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Negotiations with Métis: What Courts Can Do to Help

Shin Imai *

I. INTRODUCTION

The recognition of constitutionally protected Métis rights in *R. v. Powley* 1 has opened up new matters for negotiations and new issues for litigation. This paper will explore how negotiation and litigation can work together to steer the parties toward resolutions which will form the basis for on-going relationships between Métis and the Crown.

In the past, some judgments have suggested that negotiation and litigation must exist in totally separate worlds. For example, in a dispute over logging of old-growth red cedar on land claimed by the Haida of the Haida Gwaii (Queen Charlotte Islands) the trial judge, Halfyard J. said,

> Of course, agreement is a voluntary thing. No one can force any two persons (let alone, two or more groups of persons) to agree about anything that is a subject of dispute between them. Nor should this court attempt to influence or supervise any negotiations the parties choose to engage in. But the Court should, and does, encourage negotiations. 2

This approach gives the Court no authority to take concrete steps to enforce negotiations.

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Some dispute resolution commentators have also drawn sharp distinctions between litigation and negotiation. In a Canadian book on public disputes, for example, Jean Poitras and Pierre Renaud draw a stark contrast between court “verdicts” and negotiated “solutions.” They say that “[r]uling, or rendering a ‘verdict’, connotes favouring one party over another; resolving a dispute means finding a solution that reconciles parties’ divergent interests.” Later, they reinforce this contrast by using the analogy of a parent and a child.

Imagine two children arguing. Their first reaction is to go running to their parents to have them decide who’s right. If the children are very young, the parents will solve the problem by imposing a solution, eg. “Let your brother play with your toy.”

Most parents would be rather surprised at this description of how they would react. Upon being confronted with two crying children, it is unlikely that a parent would do no more than make a snap judgement on which child should get the toy. Parents would be more likely to talk to the children to try to keep them from arguing. They might try different solutions such as partitioning the time that each child could play with the toy, or offering the children different toys.

Just as the idea that a parent would “impose a solution” is simplistic, so is the idea that courts do nothing more than “render a verdict.” Judges regularly encourage parties to narrow the issues in dispute both before and during the hearing. They attempt to establish rules which parties would find fair and which would reduce conflict in the future. In many cases, judges are engaged in the same dispute resolution project as negotiators and mediators although the process for reaching resolution is different. While the structure of litigation does not permit the judge to play the role of mediator or negotiator, this does not lead to the conclusion that courts should not “interfere” with negotiations.

In my view, there is a need to move away from placing negotiation and litigation in separate boxes and to move toward a more integrative approach.

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4 Id., at 22.
approach. The Powley case is a good illustration of why some type of change is necessary.

All four courts and 14 judges who heard the Powley case thought that more extensive negotiations should have taken place between the provincial Crown and the Métis. The Ontario Court of Appeal was particularly critical of the province’s failure to negotiate, but granted a stay at the request of the province saying:

A stay should facilitate consultation and negotiation between the government and the aboriginal community. Both the trial judge and the Superior Court judge urged the government and representatives of the Métis peoples to enter good faith negotiations with a view to resolving s. 35 claims. I endorse their suggestion. It is my hope that this judgment in favour of the respondents, together with the stay requested by the appellant, will together serve as an incentive to the parties to embark upon negotiations.

Immediately after the Court of Appeal released its decision, the Premier of Ontario at that time, Mike Harris, announced that there would be an appeal to the Supreme Court of Canada. Perhaps it was prudent to file an appeal to fortify the government’s position in ensuing negotiations or perhaps it put a wet blanket on the government’s “good faith.” In any case, it is now a decade after the charge was first laid, Steve Powley has sadly passed away and there is still no agreement on how to handle hunting charges. What is happening now, according to the web site of the Métis Nation of Ontario, is that hunters claiming to be Métis receive a letter from the Ministry of Natural Resources requesting extensive evidence of their rights. Part of the letter reads:

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5 For a more complete discussion on these points, see Shin Imai, “Sound Science, Careful Policy Analysis and On-going Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes” (2004) 41 Osgoode Hall L. J. 587, especially at 604-611.

6 Powley (O.C.A.), supra, note 1, at para. 166:

As I have already noted, efforts to negotiate an agreement have been sporadic at best. I do not accept that uncertainty about identifying those entitled to assert Métis rights can be accepted as a justification for denying the right. The appellant has led no evidence to show that it has made a serious effort to deal with the question of Métis rights. The basic position of the government seems to have been simply to deny that these rights exist, absent a decision from the courts to the contrary.

7 See Powley (O.C.A.), supra, note 1, at para. 177.
You will note that one key aspect of this test is the requirement for a Métis person to prove he or she has an ancestor who was part of an historic Métis community in existence at the time of effective European control. But having an ancestral connection and then just joining a Métis organization is not, in itself, sufficient.

A Métis person must also show, through objective evidence, a past and ongoing relationship to a contemporary Métis community that has continuity with the historic community. Further the Métis person must show that the activity currently being investigated was part of a practice or tradition that was of significant importance to both the historic and contemporary community and that the activity occurred in the traditional area associated with the community.8

Without commenting on whether, given the existing circumstances, the province has any other option but to hand out such a letter to those claiming Métis Aboriginal rights to hunt, it is clearly not a very efficient solution. Imagine being challenged in your local Loblaws to prove your right to buy food in Toronto — not based on documentation such as a citizenship card — but by producing “objective evidence” of your current residence, the history and residence of your parents and grandparents going back to the time that your ancestors first came to Canada including proof of what your ancestors were eating when they first arrived. In the case of Powley, it took four-and-a-half years to get the matter before trial, there were three expert witnesses and 12 days of hearings. The Métis hunters who receive the letter from the Ministry of Natural Resources are given one month to produce the “objective evidence” necessary in order to avoid charges.

It is obvious that there should be a better way, but this is easier said than done. As I will point out below in Part II “Issues of Community, Membership and Representation” even the most basic issues, such as the identification of the community, are complex. Negotiations can take into account some of the complexities, such as third party interests and policy choices. However, as I point out in Part III “Negotiations and Courts,” judges have an important role in ensuring that negotiations take place and in assessing different resolutions when agreements cannot be reached.

II. ISSUES OF COMMUNITY, MEMBERSHIP AND REPRESENTATION

Métis have aspirations similar to other Aboriginal peoples: recognition of their cultures, rights of self-government and jurisdiction over an adequate land base. In all of these areas, the Métis are clearly facing challenges that are greater than those of Indians and Inuit. The Métis have been called the “forgotten people” and Sharpe J.A. noted that:

[D]iscrimination and consequent shame had created a situation in which the local Métis people became “an invisible entity within the general population” and that it was only in the early 1970s “that individuals became more public as to their heritage.”

The provinces and the federal government have bickered for years over responsibility for the Métis and at the present time, only the government of Alberta has a statute recognizing Métis communities and setting aside land for Métis settlements. For the rest of Canada, negotiations with Métis, then must begin with three fundamental questions: what constitutes a Métis community? Who can belong to the community? Which bodies can represent that community in negotiations?

1. What is a Métis Community?

Who can claim to use the term “Métis” is the source of some controversy. At one end of the scale was the idea that any person who had Aboriginal heritage, but was not registered under the Indian Act as an Indian nor an Inuk, fit into the category of Métis. This view, that any “mixed” ancestry can be “Métis,” was rejected by the Royal Commission on Aboriginal Peoples and by the Supreme Court of Canada. On the other end of the scale, the most prominent group of “Métis” were those who created their own communities in the 18th and 19th century

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9 Powley (O.C.A.), supra, note 1, at para. 35.
11 See Powley (S.C.C.), supra, note 1, at para. 10:
   The term “Métis” in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.
in western Ontario and across the Prairies. Some of these communities were associated with Louis Riel and some eventually made their way through Saskatchewan and Alberta to parts of British Columbia and the Northwest Territories. The descendants of this group have an unambiguous claim to the word “Métis” and constitute what is now called the “Historic Métis Nation.”

There are also a number of communities of mixed ancestry which were not associated with the Métis of the West. For example, there is a group in Moose Factory, Ontario, that were “half-breeds” or the “Home Guard” that are descendants of Scottish fathers from the Hudson’s Bay post and Cree mothers. In Labrador, there are “livyers” who are descendants of European fathers and Innu or Inuk mothers.\textsuperscript{12}

The fact that an individual or a community identifies itself as “Métis” does not mean that the individual or community possesses Aboriginal or treaty rights recognized by the Constitution. What Powley did was set out guidelines for identifying such communities. According to the Supreme Court of Canada evidence is needed to show the following:

- demographic information on the number of people in the community;
- whether the community had a “distinctive collective identity” which was “separate from their Indian or Inuit and European forebears”;
- whether they shared a “common way of life”;
- whether they had shared customs and traditions;
- whether they “lived together in the same geographic area”;
- whether the group had “some degree of continuity and stability.”\textsuperscript{13}

The Royal Commission suggested that there are many communities which could fit under these guidelines across Canada.

\textsuperscript{12} While the western Métis had concerns with the use of the term “Métis” for these other groups, the Royal Commission on Aboriginal Peoples decided that it was not appropriate to try to set limits on the use of the term. Therefore the Royal Commission felt that it was appropriate for communities from Labrador to refer to themselves as the Labrador Métis Nation even though their identification with the term “Métis” was fairly recent. See Chartrand, supra, note 8, at 12-13 and Royal Commission on Aboriginal Peoples, “Métis Perspectives”, vol. 4, c. 5 (1996) (hereinafter “RCAP vol. 4”), at 203.

\textsuperscript{13} See Powley (S.C.C.), supra, note 1, at paras. 10, 12 and 23.
In negotiations, a major part of the discussion will centre around recognition of the historical community and its continuity into the present. Differences in interpretation of the evidence on such elements as “collective identity” or “common way of life” will be inevitable. There will also be issues about the territorial scope of those communities because both non-Aboriginal citizens and First Nations may be affected. A good negotiating process could help consolidate the evidence from both academic experts and Métis on these issues. Any common ground at this point would help give guidance to the courts and, as I explain below, help focus discussions on policy issues relating to the exercise of contemporary rights.

2. Individual Membership

Because there is no national registry system for Métis, there will be discussions on finding an acceptable definition. The Royal Commission on Aboriginal Peoples suggests that there be minimal criteria: self-identification and community acceptance according to internally developed criteria and procedures.¹⁴

Métis groups have developed several different membership criteria. For example, the Métis National Council defines its members as the following:

“Métis” means a person who self-identifies as Métis, is distinct from other Aboriginal peoples, is of Historic Métis Nation ancestry, and is accepted by the Métis Nation.¹⁵

This definition is fairly precise in that, in addition to self-identification, it requires some link with a historically identifiable community as well

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¹⁴ See RCAP vol. 4, supra, note 12, at 202:
Every person who
(a) identifies himself or herself as Métis and
(b) is accepted as such by the nation of Métis people with which that person wishes to be associated, on the basis of criteria and procedures determined by that nation be recognized as a member of that nation for purposes of nation-to-nation negotiations and as Métis for that purpose.

as acceptance by that community. On the other hand, the definition of the Ontario Métis and Aboriginal Association is quite wide.

Any person of Aboriginal descent within the meaning of s.35(2) of the Canada Act, 1982 but NOT a band member residing on a reserve...  

In negotiations, membership definitions such as these will be discussed, especially in relation to blood quantum. One proposal from Larry Chartrand is to create a citizenship code which will provide for membership by birth, adoption, marriage and naturalization. This proposal questions the advisability of using blood quantum to identify Métis. Chartrand objects to geneological connection being a necessary criterion. He cites Aboriginal academic John Borrows:

While I think restrictions on Aboriginal citizenship are necessary to maintain the social and political integrity of the group, I must admit that I am troubled by ideas of Aboriginal citizenship that may depend on blood or genealogy to support group membership. Scientifically, there is nothing about blood or descent alone that makes an Aboriginal person substantially different from any other person. While often not intended by those who advocate such criteria, exclusion from citizenship on the basis of blood or ancestry can lead to racism and more subtle forms of discrimination that destroy human dignity.

The Royal Commission on Aboriginal Peoples expressed concerns that it should not be open to Aboriginal nations to deny citizenship on an “arbitrary basis.” While the Royal Commission recognized that Aboriginal nations have the right to set their own citizenship criteria, they

16 See the Congress of Aboriginal Peoples web site at <http://www.abo-peoples.org/affiliates/omaa.html> (accessed May 1, 2004 ). For an example of how a judge has dealt with membership issues, see R. v. Chiasson, [2002] 2 C.N.L.R. 220, at 227-28, [2001] A.N.-B. No. 87 (Prov. Ct.) where the accused produced, in his defence, xeroxed membership cards from three organizations — two of which identified him as an “Indian” and one as a “local chief”. See also R. v. Castonguay, [2003] 1 C.N.L.R. 177 (N.B. Prov. Ct.) where an individual claimed Métis rights and membership in the community of Rising Sun Restigouche West which had come into being a few years earlier in 1999.

17 Chartrand, supra, note 10, at 46.

felt that a compulsory blood quantum requirement would never be justified.\textsuperscript{19}

On the other hand, the Crown would likely want to limit the numbers of Métis and would likely prefer to see a blood quantum rule in place. This is certainly the federal government’s position with respect to registered Indians. Although Indian Bands under the \textit{Indian Act} have the power to allow anyone to become a Band member, the Act does not allow all Band members to be registered as Indians. The federal Crown has retained the power to limit the number of registered Indians.\textsuperscript{20}

There are other issues to consider when implementing membership rules. If Métis communities are to be recognized and funded, can they count their members who are also members of Indian bands? How will the size of the Métis community affect access to resources by non-Aboriginal people or neighbouring First Nations? Who will verify membership, the Métis organization or the Crown? How can membership rules be changed?

3. Who Represents the Métis Communities?

In \textit{Powley}, the court determined that there was a Métis community around Sault Ste. Marie and that members of that community had Aboriginal hunting rights. This community in Sault Ste Marie is recognized as part of the Historic Métis Nation which covers a large territory stretching from western Ontario to parts of British Columbia and the Northwest Territories. What is the relation between the rights of the


\textit{Modern Aboriginal nations, like other nations in the world today, usually represent a mixture of genetic backgrounds. The Aboriginal identity lies in people=s collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race.}

\textsuperscript{20} For a general discussion on Band membership, see Shin Imai, \textit{Aboriginal Law Handbook} (2nd ed. 1999), c. 9 “Indian Act Registration, Band Membership and First Nation Citizenship.” For a critique of federal legislation, see Palmater, “\textit{R. v. Marshall and the Rights of Non-Status Indians}” (2000) 23 Dalhousie L.J. 102, at 104:

\textit{The right to look at one’s child and call him or her Scottish or Irish, Acadian, Cree or Mi’kmaq is a human cultural right that comes with the birth of the child and the internal workings of one’s culture. Who one’s child can culturally identify with should not be based on outdated, discriminatory legislation or even the most recent case law.}
community in Sault Ste. Marie and the rights of the Metis Nation as a whole? Judging from past decisions, it would appear unlikely that a court would find that because there were hunting rights in Sault Ste. Marie similar hunting rights exist in northern Saskatchewan. The Supreme Court has stressed several times over the past few years that Aboriginal rights are specific to community and location.\textsuperscript{21}

On the other hand, the federal Crown has favoured larger regional groupings when entering into land claims and self-government agreements. The Royal Commission on Aboriginal Peoples as well, has stated that powers of self-government can only be exercised by “nations” which are made up of several individual communities. The Royal Commission identifies the Métis Nation as a nation which could exercise such powers.\textsuperscript{22}

In negotiations with Métis from Sault Ste. Marie, then, a distinction may have to be drawn between rights and powers that sit primarily with the community and rights and powers which may be at a more general level with the Métis Nation as a whole. The discussions will be complicated by the fact that the Historic Métis Nation might cover five provinces and by the fact that the federal government continues to deny that it has legislative jurisdiction over Métis. Provinces, outside of Alberta, are also not eager to make commitments to Métis.\textsuperscript{23}


Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.

\textsuperscript{22} RCAP vol. 2 \textit{supra}, note 19, at 182:

The nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland.

It is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and

It constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, will operate from a defined territorial base.

\textsuperscript{23} Under s. 91(24) of the \textit{Constitution Act, 1867}, the federal government has legislative authority over “Indians and Lands reserved for the Indians”. The federal government has argued that this wording does not include Métis while the Métis and most of the provinces have taken the opposite view. See RCAP vol. 4, \textit{supra}, note 12, at 209-10.
The three examples discussed above show that the subject matter is not amenable to a straightforward application of known legal principles. Because such disparate issues as culture, government funding and third-party interests are deeply embedded in the problem, negotiations provide a better structure for developing policy options.

III. NEGOTIATIONS AND COURTS

The trial before Vaillancourt J. of the Provincial Court was relatively short, lasting about 12 days from April to May, 1998. However, the matter took over four-and-a-half years to come to court. The judge came to the conclusion that the Crown was primarily responsible for the delay and stated that he felt that there were grounds to dismiss for unreasonable delay.24 He also noted that:

.. a court is not the ideal forum to deal with political matters. The definition question would best be addressed through negotiation and consensus building rather than an adversarial process.25

On appeal to the Ontario Superior Court, the matter was heard by O’Neill J. He spent several pages reviewing the legal authority for establishing “processes, protocols and parameters” for negotiations or mediations.26 He went as far as to say that meaningful content could not be given to section 35(1) through litigation unless there were prior “negotiations or mediations entered into and conducted in good faith”.27

At the Ontario Court of Appeal, Sharpe J.A. upheld the acquittal but granted a stay, suggesting that “[a] stay should facilitate consultation and negotiation between the government and the aboriginal community.”28 He noted that there was a difference between the government’s role in designing a regulatory regime and the court’s role in assessing that scheme.

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25 Id., at para. 40.
27 Id., at para. 87.
The design of an appropriate regulatory regime must take a number of factors into account. In addition to conservation, the s. 35 rights of the Métis have to be reconciled with the rights of other aboriginal groups. While aboriginal food hunting rights must be given priority, the interests of recreational hunters and the tourism industry are also entitled to consideration. In short, s. 35 Métis rights are an important factor that the government of Ontario must respect in designing an appropriate regulatory regime, but they are not the only factor. The courts have an important role in assessing the balance struck by the government in the design of its regulatory scheme, but courts cannot design the regulatory scheme. 29

Finally, the Supreme Court of Canada looked toward a settlement of issues through a combination of “negotiation and judicial settlement”. 30 In these judgments we see that the judges have seen the need for an integrative approach to resolving this dispute. Both negotiation and adjudication are needed to resolve these issues (Supreme Court of Canada); there are different roles between the adjudicatory function of courts and the policy-making that can occur through negotiations (e.g., Sharpe J.A.); some “political” matters are better dealt with in negotiations than in the context of criminal proceedings (e.g., Vaillancourt J.); and the government has a duty to conduct negotiations before taking unilateral action (e.g., O’Neill, J.).

In my view, proper negotiations can help courts make better decisions. And proper adjudication can help create better negotiations.

1. What Can Negotiations Accomplish to Help Courts?

Even though negotiations are not always successful, they can accomplish three things better than courts.

First, negotiations can ensure that decisions are based on “sound science”: information which is developed, as much as possible, on a collaborative sharing of expertise. This is not to say that there will not be irreconcilable differences in the perspectives of the parties. However, unlike litigation where the framework is adversarial, the collaborative nature of negotiation should help moderate rather than exaggerate these differences. This collaboration would be helpful for determining such

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29 Id., at para. 175.
matters as the historical existence of the Métis community and its continuity into the present. Here, information from experts as well as oral history and contemporary social relations could be canvassed in order to clarify areas of agreement and areas of disagreement.

Second, negotiations can ensure that there are carefully considered policy choices about such matters as the geographical extent of communities, blood quantum rules on membership and representation at the negotiation table. To address these issues, negotiators can develop mechanisms to take into consideration the concerns of other parties (through side table discussions, for example), come up with criteria for weighing different policy choices and create resolutions which satisfy a wide range of interests.

Third, the parties will be in continuous discussions into the future and it would be important to establish a pattern of dealing which could, hopefully more often than not, result in collaborative agreements which avoid contested court proceedings.

The first two objectives — sound science and careful policy analysis — can produce very important information for the courts. As Sharpe J.A. noted, courts are better equipped to assess, rather than develop, regulatory schemes which must balance a number of competing interests. Therefore, even if the negotiations do not result in an agreement on the appropriate regulatory scheme, at best, the courts will have the benefit of being able to look at a set of proposals that attempted to balance the disparate concerns. At worst, the courts will be in no worse position than they are now when the parties appear without having done any preliminary work.

The case of Mitchell v. Minister of National Revenue\(^3^1\) illustrates the dangers of reaching conclusions about contemporary problems without information available from a bona fide attempt to develop a comprehensive scheme to address those problems. In the Mitchell case, the Mohawks of Akwesasne had claimed that they had a right to cross the border without paying tax as long as it was small scale trade with other First Nations in Ontario and Quebec. Two lower courts found that the

Mohawks had such an Aboriginal right. The Supreme Court of Canada did not agree.

Chief Justice McLachlin found that there was not enough historical evidence to justify finding the existence of an Aboriginal right to cross the border duty free. While the decision was purportedly based on an evaluation of the historical evidence, it is clear that the judges had more on their mind than history. For example, McLachlin C.J. criticized the Mohawks for attempting to limit their trading partners to First Nations in Ontario and Quebec, saying,

... it is difficult to imagine how limitations on trading partners would operate in practice. If Chief Mitchell trades goods to First Nations in Ontario and Quebec, there is nothing to prevent them from trading the goods with anyone else in Canada, aboriginal or not. Thus, the limitations placed on the trading right by Chief Mitchell and the courts below artificially narrow the claimed right and would, at any rate, prove illusory in practice.\textsuperscript{32}

This is a valid concern. However, it is not a concern related directly to the sufficiency of evidence of trade in pre-contact Mohawk society. Rather, it is a concern with how an Aboriginal right would be implemented in a contemporary context. The fact that there is a possibility that duty-free goods could be resold illegally is no different than the problems caused by non-Aboriginal Canadians re-selling goods brought across the border under their statutory exemption. Yet the mere possibility of re-sale has not prevented the government from establishing the duty-free exemption for non-Aboriginal Canadians.

In Mitchell, the Court is heavily influenced by what they assumed would be the contemporary consequences of allowing duty-free border crossings without having the information necessary in order to make an informed judgment about whether their concerns could be somehow accommodated. For example, it appears that one of the perceived problems was with the \textit{volume} of goods that each Mohawk person could bring over the border. If that specific problem had been expressly articulated in prior negotiations, the parties may have been better able to address the issue before the Court and could perhaps have demonstrated that possible solutions, such as a quota system, were available. If con-

\textsuperscript{32} Mitchell, \textit{id.}, at para. 20.
sidered in prior negotiations, the Court could have been assisted by a discussion of other specific proposals to address a number issues including the following:

(i) should there be restrictions on the type or volume of goods to be traded?
(ii) if the Mohawks were to engage in the small-scale trade contemplated, what controls could be put into place in order to monitor that trade? For example, would existing methods for controlling the sale of tax-free gasoline on reserve to reserve members be adequate?
(iii) can concerns about smuggling be addressed or would some other measures have to be taken to protect against expansion of smuggling?

It would have helped the courts to have the parties develop schemes that would attempt to accommodate contemporary interests. Whether or not the court would accept one or any of these schemes in the end, the court would be in the position of assessing the scheme not trying to develop the scheme.

2. What Can Courts Do to Ensure that Negotiations Take Place and Meet Their Objectives?

In my view, the courts have three broad roles in relation to negotiations. First, the courts should create an appropriate framework and rights parameters which would encourage parties to negotiate within a framework of resolvable tensions. Second, the courts should attempt to foster a dispute resolution process which conforms to dispute system design principles. For example, the parties should be encouraged to attempt low cost discussions and negotiations before going to higher cost more formal court proceedings. Third, courts should ensure the integrity of the negotiation process by ensuring, for example, that parties negotiate in good faith.

I would like to focus on the first point — developing the framework and rights parameters for negotiation. The courts must ensure first that negotiations take place and second that the content of the negotiation is such that there are discussions of policy.
(a) Ensuring That Negotiations Take Place

One way to ensure negotiations take place would be to apply the requirement for consultation broadly. By doing so, the courts can create a framework where parties are expected to discuss ways of resolving matters in dispute. The Crown has argued that it has no duty to consult unless an Aboriginal right has been established in a court proceeding. There is support for this proposition in two earlier Ontario Court of Appeal decisions. In Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Ltd., the Court of Appeal held that it would not require the Crown to consult with Aboriginal peoples on the creation of a new municipality until the Aboriginal or treaty rights in question had been established in judicial proceedings. In Perry v. Ontario the Court stated that “there is no positive duty on the government to negotiate with Aboriginal communities for the purpose of reaching agreement upon a set of game and fish enforcement measures.” These cases do not make sense from a dispute resolution perspective, for the court is requiring a formal adversarial adjudication that could take 15 years before requiring a more informal, less adversarial consultation process. All the dispute resolution literature indicates that things should go the other way — that is, parties should begin from informal, less adversarial mechanisms and migrate to formal, more adversarial proceedings.

The British Columbia Court of Appeal has adopted an approach that is much more consistent with dispute resolution theory in Haida Nation v. British Columbia (Minister of Forests). In that case, the Court of Appeal overturned the trial decision of Halfyard J. which suggested that

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35 For the seminal text, see Ury, Brett and Goldberg, Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict (1988).

... a legally enforceable duty to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Haida people, on the one hand, and the short term and long term objectives of the Crown and Weyerhaeuser to manage [the tree farm license] in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand.
courts could only enforce consultation requirements after a judicial decision on the existence of an Aboriginal right. The decision of the British Columbia Court of Appeal requires the province to seek “workable accommodations” with Aboriginal people even though a court may not yet have confirmed the existence or scope of Aboriginal or treaty rights.

Negotiation and consultation early in the process is advantageous for two reasons. First in the process of exploring appropriate accommodations, the parties may be able to resolve matters without invoking more confrontational or more expensive procedures. Second, even if there is no agreement, the parties will be more likely to have developed thoughtful proposals which will assist the court to make wiser, better informed decisions.

In the context of the Métis at this point in time, when there is an assertion that a community exists and that it has rights, Crown should always be required to take the assertion into account. This does not mean that there needs to be elaborate consultation processes in all cases. The Crown can exercise some judgment, as “the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for aboriginal title and aboriginal rights.”37 However, it should not be an option for the Crown to do nothing. As Sharpe J.A. said of the Ontario Crown in Powley, “[t]he government cannot simply sit on its hand and then defend its inaction because the nature of the right or the identity of the bearers of the right is uncertain.”38

37 Id., at para. 51. See also Lawrence and Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000) Can. Bar Rev. 252, at 267. They propose that the courts utilize a calibrated approach to consultation:

... the content of the duty varies from context to context, depending on the nature and extent of the First Nation’s interests and the severity of the Crown action in question. In some circumstances, where the adverse affect of the action in question appears to be minimal, the duty requires the Crown to do little more than what lower courts already require of the Crown, namely, that it provide notice, gather and share relevant information, and act in a procedurally fair manner to the First Nation. In most cases, however, the duty imposes heightened consultation requirements on the Crown, including a requirement that the Crown attempt in good faith to negotiate an agreement that identifies the respective rights of the parties to the territory in question.

Let us take a claim from the Moose Factory area where there was a well-established “half-breed” population. In the 1920s the federal government even considered setting aside land for this group because they had been forced to move off a newly-created Indian reserve. What should the Court expect from the parties before having to adjudicate a case involving this individual? I would think that the parties should have entered into quite extensive negotiations on issues of community, membership and representation. Whether or not there was agreement, the Court should have the benefit of attempts to find accommodation, so that the decision could potentially affect a large number of people. Otherwise, we are back to the letter distributed by provincial officials requiring each individual to produce proof of their ancestry and the history of their community, leaving the courts to make piecemeal decisions while lamenting the lack of negotiations.

(b) Ensure That Negotiations Address Policy Issues

Since courts want negotiations to address wider policy or “political” issues of implementation of the rights, courts should make decisions which facilitate such discussions.

This brings us back to the *Mitchell* case where, I believe, the Supreme Court of Canada made a decision which would not facilitate policy discussions. Chief Justice McLachlin relied on historical evidence presented in the trial court about a situation which existed over 400 years ago. She conceded that there was ample evidence that “trade was a central, distinguishing feature of the Iroquois in general and the Mohawks in particular.” However, she found that the evidence at trial only supported east-west trade in what is now New York State. Disagreeing with the two courts below, she found that there was insufficient evidence of a Mohawk north-south trade across the St. Lawrence.

When attempting to recreate history from pre-contact times, the paucity of evidence is not the only problem. The very attempt to fix a historical “fact” with precision is fraught with difficulties because the interpretation of history is itself so indeterminate. The significance of historical events can change over time and is affected by the contemporary lens through which those events are interpreted. The indicia of

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societal importance today may not apply to societal importance in pre-contact Aboriginal society.  

This is not to say that history is irrelevant. Certainly, the way that Aboriginal rights have developed, historical reference is necessary. However, from a dispute resolution perspective, a process which relies exclusively on a reading of history to determine the resolution of a contemporary dispute over tax-free border crossing, would not be conducive to reaching negotiated agreements on that issue. This is because future disputants would prepare for negotiations by pouring resources into research to establish the veracity of a particular version of history. Both parties would focus on asserting competing claims on the correctness of their “position” and negotiations could become mired in the exchange of expert opinions on history. There would be no point in resolving “political” issues relating to trade if the Court was not going to assess the practicality of potential resolutions.

Similarly, in the case of the Métis, if too high a bar is placed on historical proof, the negotiations will not produce the important policy information needed by courts. Rather, once a court was satisfied that there was an existing contemporary Métis community, it should focus on an evaluation of proposed resolutions developed through negotiations. In this way, courts can avoid the situation encountered in Mitchell where the Court relied on an evaluation of historical evidence in order to address fears of contemporary tax avoidance.

(c) What Powers Do Courts Have to Ensure That Negotiations Take Place?

In this paper, I have not addressed the different ways that courts could ensure that negotiations take place in different proceedings. There are, of course, limitations on the orders that courts could make depending on the jurisdiction of the court and the statutory framework within which the matter arises. However, it seems to me that it is not improper to take into account the effect of a particular decision on negotiations. In

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41 Fisher and Ury, Getting to Yes: Negotiating Agreement Without Giving In (1981), at 53, “You satisfy your interests better if you talk about where you would like to go, rather than where you come from.”
fact, as we have seen in *Powley*, courts have been very explicit about addressing negotiation issues even in a quasi-criminal proceeding.

This approach is consistent with the Supreme Court of Canada’s decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*. In that case, the trial judge found that the province had breached the French language rights in section 23 of the *Charter of Rights and Freedoms*. He ordered the Province of Nova Scotia to establish French-language schools and required the province to report back to the judge regularly on the progress of the projects. The province objected to the requirement to report, claiming, among other things, that it was an improper extension of the court’s authority. The majority of the Supreme Court of Canada found that the trial judge had the authority to make the order under section 24(1) of the Charter.

*Doucet-Boudreau* is a Charter case dealing with the interpretation of section 23. Aboriginal rights under section 35 of the *Constitution Act, 1982* are not included in the *Charter of Rights and Freedoms* and section 24(1) does not explicitly apply to section 35. However, the courts have applied some of the principles of Charter analysis to the interpretation of section 35. For example, the *Sparrow* test which allows the federal government to justify infringements of section 35 rights is analogous to the operation of section 1 which can justify the infringement of Charter rights.

Similarly, while section 24(1) does not apply directly to section 35, some of the principles behind the use of section 24(1) could be applicable to determining remedies to vindicate rights under section 35(1).

In *Doucet-Boudreau* the Supreme Court outlines five guidelines for the application of remedial powers under section 24(1). Particularly relevant to the issue of negotiation is the third guideline where the Court says,

> [A]n appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be

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43 The *Charter of Rights and Freedoms* is Part I of the *Constitution Act, 1982* while section 35(1) is found in Part II, “Rights of the Aboriginal Peoples of Canada”. Section 35(1) reads:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited.\textsuperscript{45}

This guideline echoes Sharpe J.A.’s observation that courts have the expertise to assess a regulatory scheme but not to develop such a scheme. It would seem, then, that a court order which has the effect of requiring governments to negotiate to develop regulatory schemes, which the courts can then assess if necessary, is entirely in keeping with the separation of powers mandated by the Supreme Court.

Similarly, court orders which retained some supervisory functions for judges over the negotiations would be appropriate. In \textit{Doucet-Boudreau}, the Court recognized that it was appropriate for the trial judge to create such a role for himself.

The order in this case was in no way inconsistent with the judicial function. There was never any suggestion in this case that the court would, for example, improperly take over the detailed management and co-ordination of the construction projects. Hearing evidence and supervising cross-examinations on progress reports about the construction of schools are not beyond the normal capacities of courts.\textsuperscript{46}

Not every court in every proceeding would be free to fashion this type of remedy. However, when dealing with Aboriginal rights under section 35(1), courts might do well to be guided by the principle outlined in \textit{Doucet-Boudreau} for the evolution of remedies under section 24(1) of the Charter.

That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.\textsuperscript{47}

\textsuperscript{45} \textit{Doucet-Boudreau}, supra, note 42, at para. 57.

\textsuperscript{46} \textit{Id.}, at para. 74.

\textsuperscript{47} \textit{Id.}, at para. 89.
IV. FINAL WORDS

In the coming years, we will begin to see agreements which will implement the Powley decision. In the meantime, if the past is any indication, there will be a lengthy period of transition with difficult decisions that must be made by both the Métis and the Crown. The courts will play an important role in assisting the parties through this process by establishing a negotiation framework which would be based on solid information, creative policy choices and a collaborative approach. Hopefully this will set the stage for a more positive relationship between the Crown and the Métis in the future.