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(PROCEEDINGS RESUMED AT 9:31 A.M.)

CHIEF JUSTICE: Good morning.

MR. SPELLISCY: Good morning, Chief Justice.

CHIEF JUSTICE: So we're now down to the back stretch.

SUBMISSIONS BY MR. SPELLISCY, Continued:

MR. SPELLISCY: And despite the fact that I have a lot of paper, I hope to keep my time limited here today. I don't want to take up too much more time on this. But what we have prepared for you actually at your request yesterday, you had mentioned it might be useful to have a chart of the ongoing and the rest of the NAFTA cases of the sort that we have prepared.

CHIEF JUSTICE: Oh, yes.

MR. SPELLISCY: And so we did provide that and prepare that overnight, and have it for you. And we've handed one to our friends as well.

And I just want to explain sort of what the chart is, to give you some sense. Yesterday I was discussing that there have been about 35 notices of intent filed. You can find that evidence in the record, that MacKay affidavit, paragraph 67. And in that affidavit, he actually describes that, I think, as 34

notices of intent and 20 claims. He corrects that in his cross-examination. I think it's at page 54 of the cross-examination of Mr. MacKay, where he adds the *Windstream* case, which had in fact had a notice of intention, notice of arbitration. And so there are 35 notices of intent Canada has received over all of NAFTA, and 21 of those have gone to arbitration. We handed up the 12 -- a chart of the 12 to you yesterday that had actually been resolved.

What we've now done is put together a chart that has two pages. The first page are what are called the "ongoing" NAFTA cases. These are cases that are active.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: Or that the first two, there are no claim yet. The notice of intent has been filed, but it is recent, and so we haven't labeled it as inactive even though there has been no notice of intent yet and we are approaching, I guess, more than a year since the notice of intent has been filed. A notice of arbitration could have been filed in both cases by now. It has not been. We don't know whether those claims will actually proceed to be a formal claim, but nevertheless we have included them there so that you see them there.

And that is the *Eli Lilly* case, which I believe has actually been mentioned in these proceedings so far. It's a case where a pharmaceutical company is

bringing a claim with respect to, I believe, a decision of the Federal Court and Federal Court of Appeal, and the *Lone Pine Resources* case, which is regarding the moratorium put on fracking by Quebec.

The next six cases there are under "Claims filed, no resolution". And what we have included here is current claims, where the notice of arbitration has actually been filed. So we have a formal submission of the claim to arbitration, but that there's no final resolution. And so if we walk through the cases we have *Windstream v. The Government of Canada*. This involves Ontario government measures with respect to offshore wind power. As you see, the constitution of the tribunal is still pending.

There is the *Clayton v. Government of Canada* or *Bilcon v. Government of Canada* case. That case, hearings on the merits are to be held shortly. That is also another case where the damages, if there is found to be any breach will be postponed, but hearings on the merits are to be held shortly.

The *Detroit International Bridge Company v. Canada*, this is a case where the tribunal has been constituted and it is hearing Canada's objections on jurisdiction.

Mercer International v. The Government of Canada, the tribunal has been constituted. As it has -- as in *Mesa Power*, both cases are in the earlier stage of disclosure of documents to the other side. And finally

there is *Mobil Investments and Murphy Oil* v. *Government of Canada*. We talked at length about this yesterday.

I would point out, we've also listed the damages claimed at issue here, and I want to clarify one thing that was discussed in the record yesterday, just so the court has it straight. The damages claimed in the column here are from the notice of arbitration. I think yesterday my friend had referenced the concern that the claim in *Mobil* was for, I believe, close to $200 million. I want to just take the judge [sic] that you see, it's at $60 million there, that is from the notice of arbitration. I just wanted to clarify what the claim in *Mobil* is actually for.

And if you go to Canada's book of authorities, Volume 3 of 4, and it's at tab 75.

CHIEF JUSTICE: I still have it open there.

MR. SPELLISCY: At paragraph 103, which is on page 49 of -- this is the decision on -- this is the decision on liabilities and what they call principles of quantum, and that's because quantum hasn't been determined yet as we discussed. At paragraph 103 is where some of the damages figures come in.

There's an initial line there that says "Damages Projects" and it refers to the oil field damages on two projects, Hibernia and Terra Nova. This is where the numbers add up to almost 200 million. That actually is not the claim of either Mobil or Murphy.

They are in fact just partners in this venture, and so they are only claiming their proportionate share. What you see following that, it says "damages" -- the line under that, "Damages Mobil Investment Canada Inc.", and on the next page if you flip over it gives what its share in these partnerships are and what damages it's claiming, which total to be about 47.35 million, and "Damages, Murphy Oil Corporation", and you see its partnership shares and its total damages sought are 12.67 million. And so you have about $60 million in claims, a little bit less, I guess, at that point. But about $60 million, very close to $60 million in claims right there, which is where that number comes from and we just wanted to clarify in the record that in fact it's not a claim in that arbitration for more than a hundred million dollars. It's a claim for $60 million. It's still, obviously, a significant amount of money but we wanted to point out that that's why the chart that we've handed up looks different than what's in the transcript and clarify in fact what is being sought in *Mobil* so that there's no confusion should you go back and read the transcript.

CHIEF JUSTICE: All right. I have a question.

MR. SPELLISCY: Sure.

CHIEF JUSTICE: Is there a -- one of my colleagues is here and he mentioned to me last night that he thought there was a -- well, he was involved in

a case, *Compton.* Does that ring a bell?

MR. SPELLISCY: *Crompton* is another name for the *Chemtura* case.

CHIEF JUSTICE: *Crompton?*

MR. SPELLISCY: Which is one of the cases that hasn't actually been resolved. *Crompton* -- *Chemtura* I believe was the original name. I believe they changed their name to *Crompton.*

CHIEF JUSTICE: Is it on this list somewhere?

MR. SPELLISCY: It is on the initial list of twelve. So if you look at the *Chemtura* on the initial chart of the 12 claims that has been resolved, *Chemtura* is a claim that was resolved in the favour of the government of Canada. No breach of provisions was found. Zero damages were awarded. And in fact Canada was awarded its costs, some of its costs in that arbitration for having to go through with it.

CHIEF JUSTICE: You're sure about that, because he seemed to have a different recollection.

MR. SPELLISCY: With respect to the result of *Crompton?*

CHIEF JUSTICE: Yeah. He seemed to think that there was a Crown liability, but anyway.

MR. SPELLISCY: There was not.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: And in fact I believe

the -- the award is actually in the record so we can find the cite for you, and I'll provide that to you in a second.

CHIEF JUSTICE: Sure.

MR. SPELLISCY: Where -- the dispositive of the tribunal which finds that Canada has not violated any of its NAFTA obligations, and that --

CHIEF JUSTICE: And there was no settlement?

MR. SPELLISCY: No. That case proceeded to a judgment on the merits. There was a hearing. And as I say, Canada was found not to have violated its NAFTA obligations and was actually awarded costs.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: I won't take up any more -- we'll try and find a reference for you.

CHIEF JUSTICE: Yeah, sure, yeah.

MR. SPELLISCY: But yes, that was a case that there was no liability found.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: And I would point in that regard also, if you -- just for Mr. MacKay's testimony on that is paragraph 67 of his affidavit. In the first bullet point it says "Won by Canada because the tribunal found it lacked jurisdiction or that there was no violation," and one of those he lists there is Chemtura Corporation. And Chemtura Corporation was the

new name of Crompton. And in fact to see that brochure, if you wanted to go in Volume 3 -- we'll find it for you but that's the name that they changed to.

CHIEF JUSTICE: Yeah, sure. Okay.

MR. SPELLISCY: The next page that I wanted to -- there's a second page on this chart, and it's called "Inactive NAFTA cases". And I should say, just so the court is aware, this information is taken from the Department of Foreign Affairs and International Trade's website, and all this information is on that website.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: So again, you have a breakdown here of claims that are inactive or claims that have been active or withdrawn. So the first three are claims where actually the notice of arbitration was filed. The tribunal was not constituted, and they have been moribund for a number of years. The most recent has been moribund for seven years, I believe. And so these cases have been qualified just as inactive. There is no activity on them. There are then a number of cases listed under that where there is no claim yet, which again refers to the fact that the government of Canada has received a notice of intent, but that in fact it never received a notice of arbitration, and there are descriptions as much as can be done in that sense. Often in a notice of intent you'll that see that some of the damages claimed are "N/A", meaning that there is

simply no claim for damages in the notice of intent, which reflects generally the preliminary nature of the notice of intent. It is not a claim to arbitration, it is essentially what I might call litigation letter or a threat letter of litigation, and that those are all listed there. And you'll see a number of them there. They date back, some of them all the way back to 1996. There are more recent ones that have been active for three years in 2010.

One point to clarify, just on these, also, is the filing of a notice of intent does not hold the statute of limitations which is in NAFTA. And so these claims can become basically tolled by the statute, which is a three-year statute of limitations in NAFTA. There is a similar statute in the Canada/China FIPPA. But essentially parties have three years from the date of the measure or the date of which they became aware of that they have suffered damages from the measure to bring a claim to arbitration. So, to the extent that these claims, these notices of intent, are old, the statute of limitation has almost certainly run on them.

CHIEF JUSTICE: All of them.

MR. SPELLISCY: I would think all of them. John Andre might be close. I'm not sure when the measure -- I'm not sure exactly when the measure was in that case. But the notice of intent was filed in 2010.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: And so that's why we

have actually broken it down and have the inactive cases. It's done the same on the Department of Foreign Affairs and International Trade website, because there are a number of cases that are simply inactive. This is why yesterday I referred you to the 35 notices of intent, but only 21 actually having proceeded. If we take that number further, you get 12 that have been resolved, 6 that have been ongoing, and several claims that have actually been filed but have now been just left moribund, which are the three claims on page 2. So even though we received a notice of arbitration, those claims have been left behind.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: With that, I think I would, unless there are questions that the judge would like to ask that came up yesterday, or today on the chart, I would be open to do that. Or I will pass the floor over to my colleague.

CHIEF JUSTICE: Actually, I have some questions for you.

MR. SPELLISCY: Sure.

CHIEF JUSTICE: Not on the charts, but just on the agreement. So, if now is a good time to do that?

MR. SPELLISCY: Absolutely.

CHIEF JUSTICE: Okay, perfect. So I was looking at your MOFL.

MR. SPELLISCY: Mm-hmm.

CHIEF JUSTICE: Just on paragraph 55, the last full sentence on the page:

> "For example, none of the obligations in the CCFIPPA apply to measures necessary to protect the environment, including measures necessary to protect human health…"

Blah blah blah. So it's really this "necessary" -- and this is a word that I guess Mr. Underhill, in his *factum*, pointed out. Do you want to comment or elaborate a little bit on this? I'm just wrestling with this whole environmental issue and measures that the applicants may want to take.

MR. SPELLISCY: Sure. I think the -- one thing to recall with respect to -- that's in Article 33 general exceptions.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: And so the one thing to recall with this is, again, this is an article that is in some of Canada's newer FIPPAs. It is not in NAFTA. And Canada takes the position that NAFTA itself accords a necessary policy flexibility to regulate in the interests of the environment anyways. This is a provision that is, in essence, often viewed as sort of an extra clarity, an extra belt-and-suspenders approach, but our view generally is that even without these general exceptions, the government of Canada has the full flexibility to regulate to protect the environment as long as it doesn't do so in things like a

discriminatory manner.

Now, with respect to the word "necessary", and there's been some discussion of this, and I believe Mr. Thomas also discusses this in his expert report, as to what that means and perhaps we can find that reference for you, so that I can refer you to that. I think with respect to necessary we have to put the word sort of in its context. And so the idea of the general exceptions is to understand what protections would be needed for measures that protect the environment.

The measure is not necessary to protect the environment in the sense of the general exceptions, and clearly -- and this is the issue is whether it's in fact really an environmental measure. And there's concern, of course, that if it's not actually necessary to protect the environment, that then it's being cloaked in environmental justification but is in fact being used for a different purpose.

CHIEF JUSTICE: What if the applicants just wanted to put a moratorium on, you know, tree licences or cutting permits or fracking if gas is ever found, natural gas is ever found on their land, or anything? What if they just decided that they would prefer if this activity ceased or was conducted in a certain way, would they have to prove on a certain balance of probabilities that this measure was absolutely necessary in order to avoid some potential

adverse effect under CCFIPPA?

MR. SPELLISCY: I think the best answer I can probably give is to go back to the experience under NAFTA, which doesn't contain this exception, and which, in our experience, gives governments the flexibility to impose measures necessary to protect the public interest, such as things like moratoriums if there are concerns. Again, NAFTA tribunals and the obligations, and CCFIPPA tribunals, Canada/China FIPPA tribunals and the obligations are not designed to restrict governments from making *bona fide* policy choices, including with respect to the environment. And we see it not just in Article 33, but we see it in Annex B-10 of the Canada/China FIPPA, which clarifies what the parties mean by something like indirect expropriation. It says except in very rare circumstances, *bona fide* measures to protect the public interest, protect public welfare are not to be considered an indirect expropriation.

And so in thinking about how something like that would play with respect to Article 33 of the Canada/China FIPPA, might there be a ground to argue a defence that no, this is an exception? Yes. Under the Canada/China FIPPA, yes. Is that grounds in our view necessary to ensure the policy flexibility of government in order to protect the environment through moratoriums of that sort? No. The provisions in the agreement itself provide enough flexibility, as long as they are

not done in ways that violate these basic obligations.

For example, you ask about a moratorium. If you think about the MFN or national treatment clause, it's hard to imagine a moratorium that would be *bona fide* that applied only to investors of Chinese nationality. When you think about, again, the issue of minimum standard of treatment, which again is a process obligation, unless the moratorium denies justice in some way, denies access to the courts, it's enacted without due process or legislative process, it's not going to fall below the minimum standard of treatment.

And again, we get the same with expro. A moratorium would presumably not result in the taking -- direct taking of land, so the question is indirect expropriation. But we look at what that means, and we look in what Annex B-10 says indirect expropriation means. And again, it's just a clarification of what it means. It's not a new rule in B-10. So when we look at what indirect expropriation means in the Canada/China FIPPA context, it doesn't mean measures adopted in good faith unless they are so severe in light of their purpose.

And you can imagine, certainly, measures that might be cloaked in environmental garb but were in fact so severe that they couldn't reasonably -- which is what B-10 says. Could not reasonably be considered to be what they are said to be.

CHIEF JUSTICE: So is this like a just

for greater certainty type of provision?

MR. SPELLISCY: I think -- and to a certain extent the -- bringing in the general exceptions from what is essentially the GATT, another national treaty, bringing it in this way, it is one of the things that Canada does and not many other states do in their assessment treaties, and I think it provides -- it's another one of those things that provides regulatory departments confidence that they can regulate in the public interest. It's one of those things that they look at that and say, "This is important to us to make clear in the treaty." But from a perspective of the government as to what the other provisions are that the feeling is that there is enough flexibility. And I apologize, I keep coming back to NAFTA which has similar, of course, all the same substantive obligations but not these general exceptions. And that's where our experience is, and there are not these general exceptions. But the evidence shows that -- the practice shows it has not impinged on government's ability to regulate in the private interest in that matter. We have NAFTA and we have a moratorium put in place by Quebec while they study the issue.

Now, we have a claim. In any system of justice, in any system, there will be claims. There will be claims. That in and of itself, as we saw yesterday, hasn't chilled the government's regulatory decision. Claims are a fact of life. Claims are a fact

of life for a decision maker who at times are going to have to make unpopular decisions with some groups.

CHIEF JUSTICE: Well, I guess there it was the province that took the action.

MR. SPELLISCY: And it was the province that took the action, but it would be no different if it was the federal government that took the action. Now, it would be hard to imagine the federal government taking an action particularly on something like that. But if it was within its jurisdiction, the same considerations -- the same considerations go, that these treaties provide us enough flexibility to regulate in the public interest.

CHIEF JUSTICE: And I'm just wondering aloud and without putting words in the applicant's mouth, that they seem to -- trying to make something of the existence of this word "necessary", which I think they might have even italicized. And so perhaps they're suggesting that this specific provision might override the general provisions that you're placing a lot of emphasis on now.

MR. SPELLISCY: No, with respect, I don't think that that's the way that the treaty would work, because there is a specific provision that is an exception to the treaty for this that says, "Nothing in this agreement applies." And so there's one exception. And then that's an additional area of policy flexibility. Then the next question is but these other

also have policy flexibility. It's not that that exception operates as a restraint on the other aspects of policy flexibility built into the provisions in the treaty. It is in addition to. It doesn't override -- the provisions aren't in conflict such that you'd be looking at the general -- the specific overriding the general. The policy flexibility is built insufficiently into each provision as it is, to take measures to regulate in the public interest. And then there is another one here.

And just for the court's reference I was talking earlier about Mr. Thomas's statement of this, and this is in his, I guess, his opinion. If you saw the core bundle we handed up yesterday it's at tab 5, at record page 873.

CHIEF JUSTICE: I have it somewhere else. What paragraph?

MR. SPELLISCY: I've got it at paragraph 153 which is on record page 0873 or page 37 of Mr. Thomas.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: And at page 153 Mr. Thomas addresses specifically this Article 33(2) exceptions and necessity and he says:

> "Professor Van Harten describes Article 33(2) exceptions as important, if largely untested, exceptions for health, environmental and conservation measures, and asserts that it is

difficult to predict how arbitrarors will apply the conditional language associated with these exceptions such as necessity crimes. Noting further that some tribunals have taken a strict approach to the concept of necessity. In the investment context he is correct that such exceptions are untested. In the GATT WTO context from which Article 33 is derived, there is an extensive body of jurisprudence dealing with exceptions including dealing with the meaning of the word 'necessary'. I would expect that this jurisprudence would be seen as relevant to the interpretation of a clause such as Article 33(2) with the appropriate allowance made in the drafting of that article. That said, as noted, the NAFTA does not include this exception for its Chapter 11 and I do not see it as being deficient as a result."

CHIEF JUSTICE: All right. Just a couple more. I'm at paragraph 106 on page 36 of the MLFL. So you say here at the last sentence in 106:

"Even if Chinese investors do invest heavily in resource industries in Canada, a CCFIPPA will not play any role in the way in which those developments are to be regulated."

But haven't the regulatory options been altered in the way that the applicant has suggested? Isn't there any

altering of the framework within which Canada might consider its future options? That's one of their main points, I think.

MR. SPELLISCY: Well, I think with respect to this line and the statement here, "will not play role in which those developments are regulated", the point here again is that Canada's domestic laws continue to apply. Canada's domestic resource and land management regimes continue to apply. They are not amended by a Canada/China FIPPA.

CHIEF JUSTICE: No, of course. I think their point is that Canada's policy flexibility has been altered, perhaps reduced, by the agreement.

MR. SPELLISCY: And I think the best response that I can give to that is probably the point that I've been harping on the most, is that the agreement contains such basic norms that are consistent with Canadian law as it is: nondiscrimination, fair treatment. That we don't see it as operating in any sort of restriction as our policy flexibility to regulate in the way that the Canadian government regulates in this sector.

CHIEF JUSTICE: Mm-hmm. And then at the end of 107 on the same page, so you make the speculative point, and then you say, "But more important, have no nexus." What -- I just want to make sure I fully understand what that second point you're making is.

MR. SPELLISCY: I think the point that is being made here, and I think it is a point that will probably be talked about a little bit more by my colleague, Ms. Hoffman, is a point of causality.

CHIEF JUSTICE: Okay. So we'll deal with that when she's up. Just one second, I want to pull open the reply, while I have you.

Okay, paragraph 17 and 19 of the reply. So, just looking here at the second sentence.

> "The very purpose of the duty to consult is to ensure that when a First Nation is able to conclude a treaty, the ability to negotiate meaningful rights has not been rendered ineffective as a result of previous actions of the Crown."

I guess what you're saying is, these previous actions -- and in enacting CCFIPPA, signing it and I guess taking the next step that's being -- that's the subject of this proceeding, isn't going to in any way impact upon the applicant's ability to negotiate meaningful rights. Or won't in any way render them ineffective. Is that basically what you're saying?

MR. SPELLISCY: I'm sorry, I'm missing where you're reading from.

CHIEF JUSTICE: Sorry. Paragraph 17 of the reply.

MR. SPELLISCY: Mm-hmm.

CHIEF JUSTICE: Second full sentence.

"The very purpose of the duty to consul…"

MR. SPELLISCY: Again, this is a point that I do think that my colleague, Ms. Hoffman, is going to deal with in detail, which is the meaning of the duty to consult in respect, really, of treaty negotiations and what the law and the duty to consult on that is. And so I'll ask her to make a note to deal with that specifically when she stands up.

CHIEF JUSTICE: Okay. The reason I asked it of you is because it talks about the previous actions of the Crown, which of course go back to the treaty -- this CCFIPPA. Let me just see here. Yes. They make at the end of paragraph 19, the last sentence, "The terms of the final agreements make it clear that such a finding would require First Nations to remedy the measure."

MR. SPELLISCY: I see that. And this is also a point that Ms. Hoffman will address, because it is not -- it is not as simple as that.

CHIEF JUSTICE: Okay.

MR. SPELLISCY: And so she's going to go through that in some detail.

CHIEF JUSTICE: And so at paragraph 21, at the front, is I guess another way of saying what I asked you before, which is, if Canada ratifies the CCFIPPA, it will commit both itself and any other government in Canada not to conduct itself in a particular way. I guess what you're saying is, well,

its laws already do that and nothing changes. Is that -- that's the bottom line?

MR. SPELLISCY: And that is an important point, and I think that that's one -- I think the point to come back on here is, again, when Canada undertakes any international legal obligation, it is committing not to conduct its business in a particular way. That's any treaty, any international legal obligation. And the fact that Canada considers its international legal obligations in how it acts, that's the fact of Canada being a member of an international community of states. Of course it has to do that. It undertakes obligations in international law. But what that's not sufficient, and my colleague Ms. Hoffman will get, that's not sufficient to trigger the duty to consult. The outcome of an argument like that, if accepted, would mean -- it would mean that any time Canada undertook any international obligation, it would be required to consult, because international obligations, sure, they do factor in.

Now, the word here is "restrict" and I want to pause on that word because again, in a sense they have to be taken into account. And certainly the government expects to abide by its international obligations. It expects sub-national governments to abide by these basic international obligations that it agrees to. But the -- and the question that arises, and my colleague, Ms. Hoffman, will talk about this, about

the false conflict, the idea that it cannot abide by its international obligations on the one hand and its obligations under the Constitution to aboriginal peoples on the other. It's simply false. It can.

So while certainly any international or other legal obligation, domestic or otherwise, that the Crown adopts factors into its behaviour and into its decision making, the mere fact of that, the mere fact that the government has to consider now how to consider behaving in accordance with one set of obligations and another, cannot be enough to trigger the duty to consult in our submission.

CHIEF JUSTICE: And you'd go one step further, I think, as a result of an exchange we had yesterday when I gave you the example about a possible agreement involving fish stocks is that really it's a factual question. And so in this case the agreement with China not to conduct itself in a particular way, as a factual matter, doesn't alter how it would have acted in any event because it doesn't change the existing parameters within which Canada could or would or may have operated vis-à-vis the applicant or other First Nation.

MR. SPELLISCY: Yeah. I think that that's exactly -- and it is a factual determination. The position we took yesterday and the position we have is it's not that any international treaty would never possibly trigger this. You have to look at the

international treaties. And the problem that is -- we find in the applicant's argument here is exactly that. They set out a standard on duty to consult that is divorced from what is in the law, as my colleague, Ms. Hoffman, will explain, but is so broad that it would be triggered all the time.

Now, I understood my friend yesterday or two days ago to say that that wasn't their position, that they weren't saying that all international treaties triggered the duty to consult. I think I recall that. But the test that they have laid out leads to that if read as it is, and that's why my colleague, Ms. Hoffman, will explain that's not the correct test. And you look at what is in the CCFIPPA, the Canada/China FIPPA. That is what you looking -- when you see what the obligations are, what Canadian law is and what the ultimate -- where the rubber hits the road, that's where we find that this simply won't impact the government's ability to meet its Constitutional obligations.

CHIEF JUSTICE: I think in fairness to them, and as you say, they did acknowledge it wouldn't apply to every treaty, I think they do and they have pointed out, recognized that. I think it's a factual question and so that's where they placed their emphasis. That's how it's important. That's how the size, magnitude, scope of potential Chinese investment in Canada becomes important because China is different from I think the Costa Rica example I gave in my discussion

or my exchange with Mr. Underhill. And they do recognize that there is a -- there is some threshold that -- I think they take your point that a merely speculative effect wouldn't suffice. There's sort of recognition here in the reply somewhere about the need for a threshold degree of potential effect.

And so I don't think they're going as far as to say any agreement.

MR. SPELLISCY: I acknowledge that yesterday they certainly have done that. And I think they intend to do that, and I think that that is their position. What I'm trying to lay out here is, in this paragraph here, and I think when you read through the transcripts you also see in some of the ways that they laid out what the test is and when they believe the duty to consult is triggered, and there was a discussion yesterday of when Canada adopts an international legal obligation that will affect its decision making. The duty to consult is triggered.

That test that they're describing there is in fact too broad. It's one that they themselves dis- -- that they themselves want to back away from, which is fair enough. I think that's right. But the test they're describing, I think my colleague Ms. Hoffman can do that, doesn't lead to the conclusion that they're seeking, and that's why Ms. Hoffman will describe to you what the test -- we think the test is.

CHIEF JUSTICE: Okay. Just one or two

more. Maybe a couple more. Hang on. Yeah, I was just going to -- I guess paragraph 32 is exactly the same point, where they say it's not credible to assert that the CCFIPPA disciplines impose no restrictions on government than already exist under Canadian law. And you're saying, well, in fact that's the case. So you've joined issue and they're saying it does change these and you're saying it doesn't. And so it's a factual matter.

MR. SPELLISCY: It is a factual matter, and I want to pause, I guess, here to maybe bring something else to the court's attention, and that is the question of -- and I think there's a lot of concern about what tribunals might do. And *Metalclad* is, of course, a -- the reference here is to *Metalclad*, which was a judicial review of an international tribunal decision and there was discussion about whether what it decided was right or what it decided was wrong and whether it could be annulled. But I think it's important to recall that even when, even if our position was it doesn't require changes to law, even if there was a tribunal decision on this topic, what was the outcome of that decision? What happens after that decision? So there's an award and there's an obligation to pay the award. There's no obligation to change the measure going forward. Canada doesn't have to amend its measure. One tribunal finds that it's in violation, the government of Canada could determine that that it disagrees with that finding and will maintain its

measure.

Other options that could happen, the government may decide that it should look at amending its measure because of a tribunal finding. There's a full panoply of ways that the government can do that, in a way that, though it will have to take into account its international legal obligations, and potentially the decision of the tribunal should the government determine that it's right, that it will not mean, as a matter of cause, that it cannot still meet its obligations under domestic law, under the Constitution, its obligations under the FIPPA. There are ranges of options in which interests can be accommodated, that are open to the government to find a way to comply with both. And the FIPPA and in an outcome of an international arbitration decision, even if adverse to the government of Canada, still leaves the discretion in the hands of the government of Canada on how to respond.

CHIEF JUSTICE: Yeah, but I guess, you know, if you look at the fracking case, and it may be that in some cases there's only one way to respond. You either stop it or you don't, right? And I guess their point is, that this agreement might chill their willingness to stop it, in that example.

MR. SPELLISCY: Well, with respect, I think if you look at the history of NAFTA and the practice, there's no evidence. You have claims and you have these decisions taken in the public interest.

Again I come back to there have been regulatory measures of this sort. They go on, there are claims, and if you look at Canada's record, Canada's relatively successful in defending these claims. And that again, goes back to the policy flexibility that is built into these treaties.

And so even in that case -- and I would come back to this, even in that case, if there was only one way to address the public interest and there was only one way, the government --

CHIEF JUSTICE: In the aboriginal's view. You know, they wanted to -- they've decided that to fully protect their rights, their lands, their environment, this proposed activity cannot be allowed to proceed.

MR. SPELLISCY: I think in that -- well, I guess I would paraphrase your question about if it's an aboriginal measure, it's a measure of the government, because it gets a little bit tricky. If we're talking about accommodation. We're talking about there's now an award, an adverse award, so Canada has defended the case and Canada has lost, then there's a question of how do you then proceed, and then there's a question, well, what measures do you adopt?

And I would think, that depending on the facts of the case, again, duty to consult is factual and my colleague, Ms. Hoffman, is more qualified to talk about this than I am, but depending on the facts of the

case the government may look at that and say, "We now have to respond. How do we do so?" And at that point there might be a need to consult with aboriginal peoples who might be affected by the response. It could be that the aboriginal peoples believe a moratorium is the only way to accommodate their interests.

Now, the government might be able to come up with different forms of accommodation that actually might be satisfactory, and I think that that's something that's entirely speculative. It's difficult to do. Generally the government is able to come with numerous ways to meet its policy goals.

But I think that even if we come down to -- and getting back to the international realm and what this means. Even if we come down to the question as to the government might agree that the moratorium is the only way, you have an international arbitral award issued that finds a violation of it, it must be paid and there is not need, there is no requirement under the Canada/China FIPPA to change the measure. The government can -- if it is the only way to protect the interests, the government retains the discretion under the Canada/China FIPPA to maintain that measure.

CHIEF JUSTICE: All right. Sorry, but these are important points, so, and while I have you there I find it very helpful.

MR. SPELLISCY: No problem.

CHIEF JUSTICE: So then they say, and

we talked a little bit about this and maybe we have fully addressed it, but if there's anything else you want to add, the last line of paragraph 36 on page 13.

> "There can be no doubt that Annex B-10 would not apply to measures aimed at protecting lands and resources in order to preserve aboriginal rights and title."

Did you want to add anything to what you said yesterday?

MR. SPELLISCY: Sorry, the double negative, I'm just trying to figure it out. Well, I think if the position is that they are saying Annex B-10 would not apply to measures aimed at protecting land or resources in order to preserve aboriginal rights or title, we would submit they're just wrong. That again -- but I think that it's not right to think about what Annex B-10 applies to. Annex B-10 is not a substantive provision. Annex B-10 is a description of the meaning of what one of the substantive provisions is, and so what I would say that the more appropriate thing to say is that the expropriation article, and the indirect -- the article covering measures tantamount to expropriation in Article 10 of the Canada/China FIPPA, does not in fact apply to *bona fide* measures aimed at protecting land and resources, except in the rare circumstances that the parties have confirmed that their understanding means an Annex B-10.

CHIEF JUSTICE: Okay. Just one second here. I guess I was curious to know, why was it that it

was the Peru FIPPA that got incorporated by reference?

MR. SPELLISCY: I think that Mr. MacKay might touch on this in his affidavit. I'll see if I can find the reference. But my recollection from the affidavit is, there was a matter of convenience in terms of drafting and that both China and Canada already had agreements with Peru.

CHIEF JUSTICE: Mm-hmm.

MR. SPELLISCY: But, you know, I would submit that Canada's other treaties don't do this. But treaties are negotiated provisions, and the interests of both states and what both states want and how they need the provisions to be reflected in the treaty for their own purposes, plays into account in how provisions are drafted. And what we would submit is, yes, the question is Peru – I'm sure they're flattered. But the issue is the effectiveness of the provision. And I think we walked through why we exactly think it's --

CHIEF JUSTICE: No, I was just curious. Okay. That's all. Thank you very much. You've been very helpful.

MR. SPELLISCY: Just because it was raised, we've found the *Chemtura* award. It's on the CD-ROM that we provided to you. And it's attached to the affidavit of Mr. Thomas at tab 11. And just so that it's there, the decision in the award is, and I'll read from the dispositive part which can be found at page 80 of the award, it says:

"For the reasons set forth above, the tribunal issues the following award. The tribunal has jurisdiction to hear the claims brought in the present proceedings. The respondent has not breached Article 1105 of NAFTA. The respondent has not breached Article 1103 of NAFTA. The respondent has not breached Article 1110 of NAFTA. The claimant shall bear the costs of the arbitration, which are fixed at U.S. $688,219."

And then I'll skip some more of the information on the -- how that is to be paid, considering the costs are advanced. And then sub-clause (f), it says "The claimant…" which means the investor here.

"…shall bear 50 percent of the respondent's fees and costs incurred in connection with this arbitration, and shall thus pay $2,889,233.80 to the respondent…"

which is, of course, Canada,

"…within 30 days of the notification of this award."

Paragraph (g), "All other claims are dismissed."

CHIEF JUSTICE: Okay, that's helpful. Thank you very much. Okay. Duty to consult.

SUBMISSIONS BY MS. HOFFMAN:

MS. HOFFMAN: Chief Justice, before I get started, I do have a couple of things arising from

questions you had yesterday.

CHIEF JUSTICE: All right.

MS. HOFFMAN: And one of them is something that we've handed up, another chart. We love charts at the DoJ.

So this is a chart -- you had asked yesterday how many self-government agreements or modern treaties predated NAFTA. So we've listed out the agreements that we reference in our argument at paragraph 67, footnote 100. And we say, in our argument that there are 19 First Nations who possess law-making powers which were in essence listed in Gus Van Harten's opinion, at -- just for the record, that's the applicant's record, Volume 1, at page 93. He listed out a number of law-making powers which in his opinion could attract FIPPA claims, and so in response to that we wanted to inform the court as to the number of agreements that that would apply to. So hopefully that chart is of assistance as it's set out in date order.

Now, the other question you had of the conclusion of Mr. Timberg's presentation yesterday related to the Council of Canadians.

CHIEF JUSTICE: Just -- sorry.

MS. HOFFMAN: Oh, sorry.

CHIEF JUSTICE: So in addition to these, there's the older treaties as well, right?

MS. HOFFMANN: Yes. There are other land claim agreements in Canada but they don't

necessarily have the law-making powers in them that Gus Van Harten was of the view.

CHIEF JUSTICE: Oh, I see.

MS. HOFFMANN: So it's very responsive to Gus Van Harten's opinion. So yes, there will be others but that's not part of the record so we're keeping it to what we have in our agreement, or in our argument rather.

CHIEF JUSTICE: I'm just thinking about, though, the experience of NAFTA I guess didn't adversely impact upon any aboriginal rights, or wasn't alleged, was never alleged to have, in respect of those older treaties either, which cover a broad --

MS. HOFFMANN: Not that we're aware of, no. No, that has not happened.

CHIEF JUSTICE: Right.

MS. HOFFMANN: Yes.

CHIEF JUSTICE: And those treaties -- maybe you can tell me how extensive a geographic territory those treaties are, how many -- how many bands are covered by those treaties, or just -- I'm trying to get a sense about the order of magnitude, just to get a sense of whether that experience was really -- whether we can extrapolate from that experience.

MS. HOFFMANN: So are you speaking now of the land claim agreements that aren't on this list, the older agreements?

CHIEF JUSTICE: Yeah. Yeah.

MS. HOFFMANN: To be honest, Chief Justice, I'm not in a position to answer that question. However, we can certainly have someone look into that and we can do what we can to answer that before the end of the day.

CHIEF JUSTICE: It would just be helpful for me to have a sense of -- if there's only one agreement and it didn't affect -- nothing under the NAFTA experience affected anything under that one agreement, you might say, yeah, that was only one agreement. But if you've got a lot of agreements covering a lot of bands and you can say nothing under the NAFTA experience had any effect on all of this, then the power of your point is a little bit greater.

MS. HOFFMANN: Yes.

CHIEF JUSTICE: That's my only point.

MS. HOFFMANN: When you say older agreements, you don't -- are you referring to historic treaties or modern agreements?

CHIEF JUSTICE: If they are relevant, if there's anything in those that, you know, could feasibly be impacted by an international treaty such as this, or NAFTA, and weren't, then that -- then they become relevant. If they don't then they're not.

MS. HOFFMANN: Yeah. I mean, obviously B.C. mostly does not have treaties except for Treaty 8 which covers the northeast corner of British Columbia. Treaty 8 was an historic treaty that covers

quite a large area in B.C. and Alberta. I don't think there's anything in Treaty 8 that would really be of relevance to -- because it didn't necessarily grant law-making powers. I think really to be -- to be relevant, the agreement in place really would have to have delegated law-making powers to the First Nation to be of relevance to our risk analysis discussion, because then you have a First Nation with some governmental law-making authority who then would be in the position to pass the measure that may well run afoul of a CCFIPPA, so --

CHIEF JUSTICE: Okay. I'm just not familiar with the treaty, so --

MS. HOFFMANN: Right. Right. And another point of course to be made, and I'll get into this in my argument because this is the position that the Hupacasath First Nation is in, is that 614 bands in Canada have law-making powers pursuant to the *Indian Act*, and we have put those provisions in there, and if you haven't gone to them I will take you through what those powers are. And of course we have had no NAFTA claims with respect to any measures taken by aboriginal groups under those powers.

So subject to any other questions you have on that, I'd like to move on to the *Council of Canadians* question you had yesterday.

CHIEF JUSTICE: Yes, absolutely

MS. HOFFMANN: So when we left off,

you asked my colleague Mr. Timberg what our response is to the applicant's argument that *Council of Canadians* is not applicable to this case, and to recap, we rely on *Council of Canadians* for two propositions, the first being that it sets out the framework for the analysis for the court in terms of analyzing whether or not an international treaty can be said to have impacts on the domestic sphere. You'll recall that my colleague took you through the elements of that analysis and how the court concluded that NAFTA did not have sufficient links to this domestic sphere. And it specifically stated, also, that the decisions of *ad hoc* tribunals under NAFTA have no direct effect on the domestic sphere. So they don't decide the rights of Canadians and their decisions do not have a domestic impact.

Mr. Underhill, in his reply, says there's a distinction between Section 35 and *Charter* rights, and therefore *Council of Canadians* is not relevant because the existence of the duty to consult does not depend on a demonstration that those rights have been breached in contrast to *Charter* rights. However, I would point out that the claim in *Council of Canadians* was that -- is very similar to the claim here, that the government would take action in response to a NAFTA tribunal finding that would result in a violation of the applicant's *Charter* rights.

So they were dealing with a prospective breach, and I will grant to my friends that the test for

what constitutes proof of a prospective *Charter* breach is different than the duty to consult test. However, I don't think it's sufficient to distinguish *Council of Canadians* entirely on that point, because you will see that in paragraph 62 of *Council of Canadians*, and I don't think I need to pull it out for you, but that the court does use language about speculation and, you know, the threshold of possibility. And I think in the *Charter* realm it's fair to say it's probably higher than it is in the duty to consult realm.

But none the less, that risk analysis has to occur. So in that sense the *Council of Canadians* case is of assistance, we would say. And we would also say that the *Council of Canadians* case is applicable by analogy, of course, because CCFIPPA and NAFTA provisions are so similar and there's no dispute about that.

So the finding in that case that NAFTA did not have sufficient links on the domestic sphere to attract the Constitution needs to be taken into account by this court. However, we recognize that the court should also employ a duty to consult analysis to determine if a duty to consult is triggered, and I'm going to take you through that. But we say that we believe *Council of Canadians* provides a useful analogy when compared to the law on the duty to consult. It answers completely the applicant's argument that Canada does not apply the correct legal test in respect of whether CCFIPPA, as a matter of law, can or cannot

trigger the duty to consult.

And I'm going to go through this with you, but I will just say that in *Rio Tinto*, of course, the court found that a claimant seeking a duty to consult must show a causal relationship between the proposed government conduct or decision and a potential for an adverse impact. So you will be required to find that causal link between the CCFIPPA and the alleged impact that the applicant puts forward.

Of course, we take the position that there is no causal relationship between the proposed ratification of the CCFIPPA and any potential adverse impact on the Section 35 rights. In a sense ratification is simply too remote from any potential adverse effect. In this sense, as a matter of law, the ratification of the CCFIPPA simply cannot trigger the duty to consult.

CHIEF JUSTICE: And you would take that position even in respect of those bands who have those provisions in their agreements? I think we saw two or three examples, where there were specific agreements -- specific provisions in the agreements that would have required you to consult, I think if there was a certain effect, and I guess your position is, well there wasn't that effect and therefore we didn't need to consult, is that --

MS. HOFFMAN: Right. Well, the first response to that, of course, is that those agreements

aren't at issue before the court because those parties, the signatories to those agreements aren't parties before you. But we would take the position that the provisions in those agreements with respect to consultation mirror the common law. They require that there's an adverse impact to trigger consultation.

So we would take the same position with respect to those agreements on consultation.

CHIEF JUSTICE: Mm-hmm.

MS. HOFFMAN: So, in *Council of Canadians*, of course, it was found that NAFTA tribunals, which would, by analogy, extend to CCFIPPA future tribunals, do not adjudicate on the rights of Canadians, but it doesn't stop there. We have to look at the way CCFIPPA works. And as my friend, or my colleague Mr. Spelliscy has pointed out quite effectively, the CCFIPPA preserves extensive policy flexibility and this means that any adverse impact is very remote. Moreover, the existence of any claim, let alone an award, is even more remote, when you look at the NAFTA claims experience. We also have the evidence of Mr. MacKay that the existence of the CCFIPPA does not, in and of itself lead to foreign investment, which happens due to many factors.

Finally, as per Mr. MacKay's uncontradicted evidence, there is no evidence that treaties like the CCFIPPA have prevented Canada from governing in the public interest.

So we would say that the causal link between ratification and any potential adverse effect cannot, simply as a matter of law, be established. This is our point when we say that there are no sufficient links between the CCFIPPA and Canadian domestic law with respect to Section 35 of the *Constitution*.

So, that, I would suggest, fully rebuts the points made by the applicant in paragraphs 2 to 7 of their reply.

CHIEF JUSTICE: Mm-hmm. Mm-hmm.

MS. HOFFMAN: So, I'd like to move on to my assigned task today, which is to go through the duty to consult law, and I will at the end of my submissions, depending on time, touch very briefly on the Crown prerogative.

So, the key question before this court with respect to the duty to consult analysis is, of course, whether the CCFIPPA triggers a duty to consult the HFN.

CHIEF JUSTICE: Mm-hmm.

MS. HOFFMAN: The Hupacasath First Nation. I'm going to be making six points in response to my friend's argument.

First, I want to discuss the factual framework that the court has been -- sorry, that the courts have put in place. Sorry, I'm just going to back up here.

First, I want to discuss the legal

framework that the court has put in place to determine when a duty to consult is triggered. Because with respect, I think Mr. Underhill has restated the test in a number of ways in his submission, and it's our position that his formulations of the test are not consistent with the guidance in the case law.

So, my friend took you to *Haida* and *Rio Tinto*, and I do want to go to these cases, and I think it's important to, because my friend did not take you, I would suggest, to all of the relevant passages.

But the test in those cases is clear, that for a duty to consult to be triggered, the proposed Crown decision must have the potential, the non-speculative potential, for an appreciable impact -- adverse impact -- on asserted section 35 rights. That really is the test. And again, there is this causal relationship as well that *Rio Tinto* talks about in paragraph 45.

For example, I would suggest that Mr. Underhill has lost sight of the requirement to show an impact in his submissions yesterday morning, when he said -- this is the argument that my colleague, Mr. Spelliscy, was referring to -- that because Canada has to look at its international legal obligations when enacting measures, this, in and of itself, triggers the duty to consult. We have lost the element of impact, if that is the test. The test has to be whether or not there is a potential for an adverse non-speculative

impact, which is more than just an impact. It must be appreciable.

CHIEF JUSTICE: I think they recognize that, though, don't they?

MS. HOFFMAN: Well, I mean, I think they do. But when I read the transcript yesterday, they seemed to go back and forth on that. So, I would suggest that that is just simply an overstatement of the test.

CHIEF JUSTICE: Mm-hmm.

MS. HOFFMAN: But you have my point on that.

CHIEF JUSTICE: Okay.

MS. HOFFMAN: Another way in which Mr. Underhill has articulated the test is this idea of a shift in the balance of interests that need to be taken into account.

CHIEF JUSTICE: Mm-hmm.

MS. HOFFMAN: And with respect, the balance of interest doesn't come into the test for triggering a duty to consult. Rather, it comes into the mix once a duty to consult has been triggered. And I'm going to take you to the *Haida* case for that point. But I'm going to go on and just briefly summarize the other points I want to hit on before today, just to give you a road-map of where I'm going. So I'm getting a little long in my introduction.

So, the second main point that I'll want

to talk about is why we have to be solely focused on whether there is an impact to the Section 35 rights of the Hupacasath First Nation. And I don't propose to spend a lot of time on that point but I think it's important that we go back and we look at what are the rights that they're asserting, and understand that that has to be the primary focus of any analysis. And I think we've lost sight of that a little bit in talking about some of the speculative nature or general impacts on First Nations across Canada. We really do need to be focused on the Hupacasath First Nation. And that arises from the operation of the three-part test, which requires the court to really focus on what is the impact on the ability of Hupacasath to hunt in their territories, to fish in their territories, to have access to their territories, to protect their territories. That's the question that we have to answer here.

So the third main point I'm going to address is to really go at this, what I say is the central premise of the applicant's argument that the ratification of the CCFIPPA amounts to a high-level structural change to the land and resource management regime in Canada. We say that is simply not the case. And I want to take you through the cases that have decided what a high-level structural change is, and particularly *Rio Tinto,* contrast that to *Haida,* and then go through some other cases that we've put in our

arguments about that, to just get into the facts of those cases and find out, well, what constitutes a high-level structural change. And we say that the CCFIPPA cannot be that type of a decision and, you know, mainly because the CCFIPPA is not about land and resource management, nor does it change any domestic laws or regulatory regimes regarding the use of land and resources.

My fourth point is that I want to talk about really is there anything in the CCFIPPA which operates as a fetter on the discretion of the Crown to consult with aboriginals, and where appropriate, accommodate aboriginal interests where specific Crown decisions must be made in relation to specific resource or development projects or land and resource management schemes which may impact those interests. And this is really the false conflict point that we have referred to a couple of times, so I want to spend a bit of time on that.

And then finally in the duty to consult, as a counterpoint to my friend's example about the Tlichot moratorium on land development – he took you to a case yesterday solely for the purpose of demonstrating that a First Nation has put in place such a moratorium – I'm going to run through some hypothetical examples just to show how we see that there really is no impact on the CCFIPPA.

Okay, so I'd like to start with *Haida* and

I'm going to be using the applicant's authorities because they have full versions. It's in Volume 4 of the applicant's record, tab 21.

CHIEF JUSTICE: What tab?

MS. HOFFMAN: It is tab 21 of Volume 4. I'm going to go to paragraph 32.

So Mr. Underhill took you to paragraphs 32 and 33 which are of course important paragraphs in this decision, which describes the origin of the duty to consult and that arises from Section 35 and the honour of the Crown which the Crown must always deal fairly with aboriginal interests, and reconciliation is an important obligation on the Crown. However, my friend did not take you to paragraph 35 which I think is important because it describes precisely when the duty to consult arises, and there the court says:

> "The foundation of the duty and the Crown's honour and the goal of reconciliation suggests that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal rights or title and contemplates conduct that might adversely affect it."

So there is a statement of the test. And I would just note there that there's no discussion in that paragraph about this balancing of interests that Mr. Underhill has mentioned. Of course the balancing of interests is an important element of the duty to

consult, but I would suggest it doesn't arise until a duty to consult is triggered.

CHIEF JUSTICE: So here they're talking really about -- in this sentence about the foundation. Is it both the first and the third prongs of that three-pronged test we looked at earlier?

MS. HOFFMAN: Yes.

CHIEF JUSTICE: Okay.

MS. HOFFMAN: And of course it's later. We articulated in *Rio Tinto* into a three-part test.

CHIEF JUSTICE: Right. Are you going to go through those three prongs at some point?

MS. HOFFMAN: I am, yes.

CHIEF JUSTICE: Okay, so I'll leave my question till later.

MS. HOFFMAN: So if we go to paragraph 45 which my friend did take you to. He took you to the last two sentences in that paragraph.

> "Pending settlement, the Crown is bound by its honour to balance societal and aboriginal interests in making decisions that may affect Crown claims. The Crown may be required to make decisions in the face of disagreement in the adequacy of its response to aboriginal concerns. Balance and compromise will then be necessary."

So, but my point is that when you read

these paragraphs is that it's quite clear that here in paragraph 45, if you look at the beginning, he's talking about the two streams -- extremes of the spectrum of the duty to consult. And the idea of the spectrum is, of course, that when you have a weak claim but like there is a high impact on that claim, you have to figure out where on the spectrum the duty to consult arises. Is it going to be on the low end, or is it going to be on the high end?

So I would suggest that in this paragraph, where they're talking about balancing interests, they're really talking about where on the spectrum does the duty to consult fall.

So, it's my submission that the balancing of interests and the change to that balance is really not any part of the test to trigger a duty to consult. And it's also perhaps helpful just to consider again the facts of the *Haida* case. Because unlike the CCFIPPA, which is not about the management of land and resources in Canada, the Crown decision in *Haida* directly involved the exploitation of timber resources on lands over which aboriginal title was claimed.

The case involved a tree farm licence, which covered one-quarter of Haida Gwaii, and granted exclusive rights to the licence holder to harvest timber. Of course, the Haida had long had a claimed aboriginal title to Haida Gwaii, and there were a number of decisions by the Minister that were taken over the

objections of the Haida and one of them was to replace the tree farm licence and to approve a transfer of the licence.

Paragraphs 72 to 77 of the decision talk about the serious or the potential impact. If you could just go to paragraph 33, it says:

> "Tree Farm Licences are exclusive, long-term licences. Tree Farm Licence 39 grants exclusive rights to Weyerhaeuser to harvest timber within an area constituting almost one-quarter of the total land of Haida Gwaii."

CHIEF JUSTICE: Sorry, you're reading from 33, did you say?

MS. HOFFMAN: Oh, sorry. 73.

CHIEF JUSTICE: Oh, 73.

MS. HOFFMAN: I probably mis-spoke. I apologize.

CHIEF JUSTICE: That's all right. Okay. Mm-hmm.

MS. HOFFMAN: "The chambers judge

> observed that it is apparent that large areas of Block 6 have been logged off. This points to the potential impact on Aboriginal rights of the decision to replace the T.F.L."

So here, it wasn't necessarily the cutting permits that were being challenged, it was the fact that it was the higher level decision, the strategic decision, about who

would hold those permits, that was really triggering the duty to consult here.

So really the *Haida* case is one of these high level decision cases.

But you can see that the subsequent decision that it set the stage for was a decision within that same forestry management regime. And that's reflected in paragraph 76, where the court finds:

> "I conclude that the Province has a duty to consult and perhaps accommodate on tree farm licence decisions. The tree farm licence decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal rights and title."

So in contrast here, we say that this element is not present in the CCFIPPA. So that it does not set the stage for decisions to be made about the utilization of any particular resource or land base.

So I'd like to now, subject to any questions you may have about that, go to *Rio Tinto*, which is in the same volume.

CHIEF JUSTICE: Okay.

MS. HOFFMAN: *Rio Tinto* is at tab 29, and I will go to paragraph 31. I won't read it, but 31 is the three-part test. So they've taken the *Haida* test and articulated it into the three elements, which the

first being the Crown knowledge of actual or constructive of a potential adverse no claim or right. The second is the contemplated Crown conduct, and third is the potential that the contemplated conduct may adversely affect an aboriginal claim or right.

I'd like to also just go to paragraph 50, and this is an important paragraph that I don't think my friend, Mr. Underhill, has really addressed in his arguments. And paragraph 50 talks about the purpose of the duty to consult. And it says in that paragraph that:

> "Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an aboriginal group. The duty to consult, grounded in the need to protect aboriginal rights and to preserve the future use of resources claimed by aboriginal peoples, while balancing counterveiling Crown interests, no doubt may have the ulterior effect of delaying ongoing development. The duty must thus serve not only as a tool to settle interim resource issues, but also incidentally as a tool to achieve longer term compensatory goals. Thus conceived, the duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's Constitutional duties to Canada's First Nations. However, cut off

from its roots and the need to preserve aboriginal interests, its purpose would be reduced to giving one side of the negotiation process an advange over the other."

I will be addressing this point perhaps a little bit later on in my submission, but I just note here that this passage from *Rio Tinto*, I would suggest, represents a significant obstacle for Mr. Underhill's second stream argument that he talked about with respect to the duty to consult being triggered by the fact that the HFN may or may not be able to negotiate a final agreement which contains similar ILO provisions to other final agreements.

So to the extent that the adverse impacts really are to what the Hupacasath may or may not negotiate in their treaty, those do not trigger the duty to consult. So the court needs to be mindful of that and to parse out whether or not the alleged impacts really are to what are negotiating positions rather than claimed aboriginal rights.

And I will note that in my friend's argument at paragraphs 115 to 121, they raise several concerns about the impact of the CCFIPPA on its ability to negotiate a treaty and the terms that they would be able to negotiate.

And I just want to explore this just briefly by going to the *Ahousaht* case, which is in Canada's authorities, Volume 2 at tab 24. Tab 24. So

if you're at tab 24, I'm going to go to paragraphs 31 and 32. So just to give you the background of this case, it was a decision -- or sorry, a judicial review of a decision of the Minister with respect to the implementation of a groundfish quota policy, and the aboriginal groups, the applicants claimed a duty to consult with respect to that.

If we go to paragraphs 31, you'll see there that the court set out the concerns raised by the applicants with respect to the imposition of quotas. And the first concern was, quotas impact treaty settlements. And in paragraph 32, it states:

> "The respondent submits that only the concerns relating to points (c) and (d) are matters that would relate to an aboriginal right, as they show a potential for adverse cost impacts on those engaged in the commercial groundfish fisheries to acquire quotas unless only these would trigger a duty to consult."

And I'm going to skip down to, "However…", the bottom line of that page:

> "…as the respondent points out, concerns over any impact on the treaty process, which is a discrete process, would not trigger a duty to consult. The treaty negotiation process and the litigation in which the applicants are involved are only relevant insofar as they

demonstrate that the applicants have asserted a right to fish commercially, and as it is this assertion that triggers the duty to consult."

So, I would submit that the courts have been clear that impacts on negotiating positions or impacts for treaty settlements do not trigger the duty to consult.

And this makes sense when you consider the nature of the treaty process, which is really an interest-based process rather than a rights-based process, where the parties come with negotiating positions and ultimately reach a compromise. So the fact that a particular right has been reflected in a treaty is not necessarily an expression of the strength of that right. It's a negotiated position. The parties have reached a compromise on what should be included within the treaty.

Okay. So, I'd like now to -- before -- oh, sorry, just a sec.

I'd like to go now to the issue about the fact that the court in this case need only be concerned about the impact on the Hupacasath First Nation. And we set this out in our argument, so I won't spend a lot of time on it, but you know, we take the position in our argument that the Hupacasath is the only proper party in this proceeding although the applicants seek a declaration that all First Nations in Canada should be consulted regarding the ratification of the CCFIPPA.

This is at paragraph 164 of Canada's argument.

Now, of course the applicants did not commence the class action or bring a representative action, nor have they served notice on all First Nations so they can be added as respondents. But this isn't just a mere technical issue. The aboriginal rights are both Band- and fact-specific, and representatives of aboriginal groups need to be authorized to speak on behalf of their groups, or bring claims forward on behalf of their groups. That hasn't occurred here. We're dealing solely with the Hupacasath First Nation. And I would suggest for the reasons set out in our argument that it would not be appropriate for this court to go further and grant a broad declaration to consult.

CHIEF JUSTICE: What about their judicial economy point?

MS. HOFFMAN: Well, I don't think that overcomes the -- the other issue, of course, is that there is evidence before this court of the Hupacasath asserted aboriginal rights that will allow you to assess what impact the CCFIPPA has on those rights. You have no evidence with respect to other First Nations in Canada because they are not parties. With respect, then you are left in a vacuum to determine what the potential impact would be.

I want to pause here to address a point by my friend, who yesterday and I think the day before referred to the consultation that could take place if a

duty to consult were found. And of course, you know, if you ultimately find that a duty is triggered in this case, Canada will have to consider that ruling and consider what form of consultation to take. But I just want to point out that it's perhaps not as simple as my friend points out, that we could consult with an umbrella group and consult with a number of First Nations at once.

There would be some logistical, significant logistical hurdles to overcome there, because umbrella groups are not rights-holders. They represent aboriginal groups. There would be the issue of consent with respect to whether or not those groups could consult on impacts on aboriginal rights, for their membership groups. So that would be one hurdle that would have to be overcome.

I think the applicants in referring to the *Kwicksutaineuk* decision referred to consultation there which happened with a number of groups. But just to give some context, of course, those groups were all First Nations on the west coast of Vancouver Island who had fish farm licence holders that were operating in their territories, and DFO has had umbrella groups for the purposes of consultation and information sharing on a variety of fisheries management issues for quite some time in the west coast. So in that situation there are existing groups which could perform this consultation function.

But with respect, for 614 First Nations across Canada, it would be unprecedented. There is no umbrella organization which represents all of those groups and there's no precedent for consulting with all First Nations across Canada.

So I wanted to provide a little bit more context, as my friend Mr. Underhill made it appear it would be a simple matter, but those are issues that would have to be wrestled with.

So with that, I'd like to turn briefly to the evidence regarding the Hupacasath First Nation, and my friend took you to some of this but I think it is important to return to it because really it is the impact on the Hupacasath's ability to exercise their aboriginal rights which must be the focus on your risk analysis. And we also need to understand, to the extent that the Hupacasath First Nation may pass measures that could violate the CCFIPPA, we need to understand who they are, what land base they have, and what law-making authority they have. So I'd like to just quickly take you through that, and this is at paragraphs 13 to 20 of Canada's argument, and the evidence references are there so I will save a bit of time by not going to them.

But as my friend pointed out, there are 120 -- sorry, 285 members of the Hupacasath First Nation. Approximately half of the band lives on two of its five reserves, which are in and around Port Alberni. Three of their reserves are unoccupied and one is

located within the Pacific Rim National Park. The other two are quite small. They are 53.4 hectares and 2.6 hectares respectively and they are located on the banks of Alberni Inlet. And it's important for you to understand what the reserve base is is because the Hupacasath only have law-making powers under Sections 81 and 83 of the *Indian Act,* and case law is quite clear on this point that law-making authority of a First Nation only extends to their reserves.

One thing I did want to hand up, I don't propose to spend any time on it but I noticed that when we put our record together that you didn't get a colour copy of this map, and you can't really understand it unless it's in colour. So this is Exhibit E of the Barkwell affidavit, and I don't propose to spend any time on this but it really just shows the claimed territory of the Hupacasath. But it also shows that there are nine overlapping First Nations interests, and the reason that we need to have colour is because they're all -- the boundaries are all colour coded.

So I was going to ask you if you feel it's necessary for me to take you through Sections 81 and 83 of the *Indian Act* so you understand the powers that a First Nation has to make laws.

CHIEF JUSTICE: Why don't you? I'm not familiar.

MS. HOFFMAN: Okay.

CHIEF JUSTICE: I'm not very familiar

with those sections of the *Act*, so it might be helpful if -- at least brief me.

MS. HOFFMAN: Okay, if we could then go to Canada's book of authorities, Volume 1, tab 8. There was a bit of mix-up. We had to amend the record so this is a bit out of order, but paragraph 81 is actually the second page after the -- in the tab.

CHIEF JUSTICE: Okay, I have it.

MS. HOFFMAN: Okay. So we're reading this in the context or to give you some context, rather, as to the types of laws that the Hupacasath First Nation can now presently pass.

So, I won't read through the whole list, but just some examples are -- so, it basically indicates that:

> "The Council of the Band may make bylaws not inconsistent with this *Act* or any regulation made by the Governor in Council, or the Minister for any of the following purposes:
> (a) to provide for the health of residents on reserves and to prevent the spreading of contagious or infectious diseases; the regulation of traffic; …"

(f) is the construction and maintenance of watercourses, roads, bridges, ditches, fences, and other local works; (g) the dividing of a reserve into zones for the purposes of construction or maintenance of any class of buildings, or the carrying-on of any class of business,

trade or calling in any zone. So they have some zoning authority. (h) is the regulation of construction and use of buildings. You know, they have a number of powers. (o) is the preservation, protection, and management of fur-bearing animals, fish, and other game on the reserve. So that is one that would be important.

So I won't go through all of those, but that gives you some sense. And then there is 83, which is in the first page of the tab. That is more of a taxation provision.

CHIEF JUSTICE: Sorry, tab 8?

MS. HOFFMAN: Sorry, no. Section 83. It's just out of order. It's the first page in the tab. If you turn over the --

CHIEF JUSTICE: Not for mine. Mine is okay. Mine is in the right order.

MS. HOFFMAN: Oh, it's -- oh, yours is in the right order, okay.

CHIEF JUSTICE: Somehow. Miraculously.

MS. HOFFMAN: Okay, so, 83 is taxation for local purposes of land or interests in land. And (a)1 could be important, the licensing of businesses, callings, trades, and occupations. And then there is a number of provisions about Band finances.

CHIEF JUSTICE: Mm-hmm. Mm-hmm.

MS. HOFFMAN: Which likely would not be measures that would be at issue.

So, I just take you there to really give you the context of the current law-making authority that they have. And in our book of authorities, we have the *Alfred* case, which is authority for the proposition that bylaws apply only on First Nations reserves.

CHIEF JUSTICE: Which case is that?

MS. HOFFMAN: The *Alfred* case. And it's at Canada's authorities, Volume 2, tab 27.

CHIEF JUSTICE: Mm-hmm.

MS. HOFFMAN: And just to complete the circle, I guess, with respect to Gus Van Harten's opinion, he did -- I referenced this earlier this morning, the powers that he lists which he, in his opinion, could trigger a FIPPA claim. Some of those are some of the same powers that I've just read out to you: zoning, preservation and protection of, and management of, fish and animals. So there is some overlap there.

CHIEF JUSTICE: Are there any on his list that aren't in these two sections?

MS. HOFFMAN: Oh, a number, because I think he is assuming that -- he bases his list on modern land claim agreements or treaties, the law-making powers that exist in those types of agreements, and they're of course much broader than what would be contained within the *Indian Act*.

So, there is evidence before the court that the Hupacasath First Nation have a land use plan, and a cedar access strategy. Both of those are used on

a voluntary basis with the consent and cooperation of third parties, such as business groups and investors, to address development issues in the HFN. And so I would just make the point that those would not constitute measures under the CCFIPPA because they do not have the force of law. Nonetheless they are important to the Hupacasath and Ms. Sayers indicated that they're well known in their territories and that they get good cooperation from third parties.

The other thing to keep in mind with respect to the Hupacasath territory is that there's -- oh, sorry.

CHIEF JUSTICE: So just on that point, so if there was an adverse impact on the land use plan, a potential adverse impact, you're saying there would be no duty to consult because it's not a measure enacted pursuant to 81 or 83?

MS. HOFFMAN: No, I think my argument is that the land use plan could not give rise to a FIPPA claim. It could not be challenged by a Chinese investor, which I think was a concern that was raised in the application.

CHIEF JUSTICE: Oh, I see.

MS. HOFFMAN: So I just have a few more points to finish this issue. I do note the time. I'm going a little long. There is no evidence before this court of any present or future Chinese investment in the Hupacasath territory. We do have some newspaper

articles that speculate about potential future investments in the timber arena. There is some speculation about possible coal developments, but the evidence is that there are of course no active coal mines in the Hupacasath territory. So again this needs -- the lack of Chinese investor of course needs to be taken into account in your risk analysis.

And one final point that I'll just make again on the Gus Van Harten opinion is that his opinion that these powers that are listed in his opinion that could attract a FIPPA claim is somewhat of limited assistance to the Hupacasath First Nation situation because they only have a few of those powers that he lists that could attract a FIPPA claim. So I think you have to have Gus Van Harten's opinion in that regard with a grain of salt because he really doesn't examine the position of the Hupacasath First Nation and their current law-making powers.

CHIEF JUSTICE: So is your -- are you saying that even if you were to acknowledge that should the treaty ultimately be negotiated, it would contain at a minimum certain things, any adverse impacts on those things, any potential adverse impacts on those things wouldn't trigger a duty to consult?

MS. HOFFMAN: Well, I think you have to be careful there because you're talking about a negotiated treaty, and impacts to a treaty do not trigger the duty to consult.

CHIEF JUSTICE: Really?
MS. HOFFMAN: Well, I took you to the *Ahousaht* decision for that one.
CHIEF JUSTICE: Impacts on a negotiation of a treaty, I think that's what that said.
MS. HOFFMAN: Yes.
CHIEF JUSTICE: But what about the content of a treaty?
MS. HOFFMAN: I'm going to have to think about that question and answer that one after the break.
CHIEF JUSTICE: Because I would have thought that the content of a treaty is -- I don't have an aboriginal law background but I would have thought that the content of a treaty is reflective of the aboriginal interests. So if there's an adverse impact on that content, or future likely content, would that trigger a duty to consult?
MS. HOFFMAN: Right. Yes, if I might I'd like to consult with my colleagues about that.
CHIEF JUSTICE: Yes, sure, of course.
MS. HOFFMAN: Because I know there's decisions on that but I want to be sure that I'm accurately setting that out.
CHIEF JUSTICE: Yes, okay.
MS. HOFFMAN: So if we could take a break.
CHIEF JUSTICE: Okay, we've covered a

lot of ground. So it's 10 after 11, 11:25.
(PROCEEDINGS ADJOURNED AT 11:25 A.M.)
(PROCEEDINGS RESUMED AT 11:26 A.M.)
MS. HOFFMAN: Chief Justice Crampton, it's been pointed out to me that I'm mispronouncing the name of the Hupacasath First Nation. It should be *hoo-pa-CHESS-ath* rather than *Hoo-PACK-a-sath*. So I apologize for that mispronunciation, and if I slip again, please heckle me from the back.
Okay, I'd like to move now, and I'm going to try to move a little bit quicker, because I think time is becoming a bit of the essence, but we'll see where we get to. But now I want to go and actually apply the three-part test to the Hupacasath First Nations' asserted aboriginal rights.
So, as I have already pointed out, really the focus of this first part of the test is to look at the rights that are being claimed, and I'd like just to take you to the respondent's argument at paragraph 4.
CHIEF JUSTICE: You mean the applicant's argument?
MS. HOFFMAN: Yes, the applicant's argument.
CHIEF JUSTICE: Applicant's MOFL?
MS. HOFFMAN: Yes, the applicants memorandum of law, paragraph 4.
CHIEF JUSTICE: Mm-hmm.
MS. HOFFMAN: And there it is set out

what the asserted aboriginal rights of the Hupacasath First Nation are. So I won't read them, but just point out that they relate to the use, management of fisheries, wildlife and other resources, access to their territory, the ability to protect their habitat and other resources in their territories, and of course the right to use, harvest and conserve those resources. So that is really the focus that needs to be given to the alleged impact on the aboriginal rights.

CHIEF JUSTICE: Are you aware of other -- because it says "including". Are you aware of any other significant that we should be focusing on?

MS. HOFFMAN: Sorry, if --

CHIEF JUSTICE: It says "including", and so I'm just wondering, are you aware of anything else in the evidence regarding their asserted rights that ought to be in this list or might have been inadvertently left out? Just because, as you say, that that's what we have to focus on, so I want to make sure we're not missing anything important.

MS. HOFFMAN: Right. Well, I think what you would have to refer to there is the affidavit of Brenda Sayers, and she really provides the factual background for these rights, and it's my recollection that that covers it. There may be other matters in there that I can't think of at the moment, but it seems to me to be a fairly comprehensive summary.

I realize I've forgotten to answer the

question that you had before the break so I'm just going to pause and deal with that.

So as I understood your question, you asked that in the hypothetical situation where the Hupacasath actually do get a treaty, would -- an impact o the treaty provisions triggers duty to consult. And the answer --

CHIEF JUSTICE: Would it impact on what even your side would acknowledge would be the basic minimum things that would, I'll go so far as to say, eventually or obviously be in such an agreement, would a potential adverse impact on those things trigger a duty to consult.

MS. HOFFMAN: And the answer to that, in that hypothetical situation is yes. But the reason I hesitated, of course, is because once you have a treaty you have established rights and you're in a different circumstance than in the *Haida* situation, because *Haida* is speaking about the duty to consult prior to the resolution, the final resolution of pending claims. So, it's a different situation, I would submit. And I think with respect, it's one that's too hypothetical to consider impacts to a future treaty, as an impact that could trigger a duty to consult in this case, because really we're talking here about their asserted aboriginal rights which are the rights set out in paragraph 4 of their argument.

It's hypothetical, of course, because --

I mean, although the Hupacasath have aspirations to achieve a treaty, they have not actively negotiated a treaty since 2009. They are at Stage 4 of what is a six-stage process. So they do not yet have an agreement in principle.

So there would be a considerable way to go before the final --

CHIEF JUSTICE: I get the speculative point. I guess I just want to -- I assume that you would say just for -- to play devil's advocate for a second -- that if you were aware that you might be taking steps that would obviously adversely impact on what they hoped would be contained in a treaty, that that might not reflect well on the honour of the Crown.

MS. HOFFMAN: Most certainly. I mean, we've -- the Crown acknowledged that it has a duty to consult where action that it takes would have an adverse impact on a treaty right. That is without question.

CHIEF JUSTICE: Or on a treaty that -- on treaty rights that were in negotiation. If you were knowingly doing something that was going to adversely impact on rights that were currently the subject of negotiation, that might not -- that wouldn't reflect well on the honour of the Crown. To actually knowingly -- like, you and I are negotiating to buy a new house, and I go out and throw a firebomb at it, or -- you know, I go out do something to your house, or I'm your neighbour and -- or I go ahead and tell your neighbour

it's okay to go ahead and build a fence, you know, a foot onto your property.

MS. HOFFMAN: Well, I mean, I --

CHIEF JUSTICE: That wouldn't reflect well on me, if I'm negotiating the sale of the house to you.

MS. HOFFMAN: But I think we have to factor into this the clear dicta in the law that impacts to negotiating positions can't trigger a duty to consult. I mean, the way I see it, you have the situation where you have asserted aboriginal rights that have not been finally resolved. You have the *Haida* test, as the test that triggers the duty to consult. The focus there is the impact on the aboriginal rights. When you have a situation where you have a concluded treaty, the impact there is on the provisions of the treaty. What you're talking about is an in-between stage which I would submit for the reasons set out in *Rio Tinto* and the *Ahousaht* case I took you to, wouldn't necessarily trigger a duty to consult. I mean, it's an interesting hypothetical which I don't think we need to resolve for the purposes of this case.

CHIEF JUSTICE: Okay.

MS. HOFFMAN: Okay, so I indicated that I thought that in my friend's submissions, the first part of this test to focus on the aboriginal rights have been somewhat obscured in the discussions that we've had so far about the potential speculative

impact of the CCFIPPA ratification. We've talked a lot about regulatory chill. We've talked about the concern of arbitrators perhaps misconstruing provisions, or giving them broad interpretations. But really we can muse about that, but what we have to do is, we have to bring it back down to whether or not that would actually, those possibilities, would they have an impact on the Hupacasath's asserted rights to conduct the activities that they wish to carry out in their territory.

So, just to conclude on the first branch of the test, of course, Canada acknowledges in Mr. Barkwell's affidavit that Canada has knowledge of the rights asserted by the Hupacasath First Nation that are set out in paragraph 4 of the applicant's argument. So that is not in issue. However, the caution, though, is that the rights have to be rooted in Section 35 in order to trigger a duty to consult.

So, and that is why impacts to negotiating positions would not necessary trigger the duty to consult.

So moving to the second part of the test, I can cover this quite briefly. I mean, obviously the decision at issue here -- or, actually, no, I'm not going to cover it briefly, I take that back. The decision here is the ratification of the CCFIPPA. And so the focus has to be on the current decision that is at issue before the court. And unless the courts have

been clear that not only is speculation insufficient to trigger a duty to consult, but any alleged impact must arise from the Crown decision at issue before the court, not speculative future potential Crown decisions that may or may not occur.

So on this point I'd like to spend some time going through the *Adams Lake* case, which my friend took you to yesterday. But with respect, I think that my friend mis-stated it somewhat when he said that the court concluded that the First Nation there was not successful although a duty to consult was found to exist. The court held that it was met.

Just to remind you of the facts of this case. This is involving a ski resort in British Columbia called Sun Peaks, and the Adams Lake Band challenged an Order-in-Council which replaced one form of local government with another at the ski resort municipality.

Now, it's important to note that there was a separate master development agreement between the owner of the ski hill and the province that had been in place since 1993 that dealt with land issues. So any issues with respect to development were dealt with in the context of that agreement.

So, there was a request to the province to change the form of local government, and an Order-in-Council was issued to accomplish that decision, and that was the decision that was being challenged before the

court. And the court found ultimately that the change in the local government had an insubstantial impact on the band's claim for aboriginal rights and title. In particular, the court held that the incorporation had no implications for land use which were governed by this master development agreement, which was unaltered by the incorporation of the resort municipality.

I'd like to take you to this case, which is in Canada's authorities, Volume 2, and it's at tab 23. Just in response to your question about the list of rights in the argument, I'd just point out that Brenda Sayers' affidavit, which is in the motion record of the applicant, Volume 1, tab 6, is her affidavit and it's at paragraph 23 of her affidavit where she lists the rights set out there.

CHIEF JUSTICE: Okay, thank you.

MS. HOFFMAN: Okay, so I'd like to go to paragraph 59. So there the court, citing *Rio Tinto*, said that:

> "The duty to consult concerns the specific Crown proposal at issue and not the larger adverse impacts of the project of which it is a part."

It continued:

> "The subject of consultation is the impact on the claimed rights of the current decision under consideration. I consider this statement of the law to be important to the

analysis in the present case."

So if we could go, skip to paragraph 66, here there's a discussion of the trial judgment and the chambers judge made the same finding that the Band was in no worse a position before the incorporation as it was after, and that the Band's claim to aboriginal rights and title with respect to Sun Peaks was neither extinguished nor reduced by the change in the local government.

However, in the subsequent paragraphs, you'll see that the Court of Appeal was concerned that the trial judge had taken into account in her analysis the concerns regarding development in the municipality, which were governed by the master development agreement. And that, of course, was not before the court. And at paragraph 70 -- and I take it from this decision that there was concerns on the part of the Band that there would be somehow greater development in the area because of this change of incorporation.

So, paragraph 70:

"In my opinion, the suggestion that the corporation would somehow have control over development through the municipality that it would not otherwise have had is speculative at best. Land use is a matter between the province and the corporation under the master development agreement and is not affected by the incorporation of the municipality. Land

use issues remain subject to consultation where required."

And we would say that this paragraph really can be compared to the situation of the CCFIPPA, because of course, the CCFIPPA is not about the management of land and resources which will continue to be developed in accordance with the existing land and resource management regimes that exist in Canada.

And I just want to address -- I indicated that I thought my friend had misread this case, and if we can go to paragraphs 74 and 75, and what my friend said about this case is that the duty to consult was triggered, and with respect I disagree with that reading because in paragraph 74 the Court of Appeal says:

"I agree with the province, however, that it was not necessary in this case for the Ministry of Community or the court to do an analysis of the strength of the claim of the aboriginal rights and title. As it will become clear, the impact of incorporation on the Band's claim to rights and title was and remains insubstantial. This is so regardless of the strength of the claim that would have been revealed by a strength of claim analysis."

So in fact, the duty to consult was not triggered in this case. The facts were, of course, that consultation had taken place, that the effect of the

incorporation was explained to the Adams Lake Indian Band, but that was neither here nor there. That didn't impact the bottom line finding in that decision.

So I'd just like to read paragraph 75 as well:

> "As the court said in *Rio Tinto* at paragraph 51, there must be a demonstration of causal connection between the proposed Crown conduct and a potential adverse impact on an aboriginal claim or right before the need for consultation and possible accommodation will arise. The causal connection between the incorporation of the municipality and the assertion of an adverse impact in this case is difficult to see. I have not been able to discern it clearly in the evidence or in the arguments advanced. I expect this is because the assertion of impact was centred on the more general issues of past development of the resort, the proposed amendment of the MDA, and the proposed changes to timber administration."

So likewise I would urge the court to consider the extent to which the applicant's concerns really stem from future Crown decisions that may be taken in response to claims under the CCFIPPA, or that really don't centre on the ratification of the CCFIPPA. I think the case law is clear that the Crown decision at

issue must be the focus of whether that particular decision is going to have the impact alleged. And I think the Adams Lake case is instructive in considering that.

And I think this really does address Mr. Underhill's regulatory chill argument. Can a future decision by the Crown to not take a particular measure aimed at protecting aboriginal decisions because they are concerned that it may run afoul of the CCFIPPA obligations and attract claims, be truly said to arise from the ratification of the CCFIPPA, or is it rather a separate future Crown decision that may itself trigger a duty to consult down the road? It's our submission that it must be the latter in light of the caution in *Adams Lake* to focus on impacts arising from the Crown decision at issue rather than future decisions that may be taken by the Crown.

So with that, subject to any questions you have, I'd like to move on to the third element of the test.

CHIEF JUSTICE: Yes, I may have questions for you at the end.

MS. HOFFMAN: Okay.

CHIEF JUSTICE: I know I have some questions on duty to consult but why don't we save them for the end and make sure you get through.

MS. HOFFMAN: Okay. So as you've heard many times, it's Canada's position that the

CCFIPPA does not alter Canadian domestic law, nor does it operate in any way to fetter the Crown's future ability to deal honourably with aboriginal interests through consultation. In our view therefore it cannot trigger a duty to consult.

I pause to note that in my friends' reply argument that they indicate that the law regarding what is too speculative an impact to trigger a duty to consult is not well developed. With respect, I disagree to a certain degree. I mean perhaps it could be somewhat clearer in the law, but the Supreme Court of Canada in *Rio Tinto* has given a considerable amount of guidance on that point. And I think that the facts of the cases where impacts are analyzed are also important to look at to get a sense of what types of impacts will trigger a duty to consult. And so I think it is important to review the facts of *Rio Tinto* and I'd like to do that now.

And I'm going to go to the applicant's authorities, Volume 4, tab 29. So just a reminder at paragraph 45, this is where the court says that there must be a causal relationship shown. In paragraph 46 there's the discussion about, well, you need to take a generous and purposive approach to what constitutes an impact. They also state in that paragraph that there must be an appreciable adverse effect and mere speculative impacts do not suffice.

So, we disagree, with respect, with the

applicant's submission at paragraph 22 of their reply argument, that only some level of possibility of adverse impacts is sufficient. *Rio Tinto* is clear that the applicant -- or the impact must be a appreciable adverse impact and must not be speculative.

Paragraph 47 discusses the high level management decisions or structural changes that may also affect aboriginal claims or rights, and the key there is because such structural changes to the resource management, and I highlight that, may set the stage for future decisions that will have a direct impact on land and resources. And that makes sense because resources, of course, are finite. And so any time you have a management scheme that is set out to manage the resource, that may well have downstream effects on the ability of a First Nation to access that resource. But in the CCFIPPA, of course, again, it does not -- it is not about resource management.

And I also pause to point out that when you have these higher level decisions that set the stage for future decisions, there's a direction that those future decisions must have a direct impact on land and resources, and they actually emphasize "direct" in the decision.

Now, of course, this is key because the applicants concede that the CCFIPPA can only be a higher level structural change, it cannot be one of these direct decisions with respect to resources. We, of

course, take the position that it does not constitute a higher level structural change of the kind contemplated in *Rio Tinto*.

So if we can just consider the facts in *Rio Tinto*, I think it's helpful to have that background. So in the 1950s B.C. authorized a dam which altered the amount and timing of water flows in the Nechako River, which, of course, impacted fisheries. And the Carrier Sekani First Nations claimed the Nechako Valley as their territory and the right to fish in the Nechako River. The First Nation, however, was never consulted about the dam. And since 1960 energy purchase agreements required Alcan, who operated the dam, to sell excess power generated by the dam to B.C. Hydro. And in 2007 there was one of these agreements, which B.C. Hydro sought the approval of from the Utilities Commission, and this agreement committed Alcan to supplying, and B.C. Hydro with purchasing, excess electricity until 2034. This is important. There was evidence that the operation of the energy purchase agreement itself would have no effect on the water flows in the Nechako River.

So at paragraph 83 the court held that the Commission was correct to conclude that the underlying infringement, namely the failure to consult on the 1961 dam, did not in and of itself amount to a trigger, but the important point for our purposes is the court's statement that:

> "Consultation centers on how the resource is

to be developed in a way that prevents irreversable harm to existing aboriginal interests."

Sorry, that's in paragraph 83.

Now, one of the difficulties that I've had with this case is because the CCFIPPA is not about the management of land and resources, and because there is no particular proposal to develop a particular resource in the Hupacasath territory, it is quite difficult to understand how the Hupacasath's rights to exercise their aboriginal rights is being impacted by the CCFIPPA. There's really a factual vacuum in this case, that when you look through the duty to consult cases doesn't exist in other cases. They're about a specific development project in a specific geographic territory, about a specific activity that will be impacted, so fish in the Nechako River, where the waters flowing through the Nechako River are going to have a direct impact on that fishery. There really is absent from this case any direct -- or any facts on which we can really analyze the impact on the Hupacasath's aboriginal rights.

And that's something that I've struggled with in this case.

So in paragraph 86 of *Rio Tinto*, the First Nation claimed that the 2007 EPA should be subject to consultation, but the Commission concluded that because it had no impact on the water flows of the

Nechako, it didn't trigger a duty to consult, because it had no adverse impact on their rights to fish in the river.

CHIEF JUSTICE: What paragraph was that?

MS. HOFFMAN: That's 86.

CHIEF JUSTICE: Okay.

MS. HOFFMAN: Carrying on to 87, the Commission -- in that paragraph, it's noted that the Commission concluded that the EPA would not bring about organizational policy or managerial changes that might adversely affect the future exploitation of the resource to the detriment of aboriginal claimants. The Commission found that the EPA did not affect management changes, or approve transfer or control of licences or authorizations. And that's really, I think, a reference to the previous cases, like *Haida*, where you're talking about a change in control of a licence-holder.

The court actually went further than the Commission and went on to point out that in paragraph 88 that the EPA called for the creation of a joint operating committee with representatives of B.C. Hydro and Alcan, and this committee was to develop, maintain, and update a reservoir operating model. The court considered whether this committee amounted to organizational changes that have the potential to adversely impact aboriginal interests.

So, paragraph 90 is a key paragraph. And

it states, just at the top of page 24:

> "In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with aboriginal interests. Thus, in *Haida*…the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. By entering into the contract, the Crown would have reduced its power to control logging of trees, some of them old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required. The Haida people would have been robbed of their constitutional entitlement. A more telling adverse impact on Aboriginal interests is difficult to conceive."

They go on to contrast to the case before them.

> "By contrast, in this case, the Crown remains present on the Joint Operating Committee and as a participant in the reservoir operating model. Charged with the duty to act in

accordance with the honour of the Crown, B.C. Hydro's representatives would be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them. The Carrier Sekani Tribal Council First Nations' right to Crown consultation on any decisions that would adversely affect their claims or rights would be maintained. I add that the honour of the Crown would require B.C. Hydro to give the Carrier Sekani First Nations notice of any decisions under the 2007 EPA that have the potential to adversely impact their claims or rights."

So --

CHIEF JUSTICE: Just on that, though, so if a Chinese investor entered into a private transaction to which the government wasn't a party, and it was below the Investment Canada thresholds, how would Canada ever be in a position where it could influence anything?

MS. HOFFMAN: Where could it give notice of that?

CHIEF JUSTICE: Well, yes, it --

MS. HOFFMAN: Well, I don't think that -- I don't think we can read this case to say that the Crown would necessarily have a duty to provide notice

there. But certainly in that situation if that Chinese investor then wanted to proceed with a development and needed to get government approvals, or obtain tenures or anything of the like, then we would suggest that that is the point at which the duty to consult may arise.

CHIEF JUSTICE: Mm-hmm.

MS. HOFFMAN: So, we would say that the CCFIPPA situation is really quite like the *Rio Tinto* situation, in that the ratification of the CCFIPPA does not remove the Crown from the equation. The Crown remains present to deal with asserted aboriginal rights in a way that respects their Constitutional obligations. There's nothing in the CCFIPPA which removes the Crown as a decision maker.

My friend has talked about the indeterminacy of decisions that may come under the CCFIPPA by international arbitral panels, but with respect, I think that's missing the point, because the decision maker that is key remains the Crown, who is bound by the Constitution to respect its obligations to aboriginal peoples. And the Crown will have to balance its Constitutional obligations with its international legal obligations. But as we have pointed out, given the nature of those obligations, that's not difficult for the Crown to do. They can do that.

But I would suggest even that the CCFIPPA is even one step more removed from the facts of *Rio Tinto*, because unlike the energy purchase agreement

under which the decisions could be taken in the future, which may impact that First Nations' right to use the Nechako River and its fishery, the subject matter of the CCFIPPA is not about land and resource management laws, which will continue to apply, unaltered by CCFIPPA, and to which any future Chinese investor will be subject.

So I want to now turn to another element of Mr. Underhill's second stream argument, and I will confess that I'm not entirely clear on the underpinnings of this argument. But as I understand it, his argument is the fact that First Nation governments are bound by the CCFIPPA obligation somehow, in and of itself, triggers the duty to consult. And I would say that absent from that, if any assessment of whether or not there's any adverse impact on the aboriginal rights of the Hupacasath in having those obligations apply to measure that they may undertake.

He also says that Canada has a duty to consult before entering into a international legal obligation because of Mr. MacKay's evidence that Canada considers its international legal obligation in its domestic decision making. And again, with respect, that simply just cannot trigger the duty to consult because arguably any Crown decision would then trigger the duty to consult. That's just simply too wide a reading of the test.

Of course, it is the case that Canada considers its international legal obligations, but as

I've said, that can be balanced with their Constitutional obligations, and my friend has really pointed to nothing to suggest otherwise.

So just to unpack that a little bit, I mean first of all, it's a basic principle of international law that states are bound by the actions of their sub-national governments and Canada expects that all levels of government can abide by the basic obligations that are contained in the CCFIPPA given the basic nature of them. They're also consistent with Canadian law.

However, if a measure was passed which was found to violate -- if a Hupacasath measure was found to violate those obligations, we need to keep in mind that they would never be named as a respondent in any claim that would be conducted pursuant to the CCFIPPA.

So we would say that any impact to the Hupacasath First Nation measures do not amount to an impact to the inserted section 35 rights of the Hupacasath for these reasons, simply because they would not be required to account for that measure. Canada is the one who intermediates and deals with that situation at the international level.

CHIEF JUSTICE: So then it would be -- and there would be no impact.

MS. HOFFMAN: That's my argument.

CHIEF JUSTICE: Yes. So it's not that

any impact -- or there wouldn't be an impact.

MS. HOFFMAN: Right.

CHIEF JUSTICE: If there were an impact, then there might be a duty to consult. But you're saying -- it's not that any impact wouldn't, it's more there won't be an impact because first of all Canada is the one that's going to have to pay the damages if any are ordered. Canada may come back and have some subsequent negotiations with HFN but the HFN can just say no? Is that what you're saying?

MS. HOFFMAN: Well, I mean, my friend took you to the Tlicho agreement as an example of one way that this could play out. And of course this would be in the hypothetical situation where the Hupacasath had a modern treaty. This is in Volume 1 of the applicant's record, tab J.

CHIEF JUSTICE: Mm-hmm. Tab J.

MS. HOFFMAN: Yes.

CHIEF JUSTICE: Like the Comox one?

MS. HOFFMAN: Oh. No, it's -- oh, sorry. I've misspoken. It's L.

CHIEF JUSTICE: Mm-hmm. Oh, yes.

MS. HOFFMAN: And if we can turn to the page 64, and it's clause 7.13.6. So:

> "Notwithstanding 7.13.4, if there is a finding of an international tribunal of non-performance of an international legal obligation of Canada, attributable to the law

or other exercise of power of the Tlicho government, the Tlicho government shall, at the request of the government of Canada…"

So it is at the request of the government of Canada, it's not automatic.

"…remedy the law or action to enable Canada to perform the international legal obligations consistent with the compliance of Canada."

So in this hypothetical situation, I would suggest that of course the Crown remains subject to its constitutional obligations. And it can consult the Tlicho about whether or not remedying the measure would necessarily have an impact on their aboriginal rights. And there could be a consultation at that stage. And I don't think that we can assume necessarily that just because a measure is in violation that that amounts to an impact on their aboriginal rights. Because the measure could have absolutely nothing to do with aboriginal rights. It could be a measure that's not rooted in an aboriginal right, such as to fish or hunt. It could be some other measure entirely.

So, again, we would say here that the Crown remains subject to its constitutional obligations and would have to consider what steps to take that would fulfill its international obligations as well as its constitutional obligations.

My friend has also conceded that

currently there is no recognized right of self-government arising from Section 35. So that's something else to keep into -- keep in mind with respect to whether or not a measure really is rooted in Section 35.

CHIEF JUSTICE: Do you have authority for that?

MS. HOFFMAN: Sorry?

CHIEF JUSTICE: The proposition that there is no recognized right to self-government in Section 35?

MS. HOFFMAN: Well, it's hard to point to authority in the negative, but I mean, we could certainly try to find something for you. But I'm repeating merely what my friend conceded. But I understand that to be the case.

CHIEF JUSTICE: Oh, I see.

MS. HOFFMAN: Now, we should also emphasize that what is in the Tlicho agreement may not ultimately be in an agreement that the Hupacasath may negotiate at the end of the day. And as I've made the point before, to the extent that my friends are arguing that there is an impact -- adverse impact on them about their ability to negotiate an agreement and what terms that agreement might contain, we would say that does not trigger the duty to consult.

Okay, so I'd like to turn now to what I think is the central premise of my friend's argument, which is that the CCFIPPA represents a material and

lasting structural change to the resource and land management scheme in Canada, and just for your notes, I'm now at paragraph 103 to 109 of Canada's argument. And they helpfully clarified in their reply that they agree that the CCFIPPA did not apply to directly regulate the resources which are the subject of rights and title claims, but rather they say that the CCFIPPA may set the stage for future decisions that will have a direct adverse impact on land and resources.

But, however, as we have seen, even with this clarification, the entire premise of my friend's argument is simply incorrect. And to repeat, the CCFIPPA is not about land and resource management, and those decisions about how resources will be developed, how land will be used are made pursuant to existing domestic laws and management regimes. And the CCFIPPA does not alter that.

So, that leads, I would say, to the inescapable conclusion that it cannot set the stage of future decisions that will have a direct adverse impact on land and resources. Now, to make this point I also want to look at the cases that the applicant relies on in their argument at paragraphs 69 to 80 for the proposition that the Crown conduct that effects or changes the framework in which the management of resources or land use will be determined will give rise to a duty to consult. And we would say that each of those decisions is entirely distinguishable from the

Crown decision to ratify the CCFIPPA.

Each of the decisions at issue dealt with management or regulatory regimes governing the use of land or resources specifically in traditional lands claimed by the First Nations who were seeking consultation.

CHIEF JUSTICE: These are all of the decisions in which there's been an affirmative finding of a duty to consult?

MS. HOFFMAN: No, sorry, all of the decisions that my friends rely upon in their argument at paragraphs 69 to 80.

So, we summarize at paragraph 104 of the argument what is the Crown decision that was at issue in each of those cases, and I would suggest that what is common in all of these cases is that there was a change in the management scheme in respect of a particular resource or parcel of land over which rights and title were claimed. And this type of change is just not simply effected by the CCFIPPA, nor does the CCFIPPA have any connection to the applicant's territories.

Many of these cases also talk about the Crown relinquishing control over its ability to protect aboriginal rights. So in *Haida* the concern was that by giving exclusive rights to the licence holder that the Crown lost its ability to control how the forest would be managed.

So, I won't take you to all of them, but

I do want to go to some of them which I think highlight my point, and I'm going to be going to them in the applicant's authorities at Volume 4. I'd first like to go to the *Hupacasath* case at tab 22. Now, this case involved the decision of the Crown to remove lands from a tree farm licence, and I'd like to go to the paragraphs of the decision which talk about the impact of this change. So if we can go to paragraphs 201.

CHIEF JUSTICE: Mm-hmm.

MS. HOFFMAN: Okay, so paragraph 201:

> "The next step is to determine whether the Minister's decision to remove the land from the tree farm licence in fact had the potential to effect adversely aboriginal rights or title asserted by the Hupacasath First Nation."

To paragraph 203:

> "The removed lands, when managed as part of tree farm licence 44, were subject to the *Forest Act*, the *Forest Practices Code* and the *Forest Range Practices Act*. They are no longer subject to that legislation. The petitioners urge that, as a result, the removal decision has significantly reduced the Crown's ability to control forestry activities on the removed land. It terminates, for example, the land owner's obligations to submit a management plan, a

timber supply analysis and a 20-year plan and to be subject to an allowable annual cut."

So there there was a significant change to the Crown's ability to control forest management.

At paragraph 223 the court says:

"The removal decision by all accounts results in a lower level of possible government intervention in the activities on the land that existed under the tree farm licence regime. There is a reduced level of foresty management and a lesser degree of environmental oversight. Access to the land by the Hupacasath becomes, in practical terms, less secure because of the withdrawal of the Crown from the picture. There will possibly be increased pressure on the resources on the Crown land in the tree farm licence as a result of the withdrawal of the removed land. The lands may now be developed and resold."

And then paragraph 220 -- sorry.

CHIEF JUSTICE: 220?

MS. HOFFMAN: 225.

CHIEF JUSTICE: Okay. And what's what you were just reading from?

MS. HOFFMAN: No, I was reading 223.

CHIEF JUSTICE: Okay, got it.

MS. HOFFMAN: And 225:

"And agreeing to the removal of the lands, the Crown decided to relinquish control over the activities on the land, control that permitted a degree of protection of potential aboriginal rights over and above that which flows from the continued application of federal and provincial legislation."

And of course we would say that the CCFIPPA does none of this, and that is because the existing domestic laws that are in place for the management of land and resources are not altered by the CCFIPPA, and they continue to apply to all investors who may propose development in the Hupacasath territory.

If we can go to the *Dene Tha'* case which is in the same volume at tab 19, and I'd like to go to paragraphs 107 and 108, this case you may recall my friend took you to it, is a case involving the Mackenzie Gas Pipeline which was proposed to run through the traditional territory of the Dene Tha', and it was about the establishment of a review process to oversee the development of that project. So paragraph 107:

"From the facts, it is clear that the cooperation plan…"

which was this oversight mechanism that was being put in place,

"…although not written in mandatory language, functioned as a blueprint for the entire project. In particular it called for the

creation of a JRP to conduct environmental assessment. The composition of the JRP was dictated by the JRP agreement, an agreement contemplated by the cooperation plan. The composition of this review panel and the terms of reference adopted by the panel are of particular concern to the Dene Tha'. In particular the Dene Tha' had unique concerns arising from its unique position. Such concerns included the question of enforceability of the recommendations in Alberta, and funding difficulties encountered by the Dene Tha' as a result of not qualifying for the North of 60 funding programs."

So obviously the Dene Tha' had very specific concerns with respect to this cooperation plan that was being put in place. And at 108 the court says:

"The cooperation plan 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. It is a process in which the rights of the Dene Tha' will be affected."

And again I would say that the CCFIPPA does not -- is distinguishable from this case in the sense that it does not set up any management plans with respect to the development of land or resources.

I'd like now to go to the *Kwicksutaineuk* case -- and Mr. Underhill, I can only pronounce that because that's a file from our office. If we can go to tab 24, again you'll recall my friend went over the facts of this case, that this case arose in the wake of the *Morton* decision, which transferred jurisdiction over aquaculture from the provincial government to the federal government. And in this case the licences had to be rolled over, and the applicants who were First Nations who had territories in which aquaculture was taking place claimed that the licences posed significant risks to wild fish stocks upon which the exercise of their aboriginal fishing rights depended. So they sought consultation on that basis.

Now, this is the indeterminacy point that my friend has placed great weight on in his argument, is really dealt with in this decision at paragraph 105. So paragraph 105 the court says:

> "There is however a common thread in these two decisions…"

and they're talking about the *Adams Lake* and *Gitxsan* decisions, both of which are in the record for you,

> "…that is equally applicable in the present context. A careful reading of these decisions shows that it is the indeterminacy of the principles by which the new governing entity intends to operate that triggers the Crown's duty to consult."

So with respect, those changes of decisions, the decision maker that is key, of course, is in this case is the Crown because the Crown has the constitutional obligation to respect aboriginal rights and to, where appropriate, consult and accommodate with respect to them.

And my friend has said that it's -- he is saying that the indeterminacy of the future cases which may be brought under the CCFIPPA by the -- sorry. I'll pause for a moment. By the various interpretations that may be made of the CCFIPPA provisions by *ad hoc* tribunals, is an indeterminacy that can trigger the duty to consult. And with respect, I would disagree that that is because the CCFIPPA arbitral tribunals have no jurisdiction to make any determination as to aboriginal rights and title. They are dealing purely with the interpretation of the CCFIPPA agreement.

So, and add to that the fact that the CCFIPPA doesn't really amount to changing the Crown's ability to make those decisions. It doesn't amount to a relinquishment of any power or control to deal with interests as they arise in respect of specific projects.

So, if I could just read from paragraph 107, it talks a bit more about this change in control idea. It's the third sentence in that paragraph.

> "If the change in control from one company to another may lead to adverse consequences with respect to claimed aboriginal rights because

of differing philosophies, it is more likely to be the case when the transfer of decision-making involves two levels of government, however that may happen."

Well, this may yet be indiscernible. 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 of the other First Nations present in the region.

And of course I believe my colleague, Mr. Timberg, took you to this yesterday. Mr. Thomas, in his opinion, talks about the fact that the CCFIPPA doesn't change the relationship with aboriginal people, nor does it change the division of powers within Canada. So I would suggest that this change of decision-maker principle that is in the case law is simply not applicable here.

Another thing that I would note is that in all of these cases -- sorry. In all of these cases, the high-level decision that sets the stage for the future decision, it's all made within the context of the same management regime. You have a forestry licence which is transferred. There may be further decisions down the road with respect to what can be harvested with respect to that licence but it's all within the umbrella of the forest management regime.

Here, we have the CCFIPPA, which exists at the international level. And the applicant is concerned that Canada's assumption of those obligations and possible future claims that may arise may trickle down and cause the Crown to make other decisions. But really we have no idea -- I mean, it's -- when we think about it, I mean, it could be any -- a myriad of different decisions, Crown decisions which my friend says will be affected by the CCFIPPA. We don't have a specific management regime that we're dealing with, where we can deal with concrete government action and their concrete impact on asserted aboriginal rights in a specific geographic area.

And my friend took you to the most recent *Dene Tha'* case, which was handed up to you on the first day and I think this case is important because I think it really aptly sets out where the trigger should be in this case, and of course, the Dene Tha do have the presence of a Chinese investor in their territory. This case shows that this investor has invested an amount of money, large amount of money to purchase oil and gas tenures, and the expected activities under those tenures relate to shale gas development or fracking.

So, this is exactly the situation where the Crown's duty to consult may arise, when there is a specific Chinese development in Hupacasath territory. And I think this case demonstrates that the Crown can deal with that situation and can deal honourably with

asserted aboriginal rights, and that is not adversely effected by the CCFIPPA.

And of course, I think it's helpful also to note that the sale of the tenures which were in a specific location informed the analysis of how the asserted rights of the Dene Tha', to hunt and trap in their territories, might be affected by the sale. They were able to put forward quite detailed evidence about their traditional activities in the area, to show how the proposed development might impact on their ability to hunt and trap.

So really, I would say that in contrast, Mr. Underhill urges the court to assess whether the CCFIPPA will impact the Hupacasath's asserted rights in a complete factual vacuum. This allegation exists in a factual vacuum because there is no Chinese investor in Hupacasath territory and no potential development project or changes to a land or resource management scheme that may give rise to such measures, which Mr. Underhill says may ultimately be found to be in violation of a CCFIPPA.

I want to go to just one further point that my friend made with respect to paragraph 114 of this decision. And I believe my friend took you to this point for the proposition that the Crown cannot point to future opportunities to consult to avoid -- to avoid the existence of a duty to consult. But I would suggest that in fact where there is no trigger, like in the *Rio*

Tinto situation, the court did take into account that there was this committee on which the Crown was present, which could deal with any future issues that arose under that EPA agreement that did actually impact on the aboriginal rights.

Where there is a trigger, then I would agree with my friend, that you cannot point to future opportunities to consult to avoid the duty to consult at the high level stage. And I think that that is apparent from how Mr. Justice Grauer has written this paragraph, where he says:

> "The question before me, then, is different from that considered in cases such as *Rio Tinto*, *Haida Nation* and *Klahoose First Nation*."

And all of those -- he says,

> "Those cases make it clear that duty to consult will arise in relation to strategic higher level decisions notwithstanding the existence of later opportunities for consultation in a contemplative process. Thus, in both *Haida* and *Klahoose First Nation*…"

and he omits *Rio Tinto*,

> "…the Crown could not avoid consultation at the strategic higher level decision stage by pointing to the existence of subsequent opportunities at the operational stage."

So my primary point here is that the CCFIPPA does not remove the Crown from the equation with respect to future resource developments that may occur in the applicant's territories.

I note the time, and you indicated that you had some questions. My friend and I have been also discussing timing. I probably have maybe another half an hour to 45 minutes in my submissions, although I could cut them back. So I think we need to have a discussion -- we had a discussion about whether to shorten the lunch break, but my friend would like the lunch break to consider his reply. So I'm not sure --

CHIEF JUSTICE: Okay, how much time do you think you need?

MR. UNDERHILL: I would think between an hour to an hour and a half.

CHIEF JUSTICE: Okay. So --

MR. UNDERHILL: So the timing that my friend just said, we might be okay, depending how long, of course, the exchange on questions is.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: Sounds like we might be okay, if we could -- we might need to spill over a few minutes at the end, if that's okay with the court, and --

CHIEF JUSTICE: Sure.

MR. UNDERHILL: -- others.

CHIEF JUSTICE: Okay. So what we'll

do is we'll work back from 4:30, that brings us to 3:00. So we take the break at 2:45, to allow you -- just think a little bit before you take the floor again. 2:45, okay.

Why don't we take lunch now, and you'd like the full 90 minutes?

MR. UNDERHILL: Yes, please.

CHIEF JUSTICE: Okay. So you just take the time you need, and if we don't have time for my questions, then so be it. We can --

MS. HOFFMAN: I mean, I could take some of your questions now, consider them over lunch, but if you'd rather wait till the end that is fine.

CHIEF JUSTICE: Why don't we do that.

MS. HOFFMAN: Okay.

CHIEF JUSTICE: Let's just do that. And I don't mind spilling over at all. So if we -- if everybody is fine with spilling over, then -- if it takes ten minutes to deal with my questions, we'll just push everything back ten minutes.

Okay. Great, so we'll reconvene at two o'clock.

(PROCEEDINGS ADJOURNED AT 12:31 P.M.)

(PROCEEDINGS RESUMED AT 2:00 P.M.)

CHIEF JUSTICE: Good afternoon.

MS. HOFFMAN: Good afternoon.

CHIEF JUSTICE: Now we’re really on

the back stretch.

SUBMISSIONS BY MS. HOFFMAN, Continued:

MS. HOFFMAN: Yes. Just in the interests of time, I indicated at the outset that I was going to touch briefly on the Crown prerogative, but in sort of assessing what I have left to cover, I think that I can safely leave what we have said to our written argument. I don't think there is much disagreement between my friend and I with respect to the applicable law and the standard of review.

CHIEF JUSTICE: All right.

MS. HOFFMAN: The only issue is whether or not a duty to consult has been triggered, and its impact on your ability to review the ratification of the CCFIPPA.

You have some questions and I've discussed this with my friend, and he is agreeable. You had some questions about the geographic areas that are covered by the modern treaties, and in historic treaties. And we just over the lunch break got a few maps that might assist in that regard.

CHIEF JUSTICE: Oh, boy. That was efficient.

MS. HOFFMAN: I should say that these are all available on public websites.

CHIEF JUSTICE: Oh, okay.

MS. HOFFMAN: The one that I think is the most relevant for our purposes is the modern treaty

territories map.

CHIEF JUSTICE: Oh, yes.

MS. HOFFMAN: I should note that not all of the areas shown have self-government -- self-government agreements in place. The Nunavut settlement area, of course, is now a territory. So, but aside from that, it at least gives you some sense of the land base that is covered.

CHIEF JUSTICE: Okay. So not too many in the provinces. Not too much of an area, I guess, in Quebec there is.

MS. HOFFMAN: And then while I don't know if historic treaties are really at play in this issue there is a map there that shows you the coverage of those treaties.

CHIEF JUSTICE: Right. Okay.

MS. HOFFMAN: Which likely explains the paucity of modern treaties in the provinces.

CHIEF JUSTICE: Mm-hmm. Got it.

MS. HOFFMAN: And then we have also provided a map of British Columbia which sets out the treaty negotiations that are ongoing in British Columbia, and the areas that are subject to those treaty negotiations.

CHIEF JUSTICE: Very helpful, thank you.

MS. HOFFMAN: Now, I noted that when my colleague, Mr. Spelliscy, was on his feet that you

had asked him to provide a response to paragraph 17 and 19 of the applicant's reply. And I think I have done that in the course of my submissions.

CHIEF JUSTICE: Okay.

MS. HOFFMAN: So I don't propose to say anything further on that.

CHIEF JUSTICE: Mm-hmm.

MS. HOFFMAN: And then a question arose with respect to the statement that the aboriginal right of self-government, whether or not it's been recognized. And I just clarified that over the lunch break. And in fact we know of no case which has recognized a Section 35 aboriginal right to self-government. However, to be fair, that right has been asserted in cases, and duty to consult cases in particular, in that strength of claim analysis would -- has been conducted with respect to the strength of that claimed right.

CHIEF JUSTICE: The strength of claim has been conducted?

MS. HOFFMAN: Well, in those cases where a duty to consult was raised, the court would have assessed the strength of the claim to aboriginal self-government.

CHIEF JUSTICE: Mm-hmm. And where did they come out?

MS. HOFFMAN: Yeah. I would have to give you a list of the cases, which I could do. I

didn't review them in great detail.

CHIEF JUSTICE: Oh, that's okay.

MS. HOFFMAN: I just wanted to let you know that --

CHIEF JUSTICE: Okay.

MS. HOFFMAN: I just wanted to be fair. It's not that it isn't asserted. I mean, of course, in the context of a duty to consult case, all they're doing is assessing the strength of that claim. They're not making any findings with respect to its existence or not.

CHIEF JUSTICE: Oh, okay.

MS. HOFFMAN: Now, I think where I was before the break was just finishing up my point with respect to the fact that in our submission the CCFIPPA does not constitute a high-level structural change to the land and resource management scheme in Canada.

And I would just end that point by noting that I think to find that would be a marked departure from the cases which have discussed the nature of high level decisions because the international agreement, the CCFIPPA, does not regulate land or resources or change any domestic laws or resource management -- sorry, land or resource management laws in Canada. And it is not, I would submit, a Crown decision that sets the stage for future resources which will directly impact on land and resources.

CHIEF JUSTICE: And is the universe of

potential adverse effects limited to land and resources?

MS. HOFFMAN: I'm not sure that I could go that far. I would say that most of the cases that I have reviewed with respect to duty to consult do happen to be about that, but I think it's not inconceivable that the duty could arise in another context. But I think that question is a bit academic because, of course, here the focus is on the rights that are claimed by the Hupacasath First Nation, and all of those rights relate to the use of land and resources in their territories.

So I'd like to move on now to my next point, which I will touch on briefly because I think I have made many of these points, but just to say that -- again, that there's nothing in the CCFIPPA which operates as a fetter on the Crown's discretion. And my colleague, Mr. Spelliscy, pointed out yesterday that the basic international obligations in the CCFIPPA really do not act as a new or additional fetter on the Crown's discretion. There are international obligations that are consistent with protections already provided for in the Canadian legal system. As my colleague stated, Canada is comfortable with assuming these obligations because it assumes that governments will not act in a manner below a minimum standard of treatment.

So harkening back to the description of conduct which falls below in the *Glamis* case, Canada assumes that domestic levels of government will not

engage in conduct which is egregious or manifestly arbitrary or blatantly unfair or evidently discriminatory. We can also assume that governments will not expropriate without compensation.

Therefore, there is simply no basis to conclude that the ratification of the CCFIPPA represents a fetter on the Crown's discretion to deal honourably with aboriginal interests while at the same time complying with its basic international law obligations.

My colleague also spoke about the retention of policy flexibility, which is provided for in the CCFIPPA, which allows the Crown to deal with resource situations as they arise in a way that meets their public policy -- legitimate public policy objectives, in which I would include complying with the Constitution.

I think it's quite important -- I want to -- before I go to the hypothetical example that I suggested I was going to do, I do want to take you to some of the material in the record regarding Canada's domestic policy with respect to expropriation.

Now, Canada agreed to include an international obligations to not expropriate without compensation because that principle is consistent with Canada's domestic practices regarding expropriation. Canada has a long-standing policy of not expropriating third party interests to settle land claims, for instance. And I want to take you to some of the

documents that talk about this, unless you have already gone to them. But I mean, generally speaking, lands held by third parties are only ever acquired on a willing seller/willing buyer basis in the context of settling aboriginal land claims.

So if we could go to -- have you gone to those documents or would you like me to take you there?

CHIEF JUSTICE: Why don't you just go ahead and take me to them.

MS. HOFFMAN: Okay. I'd like to go to Volume 4 of Canada's authorities. If you can turn to tab 20 -- sorry, 92. This is a document from the B.C. Treaty Commission, and I'd like to go to page 16 and it's the last paragraph on page 16. So the B.C. treaty process has always been guided by the principle that private property for fee simple land is not on the negotiation table except on a willing seller, willing buyer basis. In urban areas where Crown land is limited, private property available from wiling sellers will be critical to achieving final treaties.

And then just one other document, which is in the same volume at tab 90. If you go to page 32 of that document and this is a document from *A Practical Guide to Canadian Experiences Resolving Aboriginal Claims from Indian and Northern Affairs Canada.*

CHIEF JUSTICE: Page 32 did you say?

MS. HOFFMAN: 31.

CHIEF JUSTICE: 31, sorry.

MS. HOFFMAN: So in the left-hand column in the middle it says:

"The following lands are generally excluded from selection:…"

and these are, you know, lands to be selected as part of the treaty process,

"…lands owned in fee simple…"

and then at the bottom,

"…privately owned lands may be acquired by governments for treaty settlement purposes on a willing-buyer/willing-seller basis. All other third party interests in land and resources are normally honoured."

So I would suggest that those documents support the view that in the average in the land claims context, that expropriation is not done without compensation. In fact it's just done on a willing-buyer/willing-seller basis.

Now, of course here we don't have a treaty. The Hupacasath have not negotiated one, but I think it is important to note that in modern agreements there is often an expropriation provision which provides expropriation powers to the First Nation, but there it is provided for with compensation. And I'll just take you to one example of that at Volume 2 of Canada's authorities, I believe. Yes, of the authorities, and it's tab 19. So if you turn to page 64 you'll see that paragraph (g) at the top of the page reads:

"Expropriation for public purposes or public works by Tsawwassen First Nation of estates or interest in Tsawwassen lands, if Tsawwassen First Nations provides fair compensation to the owner of the estate or interest."

And this is a list of the powers that they may make, laws with respect to these powers.

So the treaties are consistent with the international obligation to provide compensation when expropriating.

So I want to now provide a bit of a counterpoint to Mr. Underhill's example that he put to you with respect to where he says the rubber hits the road, and he put before you the *Tlicho* case where a moratorium was put in place. What I'd like to do is just kind of run through a hypothetical to sort of demonstrate what I say is the speculative nature of this case, and in essence the applicant fears that the obligation under the CCFIPPA will be used to challenge or discourage measures which would have the effect of preserving lands and resources which are the subject of aboriginal rights and title claims. Again I remind you that this fear must amount to an appreciable non-speculative impact in order to trigger a duty to consult. However, there are really several layers of speculation to this fear, which I think we need to unpack. And the allegations really boil down to,

irrespective of Canada's experience under NAFTA so far, in which no measure by an aboriginal group or a measure by a government to protect aboriginal interests has been challenged in Canada.

You know, we would have to make several assumptions. First of all, we'd have to assume that a Chinese investment may one day occur in the Hupacasath territory in the future, and of course as I've pointed out there is no evidence of this. There is no investor in their territory or more specifically on their reserves over which they have law-making authority.

The next level of speculation that we need to engage in is the measure at issue. A measure may one day be adopted that may be inconsistent with the CCFIPPA obligations, and that measure could be adopted by either Canada or the Hupacasath. But I think we need to pause and consider how likely it is for the Hupacasath that a measure that is inconsistent would be adopted.

First of all, we have the reservation for aboriginal -- sorry. Oh. We have the aboriginal reservation which permits the provision of aboriginal right -- preferences to aboriginal people. So, any measure would have to -- you would have to consider whether or not that reservation would insulate it from any challenge.

Secondly, existing non-conforming measures are grandfathered by Article 8-2(a) of the

CCFIPPA, so you'd have to consider whether or not it fell under that saving clause.

Thirdly, the law-making authorities of the Hupacasath First Nation are limited to the powers that I took you to under the *Indian Act*, and they are limited to their reserves. And finally, the principles are basic principles that we say are not difficult to comply with.

And that, I would say, I've talked about the likelihood of a measure that the Hupacasath would enact, would fall afoul of CCFIPPA, but the fact that the principles are basic obligations would also apply to a measure that Canada would adopt, and I would say, would make it unlikely that Canada would adopt such a measure.

So that's one level of -- or that's the second level of speculation. We need to go to the next level of speculation, which is that an affected Chinese investor would bring a claim under the CCFIPPA to challenge the measure. And it should be noted that of course the CCFIPPA is not the only forum in which such a claim could be brought. The claim could also be brought in domestic courts to challenge the measure.

So then we move up to the next layer of speculation.

CHIEF JUSTICE: You mean in domestic courts under the existing domestic laws, as opposed to under the treaty. Because the treaty, they can only

bring it before the arbitral tribunal, right?

MS. HOFFMAN: Yes. Yes.

So at the next level, the tribunal would have to find that the measure was in fact a violation. And I pause to note that there is evidence before you of Canada's track record of successfully defending these claims, both in the MacKay affidavit and in the chart that has been handed up to you.

And I want to pause at this point to mention the *Glamis* decision. And that was handed up to you on the first or second day. And I don't propose to go through it. It's a lengthy decision. But I mention it in response to the applicant's argument at paragraph 96, where they make the bold and unsupported assertion that an international arbitral panel would have little regard for a defence that a measure was required to fulfill Canada's legal obligations. And of course this situation hasn't yet arisen in Canada, but a similar situation like this has arisen in California in the *Glamis* case, and just to remind you of that, there was a mine project in California that was adjacent to an area of cultural significance for the Quechan First Nations. It was called the Trail of Dreams, and it was a trail that had cultural significance for them. And Mr. Thomas discusses the *Glamis* case in detail at paragraphs -- I'm going to give you the paragraphs he discusses it. It's 37, 131, 178, 184, 199 and 203 to 208.

CHIEF JUSTICE: Of his opinion?

MS. HOFFMAN: Of his opinion, yes. And the point that he makes is that the tribunal in that decision took a considerable amount of time to review the domestic regulatory framework in place, including the regulations and laws in place to protect aboriginal and cultural interests. So, this decision is really contrary to the applicant's fears, but the legitimate public policy purpose of protecting aboriginal rights would not be taken into account when considering whether a measure violates the CCFIPPA.

So the final step in this hypothetical speculation that I'm engaging in here is that what Canada would do in response to an arbitral award or the regulatory chill argument that you've heard. So this is the idea that the government would take a particular action or fail to take a particular action in response to an award that would somehow adversely affect aboriginal rights and title.

There is certainly no evidence before this court that the NAFTA cases have resulted in any regulatory chill, and it is pure speculation to assume that the Crown would react in a way in response to one of these future awards that violates -- in a way that violates the honour of the Crown. As we've said, the CCFIPPA -- under the CCFIPPA the Crown retains the necessary policy flexibility and discretion to determine an appropriate response, which can respect at the same time its international legal obligations and its

Constitutional obligations.

It should be noted that the CCFIPPA's arbitral tribunal, of course, would have no authority to require Canada to change any of its measures.

So that is really our point, is that the applicants have set up a false conflict and they've projected into the future and speculated into the future of what may happen with respect to claims that may come under CCFIPPA. But ultimately the CCFIPPA preserves the necessary policy flexibility for the Crown to exercise its discretion honourably and to reconcile aboriginal interests as they are obligated to do under the Constitution.

So, subject to any questions you have, those are my submissions.

CHIEF JUSTICE: Okay, let me just go to the reply first of all.

I think we've covered this, but just -- I spoke to your colleague this morning about paragraph 19 and that last sentence, and I think he might have said you'd address this -- you would address this. I think you may have, but this last sentence there in paragraph 19, where the terms of the final agreements address themselves -- sorry.

> "The terms of the final agreements themselves make it clear that such a finding would require the First Nation to remedy the measure."

MS. HOFFMAN: Yeah, I think I took you to the *Tlicho*, I always mispronounce that. Where it's not that simple. In fact, it's more of a discussion that takes place. Canada makes a request and depending on the nature of, you know, the government conduct in that case, they may have to consult with the First Nation before taking that step.

CHIEF JUSTICE: Right, and whether this provision would even find its way into an agreement is --

MS. HOFFMAN: Well, yes, and that's a matter of negotiation.

CHIEF JUSTICE: Right, right.

MS. HOFFMAN: Yes.

CHIEF JUSTICE: Okay.

MS. HOFFMAN: That's -- and which, I think, does not trigger the duty to consult.

CHIEF JUSTICE: Right. Just one sec, I want to look at -- I'm still wrestling a little bit -- I'm at paragraph 135 of your submissions. And I guess, you seem to be assuming that if an actual project arose, the government would invariably get involved. And is that a fair assumption? So let’s say the Chinese, I think the example I gave this morning was the Chinese make an investment that’s below the *Investment Canada Act* threshold. I guess the answer at the time was, well, subject to the same laws that exist today with respect to permits or whatever it might be. But you

seem to be assuming that if an actual project arises in the applicant's claimed territory, there will be an opportunity at that time to consult. The government will be aware of it and it will consult. There doesn't seem to be a scenario in which the government is not aware of it and the private investor just goes ahead and does something that is adverse in interest to the articulated asserted rights.

MS. HOFFMAN: Well, I note that we say that a duty to consult might be triggered by such a project. It would obviously depend very heavily on the fact situation.

CHIEF JUSTICE: But if it didn't, and I guess now I'm the one that's speculating.

MS. HOFFMAN: Yes, I mean obviously the duty to consult was all about Crown decision making. I think my friend has -- my colleague.

CHIEF JUSTICE: So if the Crown is not resolved, then there's no duty because duty doesn't apply outside that area. That's what you're saying.

MS. HOFFMAN: Right. Well, and also, I mean, that situation can occur now without the CCFIPPA because the CCFIPPA -- we make this point as well in our argument, it has no connection to the establishment of a particular Chinese investment in their territories. CCFIPPA doesn't grant rights of access. Chinese investors can come, have already come and commenced resource developments. The CCFIPPA doesn't have any

role to play in the initiation or establishment of those developments.

CHIEF JUSTICE: Well, except I think there's at least -- there's at least one document. Let me see if I can identify it for you. There's one of these documents where the document does say, you know, we initially didn't think that it could be said or demonstrated that the CCFIPPA would lead to an increase in the level of investment that would otherwise have arisen in its absence, but now we think it might. I think -- just one second. It might be.

MS. HOFFMAN: Well, I think that -- it's in Mr. MacKay's affidavit, I believe. It's from the environmental assessment, I think.

CHIEF JUSTICE: Right, the final environmental assessment.

MS. HOFFMAN: Maybe what you are -- yes.

CHIEF JUSTICE: The final one.

MS. HOFFMAN: And I think the point to be made there was that it couldn't -- the increase of Chinese investment cannot be attributed definitively to the CCFIPPA because there's all sorts of reasons why an investor would come to Canada to invest, and simply having the benefit of the CCFIPPA, you can't isolate that from the other reasons why a Chinese investor would come to Canada to invest. And I hope I'm not misstating that evidence but --

CHIEF JUSTICE: Well, I actually have it here and let me just -- yeah, here it is. It's on the second page of that document.

MS. HOFFMAN: Sorry, what's --

CHIEF JUSTICE: It's the second page of that final environmental assessment where -- second, third sentence under Part 2:

"In this final EA…"

I'll even back up further:

"In addition, in the preliminary one, the initial EA, it was found that no significant environmental impacts were expected as a result of the Canada/China FIPPA. In this final EA, the claim that no significant environmental impacts are expected based on the introduction of a Canada/China FIPPA are upheld. However, over time, Chinese investors have shown greater interest in investing in Canada. This trend is likely to continue, if not increase, with the introduction of FIPPA."

So that was, I guess, as strong as it ever got.

MS. HOFFMAN: Right. Right.

CHIEF JUSTICE: Okay. Well, I think we've covered it.

MS. HOFFMAN: Okay.

CHIEF JUSTICE: Let me see if there's one more.

Yes, it's the same issue as -- paragraph 147 about still being under -- still being subject to any obligation to consult that arises under domestic law should plans --. Okay. Well, that's it.

MS. HOFFMAN: Thank you.

CHIEF JUSTICE: Thank you very much. So how do you want to do it? Do you want to have a quick break now so you can get set up or --

MR. UNDERHILL: Yes. What I would suggest is we take the -- if it's okay with you that we take the afternoon break now and then I launch in in fifteen minutes.

CHIEF JUSTICE: Sure. So we will see everybody at ten to.

(PROCEEDINGS ADJOURNED AT 2:34 P.M.)

(PROCEEDINGS RESUMED AT 2:50 P.M.)

CHIEF JUSTICE: Okay. All righty, Mr. Underhill.

MR. UNDERHILL: Truly the home stretch now, Chief Justice.

CHIEF JUSTICE: Yes.

REPLY BY MR. UNDERHILL:

MR. UNDERHILL: You will have seen, Chief Justice, from Canada's argument and obviously especially over the last two days, that Canada says our claim must fail for two principal reasons.

The first is that -- and this argument relies principally, as you know, on Council -- the

Council of Canadians decision. That as a matter of law, the duty to consult cannot apply here, or cannot be used in this case, if you would, because the CCFIPPA is not part of Canadian domestic law. And that was addressed by Mr. Timberg in his oral submissions, picked up a little bit today.

You have our written reply at paragraphs 3 to 7, which addressed this. But just in response what Mr. Timberg had to say yesterday afternoon, I want to make this very clear. Canada is attempting in essence to put a square peg into a round hole in trying to rely on *Council of Canadians*. That decision involved a direct constitutional challenge based on Section 96 and provisions of the *Charter* to NAFTA. And the case turned, Chief Justice, on whether or not Section 96 applied, which in turn revolved around whether or not the NAFTA was part of Canadian domestic law. Because otherwise Section 96 wouldn't apply.

This is not, I emphasize, a constitutional challenge to the CCFIPPA. This is a completely different case. This is a case which says -- that asks you to review the exercise of the prerogative in ratifying a treaty, in ratifying the treaty, and to ask whether or not it was done within constitutional limits. And you've heard me on that point.

And so, my simple point is, the analysis or the question of whether or not the CCFIPPA is part of Canadian domestic law is irrelevant for purposes of this

case. That's not the analytical framework that we're in, because it's -- this is not a constitutional challenge and we don't have to consider whether Section 35 applies or not.

And to be fair, that, as you now know, did not occupy the majority of my friend's time during oral submissions. Rather, they focused -- not exclusively, but certainly in the main -- on the second argument they advanced, which is that our claim is too speculative.

Now, to reply to that, to what I have heard over the past day and a half, I think it critical to keep our two streams of argument separate. Because the speculative argument -- the speculative response by Canada is very different. Or it applies in a very different way to the two streams of argument we have. And I want to start with what we, I think, all called the treaty argument.

Because what I say at the outset in respect of the treaty argument is that there is not a speculative issue at all with this line of argument. The argument is, as I hope you now appreciate, that the day after CCFIPPA is ratified, and it comes into force, it will amount to a restraint on aboriginal governance, whether exercised through an aboriginal right of self-government, or as codified in a treaty such that it's a treaty right of self-government.

And I should pause here just to say -- to

clarify, you had a question about the case law around the aboriginal right of self-government.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: My friend did not mention the decision of Mr. Justice Williamson of the B.C. Supreme Court in the *Campbell* decision. And that decision -- and I have the cite here for you. The cite is, it's *Campbell v. The Attorney General of British Columbia* [2000] BCSC 1123, and that was the first challenge to the Niska Treaty. The first true modern day land claims agreement in this province, and the decision, obviously from the citation, came down in 2000.

In that decision the question was, was the treaty unconstitutional because it effectively was this third order of government not permitted by the Constitution. And Mr. Justice Williamson found -- grounded the constitutionality of the treaty in aboriginal right of self-government, which he said survived the assertion of sovereignty.

Now, you also need to know that the Court of Appeal addressed a second challenge to the Niska Treaty just this year, and that decision is called *Chief Mountain*, and the citation for that is [2013] BSCA 49.

Now, on that second challenge, Chief Justice, the Court of Appeal actually grounded the constitutionality of the treaty in delegation of governance powers from Canada and British Columbia. And

they said, we don't need to decide -- in other words, they didn't over turn it. We said, we don't need to address Mr. Justice Williamson's finding that it could be ground in the aboriginal right of self-government. But importantly, they did say, and this bears emphasis, as many of the courts do in these sorts of cases, they said, the preferred outcome for Canadian society is to have aboriginal rights of governance resolved through the treaty process, which of course, is the ultimate way to achieve reconciliation in Canada.

Now, to get back to my first argument, I want to make a couple of important points. First of all, my friend, Ms. Hoffman, said for both of our lines of argument Mr. Underhill has missed the impact stage. He sort of ignores that point, and with respect, that is not correct. The impact is the CCFIPPA being --

(BRIEF INTERRUPTION)

MR. UNDERHILL: I was saying that the impact on this first line of argument is that the CCFIPPA amounts to restraint on aboriginal governments, whether it's through a treaty. So that's the impact. Now, as I said, we don't get into what you and I discussed about the risk analysis and whether or not this is a high level structural change on this line of argument. But to succeed – let me be clear – what the applicant needs to do and what I need to do is convince you that Canada is simply wrong when it says the obligations that Canada and in turn all of the sub-

national governments will assume under CCFIPPA are simply consistent with Canadian domestic law. That there's nothing more there than, you know, as they like to call it, the basic requirements that are to be found in Canadian domestic law.

If you find -- and as I will go on in a moment to demonstrate, that is simply wrong, and that in fact the CCFIPPA does go beyond Canadian domestic law in terms of the obligations that Canada and in turn sub-national governments are assuming. But if that is not correct, if you find against us on that point, then effectively this first line of argument fails because I wouldn't -- I won't be able to establish that the ratification of the CCFIPPA imposes anything beyond what's already there, and that is Canadian domestic law.

So for me to say there's a restraint, then there has to be something more than just Canadian domestic law. There has to be something in the CCFIPPA obligations that go beyond Canadian domestic law for that argument to succeed.

And similarly when we get to the second line of argument, where I say the impact is the change, if you would, in the government's ability, the change in the policy space, as my friends like to say, that governments have to take measures to either protect or accommodate aboriginal rights, there has to be a change in the policy space for that argument to succeed. And so again you need to be convinced that the CCFIPPA

obligations are something more than what is already there at Canadian domestic law.

So both arguments need to jump over that hurdle, if you would, to succeed. And I'll be focusing on that in a moment in the main. But let me make one other point clear with respect to the first argument. This is not a case like *Ahousaht* where it's a question of impacts on treaty negotiations. Sorry, an impact on negotiating position, to be precise. What is being impacted here, in our respectful submission, is what can be negotiated. What can possibly negotiate. What can Canada negotiate? Because, as we say, the CCFIPPA amounts to – and this is what I hope to demonstrate – a restraint or a restriction on the government beyond Canadian domestic law. And so again it's not the negotiating position, it's what can be negotiated that's being -- and the subject matter of governance that's being restricted or constrained. So it's not anything to do with bargaining power or position, or negotiations themselves.

And of course we know that the duty to consult applies across the entire spectrum of the Crown's dealings with aboriginal peoples. And you had an exchange with Ms. Hoffman about, well, could Canada do something when it was negotiating a treaty that would effectively take away or damage what could be negotiated? And we say no. And we say in effect that's what CCFIPPA is doing. You're restraining what can be

negotiated and therefore there is an obligation to consult, so that the aboriginal peoples can express their concerns and understand what it is they are able to negotiate.

So that brings me, then, to the second -- to my second line of argument and trying to answer Canada's submissions that this is all too speculative. And this is, I should say, where the risk analysis comes in. Because I say, this argument essentially says that the adverse impact -- again we don't shy away from the test that says of course there has to be an adverse impact. And I'm going to, at the end, circle back to what you're struggling with, which is, what's that threshold for adverse impact? And I'm going to address that near the end of my submissions, with your leave.

Again, this argument says that the ratification of CCFIPPA amounts to a change in the policy space for governments. And again, not to regulate generally. And this is -- hearkens back to the exchange you and I had and also the exchange you had with Canada about, are we saying that any international treaty triggers a duty to consult? And the answer is no. Because, to be precise, what the potential impact is here is the change in the policy space, the change in the equation that you and I have discussed over the course of these three days, for governments to regulate specifically to protect or accommodate aboriginal rights and title. Not generally, but to regulate in the area

of protecting aboriginal rights and title.

And that's what makes -- that's what triggers the duty to consult, we say, in this -- for this particular treaty.

Now, again, as I said with respect to the last argument, we again need to be able to show, to use the language of this argument, a change in the policy space, a change in the equation. If my friends are correct, and they put a lot of weight on this through the course of the various speakers, that this is not much more than Canadian domestic law, then there is no change in the policy space, if that's correct. But what I'd like to do now is show you that, with great respect, it is simply wrong to suggest that there is nothing here beyond Canadian domestic law. There very much is. And I'd like to turn to that issue now.

And so in doing this, what I'd like to do is take you through sort of the three key obligations, to try to explain to you that there's much more than what Canada has presented to you with respect to those obligations, starting with the minimum standard of treatment. Canada says you should disregard the earlier cases where it was found to be in breach of the minimum standard of treatment, that being *Pope & Talbot* and *S.D. Myers*. We say there's no principled reason for you to do so. It is true the FDC note clarified the content of fair and equitable treatment in NAFTA, and that, you know, it's said to be found in customary international

law and there's no freestanding or additive rights in the minimum standard of treatment in NAFTA.

But the point I want to make is that even under the so-called FTC notes interpretation of minimum standard of treatment, Canada was liable, has been found liable for minimum standard of treatment. And to illustrate that point I'd like to go to the *Pope & Talbot* case and precisely the award on damages to make that point.

CHIEF JUSTICE: Where is that?

MR. UNDERHILL: Yeah, thank you. It is Canada's volume, book, sorry. Canada's book of authorities, Volume 3 of 4, tab 77. And so if you see, Chief Justice, from just the cover sheet transmitting it which is the first page at least in my copy, I hope in yours as well, that's just an indication that the tribunal's award in respect of damages, this is what this is. Now, just again to back up by way of background, the award on the merits of *Pope & Talbot* has been talked about a fair bit in this proceeding. That was decided before the FTC interpretive note. And in that decision the tribunal found that fair and equitable treatment was essentially an additive right beyond the sort of customary international law minimum standard of treatment of aliens. And in fact as Canada's counsel talked about, *Pope & Talbot* of course was one of impetuses for the interpretive note. But as we'll see in a moment, what the panel did here in the award on

damages is considered the issue of whether Canada was still liable, even under the standard and interpretative note. I'd like to have a look at what the panel had to say about that.

So if we could go to paragraph 52 on page 25 which is numbered at the bottom of the page, the panel says there under the heading "Construction of the Interpretation":

> "Viewing the interpretation as binding on the tribunal does not necessitate a finding that it overturns the tribunal's previous award under Article 1105. That award would remain either because the tribunal's interpretation of Article 1105 is compatible with the Commission's, or if it is not…"

that's reference to the Free Trade Commission,

> "…or if it is not, because the application of the interpretation to the facts found by the tribunal leads to the same conclusion that there was a breach by Canada of its obligations of Article 1105. If upon either basis the answer is in the affirmative, the tribunal may proceed to award damages."

And then if we can go over to paragraph 57 on page 27.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: "Based upon its

> submissions in these proceedings and confirmed internationally in its proposals in

the FTAA negotiations, Canada has considered that the principles of customary international law were frozen in amber at the time of the *Neer* decision. It was on this basis that it urged the tribunal to award damages only if its conduct was found to be 'egregious' act or failure to meet international required standards."

And you can see a statement of Canada's views there at footnote 40.

And then over the top of the page at paragraph 58, "The tribunal rejects this static conception…." Do you have that?

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: "…of customary international law for the following reasons." And then go through, which I don't need to take you through, goes through a number of reasons why it's rejecting Canada's conception or articulation of customary international law in this case.

And then if we could pick up again the reasons at paragraph 65 on page 30.

"Based upon the foregoing, the tribunal rejects Canada's contention in the present content of customary international law concerning the protection of foreign property. Those standards have evolved since 1926 and, were the issue necessary to the

tribunal's decision here, they would propose the formulation more in keeping with the present practice of states. However, because the tribunal concludes that…"

and this is what they emphasize and I emphasize,

"…even applying Canada's proposed standard, damages would be owing to the investor as a result of the verification review episode. That formulation is unnecessary here."

And then I thought it might be useful for us just to look at sort of the basis upon which the tribunal was able to conclude they was still liability on the part of Canada. So at paragraph 67,

"Applying Canada's view of the customary international law standard embodied in the interpretation, the tribunal must determine whether the conduct giving rise to the April 10, 2000 award under Article 1105 was, to use Canada's term, egregious. The tribunal finds that it was.

A lengthy statement of the facts is found by the tribunal is set out in paragraph 156 to 181 of the award."

And then it goes through, as you'll see -- this is all to do with the course of the softwood lumber dispute and you can see there, if you read through paragraph 68 and over the page, what is said to amount to, in this case, egregious conduct.

So the point simply is this. You know, Canada's submissions at various times through the course of this is, "Well, look, these aren't -- these are, of course, the standards that we'd all subscribe to and we're not going to do that." Well, they were found liable in this particular case and they met even the highest standard that Canada says is possible.

Next I'd like to go to the *S.D. Myers* decision, which is found in our Volume 4, the applicant's application -- or motion record, Volume 4, tab 16.

CHIEF JUSTICE: Volume 4?

MR. UNDERHILL: Sorry, yes, Volume 4 of 5, applicant's motion record, tab 16.

CHIEF JUSTICE: Got it.

MR. UNDERHILL: Thank you. And just again by way of background because the case has been discussed, this is the issues involving the export of PCBs and a ban on the export of PCBs. And so if we could just turn up paragraph 123, which is 947 of the record numbered at the top.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And they set out there at least one of the interim orders that's at issue. You'll see at paragraph 123 and I just wanted to draw you in to what sort of Canada -- the Minister of Environment was saying was the rationale for the order. That's the second whereas clause at the very bottom of

the page. "And whereas the Minister of the Environment…" Do you have that?

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: "…and the Minister of National Health believed that PCBs are not adequately regulated, and that immediate action is required to deal with a significant danger to the environment and to human life and health."

And then if we could go, then, to paragraph 258 is our next stop in here.

And if you have that on page 64, just to make the point that the company was -- the investor was suggesting that Canada, of course, had violated the minimum standard of treatment provision of NAFTA, at 258.

And then if you just, over the page, at the bottom, paragraph 263, we can see how the tribunal dealt with it.

"The tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner and the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in light of the high measure of deference that international law generally extends to the right of

domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case."

So effectively, you know, again, the same sort of high standard that we saw in the damages award in effect in *Pope & Talbot*."

And then over at 268, then, we have the conclusion:

"By a majority, the tribunal determines that the issuance of the interim and final orders…"

I didn't take you to the final order language, but I took you to the interim,

"…was a breach of Article 1105 of the NAFTA. The tribunal's decision in this respect makes it unnecessary to review the investor's other submissions in relation to Article 1105."

So there was a finding of the breach of minimum standard of treatment in that case as well.

And the overarching point, Chief Justice, is this. Canada has always advocated – and it takes the same position in this courtroom today – for a relatively narrow interpretation of the content of minimal standard of treatment, and fair and equitable treatment. But the reality is, tribunals don't always agree. And what the applicant is cautioning you is against relying on simply

the exposition here today and yesterday of what Canada would like the standard to be. But instead you have to look to what the tribunals have said, and indeed what the academics have to say about the fair and equitable treatment, and the explanation of its content, because it's not as simple and certainly not as narrow as Canada suggests here in this. And I appreciate -- I mean, if we look at *Glamis Gold* or any decision, these are huge decisions with just an immense amount of discourse on what fair and equitable treatment is. And our point is this: It would be very dangerous to rely on the very narrow interpretation of the obligation by Canada to in turn say, well, it doesn't seem to amount to very much and therefore the duty -- you know, there is no change in the policy space. We say would be -- we caution against that in the strongest terms. And to assist you in -- again, you know, we could spend three weeks arguing what fair and equitable treatment is before you. And I just -- I'd like to give you a citation to one of Canada's authorities which -- again Professors Newcombe and Paradell's text.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: Just that it is, again, an explanation of the streams of jurisprudence that have emerged, and just paints the picture -- paints a very different picture, I guess, in a nutshell than the one Canada's counsel has tried to do in this courtroom.

And so the citation to the Newcombe and Paradell text is Volume 4 of the Canada's authorities, tab 95, and the specific page references are 235 to 253, 272 to 275 and 275 to 298. And just those you see are a lot of pages in themselves.

CHIEF JUSTICE: But at the end of the day don't we -- we still have to -- we still have to find that there's more than a speculative chance that under whatever standard there is, there would be -- there's more than a speculative chance that a measure would be taken or that the HFN's rights were adversely impacted, right?

MR. UNDERHILL: Let me recite again what our argument is. The potential adverse impact, and again leaving aside what the test is and the threshold that we have to get over, the impact again is the change in the policy space or the fettering of the Crown's discretion to track some of the language that results -- that is, you know, is causally connected, because I agree with my friend, Ms. Hoffman, that we have to establish a causal connection. But our point -- and that's from paragraph 45 of the *Rio Tinto* decision.

Our submission to you on this line of argument, at least, is that there is a causal connection between the ratification of CCFIPPA and the change in the policy space or a fettering of the discretion of the Crown to deal with lands and resources which are subject to aboriginal rights and title claims.

CHIEF JUSTICE: Right, but again, it has to come down to a level where the rubber hits the road. You say, well, you know, there's not an exact -- there's not an exact meshing, if you will, for lack of a better word, between the existing regime and what it would be under CCFIPPA. And I understand that. But at the end of the day, that alone -- are you suggesting that that alone is sufficient to trigger the duty to consult or do you say you have to go further and find that that change gives rise to a non-speculative adverse impact, potential adverse impact on the applicant?

MR. UNDERHILL: There has to be a change, and then in turn that change has to have a potential impact on what the Crown does, and not just what the Crown does generally, but what the Crown does in trying to regulate in respect of aboriginal rights and title.

CHIEF JUSTICE: Right, potential, non-speculative impact --

MR. UNDERHILL: Yes.

CHIEF JUSTICE: -- on what the Crown would do.

MR. UNDERHILL: So -- and I might just skip ahead to this. You know, we struggled last night to assist you in, you know, what's the threshold test, because with great respect to my friend, you know, she took issue with my submission that the case law is not particularly well developed on what's speculative and

what's not. But again, with respect, all she was able to point to was *Rio Tinto* and not to any case that had decided when an impact is too speculative or not, because I'm certainly not aware of any such case. So I stand by that submission, that you're not given very much from the jurisprudence beyond *Rio Tinto* to wrestle with this important question.

And so we tried to come up with some assistance, and the language again from *Rio Tinto* talks about the possibility of an impact. That's the language from 45.

CHIEF JUSTICE: Of an appreciable impact.

MR. UNDERHILL: Right, and one of the definitions I came across, and this may or may not be useful in your thinking, is that a possibility means something that is feasible but not probable. And I found that a bit helpful in the sense of you have to determine whether it's feasible that Canada, in trying to comply with its obligations under the CCFIPPA, might have to alter its course of conduct, if you would, in some way to ensure that it complies with its international legal obligations under the CCFIPPA when dealing with and in a way that adversely impacts on aboriginal rights and titles. So in other words when it's trying to deal with protecting or accommodating aboriginal rights and title, that those obligations that it has assumed might cause it to do something which

might adversely impact on those rights and title.

CHIEF JUSTICE: Or stated differently, will be constrained. It's feasible that it'll be constrained.

MR. UNDERHILL: That's right, that's right, that's right. But I do think that very much it does -- a really important piece of this is you need to be satisfied that there is something real here and substantive in these obligations.

CHIEF JUSTICE: Right. In fact they would say on the latter point about being constrained, they'd say, well, they don't have to be just constrained because they've got lots of different ways of approaching any given issue. So the fact that they might have a little bit of a constraint that they didn't have before isn't enough because they can still ensure that aboriginal interests are not adversely impacted.

MR. UNDERHILL: Well, you know, there's potentially two aspects to that and I'm going to address both. One is, do they really have the policy space that they say to do under the CCFIPPA to still do the things they want? That's, I think one of the issues that came up during your discussions with Canada.

CHIEF JUSTICE: Right.

MR. UNDERHILL: I want to address that. Typically talking about Article 33 and the exceptions.

The other piece that I was -- and I was

going to address this a bit later but I think is important is, you know, Canada's submission was, look, we can -- this was said a couple of times, I think, by both Mr. Spelliscy and Ms. Hoffman that we think we can fulfill our obligations under the CCFIPPA and still have room to do what we need to do to, you know, fulfill our constitutional obligations to aboriginal peoples.

CHIEF JUSTICE: Right.

MR. UNDERHILL: And one of the points I want to make about that is how could Canada reach that conclusion when they did no analysis that --I took you through with Mr. MacKay's cross-examination, you'll recall this, they didn't do the analysis of what impacts CCFIPPA because their position, as we talked about in my main submissions, is there's a bright line between international trade law and aboriginal law and never the twain shall meet. They didn't do the analysis. That's one of the answers. And you know, really at the end of the day, the question for you might be put this way, can you be confident that Canada is right about that, that it will never be the case that their obligations under the CCFIPPA might come into conflict, or might intersect with its obligations to aboriginal peoples?

And I'm going to take you through in a moment a number of factors that go into what you and I have called the risk analysis that I think speak strongly against the idea that there's just no chance that that might come to pass one day. And again we're

going to look at, you know, the types of decisions under NAFTA because with respect, we have a much more robust approach to the NAFTA experience than Canada presents, and I think it says a lot more about potential impacts on aboriginal rights and title than Canada suggests but I'll come to that in a minute.

But I think it, with great respect, would be very difficult for you to conclude that those two sets of obligations, that is the obligations to aboriginal peoples under Section 35, and the honour of the Crown, will never in any way come into conflict with the obligations under CCFIPPA. How can Canada conclude that when, one, they haven't done the analysis, and two, they haven't talked to aboriginal peoples? And I'll suggest a few more factors when I come close to the end.

The next point I wanted to make just in terms of the submissions that I heard at least on the nature of the obligations under CCFIPPA deals with the expropriation provision. And with respect, what I heard from both Mr. Spelliscy and Mr. -- and sorry, and Ms. Hoffman was an almost singular focus on direct expropriation. And it is true, you know, there's a requirement if there's going to be direct expropriation there's compensation, and it's true that under Canadian domestic law there is a similar obligation to expropriate with compensation for direct expropriation.

But with great respect, what Canada glossed over in its submissions to you was the concepts

that are captured in Article 10 and as interpreted by Annex B-10, of regulatory expropriation and creeping expropriation.

And I'm not going to tread over ground I've already tread. I want to give you the cites to paragraphs 86 to 91 of our argument, where, you know, among other things we reference Canada's experts' cross-examination, conceding the, you know, the difficulty in ascertaining, for example, when indirect expropriation -- or sorry, *bona fide* regulation for a valid public purpose may nonetheless amount to indirect expropriation.

And I think it's also useful to have a closer look at *AbitibiBowater*, and we made some copies last night of the notice of intent of claim, and I just wanted to pause there before we hand it up to make the point that Mr. Spelliscy made much of the fact that, well, you know, I think it was the 31 notices of intent filed only 20 had proceeding to claims. Well, the largest settlement Canada has ever made in the *AbitibiBowater* case, it never proceeded beyond a notice of intent stage.

Sorry, my colleague is telling me the notice of intent actually is in the materials. I'll try to get the cite for you for that in a moment. But the point I wanted to make in drawing this out was this, and there are two things I've handed up. There is the -- oh sorry, I've actually got two copies of the same thing.

There's a notice of intent and then you should have, I think, the Appendix A, the *Act*, tab A, which should be the *Abitibi Consolidated Rights And Asset Act.* I'm not sure that got handed up with the notice of intent.

CHIEF JUSTICE: I've got two documents.

MR. UNDERHILL: One that says "Tab A" in the top right-hand corner?

CHIEF JUSTICE: Yes.

MR. UNDERHILL: All right. That's the *Act*. If you just turn up the cover, over -- it's double-sided. Just over the page you'll see that's a copy of the *Act*.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And the point I wanted to make with *AbitibiBowater* was this. And first, I've already made the point, it was a significant settlement based only on a notice of intent to submit a claim. So I don't think we can take too much from the fact that we have now today, and I'll come to this in a moment, some new notices of intent filed against Canada.

There was to be compensation paid to AbitibiBowater under this *Act*, and we don't need to get into the details of that, but the point is, insofar as there was a direct expropriation of certain assets and land, compensation was to be paid. And this dispute was over how much they were going to get paid, and also seeking compensation for things like the expropriation

of water licences and other resource rights, that were not covered by the *Act*.

And so my point, if it goes -- you know, Mr. Spelliscy made much of the fact, "Well, this is just a direct expropriation, it would have been treated the same way under Canadian law." This goes beyond what Canadian law provides for with respect to compensation, with great respect.

CHIEF JUSTICE: In what way?

MR. UNDERHILL: Well, because there is -- because the claim was for compensation well in excess of what was being provided for the direct expropriation of assets and land, and sought damages under Article 1105 for -- sorry, 1110 is the expropriation provision of NAFTA, for the expropriation of things like water rights and other licences and permits.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: Which this legislation did not provide compensation for.

I also just wanted to remind you of the comments of Mr. Justice Tysoe in the *Metalclad* decision, and I'll get a cite. I don't actually have a cite for where that's referenced in our argument and I'll get that to you. But the bottom line is you'll recall Mr. Justice Tysoe saying that the panel, the tribunal panel in *Metalclad* had adopted a much broader notion of expropriation than Canadian domestic law. And you remember I took you to the article by Ray Young where he

made that same point at the end of his article, that if -- leaving aside the various machinations, at the end of the day we are clearly talking about, with great respect, an obligation under Article 10 of the CCFIPPA, as interpreted by Annex B-10 that goes well beyond what in Canadian domestic law in terms of expropriation law.

CHIEF JUSTICE: And to what degree do you think it goes beyond Canadian law?

MR. UNDERHILL: Well, to what degree. I would say it's quite significant in the sense that when we talk about -- and again I refer you back to my argument, the concepts of indirect expropriation of regulatory expropriation and creeping expropriation, that is this sort of successive measures that can in their totality amount to expropriation, are concepts that I say are not recognized in Canadian domestic law.

Mr. Spelliscy made the submission, if I have it right, that Article 10 together with Annex B-10 leaves Canada with very broad flexibility to sort of regulate still in respect of lands and resources, without fear of, you know, having to pay compensation. And I say with great respect that is simply not the case when you look at the totality of the jurisprudence under Article 1110 of NAFTA. It's just not the case that they have reserved themselves the broad space that they say they do. That has certainly been their position in the cases they argue, but it is not reflective, with great respect, of the tribunal jurisprudence, as confirmed by

all of the academic writing.

And again, just so we don't get lost in the niceties, I just want to make two points about Annex B-10 just to remind you that aboriginal rights and title are not mentioned there, as Mr. MacKay confirmed in his cross-examination, and that it is restrictive, as Mr. MacKay also fairly conceded on cross-examination. It's about the police powers. And I took you to what the police powers were. I don't want to repeat my submission. But I want to keep those two points fresh in your mind when you are thinking about the submission you had from Canada about just how broad a space they have left to regulate in the public interest. That's simply not so.

I mentioned earlier that I wanted to talk a little bit about Article 33, and I struggled a bit with Canada's submissions on this because on the one hand -- and sorry, in Article 33 of the general exceptions. On the one hand Canada said, if I understood the submission correctly, that -- I think Mr. MacKay said this to me on cross-examination as well, "You know, we really couldn't negotiate any sort of aboriginal exception, if you would, for expropriation in MST. Those are really at the heart of the treaty obligations." But then on the other hand, they have the general exceptions in Article 33, and what I heard from Canada during the course of its submissions is, well, we didn't think it was necessary to negotiate an exemption

for measures relating to aboriginal peoples in Article 33 and if we thought so we would have done so.

But what's interesting is somehow Canada came to the conclusion that it was necessary to exempt, for example, cultural industries or national security from the entire ambit of this treaty, but yet was able to arrive at the conclusion that it wasn't necessary to do for Section 35. And I think what also speaks to a really important point, when Canada stands up and says, you know, these obligations are fairly milk toasty and they don't really amount to very much, well, why do you need to exempt cultural industries and all the other things that are listed in Article 33 if the obligations aren't particularly meaningful and you're going to abide by them anyway? It seems a little inconsistent, in my respectful submission.

I want to then turn to -- oh, sorry, yes. Thank you. My colleague pointed out one point I wanted to make. Mr. Spelliscy made submissions about Article 33(2) which is again was that environmental exception. And you asked him some questions, I think it was in response to a question you asked him.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: About its scope. I wanted to remind you of our submission, and it's in our reply as well, that Article 33(2), as Mr. Thomas conceded on cross-examination, is based on Article 20 of the GATT. And it has a very nuanced meaning, and there

is quite an elaborate approach to the definition of necessity and the burden that one has to establish to sort of pass through that. And we handed up to you, and you recall I handed up to you loose an extract from the Newcombe and Paradell text.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And that extract addresses that, and there is -- where is that footnote? There is a case footnoted -- yes, the -- just for your notes, footnote 92, there is a decision called *Brazil Tires*. I think I'm probably butchering that as I do with names. At footnote 92 of that extract I handed up, that contains a very useful exposition of the approach to necessity.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And the point taken from that, and you'll see in the text, you know, this notion that there has to be an identified risk. So with respect it's much more narrow than Canada would suggest.

I wanted to then turn to the most favoured nation clause. And you know, a lot of time has been spent talking about that, and its application, and I wanted to see if I could – and I think I can – reconcile the evidence of Professor Van Harten and Messrs. MacKay and Thomas on this issue. Because there is a very important distinction in terms of practical effects to be made in terms of the MFN clause, as between minimum standard of treatment and expropriation.

And let me explain what I mean by that.

First of all, there can be no doubt the MFN clause applies to both. In other words, it applies to both minimum standard of treatment and expropriation. And that's why you have most favoured nation clauses. Sorry, that's not why you have them. But the point I want to make is, most favoured nation clauses are there to be -- so that investors are able to reach back to these other treaties where there is a more substantive obligation in their favour, and so there was some discussion -- and you raised the question about principles of treaty interpretation. And with respect, I think that approaches the issue in the wrong way, because it sidesteps, if you would, the purpose of an MFN clause, which is in fact to override -- not override, but to say, "Notwithstanding the very specific thing we've negotiated here, we are willing…" because remember, these things are reciprocal, because, you know, the host states are looking to protect their investors reciprocally, "If we think there is something our investors can grab from these older treaties, we'll do that, we're prepared to negotiate that. Notwithstanding what we negotiate here."

And Mr. MacKay forthrightly conceded that the MFN clause applies to both MST and expropriation.

CHIEF JUSTICE: I'm sorry. It turns out we have a request for a break. Is now a good time? Some time in the next few minutes? Is now as good a

time as any?

MR. UNDERHILL: Sure.

CHIEF JUSTICE: Okay. Sorry about that.

MR. UNDERHILL: That's all right.

(PROCEEDINGS ADJOURNED AT 3:46 P.M.)

(PROCEEDINGS RESUMED AT 3:52 P.M.)

CHIEF JUSTICE: Okay.

MR. UNDERHILL: Thank you, Chief Justice.

So before the break we were talking about the most favourite nation clause, and I was just trying to bring a little bit of clarity to the evidence for you, as you struggle with all of this. And again, I wanted to take a step back and make the point that, you know, I've submitted to you already that Canada's submissions on the scope of the obligations on both fair and equitable treatment and expropriation, that we don't agree with them and we say they're too narrow and they're a little more robust than Canada would suggest. And so because of that, the point I wanted to make was, most favoured nation status, you know, we don't need to, you know, establish for you that the MFN clause will have a particular effect to succeed, because what we're saying is the -- you know, there is that change in the policy space, that those obligations have -- that is those obligations being minimum standard of treatment, expropriation, have life and are different leaving aside

the most favoured nation clause. I wanted to sort of just preface what I'm saying here with that remark.

CHIEF JUSTICE: Right.

MR. UNDERHILL: I don't have to bring most favoured nation home, if you would, to succeed in this case.

But nonetheless, just to assist you with thinking about it, I was making the point that I think the evidence is -- from everybody is relatively clear. That the MFN clause would operate -- it does apply, first of all, to these two obligations, expropriation and minimum standard of treatment.

And that with respect to the minimum standard of treatment, there's an interesting issue about whether Chinese investors can reach back to some of those bi-lateral investment treaties that were negotiated in the late 1990s, which have different language in them for a minimum standard of treatment. In other words, they don't have that clarifying language in Article -- sorry, the limiting language in Article 4(2) of the CCFIPPA, which, you know, follows on from the -- you know, essentially incorporates the FTC interpretive note, if you would.

And so just for your notes, then, a reference to one of those FIPPAs that does not have that language in it, and of course you can imagine the fun arbitration decisions and arguments that are going to be made about this issue, can be found in Volume 4 --

sorry, that's not right. Volume 1 of Canada's record. It's Exhibit N to Mr. MacKay's affidavit, and that's page 430. And that's Canada's FIPPA with Croatia. So it's Volume 1, Canada's record, page 430.

CHIEF JUSTICE: FIPPA with who?

MR. UNDERHILL: Croatia.

And so just again to bring everyone's evidence together, what Mr. Thomas -- Mr. Thomas didn't address the application or the MFN clause at all in his original report, but the issue came up on cross-examination, and what Mr. Thomas was saying is he wasn't sure whether, you know, the MFN would really have any practical effect when it came to expropriation, because, of course, Canada takes the position, as you've heard, that Annex B-10 simply affirms how Article 10 should have always been interpreted, right? Interpretive A --

CHIEF JUSTICE: Right.

MR. UNDERHILL: And they say that everything -- you know, all their language that they put in all the other FIPPAs is the same. And that's what Mr. Thomas was getting at. That "Yeah, I'm not sure that's going to mean that much, because there are -- there is no more substantive obligation on expropriation anywhere else to be found." And my point is simply there might be a more interesting argument on the minimum standard of treatment front because of the different language that you can find.

So, that brings me back to tackle more of

the risk analysis that you're struggling with, and in particular to sort of break down a bit the so-called NAFTA experience. And we say the NAFTA experience, first of all, isn't quite as positive for Canada in this case as it suggests, that it does speak more to the potential for adverse impacts on aboriginal peoples and more for a clash between, as we say, Canada's obligations under the CCFIPPA and its obligations to aboriginal peoples.

And I want to sort of unpack that in a number of ways. Because what Canada is saying to you is, "Look, we don't have relatively speaking at least that many monetary awards against us to date under NAFTA." You know, the U.S. investment in NAFTA dwarfs, at least in the present day, the Chinese investment, right now. And there has been no aboriginal claim against -- you know, no claim against Canada involving aboriginal rights or title, to date.

On that last point, I wanted to say this. There is no claim to date. You know, the same could be said -- it's a dangerous submission, in my respectful view, because the same could be said -- well, look, there has been no claim against Canada to date in respect of a municipal measure. But we do know, at least in part – well, not entirely – the *Metalclad* decision was based on a municipal measure.

And so, that is an illustration of how dangerous that proposition can be, when trying to do

your risk analysis of when there is a potential for what I have called the clash between Canada's international legal obligations and its obligations to aboriginal peoples. And of course we know that -- let me leave that.

So some other points to be made under this general heading. First, that the NAFTA experience has to be put in the context of the rapid changes that are going on. And in my main submissions, we talked about the exploration of the claims more generally. And we also had some references to the new claims being filed against Canada. And Canada prepared that chart for you about the ongoing -- the new and ongoing claims.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: But in describing them, Mr. Spelliscy didn't describe what they were about, at least for all of them. And I thought it useful at least to look more closely at a couple of them to illustrate the point that they -- many of them are about resources, and resource use which again I think speaks to the potential for impacts on aboriginal rights and title. And so I wanted to first of all hand up the Clayton notice of arbitration.

Oh, sorry. Before going to that, I need to correct one mistake that Mr. Spelliscy raised with me at the break. And before I go any further. I had said there was only a notice of intent to submit a claim in *AbitibiBowater*, and I was doing some jumping up and down

about that. Mr. Spelliscy pointed out that in fact a notice of claim was filed. And so I wanted to correct that. There was, in fact, a notice of claim filed in *AbitibiBowater*.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: That's volume -- just the reference is Volume 3 of Canada's authorities, tab 63.

Sorry, Chief Justice, I seem to have lost my copy of the Clayton notice of intent. Or notice of claim. And I guess your point of raising it essentially is just -- if you'll just go over the page to page 3 of the general nature of the claim.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And again, with the limited time available, I just wanted to highlight that this concerned environmental assessment process. If you see there at paragraph 11.

CHIEF JUSTICE: Mm-hmm. Yes.

MR. UNDERHILL: And just for your notes, given the time, there is also a notice of arbitration in the *Mesa Power Group* from your chart. *Mesa Power Group* is on there. Do you see that?

CHIEF JUSTICE: Yes.

MR. UNDERHILL: Yes, and that involves, just for your notes, the eligibility for a wind power program. The so-called feed-in tariff program. So again, it's, you know, allegations of

arbitrary, unfair application of these various measures to do with this renewable wind power energy program.

CHIEF JUSTICE: Mm-hmm.

MR. UNDERHILL: And of course, I took you to and referenced both the *Lone Pine* -- again, that's the fracking moratorium notice of intent and the windpower claim to do with the offshore wind power moratorium. And so the point simply is that we see these ongoing claims being in the energy and resource sector, which again, I think, in terms of the risk analysis you're trying to do and, you know, do we have this possibility of a potential impact, that these claims are coming up in that sector I say is not determinative in any way, shape or form, but it's a factor you need to take into account.

There are new awards, of course, coming up. We've referred to the *Mobil* case, which is, of course, about performance requirements. And my point there -- and my friend pointed out that we had the damages claim wrong, but it raises an interesting point because, you know, it was about the Hibernia oilfields, and while the U.S. partners were able to bring this sort of claim, because the rest of that dam -- you know, the total damages for the entire matter were much larger than the claims, of course, being brought by these particular partners, the U.S. partners. And my point is simply perhaps there's a nice illustration of how the domestic investors don't have the same ability to pursue

these claims that the U.S. investors do.

Another factor I think you need to take account in this risk analysis when looking at, you know, what -- because let me be clear, let me back up. We agree that the NAFTA experience you need to take into account. We don't resile from that for a minute. My point is that it actually -- it speaks more in favour of the applicant than Canada would suggest and it has to be contextualized with some other factors.

And so the ever evolving law on duty to consult, which of course only originated in 2004, and the uncertainty more generally around aboriginal rights and how they're to be established and proven is something that also has to be taken into account. It's still very much an emerging area of the law.

And also while it is true that there have been land claim agreements, modern land claims agreements at least dating back to the eighties, I would respectfully submit that the exercise of that self-government, relatively speaking is still in its infancy in this country. You saw the gap, of course, and you pointed out the gap in the province -- at least from Quebec west in terms of the modern land claims agreements. There are now three in British Columbia, Niska, Maa-nulth and Tsawwassen, you know, and Niska is the oldest, from the late 1990s. And so relatively speaking it's early days, with great respect. Certainly in this province it is very much early days for the

exercise of aboriginal self-governments. And again, this is responding to this notion that "Well, you know, we haven't had this spate of claims," as I think Mr. Thomas's language is. I'm saying these are reasons that explain why that is so and why it would be dangerous to make the assumption that history is going to necessarily predict the future.

Two more quick points on that matter. Again to confirm, I think my friend pointed this out, but just to make sure, the numbered treaties, the old historical numbered treaties, which blankets certainly much of the prairie provinces and into the northeast corner of British Columbia, they do not have any sort of self-government provisions in them.

And while it is true that *Indian Act* -- sorry, that bands under the *Indian Act* do have the powers that my friend took you through. As she highlighted and I sort of make my own point from it, that is restricted to the reserve land base, which with great respect is, as any aboriginal person will tell you, very small, certainly in relation to the traditional territories claimed by aboriginal peoples in this province.

The other point that I've already made to you but again I'm trying to just fill in what I think the factors that need to go into your risk analysis on this second phase of our argument is the nature of the investor here, and I've covered that off in my main

submissions with respect to, you know, it being the state-owned enterprise and how that may impact on how the CCFIPPA arbitration provisions are used. That's another factor.

We talked a little bit about the increasing growth in investment from China, and I just wanted to give you a reference for that. We don't have the time, I don't think, to turn it up, but the environmental assessment, the final environmental assessment is attached as Exhibit BB, double B, to the MacKay affidavit.

CHIEF JUSTICE: Yeah, yeah, we were reading that.

MR. UNDERHILL: Oh, that's right, of course we were reading it. Yes, of course, sorry, which is Volume 2. Page 718 is the page I am referring to.

CHIEF JUSTICE: I have it.

MR. UNDERHILL: And the point there is you'll see the reference to a 92.4 percent increase in Chinese investment 2008-2011.

CHIEF JUSTICE: Where are you?

MR. UNDERHILL: That's, if memory serves, about the middle page, top third maybe. Page 718.

CHIEF JUSTICE: Yeah, I have it. Okay.

MR. UNDERHILL: And so again, you know, we can pull out our calculators and do the

annualized increase and then forecast that over what is to be fair -- and I appreciate the -- again, in response to Mr. Spelliscy, yes, it's a 15-year term but let's remember that for existing investments, we have another 15 years where the obligations are in force, so it's effectively 30 years. Make no mistake about that. And so if one did the extrapolation with that kind of percentage increase, and even if you took a very conservative approach, it's not too difficult to appreciate the level of investment that's potentially going to be here in 15 years and 20 years and 25 years.

CHIEF JUSTICE: Right, at the same time I think we know that at least with respect to Nexen-type investments in the oil sands, they shut them down. They said, "Fine for this one but that's it, that's all."

MR. UNDERHILL: I'll come back to that. I will say, I guess, that Investment Canada isn't going to cover all Chinese investment, that's for sure. That potentially can come in. Yes, it may restrict it or may not restrict it in the oil sands, and the it's an interesting question whether this treaty offers any relief for China in that respect. But the other point is of course the other factor that goes in, and we talked about this in my main submissions, is where that investment is going. And again from the EA we know that one of the targets is natural resources.

And so I say when you look at all of

those factors with the NAFTA experience together, in our respectful submission it raises a legitimate question of whether Canada is right to say our obligations under CCFIPPA will never come into conflict or intersect with our obligations to aboriginal peoples, that we've still got plenty of room. I think when you look at all of those factors, with great respect I say it's impossible to reach that conclusion, that there's not a feasible, if you would -- it's not feasible that that policy space might become a little more crowded because of the CCFIPPA obligations.

I just want to make one point about the *Glamis Gold* decision which came up late in my friend's submissions and again, it's -- it may have been a point I made in my opening submissions, but it can be made briefly that *Glamis Gold* was not decided on the basis that the measures being taken to protect the sacred spaces could never amount to expropriation. It's just on the facts, it did not.

I then wanted to turn to the case law on the duty to consult. I have made the point to you already in my earlier submissions that it is, in my respectful submission -- I guess I stand by my submission that the case law is simply not particularly well-developed on what is or is not too speculative. There is really nothing beyond *Rio Tinto* to assist you.

Second, I also stand by my submission that *Adams Lake* -- that the Court of Appeal did not find

there was no duty to consult in *Adams Lake*. To the contrary, that case was based on the assumption that there was consultation. The issue in that case was the scope of consultation. And I would just like to refer you to two paragraphs which my friend did not take you to, which I think will clearly make that point. That's paragraphs 58 and 78 of *Adams Lake*.

Volume 2, Chief Justice, of Canada's authorities. Sorry, what tab number? Tab 23. Paragraphs 58 and 78.

CHIEF JUSTICE: Mm-hmm. Okay.

MR. UNDERHILL: Ms. Hoffman made a submission to you that all of the sort of so-called high-level strategic level -- sorry, high-level decisions, that is, that there is an obligation to consult when the Crown is making these high-level decisions, as we have tried to characterize the CCFIPPA, are all about one resource and that should be taken into account and speak against extending the duty to consult to all resources. With great respect, that is not a principle basis for finding that there's not an obligation to consult, simply because the CCFIPPA might have application to a variety of resources. And it in part seems to be based on the proposition that -- this might go to the issue I suppose of remedy, but it's an argument that the Crown has advanced from -- in many of these cases, that, well, it might get too difficult to consult with these sorts of matters because the subject

matter is so broad. It's not just one resource.

And that type of argument, with great respect, has been rejected time and time again. You know, it also speaks to whether there needs to be consultation with more, and again just on the issue of remedy, in the event I can't get to it, the applicant is content with simply a declaration that there's an obligation to consult by it, and you have my written reply on the point about judicial economy. If Canada would like to have more of these cases, so be it.

The other point that I wanted to make is -- sorry, I was going to make the point that in *Haida* the Crown vigorously argued that the province would grind to a halt if there was an obligation to consult First Nations prior to them proving their rights, that resource development would come to an end. And so those sorts of flood gates arguments should be rejected.

I want to make a point about the chilling effect and Canada's submission, well there's no evidence of that and pointing in part to Mr. MacKay's evidence. In our respectful submission, it would -- it is difficult to imagine how one could assemble any credible evidence of a chilling effect. It strikes me that it's one of those matters that is acceptable, as we say in the *Charter* cases, that's very -- it's not particularly susceptible proof because, of course, you know, what government official is ever going to say, "Well, we didn't do something because we were concerned about our

obligations under the CCFIPPA"? Highly improbable. And it's one where we urge upon you, as is done in the *Charter* cases to apply a degree of common sense to the matter, that if there are potential financial consequences of the decision that they might be taken into account.

And so I come then to what I alluded to earlier, struggling with the threshold test that I know is in the forefront of your mind, and I've made the submission to you already that I think a useful way to look at this is whether or not -- again, this only applies to the second line of argument, whether it's feasible that there will be this crowding of policy space if you would, or the change in the fettering of the Crown's discretion to deal, again, specifically with measures about aboriginal rights and title, not generally. The test again is not whether there's going to be a spate of claims. It's much more nuanced than that. It's, you know, are the Crown's options in some way going to be narrowed or constrained as a result of the obligations it's taken on?

As I said to you, in light of what I think is a fair reading of the tribunal jurisprudence and the academic literature, it is fair for you to conclude that these obligations go beyond and in some cases well beyond Canadian domestic law, and as a result you cannot, with great respect, accept the position of Canada that their international legal obligations under

CCFIPPA will somehow forever remain in a silo and apart from their obligations to aboriginal peoples.

What I would like to do is, just if I could, take a couple of minutes to consult with my colleague, and then wrap up.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: Thank you.

Chief Justice, would it be acceptable to just take a five-minute break?

CHIEF JUSTICE: Sure. We were just talking about when the transcript from today is going to be available anyway.

MR. UNDERHILL: Oh, I see. I'm sorry. Thank you.

(PROCEEDINGS ADJOURNED AT 4:24 P.M.)

(PROCEEDINGS RESUMED AT 4:29 P.M.)

MR. UNDERHILL: It appears those are my submissions.

CHIEF JUSTICE: Okay. The team approach.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: It's always a good one. I think I have three or four questions.

MR. UNDERHILL: I figured you might.

CHIEF JUSTICE: Well, I may no longer. I mean, I have to go back and look at them in light of what you said.

So, in your reply, paragraph 45, have you

referred to all the affidavit material?

MR. UNDERHILL: Sorry?

CHIEF JUSTICE: Paragraph 45 of your reply.

MR. UNDERHILL: Paragraph 45 of our reply.

CHIEF JUSTICE: Last sentence.

MR. UNDERHILL: Yes.

CHIEF JUSTICE: "We also submit that the other affidavit material before the court is of assistance in *inter alia* addressing Canada's argument that the individual circumstances of the HFN are too speculative to trigger the duty to consult." Have you referred to all the evidence you want to --

MR. UNDERHILL: I think the only affidavit I did not refer to -- I haven't referred to, I don't think, the affidavit from the Union of B.C. Indian Chiefs.

CHIEF JUSTICE: I've read it.

MR. UNDERHILL: Which just had -- and the affidavit from the Chiefs of Ontario, which, among other things, contain, I think, some relevant piece of information just about the fact that they have requested and have not been consulted.

CHIEF JUSTICE: Right. Okay, I just want to make sure that there wasn't other stuff that --

MR. UNDERHILL: I think I've referred

to the others.

CHIEF JUSTICE: Okay. We've dealt with that one. We've dealt with that one.

That's it.

MR. UNDERHILL: Okay.

CHIEF JUSTICE: Okay.

MR. UNDERHILL: Apparently I'm not done. We've been struggling with -- the reason we took the break, we're struggling with your market access question, and to be honest, we're not sure of the answer we want to give you and that's the problem, but we -- what we do know is that while the *Investment Canada Act* is exempt from the dispute resolution provisions of FIPPA, and that's for anything over 334 million, we're not sure about whether Canada can take any additional steps to limit market access by Chinese investors. And so we just don't know the answer to that. At least I'm not able to give you an answer today.

CHIEF JUSTICE: There is the state -- I used to be involved in this area of law. And just around the end of that period, they came in with some guidelines on SOEs. I'm not sure how extensive they are, but anyway.

MR. UNDERHILL: Yes, so we just -- yeah. Yeah. We're just -- yeah, we don't know it won't affect it. We just don't know the answer, so I unfortunately, without being able to go and look at some things, I can't give you a very helpful answer.

CHIEF JUSTICE: All right. Well, I want to thank all counsel. You've been very helpful, very professional. You've made it easy to deal with something that's very complicated. I obviously have a lot to think about, and digest, and sit through, and organize. So I shall commence doing that. And I'll just try to get my decision out as quickly as I can, recognizing it's a little more difficult than it was before I got appointed to this particular position.

All right. So thank you to everyone.

(PROCEEDINGS ADJOURNED AT 4:33 P.M.)

I HEREBY CERTIFY THAT THE FORGOING is a true and accurate transcript of the proceedings herein, to the best of my skill and ability.

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K.A. Bemister, Court Reporter