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# The Crown Owes No Duty to Consult Indigenous Communities Before Ratifying a Bilateral Investment Treaty

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**Case commented on:** *Hupacasath First Nation v Minister of Foreign Affairs Canada and the Attorney General of Canada*, 2013 FC 2009

In this case Chief Justice Crampton of the Federal Court Trial Division rejected the application of the claimant Hupacasath First Nation (HFN) for a declaration that Canada is required to engage in a process of consultation and accommodation with First Nations, including HFN, prior to ratifying or taking other specific steps that will bind Canada to the terms of the *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* (CCFIPPA) (text available here). It was common ground (at paras 11 and 12) that while the Department of Foreign Affairs and International Trade had consulted with stakeholders, that consultation did not extend to HFN or other First Nations.

Chief Justice Crampton concluded that the Crown owed no duty to consult because HFN could not meet the third part of the three part test derived from *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 and *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 to the effect that "(1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right." (*Rio Tinto* at para 31, emphasis added) The Chief Justice accepted that the duty to consult might be triggered by high level policy and planning decisions but suggested that the precedent cases on which HFN relied all involved a direct connection between the policy decision and the First Nations' claimed territories or the resources situated on those territories (at para 78). Those cases were therefore distinguishable. Any claimed impacts that might result from ratification of the CCFIPPA were speculative and non-appreciable and even if that was not the case it was "difficult to ascertain the required causal link between the CCFIPPA and a potential adverse impact on HFN's asserted Aboriginal interests" (at para 79).

The principal concern of HFN was the alleged chilling effect of the treaty i.e. the idea that a government might be reluctant to take some measures that might benefit the HFN (e.g. expropriation of lands or interests in lands in order to facilitate settlement of HFN's aboriginal title claim) as a result of a concern that such a measure might result in a compensation claim before an international arbitral tribunal which might award significant damages. See previous ABlawg posts on regulatory chill "From regulatory chill to regulatory concussion" and "Regulatory chill and ALSA".

In reaching the conclusion that the problem of regulatory chill was not a serious risk Chief Justice Crampton analysed the two main disciplines of the treaty, the minimum standard of treatment (MST) and the duties in relation to expropriation (and the implications of the most favoured nation (MFN) clause for these two standards) as well as the exceptions to the treaty. The Chief Justice concluded that the MST provision did not impose a risk since the MST clause in CCFIPPA was more narrowly framed than some of the fair and equitable clauses found in other international investment agreements. The text was based on the language of the interpretive note adopted by the parties to NAFTA which similarly limited the scope of the MST (or the fair and equitable treatment obligation) in that agreement. Similarly, the expropriation provision did not impose a risk since in the court's view (and relying here on the expert evidence of Chris Thomas and the *Glamis Gold Award*, available here) there was little risk that non-discriminatory *bona fide* measures taken by a government to protect an aboriginal interest would be found to be in breach of the duties in relation to expropriation within CCFIPPA. Any arguments based on the MFN clause were entirely speculative absent evidence of more favourable language in other Canadian foreign investment treaties.

Finally, the scope of the specific and general exemptions within CCFIPPA, while perhaps subject to some uncertainty in terms of when Canada would be able to rely on an exception, should not be a cause for concern (at paras 126 – 129).

**Commentary**

My comments on the decision are in five parts. The first part addresses the general question of the duty to consult in the negotiation and finalization of international treaties. The second part deals with the focus of the decision on the act of ratification rather than the process of negotiations. The third part discusses Chief Justice Crampton's efforts to distinguish the policy and planning line of consultation cases. The fourth part considers the use the Court makes of the "limited" number of awards and settlements against Canada, and the final part discusses the relationship between CCFIPPA and HFN's law making powers.

1. **The duty to consult and international treaties**

The historical record clearly shows that international treaties have the potential to impair aboriginal and treaty rights. The best known example of this is the Migratory Birds Convention of 1916 which, when implemented by federal legislation (based on s.132 of the *Constitution Act, 1867*), led to treaty Indians being prosecuted for taking game out of season. This was a breach of the hunting rights clauses of the numbered treaties of the prairie provinces and Northern Canada: *R v. Sikyea*, [1964] SCR 642, *R v Flett*, [1989] 6 WWR 166 (Man QB), leave to appeal refused 1990 MJ 427. While it is correct to say that the rights impairment flows from the implementing legislation and regulations rather than the international treaty, it is clear that the risk of impairment begins with the negotiation of the treaty.

Canada has recognized this. First Nations and Inuit were heavily involved in the negotiations which led to the adoption of the amending Protocol to the 1916 Convention in 1995 (the Protocol is available here). Furthermore, and as the judgment points out (at para 69), all modern land claim agreements contain provisions that address the relationship between rights under the land claim agreement and Canada's obligations under international law. These provisions are of two types. First, there are provisions that address how the indigenous party to the agreement should be involved in negotiations or developing positions in relation to such an agreement or its subsequent implementation. It is common to see more detailed provisions in relation to wildlife

harvesting rights but more recent agreements also contain more general commitments. See, for example, s.7.13 of the Tlicho Final Agreement (available here) dealing with general commitments and s.12.12 dealing with agreements that may affect harvesting rights. A second group of provisions deals with measures to ensure that First Nation law making powers do not cause Canada to be in breach of its international commitments (see s.7.13 of the Tlicho Final Agreement).

In sum, there is no reason in principle for thinking that the actions of the Government of Canada in negotiating, ratifying, observing and implementing an international treaty should be categorically shielded from triggering the Crown's duty to consult and accommodate. Furthermore, while the acts of negotiation and the formal act of ratification cannot in and of themselves impair aboriginal rights or title, each represents a key link in the chain which may result in changes in government behaviour, and in some cases (through implementing legislation), changes in domestic law. Chief Justice Crampton seems to accept much of this although he declined to make a formal ruling (at paras 62 – 69) on Canada's argument that the CFFIPPA could not, as a matter of law, trigger the constitutional duty to consult.

**2. The focus on consultation in relation to the act of ratification rather than consultation in relation to the negotiations**

As noted in the introductory part of this post, the court's summary of the claimant's claim for relief appears to focus on the act of ratification rather than the process of negotiations. As a result of this the court focuses on the risks associated with the final text of the agreement rather than the possibilities that might have been opened up had HFN and other First Nations been consulted as part of developing Canada's negotiating position. The argument here would then have been that Canada should not proceed to ratify the treaty since it had failed to fulfill its duty to consult *during* the negotiations. While there is some discussion in the judgement of the possibility that different negotiating positions might have been taken (e.g. at para 116, no specific exemption for measures aimed at protecting aboriginal rights) the discussion all occurs in the context of exploring the implications of the current text for HFN's rights and interests rather than how HFN's rights and interests might have been better protected if different negotiating positions had been adopted.

The focus on the effect of the final text rather than the process of negotiations seems to me to be a return to the *Sparrow* approach (*R v Sparrow*, [1990] 1 SCR 1075) to triggering the duty to consult which, as interpreted in at least some cases (e.g. *TransCanada Pipelines Ltd. v Beardmore (Township)*, 1997 CanLII 12446 (ON SC)), seemed to require the aboriginal party to establish a *prima facie* infringement before the duty was triggered. The Supreme Court of Canada turned away from this approach preferring a more proactive approach in *Haida Nation*.

**3. The specific nexus requirement and the policy and planning line of duty to consult cases**

As noted in the introduction, Justice Crampton, while accepting that high level policy and planning decisions might in principle trigger a duty to consult, distinguished the policy and planning line of cases (at paras 77 *et seq*) on the grounds that all of those cases "directly concerned the applicant First Nations' claimed lands or specific resources". I think that this way of framing the test is too demanding largely because it runs the risk of creating another way of framing a categorical exemption - perhaps expressed as policies of general application. Such an exemption might cover international agreements of general application and even legislative

decisions (see the controversial decision of the Alberta Court of Appeal in *R v Lefthand*, 2007 ABCA 206 and referred to in *Rio Tinto* at para 44). Consider, for example, the migratory birds scenario referred to above. Should Canada be able to avoid the duty to consult a First Nation in relation to changes in the bilateral agreement with the United States unless the First Nation can show that its harvesting practices will be detrimentally affected? Such a demanding approach is again, I think, a reversion to a *Sparrow prima facie* infringement analysis rather than the infringement avoidance approach required by *Haida Nation* and subsequent decisions of the Supreme Court.

### 4. The "limited" number of awards and settlements against Canada under existing agreements: a "have your cake and eat it" argument

At several points in his judgement the Chief Justice seems to place considerable reliance on the fact that there have not been very many successful claims (or settlements) against Canada under either NAFTA or "the other 24 FIPAs to which Canada is a party". See for example this and other similar comments at para 104 in the context of the MST clause and at paras 112 and 119 in the context of expropriation. But whether one agrees with this assessment or not it is not clear that that is the point. The real question is whether there is evidence that governments have backed off taking particular positions for fear of triggering investment treaty arbitration. This may be harder to establish in relation to provincial governments than the federal government since it is the federal government that will be on the hook for any treaty responsibility and liability. Indeed, part of Canada's position seems to have been that the record shows that provincial governments (Newfoundland in the case of Abitibi Bowater and Ontario in the case of the feed in tariff cases) seem not to have been much affected by the supposed disciplines of investment agreements. This is surely an example of a "have your cake and eat it argument" since on the one hand Canada uses the limited number of cases and settlements involving Canada to support the argument that HFN's claims are merely speculative, while at the same time these selfsame cases are used to bolster the argument that governments are not in fact deterred from taking aggressive steps to protect important policy positions.

It is not clear that there was any evidence on the record speaking to this particular issue (see the brief comment at para 129) and counsel for the claimant might find it difficult to build a record on this point, but this sort of evidence seems to me to be more pertinent on the regulatory chill issue than evidence as to the number of claims made against Canada and the number of awards/settlements.

### 5. Impairment of HFN law making powers

When I first picked up this decision I had thought that one of the arguments might be that the treaty might limit the exercise of law making powers by the HFN. While the treaty could not do so *de jure* (an international treaty cannot change the law of the land, only implementing legislation, as noted above, can do that) it might do so *de facto*; and indeed the Crown's land claim agreement practice as exemplified by the Tlicho Agreement supports this observation.

But in reading the decision I was surprised to see so little reference to HFN self-government or law making powers. Furthermore, such references as there are are largely framed in terms of by-law making powers under the *Indian Act*, RSC 1985, c. I-5 (see, for example the references at paras 91 and 133(i)) rather than law making as an exercise of a constitutionally protected inherent power of self-government.

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