

Reconciling Aboriginal Rights with International Trade Agreements: *Hupacasath First Nation v. Canada*

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With the introduction of section 35 of the *Constitution Act, 1982*,¹ Canada recognized and affirmed existing Aboriginal and treaty rights. From this recognition emerged, in 1990, the duty to consult as part of the justification framework allowing for the infringements of Aboriginal rights.² The Supreme Court of Canada then went on to establish, in 2004, the duty to consult and, if appropriate, accommodate Aboriginal groups when the Crown undertakes an action or decision that could adversely affect their rights. This duty is triggered even if the adverse effect on their rights is not yet proven.³ This latter duty is grounded in the longstanding, though oft neglected, principle of the honour of the Crown.⁴ In fact, this duty breathed new life into this principle, and affirmed that there is a special relationship between the Crown and Aboriginal peoples.⁵ Much litigation has followed this recognition, and now the duty to consult and accommodate is a key component of Aboriginal law. While Chief Justice Lamer recognized that Aboriginal law generally is a complex and rapidly evolving area of the law,⁶ the field of consultation and accommodation is particularly so. Aboriginal groups are driving this evolution, challenging the courts to grapple with new circumstances in novel settings.

¹ Being Schedule B to the *Canada Act 1982* (UK), 1982 c 11.

² *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

³ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*].

⁴ *Ibid* at para 16.

⁵ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 162, 153 DLR (4th) 193 [*Delgamuukw*].

⁶ *Ibid* at para 159.

Hupacasath First Nation (“HFN”) set out earlier this year to test the outer boundaries of this duty by asserting that the Government of Canada owed the duty to consult and accommodate prior to the ratification of a bilateral investment agreement with China. *Hupacasath First Nation v. Canada (Minister of Forest Affairs and Attorney General)*⁷ is the first case in which Canadian courts have been called upon to make a determination about the existence of this duty in the context of an international trade or investment agreement.⁸ The Federal Court of Canada (“the court”) dismissed HFN’s application for judicial review and denied the existence of the duty in these circumstances.⁹ Specifically, the court determined that the alleged adverse impacts that could result from the ratification of this investment agreement were “speculative” and “non-appreciable,” and further, that the causal link between the agreement and the alleged impacts was not established.¹⁰

I will argue below that the court too quickly and easily dismissed HFN’s concerns about potential adverse impacts of this agreement on Aboriginal rights. Although this challenge may seem farfetched, and could be deemed too impractical for the court to recognize, there are nonetheless solid legal grounds for seeking this judicial review. As of the date of publication, a determination as to whether the *Hupacasath* decision will be appealed has yet to be made. If it is appealed, there will be hope for a more nuanced judicial response to this complex and challenging case.¹¹

In part 1, I will provide a brief overview of the duty to consult and accommodate, the investment agreement in question, and the applicant First Nation. I will then outline the facts in the *Hupacasath* decision and the judgment rendered by the court in part 2. Finally, I will comment on the weaknesses of this decision and its problematic implications.

1. BACKGROUND

1.1 DUTY TO CONSULT AND ACCOMMODATE

As noted above, the source of the duty to consult and accommodate is the honour of the Crown, which is always at stake in the Crown’s dealings with Aboriginal peoples.¹² As explained by Chief Justice McLachlin, this principle “is not a mere incantation, but rather a core precept that finds its application in concrete practices.”¹³ This core precept reflects an important part of Canadian history, namely that Crown sovereignty over the land that now constitutes Canada did not occur as a result of conquest.¹⁴ In accordance with the *Royal Proclamation, 1763*, which is presently celebrating its 250th anniversary, the Crown recognized the existing use and occupation of the lands and resources by Aboriginal peoples and, on these grounds, the need to conclude treaties prior to lawful European settlement on the land.¹⁵

⁷ 2013 FC 900, 2013 CarswellNat 3100 (WL Can) [*Hupacasath*].

⁸ *Ibid* at para 71.

⁹ *Ibid* at paras 3-4.

¹⁰ *Ibid* at para 3.

¹¹ *Ibid*; Hupacasath First Nation, “Hupacasath First Nation File Appeal to Stop Canada-China FIPA”, online: Watershed Sentinel <<http://www.watershedsentinel.ca/content/hupacasath-first-nationfile-appeal-stop-canada-china-fipa>>.

¹² *Haida*, *supra* note 3 at para 16.

¹³ *Ibid*.

¹⁴ *Ibid* at para 25.

¹⁵ UK, *Royal Proclamation* by King George III of England (Paris, 7 October 1763).

There are exceptions to the rule that treaties were concluded prior to settlement. Most notably, treaties were not concluded prior to settlement in the province of British Columbia (“BC”). The denial of the existence of Aboriginal title at the time of European settlement in BC has proven not only to be an immoral mistake, but an expensive one due to the protracted modern negotiation process.¹⁶ Presently, sixty First Nations (one hundred four Bands) are part of the BC treaty negotiations process, which is a six-stage process. At this time, only two of these sixty First Nations have reached the final stage of the process, namely, the conclusion and implementation of a final agreement.¹⁷

Many decades may elapse between the assertion of Aboriginal rights and title, and the conclusion of a final agreement. In the interim, the fraught issue of the use that can be made of the contested lands remains unsettled. While the duty to consult and accommodate had been recognized by the courts in various circumstances in the 1990s,¹⁸ the particularly tricky issue of the use of contested lands led to the recognition of the duty to consult and accommodate as we now know it. In 2004, the Supreme Court issued the seminal decisions *Haida Nation v. British Columbia (Minister of Forests)*¹⁹ and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*.²⁰ Since then, the Supreme Court has recognized that these duties must be considered whenever Aboriginal rights and treaty rights may be adversely affected.²¹

The obligation contains two parts: 1) the duty to consult, and if appropriate; 2) the duty to accommodate. Consultation is a procedural obligation requiring the Crown to engage with Aboriginal groups and discuss in good faith their concerns regarding the impacts of the proposed action or decision. Accommodation is the substantive obligation that arises in certain cases requiring the modification of the action or decision in response to these concerns.²² 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.”²³ The depth of the consultation moves along a sliding scale in response to the circumstances in question. Its scope 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.”²⁴ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* articulates these requirements in the form of a three-part test for determining whether the duty has been triggered:

¹⁶ Murray Browne, “The Promise of Delgamuukw and the Reality of Treaty Negotiations in British Columbia” in Maria Morellato, ed, *Aboriginal Law Since Delgamuukw* (Aurora, Ontario: Canada Law Book, 2009) 465 at 478 ff.

¹⁷ BC Treaty Commission, “Negotiation Update”, online: BC Treaty Commission <<http://www.bctreaty.net/files/updates.php>> Note that an update to this existing list was provided by way of the author’s personal communication with the BC Treaty Commission on October 1, 2013.

¹⁸ *Sparrow*, *supra* note 2; *R v Nikal*, [1996] 1 SCR 1013, 133 DLR (4th) 658; *Delgamuukw*, *supra* note 5.

¹⁹ *Haida*, *supra* note 3.

²⁰ 2004 SCC 74, 3 SCR 550.

²¹ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, 3 SCR 388 [Mikisew].

²² Arthur Pape, “The Duty to Consult and Accommodate: A Judicial Innovation Intended to Promote Reconciliation” in Maria Morellato, ed, *Aboriginal Law Since Delgamuukw* (Aurora, Ontario: Canada Law Book, 2009) 313 at 317-8.

²³ *Haida*, *supra* note 3 at para 35.

²⁴ *Ibid* at para 39.

(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.²⁵

Almost invariably, cases involving the duty to consult address decisions regarding the use of natural resources, such as mining, logging, fisheries, and oil and gas extraction.²⁶ This reality is unsurprising, given the strong connections between Aboriginal rights and the land and its resources.

1.2 BILATERAL INVESTMENT AGREEMENT

The investment agreement under scrutiny in the *Hupacasath* decision is 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").²⁷ CCFIPPA was signed in Vladivostok, Russia, on September 9, 2012.²⁸ It is one of the latest in a series of Foreign Investment Promotion and Protection Agreements ("FIPA"s) signed by Canada, modeled on the investment chapter of the *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States* ("NAFTA").²⁹ Canada has signed approximately twenty-four such agreements since 1993. However, previous FIPAs were entered into with countries with minimal investment in Canada, such as Latvia, Peru, Jordan, and Trinidad and Tobago.³⁰ CCFIPPA is unique in that it was entered into with China, a major economic world player with increasing investment in Canada. As the court noted in *Hupacasath*, "Chinese investment in Canada increased from approximately \$228 million in 2003 to over \$12 billion in 2009."³¹ According to recent figures, Chinese investment has plunged, prompting the Governor-General, and the ministers of trade, of foreign affairs, and of natural resources to head to China in order to drum up business and to increase investment flows.³²

Despite being the most significant bilateral investment agreement Canada has ever signed, CCFIPPA has received remarkably little attention. This is in sharp contrast to the reaction of Canadians to NAFTA's investment chapter. This silence is significant given that certain provisions in CCFIPPA are considerably more stringent than comparable provisions in NAFTA. For example, once it comes into force, CCFIPPA will remain in force for at least fifteen years. Thereafter, either party may terminate the agreement with a year's notice, but the investments

²⁵ 2010 SCC 43 at para 31, 2 SCR 650 [*Rio Tinto*]

²⁶ Pape, *supra* note 22 at 319.

²⁷ *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, 9 September 2012 [CCFIPPA].

²⁸ *Ibid.*

²⁹ 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [NAFTA]. See also Pierre-Olivier Savoie, "Reservations, corporate social responsibility and other mechanisms in support of sustainable development in Canada's Model Foreign Investment Promotion and Protection Agreement" in Freya Baetens, ed, *Investment Law within International Law: Integrationist Perspectives* (Cambridge: Cambridge University Press, 2013) 232.

³⁰ Foreign Affairs, Trade and Development Canada, "Foreign Investment Promotion and Protection Agreements (FIPAs) in Force" (16 August 2013), online: Government of Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/force-vigueur.aspx?lang=eng>>.

³¹ *Hupacasath*, *supra* note 7 at para 84.

³² Mike Blanchfield, "Governor-General heading to China to shore up investment in Canada", *The Globe and Mail*, (14 October 2013) A3.

made during the initial fifteen-year period benefit from the investment protection for an additional fifteen-year period.³³ This extra benefit is commonly referred to as a “tail.”³⁴ *NAFTA*, on the other hand, allows a party to withdraw from the agreement with six months’ notice, with no initial term requirement, and without a protective tail.³⁵ While it is true that free trade agreements typically do not have tails, whereas investment agreements typically do,³⁶ the initial fifteen-year term requirement remains very unusual for both types of agreements.³⁷

CCFIPPA’s arbitration clause also breaks with tradition. As with other investment agreements, disputes are referred to independent arbitral tribunals.³⁸ Usually the hearings between an investor and host Contracting Party are open to the public and all documents submitted to the tribunal “shall be publicly available, unless the disputing parties otherwise agree.”³⁹ Under *CCFIPPA*, however, the Contracting Party must determine that it is in the “public interest” to make both the hearings and the documents open to the public, and notify the tribunal of this determination accordingly.⁴⁰

The governing Conservative Party tabled *CCFIPPA* in the House of Commons for twenty-one days in the fall of 2012. It was not debated or voted on, and the agreement may now be ratified at any point.⁴¹ Members of Parliament (“MPs”) Elizabeth May and Paul Dewar asked for an emergency debate several times during the twenty-one-day period. The Speaker always denied their requests.⁴² On one of the few occasions the issue was discussed, Conservative MP Ed Fast responded to concerns about the implications of *CCFIPPA* by stating, “Canadian investors have applauded this agreement.”⁴³ This response sheds no light on whether the other members of the Canadian population will also benefit from the agreement.

³³ *CCFIPPA*, *supra* note 27, art 35.

³⁴ W Michael Reisman & Mahnoush H Arsanjani, “Reflections on the Cogency of Fragmentation: Statutes of Limitation and ‘Continuing Violations’ in Investment and Human Rights Law” in Holger P Hestermeyer, ed, *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Leiden: Brill, 2011) at 266-67.

³⁵ *NAFTA*, *supra* note 29, art 2205.

³⁶ Reisman & Arsanjani, *supra* note 34 at 265.

³⁷ See e.g. *Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments*, 6 May 2009, Can TS 2012 No 5 (entered into force 22 January 2012), art 8.

³⁸ Foreign Affairs, Trade and Development Canada, “Canada’s FIPA Program: Its Purpose, Objective and Content”, online: Government of Canada <<http://www.international.gc.ca>>.

³⁹ See e.g. *Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments*, 8 May 2009, Can TS 2011 No 26 (entered into force 23 November 2011), Annex C, I(1)-(4).

⁴⁰ *CCFIPPA*, *supra* note 27, arts 28(1)-(2).

⁴¹ “5 things to know about the Canada-China investment treaty”, CBC News (27 October 2012), online: <<http://www.cbc.ca/news/politics/5-things-to-know-about-the-canada-china-investment-treaty-1.1183343>>.

⁴² See e.g. *House of Commons Debates*, 41st Parl, 1st Sess, No 156 (1 October 2012) at 1515, No 171 (29 October 2012) at 1515 (MP Elizabeth May), and No 173 (31 October 2012) at 1515 (MP Paul Dewar).

⁴³ *House of Commons Debates*, 41st Parl, 1st Sess, No 168 (24 October 2012) at 1435 (Hon Ed Fast).

1.3 HUPACASATH FIRST NATION

HFN is a “band” within the meaning of the *Indian Act*, counting approximately three hundred members.⁴⁴ This Nuu’chah’nulth ethnic group is based on Vancouver Island in BC.⁴⁵ HFN, a party to the non-binding *Framework Agreement to Negotiate a Treaty* in the BC treaty process, has asserted Aboriginal rights and title over approximately two hundred thirty-two thousand hectares of central Vancouver Island.⁴⁶ Since the signing of the *Framework Agreement* with Canada and British Columbia in 2007, HFN has advanced to Stage 4 of the six-stage process. Since 2009, however, there have been no active negotiations, leaving the claims unsettled.⁴⁷ The substantive matters in the *Framework Agreement* to be discussed through the treaty process are:

1. Land, including title, law-making authority, selection and access;
2. Water and water resources;
3. Forestry and forest resources;
4. Fisheries and marine resources;
5. Language, heritage and culture;
6. Mining and subsurface resources;
7. Wildlife and migratory birds;
8. Governance;
9. Financial matters, including, but not limited to, fiscal arrangements and sharing of resource revenues and royalties;
10. Environmental management;
11. General provisions, including, but not limited to, certainty, eligibility and enrollment, ratification, amendment, implementation and dispute resolution; and
12. 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.⁴⁸

⁴⁴ RSC, 1985, c I-5, s 2 [*Indian Act*]; Hupacasath First Nation, “Hupacasath”, online: HFN <<http://www.hupacasath.ca/>>.

⁴⁵ Robert J Muckle, *The First Nations of British Columbia: An Anthropological Survey*, 2d ed (Vancouver: UBC Press, 2007) at 127.

⁴⁶ *Hupacasath*, *supra* note 7 at paras 16-17, 137.

⁴⁷ *Ibid* at para 137.

⁴⁸ *Ibid*.

2. FACTS OF CASE AND DECISION

2.1 GROUNDS OF THE APPLICATION

On April 29, 2013, HFN brought an application for judicial review seeking a declaration that the Crown owes a duty to consult and accommodate prior to ratifying *CCFIPPA*.⁴⁹ This declaration was based on the assertion that *CCFIPPA* could negatively affect HFN by:

1. preventing it from “exercising its rights to conserve, manage, and protect lands, resources, and habitats in accordance with traditional Hupacasath laws, customs and practices;”
2. preventing it from “negotiating a treaty to protect its rights” to govern its lands, resources, and habitat in the best interest of the Hupacasath people;
3. subjecting it to international trade and investment law, which does not respect constitutionally enshrined Aboriginal rights, in the event of resource use disputes with Chinese investors;
4. causing the federal and provincial governments to be less inclined to protect its rights and title due to the potentially “significant damage claims” that could be awarded against it; and
5. causing the federal government and courts to be influenced by the rights of Chinese investors and potential damages claims, in determining whether reasonable accommodation has occurred.⁵⁰

HFN argued that these potential negative effects would cause a “chilling effect” in the Canadian government’s willingness to settle HFN’s claims.⁵¹ Specifically, the protective provisions in *CCFIPPA* could influence the willingness of the government to allow for the protection of lands and resources for fear of being hit with an adverse arbitral award.⁵² Vernon MacKay, Crown witness from the Department of Foreign Affairs and International Trade, admitted that in “developing regulatory or other policy initiatives, including measures that may be taken to accommodate Aboriginal peoples, the responsible government 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.”⁵³

2.2 APPLICATION OF THREE-PART TEST

⁴⁹ The original relief also included a request for an order restraining the government from sending China the letter signaling the completion of the domestic review process, and an interlocutory injunction with the same goal, but these were removed (*ibid* at para 19).

⁵⁰ *Ibid* at para 18 [emphasis added].

⁵¹ *Ibid* at para 81.

⁵² *Ibid* at paras 81-82.

⁵³ *Ibid* at para 82.

Chief Justice Crampton of the Federal Court of Canada determined that the first two parts of the duty to consult test were easily satisfied. Firstly, given the existence of the BC treaty process negotiations, the Crown unquestionably has knowledge of HFN's asserted Aboriginal rights.⁵⁴ Secondly, there is clearly a contemplated Crown conduct, namely the intent to ratify *CCFIPPA*.⁵⁵ The third part of the test regarding adverse effects of the action on the asserted Aboriginal rights, however, was not so easily satisfied.

Crampton CJ reviewed the preliminary question of whether high-level management decisions, such as international treaties, could hypothetically adversely affect Aboriginal rights or claims. He recognized that they could, even when there is no immediate impact, and even if there is the possibility of future consultation.⁵⁶ The existing jurisprudence supports this position.⁵⁷ After discussing this jurisprudence, he then promptly dismissed it on the grounds that these cases were all distinguishable from the present case. Specifically, the precedents involved high-level management decisions about specific lands or resources that formed part of the asserted or established Aboriginal rights.⁵⁸ *CCFIPPA*, on the other hand, is a nationwide investment agreement, not directly connected to any particular piece of land or natural resource.⁵⁹ The court determined that despite this distinction, "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*."⁶⁰

The court separated HFN's concerns about the cause of adverse effects into two categories: 1) *CCFIPPA* will cause the legal framework applicable to land and resources in Canada to change significantly; and 2) the rights granted to Chinese investors under *CCFIPPA* will impact the scope of self-government that HFN can achieve.⁶¹

2.2.1 SIGNIFICANT CHANGE IN LEGAL FRAMEWORK

HFN submitted that the ratification of *CCFIPPA* triggers the duty to consult "because it grants Chinese investors new, substantive, and enforceable rights with respect to the investments which they hold, or may obtain, in areas over which the HFN and other First Nations assert Aboriginal or treaty rights."⁶² The "minimum standard of treatment" ("MST") and "expropriation" provisions of the agreement were deemed the most likely new enforceable rights to result in awards against Canada,⁶³ and consequently, the most likely to influence govern-

⁵⁴ *Ibid* at paras 52-54.

⁵⁵ *Ibid* at para 55.

⁵⁶ *Ibid* at para 57.

⁵⁷ *Rio Tinto*, *supra* note 25 at para 47; *Dene Tha' First Nation v British Columbia (Minister of Energy and Mines)*, 2013 BCSC 977 at para 114, 229 ACWS (3d) 1.

⁵⁸ *Hupacasath*, *supra* note 7 at paras 73-78.

⁵⁹ *Ibid* at para 78.

⁶⁰ *Ibid* at para 79.

⁶¹ *Ibid* at para 60.

⁶² "Memorandum of Fact and Law of the Applicant, Hupacasath First Nation" in *Hupacasath First Nation v The Minister of Foreign Affairs Canada and the Attorney General of Canada*, Court File No T-153-13 (29 April 2013) at para 103 [*Applicant Memorandum*].

⁶³ *Hupacasath*, *supra* note 7 at para 88.

ment behaviour. These two provisions were discussed in detail in the decision.⁶⁴ Additionally, *CCFIPPA*'s provision providing for "exceptions" to certain of the investment protections was also discussed.⁶⁵

i) Minimum Standard of Treatment

Article 4 of *CCFIPPA*, the MST clause, requires that investors receive "fair and equitable treatment and full protection and security, in accordance with international law."⁶⁶ The parties disputed the meaning of this protection. This clause is clearly designed to protect investors against "an unstable legal and business environment."⁶⁷ HFN argued that the MST clause provides a wide range of procedural and substantive protections, such as maintaining legitimate expectations.⁶⁸ The Crown, in contrast, argued that it only provides "for a very low procedural 'baseline' below which the treatment of Chinese investors may not fall."⁶⁹ To support its position, the Crown argued that although MST provisions have been interpreted expansively in the past, resulting in numerous arbitral awards against states, this situation has been corrected.⁷⁰ Specifically, the *NAFTA* Chapter 11 Panel, in a 2012 decision, narrowed the scope of the MST clause by clarifying that "changes [...] giving rise to an unstable legal and business environment" would have to be arbitrary or grossly unfair to trigger MST protection.⁷¹

Crampton CJ accepted that "there is some ongoing uncertainty regarding the scope of the MST obligation enshrined in Article 4."⁷² This uncertainty is increased as a result of Article 5, the Most-Favoured-Nation Treatment clause.⁷³ When applied to the MST clause, Article 5 could cause the interpretation to revert back to the earlier expansive reading by effectively negating the language in Article 4 referring to the "customary international law" standard. Both HFN and the Crown's expert witnesses agreed this was a possibility.⁷⁴ To add to this uncertainty regarding how this provision will be interpreted, a recent tribunal decision under the International Centre for Settlement of Investment Disputes ("ICSID") interpreted a MST clause broadly, making the standard of fair and equitable treatment of alien investors one of "reasonableness" rather than a gross

⁶⁴ *Ibid* at paras 93-105 (MST), 106-120 (expropriation).

⁶⁵ *Ibid* at paras 121-131.

⁶⁶ *Supra* note 27.

⁶⁷ *Mobil Investments Canada Inc & Murphy Oil Corporation v Canada*, (22 May 2012) NAFTA Ch 11 Panel (Decision on Liability and on Principles of Quantum) at para 153 [*Mobil*] (cited in *Hupacasath*, *supra* note 7 at para 96).

⁶⁸ *Hupacasath*, *supra* note 7 at para 94.

⁶⁹ *Ibid* at para 95.

⁷⁰ *Ibid* at para 104.

⁷¹ *Mobil*, *supra* note 67 at para 153 (cited in *Hupacasath*, *supra* note 7 at para 96).

⁷² *Ibid* at para 104.

⁷³ *CCFIPPA*, *supra* note 27.

⁷⁴ *Hupacasath*, *supra* note 7 at paras 100-101.

injustice.⁷⁵ As such, the tribunal determined that the investor party did not need to demonstrate an egregious conduct to trigger the MST protection.⁷⁶

Despite its concerns about the possible negative impacts of the MST clause on the Canadian government's power to modify a regulatory framework, the court determined that the connection between these possible impacts and the asserted Aboriginal rights was speculative and non-appreciable.⁷⁷

ii) Expropriation

Article 10 of *CCFIPPA* protects investors against direct and indirect expropriation.⁷⁸ In Canada, there is a presumption that compensation will be provided for direct expropriation.⁷⁹ Indirect expropriation is more problematic. HFN argued that this provision could affect the scope of potential measures adopted to preserve its land and resources:⁸⁰ If an arbitral panel awarded damages against the federal government, Canada could force HFN to repeal the offending regulatory measure in question to decrease the amount of damages to be awarded.⁸¹ On cross-examination, the Crown's witness agreed that even bona fide regulation with a public purpose may constitute expropriation under *CCFIPPA*. Moreover, the form of a measure taken and the intent of the state are not determinative.⁸² Crampton CJ again accepted that there is uncertainty regarding the possible impacts of the expropriation provision on the ability to modify the regulatory regime without facing an adverse damages award.⁸³ Regardless of this acknowledgement, he determined that the possibility of these adverse impacts affecting HFN's rights was speculative and non-appreciable.⁸⁴

iii) Exceptions

⁷⁵ *Ibid* at para 99 (citing "Award" in *Merrill & Ring Forestry LP v Canada* (31 March 2010), online: Investment Treaty Arbitration <<http://www.italaw.com/sites/default/files/case-documents/ita0504.pdf>> [*Merrill & Ring*]).

⁷⁶ *Merrill & Ring, ibid* at paras 212-3.

⁷⁷ *Hupacasath, supra* note 7 at para 105.

⁷⁸ *Supra* note 27.

⁷⁹ *Hupacasath, supra* note 7 at para 109.

⁸⁰ *Ibid* at para 111.

⁸¹ See, for example, the consequences of *Ethyl Corporation v Canada*, UNCITRAL (NAFTA) as described in Francisco Nogales, "The NAFTA Environmental Framework, Chapter 11 Investment Provisions, and the Environment" (2010) 8:1:6 *Annual Survey of International and Comparative Law* 97 at 133-134, 139 (in this case, Canada settled with Ethyl Corp by agreeing to pay it \$13 million for lost costs and profits, removing the ban on the toxic gasoline additive, and providing a public apology for having suggested its product was hazardous).

⁸² *Hupacasath, supra* note 7 at para 114.

⁸³ *Ibid* at paras 117-118.

⁸⁴ *Ibid* at para 120.

Specific and general exemptions from certain *CCFIPPA* articles exist in order to maintain some regulatory flexibility.⁸⁵ This flexibility is designed to protect issues of particular public importance, such as public welfare policies, environmental protection measures, and, most importantly for this decision, “rights and privileges accorded to Aboriginal peoples.”⁸⁶ The aboriginal exemption, however, does not apply to the MST or the expropriation provisions.⁸⁷ Applying the Aboriginal exemption to these provisions would, according to the Crown’s expert witness, defeat the purpose of the treaty, which is to create stability for foreign investment.⁸⁸ General exceptions from certain *CCFIPPA* articles include exceptions for the protection of the environment. They are, however, applicable in limited circumstances. For example, they apply when the measures are “necessary to protect human, animal or plant life or health,”⁸⁹ a very high threshold. Crampton CJ accepted that there is uncertainty regarding the scope of the specific and general exemptions. However, he stated that “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.”⁹⁰

2.2.2 SCOPE OF SELF-GOVERNMENT

Article 2(2) of *CCFIPPA* states that the treaty will apply to any entity whenever it exercises a regulatory, administrative, or other government authority delegated by the Contracting Party.⁹¹ As explained above, HFN is in the process of seeking recognition of its right to self-government. As such, it submitted that *CCFIPPA* will adversely impact the scope of self-government it can achieve, as it will be subject to these protections guaranteed to Chinese investors.⁹²

In support of its position that Article 2(2) could one day apply to its regulatory powers, HFN pointed to a number of agreements, such as the *Yekooche First Nation Agreement*, the *K’omoks Agreement in Principle*, and the *Westbank First Nation Self-Government Agreement*, which specifically require First Nations’ laws to be consistent with Canada’s international legal obligations. In the event of an adverse ruling by an international arbitral tribunal, these agreements specify that First Nations must remedy their offending laws or measures.⁹³ Crampton CJ determined that there was no causal link between *CCFIPPA* and these international law requirements in First Nations’ agreements because Canada would likely require such a provi-

⁸⁵ *Ibid* at paras 121-122.

⁸⁶ *Ibid* at paras 121-122, 125.

⁸⁷ *Ibid* at para 124.

⁸⁸ *Ibid*.

⁸⁹ *Ibid* at para 125 (citing *CCFIPPA*, *supra* note 27 at art 33(2)).

⁹⁰ *Ibid* at para 127.

⁹¹ *Supra* note 27.

⁹² *Hupacasath*, *supra* note 7 at para 135.

⁹³ *Ibid* at paras 130, 142 (citing Tlicho, Northwest Territories, and Canada, *Land Claims and Self-Government Agreement*, 25 August 2003 at para 7.13.6 [*Tlicho Agreement*]; Yekooche First Nation, British Columbia, and Canada, *Agreement in Principle*, 22 August 2005 at para 24(b); K’omoks First Nation, British Columbia, and Canada, *Agreement in Principle*, 24 February 2011 at para 35; Westbank First Nation and Canada, *Westbank First Nation Self-Government Agreement*, 3 October 2003 at para 36).

sion in any future treaty in any event.⁹⁴ In coming to this conclusion, he did not address the additional legal obligations flowing from *CCFIPPA* down to the First Nation, but instead focused on the inclusion of the provision itself in an eventual agreement.

The court dismissed HFN's self-governance concerns by highlighting that, at present, its regulatory capacities are limited to those provided for in the *Indian Act*, which involve the ability to adopt bylaws applicable on reserve only.⁹⁵ HFN's assertion that its regulatory capacity goes beyond the *Indian Act* as a result of its Land Use Plan was also dismissed, as this Plan was deemed to merely be a consultation and cooperation instrument, which does not fall within the potential scope of *CCFIPPA*.⁹⁶

3. COMMENTARY

Crampton CJ began his judgment by repeating the Supreme Court's foundational principles regarding the Crown's duty to behave honourably and the need for reconciliation with Aboriginal peoples.⁹⁷ Despite these pronouncements, he then proceeded to focus narrowly on the three-part test, in the process paying insufficient heed to these principles. This led not only to the denial of HFN's request for a declaration that the Crown owed a duty to consult, but also an award of costs against HFN. Given that this is a case involved novel issues of public importance in which the applicant had no pecuniary interest in the outcome, that the Crown clearly has superior capacity to bear the costs, and that the application was not vexatious or frivolous, the awarding of costs against the First Nation was very punishing.⁹⁸ Advocacy organizations, such as Leadnow.ca, have mobilized to help cope with the costs award, as well as to help fund an appeal, by fundraising on behalf of HFN. As of late November, Leadnow.ca had raised \$214,966.⁹⁹

In the following section, I will comment on four particularly troubling issues with the court's decision. Firstly, I will review the court's determination that these alleged adverse impacts were speculative and that there is no causal link between *CCFIPPA* and these impacts, with reference to: a) high-level management decisions; b) the most contentious *CCFIPPA* provisions; and c) the alleged chilling effect. Secondly, I will discuss the modern First Nations' agreements, an issue that was only briefly discussed by the court. Thirdly, I will discuss *CCFIPPA*'s deeply inadequate environmental assessment process. Finally, I will review the challenging circumstances of this case that unfortunately may have dissuaded the court from ruling in HFN's favour.

⁹⁴ *Ibid* at para 144.

⁹⁵ *Ibid* at para 91 (citing *Indian Act*, *supra* note 44, ss 81, 83).

⁹⁶ *Ibid* at para 92.

⁹⁷ *Ibid* at paras 43-46.

⁹⁸ *Xeni Gwet'in First Nations v British Columbia*, 2002 BCCA 434 at 98; *British Columbia (Minister of Forests) v Jules*, 2001 BCCA 647 at 37; Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Minister of the Attorney General of Ontario, 1989).

⁹⁹ Leadnow.ca, "Donate to help the Hupacasath First Nation continue their legal battle against the Canada-China FIPA", online: Leadnow.ca <<https://leadnow.netdonor.net/ea-action/action?ea.client.id=1694&ea.campaign.id=19897&ea.tracking.id=donate-single>> (amount accurate as of 15 October 2013).

3.1 SPECULATIVE AND NO CAUSAL LINK

3.1.1 HIGH-LEVEL MANAGEMENT DECISION

In trying to persuade the court that these provisions could impact its rights, HFN raised possible scenarios that could lead to arbitral awards, such as the cancellation of a natural resource extraction permit or the implementation of a moratorium on development over traditional territories.¹⁰⁰ The court's response to each proposed adverse impact was that they were speculative and non-appreciable, and that there was no evidence of the requisite causal link.¹⁰¹ In fact, demonstrating concretely that this Crown action will result in specific harm is impossible to prove at this stage. Yet, the Supreme Court has acknowledged this evidentiary problem, recognizing that the difficulty of proving this harm does not render the harm less probable, given that high-level management decisions or structural changes

may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions.¹⁰²

Crampton CJ distinguished the existing jurisprudence from HFN's case by adopting the Crown's argument that those decisions involved regulatory regimes over lands and resources specifically claimed by the Aboriginal group in question rather than a national agreement that affected all Canadian territories.¹⁰³ The Crown further argued that "the subject matter of *CCFIPPA* bears no relationship to resource management...Nor does it set the stage for further decisions that will have a *direct* adverse impact on land and resources."¹⁰⁴ I respectfully disagree. Canada's interest in encouraging Chinese investment has everything to do with providing a welcoming regulatory environment for Chinese investors to exploit Canadian natural resources. As stated by Mike Blanchfield of the Canadian Press, "China is hungry for natural resources and Canada is eager to oblige."¹⁰⁵ Given the extent of traditional Aboriginal territories in Canada, these natural resources will almost inevitably be found within them. Should an Aboriginal community wish to and successfully become involved in the management of natural resources on its traditional territory, Canada's international obligations may hamper the extent of its management options, such as preventing the exploitation of the environment.

¹⁰⁰ *Hupacasath*, *supra* note 7 at paras 3, 128, 130.

¹⁰¹ *Ibid* at paras 128, 131.

¹⁰² *Rio Tinto*, *supra* note 25 at para 47 [emphasis in original].

¹⁰³ *Hupacasath*, *supra* note 7 at para 78.

¹⁰⁴ "Memorandum of Fact and Law of the Respondent, Minister of Foreign Affairs Canada as represented by the Attorney General of Canada" in *Hupacasath First Nation v The Minister of Foreign Affairs and the Attorney General of Canada*, Court File No T-153-13 (15 May 2013) at para 105 [emphasis in original].

¹⁰⁵ *Supra* note 32.

Although CCFIPPA certainly does not specifically target resources on Aboriginal land, if Chinese investors invest in the resources on Hupacasath traditional territory, Hupacasath claims and rights may be affected. Therefore, the distinction between this agreement and decisions that affect specific resources claimed by Aboriginal groups advanced by the court is untenable. The difference is that by the time these effects are realized, it will be too late for HPN to challenge these international investment protection standards. In the face of potentially steep damages awards, Canada would doubtless argue its hands are tied by its international obligations.¹⁰⁶

3.1.2 MST, MFN, AND EXPROPRIATION PROVISIONS

With respect to specific provisions in *CCFIPPA*, including the MST, MFN, and expropriation clauses, Crampton CJ acknowledged that their eventual interpretation by arbitral tribunals is uncertain and, consequently, their possible adverse impacts on Aboriginal rights are uncertain as well.¹⁰⁷ This acknowledgment is problematic given that the creation of certainty for investors, via a stable regulatory environment, is precisely the purpose of *CCFIPPA*. The MST clause, in particular, is designed to establish this certainty. Aboriginal communities now bear the burden of uncertainty, as it has been shifted to them in order to protect and encourage foreign investment.

Two weeks after the Federal Court released its *Hupacasath* decision, Lone Pine Resources Inc. filed a “Notice of Arbitration” under *NAFTA* against Canada under the MST and expropriation provisions. It is claiming \$250 million in damages for Quebec’s moratorium on oil and gas mining in the St. Lawrence River.¹⁰⁸ This example shows that HPN has a very real reason to be concerned about the impact of the MST and expropriation provisions on environmental regulation. While the Quebec government may have the ability to resist the pressures associated with such claims, a small First Nation may find it impossible to stand its ground. Regardless of whether a tribunal will ultimately decide in Lone Pine Resources’ favour, the mere act of filing this claim may be enough to derail, or at least undermine, Quebec’s ability to maintain this moratorium.

Chinese firms are “shedding their political caution and becoming increasingly aggressive in launching legal actions to defend their interests against western governments.”¹⁰⁹ For example, Ping An Insurance Group “launched an arbitration claim for \$2 billion against Belgium last year over the alleged expropriation of a Belgian-Dutch bank in which it had invested.”¹¹⁰

¹⁰⁶ See, for example, the discussion of *Ethyl Corporation v Canada* in Nogales, *supra* note 81 at 133-134, 139.

¹⁰⁷ *Hupacasath*, *supra* note 7 at paras 100-101, 104, 117-118.

¹⁰⁸ “Notice of Arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law and Chapter Eleven of the North American Free Trade Agreement” in *Lone Pine Resources Inc v The Government of Canada* (6 September 2013), online: Investment Treaty Arbitration <<http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf>>.

¹⁰⁹ Shawn McCarthy, “China turns to courts in business disputes with western governments”, *The Globe and Mail* (4 October 2012) online: *The Globe and Mail Inc* <<http://www.theglobeandmail.com>>.

¹¹⁰ *Ibid.*

3.1.3 CHILLING EFFECT

HFN argued that *CCFIPPA* could have a chilling effect on the government's willingness to settle its claims regarding HFN's traditional territories and recognition of its right to self-government. In some respects it is difficult to imagine the current climate becoming any chillier. For example, last year, Canada announced that it had adopted a new "results-based approach to treaty and self-government negotiations." This strategy is designed to "accelerate progress in negotiations" by focusing its resource on negotiation tables that have the "greatest potential for success."¹¹¹ Though this language sounds constructive, in practice it could allow Canada to unilaterally suspend negotiation tables if it believes they are failing to deliver results, which it has in fact done.

Proving the existence of a chilling effect is virtually impossible, particularly when the other party refuses to acknowledge its existence. Clearly, the government wishes to increase economic development by way of natural resource exploitation. Environmental protection regulations and Aboriginal rights serve to hinder reckless natural resource exploitation. The government has already acted swiftly to undermine those environmental regulatory hindrances.¹¹² However, the constitutionally protected Aboriginal rights pose a slightly more challenging hurdle. Nevertheless, the commitment to protect Chinese investors' interests in Canada is a step toward paving the way for unfettered resource development.

3.2 MODERN FIRST NATIONS' AGREEMENTS

The court acknowledged in the *Hupacasath* decision that Canada's argument that it need never consult with Aboriginal peoples when signing international agreements is inconsistent with modern First Nations' agreements.¹¹³ These agreements invariably include provisions specifically requiring consultation prior to the adoption of an international agreement.¹¹⁴ The *Maa-nulth First Nations Final Agreement*, for example, states that "before consenting to be bound by a new International Treaty which would give rise to a new International Legal Obligation that may adversely affect the rights of a Maa-nulth First Nation Government under this Agreement, Canada will Consult with that Maa-nulth First Nation Government."¹¹⁵ The

¹¹¹ Aboriginal Affairs and Northern Development Canada, "Harper Government Responds to Calls for More Efficient Results-Based Approach to Treaty and Self-government Negotiations", (4 September 2012) online: Government of Canada <<http://www.aadnc-aandc.gc.ca/eng/1346781914593/1346782141075>>.

¹¹² Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2011-2012 (assented to 29 June 2012); Bill C-45, *A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2011-2012 (assented to 14 December 2012). For a discussion of the changes to environmental regulation, see, for example, Meinhard Doelle and Chris Tollefson, *Environmental Law: Cases and Materials*, 2d ed (Toronto: Thomson Reuters Canada Ltd, 2013); Ecojustice, "How Bill C-45 weakens our environmental laws and democracy," online: Ecojustice Canada <http://www.ecojustice.ca/media-centre/media-release-files/backgroundunder-bill-c-45-open-letter/at_download/file>.

¹¹³ *Hupacasath*, *supra* note 7 at para 69.

¹¹⁴ *Ibid.*

¹¹⁵ Huu-ay-aht First Nations, Ka'yuu:k't'h'/Che:k'tles7et'h' First Nations, Toquaht Nation, Uchucklesaht Tribe, Ucluelet First Nation, British Columbia, & Canada, *Maa-nulth First Nations Final Agreement*, 9 April 2009 at para 1.7.1.

Lheidli T'enneh Final Agreement,¹¹⁶ the *Tla'amin Final Agreement*,¹¹⁷ *Yale First Nation Final Agreement*,¹¹⁸ *Tsawwassen First Nation Final Agreement*,¹¹⁹ and the *Tlicho Agreement*¹²⁰ all include similar provisions. Presumably, if HFN settles an agreement with Canada, this provision will also be included.

By including this provision in First Nations' agreements, Canada recognizes that international treaties may adversely affect Aboriginal rights and that the appropriate and necessary response is to engage in consultation. In fact, this was recognized in the 1975 *James Bay Northern Quebec Agreement*.¹²¹ In this agreement, Canada agreed to endeavour to obtain amendments to the *Migratory Birds Convention*, which it ultimately succeeded in so doing.¹²²

Crampton CJ recognized that the Crown's argument that it is not obliged to consult with Aboriginal groups in signing international obligations is inconsistent with their history of recognizing this obligation in First Nations agreements. In spite of this, Crampton CJ refused to impose this obligation in the case at hand. In consequence, the court has created a hierarchy of Aboriginal rights. First Nations with agreements with Canada have established mechanisms and recourses to address a failure to be consulted regarding the adoption of international agreements. Aboriginal groups without agreements may only turn to the courts for relief. If the courts will not recognize a failure to consult in the context of international agreements, as in the case of *Hupacasath*, they simply have no legal recourse.

3.3 ENVIRONMENTAL ASSESSMENT OF CCFIPPA

As a result of the 2001 *Framework for Conducting Environmental Assessments of Trade Negotiations*, CCFIPPA was subject to an environmental assessment ("EA").¹²³ The two key objectives of the EA are "to assist Canadian negotiators integrate environmental considerations into the negotiating process by providing information on the environmental impacts of

¹¹⁶ Lheidli T'enneh, British Columbia, & Canada, *Lheidli T'enneh Final Agreement*, 29 October 2006 at c 2, para 11 [not yet ratified].

¹¹⁷ Tla'amin Nation, British Columbia, & Canada, *Tla'amin Final Agreement*, 2011 at para 24 [not yet ratified].

¹¹⁸ Yale First Nation, British Columbia, & Canada, *Yale First Nation Final Agreement*, 5 February 2010 at para 2.8.1.

¹¹⁹ Tsawwassen First Nation, British Columbia, & Canada, *Tsawwassen First Nation Final Agreement*, 8 December 2006 at c2, paras 30-31.

¹²⁰ *Supra* note 93 at para 7.13.2.

¹²¹ *James Bay and Northern Québec Agreement and Complementary Agreements* (Québec: Les Publications du Québec, 1998) at para 24.14.2.

¹²² *Convention Between the United Kingdom and the United States for the Protection of Migratory Birds in Canada and the United States*, 16 August 1916, 39 US Stat 1702, TIAS No 628 [*Migratory Birds Convention*]. These amendments were obtained with the aid of an Aboriginal delegation that participated in the negotiations (Philip Awashish, *Amending the 1916 Migratory Birds Convention* (October 1, 2000) [copy with author]).

¹²³ Foreign Affairs, Trade and Development Canada, "*Initial Environmental Assessment (EA) of the Canada-China Foreign Investment Promotion and Protection Agreement*," online: Government of Canada <<http://www.international.gc.ca>> [*Initial EA*].

the proposed trade agreement; and to address public concerns.”¹²⁴ In requiring EAs for trade agreements, Canada acknowledges that environmental harm can result from these agreements. Canada has recognized this despite the fact that these agreements constitute an exercise of the executive’s prerogative powers, perhaps the highest form of “high-level management decision.” The duty to consult and accommodate typically arises in the context of EAs because of this recognition that the environment may be harmed.

There are three stages to the EA process in the context of trade negotiations: an Initial EA, a Draft EA, and a Final EA.¹²⁵ In the 2008 *Initial EA*, the government concluded that “significant changes to investment flows into Canada are not expected as a result of these negotiations. As such, the economic effects and likely significant environmental impact in Canada are expected to be minimal.”¹²⁶ The *EA* was posted for public comment for a month. After receiving no comments, the government determined it was not necessary to conduct a Draft EA. According to Canada, it consulted various stakeholders. It did not, however, consult Aboriginal groups.¹²⁷

The *Final EA*, posted in 2012, recognized that “[w]hile the findings of the Initial EA were valid and accurate at the time of the report’s completion, the results [of the Final EA]...do differ slightly from those found in the *Initial EA*.”¹²⁸ This change is due to the apparently unexpected growth in Chinese investments in Canada. Between 2008 and 2011 alone, Chinese investment in Canada increased by 92.4 percent.¹²⁹ The questionable conclusion of the *Initial EA*—based on the logic that minimal investment means minimal environmental harm—could no longer stand. Nevertheless, the government determined that, despite the growing rate of Chinese investment, there are still no significant environmental impacts expected to flow from *CCFIPPA*. In support of this claim, the government argued that growing Chinese investment in Canada “cannot be directly attributed to the presence of a FIPA.” Therefore, “there can be no causal relationship found between the implementation of such a treaty and environmental impacts in Canada. It is for this reason that the claim made in the *Initial EA*, that no significant environmental impacts are expected based on the introduction of a Canada-China FIPA, is upheld.”¹³⁰

Presumably, the primary justification for signing bilateral investment agreements is to encourage foreign investment in Canada. The reassurances provided in the *Final EA* that *CCFIPPA* will not encourage investment are not reconcilable with the claim of Conservative

¹²⁴ Foreign Affairs, Trade and Development Canada, “Framework for Conducting Environmental Assessments of Trade Negotiations”, (February 2001) online: Government of Canada <<http://www.international.gc.ca>>.

¹²⁵ *Ibid.*

¹²⁶ *Initial EA*, *supra* note 123.

¹²⁷ *Applicant Memorandum*, *supra* note 62 at paras 31-32.

¹²⁸ Foreign Affairs, Trade and Development Canada, “*Final Environmental Assessment of the Canada-China Foreign Investment Protection Agreement (FIPA)*,” online: Government of Canada <<http://www.international.gc.ca>> [*Final EA*].

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

Party MP Peter Van Loan that the agreement will “create success, economic growth, prosperity and jobs back here at home.”¹³¹

Both the *Initial* and *Final EAs* mention that Chinese investors are primarily interested in natural resource extraction, particularly mining and oil and gas. In response to possible concerns about the implications of these investment activities, the government provided assurances in its EAs that all extraction projects are subject to the Canadian environmental regulatory framework.¹³² Given Canada’s recent unraveling of decades’ worth of environmental protective legislation, this assurance provides cold comfort.

Instead of grappling with the possible environmental harm that could result from this bilateral agreement, Canada disingenuously produced an EA of very little worth or substance, choosing instead to rely on flawed logic. The lack of public comments suggests that the issue was not properly publicized, and does not confirm that Aboriginal groups or non-Aboriginal Canadians more generally are not concerned. Public participation is a time-consuming process; it is nevertheless an important part of the democratic process. Aboriginal groups have rights above and beyond the usual public participation requirements, as they form a distinct part of the governing system in Canada. In reviewing the environmental impacts of *CCFIPPA*, Canada should have sought feedback from Aboriginal communities.

3.4 ABORIGINAL SELF-GOVERNANCE

Crampton CJ briefly addressed the issue of whether *CCFIPPA* could impact HFN’s capacity to attain and then exercise rights of self-governance. He pointed out that HFN’s current regulatory capacity is limited to the restricted provisions of the *Indian Act*.¹³³ With respect, Crampton CJ did not address HFN’s argument. HFN is concerned about the impact of *CCFIPPA* not only on its current rights, but also on its future rights. HFN is seeking to have its right to self-government recognized by Canada. If and when this occurs, it will have various regulatory powers over its lands and resources.

As discussed above, *CCFIPPA* will apply to any entity exercising regulatory authority delegated by the Contracting Party. In theory, Canada could argue before future arbitral tribunals that, since Aboriginal self-governance is inherent power, not a delegated one, self-governing Aboriginal communities do not need to conform to Canada’s international obligations. The odds of Canada advancing this position and the tribunals accepting it, however, are small. As such, HFN would likely be subject to the international obligations established in *CCFIPPA* if it were to obtain the right to self-government.

3.5 CIRCUMSTANCES OF APPLICANT

Certain characteristics of this application for judicial review may have, though they should not have, contributed to the court’s decision to dismiss it. Firstly, a small First Nation brought the application. The optics of a 300-member Aboriginal community challenging the authority of the executive in conducting its international relations is not as persuasive as the optics of

¹³¹ *House of Commons Debates*, 41st Parl, 1st Sess, No 170 (26 October 2012) at 1205 (Hon Peter Van Loan).

¹³² *Final EA*, *supra* note 128.

¹³³ *Hupacasath*, *supra* note 7 at paras 135-146.

an Aboriginal umbrella organization bringing the application. Yet, the size of the community should have no bearing on the legal determination of the claim.

In fact, according to HFN, the application was brought on behalf of all First Nations.¹³⁴ However, as other First Nations were not parties to the proceedings, Crampton CJ dismissed this claim.¹³⁵ Four affidavits were provided in support of the application, including from the leadership of the Union of British Columbia Indian Chiefs and the Chiefs of Ontario Organization.¹³⁶ These affidavits demonstrate widespread concern within the Aboriginal population about the impacts of *CCFIPPA*. Had either of these organizations been parties to the proceedings, the outcome of the case may well have been different.

Another perennially challenging issue in duty to consult cases is determining the right moment to bring an application.¹³⁷ Perhaps if HFN had brought the application at the time of the EA, the court would again have been less likely to dismiss these claims. That the application was brought after the signing of *CCFIPPA* and before its ratification may have dissuaded the court from mandating consultation. However, Canada should not benefit from failing to engage with Aboriginal communities during the initial negotiations.

4. CONCLUSION

I conclude this paper by citing Justice Binnie's powerful opening from the unanimous Supreme Court decision *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*:

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.¹³⁸

And so it is in this case as well. Aboriginal groups have sought consultation with the Government of Canada regarding *CCFIPPA*—these requests fell upon deaf ears.¹³⁹ HFN, deeply concerned about the potential impacts of this thirty-one-year minimum bilateral investment agreement with China, filed an application for judicial review asking for a declaration that the government owes a duty to consult with First Nations groups before ratification. Rather than addressing these concerns in a meaningful or constructive manner, Canada instead

¹³⁴ *Ibid* at para 19.

¹³⁵ *Ibid* at paras 22-24.

¹³⁶ *Ibid* at paras 29-33.

¹³⁷ For a discussion of the difficulties regarding the timing of applications in duty to consult cases, see, for example, Nigel Bankes, "The role of a limitations defence in a judicial review application involving the Crown's duty to consult", University of Calgary Faculty of Law Blog on Developments in Alberta Law (26 October 2009), online: University of Calgary Faculty of Law <<http://www.ablawg.ca>>.

¹³⁸ *Mikisew, supra* note 21 at para 1.

¹³⁹ See, for example, Union of BC Indian Chiefs, "First Nations Demand Harper Government Honour Constitutional Duty to Consult Regarding China FIPPA" (14 December 2012), online: UBCIC <<http://www.ubcic.bc.ca>>.

engaged its legal machinery to suppress this request, even to the point of requesting costs be awarded against the First Nation.

In this case, the court found in favour with the Crown by narrowly applying the three-part consultation test, and by failing to consider the true meaning of the honour of the Crown. To support the request for costs, in addition, indicates a degree of deference to the Crown incompatible with the Federal Court's role as a court of equity.¹⁴⁰ Awarding costs against vulnerable parties such as HFN acts to intimidate them from seeking the assistance of, or at the very least, measured judicial direction from, the courts. The Crown's position and the court's response mark a lost opportunity on the path towards reconciliation with Aboriginal peoples, called for by our highest court.

¹⁴⁰ *Federal Courts Act*, RSC 1985, c F-7, ss 3-4.