Creating Disincentives to Negotiate: Mitchell v. M.N.R.'s Potential Effect on Dispute Resolution

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CREATING DISINCENTIVES TO NEGOTIATE:
M ITCHELL V. M.N.R.'S POTENTIAL EFFECT ON DISPUTE RESOLUTION

Shin Imai*

The Supreme Court of Canada has often encouraged the Crown and Aboriginal parties to find negotiated solutions to their disputes. The complex social, political, economic and legal interests which are embedded in many sectors of the Canadian population are not best resolved in the context of legal proceedings. Courts should, however, do more than lament the lack of negotiations—they should make decisions that create incentives for high quality, effective dispute resolution processes. This article describes the framework for negotiation set out in R. v. Sparrow (on Aboriginal rights to fish), Delgamuukw v. British Columbia (on Aboriginal title to lands) and Marshall v. Canada (on treaty rights to fish). Those cases would provide incentives for the parties to negotiate. By contrast, in the case of Mitchell v. M.N.R. (exemption from duty on border crossing), the two judgments of the Supreme Court turn on the interpretation of history and the incompatibility with Canadian sovereignty. While it is not inappropriate to take those factors into account, the Court sets those up as threshold issues that need to be resolved before the Court would consider how to balance Aboriginal rights with Crown infringements. Unfortunately, the approach used in Mitchell will provide disincentives to negotiate workable accommodations for contemporary problems.

La Cour Suprême du Canada a souvent incité la Couronne et les parties autochtones à régler leurs différends par voie de négociation. Vu la complexité des questions sociales, politiques, économiques et juridiques ainsi que les intérêts entrelacés de nombreux secteurs de la population canadienne, ce n’est pas dans le contexte d’instances judiciaires que l’on peut le mieux les régler. Toutefois, les tribunaux devraient faire plus que simplement inciter – ils devraient faire des décisions qui motivent des négociations efficaces de haute qualité. Cet article décrit l’approche aux négociations proposée dans R. c. Sparrow, Delgamuukw c. La Colombie britannique et R. c. Marshall et démontre la façon dont ces causes motiveraient les parties à négocier.

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Par contraste, la cause Mitchell c. M.R.N. concentre exclusivement sur l'interprétation de l'histoire et la compatibilité avec la souveraineté canadienne. Quoiqu'il ne soit pas inopportun de tenir compte de ces facteurs, le Tribunal en fait des points à régler au départ avant que le Tribunal ne considère comment équilibrer les droits autochtones et les violations de la Couronne. Malheureusement, l'approche utilisée en l'espèce découragera les négociations visant à trouver des accommodements pratiques pour des problèmes contemporains.

The initial trial in Delgamuukw v. British Columbia lasted almost three years, involved 374 hearing days, 35,000 pages of transcripts, 50,000 pages of exhibits and resulted in a judgment of more than 400 pages. It was eleven years between the beginning of the trial and the Supreme Court of Canada decision in 1998, which sent the case back to be retried. As of November 2003, the issues being litigated between the parties remain unresolved.

In his decision in Delgamuukw, Lamer C.J. stated:

... this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in Sparrow, [citations omitted] s.35(1) "provides a solid constitutional base upon which subsequent negotiations can take place." Those negotiations should also include other Aboriginal nations, which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in Van der Peet, [citations omitted], to be a basic purpose of s.35(1) - "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." Let us face it, we are all here to stay. ¹

This passage expresses an aspiration for a more collaborative relationship between Aboriginal peoples and the Crown, one that involves "good faith" and "give and take." It is an aspiration that has been voiced by judges from all levels of court and for good reason.² Conflicts involving Aboriginal peoples are so


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

² For a recent case in relation to the rights of Métis, see R. v. Powley (2001), 53 O.R. (3d) 35 (Ont. C.A),which found that a member of the Métis in Sault Ste. Marie Ontario had an Aboriginal right to hunt for food. Sharpe, J.A. (McMurtry C.J.O., Abella, J.A. concurring) was critical of the province's historical failure to negotiate with the Métis. He states, at para. 166:
complex, there are so many parties affected, and the potential consequences are
so great, it is clearly preferable to have matters resolved in a negotiation process
that would address a wide spectrum of public and private interests.\(^3\)

While judicial support for negotiated settlements is very strong, court deci-
sions have not always helped to create appropriate conditions for productive
negotiations. Some decisions have had the effect of discouraging the parties
from returning to the negotiating table or have encouraged negotiations over
the wrong issues.

This paper begins with a discussion of how the development of the substan-
tive law on Aboriginal and treaty rights makes negotiations necessary for resolv-
ing such disputes. It will then review the role that the courts can play in
providing the conditions necessary for productive negotiations.\(^4\) The paper con-

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3 The Royal Commission on Aboriginal Peoples has recommended the establishment of a dispute
resolution process involving specialized tribunals and commissions which would promote nego-
tiation and mediation for disputes involving Aboriginal land and treaties: Canada, Report of the
Royal Commission on Aboriginal Peoples: Restructuring the Relationship (Ottawa: Canada Commu-
nications Group, 1996) at 591-613.

4 I develop the relationship between the courts and negotiation more fully in “Sound Science,
Careful Policy Analysis and On-going Relationships: Integrating Litigation and Negotiation in
Aboriginal Lands and Resources Disputes,” (2003) 41 Osgoode Hall L. J. (forthcoming). In
that article, I describe four roles for the courts: establishing a negotiation framework and rights
parameters; determining the relationship between negotiation and adjudication utilizing prin-
ciples of dispute system design; ensuring the integrity of the negotiation process; and providing
limited review of completed agreements. In the present article, I focus on the first of the four
roles: establishing a framework and rights parameters for negotiations. In this paper, I do not
focus on legitimate criticisms of the substance of the Court’s decisions. One of the troublesome
aspects is the lack of sufficient analysis for the assumption of Crown sovereignty which leads to
problems in Mitchell discussed infra at notes 38-40 and accompanying text. For a critique of
the bald assumption of Crown sovereignty, see J. Borrows, “Sovereignty’s Alchemy: An Analysis
cludes with a discussion of *Mitchell v. M.N.R.*\(^5\), which could work against the negotiating framework developed in *R. v. Sparrow*\(^6\) *Delgamuukw v. British Columbia*\(^7\) and *R. v. Marshall*\(^8\).

I. THE LIMITATIONS OF COURT DECISIONS

Courts have traditionally articulated substantive rights and obligations by applying general rules to specific disputes. As Owen Fiss has said, the function of the courts is to "explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them..."\(^9\) In the context of the law in relation to Aboriginal people, the Supreme Court of Canada has attempted to approach section 35(1) with sympathy and vision, developing creative approaches to limiting Crown authority, interpreting treaty rights, and paving the way for new constitutional arrangements. However, the nature of these disputes and the way that the law has developed make it difficult to formulate general rules that will provide specific guidance in future cases.

The histories of the Aboriginal peoples and the Crown governments involved vary from region to region and the resolution of disputes often require delicate balancing of competing local interests. Given the large number of variables in each case, it is understandable that courts go to some lengths to restrict the scope of their decisions to the particular facts under consideration, fearing that judgments which are pitched at too general a level may have unintended consequences.

As a result, before a court can address whether a particular activity in dispute is constitutionally protected as an Aboriginal or treaty right, the court must look carefully at the historical and contemporary situation to determine whether there is a protected right at all. In this respect, the court's task is different than, let us say, a proceeding involving speeding on a highway. In a speeding case, the court would simply determine the factual issue – what was the speed of the motor vehicle? The legal standard – the speed limit – would not be in doubt. In the area of Aboriginal and treaty rights, however, the legal standard – the scope of the Aboriginal or treaty right – must be determined anew with each new set of factual circumstances. In other words, the equivalent of the "speed limit" can change from case to case.

The problem is illustrated in the Supreme Court of Canada's decision in *R. v. Van der Peet*\(^10\). Dorothy Van der Peet was charged for selling ten salmon without having a commercial fishing licence. In her defence, she claimed that she did not require a licence because she had an Aboriginal right to sell the fish. The


\(^7\) *Supra* note 1.


Court disagreed, finding that there was not enough historical evidence from pre-contact times to establish the existence of an Aboriginal right to sell fish. In coming to this conclusion, Lamer C.J. stated,

To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the tradition, custom or practice being relied upon to establish the right.\(^{11}\)

In order to consider all of these factors, an intimidating number of permutations need to be taken into account, with the result that the nature of Aboriginal or treaty rights can vary considerably from case to case. For example, an Aboriginal "right to fish" may be for food only (R. v. Sparrow\(^ {12}\)), for commercial purposes (R. v. Gladstone\(^ {13}\)), or for "moderate livelihood" (R. v. Jones\(^ {14}\)).

The difficulty in articulating a clear and precise definition of an Aboriginal or treaty right — one that could be applied to other fact situations — is compounded by the second feature of litigation in this area. Even after an Aboriginal or treaty right is established, the Crown has an opportunity to introduce evidence to justify infringements of that right. The power to infringe is set out in Sparrow. In that case, a member of the Musqueam First Nation was charged under the Fisheries Act\(^ {15}\) for fishing with a net that was longer than that authorized in the regulations. He fought the charge on the basis that the legislation interfered with his Aboriginal right to fish for food in his traditional territory. The Supreme Court of Canada recognized that there was an Aboriginal right to fish for food and held that legislation which interfered with that right could be struck down. However, the Court also held that the Crown could justify infringing the Aboriginal right through legislation by satisfying a two stage test.

In the \textit{first} stage, the Crown is required to establish that there is a "compelling and substantial" objective for the legislation, such as the need to conserve the resource. In the \textit{second} stage, the Crown is required to show that it is acting honourably in a way that is consistent with the Crown's fiduciary relationship with Aboriginal peoples. Among the questions to ask at this second stage are the following:

\begin{itemize}
\item \textit{Ibid.} at para. 53. See also R. v. Pamajewon, [1996] 2 S.C.R. 821 at para.27:
\begin{quote}
The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands". To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. 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.
\end{quote}
\item \textit{Sparrow}, supra note 6.
\end{itemize}
... whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.16

If the Crown fails to satisfy the Court on any of these matters, the legislation would not be upheld. For example, a court could conduct an *ex post facto* review of the adequacy of consultation, which occurred *before* the challenged Crown decision was made. Even if Crown legislation were found to be justified on all other grounds, a failure to consult *prior* to the Crown's decision may nullify the validity of an action taken pursuant to the legislation.17

What complicates matters in this justification stage is the fact that the basis for justification can change from case to case. As the Supreme Court of Canada pointed out in *Marshall II*, in relation to a commercial fishing right of Mi'kmaq, justification for infringing an Aboriginal or treaty right in one set of circumstances will not necessarily apply in a different set of circumstances:

The factual context, as this case shows, is of great importance, and the merits of the government's justification may vary from resource to resource, species to species, community to community and time to time.18

To return to the analogy of the speed limit, the process for deciding on the scope of an Aboriginal or treaty right might be compared to determining the applicable speed limit depending on the colour of the vehicle, how important the vehicle was to the passengers, how long the vehicle had been driven on that stretch of the highway, who else was using the road and whether the speed limit was discussed with all parties before opening the highway. There are so many variables that a decision on the speed limit in one set of circumstances can always be arguably different in another set of circumstances.

What courts can do to counter this problem is to establish a framework, which would encourage parties to negotiate in a broad spectrum of cases. The existence of such a framework could assist in resolving a larger number of future disputes than would be possible from court decisions on substantive rights alone. Elements of such a framework are found in *Sparrow*19, *Delgamuukw*20 and the two *Marshall* decisions21.

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16 *Sparrow*, supra, note 6 at 1119.
17 See *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, [1999] 4 C.N.L.R.1 (C.A.), at para. 167. Finch J.A., found that the proposed logging would infringe hunting and fishing rights guaranteed by the treaty. He found that the infringement was justified, but that the failure of the Crown to consult adequately was fatal.
18 *Marshall II*, supra note 8 at para. 22.
19 *Sparrow*, supra note 6.
20 *Delgamuukw*, supra note 1.
21 *Sparrow* note 8.
II. SPARROW, DELGAMUUKW, AND MARSHALL: THE NEGOTIATION FRAMEWORK

The success of a negotiation process depends, in part, on what the parties perceive as the critical issues that need to be resolved. Court decisions can influence the content of the negotiations by identifying the key issues and determining the parameters within which an agreement must be achieved if litigation is to be avoided. For example, as I discuss below, a court’s identification of the key factors in deciding a dispute over the payment of custom duties will influence the content of future negotiations between the Crown and First Nations on other issues. This relationship between judicial determinations and negotiations can enhance the overall process for resolving Aboriginal and treaty rights disputes and the likelihood of negotiation success if both the parties and the courts develop an appreciation of how the two processes can be used creatively to complement each other.22

A. Interest Based Negotiations: Focus on Interests, Not Positions

Modern day negotiation practice has drifted away from old-style bargaining. In the old system, the parties approached the table with inflated demands and worked for hard fought trade-offs. A successful resolution was said to be one where both parties felt equally unhappy. With the movement toward a new way of resolving conflicts, crystallized in the publication of Getting to Yes,23 the purpose of dispute resolution has become the crafting of “win-win” solutions. The objective is not to crush the other party – the objective is to identify what each party wants out of the negotiation (their “interests”) and to try to accommodate the interests of both parties. In this approach, parties are discouraged from digging into inflexible “positions” which they defend against the attacks of their adversaries.

To apply this approach to negotiations between the Crown and Aboriginal peoples is easier said than done. The parties typically arrive with little common ground. The Crown, often alarmed at the “unreasonable” demands of the First Nation, approaches the table thinking it must “lower expectations.” The Aboriginal parties, frustrated by the “colonial mentality” of the Crown, feel that they must “educate” the Crown’s representatives. In addition, whether negotiations conducted using the Fisher and Ury approach is appropriate in Aboriginal

22 In this paper, I am not addressing the need for courts themselves to engage in more dispute resolution, through pre-hearings and so on. In my view, courts continue to have an important function in making decisions. I am addressing how this decision-making function is exercised by the judiciary, not how courts can avoid making decisions by making access to hearings more difficult.

As well, I should make clear that in this paper, I do not focus on the assessment of the substance of some of the Court’s reasons. For example, in my view, the Court’s failure to question the basis for Crown sovereignty over Aboriginal people leads to problems in Mitchell discussed infra at notes 43–45 and accompanying text. For a critique of the bald assumption of Crown sovereignty, see J. Borrows, “Sovereignty’s Alchemy: An Analysis of Delgamuukw v. British Columbia”, (1999) 37 Osgoode Hall L. J. 537.

disputes is itself contested. Mark Doxtator, an Aboriginal lawyer, at that time with the Indian Claims Commission, argued that “principled” negotiations and mediation are based on principles, which are not those of Aboriginal society. In his view, Aboriginal people value on-going understandings more than static agreements.

... it is important to understand that in contrast to the Western system of dispute resolution, which attempts to arrive at an “agreement,” the Aboriginal approach strives to achieve an “understanding.”

While the courts cannot resolve all of the challenges to conducting effective negotiations, they can help increase the likelihood of success in two ways. One way is to establish objective standards and precedents to guide the parties. However, as pointed out above, there are limits to the extent that aggressive law-making can remedy the problems at negotiating tables regarding Aboriginal issues. Courts have found it very difficult to make decisions, which are broad enough to apply appropriately to situations outside of the particular facts of the case.

A second way that courts could create the conditions for fruitful negotiations is by ensuring that there are incentives to engage in negotiations, which focus on arriving at workable accommodations rather than focussing on inflexible positions. This objective can be met by creating the expectation that the Crown would routinely bring evidence of justification before the courts.

B. The requirement for justifying infringements of Aboriginal and treaty rights

The Supreme Court of Canada established the broad outlines of a framework for negotiations in Sparrow. Part I of this paper described the Sparrow test, which provided that once a practice was found to be an Aboriginal right, it could only be infringed if the Crown could justify the infringement. Part of the justification involved prior consultation, which would enhance the possibility of negotiations before litigation.

In Delgamuukw, the Court followed the Sparrow framework. First, it laid out broad parameters for the incidents of Aboriginal title, finding that such title

24 UVic Institute for Dispute Resolution, Making Peace and Sharing Power: A National Gathering on Aboriginal Peoples and Dispute Resolution (Victoria: University of Victoria, 1997) at 170.
25 Ibid. at 168.

While the ambiguity of the decision and the ensuing legal uncertainty may encourage parties to negotiate, the vagueness of the decision does not assist parties once they are at the negotiating table. Since the court’s principles are set out in the abstract, with little guidance as to how they might apply in a specific fact situation, parties with different interests and perspectives are free to interpret the decision as they wish.

27 Sparrow, supra note 6.
encompassed "exclusive use" of the land for a variety of purposes.\textsuperscript{28} The Court also provided a broad basis for Crown infringements of Aboriginal title, including "the building of infrastructure and the settlement of foreign populations."\textsuperscript{29} The decision is structured in a way that makes it difficult for either the Crown or the First Nation to avoid taking into account the interests of the other party. If a First Nation simply focuses on the existence of Aboriginal title and ignores possible grounds for Crown infringements, the First Nation would risk having a court find that broad infringements by the Crown were justified. If the Crown simply denies the existence of Aboriginal title and ignores the necessity of justifying the infringement, the Crown would risk having a court recognize the existence of Aboriginal title. If that were to happen the Crown would not have any justified legislation in place to limit the exercise of the Aboriginal right.\textsuperscript{30} In fact, the Crown found itself in this position after failing to provide evidence of justification for infringement in the \textit{Marshall}\textsuperscript{31} case.

Donald Marshall was charged with selling $787.10 worth of eels without having a commercial fishing licence. Marshall claimed that his right to sell the fish was protected by a mid-eighteenth century peace treaty between the Mi'kmaq and the British. Although the written version of the treaty did not

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\textsuperscript{28} \textit{Delgamuukw, supra} note 1 at para. 117:  
... Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures.
\end{flushleft}

\begin{flushleft}
\textsuperscript{29} Ibid. at para. 165:  
In my opinion, the development of agriculture, forestry, mining, and hydro-electric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of Aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.
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\textsuperscript{30} I should note that, while the case does create a balance, in my view, the breadth of the grounds for infringing the right tips the balance too far in favour of the Crown. See S. Imai, "Treaty Lands and Crown Obligations: The 'Tracts Taken Up' Provision" (2001) 27 Queen's L.J. 1 at 17–20.

The Court clearly sees the results of these negotiations encompassing not only traditional priorities but also modern uses of the land, citing oil extraction as an example of such a case. See \textit{Delgamuukw, supra} note 1 at para.117:

... I have arrived at the conclusion that the content of Aboriginal title can be summarized by two propositions: first, that Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.
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\textsuperscript{31} \textit{Marshall I, supra} note 8.
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specifically mention a right to fish, there was documentary evidence that the negotiations leading to the treaty had considered the economic viability of the Mi'kmaq economy. Binnie J., writing for the majority of the Supreme Court of Canada, interpreted the treaty in its historical context and held that its significance in the context of modern day Nova Scotia was to recognize a right for Marshall to sell the eels for a “moderate livelihood.”32 Following the Sparrow test, the Court turned to the issue of justification for the licence requirement. The Crown, however, had not negotiated and did not submit any arguments on justification.33 The Court overturned the conviction and entered an acquittal.

Following the decision, Aboriginal people in the Maritimes began to assert rights in forestry and lobster fishing. The violence, which followed, was very troubling. However, I believe that in order to encourage negotiations, which would prevent violence in the long run, the Court was required to make a hard decision in the specific case before it. As a result of that decision, the Crown was forced to engage in extensive negotiations. While some press reports leave the impression that the decision caused chaos, in fact, agreements were concluded with the vast majority of First Nations in the region.34

At a subsequent hearing in this matter,35 the Court was urged to find that it would be too difficult to have trials that dealt with both the existence of a treaty right and the issue of justification. Counsel argued that the Crown should be given the opportunity to introduce evidence of justification in a separate proceeding after the existence of the Aboriginal right had been confirmed by the Court. The Supreme Court of Canada rejected this submission. In my view, this was the correct conclusion. If the Crown had attempted to accommodate the interests of the Mi'kmaq before the litigation (as is required under the Sparrow test), the evidence of justification would have been easy to present to the Court. Even if negotiations were not possible before the charge was laid, there were thirteen years between the charge and the hearing before the Supreme Court. Instead of engaging in interest-based negotiations, however, the Crown pursued the “winner take all” strategy of asserting its position that no treaty rights existed. Consequently, when the Court affirmed the existence of the right, the Crown was left with nothing to say about justification.

The three cases discussed in this Part—Sparrow, Delgamuukw, and Marshall—set out important elements of the negotiation framework. Sparrow establishes the basic balance between recognition of Aboriginal rights, which would override federal and provincial legislation, and the Crown’s right to infringe those rights. By requiring prior consultation, Sparrow attempted to guide the parties

32 Ibid. at para. 59.
33 Ibid. at para. 66.
The chaos caused by the Marshall decision, sent the Department of Fisheries and Oceans scrambling to work out interim agreements with the 34 native bands affected by the Supreme Court ruling. Within a week of the violence in Burnt Church, N.B., in October 1999, all but two of the bands agreed to a self-imposed, 30-day moratorium on fishing.
35 Marshall II, supra note 8.
toward negotiations. Delgamuukw further developed the framework by encouraging negotiations based on a broad articulation of Aboriginal title and a broad view of appropriate grounds for infringing that title. Finally, Marshall strengthened the incentives for the Crown to negotiate by requiring that evidence of justification be introduced in the same proceeding as the challenge to the existence of an Aboriginal or treaty right. These cases established a reasonable framework for negotiation that should be given a chance to be implemented. Unfortunately, the Court's decision in Mitchell could make the negotiating tables irrelevant and encourage litigation.

III. MITCHELL: FOCUS ON POSITIONS, NOT INTERESTS

Akwesasne is a Mohawk reserve which straddles the Canada-U.S.A. border. In 1988, Grand Chief Mike Mitchell crossed from the American part of the reserve to the Canadian part of the reserve with one washing machine, 10 blankets, 20 Bibles, various articles of used clothing, one case of lubricating motor oil, 10 loaves of bread, two pounds of butter, four gallons of whole milk, six bags of cookies and 12 cans of soup. He reported the items to Canadian customs officials, but he refused to pay the assessed duty of $142.88 on these goods. He claimed that, as a Mohawk, he had Aboriginal rights and rights under the Jay Treaty, 1794 to pass across the border without paying duty.

Chief Mitchell's claim was successful at the Federal Court, Trial Division, where McKeown J. found that the Mohawks had an existing Aboriginal right for the following activities:

... to pass and repass freely across what is now the Canada-United States boundary including the right to bring goods from the United States into Canada for personal and community use without having to pay customs duties on those goods.... The aboriginal right includes the right to bring these goods from the United States into Canada for non-commercial scale trade with other First Nations.36

The Crown appealed, but lost again at the Federal Court of Appeal which upheld the existence of an Aboriginal right, although on slightly narrower grounds. This Court restricted the purchase of goods to New York State (rather than throughout the United States) to coincide roughly with pre-contact Mohawk territory. The destination of the trade with First Nations was also restricted to Ontario or Quebec (rather than across Canada).37

The Crown appealed again to the Supreme Court of Canada, this time with success. There were two judgments – the majority judgment was written by Chief Justice McLachlin and a concurring decision was written by Mr. Justice Binnie. As I will show below, both judgments discourage interest-based negotiations and neither decision will bring information to the Court on the possibilities of workable accommodations.

A. Focus on historical evidence

McLachlin C.J. relied on historical evidence presented in the trial court about a situation, which existed over four hundred 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 Mohawk north-south trade across the St. Lawrence.

The difficulty with her approach is that, 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 truth with precision is fraught with difficulty. The significance of historical events can change over time and can be affected by the contemporary lens through which those events are interpreted. The indicia of societal importance today may not apply to societal importance in pre-contact Aboriginal society. This is not to say that history is irrelevant, as it is the knowledge of history (or lack of such knowledge) that informs the positions of the negotiating parties. From a dispute resolution perspective, however, 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. This is because future disputants would prepare for negotiations by pouring resources into research to establish the existence of particular historical contexts leading to negotiations, which could become mired in the exchange of expert opinions.

Negotiations which are successfully concluded, such as the Nisga'a Agreement, are focussed almost entirely on setting out the contemporary social, economic, legal, and political links between the First Nation and the Crown governments. There is very little attempt to establish detailed agreements on historical events. It stands to reason that courts could make a more useful contribution to the ultimate resolution of these disputes by focussing, not only on a fair assessment of historical practices, but also directly on the contemporary issues in dispute. The effect of this shift in judicial emphasis would be to encourage negotiations between First Nations and Crowns over contemporary accommodations.

38 Mitchell, supra, note 5 at para. 41.
40 Fisher and Ury, supra note 23 at 53: "You satisfy your interests better if you talk about where you would like to go, rather than where you come from."
42 See M. Asch and C. Bell "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of Delgamuukw" (1994) 19 Queen's L. J. 503 at 549–550: Recognizing the difficulty associated with reconstructing the past, it is perhaps more appropriate to focus on results that promote the contemporary ethics of co-existence and equality, rather than on legal rights based on historical fact.
B. Focus on incompatibility with Canadian sovereignty

The concurring judgment of Binnie J. in *Mitchell* could also drive Aboriginal-Crown negotiations away from the exploration of concrete accommodations and instead encourage bargaining over abstract positions. The judge characterized the Mohawk claim as one for international trade and mobility arising out of citizenship in the Haudenosaunee Confederacy. This, he concluded, was incompatible with Canadian sovereignty.

... the [Mohawks'] claim relates to national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an aboriginal community. In my view, reconciliation of these interests in this particular case favours an affirmation of our collective sovereignty.  

He suggested that once sovereign incompatibility was established, there could be no Aboriginal right recognized in the Constitution. Consequently, in his view, it was not necessary to inquire into the existence of historical trade across the St. Lawrence. The difficulty with his reasoning is that it turns on what it means to be incompatible with "the historical attributes of Canadian sovereignty," or "a national interest that we all have in common." Such concepts are, by their nature, hard to define, and highly dependent on context. Binnie J., for example, concludes that "control over the mobility of persons and goods into one country is, and always has been, a fundamental attribute of sovereignty." However, this abstract statement does not say whether any specific proposal to cross the border without paying duty is incompatible with sovereignty. Binnie J. could not be objecting to the principle of bringing goods into Canada without paying duty. Thousands of Canadians use their statutory exemption to bring goods into Canada duty free every day. Likewise, Binnie J. could not be concerned with the principle that a Canadian would cross the border with a Haudenosaunee passport rather than a Canadian passport, as Canadians used to cross the border regularly with nothing more than a driver's licence.

Binnie J. supported his finding of incompatibility by enlarging the scope of the Mohawk claim so that it was no longer about crossing the border duty free, but about the "control over the mobility of persons and goods into one country." This kind of expansive approach to defining the issues in dispute can have an undermining effect on future negotiations. Rather than encouraging parties to discuss workable accommodations, they will be prompted to articulate abstract, general concepts and discuss whether there is any compatibility between those concepts. In the abstract, compatibility can be elusive, with each

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43 *Mitchell*, supra note 5 at para 164.
44 Ibid. at para 160.
45 Binnie J. was not concerned about the authenticity of the identification provided by a Haudenosaunee passport, but rather about the principle that such a passport may symbolize sovereignty for the Mohawk people. Border crossings have become more controlled after the events of September 11, 2001, but this decision was made earlier.
46 Ibid. at para. 160.
set of hypothetical circumstances adding more complications. The result may be to drive the parties towards unrealistic or inflexible positions rather than encouraging energies to be focussed on concrete solutions.

C. Dismissal of attempts to narrow the issue in dispute

The detrimental impact of both these judgments on the subject matter of negotiations is exacerbated by the fact that both judges dismiss attempts by the Mohawks to progressively narrow the scope of their claim through the course of the litigation. The Mohawks had stated at the outset of the trial that they were not claiming a right to large-scale commercial trade nor to trade in weapons, alcohol or prohibited drugs. Their claim was for free passage without paying duty for non-commercial trade with First Nations across Canada based on Aboriginal rights and the Jay Treaty.

The trial court and the Federal Court of Appeal provided more limited recognition of the rights. In light of these court decisions, the Mohawks had modified their position in several ways. They decided not to raise a claim based on the Jay Treaty, limited their claim to free passage, and reduced their trade partners to First Nations in Ontario and Quebec. Whether or not these modifications were, in the end, acceptable to the Court or the Crown, they were clearly the type of focusing and narrowing that is encouraged in interest-based negotiations. Rather than accepting the conciliatory gesture and addressing the modified claim, the Chief Justice resurrected the initial claim for unrestricted mobility rights with unrestricted trade partners. She then rejected the expanded Mohawk claim for being too broad and unfounded.

47 Mitchell, supra note 5 at para.22:

In another attempt at limitation, Chief Mitchell denies that his claim entails the right to pass freely over the border, i.e., mobility rights. Perhaps recognizing that mobility has become a contentious issue in recent cases [citations omitted], he answers that his claim is contingent on his existing right to enter Canada pursuant to the Canadian Charter of Rights and Freedoms and the Immigration Act, R.S.C. 1985, c. 1-2. He does not seek a right to enter Canada because he does not require such a right. Again, however, narrowing the claim cannot narrow the aboriginal practice that defines the claimed right. An aboriginal right, once established, generally encompasses other rights necessary to its meaningful exercise.

48 Ibid. at para.20:

It may be tempting for a claimant or a court to tailor the right claimed to the contours of the specific act at issue. In this case, for example, Chief Mitchell seeks to limit the scope of his claimed trading rights by designating specified trading partners. Originally, he claimed the right to trade with other First Nations in Canada. After the Federal Court of Appeal decision, he further limited his claim to trade with First Nations in Quebec and Ontario. These self-imposed limitations may represent part of Chief Mitchell’s commendable strategy of negotiating with the government and minimizing the potential effects on its border control. However, narrowing the claim cannot narrow the aboriginal practice relied upon, which is what defines the right. The essence of the alleged Mohawk tradition was not to bring goods across the St. Lawrence River to trade with designated communities, but rather to simply bring goods to trade. As a matter of necessity, pre-contact trading partners were confined to other First Nations, but this historical fact is incidental to the claim — the right to cross the St. Lawrence River with goods for personal use and trade.
Binnie J., like the Chief Justice, dismissed the concessions made by the Mohawks. He too, expanded the scope of the Mohawk claim from the movement of people and goods to a claim for sovereignty. He wrote:

For the reasons already mentioned, the respondent's claim, despite the concessions made in argument, is not just about physical movement of people or goods in and about Akwesasne. It is about pushing the envelope of Mohawk autonomy within the Canadian Constitution. It is about the Mohawks' aspiration to live as if the international boundary did not exist. Whatever financial benefit accrues from the ability to move goods across the border without payment of duty is clearly incidental to this larger vision.49

From a dispute resolution perspective, it would be counterproductive to criticize parties who enter into negotiations and then modify their positions in order to enhance the likelihood of achieving a resolution. The Mitchell decision, when viewed from this perspective, appears to work against the broader goal of encouraging First Nations and governments to resolve disputes, where possible, through the negotiation of detailed and durable agreements.

D. Concern with contemporary implementation

One could argue that the Court did no more than make a decision on the legal issues raised in the proceeding. McLachlin C.J.'s inquiry into history was necessary because previous decisions of the Court required such an inquiry in order to establish the existence of an Aboriginal right. Binnie J.'s inquiry into compatibility with Canadian sovereignty was necessary in order to establish the relationship of Aboriginal rights to the Canadian state. A corollary to this argument would be that the Court did not need to address the issue of prior negotiations because there was so little legal merit in the case that prior negotiations were not necessary.

Such an argument might be supportable from a narrow technical analysis of the case. However, the Court has said that the appropriate way to resolve disputes involving Aboriginal peoples is through negotiation. In my view, then, it is appropriate to scrutinize this decision from a dispute resolution perspective. As I have indicated above, a dispute resolution analysis shows that the way that the Court arrived at its decision could have negative impacts on negotiation processes in general. Such an analysis would also raise doubts about the wisdom of the Court's decision on the merits of this case.

It is clear that the judges had more on their minds than purely legal principles. Both judges were also wary of the practical consequences of finding in favour of the Mohawks. McLachlin C.J. criticizes the Mohawks for attempting to limit their trading partners to First Nations in Ontario and Quebec, saying,

49 Ibid. at para 125. The broadening of the Mohawk claim by both the Chief Justice and Binnie J. appears to be a departure from previous statements by the Supreme Court of Canada, that Aboriginal and treaty rights had to be narrowly and precisely defined. See supra notes 10–21 and accompanying text.
... 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.\(^{50}\)

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. Binnie J. also raises a concern with implementation of the Aboriginal right.

The Attorney General for New Brunswick argues that the claimed aboriginal right really amounts to no more than an aboriginal cross-border link to facilitate trade in non-aboriginal goods between non-aboriginal communities. There was, on the evidence, nothing to prevent the Tyendinaga Mohawks from re-selling the goods to non-natives.\(^{51}\)

Again, the concerns with implementation are valid, but they do not relate directly to the legal principle on which the decision was based. 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.

In Mitchell, the Court appears to have been heavily influenced by the potential practical consequences without having the information necessary in order to make an informed judgment on those consequences. The real problem here appears to be with the 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 considered in prior negotiations, the Court could have been assisted by a discussion of other specific proposals to address a number of 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

\(^{50}\) Ibid. at para. 20.
\(^{51}\) Ibid. at para. 94.
other measures have to be taken to protect against expansion of smuggling?

The exploration of these technical issues cannot be undertaken by the Court on its own. The Court needs to have before it developed proposals, which reveal the strengths and weaknesses of policy options, together with submissions from the parties on those options. The Court in Delgamuukw recognized this when it was faced with the claim for self-government. While the policy options were set out in the Report of the Royal Commission on Aboriginal Peoples, the parties did not address those options in their submissions. Lamer, C.J. explained that this is why he was not prepared to comment on the right of self-government.

The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues, which surround the recognition of Aboriginal self-government. The degree of complexity involved can be gleaned from the Report of the Royal Commission on Aboriginal Peoples, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fall to be determined at trial.52

The structure of the litigation process is not conducive to public policy development, nor to the development of strategies for the implementation of rights. Litigation is better suited to examining and testing policies and plans, which have already been developed. Mr. Justice Sharpe of the Ontario Court of Appeal, after deciding to stay a decision recognizing Métis hunting rights in R. v. Powley, pointed out the differences between the government’s role in designing a regulatory scheme, and the court’s role in assessing that scheme.

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.53

52 Delgamuukw, supra note 1 at para. 171.
53 R. v. Powley, supra note 2 (Ontario Court of Appeal) at para. 175.
In *Powley* the matter came before the Supreme Court of Canada. That Court found that restrictions on provincial hunting licenses infringed the Métis right to hunt for food. The province then argued that such an infringement was justified because of the need for conservation. Because arguments had been made on the issue of justification, the Supreme Court was in a position to assess the strength of the evidence. As it turned out, the province had raised the fear of conservation consequences, but had not shown that the moose population in that region was, in fact, under any threat. Consequently, the Court could find that there was no justification for the infringement.

The Court in *Powley* was able to assess the contemporary consequences of recognizing an Aboriginal right because the Court had information on justification before it. On the other hand, in *Mitchell*, the Court received submissions from the Crown about the unworkability of a contemporary exemption from custom duties, but there is no indication that the Court had before it information on whether, in fact, the scheme was unworkable. If this is true, the speculation in *Mitchell* on the unworkability of any scheme to accommodate Mohawk interests is unfortunate. While the dangers of an exemption from custom duties may seem “obvious” when baldly stated by counsel in argument these dangers may or may not accord with real possibilities. That is why, in attempting to determine the contemporary impact of an Aboriginal right, it is important to have the Crown speak to the issue of justification.

IV. CONCLUSION

The courts have been urged to make decisions that will facilitate negotiations in current and future disputes over Aboriginal and treaty rights. From a

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54 *Supra*, note 2 (Supreme Court of Canada).

Remedies such as temporary interlocutory injunctions to protect Aboriginal rights, temporary validity of laws that violate Aboriginal rights and declarations about the general nature of Aboriginal rights are manageable remedies for courts because they do not attempt to provide a final settlement of the complex problems raised in determining the appropriate relationship between the First Nations and Canadian governments. They provide temporary remedies which can induce the parties to negotiate a constitutionally adequate settlement. Moreover, they respect the purposes of Aboriginal rights by allowing First Nations to negotiate their relations with Canadian governments. Such remedies are principled because they do not abdicate the court’s ultimate responsibility, should negotiations and interim remedies fail, to enforce Aboriginal rights by striking down laws to the extent of their inconsistency with Aboriginal rights, by awarding damages and by ordering a wide variety of equitable remedies including structural injunctions and constructive trusts.

See also Canada, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Queen’s Printer, 1996) Vol. 2 (“Restructuring the Relationship”), Part 2 at 564:

Because negotiation is preferable to litigation as a means of resolving disputes between the Crown and Aboriginal nations, "courts should design their remedies to facilitate negotiations between First Nations, governments and other affected interests."
dispute resolution perspective, in order to make decisions, which facilitate meaningful negotiations, the parties and the courts should attempt to integrate the role of adjudication with the role of negotiations in a systematic and coherent way.

If the parties can expect to get a better result from the courts by honing the issues in prior negotiations, it is also true that the courts would enhance the resolution dynamic by making decisions, which provide incentives to negotiate over contemporary accommodations. This shift would have the effect of focusing both negotiations and litigation on the question of whether infringements can be justified. The Crown would have to tailor its infringements carefully, and the Aboriginal party would be forced to articulate its aspirations with some precision. The process would allow the parties, in negotiations, to express their interests, develop alternative approaches, and focus on a workable solution on the ground. In the end, if a dispute came before the Court, the Court would be in a position to determine whether there was a satisfactory process and whether any of the concrete proposals were appropriate.

It is, of course, not inappropriate for the Court to consider, in any particular case, the historical origins of claimed rights nor their compatibility with Canadian sovereignty. However, decisions made on those grounds do not have to preclude an expectation that the parties would have engaged in an attempt to develop proposals for a workable contemporary accommodation. Such an approach would not have prevented the Court in the Mitchell case from coming to the conclusion that it did with respect to the existence of an Aboriginal right or incompatibility with the national interest. However, there would be significant differences at the negotiating table. Parties would have to focus on the concrete dimensions of the dispute in order to have specific proposals to present, both in the negotiations and before the courts. Focussing on the concrete would increase the possibility of achieving the negotiated agreements that the Supreme Court of Canada has consistently encouraged.