FEDERAL COURT
(Before the Honourable Mr. Justice Crampton)

VANCOUVER, B.C.
June 5, 2013

T-153-13

BETWEEN:

HUPACASATH FIRST NATION,

APPLICANT;

AND:

MINISTER OF FOREIGN AFFAIRS CANADA
and ATTORNEY GENERAL OF CANADA,

RESPONDENTS.

Mr. M. Underhill,
Ms. C. Bioes Parker, Appearing for the Applicant;

Mr. T. Timberg,
Ms. J. Hoffman,
Ms. M. Tessier,
Mr. P. Savoie,
Mr. S. Spellisay, Appearing for the Respondents;

(PROCEEDINGS COMMENCED AT 9:38 A.M.)

THE REGISTRAR: This sitting of the Federal Court at Vancouver is now open. The Honourable Chief Justice Crampton is presiding. The court calls T-153-13, Hupacasath First Nation v. The Minister of Foreign Affairs Canada and AGC. On behalf of the applicant, Mr. Mark Underhill and Ms. Catherine Boies Parker. On behalf of the respondent Mr. Tim Timberg, Ms. Judith Hoffman, Ms. Tessier, Mr. Spellisay, and Mr. Savoie.

CHIEF JUSTICE: Well, good morning everyone and welcome. Now, I see you've risen. Did you want
to --

MR. UNDERHILL: No, that's fine. Whenever you're ready to, Justice.

CHIEF JUSTICE: Well, I just thought that at the outset I'd let you know, let everybody know, first of all, I've read all the legal submissions, I've read all the experts on both sides, I've read the affidavits and certain of the appendices, so you can all take that into account in determining how you want to use the next three days.

I thought I would just address our policy on media access and tweeting. I understand that there were some questions out in the lobby, so I'll just emphasize proceedings are generally open to the public and the media, with certain exceptions that I don't

think apply here yet. So laptops, Blackberries, similar devices may be used in the courtroom for note-taking or electronic communications so long as they don't cause any disturbance. Cell phones, pagers, similar devices may be brought into the courtroom but must be set on silent mode and not used for voice communication.

If there are journalists here with valid media credentials, they may take recording -- tape record the proceedings to verify their notes. Anybody else must seek my permission. And please, no recordings may be made of conversations between counsel and clients or between counsel and me.

All right, I just thought I'd clarify that because there seemed to have been a little bit of uncertainty, I gather, earlier today.

Now, housekeeping matters. Did anybody want to address any housekeeping matters in terms of how we want to proceed for the next few days?

MR. UNDERHILL: What I have is just some additions to the pile of paper that you already have, which I could address now if that's convenient to the court.

CHIEF JUSTICE: Sure, all right.

MR. UNDERHILL: All right. So Canada, and in fact both parties, would like to refer the court to a case released out of the B.C. Supreme Court earlier this week involving the Dene Tha' First Nation who you may have noticed is one of the affiants in this

proceeding, and so I'd hand up two copies of that.

CHIEF JUSTICE: Thank you very much.

MR. UNDERHILL: And in addition to that, we did not include certain pages from one of our secondary sources, one of the textbooks by Professors Newcombe and Paradell, and I'd just like to hand up two copies of that. A copy has already been provided to my friend.

CHIEF JUSTICE: Thank you.

MR. UNDERHILL: And I would just confirm, it looks like I can see them emerging over your desk there, that you have the five volumes of the applicant's motion record.

CHIEF JUSTICE: We do.

MR. UNDERHILL: Thank you. So that's -- and it looks like I see Canada is over there as well.

CHIEF JUSTICE: Yes. Indeed.

MR. UNDERHILL: So that's all the housekeeping for me.

CHIEF JUSTICE: All righty. Anything on your side?

MR. TIMBERG: Canada does have a few documents to hand up but we would like to provide that to you tomorrow morning at the start of Canada's submission, if that's permissible. We have a few aids for the court for our submissions, but we thought it would be perhaps best to provide that to you tomorrow.

CHIEF JUSTICE: Sure, that's fine.

Have you discussed how you want to use the available time over the next three days amongst yourselves?

MR. TIMBERG: Yes, we have spoken about that and understand Mr. Underhill and the applicant will take today and through to tomorrow morning. He's hoping to finish by the coffee break tomorrow morning.

CHIEF JUSTICE: Okay.

MR. TIMBERG: And then we would proceed at that point, and we're anticipating that we would finish shortly after the lunch break on Friday, very shortly after the lunch break on Friday so there would be time for any further reply in addition to the written reply that's already been provided.

CHIEF JUSTICE: Okay, so we have a plan for getting to where we need to get to by the end of Friday. So we'll sit from 9:30 to 4:30 every day? Do you think we need to sit longer?

MR. TIMBERG: I think that should be sufficient.

CHIEF JUSTICE: Okay, well, if we do I'm flexible. In terms of breaks, did you have particular ideas about when you wanted to take them, when you want to take lunches, et cetera?

MR. TIMBERG: My understanding is from my own behalf is lunch is from 12:30 to 2:00.

CHIEF JUSTICE: That's fine.

MR. TIMBERG: And then the morning

break somewhere around 11:00, but where it's appropriate in the --

CHIEF JUSTICE: That's fine. And the afternoon?

MR. TIMBERG: Perhaps around 3:15.

CHIEF JUSTICE: Okay, so we'll be flexible. All right, perfect. Well, I think that basically covers the preliminary matters. I understand that the applicants are no longer seeking the injunction.

MR. UNDERHILL: Yes, to be clear, Chief Justice, as we understand Canada's position and we'll of course hear from them in due course, consistent with I think what we like to call the constitutional dialogue between the courts and government, they are prepared to, as I understand their submissions, abide by any declaratory relief that this court may issue such that an injunction, in our view, then becomes unnecessary.

CHIEF JUSTICE: All right. Is there anything else we need to deal with before the applicant starts its case? All right. Well, over to you.

MR. UNDERHILL: Thank you, Chief Justice. Before -- sorry.

CHIEF JUSTICE: Did I understand that you --

MR. UNDERHILL: Yes, before doing so, two youth from my client's community would like to lead

the court in a prayer if that's acceptable.

CHIEF JUSTICE: Absolutely.

MR. TIMBERG: Thank you.

(PRAYER IN FOREIGN LANGUAGE)

SUBMISSIONS BY MR. UNDERHILL:

So, Chief Justice, by way of introduction, and I will, through the course of my submissions, generally follow and I'll tell you when I'm going to vary from the written argument. But by way of introduction I wanted to start by talking a little bit about framing and what this case is and is not about. And I want to start by saying the obvious. This is both in form and substance what's normally called a duty to consult case. And so actually the distinction I'm trying to draw was actually put in the case that was just handed up, just for your notes, at paragraph 5 where the court said this is a case about process, not policy.

And so the fundamental question that we are asking you to address is this. Does the constitutional principle of the honour of the Crown require consultation and potential accommodation of the applicant before Canada agrees to be formally bound by the obligations set out in what I'll call, for a short form, the CCFIPPA, that being the Canada/China Foreign Investment Protection and Promotion Agreement. And so I think Canada uses the same acronym and so for convenience I will just refer to it as the CCFIPPA

throughout.

We'll also refer to other FIPPAs being other bilateral investment trade agreements from time to time, and if I insert CC at the beginning, hopefully that will provide some clarity of what I'm speaking about.

CHIEF JUSTICE: Or you can just say "Treaty". We'll all know what you mean.

MR. UNDERHILL: Yeah, yeah. Well, Treaty gets tricky when we're dealing with an aboriginal case, of course.

CHIEF JUSTICE: Oh yes.

MR. UNDERHILL: Because we'll be talking aboriginal treaty rights, so that can lead into dangerous ground.

CHIEF JUSTICE: Fair enough.

MR. UNDERHILL: So that is the fundamental question, whether or not the owner of the Crown requires consultation with the advocate. That's the question you're being asked. It is not, importantly, a case based, in Canada's words, on general and unspecified policy concerns about the CCFIPPA. So in other words the applicant does not ask you, Chief Justice, to pass judgment on the wisdom of the executive's decision to ratify the CCFIPPA or this treaty such that this case is equated with the challenge to NAFTA that was at issue at the *Council of Canadians* case which you'll have seen reference to in the

materials.

This is not this case. This is not that case. You're not being asked to pass judgment on Canada's foreign trade policy nor are you being asked, in our respectful submission, to improperly intrude into the exercise of the prerogative to enter -- to engage in treaty-making.

Rather, precisely what you are being asked to do, consistent with cases like *Khadr* and *Black* which you have seen reference to in the applicant's argument, is consider whether or not the exercise of the prerogative is being done consistent with constitutional limits. In this case, that limit being the constitutional principle of the honour of the Crown. In other words, put at its simplest, is the ratification of the CCFIPPA consistent with the honour of the Crown? That's the question.

We have touched on already in the opening remarks the fact that in light of Canada's position that it will respect any declaratory relief issued by this court, we are therefore not asking this court to grant any injunctive relief. But what the applicant does have to acknowledge, fairly, is that this is a case of first instance, insofar as the court is being asked to consider whether or not the duty to consult applies in the context of the ratification of an international treaty.

But what I want to say immediately, by

way of introduction, is that should not be seen as either a novel or an extraordinary proposition. And I say that, Chief Justice, because of the material you may have already had a chance to look at, that Canada has contemplated in modern-day land claims agreements that it may consult with First Nations in respect of certain international legal obligations. And indeed those agreements, as you will have seen, provide that those First Nations, if asked by Canada, may have to remedy certain laws to be consistent with those obligations.

And so I say, then, that the idea that Canada -- or the proposition that Canada should have to consult First Nations is not in any way an unusual proposition, because it's already been contemplated in many modern-day land claims agreements.

Now, I'll take you in the course of my submissions to agreements with the Maa-nulth and other First Nations including, importantly, Chief Justice, the Tsawwassen First Nation who also have recently signed a final agreement that provides for consultation.

And I highlight the Tsawwassen for this reason. You will see in the evidence that the Tsawwassen, like my client, and the applicant before you today, have also requested consultation in respect of this treaty, the CCFIPPA, and have not received that consultation. And that's important, Chief Justice, in addressing one of Canada's principal arguments that you will hear in due course, that the -- my client's

situation is entirely speculative, and that they're not in a position to come to this court to ask for consultation. And I will submit in the course of my argument that the fact that Canada has not consulted with any First Nation, no matter how they may be situated, whether they have signed a final agreement, whether or not they have a Chinese investor operating in their traditional territory, regardless of their situation, Chief Justice, Canada has not consulted.

And so what essentially this case comes down to, then, is the question of whether the obligations that Canada is assuming in the CCFIPPA for a period of 30 years, as you will hear perhaps too many times from me, irrevocably committing for a period of 30 years to these obligations -- are those obligations the type of international legal obligation that require consultation? As contemplated in the modern-day land claims agreements.

And importantly, I want to say at the outset it is not -- you know, we agree with Canada. CCFIPPA does not change any domestic laws. And you'll hear much from Canada on that point as why therefore a duty to consult is not triggered. In fact, the case law hasn't even begun to address whether or not the duty to consult arises when a new legislative measure is being enacted. And so that this case is about is very much an on-the-ground -- the on-the-ground implications, if you would, of Canada assuming these obligation. And it's

really the on-the-ground implications that we'll see in the case law that has been the subject matter of the duty to consult jurisprudence to date. When a particular resource decision is being made, a particular policy decision being taken, it's the on-the-ground -- what the courts call the practical implications that have been the focus of the court's attention in determining whether or not a duty to consult arises because of, of course, a potential adverse impact on aboriginal rights and title.

Again, to be clear, this case clearly has implications beyond just this particular treaty, this particular -- in an actual investment treaty. The evidence before the court discloses that Canada's now engaged in negotiating a similar bi-lateral investment treaty with the European Union, and I raise that -- and although it's not a question you have to decide here, I raise that because it informs the analysis of -- or helps contextualize the issue of whether there should be a duty to consult here. Because it is conceivable that Canada could, if the court were to find in the applicant's favour in this case, construct the consultation process that could cover off both this treaty and future investment treaties. That's conceivable. Although you don't have to decide that here, my point is the court should not close its eyes to the reality that obviously this case is not confined to its four corners and there are implications that go

beyond it, and properly that is a factor we've taken into account when thinking about the implications of a finding in the applicant's favour that there is a duty to consult.

And really what I'm foreshadowing, as far as any sort of flood-gates argument that may come from Canada, that the sky will fall if there is a duty to consult on this, my point is simply there's all sorts of room for Canada to design a consultation process that can take those concerns into account.

So fundamentally then, Chief Justice, the issue before you, by way of introduction is, are these obligations in the CC FIPPA the type of international legal obligation which trigger a duty to consult because of potential adverse impact on aboriginal rights and title.

If I could just give you a road map of where I want to go in my submissions. In preparing my oral submissions it occurred to me that it would be useful for the court, and perhaps lead to a better flow, to do a somewhat unusual step of first addressing the law around the duty to consult, and I say that, Chief Justice, because the facts principally, although there are, of course, some basic background facts about my client that, of course, need to be addressed, you know, the main event with the facts are the details around the CCFIPPA and the obligations that Canada is assuming. I think you will find it helpful first of all to have been

immersed in the law of the duty to consult to understand, you know, where it's been triggered to date, before we start looking at the obligations. And second of all, I think it would be helpful to you if we move from a description of those obligations into the discussion which you will see in our argument about the implications of those obligations. And I think you may find that to be a better flow, and with your leave I propose to proceed in that way.

So in other words, what I would like to do is start with the law on the duty to consult, talk about its grounding in the honour of the Crown and the process of reconciliation, so that you can see where the courts have gone in terms of what you have seen from our submissions the type of high level decisions, the structural changes that we say the ratification of this treaty represents. I'd like to start there.

I'll then quickly address -- because I don't understand Canada to -- in fact I understand them to ask you not to decide the question of whether or not the exercise of the prerogative, if you would, can be reviewed in this particular case. We say this follows naturally or follows on from the *Khadr* case in so far as the duty to consult is grounded in a Constitutional principle and you're being asked to simply review whether or not the prerogative, that is the prerogative to enter into international treaties is being exercised in a Constitutional manner.

So I'd like to briefly address that, before then turning to the facts, and in particular looking at obviously the investor state arbitration mechanism that's in the CCFIPPA, and looking at the obligations itself, and making the point, of course, that this is the first bi-lateral investment treaty, the first FIPPA, if you would, where Canada is in a capital importer position. In other words, where unlike the sort of historical model for bi-lateral investment treaties, we have more foreign investment in Canada from China than Canada has itself in China.

I then propose to turn to analysis of the implications of the FIPPA obligations, and you'll have seen there is a lot of, in some cases very expensive evidence that's been put before the court describing the obligations and talking about how those similar obligations in other treaties, principally NAFTA but also other bilateral investment treaties, how those obligations have been applied, and what claims have been brought, what awards have been given and on what basis.

And what I will suggest to you in the course of my submissions, and at the end of the day, there was a lot of evidence and a lot of detail there. In my respectful submission, following cross-examination, the experts are actually not that very far apart, insofar as it will be our submission that they essentially agree that these obligations do represent, in short, the imposition of a new regime, if you would,

of international law on to the domestic sphere. And we say it's that, the imposition of that new regime, that triggers the duty to consult.

And it may be -- and in my respectful submission, you don't need to decide. There are lots you will see in the literature that we'll look at, lots of critics, of course, of these investment treaties, and the implications of them. And there are of course staunch defenders at the same time. It's not an issue, in my respectful submission, you need to decide, who is right and who is wrong, because in our submission the answer is, there was certainly a change. Whether it's as bad as some say, or as positive as some others say, the simple fact is, there is -- the ratification of this treaty will mean that there is a change. There are new rules, if you would, that would be imposed on Canada and that, in our respectful submission, is sufficient to trigger the duty to consult.

And as I've already alluded to, I will be talking a lot about reconciliation. We're going to develop, as you've seen from the argument, essentially two streams of argument as to why the duty to consult is triggered, Chief Justice, in the course of our submissions. First is the impact that the ratification has on government and its ability to deal with either the protection or the accommodation of aboriginal rights and title. And that really is all about reconciliation. And we'll of course go to *Haida* and look at the origins

of the duty to consult.

But the important piece to take away for purposes of this introduction is that reconciliation is about balancing. And in our submission, the introduction or the ratification of FIPPA introduces an important new factor into that balancing act, that plays out, in fact -- we'll talk about, you know, the so-called chill effect on legislative measures. But when it comes to aboriginal rights, really where the rubber hits the road, if you would, and the heart of the case lies in the -- as I said earlier, the on-the-ground implications of these treaty obligations and the balancing that has to go on both by government and indeed by the courts, by this court, in terms of how aboriginal rights are to be accommodated. There is a new factor that has to be taken into account of the rights that have been given to, in this case, Chinese investors, that we say affects the balancing act of reconciliation and therefore triggers a duty to consult.

That's the first stream of argument we'll develop. We also say, secondly, that it has a very direct impact on aboriginal self-government, whether that self-government was exercised through an aboriginal right of self-government that may be realized some time in the next 30 years, or through the treaty process, or indeed through delegation. The point is that it is not controversial, Chief Justice, that the FIPPA obligations apply to all sub-national governments in Canada,

including First Nations governments. That's not a point that's in contest between the parties. And so the fact that First Nations governments, as is played out in the modern-day land claims agreements that I alluded to earlier, by virtue of the fact that they are required in modern-day land claims agreements to remedy laws if they run afoul of international legal obligations. That is, with respect, a potential adverse impact on aboriginal rights that triggers a duty to consult. The fact that First Nations governments, no matter how they're exercising a right of self-governance or land use regulation, are required to be bound by the FIPPA obligations. We say that also triggers the duty to consult.

And so we therefore say the declaration that we seek is appropriate in this case.

So with your leave what I would like to do, as I say, is start with the law on the duty to consult, so that we can have the proper legal context for this case.

So, I'd like to begin by looking at the *Haida Nation* decision which you'll --

CHIEF JUSTICE: Sure. So what you've proposed, you've requested leave, that all seems fine but I would encourage you to the extent you can, further elaborate because I have read your submissions including your reply submissions that came in the other day.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: But I would find it helpful if you could further elaborate on this key point that you focused on about where the rubber hits the road.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: And the on-the-ground implications, because obviously you've been joined squarely on that issue.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: And after my initial pass I have to say that there are questions in my mind, and it would be just helpful if you can further flesh that out.

MR. UNDERHILL: And I think that is -- that's exactly the issue in this case. Where the parties are joining issue, Canada's position as you've see is look, first of all, there's no change to any domestic laws so how can there really be any impact on aboriginal rights and title? And then in essence what they're saying is, look, all this means is there are, you know, the potential of monetary claims against Canada, and Canada may have to pay money. So how can that -- in essence, how does that affect aboriginal rights and title? And so what I intend to focus on in the course of my submission very much is, and this is why I wanted to go to the law and the duty to consult first, talking about the practical implications of the right to seek those monetary claims and the spectre of

those monetary claims, what that means on the ground for aboriginal rights and title.

CHIEF JUSTICE: That's the first point, but then the other one, if I understand what they're saying is that this might be speculative, premature to be challenging, and at this stage that if and when the Chinese do come in with a particular investment, the duty to consult would get triggered at that time and would suffice. And so if you can just flesh out your position on that.

MR. UNDERHILL: Yes. And certainly, you know, one of the key points I tried to emphasize in the opening was the irrevocable nature, in other words -- of the ratification process. In other words, Canada, as soon as this treaty is ratified, there is nothing this court can do, no declaration that can be issued that will have any effect on the obligations that Canada has assumed for a period of 30-plus years. And so there is no further opportunity for consultation in respect of the obligations that Canada is assuming here and the rights they're giving to investors from China after this case. There is no further opportunity.

And so it sort of circles back to the first point. Insofar as those obligations, you know, I have to convince you in other words that the imposition, if you were, the consent to those obligations by Canada and in turn the giving of rights to those investors has the potential adverse impact now.

CHIEF JUSTICE: Exactly.

MR. UNDERHILL: Right.

CHIEF JUSTICE: And on the potential, I think you yourself in reply noted that there has to be a threshold level of probability to trigger the -- to bring you within the notion of potential as it was contemplated by the Supreme Court, so I'll want to hear you on that point as well.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: But, you know, if you go back to where the rubber hits the road, it's really going to be, well, if there's something that you think you would have wanted in the future, how does entering into this agreement today put you in a -- put the band in a position where it's worse off, I think.

MR. UNDERHILL: Yeah. Yeah. No, and that certainly, and again when we look at the high-level changes it's of course not -- you don't need to find that there's any sort of direct impact tomorrow, and I think it's fair to say tomorrow -- if it was ratified tomorrow or the day after a judgment in favour of Canada came down and it was ratified, there's nothing happening the day after.

CHIEF JUSTICE: Right.

MR. UNDERHILL: This is not one of those cases. We're not dealing with one of the resource project cases that we'll see in the literature. So what we are dealing with is the high-level structure. As you

say, the question is, does this change the balance and does it create that potential, the prospect for potential direct adverse impacts down the road?

CHIEF JUSTICE: And there's two kinds. There's -- if the Chinese actually do come in to invest, and then there's also, if I understood your submissions correctly, there's the actual negotiation of the treaty in respect of which you're at Stage 4, that those terms could get impacted if I understand you correctly.

MR. UNDERHILL: Yes, and to be precise it's the aboriginal rights of self-government which are codified in the treaty. Certainly from the aboriginal perspective. Treaty making is about essentially, you know, the parties recognizing each other's jurisdiction and putting it into a written document.

CHIEF JUSTICE: Right.

MR. UNDERHILL: You know, of course governments don't necessarily agree with the inherent right to self-government. We don't need to decide that here today. But from the aboriginal perspective, indeed we see this in the preambles to the framework agreement which we might touch on.

The point is from an aboriginal perspective, those are pre-existing rights of self-government which are modified, in effect, by Canada assuming these obligations, because the exercise of those self-government rights, however they may be exercised, whether they're exercised through, you know,

a -- for example, the land use plan that you saw in the materials of the Hupacasath. If that was actually challenged by a third party investor down the road and the court found, well no, I think that land use plan or that cedar access strategy is, you know, a binding document insofar as it's grounded in a valid aboriginal right of self-government to land use, then the fact that that right of self-government, whether it's expressed through that means, whether it's proving it in court or whether they agree with Canada to put it into a treaty, my point there on that second line is that because the way international law works is, all of the sub-national governments, including First Nations' governments, are bound by those obligations, that is a potential there for modification, if you would, of that right of self-government, potential impact on the self-government insofar as down the road -- of course it may not happen tomorrow, but it may be the case, and in our submission very real possibility -- and we know it's a real possibility, Chief Justice, because we see what the language is in the modern day land claims agreements. We know that Canada is taking the position in all treaty negotiations that First Nations must exercise their rights in accordance with Canada's international legal obligations.

CHIEF JUSTICE: I understand, but as you were saying a moment ago, I think you were starting to say, at the end of the day the claim gets brought

against Canada, Canada pays. So what I'm wondering is, how does that impact you other than possibly through -- your client, I mean -- other than possibly through the negotiation of this treaty and how its terms might get influenced, if I understood you to say that, and maybe how your own laws might get influenced. So I need to better understand how at the end of the day -- and of course, we've got the aboriginal reservation, which I understand -- I understood the point about it not applying in two of the cases, I think it's expropriation and the minimum standards.

MR. UNDERHILL: Correct.

CHIEF JUSTICE: And I understood the point also about the MFN and how that inter-relates with the annex on expropriation. So, I just need to better understand exactly how it's going to impact on your client, because at the end of the day can't your client simply say "No," and exercise its rights, put Canada in a position where it's offside and has to pay the damages, if any, that might ultimately in some proceeding, if it's successful against Canada, it might have to pay, and how are you then left in a worse-off position?

So I need you to bring it back to how your client's going to be actually in a worse-off position as a result of this treaty. And so I'm glad that you pointed out yourself that it's really where the rubber hits the road and it's the on-the-ground

implications that are key in terms of what triggers the duty to consult, and that's what I'm going to need to better understand within the overall legal framework, because, you know, as I said, after a first pass I think I understand the parameters and now I just want to get down to exactly where the rubber hits the road.

MR. UNDERHILL: Yes, and certainly that's the meat of the submission, but as I say, I think it is important to pause and spend some time with the law around the duty to consult to really -- in particular to look at the law around these high level changes, because you'll see the court struggling with the very question you're struggling with, with these high level changes, these structural changes. Well, you know, it's -- because, of course, it's much easier when you're dealing with a particular resource decision because you can sort of see the more tangible effect on the aboriginal right the next day. You know, if the tailings pond goes there or the access road goes in. Those are much easier cases for, I think, for the court to wrap their heads around in terms of how is it going to effect.

It does get trickier, admittedly, when you're dealing with the so-called high level changes because you're not talking about impacts tomorrow. So you're wrestling with already this idea of just potential adverse impacts, because we're not talking about actual infringement. That's not the test.

CHIEF JUSTICE: Right.

MR. UNDERHILL: We're talking about potential. And so really what you're wrestling with, and properly so because that's the heart of the case is, you know, is there real potential here down the road, and one of the unique things about this case is, because it's a case of first instance, we're dealing with a 30-year window. And so assessing -- and of course, therefore, there's an inherent speculative nature to this case. I can't deny that. Absolutely there is, because we're talking about what can happen over a 30-year period with no opportunity to change it.

CHIEF JUSTICE: I understand that, but if you can -- for example, if you can give some examples, such as the land use document that you mentioned, and that I've read, if you could help to flesh out how that type of a measure, or another one, if you prefer, might be adversely impacted by the treaty if your client decided to hold its ground and just say, "Sorry, if you're offside, you're offside, you pay and that's -- you know, that's your problem, it's not ours." I just want to understand how it -- why you couldn't do that, and how things would play out if you really did, in the future, notwithstanding this treaty, if your client did strongly assert its rights and refuse to compromise in any ways that the government might request in light of the fact that there would then have been this treaty.

MR. UNDERHILL: And one of the things that I urge you to think about and in the cases, and that's why I emphasize the on-the-ground implications -- because you'll see -- and, you know, one of the things that the literature speaks about, as I mentioned in my opening, is the chilling effect.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: But one of the things that my job is to convince you of is to really recognize that, you know, it's an overused term, the *sui generis* term, but aboriginal rights are so because one of the ways the impacts will be felt on the ground sort of -- I'm trying to sort of address your question now, before getting into the law -- is how this court, for example, might look at the question of what's reasonable accommodation when -- let's take an example of where the court has taken some sort of measure -- sorry. The government has taken some sort of measure that it thought it needed to do, you know, with the *Dene Tha'* case just being handed up with the fracking example. And fracking is not a bad example to talk about, because of course one of the claims you may have seen that's recently been brought, although it hasn't been adjudicated, is a challenge under NAFTA by an American company to Quebec's moratorium on fracking.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And so to play it out, as you say, and you know, where is the rubber hitting

the road? If we can play out this scenario -- and this is just one of the avenues we can go down, to talk about real impacts, but you know, if the government did decide to take a measure that, you know, imposed, for example, a moratorium on fracking, or potentially in a certain area, and that government measure was subsequently challenged in court, or through one of the -- well, let's talk about the court scenario, for example, for a moment. Does the prospect -- if Canada came to this court and said, "Well, you know, we're here and we couldn't -- and we imposed this particular measure, but we couldn't go farther than what we did." And the Dene Tha' are saying -- you know, Dene Tha' or some other group, or my client group, are saying, "Well, this particular measure didn't go far enough to protect our rights." And it's challenged in court. Here. Domestically. Leaving aside *FIPPA*. But Canada says, "Well, we couldn't go farther, because if we did go farther, that would be tantamount to a breach of our obligations under the *CCFIPPA*. And so it wouldn't be reasonable for us to take that step. It wouldn't be reasonable accommodation." We can't go farther, because that would amount to, for example, an indirect expropriation of investor X's rights. Or it would amount to a breach of the obligation for fair and equitable treatment under the minimum standard of treatment obligation.

And similarly, you know, just as -- and

so the question which I don't think this court can answer right now is: Is that properly a factor? Might that be a factor in what's reasonable accommodation? And then back it up, back it up to the -- back it up to earlier when the government is considering that measure in the first place, and this is what, you know, again, this is the -- what I am talking about with the rubber hitting the road. Government -- and again, it's not -- you know, it's much more subtle than the chill effect that we're talking about here, and this is why the importance of Mr. MacKay's evidence on cross-examination, which you saw reference to in our argument, that, you know, Canada and other arms of government should properly do a risk analysis about the compatibility, the certain new measures with Canada's international legal obligations.

My point is this, that when Canada or any sub-national government, be it the province or even a municipality, are thinking about a new measure, and specifically with aboriginal rights, is this measure reasonable accommodation? Right? Because that's, you know, that fine balancing act, which you probably already know from the cases, between the aboriginal interests, the aboriginal rights and great societal interests. We say, based in part on Mr. MacKay's own evidence, that necessarily these international obligations go into that mix of what's reasonable accommodation.

And so, again to use the language I used earlier when speaking about what the court has to wrestle with, government might say, "Well we can't go farther than this, because if we go farther than that to protect those rights or to accommodate those rights, that's going to put us offside the CCFIPPA obligations."

CHIEF JUSTICE: I understand what you're saying generically, and so if you can just bring it down to -- at some point, not necessarily right now, but at some point over the course of today, just bring it down into, as you put it very well, where the rubber hits the road on a particular matter. Like something that your client might feasibly want and might find that Canada's willingness to go all the way might be constrained and that it may therefore only be allowed to go part way, which I think is what you're saying now.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: So, I'm just -- I understand the concept and everything that you just articulated, but I'd find it really helpful if you can bring it down to that level of where the rubber would hit the road and how the -- how your client wouldn't be able to just say "Sorry, this is -- we're going to do what we think we're entitled to do, and if you're offside, so be it. You pay the fine, that's not our problem."

So, I understand what you're saying and I think what you're saying is there's going to be a middle

ground there and that's what it's going to affect. Yes, your client may be able to do what I just described in respect of some class of matters, but there will be another class of matters in respect of which there'd be some giving and taking, to'ing and fro'ing and it's that class where, not withstanding any position that your client may take, the government will have some scope to take a different position as a result of -- and I really need you to do this particular measure -- this particular Article in the agreement which says this, and it changes things in a way that it wouldn't otherwise have been changed as a result of that particular obligation. Because I think we've heard the respondent say, "Look, there's lots of stuff in this that isn't going to change anything, and it wouldn't reasonably, and there isn't a situation in which we -- they can conceive in which it would have changed anything relative to that which would otherwise have occurred in the absence of the agreement."

So I'm pretty familiar with counter-factuals and so I just need you to flesh out the counter-factual.

MR. UNDERHILL: Yes. I think it'll be -- you know, we can get into that in the afternoon after the lunch break.

CHIEF JUSTICE: Sure.

MR. UNDERHILL: And really -- that's why I say I think it'll be easier to do that when we've

gone through the niceties of the provisions – and I appreciate you're already generally familiar with them – get into some of the claims that have been brought so we can understand the scope of those obligations, and then bring it home, hopefully, to say "All right, let's look at how these obligations may play out," and some scenarios, to try to bring that home.

CHIEF JUSTICE: Sure. And just while you're going through that first part on the honour of the Crown, reading their submission, you know, it's -- you come away with the sense that they actually didn't think that anything they were doing was going to adversely impact on you, and so it would be helpful to understand how the honour of the Crown fits in that situation where the government doesn't think that they're doing anything that's going to adversely impact on any aboriginal -- any First Nations' group, and so --

MR. UNDERHILL: That is there -- there's no question that's the legal position, but certainly, you know, Mr. MacKay's evidence as the lead negotiator is they, you know, they have not consulted, as you know, with any First Nation because they take the view it has no impact on -- or potential impact on aboriginal rights and title.

CHIEF JUSTICE: Right, and then the other part of that would be if they did a -- as they seem to be suggesting, and as some of the material suggests, they did do a broad public consultation,

including on the Indian environmental impact, how does that impact on the duty to consult, especially if -- because I gather from your submissions that there's a sliding scale and the lower the probability, the less the consultation going all the way down to notice and did that constitute notice, et cetera.

So, just --

MR. UNDERHILL: Yeah, and we'll talk about that minimum threshold because -- just on that very point. You know, even at the lowest end of the threshold, it's not just giving notice, it's at a minimum, you know, being able to at least hear the concerns of the affected First Nations.

CHIEF JUSTICE: Right.

MR. UNDERHILL: And so to the extent that there was any so-called public consultation or any other consultation process period, regardless of how you labelled them, I think it's fairly clear that First Nations were not given an opportunity, directly at least, to set out their concerns.

CHIEF JUSTICE: It would be helpful on that point if you can -- I think one of the affidavits, it wasn't your client's but it was another one, that seemed to suggest, I think explicitly, that consultation with each First Nation would have been required, and so it would be helpful to have your perspective on that.

MR. UNDERHILL: Yeah, and actually, and that was actually another reason I wanted to go through

that law and the duty to consult first, because that is an important issue. And, you know, you've seen there's a bit of a tussle between the scope of the declaration – right? – here, at the end of the day.

CHIEF JUSTICE: Right.

MR. UNDERHILL: And we'll see in some of the cases -- because look, it can't be controversial that, you know, if our client needs to be consulted, there are other First Nations in Canada that need to be. There's obviously a broader group.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: Whether you have to issue a declaration to that effect or not, I'm not sure is all that necessary because if you were to find in the applicant's favour, I suspect your reasons would give sufficient guidance to Canada as to what, you know, that there obviously might be implications beyond.

But my point is, what we'll see in the cases is examples of broader consultation processes that have been set up. For example with the change in jurisdiction with fish farms from the province to Canada, some broader consultation processes were set up, so such that Canada -- again, you don't need to decide this, that we're getting one step ahead of ourselves, but just very briefly, I think it's fair to say a process that would contemplate somehow individual consultation with virtually every First Nation in Canada is obviously unworkable. I don't think anyone could

stand up here and stay anything to the contrary.

But what we do have is evidence, including from the treaties themselves, remember the modern day land claims agreements that talk about consultation with the First Nation about those international legal obligations, either -- I can't remember exactly the language but either directly or through another forum, I think is roughly the language that's used. And so we made the point in our written submissions that there's an example where Canada has thought, you know, it might have to be part of a broader process. And that's realistically what had to happen here if you were to find in the applicant's favour. There would need to be a broader process likely involving umbrella organizations and the like. And as I say, that's been done. You know, it's done regularly by the Department of Fisheries and Oceans insofar as, you know, fishing measures that are being implemented for conservation or otherwise, you know, on the Fraser River as an example. And so there is lots of precedent for a broader consultation process. And so certainly we're not urging on you that, you know, necessarily that it had to be an individualized consultation process for every First Nation in Canada. Certainly the Hupacasath could be consulted, I guess is what I'm saying at the end of the day. My client could be consulted as part of a broader process.

CHIEF JUSTICE: The last thing, if you

can just make a note and at some point over the course of the day, it would be helpful to understand what -- and I understand your point about process and maybe it's just as narrow as that, but it would be helpful to have some kind of a sense as to how consultation would have led to a different document, like what particular provision would your clients have liked to have seen changed, and in what way. Because I think what we're hearing is that the terms in there are fairly standard, and yes, they differ slightly from agreement to agreement and maybe it's the differences that you would focus on, I don't know. But it would be helpful to understand again where the rubber hits the road, to have a sense of, well, what would it change? And it may be that at the end of the day it's not all that relevant if what you say is correct, and I'll have a better feel for that once you go through the law, that, look it, it doesn't matter if nothing would have changed, they were still entitled to consultation, and that may be where I come out, that may be what the law says. But it would be helpful to have a feel for, well, what do you think might have changed realistically and reasonably had some form of consultation -- and perhaps you can give a sense of what form you think that consultation should have been, given where this particular matter falls on that probability sliding scale. So --

MR. UNDERHILL: Well, in fact that issue was raised in the course of the cross-examinations, and

we asked Mr. MacKay about that in the context of looking at what you alluded to earlier, Annex B-10, which is the exception of the reservation for certain -- as I understand now after following the cross-examination, for what they call the police powers to do with health and safety, and so forth. We asked Mr. MacKay, in the course of the cross-examination. "Well, you know, could you have added in aboriginal rights and title here?" Because you'll see when we get there, that language is not included in there. In other words, could the protection -- could measures -- in other words, could there even be a general exception for that measures taken to protect or accommodate aboriginal rights and title? Essentially, to put at its simplest, would not give rise to any claims under CCFIPPA. Right?

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And Mr. MacKay confirmed that, no, that, you know, they didn't want to do horse-trading, in essence, and it certainly confirmed that it wasn't included in there. But of course then went on to say, to be fair, you know, "We take the position there is nothing -- nothing here affects First Nations' rights and title so we didn't think it necessary to do that."

But my point is, that's an easy example of what could have been done so that there is no -- you know, China could have been put on notice, and it could have agreed to, in this treaty, essentially that Canada

could continue to take measures to protect or accommodate aboriginal rights and title, which would not give rise to any claims.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: Now, there may be -- you know, I'm not an international trade law expert by any means. There may be other ways. There may be other language that could be used. And there may still be a way that diplomatic letters could be sent. I don't know. But these are all things that would be addressed in a consultation process, so that First Nations could be satisfied that in fact there would not be claims brought for things government was doing to protect or accommodate aboriginal rights and title. If there is some way that China can agree to that inside of the four corners of the treaty, I don't know. But it's something that certainly could and now of course in our submission should be explored in a consultation process.

But what is clear on the evidence before you is because of Canada's position, as you gleaned from the evidence, that this treaty and ones like it have no possibility of potentially impacting aboriginal rights and title they didn't put any of that language in.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: But we say it could be put in, obviously. It should be put in. That's one possible outcome of consultation.

But again, it's an issue -- we're getting

ahead of ourselves to the extent that it's not here to decide. But it is perfectly fair, and I think all courts do think about, well, you know, you want a process, but, you know, what do you -- what's going to happen? Right? Is there something real that can be done here?

CHIEF JUSTICE: Right.

MR. UNDERHILL: And there are, in our respectful submission, very real things. And real things probably that I can't think of here today before you, that could be done. And as I say, I think it obviously would be a broader process where umbrella organizations would be involved. And I don't think I can ever stand up before you and say "And it would have to be an individualized -- the only way we would be satisfied is an individualized process." I don't think that's the way it should go. Or a way it could go, practically speaking.

CHIEF JUSTICE: Yes, I didn't mean to interrupt you.

MR. UNDERHILL: Yes. No.

CHIEF JUSTICE: I just wanted to identify things that I thought would be helpful to hear at some point over the course of this.

MR. UNDERHILL: No, this is very helpful. I appreciate that, and will do my best through the course of the day to hone in on those.

CHIEF JUSTICE: All right.

MR. UNDERHILL: As we're going through. So, how are we doing on time? We're at 10:30.

So, why don't we move into the law on doing consults?

CHIEF JUSTICE: Sure.

MR. UNDERHILL: And then I will try to, as we're going through, you know, being mindful of our discussion just now, highlight, you know, particular points from those cases to try to bring home some of these issues we've been talking about.

So, to begin, is *Haida*. And volume 4, tab 21. So this is, as you're probably aware, the case that started it all, so to speak, insofar as this was the case that first determined that there was an obligation to consult. First Nations prior to, if you would, proof of the right or its establishment through a treaty. And so, you know, as the aboriginal bar likes to say the dark days before Haida, First Nations faced the prospect of resource development continuing unabated unless they were able to obtain an injunction in court, and of course, *Haida* talks a lot about why that's an unsatisfactory state and why, you know, resolution or reconciliation should not have to await proof of the claim.

And so, you know, I'll make the point later on in the course of my submissions, although obviously there's been a lot of jurisprudence since then, we're still relatively early days. You know,

we're still under a decade of, in this country, having the concept of the duty to consult. And in part I'm foreshadowing, you know, submissions I would like to make about, you know -- and you'll see in one of Canada's arguments "Well look, we've had NAFTA with all that investment for a number of years, and boy, we sure haven't seen may claims." Now, they in fact go so far, I think, to say there have been no claims, and in fact there hasn't been one in Canada about aboriginal rights and title, but the *Glamis Gold* decision, which we refer to in our reply, was one such case in the United States and I'll come to that.

But my point simply is, of course the duty to consult wasn't in existence in 1994 when NAFTA was ratified, so of course there was no consultation with First Nations then. And we're still very much in the early days, both of the jurisprudence around the duty to consult and also with respect, you know, modern day forms of self-government. Yes, there have been some self-government agreements that date back a number of years, but insofar as this province is concerned, we of course had the Niska treaty in the last part of the 20th Century, and we now have, you know, a spate of smaller agreements, forestry agreements and the like in this province, but it's still very much early days. And so my point is, it shouldn't be surprising to the court that we have not seen, you know, to use their language, a spate of claims. And we say, of course, we don't need

to establish that in any way, shape or form. But it should be no surprise to the court that we have not seen a lot of claims because, as I say, it's -- certainly for this province it's very early days, in terms of development of this law and the development of aboriginal self-government in this province. At least that which has been recognized by either the courts or governments, put it that way. Of course, First Nations have been exercising self-governance since time immemorial, but it has not been recognized by government or the courts.

So, Haida concerned, as you're probably aware, the replacement and transfer of a tree farm licence to Weyerhauser, and so again, this is actually another example of -- and of course, being the first case, really probably the first example of the sort of high level change, because it was -- you know, as opposed to a cutting permit, where "X" number of trees would be cut, it was the larger tree farm licence that was at issue, and of course the Supreme Court of Canada went on to find that a duty to consult with the Haida Nation was triggered as a result of this transfer of the tree farm licence.

I want to begin, if I could, with, as I say, the basics under the heading, "The source of a duty to consult and accommodate", which you'll find on page 8 of decision, 1122 of the record, paragraph 16.

CHIEF JUSTICE: All right.

MR. UNDERHILL: So you'll see, Chief Justice, under the heading "B. The source of a duty to consult and accommodate"?

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: Paragraph 16,

> "The government's duty to consult with aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with aboriginal peoples (see *Badger…*) It is not a mere incantation but rather a core precept that finds its application in concrete practices. The historial roots of the principle of the honour of the Crown suggests that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with aboriginal peoples from the assertion of soverignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'."

Citing *Delgamuuk* and in turn *Van der Peet*.

And so the point there simply is the grounding, of course, Chief Justice, of the duty to

consult in the honour of the Crown, which is in turn all aimed at the duty to consult, you know, is really -- its fundamental object is to achieve reconciliation. And so the whole point of the *Haida* case was to say "We need to be addressing reconciliation prior to proof of claim," because if we don't then we'll go on to see in a moment, there may be nothing left for aboriginal people if we don't deal with reconciliation prior to proof of claim.

And that point the Chief Justice has made a few paragraphs later, starting at paragraph 32, where the court says this at -- that's page 11, 1125 of the record.

> "The jurisprudence of this court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s.35 of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As

stated in *Mitchell*…

> 'with this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation'."

And so here we go with the point at paragraph 33.

> "To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the 'meaningful content' mandated by the 'solemn commitment' made by the Crown in recognizing and affirming aboriginal rights and title…"

Sparrow at 1108.

> "It also risks unfortunate consequences. When the distant goal of proof is finally reached, the aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable."

And so, we had a discussion earlier, Chief Justice, about the spectrum. And you alluded to that. And that spectrum is addressed -- and I think it useful, particularly in light of our discussion, just to turn that up briefly and look at sort of what in particular the lower end of the spectrum is about. And so to do that, if you could turn paragraph 43 on page 1127 of the record.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And so the court says there, at paragraph 43:

> "Against this background I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice."

So I just again emphasize, further to our discussion, it's not just giving notice. There has to be a subsequent discussion.

And that point is made in the quote from the Isaac and Knox piece, which you'll see there at the end of the paragraph, where the authors say:

> "'Consultation' in its least technical definition is talking together for mutual understanding."

And so, my point simply, Chief Justice, is that even at the low end of the spectrum, there has to be that opportunity for, as the authors say, "mutual

understanding". In other words, an opportunity to not only understand what is being proposed but to respond to that, and to raise concerns, so that the government, the decision-maker can understand what those concerns are, and of course potentially accommodate them.

CHIEF JUSTICE: I'm just going to -- since we're on this case --

MR. UNDERHILL: Yes.

CHIEF JUSTICE: -- and I, myself, am going to go back and look at this, obviously.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: But I just put square brackets around these words in paragraph 17. "In all its dealings with aboriginal peoples". And so just flag that, because we're going to want to come back to that, because this was a dealing with the Chinese and so you're obviously going to have something to say about it.

MR. UNDERHILL: Yes. Right.

CHIEF JUSTICE: And it's just -- it's a question -- just reading it there, in my mind.

MR. UNDERHILL: I'm not sure quite sure I understand your point there.

CHIEF JUSTICE: Sorry. So, it said -- the first -- the second paragraph that you took me to.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: "In all its dealings with aboriginal peoples," right, "the Crown must act

honourably." And so, the question is here, they were dealing with the Chinese.

MR. UNDERHILL: Well, no, but my point is, they should have been dealing with us, insofar as they were dealing with the Chinese. In other words, what our point is, if you're going to go and make commitments about things you're going to do or not do, and make commitments that involve us, insofar as we are a sub-national form of government, you should talk to us about those international obligations.

CHIEF JUSTICE: And that principle -- if that's the principle then obviously it would extend to every international treaty that might bind sub-national governments.

MR. UNDERHILL: Yes. Yes.

CHIEF JUSTICE: But I just raised it because I know what your position is, but since you're talking about the law now, I just want to know -- I assume that somewhere they expanded it beyond these words, dealing with --

MR. UNDERHILL: Well, I mean, let's talk about third parties for a moment. Remember that, you know, this case like most cases arises where government's in fact starting to deal with a third party.

CHIEF JUSTICE: Right.

MR. UNDERHILL: Substitute, you know, the Chinese government, for example, with the CCFIPPA

with the forestry company here in *Haida*. And so actually, you know, one of the things that was, of course, at issue in this case was, was there an obligation to consult on the part of the third parties, which the Court of Appeal had found was so, and the court rejected that -- Supreme Court of Canada rejected that point, that there was any obligation to consult on the part of the third parties.

But my point is, these cases generally -- the duty to consult cases, you know, generally arise from some sort of interaction between government and a third party about a -- you know, usually about a resource development, and the question then becomes is: Do aboriginal peoples need to be involved in that conversation?

And so *Haida* was about making the fundamental point that, yes, aboriginal peoples need to be involved in that discussion of -- need to be involved in the discussion about resource development prior to them proving claims. So you don't have to -- you know, government, you can no longer take the position that we don't have to -- you don't have to talk to First Nations until they prove their claims in court or they conclude a treaty with you. And that's really the fundamental point of *Haida*.

You know, what once was a conversation for many years, up until 2004, what once a conversation between government and third parties about land and

resource use in this province, after 2004, became a conversation that finally involved aboriginal peoples.

And so you'll see, although I don't need to take you through it, the other end of the spectrum at paragraph 44. You see, at the bottom of the page, Chief Justice, talking about the need for deep consultation, and over the page, formal participation in the decision making process and so forth. And again, you know, we're wrestling here with – and we've engaged on this already – the narrow question of whether there is -- even the existence of the duty to consult. So we're one step behind having to look at, okay, look what might be the scope and content of that duty.

CHIEF JUSTICE: Just so I have a sense, where do you feel this falls on this spectrum here? Ideally, you think -- obviously your position is there should have been -- there was a duty to consult.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: And its content was "X" given where on the spectrum you think this lies.

MR. UNDERHILL: Yes, and truthfully, it's early days to make that conversation, because one of the things that has to happen through consultation process here is, you know, Canada obviously, as you know, takes the position, well there's no possible impact. One of the things that needs to be -- you know, one of the subject matters of consultation is to talk about that issue, and for aboriginal people say, "Well,

this is, you know, what we think about this", and to try to understand better how the impacts might come along. And then, you know, government can assess really what properly should be the scope of the content. And obviously if First Nations are unhappy at the end of the day with what is provided to them by way of content, then another case could follow.

But at this stage I think fairly, you know, we're wrestling with is -- because we know not even the minimal threshold was met here. There can be no question about that in our respectful submission.

CHIEF JUSTICE: Right.

MR. UNDERHILL: And again, I'll come back to the public consultation when we get there, but, you know, I say in the strongest possible terms, we did not meet the lowest threshold on any fair reading of the evidence. And so it's really for this court to determine whether or not there is the existence of a duty. Scope and content is probably left for another day. We've got enough to wrestle with.

My colleague pointed out that, you know, the law is fairly well developed now that this court and other courts will in fact give deference to Canada in terms of its assessment of the content as it goes through a consultation process, whereas in contrast, it is clear from the cases and indeed including the *Dene Tha'* case handed up this morning, the question of the existence of the duty, which is what we're struggling

with in this case, is a question of law to which no deference is owed.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: So, I want to look at paragraph 45 as sort of the last paragraph talking about the spectrum, because there's an important point about balancing that you've heard me emphasize that I wanted to pick up from paragraph 45 on page 14. The court says there:

> "Between these two extremes of the spectrum just described will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown to effect reconciliation between the Crown and the aboriginal peoples with respect to the interests at stake."

And again, this is on the next sentence:

> "Pending settlement, the Crown is bound by its honour to balance societal and aboriginal interests in making decisions that may affect aboriginal claims. The Crown may be required to make decisions in the fact of disagreements as to the accuracy of its

response to aboriginal concerns. Balance and compromise will then be necessary."

And I just harken back to the discussion that you and I had this morning about, you know, our fundamental point in terms of the rubber hitting the road, and again, I'll try to elaborate this with perhaps some more concrete examples this afternoon, but the point is that the rights that have been given to Chinese investors and the obligations Canada has assumed is now another societal interest that is going to have to be taking it into account, in our respectful submission, in the balancing act known as reconciliation.

And just briefly at paragraph 46, you will see there is, you know, the point -- just at the beginning of the paragraph, “Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultation.” And so that, again, hearkens back to the conversation we had about, well, you know, if Canada is required as a result of this court’s decision to sit down with aboriginal peoples, there may be, as a result of that, changes that can be made. It may not have to be an amendment to the treaty. There may be something else Canada can do to give assurances to aboriginal people that their rights and titles will not be affected by these things. You know? It may be some sort of agreement with respect -- you talked about, you know, monetary claims, is there something that can be done in

terms of, well, you know, assurances that can be given in writing about the impact of those claims and so forth. Or the monetary awards that may be granted. These are all the kinds of things that the parties could speak about in consultation.

So, I wanted to move from *Haida*, then, subject to your questions arising out of that case, to the previous case brought by my clients in respect of the removal of privately held lands from a tree farm licence. And that decision is found at, actually, the very next tab, tab 22.

CHIEF JUSTICE: Yes. Mm-hmm.

MR. UNDERHILL: And you'll see there that is a 2005 decision of the British Columbia Supreme Court, which was not subject to appeal and – you may have seen the materials – led to a mediated settlement, a number of years later, which I will come to when we move into the facts.

But briefly, this case, as I say, concerned the removal of privately-held lands from a tree farm licence. There had been no consultation with my client about that removal, and the court ultimately, to cut to the punch line, found that indeed a duty to consult was triggered.

It might be useful just to spend a little bit of time, because we, of course, haven't gone into the facts of my client, to just have a brief look at some of the background facts here, which will cover off

some of what we might otherwise do later. And so if you can turn up paragraph 10 on page 5.

So just to situate my client in this province, you'll see that their traditional territory is near Port Alberni on Vancouver Island, on the west coast of Vancouver Island. And continuing today, they assert aboriginal rights and title over some 232,000 hectares of land in central Vancouver Island. And of course in that particular case, much of the privately owned lands were within their traditional territory. And you'll see there, if you've ever travelled the area, you may recognize some of these. The lake, Sproat Lake in particular is well known. Gives you a sense of the area in which their traditional territory lies.

Now, if I could ask you -- we're going to this case, as I said, to talk about the test for when the duty to consult is triggered. So you can have that in your mind as we move through here. And the three-step test which is generally sort of accepted in the jurisprudence is articulated at paragraph 138. And that's page 27 of the decision, 1163 of the record.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And so if you have that, you'll see just in paragraph 137 above it, Justice Smith says:

> "To summarize the effect of the judicial authority, they show a three-step process for considering an alleged failure of the Crown

to consult with and accommodate aboriginal people."

And so the first step, as you'll see at paragraph 138, Chief Justice, is:

"First, in determining whether a duty to consult arises, the court must assess whether the Crown has knowledge, real or constructive, of the potential existence of the aboriginal rights."

And let me pause there to say this case itself is an illustration of how the Crown obviously has knowledge of the asserted rights and title, and in our submission, it really can't be in dispute that the Crown has knowledge, not only from this case, from the fact that it's at Stage 4 of the treaty process. There's another well-known Supreme Court of Canada case called *Smokehouse* which our clients participated in, where various rights and title around land and resource use were being asserted. And so in our respectful submission there can't be much contest and shouldn't be much contest that the Crown has knowledge of the assertion of aboriginal rights and title by my client.

Second -- just returning to the quote, Chief Justice:

"Second, the court must determine if the Crown contemplated conduct that might adversely affect those rights."

And that's where really the focus of this case is. Is

this, and as we've talked about, you know, does the rubber hit the road or not? And is this contemplated conduct that is going to -- and again you'll see it's important, might – or "potentially" is another word that's used frequently in the case law – might or potentially adverse affect those rights? We don't have to convince you that there will be, but we have to convince you, I think fairly, that there's a real possibility of that.

As I've said, I think in light of the fact, and I may still need to convince you that even the minimum threshold hasn't been met here, it's not necessary for this court to go on to consider the scope and content. That of course comes up in a case like *Dene Tha'* where you've had a consultation process and you're having to wrestle with, you know, is it good enough, which was really the focus of the *Dene Tha'* case which we'll come to. Here we're just wrestling with whether there's the existence of the duty.

And so in terms of the -- and I don't propose to take you through it but just for your notes, I alluded to some of it already, the knowledge of the Crown you'll see in terms of the assertion of the rights begins at paragraph 139 over the page. And so there's quite a lengthy discussion including, as I mention, the participation of my clients in the *Smokehouse* decision you'll see at paragraphs 144 and following. So, and as well, just for your notes, I'd make a point that the

Barkwell affidavit which is at -- we have at least part of it at Volume 2, tab 9 of our motion record. I'm not asking you to turn it up but just for your notes, Mr. Barkwell acknowledges in that affidavit that there are other cases that Canada is aware of where my client has asserted aboriginal rights, and of course acknowledges and it is obvious that they -- while they're not actively engaged in the treaty process today, are at Stage 4 in terms of negotiating the agreement in principle.

And so that's why we say, in essence, that's more than sufficient to meet the first step, if you would, of the test. And the focus then properly was on the second step. Now --

CHIEF JUSTICE: Well, but there was the letter as well.

MR. UNDERHILL: Sorry?

CHIEF JUSTICE: There was the letter to the prime minister as well that is in your materials.

MR. UNDERHILL: Oh, in terms of the present day, that's right, yeah, in terms of this case. Obviously the letter requesting consultation includes an assertion of aboriginal rights and title.

CHIEF JUSTICE: Right.

MR. UNDERHILL: Is that what you're referring to?

CHIEF JUSTICE: Yes.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: I would have thought you might rely on that to some extent at least.

MR. UNDERHILL: Well, certainly I do, but my point is there's a much more fulsome, if you would -- "fulsome" is not the right word but much more detailed knowledge comes from the various cases Canada has been involved with and they obviously weren't a party in this one. But the point is, beyond the mere assertion in that letter, there's a very detailed history through the treaty process and through the courts from which you can reasonably conclude, with respect, that Canada has very clear notice of the assertion of rights and title. Certainly the letter that forms part of this record in connection with this treaty is part of that, but there's much more is my point, that can support that conclusion.

CHIEF JUSTICE: All right.

MR. UNDERHILL: The point I'd like to move to next is the fact that for the duty to consult to be triggered, it is a low threshold. You know, I agree with Canada. It's not so low that it's meaningless, but it is a low threshold. And the point that we'll see, and I want to take you to the *Mikisew Cree* case in a moment, is that what the courts have said is look, we're going to set the bar low, and then the nuancing and the tweaking comes from the content of the duty. You know, how much is required. So we're going to set the bar low, but then, you know, and we know this now from

subsequent jurisprudence, we're going to be deferential to government in terms of their determination of the content and what has to take place. And that's where we're going to do the tweaking and the balancing to figure out how much consultation is required. We're not going to say, we're not going to -- in other words we're not going to have a very strong gatekeeper here to say there can't -- you know, and kick a lot of people out. We'll let them in, but that doesn't mean you're entitled necessarily to deep consultation at the far end of the spectrum just because there's a duty to consult.

And that's the point I wanted to take you to in the *Mikisew Cree* case, which you'll find at tab 27 of Volume 4.

And so again, this is another of the Supreme Court of Canada cases, Chief Justice. This time involving a treaty First Nation, and -- from Treaty 8, which, you know, encompasses a tremendous swath of land into northeastern British Columbia and over, in fact, through northwestern Saskatchewan. The issue was a winter road proposed to go through Wood Buffalo National Park, and in short the court found that there was in fact the duty to consult with respect to this winter road. In part because of potential adverse impacts on hunting and trapping treaty rights.

The particular passage I wanted to take you to is found at page 1335 of the record, paragraph 34, page 13. Now of course, here you'll see in the

first line of paragraph 34, they were again obviously easily able to get over the first step because the court said:

> "In the case of a treaty the Crown as a party will obviously have notice of the context of the treaty."

So, there's no issue there.

> "The question in each case, therefore, will therefore be determined the degree to which conduct contemplated by the Crown would adversely effect those rights so as to trigger the duty to consult."

The very question that you're faced with here. Citing *Haida* and *Taku River*. And what the court says is, "*Haida Nation* and *Taku River* set a low threshold." You'll see that in the middle of the paragraph, and importantly it goes on to say, and this is what I was alluding to earlier,

> "The flexibility lies not in the trigger 'might adversely affect' but in the variable content of the duty once triggered. At the low end the only duty on the Crown would be to give notice, disclose information…"

And of course, I put information -- emphasis on,

> "…and discuss any issues raised in response to the notice…"

citing *Haida* at paragraph 43, which you'll recall we went to. And of course, in that case the Mikisew say

that even the lower end of the content was not satisfied in this case and the court, of course, went on to agree.

And so as I said, the point is, it is a low threshold and where the flexibility comes from is looking at the variable content. And that, of course, is consistent with the principles of reconciliation. That there should at least be a dialogue so that you can understand the concerns. It may be nothing further is required other than that initial dialogue. So that government decision maker and the Crown can understand the concerns of aboriginal peoples. But there should -- you know, the fundamental point of this and the other cases is, reconciliation means there at least has to be a dialogue, and of course, there was no dialogue here.

That then takes me to a point that I made in the introduction, is the nature of this case involving the high level decision, and probably the leading case on that point is -- it's commonly referred to as the *Rio Tinto* decision, again out of the Supreme Court of Canada, which you can find at tab 29 of this volume.

And so this case, Chief Justice, involved the sale of power from a dam and, you know, this case is often cited for the thorny issue of, you know, is there sort of an incremental impact on aboriginal rights such as duty is triggered, or is it -- are we simply doing dealing with a "past infringement" that doesn't trigger a duty. That's what this case is often cited for, and a

lot of courts have to wrestle with that hard question of whether, you know, we're dealing with some new, if you would, event that is sufficient to trigger a duty to consult, or whether we're really talking about something in the past that was -- if you would call it, the potentially infringing event, such that there's no new duty to trigger consulted. Triggered, I'm sorry. No duty to consult triggered.

And that was ultimately what the court found here in this case, that it was, of course, the original building of the dam and reservoir which was the real problem, if you would, or what might have triggered the duty to consult. And simply having power be sold in more modern day wasn't sufficient to trigger the duty to consult on these particular facts.

I'm taking you to the decision to look at the court's discussion of strategic higher level decisions, which we, of course, say, as you know from our submissions, this case falls within that category.

And so if I could take you to start with paragraph 44 on page 15.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And so you'll see there, the court says this:

> "Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impacts suffices.

Thus, the duty to consult extends to 'strategic, higher level decisions' that may have an impact on aboriginal claims and rights…."

Citing Jack Woodward's text,

"…examples include the transfer of tree licences which would have permitted the cutting of low growth forests…"

citing *Haida*,

"…the approval of the multi-year forest management plan for a large geographic area…"

citing *Klahoose*,

"…the establishment of a review process for a major gas pipeline…"

which is the Dene -- an earlier Dena Tha' case which I will take you to,

"…and the conduct of a comprehensive inquiry to determine the province's infrastructure and capacity needs for electricity transmission."

And of course, they leave for another day, interestingly enough, at the end of whether the government conduct includes legislative action. In other words, whether a new legislation might trigger a duty to consult.

And so, you know, our submission is that we fall within the ratification of the FIPPA represents the strategic higher level decision, and I'll take you

to paragraph 47. But I wanted to pause here, Chief Justice, if I could to -- because we had a discussion about this as well. You'll see the last case that's referenced is the *Electricity Transmission Infrastructure Inquiry* at the bottom of the paragraph. That's another example -- we don't need to -- it's not in the materials, but it's another example of what we were talking about earlier with broader consultation processes. Obviously the consultation that went on there, you know, encompassed a number of First Nations in British Columbia. And so there is certainly precedent for, and we'll actually go to the fish farm case in a moment, as another example of the broader processes that can be established amongst many First Nations. And so again, we're not saying there necessarily needs to be an individualized process with, you know, every First Nation in Canada with respect to the CCFIPPA.

So again, zeroing in and being mindful of the discussion we had and the questions that are in your heard right now, I want to go to paragraph 47 to sort of talk about the -- you'll see there's a further elaboration on, you know, this notion of adverse impact arising out of structural changes that I think will be helpful. And then we might finish this and then, if it's convenient, take the morning break at that point.

CHIEF JUSTICE: Sure.

MR. UNDERHILL: And then I want to

circle back to the earlier case from my client, to again start really trying to focus on the test for real possibility that I know you're struggling to get to. And I want to take you through some cases to sort of see what the courts have said about what you're struggling with.

So just to go through paragraph 47 before the break:

> "Adverse impacts extend to any effect that may prejudice the pending aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high level management decisions or structural changes to the resources management may also adversely affect aboriginal claims or rights even if these decisions have no 'immediate impact on lands and resources'. This is because such structural changes to the resource management may set the stage for further decisions that will have a direct adverse impact on lands and resources."

And so again, that is really our submission here, that it's setting -- the ratification of FIPPA is setting the stage for potential direct adverse impacts down the road and for a period, of course, as you know, of 30 years.

"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…"

Sorry. Sorry, Chief Justice. I was reading from the penultimate line there in paragraph 47.

"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 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. This is an adverse impact (see *Haida Nation* at paragraph 72 to 73)."

And so, you know, we say the ratification of the FIPPA in a number of ways will lead to our clients finding their Constitutional rights at least diminished, or you know, the development decision process is being altered, in our respectful submission, by the ratification of FIPPA. There is a new factor that takes into account which may well diminish our client's aboriginal rights. And importantly, it's the ability of government to protect and accommodate those rights which is potentially being diminished, or at

least altered, by the ratification of the CCFIPPA.

And if that's convenient, Chief Justice, I propose we take the morning break.

CHIEF JUSTICE: All right, so 15 minutes? All righty, so why don't we go to 11:25? Sorry, 11:35.

MR. UNDERHILL: Thank you.

CHIEF JUSTICE: Give you a little more than 15.

(PROCEEDINGS ADJOURNED AT 11:16 A.M.)

(PROCEEDINGS RESUMED AT 11:36 A.M.)

MR. UNDERHILL: Chief Justice, before the break we were looking at the *Rio Tinto* decision and starting to get into the notion of these high-level strategic decisions, and then -- you know, and what's, you know, and again remembering that it's a low threshold but still trying to figure out, all right, with these high-level decisions that don't have the effect tomorrow, how do you determine whether or not there is still this potential adverse impact that triggers the duty? And that's what I know you're -- one of the issues you're wrestling with, and I think the cases that we'll go through again will help you a little bit because the courts today have wrestled with that very question obviously, particularly with these high-level cases.

So I actually want to go back to the *Hupacasath* earlier case. So that's at tab 22. You'll

see Mr. Smith wrestling with the same question here, and in particular if you could turn up paragraph 228 on page 39 of the decision, which is 1175 of the record.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: And so I'd just like to take you through that paragraph and a couple that follow:

> "Although there is no evidence that the Hupacasath have experienced problems in exercising specific aboriginal rights on the land since the removal decision, the question is whether a greater potential now exists for such rights to be adversely affected than did before."

And again, you know, this is all about the struggle with what kind of potential, and what is the potential that's required.

And so at paragraph 229 she carries on:

> "The authorities reveal that the contemplated adverse effect need not be obvious. The test as articulated by Haida Nation and subsequently filed in a number of cases focuses on conduct that has the potential to cause an adverse impact. In *Gitxsan First Nation No. 1,* Mr. Justice Tysoe…"

and just to pause there, we'll be going to -- the *Gitxsan* case is the very next case I want to take you to.

"…Mr. Justice Tysoe rejected the Crown's argument that transfer of a tree farm licence and forest licence was a neutral decision that did not require any consultation."

And that's really akin to the position that's being taken by Canada here at the end of the day, that, well, this really is a neutral -- you know, the ratification of CCFIPPA, because it doesn't change in any domestic laws, it's sort of a neutral decision, doesn't really have any impact on aboriginal rights and title. That's really what Canada, the core of their submission is. And you'll see what Mr. Justice Tysoe held and we'll go look at it directly in a moment, but he held that the potential for an adverse effect did result. The transfer changed the identity of the controlling mind of Skeena and the philosophy of the persons making the decisions associated with the licences and prevented the sale of the licences.

So to pause there, what we have there with the ratification of FIPPA is the imposition of a new decision maker, that is the international investor state arbitration panels, who will be deciding -- who will be adjudicating on claims respecting these obligations that Canada will assume if CCFIPPA is ratified, and in turn, the rights that are given Chinese investors to bring these claims. And you know, it admittedly -- you know, as I said, I have to acknowledge that there is a speculative nature to this case. Of

course there is, because we don't know how, you know, these new decision makers are going to render claims. And I'm going to come to -- there's another piece that has to be added onto that. But the point is that, just to pick up on that language, you have a new decision maker making decisions and then the question becomes, if you accept -- and I still need to convince you that we do have a different regime that is different than, for example, the domestic expropriation law in Canada, and I will take you to both decisions and commentary on those decisions, which I think clearly establish that this is a new regime. This is a new body of law that would be applicable in respect of this class of investors. And at the end of the day in terms of our argument and with the rubber hitting the road, what I need to convince you of is that Canada and other government decision-makers will -- it is reasonable to conclude that Canada decision-making will be affected. The exercise of a discretion when it comes to protecting and accommodating aboriginal rights will be affected by the fact that the potential for those claims exists.

And in terms of my two streams of argument -- remember I took you through that, we talked about this in an introduction. You know, I had the treaty stream, which is a very different argument, and I'll come to that later, but just in terms of this case and focusing on, you know, what you're struggling with, the potential adverse impacts, if you come to the view

that the potential for these claims will not have an impact in any way on Canada's decision-making, I can't win on that stream of the argument. And we'll go through on that stream of the argument. I still have my treaty argument, and I'll come to that in a minute, but insofar as this potential impact on decision-making and the constraints on discretion, the nub of my submission, as I've said, is the potential impact that these claims might have on decision-making.

And you'll see in a moment when we come to it, the court's focusing on: Look, we have to think about the practical implications. How is this going to play out on the ground? And, you know, at one level there is Canada saying, "Well, they're just monetary claims and Canada pays them. So what?" If you accept that, I lose on that line of the argument, there's no question about it.

My submission is that is a very, very narrow view that just is not reflective of reality on the ground. The idea that the spectre of being liable for what we know objectively is the prospect of very sizeable claims would not have an impact on decision-making. I say it's just not supported. It's not sustainable to say that the prospect of facing a claim in terms of how far we're going to go -- and then we'll talk about it. It's much easier to situate this argument, obviously, and this is why I've left it till later. It's obviously much easier to situate it when

you see the type of claims that have given rise, you know, to an expropriation claim, or to a breach of the minimal standard of treatment.

But the point at the end of the day is, on this line of argument, that there are practical implications when you have the prospect of these claims out there on government decision-making to protect or accommodate aboriginal rights and title.

CHIEF JUSTICE: So, just on that point, maybe now is a good time for me to flag this, because as you know the government went hard on this whole issue you've just alluded to, the statistics and the experience under NAFTA.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: And you know, not only the paucity of claims but the small number of -- the small amount in aggregate of damages paid. And they seem to be suggesting that prospect of something similar happening in the future isn't going to impact their behaviour vis-à-vis your client, because that's just so small that it's not in the order of magnitude of anything that would be taken into account at the treaty negotiation level. So, you may just want to, at some point, not necessarily now, address that, because you were just starting to allude to it, and it reminded me of what they had said on that point.

MR. UNDERHILL: Yes. Yes. Well, and we certainly will -- I will be certainly be addressing

that point when it comes to looking at those specific claims. But you know, again, you know, remembering the low threshold, but talking about the potential adverse impacts, let me say two things.

First of all, NAFTA is not the only investment treaty that we have to be concerned about out there. Because, yes, NAFTA is the only other one where Canada is in a capital importer position, if you would. But, you know, as Professor Van Harten talks about in his opinion, we fairly, in our respectful submission, can look to the experience from other investment treaties around the world. And look at the size of claims in terms of your decision-making about, well, what's the potential adverse impact? The fact that -- you know, and again this is all relative. I mean, there have been millions of dollars in damages against Canada under NAFTA.

CHIEF JUSTICE: Right.

MR. UNDERHILL: Is that small? And to be ignored? In our respectful submission, no, it can't be. And if you look at some of the issues, for example,

That have come up, you know, with the *Ethyl Corporation* case and Canada had to abandoned -- you know, had to -- could no longer ban a certainly gasoline additive and had to apologize to the company that made it. You know, and yes, maybe the damages were only measured in millions of dollars, but transpose that over to a, you know, a scenario that's involving a First

Nation, where Canada has to, you know, take steps in that regard to -- the prospect, I guess my point is, the prospect of having -- facing these claims, and this goes back to what I was saying earlier. You know, for a particular First Nation, a claim that's being brought for even millions of dollars is a big, big deal.

CHIEF JUSTICE: No, but the question is whether it's going to impact the government's decision, because they're the one that's going to have to pay it, and so I think quite apart from the Ethyl example and the other one or two, I think they were also pointing out that there hadn't been any aboriginal space.

MR. UNDERHILL: Right.

CHIEF JUSTICE: And so if they're looking at this, sort of *ex ante*, saying "Well, okay, here's the experience under not just NAFTA, but all the other investment treaties to which Canada has been a party, and this is what the damages have been and there have been none in the aboriginal space, and so -- I think what they're saying is it was reasonable for them to take the position that there wasn't a threshold level of potential adverse impact on your clients or other First Nations in light of that experience. And so I think it would be helpful, in case it becomes relevant in my decision, to hear from you directly in response to that point, because I think they're putting a lot of weight on it, and so --

MR. UNDERHILL: Yes. They do. They do put a lot of weight on it, and again, this is where -- one of the points I will make, and I think it's -- again, I want to be responsive to your questions but on the other hand, I think -- I don't want to have too -- because I think it's really important we have a really strong discussion on that when we're in the context of looking at those claims.

But one of the points I again want to emphasize is, you know, we sit here today wrestling with these sort of questions: Well, what's been the experience to date. And in turn you need to think about, well, what might be the experience going forward. Again, I emphasize, we're talking about a 30-year window.

CHIEF JUSTICE: Yes.

MR. UNDERHILL: And if we look, for example, at the evidence that's before you on the growth of Chinese investment in Canada, and we know -- at least we don't have a lot of detailed evidence about where it is, but we know, obviously, that the Nexen deal is in the evidence and we know that's obviously resource-based and, you know, it's no secret what the Chinese are looking to Canada to in terms of investment. That's, you know, not controversial. And my colleague is writing me a note to remind me that in fact in the environmental assessment documents, which are in there, there is a discussion about, you know, the Chinese

interests in mining and other resource activities going forward.

So the point is, as we sit here today and you struggle with the question of, well, you know, is there really a potential for adverse impacts, if nothing else you could extrapolate the growth of Chinese investment in the resource areas. If the growth continues and we look at this, you know, one could forecast a tremendous volume of Chinese state in investment in Canada's resource sector, because we're talking about a 30-year window here. And it can't be, Chief Justice, with great respect, that, you know, if that came to pass, and it may or may not come to pass, but if there's the potential for that, it can't be that 15 years from now when it's all this investment, that that somehow should change your analysis, right? That simply because U.S. investors have not challenged aboriginal claims, if you would, or measures taken to protect aboriginal rights to date in the -- you know, effectively in the ten years since we've had this modern law of the duty to consult, then --

CHIEF JUSTICE: Well, just on that point though, I want to -- sorry to interrupt you.

MR. UNDERHILL: No.

CHIEF JUSTICE: But I'm concerned you might have misinterpreted the point of my question. It doesn't just go to the duty to consult, it goes to their perception of whether they meet the threshold level of

potential adverse impacts. And so what they're, I think, saying is, "Well, look, we've got this experience going back to 1993, so 20 years, and there hasn't been anything in the aboriginal space at all, notwithstanding all," and I may be paraphrasing, but that's what they're saying, "all the investment there's been from our single greatest trading partner into Canada, including in the resource area," and so it's not really a duty to consult issue, it's more a what was the risk. What was the potential for any adverse impacts on aboriginal peoples as a result of this agreement that largely models the NAFTA. And we look at what happened in the NAFTA and there isn't much evidence of any impact on aboriginal, First Nation peoples, right?

MR. UNDERHILL: But importantly, you know, they don't get any deference from you, in terms of, you know, whether or not they had an obligation to consult. They may have -- you know it may be they -- obviously they did. On the basis of their NAFTA experience, they said, "Well, we don't think there is any real potential for adverse impacts. So we're not going to consult with First Nations."

But you have to now make that decision, whether that's so or not.

CHIEF JUSTICE: Absolutely. And so what I wanted is your position on whether the NAFTA experience is something that I should be taking into account in determining whether or not we got to that

threshold level of potentiality. You put it in somewhat similar terms.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: You talked about this threshold in your reply. Whether we got to that in light of -- because, you know, you can estimate what's going to happen in the future, and one of the ways we do this is by looking at what happened in the past. And so I think that's the path they're on. And I take your point, that, well, you know, there is other ways as well. You have to extrapolate. Because the Chinese investment is actually growing at a faster rate, I think maybe you might be saying, than U.S. investment ever did. And so, we can't just rely on the past. We have to kind of extrapolate.

So, then, I'm kind of in a position of extrapolating from when I think it is zero in the aboriginal space. I understand that there was the *Glamis Gold* case. But that wasn't really a NAFTA case, right?

MR. UNDERHILL: That was a NAFTA case, yes.

CHIEF JUSTICE: Oh, it was a NAFTA case.

MR. UNDERHILL: Yeah. But against the U.S.

CHIEF JUSTICE: Going the other way. Yes.

MR. UNDERHILL: So, yeah. Yeah.

CHIEF JUSTICE: So, anyway, that's the position I'm in.

MR. UNDERHILL: Yes. Yes.

CHIEF JUSTICE: If you can kind of --

MR. UNDERHILL: And I guess, you know, we'll certainly have more of a discussion about this, but one of the points I wanted to make is, I think you do need to look at the types of claims that have come up under NAFTA. But as I said, you also have to look at the type of claims that have come up under other bilateral investment treaties involving other countries. And one of the areas where Canada and the applicant diverge is, you know, they say, "Well, those are, you know, potentially -- you know, there might be slightly different language in those other BITs, so that's not really that relevant." And you know, Professor Van Harten in his opinion rejects that proposition. He said, "Look, there is a commonality in language among these other bilateral investment treaties." And so my point to you, and we're certainly going to be going through this this afternoon, is you know, in making your decision, you need to look at the experience under these other BITs to get a sense of the types of claims that have been coming up. You know, yes, we may not have had, you know, a number of claims involving aboriginal rights *per se*, but you look at the claims that have been coming up with respect to resource use and land use, and

as you say, it is somewhat like a risk assessment, I suppose, at the end of the day. But I guess where we diverge from Canada is, what's the -- you know, what feeds into that risk analysis is much broader than Canada would suggest. It's not just the NAFTA experience that properly should be taken into account. You know? You have to look at these multi-billion-dollar claims that have arisen in other countries. You know? We know that China has just filed a multi-billion dollar claim against Belgium, for example. It hasn't been adjudicated. I'm not saying there is an award out there. But, you know, you talk about risk analysis, all of that, in our respectful submission, fairly goes into the hopper when looking at the question of, are there potential adverse impacts?

And again, that doesn't take me all the way. Right? Just to talk about the spectre of claims isn't enough. Again, I have to convince you that there is -- it is practically or reasonably speaking likely that these claims will -- or the prospect of these claims will bear on government decision-making.

CHIEF JUSTICE: Notwithstanding the reservation.

MR. UNDERHILL: And I think I can easily convince you of that. I can show you that the two principal grounds under which most of these claims are made are expropriation and minimal standard of treatment. The aboriginal reservation does not apply to

those two.

CHIEF JUSTICE: Right.

MR. UNDERHILL: And I think I can do my job there by taking you through, you know, just the plain language of the treaty. That's easily enough done. And so when I talk about the prospect of all these claims, you can take the aboriginal reservation out of the equation, in our submission, because it doesn't apply to the two main pillars under which most of these claims are brought.

CHIEF JUSTICE: Right. Okay.

MR. UNDERHILL: And also -- and again, that hearkens back to the discussion we've had about, you know, tweaks that could have been made to the treaty. What if they had done something like that with perhaps even stronger language about, you know, a full reservation across the board in the treaty. Right? As something that could have been done. Or that could still be done after a consultation process.

CHIEF JUSTICE: Yes, and so on the expropriation point, I am really wondering -- because you raise a fair point, I am wondering what the law has to say about the interplay between MFN and an explicit note such as what we have here on, you know, what the meaning of "indirect expropriation" is, and what would prevail. Would the MFN principle really oust that note? Or not? And you might say, well, that's up to -- it's up to an individual panel, arbitration panel.

MR. UNDERHILL: Well, and actually that's one of the points I was going to say, and that's what Professor Van Harten gets at, in part. But I would actually -- I don't know that it's that controversial. If China -- let me make two points, I guess.

First is, I believe, and we'll go through this, obviously, in some detail. If China is able to point to another, you know, post-1994 treaty but pre-interpretation note treaty that has certain language in it about expropriation, I think the experts all agree that China can avail itself of that language. Now Canada has another argument. They say, "Well, it's all been the same, the whole way along, so, you know".

But the second and more important point is the point is the one you just alluded to, and this really, you know, is really one of the pillars of our case, is we don't know. We don't know because we -- we don't know because of what we do know. What we do know is that there is a great deal of uncertainty in what a particular panel will do, in part because, you know, we have these *ad hoc* appointments and you probably read a lot about, you know, the lack of judicial independence and so forth, and that there is, you know, different approaches as everybody concedes under cross-examination. Different approaches taken by different panels.

And you don't have to decide, frankly, whether that's so and how it's going to -- you know,

what is the inter-play between MFN, and Canada will have very strong arguments to say, you know, take a particular view. You don't have to decide that question.

In our respectful submission, what you fairly can conclude is there is at least arguments about that and therefore uncertainty about that. And that's a -- therefore, you know a change or a different regime, an uncert -- you know, that will apply in Canada. And so you can't conclude, well there's not going to be any claims under expropriation because of the FTC interpretation note. You cannot do that in this case. And because there's uncertainty, we say the duty's triggered.

CHIEF JUSTICE: Well, because of that uncertainty, the risk goes up and therefore --

MR. UNDERHILL: Yeah.

CHIEF JUSTICE: -- takes you further up the curve beyond the threshold level of potentiality.

MR. UNDERHILL: And again, sticking with -- you know, we have these two lines of argument. We haven't talked very much about the treaty line of argument, that talks about, you know, the fact that treaties, the modern day treaty as an agreement in principles say aboriginal treaty rights have to be exercised, you know, in accordance with Canada's international legal obligations and you'll be required to remedy if they're not. That's a separate line of

argument. We say that's an adverse impact that's unaffected by all discussion you and I are having right now.

The discussion you and I are having right now is focused on this idea of the risk analysis, then leading to again -- risk analysis in itself isn't enough. Where we need to go with that risk analysis is to say, "Will it have a practical impact on government decision making because of the risk they're facing?"

CHIEF JUSTICE: Correct.

MR. UNDERHILL: Right? Canada says -- Canada really stops at the risk analysis. And you know what? It's just about risk of claims.

CHIEF JUSTICE: And a low amount of money.

MR. UNDERHILL: Right.

CHIEF JUSTICE: And therefore wouldn't have affected anything because --

MR. UNDERHILL: Right, and so we say no, that's at best naïve, to take the position that the risk of claims -- and again, on the money issue we say, well, look, you know, first of all it's not a small amount of money. Canada may say that, but we say that's not so. But secondly, and more importantly, look at the broader experience under all these investment treaties, in terms of that risk analysis and then, you know, to bring it home, where the rubber hits the road, I need to convince you that it is reas -- it's a real possibility

that Canada will take those risks into account in its decision making around potential to accommodate. I have to convince you of that to win on that line of argument. I don't need to do that for my treaty argument and I'll take you through that. But if I'm going to convince you, you have to be satisfied that those risks will be taken into account in decision making.

And if that's so, Chief Justice, then we're over that low threshold that triggers a duty to consult.

CHIEF JUSTICE: Correct. Well, subject to what they have to say.

MR. UNDERHILL: Of course. But they're going to try to un-convince you.

CHIEF JUSTICE: Right, but it sounds like those are the principles at play.

MR. UNDERHILL: But that's really what we're wrestling with on that line. You know, I need to convince you on the second line of argument, just -- again, just so the framework is clear in your mind of what you're wrestling with. On the second line of argument I need to convince you that it is a potential adverse impact if the HFN will be required to remedy – down the road admittedly in the future, we don't know – will be required to exercise its treaty rights in a manner consistent with the CCFIPPA obligations. In other words that it will be constrained by the FIPPA obligations. It will have to ensure that it does

minimal standard of treatment and so forth to the extent that it's a sub-national government.

CHIEF JUSTICE: Yes, that one I'm wondering about because, I mean, they can say no and Canada pays. So I need to understand why they --

MR. UNDERHILL: Well, here's the only thing they can say no to. What we're talking about is the negotiation of the treaty. Hupacasath could say, "Well, we don't want to agree to that in the treaty. We don't want -- that's not how we want to codify our original right."

CHIEF JUSTICE: This is the treaty, the B.C. treaty.

MR. UNDERHILL: This is the treaty argument. This is the -- this is the -- sorry, yes. This is the -- remember we talked about the danger of using treaties.

CHIEF JUSTICE: Yeah.

MR. UNDERHILL: So I'm talking here about land claims agreements. Maybe I'll try to use that language if I can. So modern day land claims agreements, otherwise known as treaties. What Hupacasath could say no to is, "We don't want to codify our rights in that way. We don't want to be constrained to be in accordance with your international legal obligations, at least in respect of the CCFIPPA." But then, what does their treaty right look like? And my point is, that is an impact. Having to say no and then

negotiate something else is a potential adverse impact on their rights and title.

CHIEF JUSTICE: Yeah, so that takes us back -- yeah, I mentioned that this morning.

MR. UNDERHILL: Yeah.

CHIEF JUSTICE: It's the content of this treaty in respect of which your client is at Stage 4.

MR. UNDERHILL: The content of the treaty might be affected.

CHIEF JUSTICE: Right.

MR. UNDERHILL: The content of their treaty, sometime in the next 30 years and the evidence is while they're not active right now, certainly the goal is one day to conclude a treaty, as is the goal -- you know, and let's remind ourselves from the case law, that's the goal of all of this. You know, the Supreme Court of Canada usually likes to end its judgments with a flourish and talk about, look, the end goal here is the just settlement of claims through treaties. You know, we see that in all of the leading cases going back even to *Delgamuukw.* That's what this is all about.

And so our point is that's the end goal, not obviously, you know, we're focused on my client here, but that's the end goal for all first nations who don't have treaties. So certainly you're talking about, you know, a great number of first nations in this province who have not concluded treaties. For them, if

they are thrown into a situation where they're either forced to negotiate compliance, if you would, or that they have to exercise their treaty rights in accordance with CCFIPPA obligations, or if they refuse and something else was negotiated, that, in our respectful submission, is a potential adverse impact sufficient to trigger the duty to consult. That's the gravamen of that second line of argument that leaves aside our discussion about risk analysis and taking into account.

And so we rely on both to get us to the trigger, if you would, the treaty line that I just described, and what we'll call our risk analysis being taken into account by government line of argument. Both of those streams, we say trigger the duty to consult. And if you find for us, with great respect, on either of those grounds, you may reject one, but it is conceivable that if you find in our favour on only one of those, the duty to consult is still triggered.

So we went afield from the Hupacasath's first case and we were at paragraph 229.

CHIEF JUSTICE: Right.

MR. UNDERHILL: And I think I had taken you through the bulk of that paragraph reciting what Mr. Justice Tysoe had to say in the *Gitxsan First Nation* case. And then just quickly at 230 if we could just spend a moment with paragraph 230 before leaving the case, Madam Justice Smith says this:

"The change from the regulatory regime before

July 9, 2004 to the post-removal regime does have the potential to affect adversely aboriginal interests despite the conditions imposed by the Minister, the continued application of federal and provincial legislation, and the effect of certification requirement."

And here's the sentence I really wanted to take you to:

"The Crown has relinguished its ability to protect undeclared aboriginal rights and to maintain the integrity of the treaty process."

And so that, you know, is one of the bases on which -- why the duty is triggered.

Now, has the Crown completely relinquished its ability to protect undeclared aboriginal rights as a result of ratifying CCFIPPA? No. It hasn't completely relinquished. But we say that risk of those claims is something that the Crown is now going to take into account in its discretion to protect undeclared aboriginal rights, and that's the potential impact that triggers the duty to consult. There's been a change in its ability to protect undeclared aboriginal rights because of the risks it faced under CCFIPPA.

Okay, so unless you have any questions about that decision, I want to then just pick up very quickly one comment by Mr. Justice Tysoe in the *Gitxsan* case that's referenced there at paragraph 229, because I

think it's an important one.

So that decision is found at tab 20 in our -- still in Volume 4. And again, this is the decision of the British Columbia Supreme Court. This time involving the consent by the B.C. Minister of Forests to a change in control of Skeena Cellulose, which at the time was a major player in the forestry sector, operating pulp and saw mills. And the court, as you saw from the earlier decision we were looking at, did indeed find that that change in control -- and remember the quote about the change in philosophy -- a different decision maker, was sufficient to trigger the duty to consult.

I wanted to pick up on one specific point at paragraph 82, which you will find on page 21 of the decision, 1107 in the record.

CHIEF JUSTICE: Page 21, right?

MR. UNDERHILL: Page 21, paragraph 82, do you have that?

CHIEF JUSTICE: Yes.

MR. UNDERHILL: And so you'll see it's partially what was alluded to by Madam Justice Smith in the *HFN* case, and this is the longer description. So Mr. Justice Tysoe says at paragraph 82:

> "I do not accept the submission the decision of the Minister to give his consent to Skeena's change in control had no impact on the petitioners. While it is true that the

change in control was neutral in the sense it did not affect the theoretical tenure of the tree farm and forest licences or any of the conditions attached to them, the change in control was not neutral from a practial point of view."

And really, Chief Justice, that's the discussion we had earlier, is what I'm urging on you, is to take that practical point of view and to accept that the risk of claims -- and I appreciate I have some work to do to talk more about the risk of claims, but accepting that for a moment there is such a risk, I'm asking you to take the practical point of view that Mr. Justice Tysoe did here in finding that it's reasonable to conclude that that risk will be taken into account in government decision making with respect of aboriginal rights. And we know that's so in part because Mr. MacKay, as I'll take you to, said as much in his cross-examination.

That, you know, in essence, including measures taken to protect aboriginal rights, a risk analysis is done at least of government decision making vis-à-vis the international legal obligations. I still need to convince you that there is that risk, but I say Mr. MacKay's evidence on cross-examination should be a significant factor in you addressing that question of whether or not it is reasonably probable to think that government will take those risks into account in its

decision making around the protection and accommodation of aboriginal rights and title.

And so just to carry on, just because I don't need to take you through the whole paragraph, but the next line after that is:

> "First it changed the identity of the controlling mind of Skeena and the philosophy of the persons making the decision associated with the licences may have changed correspondingly. Secondly, Skeena was on the brink of bankruptcy and it may have gone into bankruptcy if the Minister had not given its consent by April 30. If Skeena had gone into bankruptcy it would no longer have been able to utilize the licences. It is possible the trustee in bankruptcy or Skeena's secured creditors would have been able to sell the licences, but any sale would have required the Minister's consent and there can be no doubt that he would have been required to consult the petitioners before giving his consent to any sale of the licences. There is also a possiblity the tree farm licence would not be sold, in which case the petitioners would have the opportunity to pursuing their own ventures for logging some or all of the lands covered by the licence."

And my point in taking you through all

of that in fact is you see the courts talking about possibilities, what might happen down the road, and concluding from that, because there are these possibilities, the duty to consult is in fact triggered. Not saying this will happen but they're saying there is a possibility of that. And I hope to convince you that, as I say, there is a very real possibility that the risk of claims will factor into the government decision-making.

If we could quickly then go to the *Dene Tha'* case, which has been referred to a couple of times, which is found at tab 19 in Volume 4, just one tab back. So, unlike the case that's before you, which deals with essentially fracking tenures, this involved the failure to include the Dene Tha' in the creation or design of the regulatory and EA review processes for the Mackenzie gas pipeline.

And so again, we're talking about whether or not the Dene Tha' should have been consulted, essentially, in the design of a process. Not even whether they should be included in the process, let alone, you know, any specific permits thereafter issued, but whether they should be involved in the design of a process.

And so the point I wanted to draw out for you is found at paragraph 80 on page 18.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: And it's at the bottom

of that paragraph. The line beginning, "As such," do you have that? Four lines up from the bottom.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: I just wanted to draw you into that. Mr. Justice Phelan says this here:

> "As such, the Crown must consult where its honour is engaged and its honour does not require a specific aboriginal interest to trigger a fiduciary relationship for it to be so engaged."

Another way of formulating this difference, talking about sort of the new law on the duty to consult, is that a specific infringement of an aboriginal right is no longer necessary for the government's duty to consult to be engaged.

And similarly, if I could just ask you to go a few more pages to page 24, and paragraph 108.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: Just the simple point that the cooperation plan is, in my view, is a form of strategic planning. By itself it confers no rights but it sets up the means by which a whole process will be managed. And it's a process in which the rights of the Dene Tha' will be affected.

CHIEF JUSTICE: Was that paragraph 84, did you say?

MR. UNDERHILL: Oh, sorry, that was 108.

CHIEF JUSTICE: Oh, 108.

MR. UNDERHILL: 108, sorry. Sorry, we missed each other there. That's 108 on page 24 I was reading from.

CHIEF JUSTICE: Got it. Mm-hmm.

MR. UNDERHILL: All right. So I just have two cases left to cover. The next is found at tab 30, the *Squamish* decision. *Squamish Indian Band* decision. That's tab 30 in Volume 4.

And this case, on its facts, involved again the failure of the government to consult the Squamish Indian Band respective of a proposed ski resort and golf course development on Mount Garibaldi. And it's often cited in the jurisprudence for the proposition that consultation has to be early. And that's found at paragraph 75 on page 12.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And so my focus is not on that point, but this is -- that paragraph 75 is often brought out in other cases for the point that, you know, there is a certain momentum to projects and if there is not consultation at the early stages, First Nations' interests can be harmed if they're not involved from the get-go, is essentially what's often taken away from this case.

I wanted to draw you in particular to the factors that the court considers, the questions that the court poses in paragraph 76 in sort of wrestling with,

again, the question of when a duty to consult arises.

And I thought in particular you might find it helpful to have in your mind the first two questions that the court poses, as you're wrestling with this case.

So you'll see there at paragraph 76:

> "The case law establishes that the proper questions to be asked in order to assess whether the duty to consult and its scope will rise in respect of statutory decisions in respect of an activity which causes the potential infringement to aboriginal rights and title are these:
> (a) Does a decision purport to grant rights in enforceable terms, either actual or conditional ones, in relation to lands which would be inconsistent with aboriginal title or rights?"

And I pause there to say, in a sense, you know, you can think of the rights being given to Chinese investors as, you know, analogous to this sort of situation. And similarly in (b):

> "Does the decision constitute the imposition of obligations or the fettering or the restriction of Crown discretion over land upon which there were duties of consultation?"

And again, we say you can insert the

CCFIPPA obligations, and that they amount to a -- in a very real way, the fettering of discretion, because of the -- you know, the different law and therefore the risk of these claims being advanced.

So finally I want to take you to what I call, because of my complete inability to pronounce the petitioner's name, what I call the fish farm case at tab 24.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And this case involved -- so this is a case that followed on what's commonly referred to as the *Morton* case, where it was held that in fact the jurisdiction to regulate fish farms properly lay with Canada as opposed to British Columbia, and subsequent to that a challenge was brought with respect to two new aquaculture licences for fin fish that were issued, and the question was, you know, was there a breach of the duty to consult. And in the result, the court found there was a need for consultation, but the duty had been met in that case, that there had been consultation.

What I want to draw you into, particularly in light of discussion you and I had earlier about consultation, it's just for you to make a note of paragraph 22. You may find it helpful to look back at this later on. So that's paragraph 22 on page 6, right at the bottom of the page. And I just draw you to that as an example of the type of broader

consultation process that had been used. Just an example.

You'll see, you know, the way they went about it is the Department of Fisheries and Oceans contracted with the aboriginal Aquaculture Association and the First Nations' Fishery Council to host meetings with groups in B.C. And ultimately that and various other processes of consultation led to the conclusion on the facts of this case, that the duty to consult had been met, that there had been consultation and nothing -- there wasn't anything more required when it came to the specific issuance of the licences because there had been this process of consultation.

And in addition to that I wanted to again, just picking up on the theme of how difficult -- you know, it is difficult to determine potential adverse impacts, and the court wrestles with it here as well, and says this -- and if I could take you to paragraph 107 on page 27 of the decision. The court says this here:

> "Admittedly the Crown was involved in the change to the decision maker in these two cases, whereas the transfer of juris-…"

This is referring up above to the Adams Lake -- sorry, I should give you a little more context. Of the *Gitxsan* case which we've gone through, and *Adams Lake*, which I haven't taken you to yet. Talking about those two cases, and then sort of juxtaposing it with this case

and talking about how here the

> "…transfer of jurisdiction from the provincial to the federal government in the present case came as a result of the judicial decision interpretting the *Constitution Act*. Strictly speaking, therefore, the Crown did not initiaite that change and it cannot be said to derive from Crown conduct. However, this is inconsequential. If the change in control from one company to another may lead to adverse consequences with respect to claimed aboriginal rights because of different philosophies, it is more likely to be the case when the transfer of decision making involves two levels of government, however that may happen."

And again, actually to emphasize the next clause:

> "While this may yet be indiscernable, only time will tell whether the regulation of aquaculture will dramatically be impacted as a result of the *Morton* decision. In recognition of this fundamental shift in the management of the aquaculture industry, I believe the federal government had an obligation to consult the applicant and all the other First Nations present in the region."

Similarly, and I think this is also at -- for the

question you're facing, at paragraph 105, just up above. The court again, referring to *Adams Lake v. Gitxsan,* says this:

> "There is, however, a common thread in these decisions that is equally applicable in the present context. Careful reading of these decisions shows that it is the indeterminacy of the principles by which the new governing entity tends to operate, that triggers the Crown's duty to consult."

And we, of course, say that has some application here when you look at the -- you know, I think fairly, and I hope to demonstrate to you this this afternoon, that there is some indeterminacy in the principles that will be applied under CCFIPPA. And that's why I talk about, you know, there is a change. We're not quite sure what that change is, in terms of what the -- you know, how expropriation and the question you properly raised, well, what's the interplay between most favoured nation and the FTC interpretation notes. We're not sure.

But what this case, I think, helps me submit to you is that that indeterminacy, if you would, is sufficient to trigger the duty to consult.

So that concludes my review of the case law on the duty to consult. And of course as you've gleaned from my submissions and our discussions, I am asking you to take away from that case law that even when there is no impact tomorrow, that these sort of

changes, even when it's difficult to tell how it's going to play out, when these high-level treaty decision changes are made, and of course in our context, where there is this -- you know, these risks that are now present, that that is sufficient to trigger the duty to consult.

So, we're just moments away from lunch, but I think what I can just quickly cover in a couple of minutes, because as I say I don't understand Canada to advance a vigorous argument about this, is that it is -- that this court is able to review the exercise of the prerogative, that is, the prerogative to enter into international treaties on constitutional grounds. In other words, to be clear, we're not asking you to say, you know, that the federal government or the executive and council can never enter into an international treaty. Right? That's not our case here. The case is not, they can't do this. The case is, in a nutshell, as we talked about earlier, there has to be a process.

And there has to be a process because of the constitutional principle of the honour of the Crown, which grounds the duty to consult. And so, for that reason, we say it falls within the *Khadr* case – which I'll just turn up, and then we'll take the morning break, if that's acceptable to the court – to make the point that you have very limited jurisdiction here, it is true. You have to acknowledge that the signing of an international treaty is a matter of high policy, which

the court generally stays away from. But within that limited jurisdiction is the ability to review even the exercise of the prerogative on constitutional grounds.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: Which is in essence what you're doing here. And so if I could just ask you -- and then we'll take the break -- to turn up paragraphs 36 -- paragraph 36 of the *Khadr* decision which is found at tab 18 of the book of authorities.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And I think the facts of this case are obviously somewhat notorious. And so I don't propose to take you through it unless you would like me to. But the paragraph that I wanted to take you to is 36, at the bottom of page 12, if you have that.

CHIEF JUSTICE: Yes.

MR. UNDERHILL: And so the court says there:

> "In exercising its common-law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny…"

Citing *Operation: Dismantle*.

> "It is for the executive and not the courts to decide whether and how to exercise its powers…"

And we don't quarrel with that, of course.

> "…but the courts clearly have the jurisdiction and the duty to determine

whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter*…or other constitutional norms…"

And we of course say the honour of the Crown is one such constitutional norm.

And then finally at paragraph 37:

"The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged…"

citing the *Secession Reference*.

"…but it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government

to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution…"

And we say that is solely what you're being asked to do here.

CHIEF JUSTICE: Just back to your other point about saying you're not suggesting that the government can never enter into an international treaty.

MR. UNDERHILL: Yeah.

CHIEF JUSTICE: Are you suggesting that they can never enter into one without consultation?

MR. UNDERHILL: No, I am not.

CHIEF JUSTICE: Is it just this one? Because it's China? And China --

MR. UNDERHILL: No, it's not. It -- you know, we would -- if we could take ourselves back to 1994 and we had *Haida* in our hands, someone would be here suggesting that there should be consultation under NAFTA. Sorry, with respect to Canada ratifying NAFTA.

CHIEF JUSTICE: So it's always fact-specific and I guess it's because each treaty will raise a different level of probability of an adverse impact, and you have to look at it on its facts. The U.S., our largest trading partner, China, maybe on its way to becoming our largest or second-largest, and in -- so is it your submission that it's in that context because of

the magnitude, you get further along the probability scale?

MR. UNDERHILL: Yeah. It's not so much the magnitude --

CHIEF JUSTICE: And sufficient to get over the threshold.

MR. UNDERHILL: -- of the investment as it is -- for example, one of the submissions, I think it's conceivable that, you know, there might have been a consultation around the model FIPPA, which you've seen reference to that Canada developed in 2004. Of course, it was right around when *Haida* came out. But my point is this.

There are commonalities between NAFTA and the CCFIPPA, obviously, insofar as you have Canada in a capital importer position, and the point there is, this becomes real and the potential for adverse impacts becomes real, if you would, when you have, you know, investment in Canada. You know, I need to be careful here. You know, because the -- and this is the discussion you and I had earlier.

When you make -- you're faced with a situation that's frozen in time and we're trying to do a risk analysis today, the point I've made to you is we've got a 30-year window. So, if a FIPPA came along that involved countries with no significant foreign investment in Canada at that day, would I be saying, well there's no duty to consult there? I'm not sure

that I would because, you know, one couldn't say that there might not be that foreign investment down the road, which would make, you know, that risk analysis become different.

But for present purposes, I'm not making the submission to you that every international treaty or necessarily every international investment treaty requires consultation with aboriginal peoples. But certainly this one does, and I would say NAFTA would have as well.

CHIEF JUSTICE: And Europe? It's a big trading block.

MR. UNDERHILL: Yes, yes.

CHIEF JUSTICE: But perhaps not a tiny country like Costa Rica.

MR. UNDERHILL: Yes. And so the interesting question for Canada to answer, not you to answer, and maybe this goes to the further case, is there a consultation process that can be designed that looks at the -- in addition to the CCFIPPA, the proposed trade agreement with the European Union. You don't have to decide that, but I'm not here to day necessarily there needs to be, you know, unique process for CCFIPPA and then there has to be another one for the European Union, right? It may be within Canada's ambit, subject to input, of course, from First Nations, that there can be a process designed to look at a broader cross-section of these investment treaties and the implications for

First Nations.

And that may include some where today Canada's not in a capital importer position might be down the road, right? So you can envision, in my respectful submission, a process -- it is possible to envision a process, and I would not say it would necessarily be deficient, that encompassed more than just the CCFIPPA.

CHIEF JUSTICE: Right, and you've mentioned a couple of times this notion of Canada being in a capital importing position.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: But isn't it really the level of the capital being imported as opposed to the fact that it happens to be in a negative position? It could be in a negative position with a country with whom it has virtually no trade and yet the balance of that happens to be inward as opposed to outward and --

MR. UNDERHILL: Right.

CHIEF JUSTICE: -- you might say that in a factual analysis you don't get to the probability threshold. So it's not so much the capital importing position as it is the absolute level of that. And at some point you get to a scope of investment as you project it out for 30 years that hits that probability threshold, where, you know, it gets to a level in absolute dollar terms, especially given the sectors that you're looking at, and you've suggested that in the case

of China it's the resource sector, that you get to a probability that if you're talking about that many dollars in the resource sector, chances are you're going to impact adversely on --. Is that what you're saying?

MR. UNDERHILL: That is what I'm saying. I was going to make the point that you got to already, that it's not just the level, it's where those dollars --

CHIEF JUSTICE: Right.

MR. UNDERHILL: -- may be reasonably -- again, we're dealing with speculation to the extent that we're trying to forecast, we're trying to do a risk analysis here. We don't have -- you know, we have evidence that it's forecasted to be in the -- that China's interested in the resource sector. That's not controversial. And so it's obviously very fact specific.

But again, it seems to me, just to end on the point I was raising, it's conceivable that you could look at these issues together. In other words, you could -- take the European Union, for example. In my respectful submission it is possible for Canada, in consultation with First Nations, to design a process that talks about potential impacts not just for the CCFIPPA. Maybe it brings in the European Union, which is obviously, as the evidence discloses, next up in the line, and where many of those countries obviously have significant investment in Canada.

CHIEF JUSTICE: And your position, if I understand it correctly, is that notwithstanding the *Investment Canada Act* and what it may or may not have to say about the review of foreign investments, that even if there were consultation at that time, during that review, it wouldn't suffice.

MR. UNDERHILL: No. There has to be consultation about the implications of Canada assuming these obligations and what it means, as we talked about, on the ground, in terms of that reconciliation balancing act that has to go on.

CHIEF JUSTICE: All right. A good time to break?

MR. UNDERHILL: I think so.

CHIEF JUSTICE: Until two o'clock.

MR. UNDERHILL: Thank you.

CHIEF JUSTICE: All right. Thank you.

(PROCEEDINGS ADJOURNED AT 12:38 P.M.)

(PROCEEDINGS RESUMED AT 2:01 P.M.)

MR. UNDERHILL: Mr. Justice. So we had covered before lunch the law on the duty to consult, and briefly touched on the role that you have in reviewing the exercise of the prerogative on Constitutional grounds. And if you remember the road map that I'd given you, what I propose to do next is go into the facts, and in particular to at least initially do a walk through of the agreement itself, familiarize ourselves with the provisions, and then talk about the

implications of Canada agreeing to those obligations.

So, I'd like to move as quickly as we can into that discussion of the provisions of the agreement, but there's a few things I just need to, by way of background, cover off. When we were in you'll recall the earlier case that my clients had brought, we touched on the basics about who my clients are and where they are from.

CHIEF JUSTICE: Yes.

MR. UNDERHILL: So you've heard that. I don't need to repeat that. I have referenced the fact that they have a land use plan, and a cedar access strategy to the component of that. And importantly that they are at Stage 4 of the treaty process, where they're negotiating, among other things, their land and law making authority forestry and forest resources and the like.

The only other point that I thought I should draw your attention, you probably seen references to this in the materials, is the fact that the very company that was at issue in the previous case, that there are media reports that Chinese state investors are considering investing in that very company. And that reference is at paragraph 33 of Ms. Sayers' affidavit, which is found in Volume 1 of the record, tab 6, page 125 of the record.

CHIEF JUSTICE: I've read it. I remember it.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: There was something that came up on cross-examination on that front as well, wasn't there?

MR. UNDERHILL: There was. I mean, Ms. Sayers was asked whether or not she had any further information about whether that had come to fruition or where it was at and she did not have any further information --

CHIEF JUSTICE: Right.

MR. UNDERHILL: -- I think was her answer on cross-examination. And you know, we've already had a discussion about -- to some extent whether my clients' particular situation and the fact that there is not today a Chinese investor, if that material, does that contribute to Canada's argument that this is too speculative. You know, does it fit within that *dicta* in *Rio Tinto* about claims can't be too speculative. And simply put, the answer there is that can't be so because what we do know and what the evidence discloses is there are First Nations who do have direct Chinese investment – of course the Dene Tha' and we'll be talking about that most recent case through the course of argument – who have equally not been consulted.

So, Canada's position, as you in fact alluded to in some of our discussions is, "We don't have to consult with anybody." When I say "anybody", any First Nation, because Canada's position is there is no

potential for adverse impacts.

So I think you have already gleaned the general background to the FIPPA, that it was signed in September of 2012, it's nature as a bi-lateral investment treaty, whose purpose is to protect foreign investment in the host state. You've seen Professor Van Harten, indeed if you went into any of the other literature, that its origins flow from really the colonial powers wanting to protect their foreign investments in developing countries, originally in Africa and then elsewhere. And so I don't need to tread over that ground in any detail, I think.

And I'll come back to the capital importer point in a moment. We've had that, I think, useful exchange honing down on what really matters in terms of, you know, the investment and where it is, and so I'll simply glide over that when I come to it again.

You also, I think, understand the point that the FIPPA obligations if I can call them that, the CCFIPPA obligations apply not just to decisions taken by the federal government but to all the sub-national decision makers including First Nations governments.

CHIEF JUSTICE: Right.

MR. UNDERHILL: Equally you're well aware of the length of the term, which you've heard me beat that drum a few times. And I think you also appreciate that, you know, that these claims are being adjudicated by these *ad hoc* investor state arbitration

panels that are, you know, appointed by the parties. So I think you have all of that.

Equally, you probably appreciated from the materials that, you know, this is -- that is, these arbitration claims are a relatively recent phenomenon, that they really only became in widespread use about 15 years ago. I don't think any of this is controversial. And while there was some exchange about the appropriate language to use, Mr. Thomas, Canada's expert agrees there's been a dramatic increase at least if not an explosion of claims in the last few years.

CHIEF JUSTICE: At the appropriate time you can take me to that particular evidence.

MR. UNDERHILL: I can, certainly, I can make a note of that.

CHIEF JUSTICE: I didn't recall that particular language but --

MR. UNDERHILL: Yeah, no, my colleague put that point to Mr. Thomas during cross-examination, and we'll get that reference for you, although I think I made need to borrow the volume perhaps that my colleague would be looking at. But maybe what we can do is have a look at Professor Van Harten's opinion which is found in Volume 1, Chief Justice. It's Exhibit C to Professor Van Harten's affidavit.

CHIEF JUSTICE: I have it somewhere else. I'm just going to see if I can --

MR. UNDERHILL: All right, so that's

-- I'm not sure. I've got it at Volume 1 starting at page -- the opinion itself starts at page 76 of the record and it's in Volume 1.

CHIEF JUSTICE: What page?

MR. UNDERHILL: 76 of the record. The number is in the top centre.

CHIEF JUSTICE: Got it.

MR. UNDERHILL: So did you review this opinion in the course of your preparation for today?

CHIEF JUSTICE: Absolutely.

MR. UNDERHILL: All right. So then I don't need to belabour then Professor Van Harten's credentials. You will have seen those laid out.

CHIEF JUSTICE: Yes, I did.

MR. UNDERHILL: In paragraph 77 in his background and looking at, you know, his specialty in investment trade law and arbitration. So I won't take you through that. And I don't understand Canada to quarrel with his qualifications in that respect, so I don't think I need to belabour those points. The only issue they take, as you will have seen from their argument, is that perhaps less weight should be given because he is, you know, an acknowledged and well-known critic of investor state arbitration more generally. And in my respectful submission, there is little merit to that point. Simply because an academic takes a particular position does not properly affect the weight of the questions he is being asked in this particular

opinion.

CHIEF JUSTICE: Was there also a wrinkle about him actually having commented publicly and adversely against the CC --

MR. UNDERHILL: I don't understand Canada's argument to advance that particularly strenuously. I took from Canada's argument that you should give less weight to it because he's being an open critic of investor state arbitration more generally.

CHIEF JUSTICE: All right.

MR. UNDERHILL: And, you know, Professor Van Harten did readily acknowledge on the point you just raised that he does see his role as an academic to educate the public and to speak out on these sorts of issues, and he has done so. There's no question about that.

CHIEF JUSTICE: I guess the issue would be if Canada is pushing the second point, I think it would go more to neutrality than anything else.

MR. UNDERHILL: Yeah, yeah, yeah. Well, and again, really at the end of the day what Professor Harten -- Professor Van Harten, I'm sorry, is doing in this opinion for you is trying to describe how the FIPPA works.

CHIEF JUSTICE: Right.

MR. UNDERHILL: And the cases, the claims have been brought under it, and with great respect, you know, the explanations are not undermined

in any way by that. They allege lack of neutrality.

So I turned up Professor Van Harten's opinion just to touch on -- and we started to have a discussion about this this morning, and it picks up on the point I was making about the relatively recent phenomenon that's continuing to expand, and in doing this I'm trying to address the really thorny question that you and I discussed this morning about the past experience and what can be taken from that and how that factors in.

And so if I could ask you to go to page 6 of the opinion, numbered at the bottom, which is 81 of the record. Professor Van Harten, under the heading you'll see, "Investment tree arbitration is a relatively recent phenomenon that continues to expand"?

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: So he says there,

> "Although the earliest known award under an investment treaty dates back to 1990, treaty-based investor estate arbritration was put into widespread use by foreign investors about 15 years ago. It continues to evolve and expand, sometimes in dramatic ways. For example, the largest known award under an investment treaty for about 1.8 billion plus pre-award interest was issued in September 2012. Another recent award (*Abaclat v. Argentina)* majority of the tribunal

incorporated a mass claims class action mechanism to an investment treaty in the context of a sovereign bonds dispute involving tens of billions of dollars. In September 2012 the Chinese firm Ping Yan reportedly brought the largest known claim by a Chinese investor to date against Belguim, for between 2 billion and 3 billion. Finally, there are various ongoing cases, especially in the resource sector, that involve disputes over assets valued in the tens of billions of dollars."

And later on in the opinion, and this is the point I was making earlier this morning, Professor Van Harten goes through the sort of types of claims that have been brought and decided or that had been brought in the most recent days, and that begins on page 88 of the record. And so you see there's a sub-heading "B" with a title there. Do you have that?

CHIEF JUSTICE: Yes.

MR. UNDERHILL: And under there he says:

"Virtually any area of decision making in Canada may lead to a FIPPA claim, although the risk of claims…"

and this harkens exactly to what we were discussing this morning,

"…would arise according to, among other

things, the amount of Chinese owner assets at stake. Under other investment treaties claims by foreign investors have most commonly involved decision making about natural resources, major utilities or infrastructure, health or environmental regulation and so forth. For example, under other treaties, investors have brought claims against governments in the following topics: only some of these lead to a finding of a treaty violation and compensation order, or alternatively to payment of compensation pursuant to a settlement. Also many cases are ongoing. These are underlined below."

And then he goes through a number of examples over the page to 14, and you'll see we've highlighted in our argument, for example, the *Lone Pine* -- I've already alluded to the *Lone Pine Resources* claim, filed very recently against Canada. That's the moratorium against fracking in Quebec.

CHIEF JUSTICE: Mm-hmm. Where is that? Sorry, what page?

MR. UNDERHILL: The reference to that is at the bottom of page 13. It's the first bullet.

CHIEF JUSTICE: Oh, sorry, previous page.

MR. UNDERHILL: I'm still on page 13, I'm sorry.

CHIEF JUSTICE: I see it there, yes.

MR. UNDERHILL: Yes, okay. Oh yes, sorry, and yes, the complaint too. Maybe, actually, you might make a note of this. The complaint itself is in the record. It's an exhibit to the cross-examination of Mr. MacKay and my colleague will find that reference for you in a moment.

And so you'll see over the page on 14 then, there is a number of various cases, examples discussed, including -- I just wanted to highlight the fourth bullet from the bottom, the hunting and fishing restrictions such as the recent caribou tags that was brought. And then continuing on, reversal of privatization decision, expropriation of property, and I wanted to pause there because that references the *AbitibiBowater* case. And this is sort of my segue way into the -- back into the discussion we had this morning.

The *AbitibiBowater* case was decided -- claim was decided in 2010 and resulted in a claim against Canada of some $130 million, and of course generated quite a bit of press at the time. Sorry, did I say an award? Yeah, I meant to say a settlement, sorry. Yes, if I said "award" I mis-spoke myself. The settlement was for $130 million.

Similarly, recently in the fall -- last fall, in the fall of 2012 a decision has come down against Canada in the *Mobil* decision. Quantum of

damages hasn't been determined yet, but we might turn up the decision just to have a look at the quantum that's being claimed. And so to do that, if we could go to -- unfortunately into Canada's record and especially their book of authorities, they've separated their book of authorities from the record and we're looking for Volume 3. It may be a bit unwieldy to get into it, Chief Justice. I can certainly give you the note.

CHIEF JUSTICE: Sure.

MR. UNDERHILL: That might be easier.

CHIEF JUSTICE: That's enough, yeah.

MR. UNDERHILL: In the interests of time. I apologize, Madam Registrar.

CHIEF JUSTICE: So what --

MR. UNDERHILL: The *Mobil* decision is found at tab 75, *Mobil Investments Canada v. Murphy Oil* -- sorry, *Mobil Investments Canada and Murphy Oil Corporation v. Canada,* decision on liability and on principles of quantum, tab 75, Book 3 of 4. And so, as you'll see, this was handed down very recently. And if you go to page 49 of the decision --

CHIEF JUSTICE: Yes.

MR. UNDERHILL: -- you'll just there get a sense of the damages that are being claimed. Of course, you know, there hasn't been an award yet on the damages front, but you'll see the updated calculation of damages, according to the claimants at least.

CHIEF JUSTICE: Yes.

MR. UNDERHILL: And you'll see from the numbers they're quite significant. You know, well over $100 million and perhaps closer to $200 million in total between the two claimants.

CHIEF JUSTICE: All right.

MR. UNDERHILL: And so the point of referencing specifically the *AbitibiBowater* settlement and now this decision against Canada and Mobil is this: This is a rapidly evolving area. And so Canada says, you know, well, look, on average if we go back to 1994, you know, if *AbitibiBowater* is out of the equation, you know, there's very little awards if you think about it, if it's averaged over that number of years. But when we go back to the risk analysis that you and I were discussing this morning, it is, in our respectful submission, very dangerous to, and one should be very, very careful to rest on the experience from NAFTA to date, because we see just from these two decisions alone, or sorry, one settlement and one decision, to be precise, that the stakes can be very high and, you know, where these claims are going to go, no one can say precisely.

And so in our respectful submission it is -- Canada can't rest on -- particularly when you look at the nature of the claims that Professor Van Harten outlined in his opinion that we went through, you cannot rest on the simple fact that, well, we haven't had many large claims, there hasn't been any claims against

Canada in respect of aboriginal rights. We say that is as fraught with danger to rest the analysis on that when you look at how rapidly evolving this is and the claims that are being filed. So you look at an AbitibiBowater settlement, you look at a decision against Canada which realistically looks like it's going to be a significant damages award against them, just decided, and then you look at the new claims that have been filed against Canada, you know, around moratoriums on fracking and offshore wind power development. And we say those should weigh heavily in the analysis of is there a real potential for adverse impact here? Because it's changing and it's changing rapidly.

CHIEF JUSTICE: That's the second time you've mentioned the moratorium against fracking.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: Wouldn't that decision actually be consistent with First Nations interests though? Wouldn't they typically be on that side of that argument?

MR. UNDERHILL: Well, again, the difficulty is -- I mean, yes, they might be on the side of saying we'd like a moratorium. But the point is this. If that claim were to be successful and give rise to a significant claim, what does that mean for the future? What does that mean for government decision-making that may want to -- maybe it's not a moratorium. But let's think about the *Dene Tha'* case that was handed

up to you.

Sorry, so the reference for your notes, because you had wanted that reference to the claim -- sorry.

CHIEF JUSTICE: All about --

MR. UNDERHILL: To the *Lone Pine* claim, I'm sorry.

CHIEF JUSTICE: Yes.

MR. UNDERHILL: I'm speaking away from the microphone. I'll just bring it over here.

That reference for you is the notice of intent to submit a claim to arbitration. It's Exhibit 5 to the cross-examination on affidavit of Mr. MacKay. That's Volume 2, starting at page 623. Sorry. That is Volume 3, page 623.

And so I was starting to make the point, in response to your question, well, isn't that something the First Nations are in favour of? If we again -- looking at our risk analysis and looking into the future, think about what impact that may have on government decision-making in the future, and specifically for example in respect of, you know, a First Nation like the Dene Tha' who have fracking in their traditional territory. And so, the case that was just handed up found, as I have alluded to, that there was reasonable consultation around the granting of tenures, which didn't have any immediate -- you know, they didn't authorize the immediate carrying out of

fracking. They were just tenures that were granted. But with a significant amount of money at stake, some $400 million.

If that *Lone Pine* claim were ultimately to be successful, what does that mean for when government is faced with down the road -- let's say there's a determination that they need to put some kind of moratorium on fracking in a particular part of that territory. And they know that -- you know, they've been held liable potentially for a significant amount of money in that case. Our point, as I made this morning, is that's a factor which is going to go into that decision about how they can accommodate the asserted aboriginal rights of, say, the Dene Tha' or another similarly situated First Nation.

CHIEF JUSTICE: So you're saying they might not do something similar in the future which might in turn adversely impact.

MR. UNDERHILL: Yes, right.

CHIEF JUSTICE: Or if your clients wanted them to do something like that, having been -- and the prior experience in *Lone Pine* might chill them.

MR. UNDERHILL: Yes. And that's -- again, I hesitate to use the word "chill", because I think that sometimes carries too much of a pejorative sense to it. But what it does -- I prefer saying it changes the reconciliation balancing act that government has to do. You know, whether we want to call it a chill

or not is, I think, just a label. What's important is, you know, if that claim is successful properly, as Mr. MacKay conceded under cross-examination, that should be taken into account in a future decision about moratoriums, or something else. You know, maybe they, you know -- placing some limits on fracking in British Columbia.

And so, you know, again -- and this is trying to focus on your question, you know, where does the rubber hit the road? This is where the rubber hits the road, at least insofar as this stream of the argument is concerned. You know, if they have to decide they're going to place a moratorium, or perhaps down the road when there is more consultation, as the court suggested there would of course be when it came to the issuance of permits, the government will have to take into account the *Lone Pine* award or -- you know, maybe it's still in progress. And they're like, well, you know, I'm not sure how that's going to go. And so maybe we can't do exactly what Quebec did here. And we know that there is a significant amount of money now invested in the tenures. And so will that give rise to a claim, the government might say to itself, and so that, we say, reasonably can be expected to be a factor taken into account in that decision making, and that's the trigger, we say, for the duty to consult.

Staying with that example, what if the government ended up issuing some permits, the government

changed and they subsequently cancelled some permits after representations or even a court case decided that the permits had to be cancelled? That can in turn give rise to a claim. And so these are the cities, or the triggers that the applicant is urging upon you, these changes.

So with that background, I would like to now move through and cover off the -- at least an overview of the obligations in the CCFIPPA as my next topic. And so to do that I'd like to turn up, obviously, the agreement itself, which is Exhibit B to Mr. MacKay's affidavit, found in Volume 2 starting at page 363.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: You have -- oh, you have it, okay. Thank you.

So refer to the -- you have page numbers on that loose copy, do you?

CHIEF JUSTICE: Forty-five, 47 -- 0045, 0046.

MR. UNDERHILL: Let me just make sure, so that we don't lose each other as we're going through this.

CHIEF JUSTICE: Starts at 0042 and ends at 0090?

MR. UNDERHILL: Yeah, I don't have that numbering. I'm wondering where that came from. I'm -- so you took that from the copy of Mr. MacKay's

affidavit that's in Canada's record.

CHIEF JUSTICE: I'm not sure where I got it, but --

MR. UNDERHILL: Okay. Well, I think to avoid us getting lost, what I'll do is work off that copy then, yes. Yes, thank you. So I'm just going to pull that up in Canada's record, so that we can refer to the same page numbers, so we don't get --

CHIEF JUSTICE: Sure. Okay.

MR. UNDERHILL: So we don't get lost.

Okay. So to begin I'll ask you to go to Article 4, which is the minimum standard of treatment on page 49.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: All right, and so this is, as I said, the minimum standard of treatment obligation. You'll see there, and particularly over the page, it's -- and as we'll see when we look at some of the claims in Professor Van Harten's opinion, that it's a fairly broad obligation in the sense that it incorporates, as you'll see, on sub-paragraph (2) at the top of page 50, these concepts of fair and equitable treatment and full protection and security, which are alluded to, of course, in paragraph 1.

As I said to you, this standard or this obligation, if you would, along with the expropriation obligation in Article 10, are I think and I don't believe this is controversial. The two most cited

obligation in these investor state obligation claims, they're the most often invoked obligations that are at issue in these claims. And I wanted to make the point that the notion of fair and equitable treatment which you see in paragraph 1 also encompasses a notion of the legitimate expectations of the investor. So in that sense, my point is it's a very broad basket which is very much at the centre of many of these cases.

CHIEF JUSTICE: Sorry, so this legitimate expectations, is that actually -- I didn't see that in here. Is it actually in here?

MR. UNDERHILL: It's not referenced in the text.

CHIEF JUSTICE: No?

MR. UNDERHILL: But I will take you in part to some, you know, the discussion of what fair and equitable treatment means in receipt of --

CHIEF JUSTICE: Oh, in some of the arbitral decisions.

MR. UNDERHILL: Exactly, exactly, in the Articles in some of the claim decisions and so it becomes clear that legitimate expectations is compassed within fair and equitable treatment.

CHIEF JUSTICE: Right. No, I know that's in your brief.

MR. UNDERHILL: Right.

CHIEF JUSTICE: Yeah.

MR. UNDERHILL: And just because I may

have misspoke myself this morning, the FTC interpretive note is concerned the minimum standard of treatment, or fair and equitable treatment. I may have said it was in relation to expropriation, I'm not sure, but just in case I misspoke myself.

CHIEF JUSTICE: Sorry, and remind me what FTC means again?

MR. UNDERHILL: Sorry, the Free Trade Commission, which issued the interpretive note. And so the background to that, just very briefly, is concern had arisen by the parties to NAFTA that these tribunals -- and I think the *Pope and Talbot* case was front and centre. You probably saw a reference to that in the various arguments, that this minimum standard of treatment, in particular the fair and equitable treatment that's encompassed within it, was being interpreted too broadly.

CHIEF JUSTICE: Right. So then they issued that, that's right.

MR. UNDERHILL: Exactly. And what I should have said if I didn't say this clearly enough is that Mr. MacKay agreed that the most favoured nation obligation, which was the next Article along with Article 8, applies to minimum standard of treatment. So to the extent that a Chinese investor is able to invoke a treaty which has different language minimum standard of treatment that was enacted earlier, they are able to take advantage of that.

CHIEF JUSTICE: I thought that argument also applied to the expropriation.

MR. UNDERHILL: It does in Professor Van Harten's opinion.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: And I want to go and confirm this. I just at my fingertips don't have exactly what Mr. MacKay's evidence was on that, but I will look at that.

CHIEF JUSTICE: Why would they be different?

MR. UNDERHILL: That's a good question and certainly Mr. Van Harten doesn't say that. He says the most favoured nation sentence would apply to the expropriation obligation.

CHIEF JUSTICE: Notwithstanding the note.

MR. UNDERHILL: Right.

CHIEF JUSTICE: So this principle that we have and the statutory interpretation of where the specific overrules the general, that wouldn't apply in this context?

MR. UNDERHILL: Well, because what you're doing is you're saying, "We get to take advantage of the treaty obligations of somebody who signed the treaty earlier," right?

CHIEF JUSTICE: Notwithstanding their own agreement to the contrary.

MR. UNDERHILL: Right, exactly. Right?

CHIEF JUSTICE: And you think that would hold water.

MR. UNDERHILL: Well, Professor Van Harten seems to say, and Mr. MacKay confirmed, that the most favoured nation obligation will apply to minimum standard of treatment.

CHIEF JUSTICE: There's another principle that we have in statutory interpretation which is that something that you wrote -- something that Parliament wrote in the statute has to mean something and you can't give it an interpretation that renders it nugatory. If this MFN overrides that provision, wouldn't it have a similar nugatory effect, a rendering nugatory effect?

MR. UNDERHILL: Well, it does. And what's interesting about that and my friend just wrote me a note about this and I was actually going to mention this is the model FIPPA, you heard references to the model FIPPA that Canada developed in 2004, it doesn't allow most -- it doesn't allow for this. And what Mr. MacKay confirmed --

CHIEF JUSTICE: Doesn't allow for --

MR. UNDERHILL: Doesn't allow for most favoured nation status to apply, if I'm right, to the fair and equitable treatment obligation. Right. So it doesn't allow you to reach back to treaties signed

before this one, in other words, right? That's the way the model FIPPA works. And so Mr. MacKay confirmed on his cross-examination that there was a departure from the model FIPPA in respect of this particular investment treaty, in that regard.

CHIEF JUSTICE: Allowing them to reach back.

MR. UNDERHILL: Right. And he said, "We want to do that because we wanted to take advantage over in China of the same thing." Because remember, these are all reciprocal obligations.

CHIEF JUSTICE: Yes.

MR. UNDERHILL: Right? So, Mr. MacKay's evidence, I think I'm capturing it accurately, was we did that, we departed from the model FIPPA, because we perhaps want to take for Canadian investors to be able to take advantage of older treaties that China had signed.

CHIEF JUSTICE: Right. But my question is actually more specific, which is if somebody actually puts language in as they did in the appendix B, whatever it was, describing what indirect expropriation really means, so they put explicit language in that, what you're saying is, that doesn't overrule the general MFN obligation, even though generally in the law it tends to work the other way. The specific would override the general.

MR. UNDERHILL: Well, but I -- with

respect, I'm not sure that's apt. Because they've used -- equally they've used very explicit language to say "We're going to." I mean, I think fairly to say, if we're going to sort of use the analogy to statutory interpretation principles, they've been very explicit that that's what they want to do. They want to override. They're prepared to override by using the most favoured nation status. That's very -- you know? And Mr. MacKay confirmed that's so. That was --

CHIEF JUSTICE: Except, and this is what I'm trying to scope out, if what you just said is correct, and if that means that this note has absolutely no meaning, then you've kind of landed at a place that's very different from where we normally land when we're interpreting documents that have general and specific provisions, right?

MR. UNDERHILL: Well, from a policy perspective, they've landed somewhere different than they contemplated in the model FIPPA, that's for sure. In other words, the model FIPPA didn't contemplate them doing this.

CHIEF JUSTICE: Right. So they made -- they averted their mind to it and decided to do something different. That's fine. But then at the same time they did that, they made a very specific provision about indirect -- they agreed to a very specific language carving back, I guess, where the arbitral tribunals have gone with indirect expropriation, and

reaching a very specific intent about what they thought they were agreeing to in this regard, and so what you're saying -- and I don't know whether what they did on the MFN front would render that particular provision in the appendix nugatory. But if it did, you know, I'm happy to hear what else the two of you have to say over the course of the next three days. But if it did, it strikes me as fairly striking.

MR. UNDERHILL: Well, that -- I think you may -- with respect, I think we're confusing apples and oranges here. You were just referencing the Annex B-10.

CHIEF JUSTICE: Yeah, that's the one.

MR. UNDERHILL: Right. That has to do with expropriation.

CHIEF JUSTICE: Right.

MR. UNDERHILL: Right?

CHIEF JUSTICE: Right.

MR. UNDERHILL: And so that's different, what we're talking about, right?

CHIEF JUSTICE: Well, but remember, we were talking about your expert having said that the MFN also applies to expropriation, so --

MR. UNDERHILL: Right. Oh, I see. Sorry, sorry. Okay. And so as I said, you know, Canada appears, at least according to Mr. MacKay, to have turned its mind to that. And now, Canada would say, "Look, there is -- you know, this is always what it

meant, and, you know, we can still argue that the Tribunal is -- you know, we can still argue that it should be, you know, the language in Article 10 around expropriation has always meant what Annex B-10 says. I think that's one of the things you'll hear from my friend.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: But my point is, that's not -- you know, there is uncertainty there to pick up on the language. There is an indeterminacy around whether that's so or not. I mean, we're -- you know. Because it's not at all clear that having made the conscious decision to effectively override that more specific language in Annex B-10, if Professor Van Harten is right, that the MFN applies to indirect expropriation, that they made that policy choice to do that. In the hopes of being able to get some benefit for Canadian investors abroad.

CHIEF JUSTICE: But they did that even if it meant that what they had just finished writing meant absolutely nothing, in B-10.

MR. UNDERHILL: Well, again, you know, Canada will say it really was just a clarification. But maybe let me also make this point, which I think is very important, is that in respect of the conversation you and I are having, Annex B-10 -- let's talk about that for a minute and just skip ahead to it.

CHIEF JUSTICE: Sure.

MR. UNDERHILL: Because I think there's a couple of important points that should inform this analysis, because we've oversimplified to a certain extent the points to be made.

First of all, NSB-10 has nothing to do with aboriginal rights. That was confirmed. There's nothing about aboriginal rights in that language. That's the first point. Mr. MacKay confirmed that on cross-examination. The reference to that is Volume 2, page 535. So there's nothing about aboriginal rights there.

And you know, you asked me this morning and I was going to go through some of the other exceptions as we're moving along through here.

I lost my train of thought. But my point is that they did not negotiate aboriginal rights language in NSB-10. So it doesn't apply to aboriginal rights and title. That's the first point.

CHIEF JUSTICE: Well, it's broad, isn't it?

MR. UNDERHILL: Well, let's go to it, because -- and it's not as broad as you might think it is, and that's my second point.

CHIEF JUSTICE: Well, what I meant by that was, it's not limited to any particular stakeholder group, it's just a general -- isn't it a general qualification on the meaning of "expropriation"?

MR. UNDERHILL: I think we should look

at it.

CHIEF JUSTICE: Yes, sure.

MR. UNDERHILL: Let's look at it.

CHIEF JUSTICE: Good idea.

MR. UNDERHILL: So that's --

CHIEF JUSTICE: Okay, I have it here. Page 84.

MR. UNDERHILL: Page 84, exactly. And so the language that you've been referring to is in paragraph 3.

CHIEF JUSTICE: Right.

MR. UNDERHILL: "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 an applied in good faith, a non-discriminatory measure or series of measures of a contracting party that is designed and applied to protect legitimate public objectives for the wellbeing of citizens, such as health, safety, and the environment, does not constitute indirect expropriation."

So, what does that mean? What are legitimate public objectives for the wellbeing of citizens? Let's go to Mr. MacKay's cross-examination, which is Volume 2 --

CHIEF JUSTICE: Of your record or

theirs?

MR. UNDERHILL: Sorry, of the applicant's record. It's at tab 10, starting at page 463, and I'd like you, if you could, turn up page 535 of the record.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: So, I asked a question you'll see at line 10. Do you see that? It begins with "Well, no"?

CHIEF JUSTICE: Yes.

MR. UNDERHILL: "If what you're saying is First Nations are Canadian citizens as well, I agree, but I'm talking specifically about whether Canada tried to negotiate – and I think your answer to this is "no" – was they tried to negotiate including a specific objective of protecting rights and title, aboriginal rights and title into paragraph 3 of NXB-10…"

which we were just looking at.

"A No, we did not.

Q Why not?

A Because we were trying to, here, re-state the police powers principle when it comes to compensation in the event of expropriation. And if you can demonstrate that substantial taking or substantial deprivation was done context of a policy, a

measure pursuing a public welfare objective then it is not an indirect expropriation. The moment you start expanding the number of policy objectives, then you're now taking this beyond what's understood in international law as a police power, the ability to not…"

should be "compensate",

"…in the event of the taking a substantial taking."

So your question properly to me is "Well, what are police powers?" What are we talking about then in Annex B-10, and to answer that question I'd like to go to an Article about Professor Newcombe, who is one of the leading academics in this area, in investment trade law and arbitration. Or investment trade law certainly. And his Article is found in Volume 5 of our record, and that's tab 40.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: "The Boundaries of Regulatory Expropriation in International Law"? And then page 20 of that Article, which is page 1674 of the record.

CHIEF JUSTICE: Yes, I have it.

MR. UNDERHILL: All right. So under the heading "Non-compensation and the Concept of State Police Powers"?

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: "The term 'police powers' causes significant confusion. The term can be used in a general sense to refer to all forms of domestic regulation under a state sovereign powers. A narrow formulation is that police powers refers to measures that justify state action which would otherwise amount of a compensible deprivation or appropriation of property. While I use the term in this narrow sense, discussion of this issue would be much improved if it was discussed in terms of justifications or excuses for non-compensation. Exercise of police powers allows the state to protect essential public interests from certain types of harms. For example, the state might ban use of a pesticide that scientific studies have demonstrate is carcenogenic, even where applied in minute amounts. Assuming this pesticide was an investor's only investment, the ban could result in the complete destruction of the investment and no compensation would be due. In other cases, however, the state may regulate but compensation is due if the regulation results in a deprivation or appropriation. For example, a state may prohibit access to a

park in which they were previously granted mineral rights. Prohibiting mineral extraction may be a perfectly reasonable and legitimate way to protect the environment, but the prohibition on access would likely be found to be an expropriation. The mere fact that a measure protects the environment…"

this is what I wanted to emphasize, Chief Justice.

"The mere fact that a measure protects the environment does not provide a justification for non-compensation. In this context the Santa Elena Tribunal in the now much cited paragraph held that:

> 'Expropriatory environmental measures, no matter how laudable and beneficial to society as a whole, are, in this respect, similar to any other exppropriatory measures the state may take in order to implement its policies. Where property is expropriated even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.'"

And so the point, I think which you've got now, is it's not quite as broad as one might think on a first reading.

CHIEF JUSTICE: Oh yeah, no, it just goes to the probability, right? Because if the two main

types of claims are in the two areas in respect of which the aboriginal carve out doesn't apply, or reservation doesn't apply, and if one of those was carved back significantly, i.e. the expropriation one was carved back to limit exposure in areas where some tribunals had arguably created exposure, then it just goes to the probability of future exposure, right? That's all I'm suggesting. That's my understanding.

MR. UNDERHILL: And my point, when it comes to, which is what we're concerned about here, it measures that whose purpose and object is to either protect or accommodate aboriginal rights and title, Annex B-10 is not very helpful to Canada, at least, in arguing that, you know, that risk analysis goes down. Because there is no policy objective, as I showed you in Mr. MacKay's evidence --

CHIEF JUSTICE: Yes.

MR. UNDERHILL: -- about aboriginal rights and title. So an objective aimed at that is not covered by Annex B-10 in the first place.

CHIEF JUSTICE: Right.

MR. UNDERHILL: And even if we're talking about -- and this is the point of Professor Newcombe's piece, is even if we're talking about general measures to protect the environment, that's not the carve out that Annex B-10 is about. It's much narrower than that. Well, we don't even need to get there, because we're not talking about aboriginal rights and

Annex B-10 in the first place.

CHIEF JUSTICE: No, I understand.

MR. UNDERHILL: So if we -- I wanted to go back, then, to -- going through the Articles of the CCFIPPA. So I'll just need to get that back in front of me, with your leave. So that I have it in front of me. So we talked about minimal of standard treatment in Article 4.

CHIEF JUSTICE: Yes.

MR. UNDERHILL: And then I would next then of course go to Article 5, which is the most favoured nation provision and that needs to be read together, of course, with Article 8, which talks about the exceptions. And so the point there is, if you look at Article 8 over at page 52, this sort of defines the application of the most favoured nation status obligation.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: What they say there, in paragraph 1, under exceptions in Article 8 is, Article 5 does not apply to the treatment accorded under any bilateral or multilateral international treaty in force prior to 1 January 1994. So what it applies to is agreements entered into after January, 1994. But nonetheless, the reach-back there is back -- the reach-back is back to any treaty post-1994.

And of note, and I'll get you the reference for this, the reach-back in the model FIPPA is

only 2004.

CHIEF JUSTICE: Right.

MR. UNDERHILL: In contrast. And as I say, Canada made the -- in my respectful submission at least, Canada made the policy decision that they -- and I'm not sure we have the full evidence on why exactly they did this, but the point is, they turned their minds to and negotiated a reach-back for, you know, in turn for their Canadian investors in China, but then of course equally for Chinese investors in Canada for any treaty negotiated before the CCFIPPA after 1994.

CHIEF JUSTICE: Yes, okay.

MR. UNDERHILL: Article 6 deals with page 51, the national treatment obligation, which essentially means you have to treat foreign investors no less favourably than domestic investors, with respect to all aspects of foreign investment.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And then we come to the aboriginal reservation in Article 7, I believe. No, this doesn't look right. I have the wrong --

CHIEF JUSTICE: No, I think it's later.

MR. UNDERHILL: -- reference there. Sorry. I'll come back to that.

Article 9 is the performance requirements. You'll see it at the top of page 54.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And this is reaffirming the obligations under the WTO agreement on trade related investment measures by local requirements and the like. Just briefly one point. You know, what's important to understand about the WTO agreement is how they're enforced. It goes back to the rights that have been given to Chinese investors under this Article, in contrast to the WTO. WTO, the remedy there is -- you know, it's state to state and the remedy is that Canada may be required to amend the particular measure that's said to contravene the WTO provisions, as opposed to here under the CCFIPPA where you have a private third party investor potentially able to seek a claim in damages or compensation from Canada.

CHIEF JUSTICE: Right.

MR. UNDERHILL: Article 10 Expropriation, you'll see there and we've already taken you through Annex B-10 so we've had that discussion and I won't go to that again. The point here is that, you know, and this is obviously came up in our discussion of Annex B-10, is it encompasses the notions of direct and indirect expropriation.

CHIEF JUSTICE: Yes.

MR. UNDERHILL: And so that, as we saw from Professor Newcombe, you know, a bona fide measure aimed at protecting the environment, even if enacted in the public interest, may still give rise to a claimant compensation. That's sort of the central point.

I'll deal with the aboriginal reservation after the break. What I thought I'd do to try to be responsive to -- I know what's on your mind and the burden I bear is try to get through this afternoon before we break, and I think I can do this easily and then return to the -- is deal with the second line of argument that is at the end of our written argument, dealing with what I've called the treaty line of argument. Because I know that you're, you know, you want to know how the rubber hits the road and you want to know about the potential adverse impacts on my client, and I think it useful, because only the first line of argument requires a much more detailed examination of some of the cases and the literature to get to the bottom of the risk analysis, but I think it's a little cleaner when we talk about the treaty line of argument to get to what's troubling you and what you'd like answers to. And so I propose to do that now, with your leave, so that distinction is very clear in your mind of the two lines of argument that we're developing. I think it'll allow you to put everything in the proper perspective.

So just for your notes, what I'm going to do is cover off the points made at paragraph 114 of the written argument and following.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: So to do that, you know, the starting point of course is, and I think you

appreciate this now, is that even First Nation decision makers are covered as sub-national government decision makers under the FIPPA. So in other words the FIPPA obligations apply to those decision makers. And so that brings us then to what Canada is doing in the treaty process and the nature of the agreements that are negotiated, and I've alluded to this a couple of times, but I think this is the appropriate time to go and have a look at what Canada is putting into both its agreements in principle and its final agreements. And so if we could start with one of the final agreements, which are -- all these various agreements are appended to Ms. Sayers' affidavit which is found in Volume 1 at tab 6 of the applicant's record, the Cerlox record that's Volume 1.

CHIEF JUSTICE: Got it.

MR. UNDERHILL: Thank you. I'll just make sure I've got the right reference. We're going to go to page 216 of the record. In fact we'll back up. It's Exhibit E to Ms. Sayers' affidavit which actually begins at page 213, I apologize.

CHIEF JUSTICE: Yes, I have it.

MR. UNDERHILL: And you'll see that's the Maa-nulth First Nations file agreement.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: All right. So the international legal obligation provisions start at page 216 and that's where I wanted to land, and so this

agreement you'll see was negotiated in 2006. And you'll see at the bottom 1.7.1. At the bottom of page 216.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: So there's sort of two main points, first of all, and we've talked about this in terms of Canada's -- first of all, its agreement to consult with First Nations. And so what 1.7.1 says is:

> "After the effective date, before consenting to be bound by a new international treaty which would give rise to a new international legal obligation that may adversely effect a right of a Maa-nulth First Nations' government under this agreement, Canada will consult with that First Nation government with respect to the international treaty, either separately or through a forum that Canada determines is appropriate."

And so of course, what we say here, and you've heard me say, perhaps too much, this is really in our respectful submission, a codification of a common law obligation that already exists on Canada to consult with affected First Nations when entering into international legal obligations that may impact on aboriginal treaty rights. And I emphasized this morning, of course, going to sort of the issue of remedy and the nature of the declaration, just to make the point that, you know, consultation can either -- in the last line, "either separately or through a forum that

Canada determines is appropriate", which seems to suggest, you know, turning their minds to that there might be a larger process in which the Maa-nulth could be included. That goes beyond an individualized process.

1.7.2 over the top of the page:

> "Where Canada informs a Maa-nulth First Nation government that it considers that a Maa-nulth First Nation law or exercise of power of that Maa-nulth First Nation government causes Canada to be unable to perform an international legal obligation, that Maa-nulth First Nation government and Canada will discuss remedial measures to enable Canada to perform the international legal obligations. Subject to 1.7.3…"

which, as you'll see, deals with the dispute resolution provision that I want to touch on in a minute because it explains why, you know, the treaty First Nations are going to have a hard time coming to court. But:

> "Subject to 1.7.3 the Maa-nulth First Nations government will remedy the law or other exercise of power to the extent necessary to enable Canada to perform the international legal obligations."

And that's critical, obviously, because here what you're talking about is a requirement on the First Nation to remedy the law in order to allow Canada to perform it's

international legal obligations. As I say, if there's a dispute about that, you'll see the reference to -- they have a dispute resolution chapter, which it appears would, even if there's a dispute of whether they should be consulted, it would go there.

CHIEF JUSTICE: So your point is that the entering into the CCFIPPA increases the odds that Canada's going to ultimate require a similar clause if and when it enters into a treaty with your client.

MR. UNDERHILL: And that is a direct -- and what that means is it is a direct constraint, if you would, on the aboriginal and treaty rights of First Nations. So they're requiring the rights that are to be put into this treaty to be constrained, to be consistent with --

CHIEF JUSTICE: I understand that. This goes back to a point I made earlier today. Couldn’t your client just say no, in negotiating. Canada kind of put this provision on the table while they were negotiating this treaty in the future, and your client is as concerned about it as you're saying, couldn’t they just say, "No, we're not agreeing to that"?

MR. UNDERHILL: And that's the point. If they have to say no and negotiate something else, that, with respect, is a potential adverse impact on them. If they're required to -- because Canada might say, "Well then, you know, we can't -- either we can't

conclude this treaty or you have to give something else," and so forth. But with respect, that's an adverse impact. If it affects -- if Canada is taking the position that we either can't conclude a treaty or a treaty has to look like something -- your rights have to be circumscribed in another way perhaps, we can't give certain powers, for example, because, you know, we need those powers to be exercised in a manner, consistently managed, so well, you know what? We can't give you those powers then. You can't have those self-government powers in a treaty. That, with respect, is a potential adverse impact.

CHIEF JUSTICE: So let me ask you this, and it goes to the counter factual point I made earlier today. The fact that this is already being added to these types of treaties, doesn't it suggest that Canada was going to lobby for this in any event?

MR. UNDERHILL: Sorry, that Canada was going to lobby for which?

CHIEF JUSTICE: Canada was going to try to get this type of a clause in any event, such that the entering into the China FIPPA didn't increase the likelihood that Canada was going to request this type of a clause?

MR. UNDERHILL: We maybe be missing each other here in terms of --

CHIEF JUSTICE: Yeah, possibly.

MR. UNDERHILL: Yeah, I'm going to

take one step back. Let me make one point and then try to come at this another way.

What should be very clear, if you look at just turning the tabs you'll see a series of final agreements which are followed there and the point is there can be no question Canada is absolutely requiring these types of provisions in their final agreements.

CHIEF JUSTICE: Right.

MR. UNDERHILL: And just -- we might also -- I think it useful to go to the agreements in principle, which we might just quickly turn up and then come back to this point. Similarly, just so that you're aware of it, there's a series of agreements in principle, which if you remember is the stage at which my client is at in terms of the negotiation -- their negotiating the IP.

CHIEF JUSTICE: Yeah, mm-hmm.

MR. UNDERHILL: So just to have a look at one of them, a very recent one from March of 2012. The K'ómoks agreement in principle. If you just turn up -- it begins -- it's Exhibit J. It's in Ms. Sayer's affidavit beginning at page 253.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And then -- so you'll see that. You'll see the K'ómoks agreement in principle, March 24, 2012 and then over at 256.

CHIEF JUSTICE: Yeah.

MR. UNDERHILL: Under the heading

"International Legal Obligations".

CHIEF JUSTICE: Yeah.

MR. UNDERHILL: "The final agreement will provide for the consistency of K'ómoks laws and other exercises of power with Canada's international legal obligations."

And the point, My Lord, that we're trying to make here is Canada has to do this. Canada has to ensure, under CCFIPPA and other agreements, that all the sub-national governments exercise their powers in a manner consistent with, in this case the obligation to CCFIPPA. And it goes back to -- it goes back to the point. It's no answer for Canada to say, "Well, look." You know, all the -- the only consequence here is if there's ever a breach of Canada's obligations there's going to be a monetary claim which we just pay.

The point is, and it's really what these provisions are going to, Canada is committing itself internationally to certain obligations and so it can't say, "Well, you know, we could just breach those and pay some money." You have to assume that Canada is going to to abide by its international legal obligations, not breach the treaty and have to pay money. In other words, it's going to alter its conduct. And so it has to -- and my point is it has to, therefore, when negotiating treaties with First Nations who will be bound by the same international treaties whether it's one of these investment treaties or something else, it

has to ensure equally that these sub-national governments abide by those international legal obligations, and importantly, alter their conduct. And that's why they insist on provisions that say, "Look it, you have to remedy."

CHIEF JUSTICE: Yes, no, I understand that, but right now we're on the treaty language stream. And so my question to you was, wasn't the language going to be this in any event, or something like this, because for all the reasons you just pointed out, Canada has been doing it, it has to do it. Whether it entered -- so my question to you is, well, whether it entered into the CCFIPPA or not, was it going to be insisting on that language in any event such that CCFIPPA didn't have any impact on the language?

MR. UNDERHILL: But I'm going to try to make the point as clear as I can. Because Canada is going to insist on this in any event -- they are going to insist on this kind of language in their final agreements. We know that. We look at every final agreement. We look at all the AAPs.

CHIEF JUSTICE: That's exactly my point, yes.

MR. UNDERHILL: Right? Precisely. And so we know that if the HFN want to negotiate a treaty and have their rights crystallized in a treaty, they're going to have to agree to these type of provisions. And so surely if that's so, my point is

this. If that is so, Canada is going to go enter into a particular international legal obligation, it has to talk to them about that, because it's going to insist down the road that they act in a manner consistent with that obligation. That triggers the duty to consult, with great respect. The fact that they're going to be requiring that means, look, when you go and enter -- and that's why -- that is why, with great respect, they've put those consultation obligations in there.

CHIEF JUSTICE: So it's not because the language would have been different, it's because they would have done what you just described.

MR. UNDERHILL: Right. Yeah. Because there, what they're doing is, we know that they -- and of course they have to. They have to have all their governments essentially agree to abide by their international legal obligations. They can't negotiate these things and then honour them in the breach. They of course have to modify their conduct and make sure they respect them. And so they, of course, need to require their sub-national governments, in this case, the First Nations governments, to abide by those obligations. And so when they go enter into new ones that are therefore going to be a restriction on the First Nations governments when they negotiate treaties, or otherwise, they, in our respectful submission, have to consult about those international legal obligations. And that's why, Chief Justice, they put those

consultation provisions in their final agreements. They say, "Yeah, we are going to consult with you about it." And so we've come back to where we started this morning is, the question is, is this an international legal obligation that requires consultation? And we say it is. And because it's something new that they're agreeing to. And they're going to --

CHIEF JUSTICE: Right. And it's not because the language is going to be different, but it's because their rights are going to be affected.

MR. UNDERHILL: That's right. That's the point. Because we know with a -- quite frankly, with a great deal of certainty, that Canada is going to insist, and properly so, that all the sub-national governments respect their international legal obligations and where necessary alter their conduct.

CHIEF JUSTICE: Okay, I hear you.

MR. UNDERHILL: And just -- I think we're in time for the break. And so that really is a corollary of our point in response to Canada saying, "Well, this is just about prospective claims." Canada really can't take that position, because properly the court should assume Canada is going to abide by those international legal obligations and they're not going to have claims. And what that means is altering their conduct to make sure they're consistent with it.

And if that is so, then there is an obligation to consult because they are going to be

altering their conduct to make sure they comply.

CHIEF JUSTICE: Mm-hmm. I'm still -- I don't know if you've ever seen "Voltaire's Disappearing Bust". Sorry, Dali's painting called "Voltaire's Disappearing Bust" but it kind of -- you could stand there and look at the painting and Voltaire's bust kind of comes in and out of focus. And I'm -- I hear what you just said, and it's coming in and out of focus, because I'm just wondering what would have been different in any event. If I go back to the two -- the future with and the future without the agreement. Anyway we can --

MR. UNDERHILL: Yeah, well, if you --

CHIEF JUSTICE: If you feel you need to come to that --

MR. UNDERHILL: I'm not sure I can say much more than repeating myself. Maybe we can -- I can use the break to think about whether I can come at this another way to make the point that if -- you know, because what I'm saying is, look it, this treaty language -- and when I say -- these land claim agreement treaty language are effectively – and I think you have this point – a constraint on how these treaty rights are going to be exercised. In other words, they have to be -- Canada is insisting that they are -- those treaty rights be exercised in a manner consistent with their international legal obligations.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And so, as Canada recognizes, in that other provision, when they go enter into a new one, they've got to talk to the First Nation about it, because that's going to -- you know, that changes the constraint, right? It's a new constraint when it's a new international legal obligation. That triggers a duty to consult, which they recognize in these agreements.

CHIEF JUSTICE: Mm-hmm. All right. Helpful.

MR. UNDERHILL: So, a perfect time, I think, for the break.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: With your --

CHIEF JUSTICE: Sure. So we'll come back at 3:30.

MR. UNDERHILL: Thank you.

CHIEF JUSTICE: Okay.

(PROCEEDINGS ADJOURNED AT 3:16 P.M.)

(PROCEEDINGS RESUMED AT 3:32 P.M.)

MR. UNDERHILL: Thank you, Chief Justice.

So to conclude what I've been calling the second stream argument or the treaty argument if you would, the point I think at the end of the day is this. When a First Nation signs -- we know with a great deal of certainty, give the position that we say Canada has to take in negotiating these final agreements with First

Nations, that is that they have to require those First Nations governments to act in a manner consistent with the international legal obligations, and where they don't do so, to remedy those obligations.

And so the point therefore is this. The moment a First Nation signs a treaty, whether it be the HFN or another First Nation, insofar as the CCFIPPA is concerned, there is an overnight change when they sign one of these final agreements, because before they sign a treaty -- and again, you know, this dovetails with the point that the HFN would very much like to conclude treaty sometime in the next 30 years, of course, that's the other piece that needs to be included here, but as soon as a treaty is concluded in the terms that Canada insists upon, then that First Nations government is bound by Canada's obligations under CCFIPPA. In other words, it now then has to accord fair and equitable treatment, for example, to Chinese investors. It has to make sure that it doesn't do direct or indirect expropriation without appropriate compensation. It has to abide by the performance requirement obligation of the CCFIPPA. Insofar as, you know, provisions like buy local are concerned.

And so because we know that Canada insists on these provisions in these land claim agreements, it is reasonable to say that there is a very strong possibility of new constraints being imposed on treaty rights with the ratification of the CCFIPPA,

because we know that First Nations' governments are going to be required to act in a manner consistent with those obligations. And that, in and of itself, we say with great respect, is a potential adverse impact which triggers the duty to consult.

And that really is the essence of the second line of argument that we've developed in the argument -- that was developed in the written argument, I'm sorry. And so what I would like to do now is then go back to the first line of argument.

CHIEF JUSTICE: Sure. Just before you do that, on this -- just you took me to the Maa-nulth agreement and 1.7.1. Is it your position that under this provision Canada would have been required to consult with the Maa-nulth and did not?

MR. UNDERHILL: Correct, yes. Yeah, and in fact I should have actually taken you to the example of Tsawwassen. In the evidence before you, just so we're clear about that, I've referenced the Tsawwassen First Nation. The affidavit of Chief Bryce Williams is also in Volume 1, the volume I think you're in right now. He is the Chief of Tsawwassen First Nation.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And if you could turn up his affidavit, which is at page 42 of the record in Volume 1.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: You'll see there that -- in paragraph 2 that the Tsawwassen First Nation final agreement was brought into force in April of 2009.

CHIEF JUSTICE: Yes.

MR. UNDERHILL: Then you'll see virtually identical provisions that we looked at in the Maa-nulth final agreement at paragraph 3.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: That is, first of all, the requirement to consult about an international legal obligation, which may adversely affect a right of Tsawwassen First Nation. And then second of all that -- in paragraph 31 or clause 31 of their agreement, that the Tsawwassen First Nation will remedy the Tsawwassen law or exercise the power to be sent necessary to enable Canada to perform the international legal obligation.

And then -- then there's a similar reference to the dispute resolution mechanism that was in there, that they can go to arbitration over these sorts of disputes. And then in the paragraphs that follow, you'll see at paragraph 5 that the Tsawwassen First Nation is also concerned about the implications of this agreement, and you'll see reference in there to Exhibit A, which is the letter from Chief Williams to various ministers, that's page 45, the November 29th, 2012 letter requesting essentially consultation. And as you'll see, they are citing, of course, clause 30 which we just looked at, which has the consultation

obligation. So it's certainly the Tsawwassen First Nation's position that consultation was required.

And you'll see then a reference to Exhibit B being an acknowledgement letter back, which is at page 47 of the record. And as you'll see, in essence really, a substantive response is not being received from Canada. This is simply that, you know, the letter simply states that your letter will receive careful consideration. And so it appears that Canada, at least at the date of the swearing of this affidavit, was taking the position that it -- well, it hasn't -- all we can say is it has not yet consulted with the Tsawwassen First Nation who have requested same.

CHIEF JUSTICE: All right.

MR. UNDERHILL: So subject to your questions or direction, what I would like to do is return to the first stream of argument and try to focus on the rubber hitting the road, so to speak, in respect of that first line of argument.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: And so just for your notes I'm returning then to paragraph 82 of the written argument and the paragraphs that follow.

CHIEF JUSTICE: Paragraph or page?

MR. UNDERHILL: Paragraph 82 of the written argument.

CHIEF JUSTICE: Yeah, okay. All right.

MR. UNDERHILL: And so what we're going to try to do, and we covered some of this so I'll try to not duplicate discussions you and I have already had, but what I'd like to do is explore in particular the expropriation and minimum standard of treatment obligations again to try to understand how this might play out on the ground. And that's really the object of this exercise, to try to get at the questions that you've been asking me.

So you now appreciate, of course, that, you know, the expropriation provision as we've discussed covers both direct and indirect expropriation.

CHIEF JUSTICE: Right.

MR. UNDERHILL: This was of course the subject of some discussion on the cross-examinations, which I think you've looked at. And Mr. Thomas, Canada's expert, confirmed that, you know, it is a matter of significant contention in the arbitration decisions about when legitimate government measures enacted in the public interest can constitute indirect expropriation. So there's some uncertainty there and it's a matter of great debate in the various cases. And the reference there, just for the Thomas cross-examination is Volume 3 of the applicant's record, pages 754 to 755 for your notes.

And so to just unpack that a little bit, I'd like to go into some of the -- you know, academic literature that had talked about this issue and that

line, and to go to the text which we referred to earlier by Andrew Newcombe and Mr. Paradell, which is Volume 5, tab 41. That's again, sorry, Volume 5 of the applicant's record.

MR. UNDERHILL: Okay. And I apologize that copy quality is not the greatest but we'll do our best. Hopefully your copy you can at least make out the words. And I'm looking at the paragraph 7.12 "Key Principles Related to Indirect Expropriation". And so the acronym you'll see begins:

> "IAA…"

which is International Investment Arbitration,

> "…jurisprudence to date has identified a series of key principles relevant to analyzing whether there has been indirect expropropriation. First, the form of the measure is not determinative, nor is the intent of the state."

And that's an important point to emphasize, that just because it's aimed at, for example, a legitimate environmental objective does not -- is not the end of the analysis.

> "Second, the claimant must establish that the measure in question results in a substantial deprivation. Third, the character of the government measure in question must be taken into account in determinining whether a police powers exception applies."

And again you'll remember our conversation about Annex B-10 according to Mr. MacKay being really a codification a codification of the police powers, and our discussion around that from Professor Newcombe's other article that's in the materials.

> "Fourth, the investment-backed legitimate expectations of the investor."

And this is the question you had for me, how does that fold in? So what the professors are explaining is that the legitimate expectations of the investor are relevant in assessing whether there's been an indirect expropriation.

> "Finally, the indirect expropriation analysis is context and fact-specific. Each of these principles is addressed in turn below."

And I thought it might be useful just to quickly look at the form of the measure not being determinative. The next paragraph, 7.13 just to hammer home that point.

> "International expropriation law takes a functional effects-based approach to the expropriation analysis. The form of the measures of control or interference is less important than the reality of their impact. The formal status of a government measure will not insulate a measure from scrutiny; there are no blanket exceptions for certain types of state measures. The tribunal in

> *Pope & Talbot* rightly rejected Canada's argument that non-discriminatory regulations cannot be expropriatory, holding that a blanket exception for regulatory measures would create a 'gaping loophole in international protections against expropriation'. States are not permitted to evade responsibility for *de facto* expropriations simply by characterizing the measure as regulation in the public interest. Equally, it is no defence for the state to characterize its measure as commercial or mercantile rather than a sovereign act; so far as the conduct is attributable to the state, its characterization is not determinative."

So how has this played out in the arbitration jurisprudence? You've probably seen a few references in the arguments, and the materials, to the *Metalclad* decision. And this is a good example of what we're talking about here.

So, just for your notes, the *Metalclad* tribunal decision is found in the applicant's record, Volume 4, tab 25. And if -- maybe if you want to just turn it up now, and then I'll just give you a little introduction to it, and then take you to the paragraph that I wanted to bring you to. So that's Volume 4, tab 25.

So this case involved, in short, a U.S. investor bringing a claim against Mexico, alleging that Mexico had wrongfully refused to permit the investor from operating a hazardous waste facility. And the tribunal, at the end of the day, found a breach of the provisions of both minimum standard of treatment and expropriation, and adopted a relatively broad definition of expropriation. And I'd like to take you to that, which is found at paragraph 103 on page 28 of the decision, which is 1282 of the record.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: And so paragraph 103, said:

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

And so, remembering that, you know, a lynchpin of the argument here is that these obligations which Canada are assuming introduce something different

or broader than what can be found in domestic law. To make that point we need to go to the judicial review decision of *Metalclad*, which was brought here in British Columbia. Mr. Justice Tysoe rendered a decision in that matter. And that is actually at the very next tab that's indexed as *Mexico v. Metalclad Corp.*, tab 26. And so you'll see Mexico brought a judicial review of the decision in the B.C. Supreme Court, because the NAFTA provided for the jurisdiction to be here. And Canada actually intervened in support of Mexico. And just to descend a bit more into the facts, Mr. Justice Tysoe set aside the award in respect of a minimum standard of treatment, on the basis that the tribunal had actually exceeded its jurisdiction, which was one of the very limited grounds of judicial review that is possible. And we'll come to that in a minute. That they exceeded their jurisdiction in finding that Mexico was in a breach of the provision of NAFTA which was not part of the minimum standard of treatment provisions. But, importantly for our purposes, Chief Justice, Mr. Justice Tysoe did not set aside the panel's finding that the issuance, in this case, of an ecological decree, which had established a reserve for cacti, that that issuance of the decree amounted to an expropriation. And Mr. Justice Tysoe referred, in fact, to the very definition of expropriation we talked about and I'd ask you to go to paragraph 99 to see what he said about that.

So paragraph 99 you'll find on page 23 of the decision.

CHIEF JUSTICE: Paragraph 90-what?

MR. UNDERHILL: Paragraph 99 on page 23, 1313 of the record.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And so he says there at paragraph 99:

> "The tribunal gave an extremely broad definition of expropriation for the purposes of Article 11(10). In addition to the more conventional notion of expropriation involving the taking of property, the tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property, which has the effect of depriving the owner in whole or in significant part of the use or reasonably to be expected economic benefit of property. This definition is sufficiently broad to include a legitimate re-zoning of property by a municipality or other zoning authority. However…"

and this is important for our purposes.

> "…the definition of expropriation is a question of law with which this court is not entitled to interfere under the *International Commercial Arbitration Act*."

And so the point there is what you have is international tribunals under the international law, applying these broad definitions of expropriation, which -- you know, even if the domestic courts would say, "Well that doesn't seem consistent with our domestic notions of expropriation", they are essentially, insofar as they are really questions of law, that is what is the scope or the definition of expropriation under these investment treaties, that's a question of law which domestic courts can't interfere with on judicial review.

And so that broad definition of expropriation, we say, with respect, has a number of consequences. And we refer in the argument, and just for your notes, Professor Van Harten in his opinion, pages 14 and 15, that's Exhibit C to his affidavit in Volume 1, pages 14 to 15, talks about some of the settlements that have taken place. And we've already referred to *AbitibiBowater*, and we've also touched on *Ethyl Corporation*. And so just if -- I might just -- Volume 1 for the moment.

And so the page reference that I'm taking you to -- sorry, my apologies.

CHIEF JUSTICE: Eighty-nine and 90?

MR. UNDERHILL: Page reference is page 90, thank you, on page 15. And you'll see there under sub-paragraph (b).

CHIEF JUSTICE: On 88?

MR. UNDERHILL: On page 90 of the

record, page 15 of Professor Van Harten's opinion.

CHIEF JUSTICE: (d)?

MR. UNDERHILL: Sorry, (b). "B" as in Bob.

CHIEF JUSTICE: (b) is on 88, isn't it?

MR. UNDERHILL: It's sub-paragraph (b), sorry. The title is "D", you're absolutely correct. You're in the right spot. I was just making a reference to sub-paragraph (b) on that very page.

CHIEF JUSTICE: Oh, I see. Sorry.

MR. UNDERHILL: So under -- yes, under the heading "D. Canada's Experience" and then sub-paragraph (b) is the reference to it.

> "Government of Canada may withdraw a measure due to the threat or filing of an investor claim, e.g. Ethyl Canada, and the Canada/China FIPPA, this may not be a matter of public record even after the claimant's final award is issued in Canada."

And as I say, that -- I alluded to this earlier. That case involved a ban on the import and inter-provincial trade of MMT, a gasoline additive which was suspected to be a neuro-toxin. There was some preliminary panel decisions against Canada, and subsequent to that, the government repealed that ban, the MMT ban, issuing the policy, as I said earlier, and settled the claim for some $13 million.

And again, I refer to the AbitibiBowater settlement which led to the settlement for some $130 million, and again the claim that had been filed was under all the usual suspects including, importantly, minimum standard treatment and expropriation.

And I thought the point was actually made quite nicely by one of the commentators at the end of a piece trying to, you know, there's lots of people like to write on, of course, what all these things mean. But the bottom line for your purposes, again, I've said this before and I'll say it again, it's not for you to decide exactly how, you know, the article, the expropriation obligation will necessarily be applied, and how a particular tribunal is going to come down and what it's all going to mean. For purposes of our argument, the point we need to convince you of is that there is a change, that there is a different set of rules, if you would, that are going to be applicable in Canada that then factor into what we've talked about, the risk analysis in turn which gets taken into account in government decision making.

And I thought that point, at least in the context of expropriation, was made very nicely by Ray Young, who is a lawyer here in Vancouver. And his article is found at -- sorry, is an article about expropriation law under NAFTA. It's found at Volume 5, tab 45.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: And so you'll see from the sort of précis at the beginning the article is aimed at trying to look at how the expropriation provision in NAFTA Chapter 11 has been applied. And after much discussion he comes to this conclusion at the very end, so the very last page of Volume 5 is page 1800, which is page 1022 of the *Alberta Law Review* article. He says at that last paragraph:

> "It is clear in the end that the NAFTA regime does establish a scheme for compensation in respect of regulatory takings that is substantially different, far broader, and much more protective than similar law applying to domestic investors in Canada. In large part it may well be that the major differences apparent between the NAFTA takings regime and those of Canada, Mexico and the U.S. have a great deal to do with the fact that all three domestic systems are so different. In addition, because the CALVO Doctrine espoused by Mexico presented a major disincentive to Canada/U.S. investment in Mexico, Mexico would gain no advantage by insisting upon its incorporation into NAFTA. One might assume that Canada and the U.S. each would have accepted their own system. However, a comprise reflected in the then current developmental language in use in

innumerable…"

that's bilateral investment treaties,

"…avoided any attempt at an amalgam of Canadian/American and domestic law."

So the point, of course, that the applicant makes is we have a different set of rules and we can debate exactly what those rules are, probably, and a lot of ink has been spilled to try to expound on that. You don't have to decide where those boundaries are and when a legitimate public objective becomes indirect expropriation. You don't need to decide that. What we urge upon you to conclude is this is a new set of rules that Canada has to take into account, as I've said, when making decisions about measures taken to protect and accommodate aboriginal rights and title.

And so even from these small amount of examples, they say in the argument that -- in the written argument, that you can see how, if a measure is taken, you know, for example to protect aboriginal rights and title, for example a moratorium on -- you know, we talked about moratorium on fracking, but a moratorium on development, you know, an ecological decree of the kind that we saw in the *Metalclad* decision, for example, that is, is aimed at protecting, you know, a particular species for purposes of allowing aboriginal people to exercise their rights in respect of that species, for example. Caribou. Caribou has, you know, been the subject of much litigation for example.

The woodland caribou herds, which are -- and the mountain caribou herds, which are in great jeopardy in this province. You know, there's been jurisprudence in that area about, you know, measures being taken to try to preserve those herds so that aboriginal people can carry on their aboriginal rights. And if, you know, such a measure came to pass, I guess there's two points. One can see then if the effect of that -- what we take from, you know, Professor Young's point and the *Metalclad* decision is, it is conceivable that if the measure has the effect of substantially reducing the value of that investment, it can amount to indirect expropriation.

So, therefore, we say Canada has to take that risk into account in deciding what measure it is going to take and how far it's going to go to protect, for example, the woodland caribou or the mountain caribou herds. Because if they go too far and essentially put a moratorium on development in the grazing fields of that herd, for example, if they did impose that kind of blanket moratorium on development or mineral extraction in that area, it might amount to indirect expropriation. And that's going to be taken into account. The risk of that claim is going to be taken into account by government, and that change in the balancing, in terms of government saying "Well, we have to -- you know, we understand we're required to accommodate aboriginal rights where possible, but we

can't go as far as we might otherwise because of the risk of this claim," and as I said, perhaps *ad nauseum*, it's that change in the balancing act of reconciliation that we say under this line of argument triggers the duty to consult.

I think it's important here just to reference, at least, the *Glamis Gold* decision, which you've seen some reference to. And just to briefly talk about -- that claim ultimately was not successful. But it's important to understand why it was not, because what the tribunal found was -- sorry. Protective measures were being proposed to protect a sacred area, and the result of those protective measures being proposed meant the investors had to spend more money, essentially, in order to make sure those areas got protected. And what the tribunal found at the end of the day was not that -- you know, the expenditure of that money, if you would, could never be tantamount to an indirect expropriation, but here just having to spend the amount of money that was at issue there – I don't have my finger on the exact number that was required to be spent, I can get that – wasn't enough to constitute indirect expropriation.

And so I say that case, with respect, can't give anyone a lot of comfort. Obviously, as you've already alluded to, these all are very fact dependent. But the point is *Glamis Gold* doesn't suggest that measures taken, if you would, to protect aboriginal

interests can never result in a finding of indirect expropriation. And that's important to emphasize. So, the value -- in other words, the value of the investment was not sufficiently diminished simply by them having to spend more money, such that there was an indirect expropriation. That's the essence of what the tribunal found.

And, you know, one needs to ask oneself, what if, in the *Glamis Gold* context, or in, for example, the *Dene Tha''*s context up here, what if a permit -- what if they had actually canceled the permit to either, in the Dene Tha''s case, engage in fracking or in *Glamis Gold's*, to sort of carry out the exploration and eventually extraction of minerals and other valuable ore, would that cancellation amount to an indirect expropriation?

And I think the answer is, it very much could, when you look back at that broad definition of "expropriation" from *Metalclad*. So while the facts of *Glamis Gold* weren't about the cancellation of a permit, one, it is not unreasonable to imagine a scenario where taking steps to protect aboriginal rights might result in the cancellation of a permit, which would in turn, then, have that substantial reduction in the value of the investment.

I'd like to then move to talk about fair and equitable treatment. And I'll probably conclude this in the morning, and then -- but at least get a

start on it this afternoon. It does not appear controversial following cross-examination that -- and again, fair and equitable treatment, just to be precise, falls under the minimum standard of treatment obligation. So it's a component of, as you saw from the language, a component of minimum standard of treatment.

But that fair and equitable treatment is really the most often-invoked obligation in investment treaties. And I will provide you in the morning with a cite to Mr. Thomas's cross-examination on that point.

And we saw earlier from Professor Newcombe -- sorry, no, that's another point I wanted to make. The point is that legitimate expectations of investors is included within that, and a requirement to maintain a stable regulatory framework.

Okay. My friend actually was able to find the quote, so let's -- I think it useful to go there now, rather than in the morning.

Okay. So, sorry. To be clear, it's not -- I still need to get you the quote of being the most often invoked, but I wanted to take you to Professor Thomas's cross, because there we put to him sort of Professor Newcombe's exposition on what fair and equitable treatment is. And I think that would be helpful for you to sort of get a sense of the breadth that I've been talking about, a bit generically. And ground it a little bit.

So, I'll just give you the reference in a

moment.

Okay. So the reference to the cross-examination of Mr. Thomas is Volume 3, page 781 of the record. And if you could just turn that up, I'll take you through it.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: All right. So, this is a reference to, I think it's Professor Newcombe's text, but -- and so the question beginning at line 35 -- actually, no, I'm sorry. If we just go back to the other one, sorry about that. Professor Newcombe at page 279, at the top of the page, talks about:

> "…fair and equitable treatment as a broad overarching standard that contains various elements of protection, including those elements commonly associated with the minimum standard treatment, the protection of legitimate expectations, non-disciminations, transparency and protections against bad faith, coersion, threats and harassment. You would agree that tribunals have discussed all of those issues in the context of fair and equitable treatment.
>
> A Yes. Under different treaties and different formulations of standard they have done so.
>
> Q Thank you."

And at 6.26 he talks about legitimate expectations and

says:

"Tribunals have identified the protection of legitimate expectations as a key element of fair and equitable treatment. Indeed, one tribunal is referred to as the 'dominant element of the standard'. Would you agree with that?

A I can't -- I'm not sure which case is actually footnoted there because of the photocopy that I have.

Q In *Saluka* I think that's the case you referred to earlier today, right?

A Yeah. If that's what it says, I don't dispute that. Certainly there are many tribunals which have focused on legitimate expectations."

And then carrying on at line 21:

"Q And it goes down to say:

'In its most specific form, "legitimate expectation" refers to expectations arising from the foreign investors reliance on specific host state conduct, usually oral or written representations or commitments made by the host state relating to an investment.'

Do you agree that that's one meaning of legitimate expectations that tribunals have referred to?

A Yes, some tribunals have done that, yes.
Q And then at the bottom:
'Second, tribunals have referred to legitimate expectations as stable and predictal, legal and administrative frameworks that meets certain minimum standards, including consistency and transparency in decision making.'
Do you agree that's what some tribunals have referred to?
A Yes, again, depending on the expression of the standard in the treaty.
Q And then…"
over the page at 65:
"…third:
'At the most general level, legitimate expectations can be used to refer to the expectation of the conduct of the host state subsequent to the investment will be fair and equitable.'
Would you agree that's a third kind of reference to legitimate expectations that tribunals have made?
A And some…"
again that's the *Saluka* case.
"…some tribunals, yes, some tribunals that you have referred to under some treaties, yes."

And then there's a reference to the *Merrill and Ring* case, and there's a debate in the cross-examination, and indeed you'll see in the literature as to whether *Merrill and Ring* -- the *Merrill and Ring* decision is an outlier or whether it's to be considered consistent with past jurisprudence or not, and I think it's fair to say that that's an area where the various experts in this area do disagree.

And so it might be useful to have a look at *Merrill and Ring*, which --

CHIEF JUSTICE: Where is the discussion of *Merrill and Ring*?

MR. UNDERHILL: Sorry, discussion of *Merrill and Ring*?

CHIEF JUSTICE: Yes. In this cross?

MR. UNDERHILL: I can take you to some earlier passages, where there's a discussion of *Merrill and Ring*, but I think I better first tell you what the case is about, and then we can come back to that maybe in the morning.

So I'm just trying to determine whether it's anywhere else. I think it's just -- the decision -- the award, I should say, is I think just in -- at tab 74 in Canada's materials, Volume 3 of 4.

Do you have that award?

CHIEF JUSTICE: Tab 77 you said?

MR. UNDERHILL: Tab, no, tab I'm sorry, tab 74 in Volume 3 of 4 of Canada's materials?

CHIEF JUSTICE: I have it, yeah.

MR. UNDERHILL: All right, so again, this is a decision decided after *Glamis Gold*, and let me say at the outset, it is a decision that is in favour of the state, and so this is not a case where the investor prevailed. Let me make that clear at the outset. And the facts, or what the case is about you will see is just briefly summarized at page 15 of the -- of course they are just numbered by the page numbers. It is page 15 of the case?

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And it in respect of the implementation of Canada's log export regime to the Merrill and Rings timber operations here in British Columbia.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And specifically, that the requirement that any of its export be subject to a log surplus testing procedure among other regulatory measures.

And so, the point of me taking you here, and again in the morning, I will just take you to the references about the debate, because we have an article appended to our reply that talks about the wisdom of the approach of -- to fair and equitable treatment in *Merrill and Ring*, versus the approach taken in *Glamis Gold*. And the point I am trying to illustrate to you is that again, as I did with expropriation, there is great

uncertainty in how these will be -- how fair and equitable treatment will be applied. And again, it is not something that we are asking you to pick if you would, who is right and who is wrong, whether the more, you know, the hawkish commentators who feel that *Merrill and Ring's* approach to fair and equitable treatment is to be preferred versus more state friendly commentators who think the *Glamis Gold* approach is better, the fair and equitable treatment. The point I am trying to make is, there is -- harkening back to the case law, there is this indeterminacy in the principles of this new set of rules that is being applied, that we say, creates that risk which triggers the duty to consult.

CHIEF JUSTICE: Mm-hmm?

MR. UNDERHILL: And so, just to have a look at what this tribunal had to say about fair and equitable treatment is found, first of all, at page 70 of the decision, under the heading 2.7.3 of the tribunal's findings?

CHIEF JUSTICE: What page?

MR. UNDERHILL: Sorry, we are starting at page 70.

CHIEF JUSTICE: Mm-hmm. Okay.

MR. UNDERHILL: So, it is the under the heading, The Intricacies of the Applicable Law, paragraph 182, do you have that?

CHIEF JUSTICE: The Intricacies of the Applicable Law?

MR. UNDERHILL: Of the Applicable Law.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: So, paragraph 182:

"The most complex and difficult question brought to the tribunal in this case is that concerning fair and equitable treatment. This is so because there is still a broad and unsettled discussion about the proper law applicable to this standard, which ranges from the understanding that it is a free-standing obligation under international law, to the belief that the standard is subsumed in customary international law. NAFTA and investment treaty tribunals have had the occasion to discuss this question under different legal frameworks. Under either view, the difficulties associated to this question are further compounded because of the need to determine the specific conduct of the standard. In addition to this case, there was a particularly difficulty assessing the facts, and how they are related or unrelated to the governing law."

And then, over at page 75.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: Paragraph 193.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL:

"In spite of arguments to the contrary, there appears to be a shared view that customary international law has not been frozen in time, and that it continues to evolve in accordance with the realities of the international community. No legal system could endure in stagnation. The issue then is to establish in which direction customary law has evolved. State practice and *opinio juris* will be the guiding beacons of this evolution. Canada has maintained that to the extent that an evolution might have taken place, it must be proven that it has occurred since 2001, when the FTC interpretation…"

that is the reference to the FTC interpretation note,

"…was issued, and this almost certainly has not happened. Such a view is unconvincing. The FTC interpretation does not refer to the specific content of customary law at a given moment, and it is not an interpreted a note of such content. Accordingly, the matter needs to be examined in the light of the evolution of customary law over time."

And so, the point is this, you will hear from Canada to the extent that we descend in to the niceties of this area of international law, international trade law, about, you know, whether the tribunal here is right, about, you know, the FTC

interpretation note. And I don't want to get lost in the details of who's right and who's wrong, because that's not my point. My point is that, at least according to this tribunal, when Canada is committing itself, if you would, or agreeing to be bound by the fair and equitable treatment obligation, and in turn of course of those treaty First Nations who have to abide by the same obligation, at least according to this tribunal it's a commitment to an evolving standard.

That's the point, you know, made at the end of paragraph 194. And so, again, I hearken back to the uncertainty and the indeterminacy of this new set of rules which is being applied in Canada over time.

And just to hammer home, I think, the point about indeterminacy that I've been trying to belabour -- sorry, before we put that away --

CHIEF JUSTICE: Okay.

MR. UNDERHILL: -- I just wanted to take you to one more passage to just hammer home this point about indeterminacy.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: It's paragraph 210 on page 81. So at paragraph 210:

> "A requirement that aliens be treated fairly and equitably in relation to business, trade, and investment is the outcome of this changing reality. And as such, it has become sufficiently part of widespread and

consistent practice so as to demonstrate that as reflected today in customary international law as *opinio juris*. In the end, the name assigned to the standard does not really matter. What matters is that the standard protects against all such acts or behaviour that might infringe a sense of fairness, equity, and reasonableness. Of course the concepts of fairness, equitableness, and reasonableness cannot be defined precisely. They require to be applied to the facts of each case. In fact, the concept of fair and equitable treatment has emerged to make possible the consideration of inappropriate behaviour of a sort which, while difficult to define…"

And I emphasize that.

"…may still be regarded as unfair, inequitable, or unreasonable."

And then, at their conclusions at 213.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: "In conclusion, the tribunal finds that the applicable minimum standard of treatment of investors is found in customary international law, and that, except for cases of safety and due process, today's minimum standard is broader than that defined in the *Neer* case and its

progeny. Specifically, this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness. The protection does not go beyond that required by customary law, as the FCC has emphasized. Nor, however, should protected treatment fall short of the customary law standard."

And so, that is, in essence, a rejection by this tribunal at least, of an argument that fair and equitable treatment is limited only as Canada would argue in this and argues in other cases, and you'll hear from Canada on this, that it's really only about egregious conduct. And that's all fair and equitable treatment is about. And again, it's not for you to descend into these, in my respectful submission at least, descend in and figure out who's right and who's wrong, whether this tribunal decision will be followed in the future or whether Canada will one day prevail in arguing for what's, you know, the so-called near standard and so forth. That's not the point.

The point is that there is this regime with a tremendous amount of uncertainty in it, such that you cannot properly be satisfied, if I can put it at its simplest, that all is well and that there isn't that risk of claims being brought for measures that seek to protect aboriginal rights and title. It's just, in my respectful submission, is impossible to take that away

from the variety of cases that you see, even just under NAFTA, leaving aside of course other bilateral investment treaties.

And that's probably, given the time, a useful place to break and we'll pick it up in the morning.

CHIEF JUSTICE: Perfect. All right, that's very helpful. So I gather we're going to have transcripts then for the morning? Before we start up at 9:30. Do you think we'll have one in time for people to be able to look at them before they come in.

COURT REPORTER: We'll try and get some tonight. A least a rough copy.

CHIEF JUSTICE: Okay, that'll be helpful. Yeah, that will be helpful. Okay, I think people will find that helpful.

MR. UNDERHILL: Thank you.

CHIEF JUSTICE: Okay. Thank you very much.

MR. UNDERHILL: Thank you.

(PROCEEDINGS ADJOURNED AT 4:30 P.M.)