerning the degree or quality of causal relationship that must be present in order to trigger a duty to consult. That law is found, once again, in *Rio Tinto*, *supra* and contains two elements:

- The focus of the analysis must be the effect caused by the Crown conduct on Aboriginal rights or the exercise of rights (at paragraph 46). A general "adverse impact" or an effect caused on matters divorced from rights, such as "a First Nation's future negotiating position," is irrelevant (at paragraphs 46 and 50);

- While a "generous, purposive approach [must] be taken," the effect on rights must be one of "appreciable adverse effect." While "possible" impacts can qualify, those that are "[m]ere[ly] speculative…will not suffice" (at paragraph 46).

[87] As mentioned, the Federal Court identified and stated all of this law. What the appellant raises in this appeal is whether the Federal Court applied this law correctly to the facts of this case.

[88] On the facts, the Federal Court concluded that the potential adverse effects the Agreement may have upon the appellant's Aboriginal rights are "non-appreciable" and "speculative" and so a duty to consult with the appellant does not arise. Put another way, the appellant had not demonstrated a causal relationship between the Agreement and potential adverse impacts on asserted Aboriginal claims or rights.

[89] As will be evident from the discussion below, in this Court the appellant has not shown any palpable and overriding error in how the Federal Court applied the law to the facts of this case or in its fact-finding. In any event, I agree with the Federal Court's factually suffused conclusions.

[90] In this Court, the appellant submits that the Federal Court's conclusion that the Agreement's effects were "speculative" was primarily based on its view of the content of obligations assumed by Canada under the Agreement. But, the appellant says, that was based on the Federal Court's fundamental misapprehension of the evidence before it about those

obligations. The Federal Court stated that the appellant had failed to lead enough persuasive evidence about the consequences of other foreign investment promotion and protection agreements that would shed light on Canada's obligations under the Agreement. In fact, says the appellant, those other agreements and their consequences were before the Court. The Federal Court's error in overlooking these was a palpable and overriding error.

[91] The problem with the appellant's submission is that notwithstanding the existence of other agreements, there is no evidence deserving of sufficient weight that these agreements are causing or might cause Canada to make decisions that are contrary to law. In particular, there is no evidence that those agreements are causing Canada to make decisions that do not respect Aboriginal rights.

[92] It bears noting that, as the Federal Court found (at paragraphs 87, 133(f) and 144), the Agreement does not contravene or contradict any domestic law at either the federal or sub-national government level, does not change the way in which the appellant could exercise its rights under a future treaty, or give arbitral tribunals the power to invalidate any measures that may be adopted by the appellant or by Canada in the future to protect the appellant's asserted Aboriginal rights: see also paragraph 20, above. There is no basis to interfere with these factual findings.

[93] The appellant also submits that the Federal Court applied the wrong legal test when it held that the adverse effects identified by the appellant were too "speculative," insignificant and "non-appreciable" to trigger the duty to consult. The appellant suggests that the threshold to

trigger the duty to consult is "very low" – even quite insignificant effects on asserted rights or title can suffice.

[94] The appellant adds that the Federal Court overlooked a "chilling effect" that will arise when the Agreement takes effect. It says that the Agreement inhibits Canada's ability or willingness to take steps to regulate or prevent the use of lands and resources by Chinese investors that are the subject of the appellant's rights and title claims. The appellant suggests that Canada will fear the monetary awards imposed for non-compliance under the Agreement and will exercise its regulatory and other powers less aggressively.

[95] The appellant adds that the Federal Court wrongly required 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. The appellant notes that a chilling effect is not susceptible to easy proof.

[96] At the root of this allegation of chilling effect is a speculation that Canada will not want to incur an adverse monetary award so it would likely avoid taking action barred by the Agreement that would prevent infringements of Aboriginal rights. In effect, the speculation is that when push comes to a shove Canada will subordinate Aboriginal rights to its desire to avoid economic penalties under the Agreement.

[97] The appellant calls this logic and common sense. It is actually pure guesswork. We cannot assume that there will be a collision between protecting Aboriginal rights and a monetary

award under the Agreement, nor can we assume that Canada will prioritize the latter over the former; indeed we cannot assume that that will happen even once: *Gitxaala National v. Canada*, 2012 FC 1336, 421 F.T.R. 169 at paragraph 54. We have no idea whether the two will ever clash.

[98] On the information in this record, it is equally possible to assume that Canada will prioritize the protection of rights over economic penalties. Government priorities can shift over time according to the circumstances, can shift in accordance with the particular decision to be made, and can shift in accordance with popular opinion and electoral results that express that opinion. And sometimes governments affirm rights regardless of the financial cost or public opinion. At this time, we can only guess as to what will happen under the Agreement and what decisions or events will arise, or whether there will ever be any decisions or events requiring response. And, as we shall see, after the Agreement comes into effect, if any actual non-speculative effects on the appellant's rights appear on the horizon and become possible, the appellant will have many opportunities to protect its rights fully and prevent any harm, especially irreversible harm.

[99] Until there is at least a prospect of a decision or event prompted by the Agreement and until we know the nature of that decision or event, we cannot say with any degree of confidence or estimate any possibility that there will be a collision between protecting Aboriginal rights and a monetary award under the Agreement. If a decision or an event prompted by an agreement affecting Aboriginal rights were in prospect, a duty to consult might then arise depending on whether it causes a possibility of harm. But nothing is in prospect at this time, nothing can be defined, nor can we even say that anything problematic might ever arise. At this time, all we can

do is imagine decisions or events and impacts from them that might or might not happen as a result of the Agreement. However, the duty to consult is triggered not by imaginings but by tangibilities.

[100] Indeed, the evidence we do have at this time – evidence of what has happened under other foreign investment promotion and protection agreements – suggests that concerns arising from these agreements have not arisen: see the Federal Court's reasons at paragraphs 133(a), (c) and (d) and paragraph 69 of the main affidavit Canada has adduced. There is no evidence to suggest that these agreements have impaired the ability of any level of government to protect Aboriginal rights and interests, or the rights and interests themselves, whenever the need arises.

[101] Before us, the appellant emphasized that there is a difference between "possibilities" and "speculations" and that while the Supreme Court said the duty to consult does not arise in the case of the latter, it does in the case of the former. The mere possibility of harm is enough.

[102] The appellant is right to draw this distinction to our attention. And in some cases the line between the two might be a fine one. However, the aims behind the recognition of the duty can assist us in drawing the line. To reiterate, they are to protect Aboriginal rights from injury, to protect against irreversible effects and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests: see paragraphs 82-83 above. An impact that is, at best, indirect, that may or may not happen at all (such that we cannot estimate any sort of probability), and that can be fully addressed later is one that falls on the

speculative side of the line, the side that does not trigger the duty to consult. As the Federal Court found on the facts, this case falls on that side of the line.

[103] Once the Agreement comes into effect, it may be expected to increase Chinese investment into Canada. It may be that some of that new investment finds its way into resource development companies. Might those companies eye resources on Aboriginal lands or lands claimed by Aboriginal peoples for development? Maybe. Or maybe not. We just don't know.

[104] But what we do know is that upon the concrete possibility of that development and certainly by the time of application for development permits and approvals by those companies from governments and their agencies, Aboriginal peoples will have access, if necessary, to administrative decision-makers and the Courts for protection. That protection may be by way of application for interim or permanent injunctive relief, prohibition, *certiorari* or, if Canada is somehow not involved and should be, *mandamus*. In these ways, an aggrieved party may allege, with evidence in support, among other things that Canada is improperly prioritizing the risk of a monetary award under the Agreement over Aboriginal rights and interests. The jurisprudence of this Court on direct standing to bring a judicial review is liberal enough to fully protect those concerned about non-speculative effects on their legal rights or practical interests: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, 409 N.R. 298 at paragraphs 57-58.

[105] Bearing in mind the aims the duty to consult is meant to fulfil, I cannot say that imposing a duty to consult in this case would further those aims at all. There is no apprehended, evidence-

based potential or possible impact on Aboriginal rights. The imposition of a duty here is not necessary to preserve the future use of the resources claimed by Aboriginal peoples. Any adverse impact on rights stemming from the Agreement, if any, can be addressed later when they rise beyond the speculative and trigger the duty to consult. The appellants have failed to show that anything will be evasive of review before any harm is caused, if ever it is caused.

[106] The appellant further submits that Canada's obligations under the Agreement will last for at least thirty years and cannot be set aside by any government or Canadian court during that period. The Agreement "cannot be undone." That is so, but it adds nothing to the analysis. Until there is a non-speculative impact on rights of the sort I have described above – if there ever is one – a duty to consult simply does not arise.

[107] Next, the appellant says that the Federal Court failed to address one of its arguments. It argued that Canada, by agreeing to be bound by the obligations in the Agreement, has also agreed to ensure that the appellant's exercise of its rights of self-government would be constrained by those same obligations.

[108] I do not accept that Canada has agreed to ensure that the appellant's exercise of whatever rights of self-government it has will be constrained by the provisions of the Agreement. Nothing in the Agreement suggests that, nor is there anything that suggests that result. There is no evidence on this record to suggest any possible impact on rights to self-government.

[109] Again, to the extent that a decision is made or a power is exercised that affects any rights of self-government the appellant has, the appellant will have its legal recourses. Again, a decision in prospect might trigger a duty to consult, but here we have no idea what events or decisions might follow as a result of the Agreement, or even whether any events or decisions might ever be in prospect, let alone whether the appellant's asserted self-government rights might be affected by those events or decisions.

[110] The appellant submits that the Federal Court wrongly required evidence of the presence of investors on its traditional territory with rights under the Agreement and that measures were being contemplated that would impact on those rights.

[111] I do not read the Federal Court's decision so narrowly. The Federal Court was alive to broader impacts said by the appellant to trigger the duty to consult. Those broader impacts, as I have said above and as the Federal Court has found, are speculative at this time.

[112] In the Federal Court and in this Court, the appellant submitted that the Agreement would prevent Canada from enacting a moratorium on resource development, something that would respect the rights of Aboriginal peoples. But as the Federal Court noted (at paragraph 131), that submission relies on layers of speculations or assumptions, conjectures and guesswork, not evidence. Among other things, there was no evidence that Canada is considering or would ever consider, let alone implement such a moratorium, that such a moratorium might adversely impact a potential Chinese investment in the appellant's territory, that the moratorium would be found

by an arbitral tribunal to contravene the Agreement, and that Canada would not retain sufficient policy flexibility to prevent impacts upon the appellant.

[113] The appellant cites several cases showing that high-level management decisions or structural changes can trigger a duty to consult: *Huu-Ay-Aht First Nation v The Minister of Forests*, 2005 BCSC 697, 33 Admin. L.R. (4th) 123; *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354, 303 F.T.R. 106; *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517, 409 F.T.R. 87; *Squamish Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320, 34 B.C.L.R. (4th) 280.

[114] I agree that high-level management decisions or structural changes can trigger a duty to consult, but only where the legal test is met. The cases the appellant cites are distinguishable. I agree with the Federal Court's observation (at paragraph 78) that the Crown conduct in those cases "directly concern[ed] the applicant First Nation's claimed territories or the resources situated upon those territories." In each case, there was, in the words of *Rio Tinto, supra* at paragraph 45, "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights." I agree with the Federal Court's assessment that the case before us is different (at paragraph 78):

> They are all distinguishable from the ratification of the [Agreement], because the [Agreement] does not address any specific lands, potential projects involving specific lands, or specific resources. It is simply a broad, national, framework agreement that provides additional legal protections to Chinese investors in Canada, and Canadian investors in China, which parallel the rights provided in several existing investment protection and trade agreements to which Canada is already a party.

[115] Overall, I believe that at the root of all of the appellant's submissions is its definition of "speculative," a definition that cannot be accepted.

[116] The appellant defines "speculative" as situations where "there is no reasonable basis to conclude that an impact might occur." Applying that definition in this case, the appellant says that there is a reasonable basis for concluding that an impact caused by the Agreement might occur.

[117] What is missing from the appellant's definition of "speculative" is the idea of assumption, conjecture or guesswork. A conclusion is not speculative when it is reached by way of a chain of reasoning all of whose links are proven facts and inferences, joined together by logic. A conclusion is speculative when it is reached by way of a chain of reasoning where one or more of the links are assumptions, conjectures or guesses or where assumptions, conjectures or guesses are needed to join them.

[118] Assuming the Agreement is successful in achieving its objectives, it is true that there will be more investment in Canada from the People's Republic of China. But more investment in Canada does not necessarily lead to the conclusion that the appellant's Aboriginal rights will be affected. The appellant's case founders on that break in the chain of reasoning, a break that can only be repaired by resort to assumptions, conjectures or guesses. In short, the appellant has failed to show, in the words of *Rio Tinto* at paragraph 45, "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on [its] pending Aboriginal claims or rights" that rises above the speculative.

[119] If the appellant's definition of "speculative" were accepted, then just about every decision or action by governments would trigger the duty to consult. Governments announce high-level policies all the time. For example, often measures are proposed to encourage Canadians and others to invest in Canadian businesses and developments, just like the Agreement before us. Does the duty to consult arise every time the government intends to announce measures of that sort?

[120] Taken to its extreme, the appellant's position would require the Minister of Finance – before the annual budget speech in the House of Commons, on every measure in it that might possibly affect the investment and development climate – to consult with every First Nation, large or small, whose claimed lands might conceivably or imaginatively be affected, no matter how remotely, no matter how insignificantly. Such a tenuous triggering and aggressive application of the duty to consult would undercut one of its aims, namely respect for "countervailing Crown interests" – in this example, the Crown's interest in workable governance: *Rio Tinto*, *supra* at paragraph 50.

[121] Finally, just before this Court's judgment in this matter was released, the appellant drew to our attention the recent decision of the Federal Court in *Mikisew Cree Nation v. The Governor General in Council et al.*, 2014 FC 1244, a decision not binding upon us. I see no need for further submissions from the parties on this new authority. In *Mikisew*, the Federal Court noted (at paragraph 93) that the possible or "potential existence" of a harm is sufficient to trigger the duty to consult, a legal proposition supported by Supreme Court case law (see paragraph 86, above). On the particular facts of *Mikisew*, the Federal Court found a possible effect that went

beyond the appreciable and the speculative. For the reasons above, and as found by the Federal Court in this case, the appellant has failed to show on the facts a causal link between the Agreement and any possible harm, let alone any harm that rises above the appreciable and speculative.

[122] Therefore, there are no grounds to set aside the judgment of the Federal Court.

D. Proposed disposition

[123] Therefore, for the foregoing reasons, I would dismiss the appeal with costs. I wish to thank the parties for their helpful submissions.

"David Stratas"

J.A.

“I agree
M. Nadon J.A.”

“I agree
A.F. Scott J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-324-13
APPEAL FROM A JUDGMENT OF THE HONOURABLE CHIEF JUSTICE CRAMPTON DATED AUGUST 26, 2013, NO. T-153-13	
STYLE OF CAUSE:	HUPACASATH FIRST NATION v. THE MINISTER OF FOREIGN AFFAIRS CANADA AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 10, 2014
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NADON J.A. SCOTT J.A.
DATED:	JANUARY 9, 2015

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