Federal Court Cour fédérale

Date: 20130826

Docket: T-153-13

Citation: 2013 FC 900

Ottawa, Ontario, August 26, 2013

PRESENT: THE CHIEF JUSTICE

BETWEEN:

HUPACASATH FIRST NATION

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review regarding the pending ratification of the *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* [CCFIPPA].

[2] The Applicant, Hupacasath First Nation [HFN], seeks a declaration that Canada is required to engage in a process of consultation and accommodation with First Nations, including HFN, prior to ratifying or taking other steps that will bind Canada under the CCFIPPA.

[3] For the reasons that follow, I have concluded that:

> (i) The potential adverse impacts that HFN submits the CCFIPPA may have on its asserted Aboriginal rights, due to changes that the CCFIPPA may bring about to the legal framework applicable to land and resource regulation in Canada, are non-appreciable and speculative in nature. I also find that HFN has not established the requisite causal link between those alleged potential adverse impacts and the CCFIPPA.
>
> (ii) The same is true with respect to the potential adverse impacts that HFN submits the CCFIPPA may have on the scope of self government which it can achieve.
>
> (iii) Therefore, the ratification of the CCFIPPA by the Government of Canada [Canada] without engaging in consultations with HFN would not contravene the principle of the honour of the Crown or Canada's duty to consult HFN before taking any action that may adversely impact upon its asserted Aboriginal rights.

[4] This application will therefore be dismissed.

I. The CCFIPPA

[5] The CCFIPPA was signed at Vladivostok, Russia, on September 9, 2012.

[6] Pursuant to Article 35, Canada and the Government of the People's Republic of China [the "Contracting Parties"] are required to notify each other through diplomatic channels that they have completed the internal legal procedures for the entry into force of their agreement. The CCFIPPA will enter into force on the first day of the month following the month in which the second of the two notifications is received and shall remain in force for a period of at least 15 years.

[7] After the expiration of the initial 15-year period, either party may terminate the CCFIPPA. Such termination will be effective one year after its receipt by the other Contracting Party. However, the agreement will continue to be effective for an additional 15-year period with respect to investments made prior to its termination.

[8] It appears to be common ground between the parties to this proceeding [Parties] that the substantive provisions in the CCFIPPA are highly similar to those in the *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [NAFTA] and closely resemble the provisions in Canada's 2004 Model Foreign Investment Protection Agreement [2004 Model FIPA]. Indeed, HFN acknowledged that the provisions in the CCFIPPA that were the focus of this proceeding "are the same as those set out in NAFTA" (Reply of the Applicant [Reply] at para 33).

[9] According to the *Explanatory Memorandum on the [CCFIPPA]* [Explanatory Memorandum], the CCFIPPA:

[…] is a bilateral treaty designed to protect and promote investment between Canada and the People's Republic of China (the "Parties") by assigning legally binding rights and obligations to both Parties in foreign investment matters.	[…] est un traité bilatéral conçu pour protéger et promouvoir les investissements entre le Canada et la République populaire de Chine (les « Parties »), qui définit des droits et des obligations juridiquement contraignants pour les deux parties en matière d'investissements étrangers.
The Agreement provides Canadian investors operating in the People's Republic of China with additional legal protection, setting out the manner in which Canadian investors should be treated and procedures through which they may pursue alleged breaches of the Agreement. Key provisions include: national treatment, most-favoured nation treatment, minimum standard of treatment, protection against expropriation, obligations for the free transfer of funds and an investor-State dispute settlement mechanism.	L'Accord prévoit une protection juridique additionnelle pour les investisseurs canadiens faisant des affaires en République populaire de Chine, établit la manière dont doivent être traités les investisseurs canadiens et énonce les procédures visant les mesures que peuvent prendre ces investisseurs relativement aux violations alléguées de l'Accord. Les principales dispositions de l'Accord comprennent : le traitement national, le traitement de la nation la plus favorisée, la norme minimale de traitement, la protection contre l'expropriation, les obligations relatives au libre transfert de fonds et un mécanisme de règlement des différends opposant un investisseur et un État.

[10] The CCFIPPA provides the same protections described above to investors of the People's Republic of China [China].

[11] The Explanatory Memorandum also notes that "[c]onsultations on the [CCFIPPA] took place under the ongoing consultation process by the Department of Foreign Affairs and International Trade with stakeholders."

[12] It is common ground between the Parties that such consultations did not include the HFN or other First Nations, notwithstanding that Canada released an initial Environmental Assessment of the CCFIPPA for public comment in February 2008.

[13] Shortly following the announcement of the signing of the CCFIPPA, HFN wrote to Prime Minister Harper to request that the ratification of the agreement be postponed "until there has been full and proper consultation between the Crown and the founding First Nations, including [HFN]." Representatives of other First Nations have made similar requests. To date, HFN's request has not been granted. It appears that the same is true with respect to the requests that have been made on behalf of other First Nations.

[14] No legislative amendments are required to implement the CCFIPPA.

[15] The CCFIPPA is similar in many respects to 24 other foreign investment protection agreements [FIPAs] that Canada has entered into since 1989, particularly those entered into since

1995 (Affidavit of Vernon MacKay, [MacKay Affidavit], Respondent's Record, Volume I, Tab 1, at paras 20 - 31 and 39 - 44).

II. The HFN

[16] The HFN, formerly known as the Opetchesaht Indian Band, is a "band" within the meaning of that term as defined in the *Indian Act*, RSC, 1985, c I-5 [*Indian Act*]. The Hupacasath Chief and Council represent approximately 285 band members, all of whom are Indians as defined in the *Indian Act*.

[17] According to an affidavit sworn by Carolyne Sayers [Sayers Affidavit], a Council member of the HFN, the HFN's band members live on two reserves near Port Alberni on Vancouver Island. It appears that those reserves are located on the banks of the Alberni Inlet, and are approximately 53.4 and 2.6 hectares, respectively, in size. The HFN has three additional reserves in that territory which are not occupied, due to the lack of infrastructure. In total, the HFN asserts Aboriginal rights and title with respect to approximately 232,000 hectares of land in central Vancouver Island, as reflected on the map set forth in Appendix 1 to these reasons.

[18] In her affidavit, which was authorized by, and sworn on behalf of, the HFN's Chief and Council, Ms. Sayers stated that she is concerned that if the CCFIPPA is ratified and implemented the HFN will be negatively affected in a number of ways, including:

a. HFN may be prevented from exercising its rights to conserve, manage and protect lands, resources and habitats in accordance with traditional Hupacasath laws, customs and practices, and in the best interest of its members;

b. HFN may be prevented from negotiating a treaty which protects its rights to exercise its authority in the best interest of the Hupacasath people, including to conserve, manage and protect lands, resources and habitats and to engage in other governance activities, in accordance with traditional Hupacasath law, customs and practices, and in the best interest of its members;

c. disputes over resource use between HFN and companies with Chinese investors will be resolved by the application of international trade and investment law, which Ms. Sayers believes does not provide the same protections for Aboriginal rights and title as Canadian constitutional law;

d. because measures aimed at protecting HFN's rights and title may give rise to significant damage claims, the federal and provincial governments will be less likely to take steps to protect those rights, including engaging in adequate consultation and reasonable accommodation; and

e. the rights of Chinese investors, and the impact of any potential claim under the CCFIPPA on Canada may be taken into account by the government and courts in determining whether a specific measure HFN seeks to protect its rights and title would constitute reasonable accommodation.

III. Issue

[19] In its Application, HFN sought:

a. A declaration that Canada is required to engage in a process of consultation and accommodation with First Nations, including HFN, prior to taking steps that will bind Canada under the CCFIPPA;

b. An order restraining the Minister of Foreign Affaires or any other official or representative of Canada from sending a letter to the People's Republic of China [China] stating that Canada has completed the internal legal procedures for the entry into force of the CCPIFFA, until the appropriate consultation and accommodation has been carried out; and

c. An interlocutory injunction restraining the Minister of Foreign Affairs or any other official or representative of Canada from sending a letter to China stating that Canada has completed the internal legal procedures for the entry into force of the CCFIPPA, until this application has been heard and determined by the Court.

[20] In their written submissions, the Respondents stated that if this Court finds that a duty to consult with HFN has been triggered and breached, it would not be necessary for the Court to go beyond making a declaration that a such a duty is owed to HFN, "as it can be assumed that the government will comply with the law as stated by the courts."

[21] Based on that statement, HFN withdrew its request for the relief described in subparagraphs 19(b) and (c) above.

[22] The Respondents also submitted that any declaration that this Court may issue should be confined to addressing the asserted duty to consult with HFN, and should not address whether a duty to consult is owed to other First Nations. I agree.

[23] As the Respondents noted, HFN did not commence a class action or bring a representative action on behalf of other First Nations. It also did not serve notice on all First Nations so that they could be added as parties. No other First Nations sought to be added as a party to this proceeding.

[24] In these circumstances, I agree that it would not be appropriate for this Court to address, in any declaration that may be made in this proceeding, the issue of whether a duty to consult is owed to other First Nations, even if the formidable practical impediments to workable and meaningful consultations with the over 600 First Nations bands that exist across the country could be overcome. My conclusion in this regard is reinforced by the fact that Aboriginal rights are both band and fact-specific (*R v Gladstone*, [1996] 2 SCR 723, at para 65 and *R v Van der Peet*, [1996] 2 SCR 507, at para 69); and representatives of Aboriginal groups need to be authorized to speak or to bring claims on behalf of their groups (*Sechelt Nation v Bell Pole*, 2013 BCSC 892 (QL), at para 17). Moreover, with one exception, no evidence has been led on behalf of other First Nations regarding the potential impact of the CCFIPPA on their Aboriginal interests.

[25] In its initial written submissions, HFN raised a threshold issue of whether the act of ratifying the CCFIPPA is something that could be subject to judicial review. HFN maintains that ratification of the CCFIPPA is subject to review on the basis that Canada's failure to consult HFN prior to ratification is a breach of its constitutional duty to consult with HFN in respect of a measure that may affect HFN's Aboriginal rights. That said, during the hearing, HFN underscored that it was not suggesting that the Court can review either Canada's prerogative to enter into the CCFIPPA or the content of the CCFIPPA. HFN acknowledges that these are matters of "high policy" that are not amenable to judicial review (*Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215, at para 52). The Respondents have not contested this threshold issue. Indeed, it is clear that the exercise of the prerogative power of the Crown can be reviewed for constitutionality (*Canada (Prime Minister) v Khadr*, 2010 SCC 3, at paras 36-37; *Black*, above, at para 50).

[26] Accordingly, the only issue to be determined in this application is whether, prior to ratifying the CCFIPPA in accordance with Article 33 of the CCFIPPA, Canada has a duty to consult with HFN.

IV. Standard of Review

[27] The ratification the CCFIPPA is an exercise of a prerogative power. It is common ground between the Parties that the exercise of this power is subject to review on constitutional grounds. In this proceeding, HFN submits that Canada's failure to consult with HFN prior to ratifying the CCFIPPA would constitute a breach of Canada's constitutional obligation to engage in

consultations with HFN before taking any action which may adversely affect HFN. It also asserts that such action would be contrary to Canada's constitutional obligation to act honourably in all its dealings with Aboriginal peoples (*Tzeachten First Nation v Canada (Attorney General)* 2007 BCCA 133, at paras 47-49; *Nlaka'pamux Nation Tribunal Council v British Columbia (Project Assessment Director, Environmental Assessment Office)*, 2011 BCCA 78, at para 68).

[28] Given the constitutional nature of this issue, it is subject to review on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 58; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61, at para 30).

V. Preliminary Issues

[29] In their written submissions, the Respondents requested the Court to strike four affidavits sworn on behalf of the Applicant by individuals who are not members of HFN. In the alternative, the Respondents requested that portions of those affidavits be struck. The Respondents maintain that those affidavits or portions thereof, are clearly irrelevant.

[30] The affidavits in question were sworn by Grand Chief Stewart Phillip, Chief James Ahnassay, Chief Bryce Williams and Chief Isadore Day.

[31] The first three of those affidavits focus primarily upon consultations that were requested in respect of the CCFIPPA, and the affiants' concerns regarding the potential implications of the

CCFIPPA on (i) their bands' Aboriginal interests, treaty rights and ability to protect the environment in their territories or (ii) First Nations more generally. Grand Chief Phillip's affidavit also briefly discusses the history behind the establishment of the Union of British Columbia Indian Chiefs and that organization's principal objectives.

[32] Chief Day's affidavit, written on behalf of the Serpent River First Nation and the Chiefs of Ontario Organization [COO], also focuses upon the potential implications of the CCFIPPA on First Nations' treaty and other rights. In addition, it provides an overview of the history of relations between First Nations and the Crown and a more detailed treatment of the concerns of First Nations than is provided in the other three affidavits mentioned immediately above.

[33] Notwithstanding that Grand Chief Phillip, Chief Ahnassay, Chief Williams and Chief Day are not authorized to represent HFN, and have focused on the potential impact of the CCFIPPA on their respective First Nations groups, or on First Nations in general, I have decided to exercise my discretion in favour of allowing their affidavits to remain on the Court record. My decision in this regard is based on my conclusion that those affidavits may potentially assist my understanding of the potential impact of the CCFIPPA on HFN. In the case of Chief Day's affidavit, I consider the history that he provides to be helpful in assisting me to understand the important context in which the Crown's legal duty to consult First Nations arose, particularly as that duty relates to the honour of the Crown and the objective of reconciliation.

VI. Experts

A. Mr. Gus Van Harten

[34] HFN's expert evidence was provided by Mr. Gus Van Harten, in a letter dated February 13, 2013 [Van Harten Opinion] to HFN's counsel.

[35] Mr. Van Harten is an Associate Professor at Osgoode Hall Law School, at York University. He obtained his PhD in 2006 and has since published a number of articles, primarily on investment treaty arbitration. He has also written a book on that topic.

[36] Mr. Van Harten was retained to provide his expert opinion with respect to various aspects of the CCFIPPA. These include the obligations that it imposes upon Canada, the manner in which it differs from other international treaties to which Canada is a party, how it will apply to federal and provincial government action and legislation, how it will apply to domestic judicial decisions which affect land and resources subject to Aboriginal or treaty rights claims, whether principles of domestic law will be taken into account by international arbitrators who are appointed to adjudicate under the CCFIPPA, and whether measures or actions taken by First Nations governments could potentially put Canada out of compliance with the CCFIPPA.

[37] The Respondents submitted that Mr. Van Harten's evidence should be accorded reduced weight because he has been a vocal critic of the type of investor state arbitration provisions that are included in the CCFIPPA and because he has frequently and publicly voiced his opposition to ratification of the CCFIPPA.

[38] Given that HFN acknowledged and did not dispute these allegations, I am inclined to agree with the Respondents' position, primarily on the basis that Mr. Van Harten's ability "to assist the Court impartially," as required by the Court's *Code of Conduct for Expert Witnesses*, SOR/2010-176, would appear to be somewhat compromised.

B. Mr. J. Christopher Thomas, Q.C.

[39] The Respondents' expert evidence was provided by Mr. Chris Thomas, Q.C. in a letter dated March 13, 2013 [Thomas Opinion] to counsel to the Respondents.

[40] Mr. Thomas is a Senior Principal Research Fellow at the National University of Singapore's Center for International Law. He has also practiced in the field of international economic law for over 25 years, taught at two Canadian universities, and worked for the Federal Minister for International Trade during the launch of the Uruguay Round of Multilateral Trade Negotiations and the Canada-United States Free Trade Agreement negotiations. In addition, he acted for the Government of Mexico in relation to the negotiation of the NAFTA and two related agreements on Labour and Environmental Co-operation. He has also practised as an international trade dispute panellist and an international arbitrator.

[41] Mr. Thomas was retained to provide his views on the Van Harten Opinion, including its criticism of international investor-state arbitration; the extent to which the CCFIPPA differs from Canada's past agreements on investment protection; the extent to which the CCFIPPA may prevent

a government from determining an appropriate level of environmental protection, from managing its international resources, or from making changes to its laws; the interaction between the CCFIPPA and Canadian domestic law; remedies that may be granted by an arbitral panel constituted under the CCFIPPA; the extent to which Canada can be held internationally responsible under the CCFIPPA for legislative or judicial decisions with respect to HFN; and the scope of the Aboriginal affairs' exception in the CCFIPPA.

C. General Observations

[42] Given Mr. Van Harten's acknowledged partiality, and given that I generally found Mr. Thomas to be more neutral, factually rigorous and persuasive, I generally accepted his evidence over Mr. Van Harten's when they did not agree. In any event, I found that Mr. Van Harten's evidence did not materially assist HFN to demonstrate that the potential impact of the CCFIPPA on its Aboriginal interests is appreciable and non-speculative, as required to trigger a duty to consult. To a large extent, this was due to the fact that his assertions on key issues were baldly stated and unsubstantiated.

VII. Analysis

A. Duty to Consult – General Principles

[43] The Government of Canada's duty to consult with Aboriginal peoples, including HFN, and to accommodate their interests in certain circumstances is grounded in the honour of the Crown (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at paras 16 and 20 [*Haida*]). In brief, "in all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably." This is necessary to achieve the important goal of "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." In turn, to achieve that goal, the principle of the honour of the Crown must be viewed generously (*Haida*, above, at para 17). Likewise, the duty to consult must be approached in a "generous" and "purposive" manner (*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, at para 43 [*Rio Tinto*].

[44] The honour of the Crown gives rise to different duties in different circumstances. Where, as in the present circumstances with HFN, a treaty with a particular Aboriginal group remains to be concluded, the honour of the Crown implies a duty to consult when the conditions described below are met. Moreover, when those conditions are met, the honour of the Crown further requires that the Aboriginal group's relevant interests be reasonably accommodated, if appropriate (*Haida*, above, at paras 18, 20, 27 and 33).

[45] The Aboriginal interests that are relevant for this purpose are those interests that are protected by s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada" (*Hiawatha First Nation v Ontario (Minister of Environment)*, [2007] OJ No 406, at para 50). For greater certainty, subsection 35(3)

clarifies that, for this purpose, "treaty rights" includes "rights that now exist by way of land claims agreements or may be so acquired."

[46] Given the constitutional dimension of the honour of the Crown, the duty to consult is a "constitutional imperative" (*Nlaka'pamux Nation Tribal Council v British Columbia (Project Assessment Director, Environmental Assessment Office)*, 2011 BCCA 78, at para 68). It seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown (*Rio Tinto*, above, at para 34; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, at para 66).

[47] Once triggered, the content of the duty to consult and accommodate varies with the circumstances. The jurisprudence in this area continues to evolve. However, in general terms "the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and the seriousness of the potentially adverse effect upon the right or title claimed" (*Haida*, above, at para 39).

[48] The present case solely concerns whether the preconditions that must be met to trigger a duty to consult were met. It does not concern the content of that duty, if the duty exists in respect of the ratification of the CCFIPPA.

[49] In *Haida*, above, at paragraph 34, the Supreme Court stated that the duty to consult "arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."

[50] In *Rio Tinto*, above, at para 31, the Court elaborated on this test as follows:

> [31] … This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

[51] I will address each of these three elements of the test separately below. Although HFN also briefly stated in its Application that Canada's duty to consult also arises from the Crown's fiduciary obligations towards First Nations Peoples and the *United Nations Declaration on the Rights of Indigenous Peoples*, Resolution 61/295, 13 September 2007, I agree with the Respondents that the question of whether the alleged duty to consult is owed to HFN must be determined solely by application of the test set forth immediately above. I would add in passing that HFN did not pursue these assertions in either written or oral argument, and that, in a press release issued by Aboriginal Affairs and Northern Development Canada, entitled *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, that Declaration is described as "an aspirational document" and as "a non-legally binding document that does not reflect customary international law nor change Canadian laws." HFN did not make submissions or lead evidence to the contrary.

B. The Crown's Knowledge of HFN's Claims or Rights

[52] It is common ground between the Parties that this element of the test is satisfied.

[53] In her affidavit, Ms. Sayers characterized HFN's asserted Aboriginal rights as including the following:

> a. The right to harvest, manage, protect and use fish, wildlife, and other resources in HFN's traditional territory in priority to all other users, subject only to conservation;
>
> b. Rights to the commercial sale of fish, wildlife and other resources to earn a livelihood;
>
> c. The right to have access to exclusive and preferred areas to harvest or use fish, wildlife and other resources in their traditional territory;
>
> d. The right to protect the habitats that sustain fish, wildlife and other resources which the Hupacasath have a right to harvest;
>
> e. The right to harvest, use and conserve fish, wildlife and other resources and to protect and manage the habitat of fish, wildlife and other resources in accordance with traditional Hupacasath laws, customs, and practices both in their traditional and their modern form; and
>
> f. The right to build, maintain and occupy structures incidental to harvesting, using, managing or conserving fish, wildlife and other resources in HFN's territory.

[54] The Respondents confirmed that they are aware that the foregoing Aboriginal rights have been advanced by HFN, both in treaty negotiations and in litigation. As is immediately apparent, those rights essentially relate to the use, management and conservation of land and resources within HFN's claimed territory. The Respondents acknowledge that those rights are rooted in section 35 of the *Constitution*. It is those rights, and those rights alone, that are relevant for the analysis below.

C. The Contemplated Crown Conduct

[55] It is common ground between the parties that the contemplated Crown conduct in question is the ratification of the CCFIPPA.

D. The Potential That The Contemplated Conduct May Adversely Affect HFN's Asserted Aboriginal Rights

[56] In assessing whether this third element of the duty to consult test is met, it is critical to determine "the degree to which the conduct contemplated by the Crown would adversely affect" the asserted Aboriginal rights (*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at para 34 [*Mikisew*]). While a generous and purposive approach to this element is required, "[m]ere speculative impacts" will not suffice. There must be "an appreciable adverse effect on the First Nations' ability to exercise their aboriginal right" (*Rio Tinto*, above, at para 46). Moreover, the claimant "must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights" (*Rio Tinto*, above, at para 45).

[57] In this regard, adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. This includes high-level management decisions or structural changes to the management of a resource that may adversely affect Aboriginal claims or rights, even if such decisions have no immediate impact on the resource or the land upon which it is situated (*Rio Tinto*, above, at para 47), and even if later opportunities for consultations exist in respect of specific

actions that may be taken pursuant to such high level decisions or structural changes *(Dene Tha' First Nation v British Columbia (Minister of Energy and Mines)*, 2013 BCSC 977, at para 114).

[58] HFN submits that the ratification of the CCFIPPA is such a high-level management decision or structural change and has a non-speculative potential to adversely affect its asserted Aboriginal rights in an appreciable way, even if it will have no immediate impact on its lands or the resources situated thereon. In this regard, HFN adds that Canada's agreement to be bound by the CCFIPPA "may set the stage for further decisions that will have a direct adverse impact on land and resources" (*Rio Tinto*, above, at para 47), by granting Chinese investors enforceable rights which must be taken into account when any level of government in Canada makes any kind of resource management decision.

[59] For the reasons set forth below, I respectfully disagree. In my view, the evidence adduced during this proceeding does not demonstrate that any adverse impacts that the CCFIPPA may have upon HFN's asserted Aboriginal interests will be appreciable and non-speculative. On the contrary, I am satisfied that the adverse impacts which HFN has identified are speculative, remote and non-appreciable. In addition, HFN has not demonstrated the required causal link between the CCFIPPA and those claimed potential adverse impacts.

[60] HFN submitted that the ratification of the CCFIPPA is likely to give rise to the following two general categories of adverse effects:

a. The CCFIPPA will result in a significant change in the legal framework applicable to land and resource regulation in Canada, and that various potential adverse effects on its Aboriginal rights will flow from that change.

b. The rights granted to Chinese investors under the CCFIPPA will directly and adversely impact the scope of self-government which HFN can achieve, either through the exercise of its Aboriginal rights, through the treaty making process, or through the exercise of delegated authority from Canada or the Government of British Columbia.

[61] I will address these two broad categories of claimed adverse effects separately below. However, I will first address a threshold issue raised by the Respondents.

(i) *Can it be said that the CCFIPPA cannot, as a matter of law, trigger a duty to consult?*

[62] The Respondents submit that the ratification of the CCFIPPA cannot, as a matter of law, trigger a duty to consult with HFN. This position is based primarily on its assertions that (i) the ratification of the CCFIPPA will not alter Canadian domestic law or require existing laws or regulations to be changed, and (ii) the authority of arbitral tribunals established under the CCFIPPA will not extend into the domestic sphere. In this latter regard, the Respondents note that the remedial powers of such tribunals will be restricted by the CCFIPPA to awarding monetary damages or restitution of property, solely against Canada and China. As a result, in the event a measure passed by HFN were found by an arbitral tribunal to be in breach of Canada's obligations under the CCFIPPA, the tribunal would have no power to enjoin the measure and it would be Canada, not

HFN, that would be responsible for paying damages or providing restitution. Put differently, any awards issued by arbitral panels under the CCFIPPA will have no binding effect upon HFN.

[63] In support of their position, the Respondents rely upon *Council of Canadians v Canada (Attorney General)* [2005] OJ No 3422 [*Council of Canadians* – OSCJ]; aff'd [2006] OJ No 4751 [*Council of Canadians* – ONCA]. There, the Ontario Court of Appeal upheld a finding of first instance that the fact that the arbitral tribunals set up under Chapter 11 of the NAFTA have not been incorporated into Canada's domestic law negated one possible basis for applying section 96 of the *Constitution* to those tribunals (*Council of Canadians* – ONCA, above, at para 25). However, the Court then declined to address the broader question of whether a tribunal established pursuant to an international treaty is *per se* exempt from section 96, because it was satisfied that the NAFTA tribunals do not violate section 96.

[64] Section 96 of the *Constitution* states:

The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.	Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.

[65] In the course of its reasons, the Court of Appeal observed that although this provision is "framed as an appointing power accorded to the federal government, it is now well established that

section 96 was designed to ensure the independence of the judiciary and to provide some uniformity to the judicial system throughout the country" (*Council of Canadians* – ONCA, above, at para 31).

[66] In reaching the conclusion that Chapter 11 of the NAFTA had not been incorporated into Canada's domestic law, the applications judge observed that international law, which governs NAFTA tribunals, and domestic law, operate in different spheres (*Council of Canadians* – OSCJ, above, at para 41). She then proceeded to conclude that the establishment of tribunals under NAFTA cannot breach the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], because (i) those tribunals have no authority to change Canada's domestic laws or practices, (ii) their jurisdiction is limited to the international law issues before them and the remedies are also circumscribed, (iii) nothing in the NAFTA compels Canada to amend its laws and practices, and (iv) the arbitration of claims that Canada has failed to honour its treaty obligations does not affect or determine the rights of Canadians (*Council of Canadians* – OSCJ, above, at para 65).

[67] The Respondents rely on the foregoing reasoning to assert that the CCFIPPA cannot, as a matter of law, trigger the constitutional duty to consult.

[68] In my view, the fact that the arbitration provisions in the NAFTA, or similar provisions in other FIPAs, may not attract section 96 of the *Constitution* or breach the *Charter* does not preclude the possibility that the ratification of such agreements may trigger the application of the constitutional principle of the honour of the Crown and a duty to consult with First Nations prior to such ratification. One reason why this is so is that the duty to consult is triggered where there is

simply a non-speculative possibility of appreciable impacts on asserted Aboriginal rights, whereas *Charter* rights are only triggered when there is a more serious risk that the alleged violation will occur (*Phillips v Nova Scotia (Westray Mine Inquiry)*, [1995] 2 SCR 97, at para 108; *Council of Canadians* – OSCJ, above, at para 62). Absent other legal considerations that have not been addressed in this proceeding, the question may need to be determined on the basis of the facts and evidence in each case, namely, whether they establish the three elements required to trigger the duty to consult. In any event, given the conclusions that I have reached below regarding the facts and evidence in this case, it is not necessary to make a definitive determination on the Respondents' position that the CCFIPPA cannot, as a matter of law, trigger the duty to consult.

[69] However, I will note in passing that the Respondents' position on this point is inconsistent with provisions that are included in a number of final agreements that Canada has entered into with First Nations, which require it to consult with those First Nations prior to consenting to be bound by a new international treaty which would give rise to new international legal obligations that may adversely affect a right of the First Nations. (See for example *Maa-nulth First Nations Final Agreement*, December 9, 2006, at para 1.7.1; *Lheidli Final Agreement*, October 29, 2006, at para 11; *Tla'amin Final Agreement*, at para 24; *Yale First Nation Final Agreement*, at para 2.8.1; and *Tsawwassen Final Agreement*, clauses 30 and 31 in Chapter 2; see also *Land Claims and Self Government Agreement Among The Tlicho and The Government of the Northwest Territories and The Government of Canada*, at para 7.13.2).

(ii) *Effects flowing from a change in the legal framework applicable to land and resource regulation*

[70] HFN submits that the ratification of the CCFIPPA triggers the duty to consult because it grants Chinese investors new, substantive, and enforceable rights with respect to any investments they may hold, or maintain, in areas over which HFN asserts Aboriginal or treaty rights. HFN maintains that this constitutes a significant change in the legal landscape pertaining to its lands and resources because, among other things, those rights necessarily involve a restriction of the options open to the Crown to address HFN's asserted Aboriginal and treaty claims, and to protect the resources which are the subject of those claims.

[71] It is common ground between the Parties that there does not appear to have been a previous case in which the Courts in Canada have been called upon to assess whether a duty to consult exists in respect of any other investment treaty or similar international agreement.

a. Duty to consult jurisprudence relied upon by HFN

[72] In support of its assertion that ratification of the CCFIPPA would constitute a high-level management decision or structural change that has an appreciable and non-speculative potential to adversely affect its asserted Aboriginal rights, HFN relies on a line of cases in which a duty to consult was found to exist in respect of conduct that was found to meet this test.

[73] I agree with the Respondents that those cases are all distinguishable on the basis that the high-level decisions or structural changes in each of those cases all directly related to land or resources in respect of which Aboriginal peoples have asserted or established Aboriginal rights. By contrast, the CCFIPPA is a broad, national framework investment treaty that does not directly relate

to any particular lands or resources. Rather than being directly or even broadly related to land or resources, it is designed to protect and promote investment between Canada and China by ensuring basic legally binding rights and obligations to investors of both Contracting Parties.

[74] In *Hupacasath First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 1712 [*Hupacasath*], the Crown conduct which gave rise to the duty to consult was the removal of certain lands from a tree farm license [TFL] within claimed HFN territory. It was determined that the removal of those lands from the TFL had the potential to result in a lower level of possible government intervention in the activities on the land than existed under the TFL regime. Justice Lynn Smith elaborated as follows at paragraph 223:

> There is a reduced level of forestry management and a lesser degree of environmental over-sight. Access to the land by the Hupacasath becomes, in practical terms, less secure because of the withdrawal of the Crown from the picture. There will possibly be increased pressure on the resources on the Crown land in the TFL as a result of the withdrawal of the Removed Lands. The lands may now be developed and resold.

[75] Justice Smith added, among other things, that by agreeing to the removal of the lands in question from the TFL, "the Crown decided to relinquish control over the activities on the land, control that permitted a degree of protection of potential aboriginal rights over and above that which flows from the continued application of federal and provincial legislation" (*Hupacasath*, above, at para 225). As further explained in the reasons below, no similar relinquishment of control or non-speculative attenuation of the Crown's ability to protect HFN's asserted Aboriginal rights will occur as a result of the ratification of the CCFIPPA.

[76] In *Gitxsan First Nation v British Columbia (Minister of Forests)*, 2002 BCSC 1701, Justice Tysoe found that the Minister of Forests' consent to a change in corporate control of a company which held a TFL gave rise to a duty to consult. In reaching that conclusion, Justice Tysoe found that the change in the controlling mind of the company, as well as the fact that the effect of the change in control was to protect the company from bankruptcy, gave rise to a non-speculative potential for an adverse effect on the First Nation applicant's Aboriginal rights and title. This was in part due to the fact that the philosophy of the persons making the decisions associated with the licenses may have changed. In addition, any sale by a trustee in bankruptcy (in the absence of such a change in control) would have required the Minister's consent, and he would have been required to consult with the applicants before giving such consent. Once again, ratification of the CCFIPPA has no similar non-speculative potential to adversely impact upon any of the lands or resources over which HFN has asserted Aboriginal rights.

[77] Likewise, the Crown conduct at issue in the other duty to consult cases relied upon by HFN also directly concerned the applicant First Nations' claimed lands or specific resources on those lands. For example:

- In *Huu-Ay-Aht First Nation v The Minister of Forests*, 2005 BCSC 697, the Crown conduct was a forest and range revitalization policy which, among other things, took back 20% of the annual allowable cut from major replaceable forest licenses and tree farm licenses throughout the province, and allocated back to First Nations some of what was taken, based upon a formula that was rejected by the applicants. The Crown

unsuccessfully argued that a duty to consult did not arise until a future point in time at which decisions to grant or renew specific licenses on specific parcels of land occurred.

- In *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354, the Crown conduct at issue was the design of an oversight mechanism, or blueprint, for the construction of the Mackenzie Gas Pipeline [MGP], from which all ensuing environmental and review processes would flow. That mechanism, or Cooperation Plan, conferred no rights, but established the means by which future activities in relation to the MGP, which ran through the applicant's territory, would be managed.

- In *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517, the Crown conduct at issue was the re-issuance of finfish aquaculture licenses in the applicant's territories by the federal government following the assumption of this jurisdiction from the provincial government. The applicant sought consultation because it was concerned that the licences authorizing aquaculture at particular farm sites posed significant risks to the health of nearby wild fisheries, upon which the exercise of their Aboriginal fishing rights depended.

- In *Squamish Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320 [*Squamish*], the Crown conduct at issue was a decision to allow a change in the control and expansion of a proposed ski and golf resort, on lands over which the applicant claimed Aboriginal rights and title. In the course of finding that a duty to consult existed, the Court characterized the practical implications

of the decision to allow a change in control as having been "dramatic" (*Squamish*, above, at para 78).

[78] The foregoing cases all involved Crown conduct which directly concerned the applicant First Nation's claimed territories or the resources situated upon those territories. They are all distinguishable from the ratification of the CCFIPPA, because the CCFIPPA 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.

b. Potential adverse effects identified by HFN

[79] Nevertheless, it remains important to consider each of the principal adverse impacts on its Aboriginal rights that HFN alleges may result from the ratification of the CCFIPPA. For the reasons set forth below, I have concluded that each of those claimed impacts are speculative and non-appreciable. In the absence of more specific asserted interests that may be adversely impacted and more specific measures that may be found to contravene the CCFIPPA, it is also difficult to ascertain the required causal link between the CCFIPPA and a potential adverse impact on HFN's asserted Aboriginal interests.

[80] It is common ground between the Parties that the jurisprudence on what is or is not a speculative or non-appreciable impact is not well developed.

[81] HFN's principal concern appears to be the possibility that the rights conferred upon Chinese investors under the CCFIPPA may be used to challenge or discourage measures which would have the effect of preserving lands and resources that are the subject of its asserted Aboriginal claims. Stated differently, HFN submits that the CCFIPPA may oblige or lead Canada to refrain from taking certain types of measures which would otherwise have been open to it to address conflicts that may develop between Chinese investors and HFN, for example, if HFN takes action to protect its lands and resources for the future.

[82] With respect to the potential "chilling effect" of the CCFIPPA on the government, HFN asserts that even the spectre of potentially substantial awards that may be issued by arbitral panels in favour of Chinese investors may well factor into Canada's analysis of whether to proceed with a proposed measure to protect HFN's asserted Aboriginal rights. In this regard, HFN placed significant weight on evidence provided by Mr. MacKay, Acting Director, Investment Trade Policy Division, Department of Foreign Affairs and International Trade [DFAIT]. In cross-examination, Mr. MacKay confirmed that, when developing regulatory or other policy initiatives, including measures that may be taken to accommodate Aboriginal peoples, the responsible government department is strongly advised to consult with the government's Trade Law Bureau to ensure that the obligations or measures in question are consistent with Canada's international trade and investment obligations (Cross-Examination on Affidavit of Vernon John MacKay, April 3, 2013 [MacKay Cross], Applicant's Record, Volume II, at pp 482-83 and 537).

[83] Given the foregoing, HFN further maintains that ratification of the CCFIPPA will significantly change the equation for the balancing exercise that the Crown is required to conduct where accommodation is required in making decisions that may adversely affect HFN's asserted Aboriginal interests. As a result, HFN states that those interests will be less likely to receive the protection which is currently required in order to maintain the honour of the Crown. For example, if HFN's preferred form of accommodation would expose Canada to significant potential liability to one or more Chinese investors, this may be a factor in Canada's determination of whether such a measure is reasonable.

[84] In support of its positions, HFN relied primarily upon the experience to date under the NAFTA, the international experience with agreements providing for investor-state arbitration, and the ongoing uncertainty regarding how arbitral panels are likely to assess claims under the CCFIPPA. However, HFN also encouraged the Court to look beyond the experience to date under NAFTA and other international trade and investment agreements, because that experience has been limited and continues to evolve. HFN also dismissed Canada's experience under the approximately 24 bilateral investment protection treaties that are currently in force, on the basis that, in most cases, the other party to the treaty has little investment in Canada. In contrast, HFN noted that Chinese investment in Canada increased from approximately $228 million in 2003 to over $12 billion in 2009, prior to the acquisition earlier this year of Nexen Inc. by CNOOC Ltd., a Chinese state-owned oil company, in a transaction valued at approximately $15 billion. HFN attaches further significance to the fact that much of the investment in Canada by Chinese entities to date has been by enterprises having links to the Chinese government, which HFN contends has been reported to have a strong, centralized interest in securing natural resources in Canada and elsewhere.

[85] With respect to the NAFTA, HFN notes that it is the only other international trade or investment agreement with investor-state arbitration provisions, under which Canada hosts a significant level of foreign investment. HFN observes that most of the obligations in the CCFIPPA are the same as those set out in the NAFTA, and that as a result of its experience under the NAFTA, Canada ranks sixth on a list of 90 countries published by the United Nations Conference on Trade and Development in 2012, in terms of claims made by foreign investors against governments. HFN further observes that whereas the NAFTA can be terminated at any time by any of its three signatories with one year's notice, the CCFIPPA has a minimum period of 15 years and its protection for investments existing at the end of that period will extend for a further 15 years.

[86] With respect to legal uncertainty, HFN makes two general points. First, it notes that the arbitrators who will be appointed to adjudicated claims brought under the CCFIPPA are not judges and are not provided with the hallmarks of judicial independence, such as security of tenure and financial security. It notes that Mr. Van Harten provided evidence, which does not appear to be disputed, that many arbitrators work as counsel while also working as arbitrators. Second, it notes that there is a significant level of uncertainty regarding how important provisions in the CCFIPPA will be applied. This will be discussed further below. In general, it states that arbitrators' decisions under the CCFIPPA will be subject to judicial review on a very limited basis, and that to date, judicial reviews of decisions by tribunals constituted under the NAFTA have been dismissed in their entirety, with one exception (*Metalclad Corporation v The United Mexican States*, (August 30, 2000), ICSID Case No. ARB (AF)/97/1), where a portion of the award was set aside.

[87] HFN acknowledges that arbitral awards under the CCFIPPA can only be made against, and bind, the parties to the CCFIPPA, i.e., China and Canada, pursuant to Article 32 of the CCFIPPA. Specifically, it acknowledges that an arbitral panel would have no power to invalidate a measure that may be adopted by HFN or Canada to protect HFN's asserted interests. It also acknowledges the possibility that the parties to the CCFIPPA may choose to simply pay damage awards and maintain regulations or other measures that have been found to contravene the CCFIPPA. However, based on terms that are contained in various Final Agreements that the Government of Canada has entered into with First Nations, it asserts that it is likely that HFN will be required to remedy any measures that it may implement (assuming that it eventually enters into a Final Agreement containing similar terms), if those measures are found to contravene the CCFIPPA. HFN maintains that Canada is not likely to maintain any such measures in the face of such a finding.

[88] In addition to the foregoing general submissions, HFN makes various specific submissions with respect to Articles 4 and 10 of the CCFIPPA, which deal with the minimum standard of treatment to be accorded to Chinese investors, and expropriation, respectively. It appears to be common ground between the Parties that, based on past experience internationally, if any challenges are brought by Chinese investors under the CCFIPPA, they are more likely to be based on one or both of these two provisions than on other provisions. HFN adds that these are the two provisions that have been most likely to lead to significant awards under other investment treaties.

[89] HFN also made submissions with respect to the scope of certain of the exceptions in the CCFIPPA, including (i) measures that Canada has reserved the right to adopt pursuant to Annex

B.8, which includes measures denying Chinese investors any rights or preferences provided to Aboriginal peoples, and (ii) environmental measures.

[90] The Parties' submissions with respect to the provisions in the CCFIPPA pertaining to minimum standard of treatment [MST], expropriation and exceptions are discussed separately below.

[91] However, before addressing those submissions, I pause to note that, in the absence of a modern treaty, it appears to be common ground between the Parties that the HFN's existing law making powers are limited to the authority provided under sections 81 and 83 of the *Indian Act*, above. Section 81 authorizes band councils to make by-laws that are not inconsistent with that legislation or any regulation made by the Governor in Council or the Minister, regarding various purposes, including health, traffic, zoning and land use planning, construction and maintenance of buildings and infrastructure, the protection of wildlife and gaming. Section 83 provides the authority for band councils to make by-laws, subject to the Minister's approval, pertaining to matters such as local taxation, the licensing of businesses, the appointment of local officials, the payment of local officials and the raising of money from band members to support band projects. HFN laws passed pursuant to sections 81 and 83 apply only on HFN reserves (*R v Alfred*, [1993] BCJ No 2277, at para 18).

[92] HFN also has a Land Use Plan that Ms. Sayers acknowledged is consultative in nature (Cross-Examination on Affidavit of Carolyne Brenda Sayers [Sayers Cross], Respondent's Record, Volume III, at pp. 919 – 921). An important component of that plan is HFN's Cedar Access

Strategy, which, like the Land Use Plan, HFN seeks to implement with the consent and cooperation of third parties (Sayers Cross, at p. 922). It appears to be common ground between the Parties that, as consultation documents (rather than legal instruments), the Land Use Plan and the Cedar Access Strategy are not instruments that fall within the potential scope of the CCFIPPA.

1. Minimum standard of treatment

[93] The provisions with respect to MST are set forth in Article 4 of the CCFIPPA. Pursuant to Article 4(1), the Contracting Parties are required to "accord to covered investments fair and equitable treatment and full protection and security, in accordance with international law." Pursuant to Article 4(2), the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the international MST of aliens, as evidenced by general state practices accepted as law. It is common ground between the Parties that this latter provision, which is virtually identical to the language in the Note of Interpretation issued by the NAFTA Free Trade Commission in 2001 [2001 Interpretation Note] regarding the MST provisions in Article 1105 of the NAFTA (Thomas Opinion, at para 102), contemplates the minimum standard of treatment required by customary international law.

[94] Apparently relying largely upon decisions that pre-date the 2001 Interpretation Note, HFN asserts that "fair and equitable treatment" includes a wide range of procedural and substantive protections, including a requirement for states to satisfy legitimate expectations of foreign investors and to maintain a stable legal or regulatory framework for foreign investors. It adds that this standard would not allow Canada to defend a challenge based on an argument that the measure in

question was required to fulfill Canada's constitutional responsibilities under section 35 of the *Constitution*. Citing the recent Notice of Intent filed by Eli Lilly and Company, HFN states that it would even be open to a Chinese investor to challenge judicial doctrines developed to give effect to section 35, on the ground that those doctrines give rise to an unstable regulatory framework for investment. In its Notice of Intent, Eli Lilly challenges the "promise of the patent" doctrine developed in this Court, and in the Federal Court of Appeal (*Eli Lilly and Company v Canada*, NAFTA Ch 11 Panel, Notice of Intent, 7 November 2012).

[95] By contrast, the Respondents took the position that the MST obligation simply provides for a very low procedural "baseline" below which the treatment of Chinese investors may not fall. This position was supported by Mr. Thomas, whose evidence on this point I accept. In this regard, he observed that the MST obligation in Article 4 "is considered to be a basic standard of treatment that all members of the international community are capable of meeting" (Thomas Opinion, at para 119). Citing the recent arbitral panel ruling in *Glamis Gold Corporation v United States of America*, NAFTA Ch 11 Panel, Award, 8 June 2009 [*Glamis Gold*], at para 627, the Respondents described this standard as:

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

[96] Based on *Mobil Investments Canada Inc & Murphy Oil Corporation v Canada*, NAFTA Ch 11 Panel, Decision on Liability and on Principles of Quantum, 22 May 2012, at para 153 [*Mobil*],

the Respondents maintain that this standard does not prohibit regulatory changes even if they have a negative effect on an investor. In that case, an arbitral panel stated:

> Article 1105 [of the NAFTA] may protect an investor from changes that give rise to an unstable legal and business environment, but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects and even if they impose significant additional burdens on an investor.

[97] According to Mr. Thomas, whose evidence I once again accept, the fact that a regulatory measure may adversely affect an investment, increase the investor's cost of doing business, or result in reduced profitability does not, in and of itself, constitute indirect expropriation (Thomas Opinion, at paras 32 and 131).

[98] In support of its position that Chinese investors may rely on the MST provisions in Article 4 to challenge measures that may be adopted to protect or accommodate HFN's asserted interests, and to seek substantial damages claims, HFN refers to several claims or notices of intent to file claims which have been made against Canada under NAFTA (e.g., *SD Myers, Inc v Government of Canada*, NAFTA Ch 11 Panel, Partial Award, 13 November 2000 [SD Myers]; *Windstream Energy LLC v Government of Canada*, NAFTA Ch 11 Panel, Notice of Intent, 17 October 2012; *Lone Pine Resources Inc v Government of Canada*, NAFTA Ch 11 Panel, Notice of Intent, 8 November 2012; *Pope & Talbot Inc v Government of Canada*, NAFTA Ch 11 Panel, Award in Respect of Damages, 31 May 2002 [*Pope & Talbot*] as well as claims that have been made against other countries (e.g.,

Tecnicas Medioambientales TECMED SA v United Mexican States, ICSID Case No. ARB (AF)/00/2; *Occidental Exploration and Production Company v Republic of Ecuador*, (Final Award, 1 July 2004) LCIA Case No. UN 3467).

[99] HFN acknowledges that the above-mentioned 2001 Interpretation Note was issued in response to the expansive interpretation given to that provision in prior decisions, particularly *Pope & Talbot*, above. HFN also acknowledges that the interpretation of the MST obligation in NAFTA has been incorporated into the language of Article 4 of the CCFIPPA, as quoted above. However, HFN maintains that the most-favoured nation [MFN] obligations in Article 5 of the CCFIPPA may lead an arbitral panel to interpret the MST obligation in the same "expansive" manner as in *Pope & Talbot* and other cases that were decided prior to the adoption of the 2001 Interpretation Note. HFN further notes that, in the more recent decision of *Merrill & Ring Forestry LP v Canada*, ICSID Administrated, Award, 31 March 2010 [*Merrill & Ring*], the arbitral panel adopted an interpretation of the MST obligations in NAFTA that was broader than the interpretation advanced by Canada, and found that the MST established in customary international law continues to evolve in accordance with the realities of the international community (*Merrill & Ring*, above, at para 193). The arbitral panel proceeded to find that this standard "provides for the fair and equitable treatment of alien investors within the confines of reasonableness" (*Merrill & Ring*, above, at para 213). Nevertheless, as noted by the Respondents, the arbitral panel then concluded that regardless of whether the lower standard advocated by the investor or the higher standard advocated by Canada were adopted, damages had not been established (*Merrill & Ring*, above at para 266).

[100] Professor Van Harten stated in his affidavit that the MFN provisions in Article 5 of the CCFIPPA would likely be found by an arbitral tribunal to have the effect of negating the language in Article 4 that incorporates the "customary international law" standard that was articulated in the above-mentioned 2001 Interpretation Note (Applicants' Record, at p.85). He appears to base this belief on the view that there are some bilateral investment treaties that entered into force subsequent to January 1, 1994 which do not contain that language, and the limitations that it imports into the MST standard. (Pursuant to Article 8(1) of the CCFIPPA, the MFN provisions in Article 5 do not apply to treatment afforded under any bilateral or multilateral agreement in force prior to January 1, 1994.) However, Mr. Van Harten did not identify any post-1993 trade agreements or FIPAs that contain broader protections for investors than those set forth in Article 4 of the CCFIPPA.

[101] In cross-examination, Mr. MacKay acknowledged the possibility that the MFN provision in Article 5 could potentially negate the language in Article 4 that was incorporated from the 2001 FTC Interpretation Note. However, he maintained that the 2001 Interpretation Note simply clarifies the standard that has been in the NAFTA from the outset, and that is embodied in each of the other post-1993 international trade agreements and FIPAs to which Canada is a party (Applicants' Record, at pp 509-510).

[102] Mr. Thomas did not address this specific issue, although he testified on cross-examination, in the context of discussing the interpretative note on expropriation in Annex B.10 of the CCFIPPA, that the specific language of the substantive provisions in a treaty would likely be given very serious consideration by an arbitral tribunal, and perhaps ultimately given priority to the MFN clause (Applicants' Record, at pp. 769 – 772).

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

[104] I also accept HFN's position that, even without considering the MFN provisions in Article 5, there is some ongoing uncertainty regarding the scope of the MST obligation enshrined in Article 4. (See also Margaret Clare Ryan, "*Glamis Gold, Ltd v The United States and the Fair and Equitable Treatment Standard*", (2011) 56:4 McGill LJ 919 at 957). However, once again, HFN did not lead any material evidence to demonstrate how, as a practical matter, it would face a non-speculative possibility of an appreciable adverse impact on its asserted Aboriginal interests, if an arbitral panel were to give a Chinese investor the benefit of a standard that is different from the one contemplated by the quotes above from *Glamis Gold* and *Mobil*. Indeed, Mr. Thomas' uncontradicted evidence is that only one of eleven cases that post-date the 2001 Interpretation Note and that have raised a challenge under the MST obligation in Article 1105 of the NAFTA have succeeded (Cross Examination on Affidavit of John Christopher Thomas [Thomas Cross], Applicant's Record, at p 785). That said, I recognize that the tribunal in *Pope & Talbot*, above, concluded that the measure challenged under Article 1105 in that case would have contravened even the more limited interpretation of MST reflected in the 2001 Interpretation Note. However, I also

note that the total number of cases in which Canada has been found to have violated the MST obligations set forth in the NAFTA and the other 24 FIPAs to which Canada is a party is extremely small.

[105] Considering the foregoing, together with the fact that the current aggregate level of investment from Chinese investors into Canada is only a small fraction of the aggregate level of U.S. investment in Canada in each year over the last two decades, I am satisfied that the potential for HFN's asserted Aboriginal rights to be adversely impacted as a result of the MST obligations in the CCFIPPA is speculative and non-appreciable.

2. Expropriation

[106] Among other things, Article 10(1) of the CCFIPPA provides as follows:

> Covered investments or returns of investors of either Contracting Party shall not be expropriated, nationalized or subjected to measures having an effect equivalent to expropriation or nationalization in the territory of the other Contracting Party … except for a public purpose, under domestic due procedures of law, in a non-discriminatory manner and against compensation.

[107] It is common ground between the Parties that this obligation protects investors against both direct and indirect expropriation.

[108] HFN maintains that the prohibition on direct and indirect expropriation without compensation is specifically designed to ensure that Chinese investors will be compensated in

circumstances where they would not be compensated under domestic law. Stated differently, HFN asserts that once the CCFIPPA is ratified, it will no longer be open to any Canadian legislative body to expropriate investments of Chinese investors without full compensation. As a result, HFN submits that Canada will have given up a significant degree of flexibility in its ability to protect lands and resources that are within the scope of its asserted Aboriginal interests.

[109] In response, the Respondents state that Canada has a longstanding policy of not expropriating third party interests in order to settle land claims, and that lands held by third parties are only ever acquired on a "willing seller, willing buyer" basis. This was supported by documentation from the Department of Aboriginal Affairs and Northern Development Canada. As a result, the Respondents maintain that, as a practical matter, there will be no change in the range of potential options that would be realistically considered and available to Canada to protect or accommodate HFN's asserted Aboriginal interests. Citing *Toronto Area Transit Operating Authority v Dell Holdings Ltd*, [1997] 1 SCR 32, at paras 20-23, the Respondents note that there is a strong presumption in Canadian law that whenever land is expropriated, compensation will be paid, unless the words of the statute authorizing expropriation clearly state otherwise.

[110] In the absence of any evidence to suggest the existence of a non-speculative possibility that Canada or the Province of British Columbia may, in the absence of the CCFIPPA, have otherwise entertained the possibility of expropriating without compensation, I am left to conclude that the loss of this theoretical possibility is not likely to have the non-speculative potential to result in adverse impacts on HFN's asserted Aboriginal rights.

[111] HFN also submits that the prohibition on indirect expropriation will reduce the scope of potential measures that may be taken to preserve its land and resources. As with the MST obligation in Article 4, HFN states that there is a significant level of uncertainty regarding the extent to which measures may be found to constitute indirect expropriation. It adds that it is clear that legitimate government measures enacted in the public interest can constitute expropriation, even in the absence of discrimination. In addition, citing the decision of the NAFTA panel in *Metalclad*, above, it states that the investment-backed legitimate expectations of an investor will be taken into account in assessing whether there has been an indirect expropriation. Furthermore, it maintains that a measure which has a substantial adverse impact on the value of an investment may be found to constitute indirect expropriation.

[112] In support of its position that the expropriation provisions in Article 10 may lead Canada to refrain from adopting a measure that would otherwise likely be embraced to protect or accommodate HFN's asserted Aboriginal interests, HFN noted that Canada has paid a total of approximately $160 million to settled claims based on expropriation under the NAFTA. Those claims were brought by Ethyl Corporation, in respect of a ban on the import and interprovincial trade of MMT, a suspected neurotoxin; and by Abitibi Bowater, in respect of legislation passed by the Government of Newfoundland to expropriate certain of the company's lands and assets, including resource rights, after it announced that it intended to close a pulp & paper mill located in that province.

[113] In response, the Respondents note that Annex B.10 of the CCFIPPA defines indirect expropriation in terms of "a measure or series of measures of a Contracting Party that has an effect

equivalent to direct expropriation without formal transfer of title or outright seizure." In addition, the Respondents note that Annex B.10 clarifies that "the sole fact that a measure or series of measures of a Contracting Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred." Moreover, they assert that the following provision in paragraph 3 of Annex B.10 makes it clear that the circumstances in which *bona fide* regulation may constitute indirect expropriation are rare:

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

[114] In Reply, HFN noted that Mr. Thomas agreed on cross-examination that *bona fide* regulation with a public purpose may constitute expropriation under the CCFIPPA, and that the form of a measure and the intent of a state are not determinative. HFN observed that Mr. Thomas further agreed that the question of when regulation crosses the line and constitutes a measure "tantamount to expropriation" is a contentious issue, and that there is no bright line which identifies when compensation will be required, because each case is very fact dependent (Thomas Cross, Applicant's Record, at pp 754 – 760).

[115] In addition, HFN noted that Annex B.10 does not provide any protection for measures whose purpose is to protect Aboriginal rights and title, or to otherwise fulfill Canada's obligations under section 35 of the *Constitution*. In this regard, it underscored that Mr. MacKay acknowledged

that no attempt was made to negotiate specific protection for such measures, because Canada did not want "to enter that trading game" (MacKay Cross, Applicant's Record, at p 535). It concludes from this that a measure aimed at protecting the rights of Aboriginal peoples would not benefit from Annex B.10.

[116] As with the MST provision in Article 4 of the CCFIPPA, discussed above, HFN submits that the MFN provision in Article 5 would effectively negate the limitations in Annex B.10, which Canada and the U.S. added to their respective model foreign protection agreements in 2004, to clarify the framework for determining whether an indirect expropriation has occurred. The evidence relied upon by HFN in this regard closely tracks that which was discussed at paragraphs 100-102 above, in respect of the interplay between the MFN and MST provisions in Articles 5 and 4 of the CCFIPPA, respectively.

[117] For essentially the same reasons set forth at paragraph 103 above, I have been left to speculate as to whether the MFN provision would be applied so as to negate all or some of the limitations set forth in Annex B.10, notwithstanding the fact that Article 35(4) specifically states that the Annexes and footnotes to the CCFIPPA constitute integral parts of that agreement.

[118] Indeed, I am satisfied that even without considering the MFN provisions in Article 5, it is not entirely clear how the language in Annex B.10 and Article 10 may be applied to measures that may be alleged to constitute indirect expropriation. This was conceded by Mr. Thomas (Thomas Cross, Applicant's Record, at pp. 754-755).

[119] However, I accept Mr. Thomas' evidence that the circumstances in which a non-discriminatory measure that is designed and applied to protect the legitimate public objectives, as contemplated in Annex B.10, might be found to constitute indirect expropriation are likely to be rare (Thomas Opinion, at para 33). I also accept his uncontested evidence that, apart from one notice of intent to file a claim, which did not proceed to the establishment of a tribunal, there have been no other claims, let alone a tribunal finding, against Canada, for any federal, provincial or territorial measures taken in relation to Aboriginal rights or interests, or for allegedly unlawful measures taken by First Nations themselves (Thomas Opinion, at paras 29-30 and 127). Likewise, I accept Mr. Thomas' evidence that there has only been one such claim brought against the United States (*Glamis Gold*, above), to challenge regulatory measures taken to protect Aboriginal interests, and that this claim not only was rejected, but provides a good example of how such interests would be taken into consideration by an arbitral panel applying the standards set out in the CCFIPPA (Thomas Opinion, at paras 31 and 199-204).

[120] Given the foregoing, and in the absence of any evidence to the contrary, I have not been persuaded that there is an appreciable and non-speculative potential for either (i) an arbitral tribunal to find that measures designed to protect or accommodate HFN's asserted Aboriginal interests contravene the expropriation provisions in Article 10 of the CCFIPPA, or (ii) Canada to refrain from implementing a measure that would otherwise be implemented for that purpose, due to a fear of being found liable to pay significant damages to one or more Chinese investors.

3. The Exceptions in the CCFIPPA

[121] In support of its position that Canada continues to have ample policy flexibility to protect and accommodate HFN's asserted Aboriginal interests, the Respondents note that, as with each of the other FIPAs that Canada has entered into, the CCFIPPA contains general exceptions to ensure that the federal government and sub-national governments retain policy flexibility in key areas. In this regard, they note that "specific exemptions," sometimes called "reservations," are used to exempt specific matters from the application of some or all of a FIPA's obligations; whereas "general exemptions" are typically used to carve out broad subject-matter areas from a FIPA's application.

[122] With respect to specific exceptions, the Respondents assert that, pursuant to Article 8, existing non-conforming measures are grandfathered against the application of the MFN provisions in Article 5, the national treatment provisions in Article 6, and the provisions relating to senior management and boards of directors in Article 7. In addition, the Respondents note that, pursuant to Article 8, Canada has also reserved policy flexibility with respect to measures that may be adopted in the future pursuant to certain programs or in sensitive sectors, by exempting such measures from the application of Articles 5, 6 and 7. For example, the Respondents note that, pursuant to Article 8, procurement and subsidies are exempted from these obligations in the CCFIPPA. Moreover, through the application of Annex B.8, Article 8 also provides that Articles 5, 6 and 7 do not apply to measures relating to, among other things, social services that are established or so maintained for a public purpose, and, most importantly for present purposes, any rights and privileges accorded to Aboriginal peoples [the "Aboriginal Reservation"].

[123] The Respondents submit that the Aboriginal Reservation allows all levels of domestic governments, including Aboriginal governments with legislative and regulatory powers, to provide rights and preferences to Aboriginal people that may otherwise be inconsistent with the obligations set forth in the CCFIPPA. The Respondents observe that Canada has ensured that policy flexibility is retained to provide preferences for Aboriginal interests, in each of the other FIPAs that it has entered into.

[124] It appears to be common ground between the parties that the Aboriginal Reservation does not apply to the MST provisions in Article 4, the expropriation provisions in Article 10 or the performance requirements provisions in Article 9 (which apparently reiterate obligations already covered by the separate *Agreement on Trade Related Investment Measures*, to which all WTO Members are a party and against which reservations may not be taken). According to Mr. MacKay's uncontradicted evidence, the various FIPAs to which Canada is a party, including the CCFIPPA, do not extend reservations with respect to MST and expropriation because such reservations "would defeat the purpose of the treaty, which is to create reciprocal legal stability for foreign investors in the host state." Mr. MacKay added that the MST and expropriation obligations are simply "basic protections against lack of due process, denial of justice and confiscatory conduct" (MacKay Affidavit, at para 58).

[125] With respect to the general exceptions in the CCFIPPA, the Respondents noted that Canada has exempted various types of measures from the application of the CCFIPPA's obligations generally. This includes, pursuant to Article 33(2), environmental measures that are (i) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of the

CCFIPPA, (ii) necessary to protect human, animal or plant life or health, or (iii) relate to the conservation of living or nonliving exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption.

[126] HFN maintains that the foregoing exceptions and the Aboriginal Reservation do not preserve sufficient policy flexibility for Canada to protect and accommodate its asserted Aboriginal interests. With respect to the environmental exception in Article 33(2) in particular, it notes that the first two of three types of measures described therein are confined to measures that are *necessary* to achieve the stated objectives, and that the burden to demonstrate such necessity would be upon Canada. Relying upon Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties* (Austin, Tex.: Wolters Kluwer, 2009), pp 500-506, HFN suggests that the meaning of "necessary" can be situated on a continuum ranging from indispensable or of absolute necessity, to a contribution to achieving the stated objectives. Newcombe and Paradell also note, more broadly, that general exceptions such as those discussed above raise many interpretive issues that have not yet been clarified in the jurisprudence.

[127] I accept that there is some uncertainty regarding the scope of the general and specific exemptions discussed above. However, it remains far from clear how this uncertainty assists HFN to establish that the potential adverse effects on its asserted Aboriginal rights are appreciable and non-speculative.

[128] When pressed during the hearing on this point, and more broadly on how the CCFIPPA in general gives rise to the potential for such effects, HFN struggled. At one point, it stated that "it is

not unreasonable to imagine a scenario where taking steps to protect aboriginal rights might result in the cancellation of the permit, which in turn, then … [might be claimed to result in a] substantial reduction in the value of [a Chinese investor's] investment" (Transcript, at p 178). This is similar to its written submission that an arbitral panel might find a contravention of the CCFIPPA, and impose substantial damages on Canada, in respect of the quashing of a resource extraction permit by the Courts, on the ground that either (i) Canada failed to adequately consult or accommodate asserted Aboriginal rights, or (ii) the permit authorizes development which unjustifiably infringes Aboriginal or treaty rights. In the absence of any evidence to demonstrate that there is a non-speculative and appreciable risk that an arbitral panel might not only make such a finding in respect of an identifiable permit, but also that such a finding would adversely impact upon HFN's asserted Aboriginal interests, I am unable to agree with HFN that the ratification of the CCFIPPA gives rise to such a non-speculative and appreciable risk.

[129] HFN also stated that the ratification of the CCFIPPA gives rise to an appreciable and non-speculative risk that its asserted Aboriginal interests will be adversely impacted by virtue of the fact that Canada will take into account the risk of an adverse arbitral panel ruling, in deciding how to accommodate those interests. This is discussed in greater detail at paragraphs 82 and 83 above. However, HFN has not adduced any evidence to persuasively demonstrate that as a result of the fact that Canada will take such risk into account when developing measures to protect or accommodate HFN's asserted Aboriginal interests, there is an appreciable and non-speculative possibility that Canada's scope of action will be constrained, fettered or influenced in a way that will leave HFN worse off, in terms of those interests, than if the CCFIPPA is not implemented. In the absence of such evidence, and considering the very basic nature of the MST and expropriation obligations, as

well as the fact that the general and specific exemptions discussed above will afford policy flexibility to Canada, I find that this assertion is entirely speculative in nature. My conclusion in this regard is reinforced by Mr. MacKay's evidence that he is "unaware of any decision of a Canadian court finding that either the minimum standard of treatment or expropriation provision interferes with or are incompatible with Aboriginals' claims or rights" (MacKay Affidavit, at para 59).

[130] Another example HFN provided as to how, as a practical matter, ratification of the CCFIPPA might adversely impact upon its asserted Aboriginal interests was the possibility that HFN might want to place a moratorium on land development until regulations governing a land use plan on its reserves or broader territory have been enacted. HFN observed that the Tlicho Government [*Tlicho*] did something similar and then was unable, in proceedings before the Supreme Court of the Northwest Territories, to prevent an environmental assessment from proceeding. This occurred notwithstanding that the assessment included within its scope potential access roads that the Tlicho did not want included in the assessment (*Tlicho Government v MacKenzie Valley Impact Review Board*, 2011 NWTSC 31). Extrapolating from this case, HFN submitted that it is not difficult to envision a scenario in which a similar moratorium could give rise to an adverse arbitral ruling against Canada, if it were found to violate the MST or expropriation provisions in the CCFIPPA. In such a case, HFN submitted that it could be pressured by Canada to either abandon the moratorium or pay any damages levied against Canada (Transcript, at pp 212-218). In the latter regard, HFN noted that Tlicho has a Land Claims and Self Government Agreement with Canada and the Government of the Northwest Territories, and that paragraph 7.13.6 of that agreement requires Tlicho, at the request of Canada, and in the event of an adverse ruling by an international arbitral panel in respect of any law or other exercise of Tlicho's powers, to

remedy such law or other measure, to enable Canada to perform its international obligations. HFN suggested that it was not unreasonable to expect that it will be required to agree to a similar provision in any similar agreement that it ultimately may negotiate with Canada and the Government of British Columbia.

[131] Once again, I have not been persuaded that there is an appreciable and non-speculative possibility of this scenario occurring, particularly given the absence of any evidence that (i) HFN is considering such a moratorium, (ii) such a moratorium might somehow adversely impact upon a potential Chinese investment in HFN territory, (iii) there would be a non-speculative possibility of such moratorium being found to contravene the CCFIPPA, and (iv) Canada would not retain sufficient policy flexibility to deal with this in a way that would avoid any adverse impact upon the HFN's asserted Aboriginal interests.

c. Conclusions regarding the potential effects that HFN claims will result from a change in the legal framework applicable to land and resource regulation

[132] For the reasons given above, HFN has not demonstrated that the ratification of the CCFIPPA has the non-speculative and appreciable potential to adversely impact HFN's asserted Aboriginal interests, as a result of any changes that the CCFIPPA will make to the legal framework applicable to land and resource regulation in Canada.

[133] My conclusion in this regard is reinforced by the following:

a. Canada's experience under NAFTA and the 24 FIPAs that it has entered into with other countries is perhaps the best available evidence that is relevant to an assessment of the potential for the CCFIPPA to have the effects identified by HFN. Indeed, that experience is more relevant than the international experience under agreements to which Canada is not a party, and in respect of which HFN identified only a very small number of arbitral decisions in the course of this proceeding.

- As discussed at paragraph 104 above, Mr. Thomas' uncontradicted evidence is that only one of eleven cases that post-date the 2001 Interpretation Note and that have raised a challenge under the MST obligation in Article 1105 of the NAFTA have succeeded. In any event, the total number of cases in which Canada has been found to have violated that obligation is extremely small.

- Likewise, as discussed at paragraph 119, above, Mr. Thomas also provided uncontested evidence that, apart from one notice to file a claim, which did not proceed to the establishment of a tribunal, there have been no other claims, let alone a tribunal finding against Canada, in respect of any federal, provincial or territorial measures taken in relation to Aboriginal rights or interests, or in respect of allegedly unlawful measures taken by First Nations themselves; and there has only been one such claim filed against the United States, which was rejected.

- Only two judgments for damages have ever been rendered against Canada (*Pope & Talbot* and *SD Myers*, above), in an aggregate amount of less than

$7 million, although there has been an adverse finding of liability against Canada in a third case (*Mobil,* above), in which damages remain to be determined; and there are approximately six others in which claims have been filed but not resolved, and a further two in which a notice of intent has been filed but no formal claim has been made.

- As discussed at paragraph 112 above, only two claims against Canada under the NAFTA have ever been settled with compensation, for an aggregate amount of approximately $160 million (Transcript, at pp 343-348).

- Mr. MacKay, whose evidence on this point does not appear to have been contradicted, stated in his affidavit that he is not aware of any evidence suggesting that any of the aforementioned losses or monetary settlements have implicated or impaired Canada's ability to regulate in the public interest in a non-discriminatory manner, and none of the claims that have ever been brought against Canada have involved Aboriginal rights (MacKay Affidavit, at para 69). He also provided uncontested evidence that, to his knowledge, no Canadian court has ever found that either the MST or expropriation provisions in international agreements to which Canada is a party interferes with or are incompatible with Aboriginals' claims or rights; and, indeed, no litigation has ever been initiated in Canada by Aboriginal groups regarding an alleged impact on Aboriginal rights of any FIPA or other investment treaty, including the NAFTA, since 1989 (MacKay Affidavit, at paras 59 and 69).

- It appears to be common ground between the parties that, to date, there have been no claims filed against Canada under any of the 24 FIPAs that it has entered into.

b. The aggregate existing level of investment in Canada by Chinese investors is a small fraction of the level of aggregate level of investment in Canada by U.S. investors in each year since the NAFTA came into force on January 1, 1994. According to Mr. MacKay's uncontested evidence, in 2011, the latest year for which data is available, Chinese investors had an aggregate of approximately $10.9 billion in investment in Canada, versus approximately $326 billion from U.S. investors – almost 30 times the level of aggregate investment from China. Although CNOOC Ltd. subsequently purchased Nexen, Inc. in a transaction valued at approximately $15 billion, Mr. MacKay's uncontested evidence is that most of Nexen's assets are located outside Canada (MacKay Cross, Applicant's Record, at p 485). According to data included at Exhibit H to Mr. MacKay's affidavit, the level of aggregate investment in Canada from U.S. investors was approximately $103 billion in 1994 and has steadily increased since that time.

c. No evidence was led to demonstrate or to even suggest that the experience under the CCFIPPA is likely to be any different than the experience to date under the NAFTA or the 24 FIPAs to which Canada currently is a party.

d. There is no evidence that any sub-national governments in Canada have been fettered or "chilled" by NAFTA or the 24 FIPAs in force, from legislating in the public interest. Indeed, the moratoriums imposed by the Government of Quebec against natural (shale) gas fracking (in respect of which a Notice of Intent was filed in 2012 by Lone Pine Resources Inc) and by Ontario against offshore wind farms (in respect of which Windstream Energy LLC filed a claim in 2013) suggest that they have not been so fettered or "chilled."

e. Apart from Ms. Sayers' hearsay evidence obtained from the *Wall Street Journal*, which reported that China Investment Corp. was close to purchasing a 12.5% stake in some timber assets held by Island Timberlands LP for approximately $100 million, there is no evidence regarding actual or potential future investment in HFN's claimed territory, let alone on its reserves, by Chinese investors.

f. No evidence was led to demonstrate or even to suggest that any existing federal or sub-national measures, including any measures established by HFN, might contravene or be in conflict with any of the provisions in the CCFIPPA.

g. There is very little, if any, evidence of a causal link between the CCFIPPA and potential investment in Canada by Chinese investors, and there is no such evidence of such a link to any potential investment in HFN territory. The only evidence that was adduced in this case was in a document entitled Final Environmental Assessment of the China Foreign Investment Protection

Agreement (FIPA), included at Exhibit BB to Mr. MacKay's affidavit. At page 2 of that document, the following statement is made:

> In the initial [Environmental Assessment], it was found that significant changes to investment in Canada were not expected to occur as a result of the Canada-China FIPA … In this Final [Environmental Assessment], the claim that no significant environmental impacts are expected based on the introduction of a Canada-China FIPA are upheld; however, over time, Chinese investors have shown greater interest in investing in Canada, and this trend is likely to continue, if not increase with the introduction of a FIPA.

h. Even if the only reasonable accommodation of an Aboriginal right asserted by HFN would require action such as the expropriation of lands or a moratorium, an arbitral panel would have no power to enjoin such action, and any award that may be made on behalf of a Chinese investor would be made solely against Canada. HFN will never be a respondent in any action initiated by a Chinese investor under the CCFIPPA.

i. HFN's existing law making powers are those conferred under the *Indian Act* to over 600 bands, and are confined to zoning and land use planning, the preservation, protection and management of animals and fish, and business licensing and regulation (sections 81 to 83 of the *Indian Act*).

j. HFN's existing Land Use Plan and Cedar Access Strategy can not be challenged by a Chinese investor.

k. The boundaries of HFN's claimed traditional territory remain uncertain. There are at least nine First Nations whose claimed traditional territory overlaps with HFN's claimed traditional territory (Affidavit of Jim Barkwell, Respondents' Record, Volume II, Tab 34, at para 16).

[134] 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 CCFIPPA, 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 failed to demonstrate that this scenario is anything other than speculative and remote.

(iii) Adverse impacts on the scope of self-government that HFN may be able to achieve

[135] HFN submits that the legal rights granted to Chinese investors under the CCFIPPA will have a direct adverse impact on the scope of self-government which it can achieve either through (i) the exercise of its Aboriginal rights, (ii) the treaty-making process, or (iii) the exercise of delegated authority from the federal or provincial governments. HFN maintains that no matter what type of

governance structure it utilizes, its authority will be limited or constrained by disciplines in the CCFIPPA, including the rights that it grants to Chinese investors. It asserts that this adverse impact is sufficient to trigger Canada's duty to consult with it prior to ratification of the CCFIPPA. I respectfully disagree.

[136] In support of its submissions on this point, HFN notes that, pursuant to Article 2(2) of the CCFIPPA, the treaty will apply to any entity whenever that entity exercises any regulatory, administrative or other governmental authority delegated to it by a Contracting Party. Accordingly, it states that it will be subject to the CCFIPPA, whether it exercises law making or governance powers pursuant to an aboriginal right, through a delegation agreement with a province and/or the federal government, or through a treaty protected by s. 35 of the *Constitution*.

[137] It is common ground between the parties that HFN has never signed a treaty or "land claim agreement" with the Crown in right of Canada or British Columbia. However, HFN is a party, together with Canada and the Government of British Columbia, to a non-legally binding agreement entitled *Framework Agreement to Negotiate a Treaty* [Framework Agreement], dated July 27, 2007. According to Mr. Barkwell's uncontested affidavit evidence, that agreement was entered into within the framework of the British Columbia Treaty Process [BC Treaty Process]. By 2009, HFN had advanced to Stage 4 of that process, which has six stages and is not structured to require any assessment or proof of Aboriginal rights or title. While there have been no active negotiations since 2009, the uncontested evidence of Ms. Sayers is that HFN remains committed to that process (Sayers Cross, Respondents' Record, Volume III, pp. 915-916). The substantive matters under negotiation, and reflected in the Framework Agreement, include the following:

a. Land, including title, law-making authority, selection and access;

b. Water and water resources;

c. Forestry and forest resources;

d. Fisheries and marine resources;

e. Language, heritage and culture;

f. Mining and subsurface resources;

g. Wildlife and migratory birds;

h. Governance;

i. Financial matters including, but not limited to, fiscal arrangements and sharing of resource revenues and royalties;

j. Environmental management;

k. General provisions, including, but not limited to, certainty, eligibility and enrollment, ratification, amendment, implementation and dispute resolution; and

l. The settlement of HFN's claims of aboriginal rights and title, including but not limited to, the related financial component and certainty issues referred to above.

[138] In addition to the foregoing, HFN notes that it already engages in some land use regulation through its Land Use Plan and the associated Cedar Access Strategy.

[139] HFN asserts that because of Canada's agreement to be bound by the CCFIPPA, the HFN may be prevented from negotiating an agreement or treaty which protects its rights to exercise its authority in the best interests of the Hupacasath people, including to conserve, manage and protect

lands, resources and habitats and to engage in other governance activities, in accordance with traditional Hupacasath laws, customs and practices.

[140] It is important to distinguish between potential adverse effects on asserted Aboriginal rights and potential adverse effects on a First Nation's future negotiating position. The duty to consult applies solely to the former, where they are demonstrated to be non-speculative, appreciable and causally linked to particular conduct contemplated by the Crown. Stated alternatively, that duty does not apply to contemplated conduct that may simply have potential adverse effects on HFN's future negotiating position (*Rio Tinto*, above, at paras 46 and 50). It also does not apply to other interests of HFN that do not specifically concern HFN's asserted Aboriginal rights, as listed at paragraph 53 above.

[141] Accordingly, to the extent that any of the potential adverse impacts identified by HFN concern matters that may, as a result of the CCFIPPA, be more or less likely to be addressed in any future treaty that HFN may negotiate with Canada, and that do not directly concern HFN's asserted Aboriginal rights themselves, those potential impacts cannot give rise to a duty to consult. This includes adverse impacts on those dimensions of "the best interests of the Hupacasath people" and "other governance activities" which do not directly concern HFN's asserted Aboriginal rights (*Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, 2007 FC 567, at paras 31-32; aff'd 2008 FCA 212 [Ahousat FCA], at para 37).

[142] HFN expressed a specific concern that any governance rights to be included in any treaty that may be negotiated as part of the BC Treaty Process, or otherwise, will have to conform to

Canada's international legal obligations, including those under the CCFIPPA. In this regard, it identified a number of agreements concluded between First Nations and the federal, provincial or territorial governments which make this clear. These include the Yekooche First Nation Agreement in Principle (at paragraph 24(b)) and the K'ómoks Agreement in Principle (at paragraph 35), which require that any Final Agreement provide for the consistency of the First Nations' laws and other exercises of power with Canada's international legal obligations. Similarly, the Westbank First Nation Self-Government Agreement (paragraph 36) requires that First Nation take all necessary steps to "ensure compliance of its laws and actions with Canada's international legal obligations" and requires it to "remedy any Westbank Law or action found to be inconsistent with Canada's international legal obligations by an international treaty body or other competent tribunal." A number of other agreements identified by HFN contain similar provisions.

[143] If HFN's position is that the CCFIPPA increases, to a non-trivial degree, the probability that these types of provisions will be required to be included in any Final Agreement or other treaty that it may ultimately negotiate with Canada, this was not supported by any evidence. The same is true if HFN's position is that the ratification of the CCFIPPA will reduce the scope for HFN to avoid having to agree to these types of provisions, or to negotiate alternative provisions that may impose lesser constraints on its ability to protect its asserted Aboriginal rights. Indeed, HFN repeatedly asserted during its oral submissions that it is already highly probable, if not virtually certain, that Canada will insist on the inclusion of these types of provisions in any Final Agreement or other treaty that it may ultimately negotiate with HFN (Transcript, at pp. 23 and 153 – 157). The presence of those provisions in the above-mentioned agreements, and others appended to Ms. Sayers' Affidavit, lends support to this view.

[144] Given the existence of those provisions in those agreements, and in the absence of evidence to suggest that, but for the ratification of the CCFIPPA, HFN may have been able to negotiate different provisions that provide greater scope for HFN to protect its asserted Aboriginal rights, I am satisfied that HFN has not established the required causal link between the ratification of the CCFIPPA and the potential adverse impacts that it has identified. Stated differently, I am satisfied that HFN has not established a causal link between the ratification of the CCFIPPA and the types of treaty provisions that it has identified, and that it may have to agree to include in any future treaty that it ultimately negotiates with Canada. The evidence suggests that Canada is likely to require HFN to exercise its treaty rights in a manner consistent with the types of obligations that are in the CCFIPPA, in any event.

[145] In its written and oral submissions, HFN placed great significance on the fact that the ratification of the CCFIPPA would extend the benefit of the provisions described above to Chinese investors. For example, HFN maintained that the CCFIPPA will require HFN to refrain from regulating in a manner which has the effect of substantially diminishing the value of an investment owned by a Chinese national without paying compensation. It further maintained that the CCFIPPA will require HFN to ensure that it provides Chinese investors with "fair and equitable treatment," as that term has been interpreted by arbitrators; and that HFN will not be able to impose performance requirements which require the use of local products. While it acknowledges that it will still be able to provide preferential treatment to First Nations, it stated that it will be constrained from making distinctions between other companies if some of them have Chinese investors.

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

VIII. Conclusion

[147] The potential adverse impacts that HFN claims the ratification of the CCFIPPA would have on its asserted Aboriginal rights, due to changes that the CCFIPPA may bring about to the legal framework applicable to land and resource regulation in Canada, are non-appreciable and entirely speculative in nature. Moreover, HFN has not established the requisite causal link between those potential adverse impacts and the CCFIPPA.

[148] The same is true with respect to HFN's assertions that the rights granted to Chinese investors under the CCFIPPA will directly and adversely impact the scope of self-government which HFN can achieve, either through exercising its Aboriginal rights, through the treaty making process, or through the exercise of delegated authority from Canada or the Government of British Columbia.

[149] Accordingly, the ratification of the CCFIPPA by Canada without engaging in consultations with HFN would not breach either (i) Canada's constitutional obligation to act honourably with

HFN in all of its dealings with HFN, and particularly in respect of HFN's asserted Aboriginal rights, or (ii) Canada's duty to consult with HFN before taking any action that may adversely impact upon those rights.

[150] This application will therefore be dismissed.

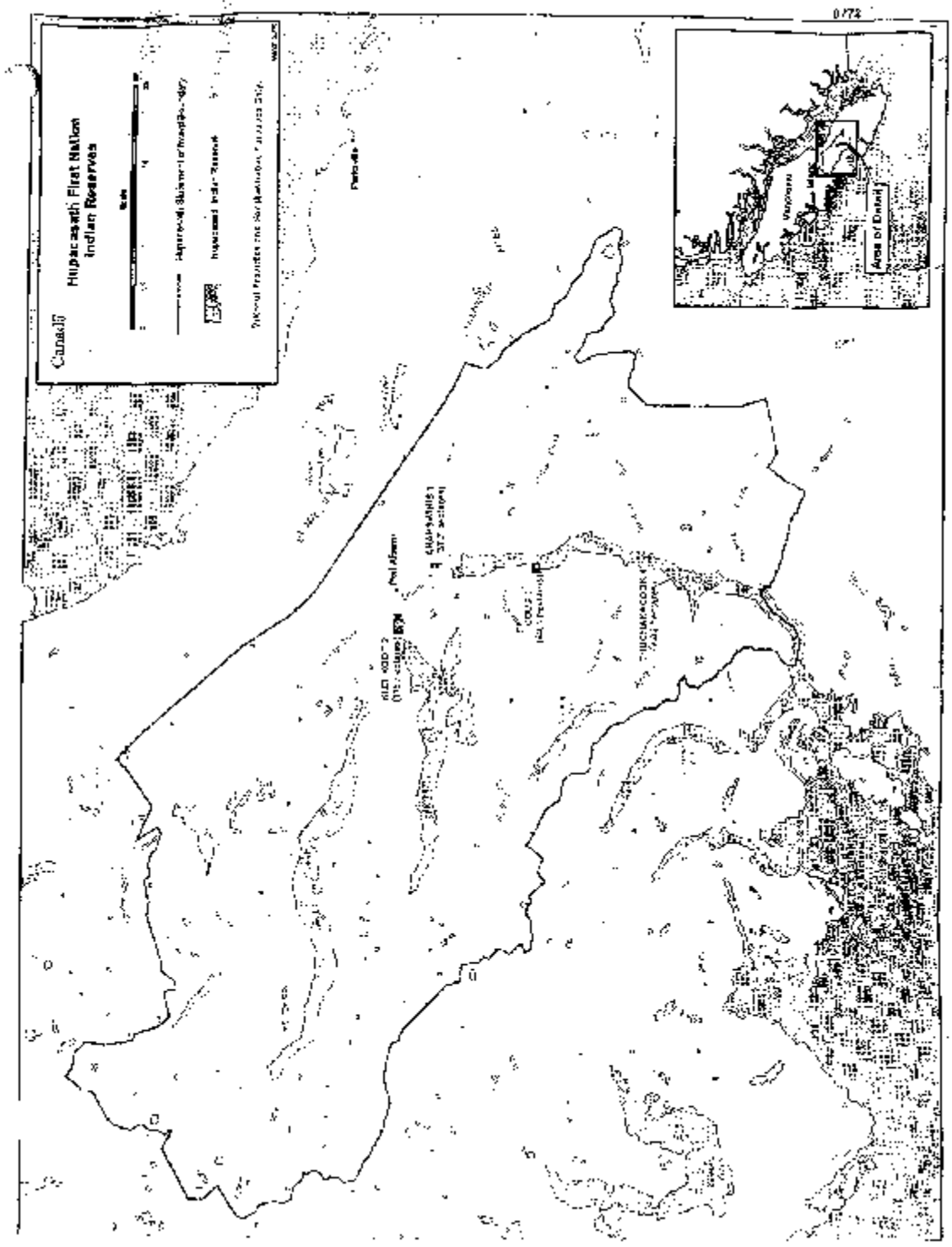
JUDGMENT

THIS COURT DECLARES, ADJUDGES AND ORDERS that this Application is dismissed with costs.

"Paul S. Crampton"

Chief Justice

APPENDIX I



FEDERAL COURT

SOLICITORS OF RECORD

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