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Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes

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Abstract
Until recently, both courts and dispute resolvers have viewed negotiation and adjudication as two separate processes. What occurred in one process was considered largely irrelevant to what went on in the other. Recently, however, there has been a growing recognition that both processes must work together to resolve disputes over Aboriginal lands and resources. This paper weaves together the emerging trends in court decisions with the new thinking on dispute system design to set out a framework that maximizes the strengths of each process. In this framework, the courts are responsible not only for adjudicating on the substance of Aboriginal and treaty rights, but also for establishing standards for the negotiation process itself, thereby increasing the likelihood of a fair and durable resolution.

SOUND SCIENCE, CAREFUL POLICY ANALYSIS, AND ONGOING RELATIONSHIPS: INTEGRATING LITIGATION AND NEGOTIATION IN ABORIGINAL LANDS AND RESOURCES DISPUTES©

BY SHIN IMAI*

Until recently, both courts and dispute resolvers have viewed negotiation and adjudication as two separate processes. What occurred in one process was considered largely irrelevant to what went on in the other. Recently, however, there has been a growing recognition that both processes must work together to resolve disputes over Aboriginal lands and resources. This paper weaves together the emerging trends in court decisions with the new thinking on dispute system design to set out a framework that maximizes the strengths of each process. In this framework, the courts are responsible not only for adjudicating on the substance of Aboriginal and treaty rights, but also for establishing standards for the negotiation process itself, thereby increasing the likelihood of a fair and durable resolution.

Jusqu'à récemment, tant les cours que les organismes chargés de résoudre les litiges considéraient les négociations et les décisions comme deux processus différents. Ce qui se produisait dans un des processus était considéré comme étant sans objet par rapport à ce qui se passait dans l'autre. Dernièrement toutefois on a constaté une tendance croissante pour amener les deux processus à collaborer pour résoudre les litiges relatifs aux terres et aux ressources des Autochtones. Cet article veut combiner les tendances qui se font jour tant dans les décisions des cours que dans la conception nouvelle d'un système qui instaurerait un cadre pour retirer le maximum des points forts de chacun des processus. Dans un pareil régime, les cours auraient la responsabilité non seulement de statuer sur le fonds des droits et des traités concernant les Autochtones, mais également d'instaurer des normes pour le processus même des négociations, favorisant ainsi les possibilités d'aboutir à une solution équitable et durable.

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I. INTRODUCTION

Since the repatriation of the Canadian constitution in 1982, the Supreme Court of Canada has decided almost twenty cases related to the rights of Aboriginal people to lands and resources. There are probably over a hundred decisions from provincial courts of appeal, and over a thousand from other courts and tribunals during the same period. Central to all of these cases is the interpretation of section 35(1) of the *Constitution Act, 1982*, which provides that, "The existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed."[1]

The task of interpretation is challenging. While courts have said that the implementation of section 35(1) requires changes to the status quo, those changes must incorporate myriad social, scientific, economic, historical, anthropological, and legal factors. It is not surprising that judges want to see these issues addressed through negotiation. After the decade-long *Delgamuukw* case, former Chief Justice Antonio Lamer stated that there was a "moral, if not a legal duty to enter into and conduct ... negotiations" and that "it is through negotiated settlements, with good faith

[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11.

and give and take on all sides" that a resolution will be found.[2] After finding that the Mi'kmaq had treaty rights to fish for a moderate livelihood, the Court stated in the *Marshall* case that "the process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation."[3] Other courts at all levels have made similar statements. In spite of the encouragement to negotiate, there has been a tendency to see negotiation as something completely separate from the litigation process. Judges have felt that they could neither order parties to negotiate nor influence the negotiation in any way.

Dispute resolvers have also taken polarized positions on the appropriate role of courts in negotiation. Some people had concerns about the process of negotiation, including the potential for exploitation of power imbalances, the cultural inappropriateness of the process, and the danger of a "system maintenance" function that would preserve the status quo. Commentators with these concerns favoured more direct access to courts. Those who preferred negotiation, however, argued that litigation creates an adversarial dynamic not conducive to promoting comprehensive resolutions or fostering ongoing relationships. They felt that the involvement of courts should be restricted to cases where there are irreconcilable issues of principle. Both sides of this discussion viewed negotiation and litigation as separate processes that exist more or less independently. Disputants chose one of the processes, then they had to live by the consequences of their choice.

Recently, some courts have seen that there are occasions when judicial direction is needed to make negotiation effective. They have progressed beyond simply encouraging the parties to talk to a more active enforcement of consultation requirements and a more vigorous supervision of the conduct of parties in negotiation. At the same time, an approach is beginning to emerge from dispute system design and environmental mediation that incorporates adjudication into the overall dispute resolution process. This approach recognizes the need for adjudication to break deadlocks or to ensure fairness in the negotiating process.

In this article, I have drawn on the recognition, in both case law and dispute resolution literature, of the importance of integrating adjudication and negotiation. I suggest there are three ways in which courts could enhance negotiation on Aboriginal rights to lands and resources: by

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[2] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1123 [*Delgamuukw*].

[3] *Marshall v. Canada*, [1999] 3 S.C.R. 456 [*Marshall*], reconsideration refused [1999] 3 S.C.R. 533 [*Marshall (2)*].

establishing a negotiation framework and the parameters for Aboriginal rights (Part III); by determining the relationship between negotiation and adjudication using principles of dispute system design (Part IV); and by ensuring the integrity of the negotiation process (Part V). These functions should be carried out in a way that promotes three objectives for negotiation (Part II): sound science, careful policy analysis, and ongoing collaborative relationships.

II. THREE OBJECTIVES FOR NEGOTIATIONS

The generic terms "negotiation" and "consultation" cover a variety of processes. I use the term "negotiation" to include direct negotiation between parties as well as negotiation with a third party such as a mediator or facilitator. The term "consultation" refers here to the duty of the Crown to consider the interests of Aboriginal people before infringing Aboriginal or treaty rights. Consultation is an integral aspect of disputes involving lands and resources. The nature of the consultation varies from giving information to an Aboriginal group before resource extraction to more extensive formal negotiation involving mediators. Negotiation is not restricted to situations where there is a duty to consult, but consultations, I argue, should always involve a degree of negotiation.

The most common negotiation model is the one developed by the Harvard Negotiation Project and popularized in 1981 in Roger Fisher and William Ury's *Getting to Yes*.[4] This "principled" or "interest-based" negotiating approach promises "win-win" and "all-gains" solutions to difficult problems. It promotes a process in which the parties are encouraged to collaborate to find solutions that will benefit them all, and its influence has spread from private disputes involving two parties to public disputes[5] and environmental mediation.[6] Adherents of this approach argue

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[4] Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, 2d ed. (New York: Penguin Books, 1991).

[5] See *e.g.* Round Tables on the Environment and Economy in Canada, *Building Consensus For a Sustainable Future: Guiding Principles* (Ottawa: Round Tables on the Environment and Economy in Canada, 1993) (referring to "consensus processes" for resolving disputes in the public domain). The foundational American text is Lawrence Susskind & Jeffrey Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (New York: Basic Books, 1987).

[6] See *e.g.* the report and the model developed out of a two-day workshop for Canadian environmental tribunals sponsored by the Alberta Environmental Appeal Board in Matthew Taylor *et al.*, "Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices" (1999) 22 Dal. L.J. 51 [Taylor *et al.*]. Robert F. Blomquist, "Some (Mostly) Theoretical and (Very Brief) Pragmatic Observations on Environmental Alternative Dispute Resolution in America" (2000) 34 Val. U.L. Rev. 343 says that there are hundreds of articles on environmental mediation. See also Lawrence

that it is better suited to the parties and that it produces results more quickly and at less cost.

The Harvard Negotiation approach is not universally accepted. Mark Doxtator, an Aboriginal lawyer who has worked with the Indian Claims Commission, argues that "principled" negotiation and mediation are based on principles different from Aboriginal society.[7] In his view, Aboriginal people value ongoing understandings more than static agreements:

> [I]t 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." Unlike a "fence," the Aboriginal approach requires the parties to work constantly first at achieving, and then maintaining, a balance. Unlike the Western approach it is not a static environment or a "one shot" deal. Rather, the Aboriginal approach is more of an ongoing process in which the parties work together and, as a result, the solution may be constantly modified or completely changed depending on the actions and reactions of the parties involved in the dispute.[8]

Peggy Blair, a lawyer active in representing Aboriginal people in fishing disputes, reinforces Doxtator's point when she casts doubt on the plausibility of a story recounted by Susskind and Cruikshank in their popular book, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*.[9] In her view, the tactics used by the mediator in that negotiation would not have worked in a real Aboriginal context.[10]

In addition to the concerns of some Aboriginal people with the Harvard Negotiation approach, there is some question about the assertion

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Susskind, Paul F. Levy & Jennifer Thomas-Larmer, *Negotiating Environmental Agreements* (Washington: Island Press, 2000).

[7] 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 [Uvic Institute for Dispute Resolution].

[8] *Ibid.* at 168.

[9] See *supra* note 5.

[10] The story was of a negotiator who helped tribal fishers exercising treaty rights come to an agreement with federal fisheries officials and non-Aboriginal fishers. Susskind and Cruikshank indicate all of their examples are fictionalized, but based on real events. Blair's point is that the fictionalized account did not ring true and that it is unlikely that the particular tactics ascribed to the mediator in that case would have worked in a real situation. See Peggy J. Blair, "Aboriginal Dispute Resolution: Conflicting Values in Co-management Negotiations" in *ADR and Aboriginal Rights: A Creative Solution for Complex Problems... Or Just Another Trend?* (Toronto: Canadian Bar Association-Ontario, 1998) at 2 [*ADR and Aboriginal Rights*].

that principled negotiations are cheaper and faster than litigation.[11] Colin Gabelman, the former attorney general of British Columbia, points out that it is very difficult to compare the costs of negotiation and litigation:

> [N]o one can quantify the costs of either approach until at least decades later. Nor can one conclude that the courts are more expensive in one case, even if they were, because that court decision may pave the way for dozens of other successful and less expensive negotiations.[12]

Bearing this caution in mind, how can we compare the decade and a half and $10 million spent on litigating the *Delgamuukw* case[13] with the time and cost of resolving comprehensive claims in the Yukon, in Nunavut, and with the Nisga'a, which took decades and cost tens of millions of dollars each to negotiate?[14] And how do costs for litigation and negotiation compare with the $150 million spent in 1990 dealing with the armed standoff at Oka and Kanahwake?[15] Each situation is so different that generalized statements about cost or timeliness are not helpful.[16]

Although cost and time savings may not be able to justify using negotiation for resolving lands and resources disputes and the process of a particular negotiation may not be appropriate for Aboriginal people, some form of negotiation cannot be avoided. As Peter Hogg and Mary Ellen

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[11] See *e.g.* the argument against litigation advanced by Peter Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-government: Constitutional and Jurisdictional Issues" (1995) 74 Can. Bar Rev. 187 at 216:

> The litigation for matters of self-government is open-ended and the outcomes are unpredictable. The legal issues are complex and legal proceedings are lengthy and costly.

[12] UVic Institute for Dispute Resolution, *supra* note 7 at 45.

[13] According to Derek Ground, conservative estimates of the *Delgamuukw* litigation put the cost at $10 million. See Derek Ground, "Principles and Practice: the Nexus Between Litigation and Negotiation in Aboriginal Rights Claims" in *ADR and Aboriginal Rights*, *supra* note 10 at 15. This is not much when it is compared to the $9 million spent by the British Columbia government in 2002 on the "pointless and divisive" referendum on treaty negotiations. See "How to undermine any treaty talks," Editorial, *The Globe and Mail* (5 July 2002) A16.

[14] Yukon First Nations collectively borrowed about $90 million from the federal government for their land claims negotiations. See Julie Jai, *Negotiated vs. Judge-made Aboriginal Law: Bridging the Two Solitudes* (LL.M. thesis, University of Toronto, 2000) at 17 [unpublished].

[15] See Geoffrey York & Loreen Pindera, *People of the Pines: The Warriors and the Legacy of Oka* (Toronto: Little, Brown & Company, 1991) at 405.

[16] Claims of cost and time savings of ADR have been compromised by empirical studies that show little in the way of dramatic results. J. Kakalik *et al.*, *Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act* (Rand-ICJ, 1996). But see Julie Macfarlane "Court-based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre" in Julie Macfarlane, ed., *Dispute Resolution: Readings and Case Studies*, 2d ed. (Toronto: Emond Montgomery, 2003) at 812-31 [Macfarlane].

Turpel observe:

> [T]he outcome of litigation is usually more negotiation, as courts have never imposed an agreement on the parties, and perhaps could not because of the nature of third party interests in some of the litigation. It is clearly in the best interests of all parties to come to a negotiation table where an agreement can be reached based on reasoning broader than that permitted by legal doctrine and constitutional remedies. Such an agreement provides the certainty that is so conspicuously lacking in the general law of aboriginal rights.[17]

In a similar vein, Justice LaForest concluded his judgment in *Delgamuukw* by stating, "I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake."[18]

The complexity and detail involved in large claims can be seen from the length of existing land claim and self-government agreements. The *Nisga'a Final Agreement* in British Columbia[19] consists of twenty-two chapters totalling 252 pages and a further 462 pages of appendices. The James Bay and Northern Quebec Agreement[20] consists of thirty-one chapters, totalling 455 pages. In the Yukon, each of the fourteen First Nations is covered by the Umbrella Final Agreement (292 pages), a final agreement specific to that First Nation (over 400 pages), a self-government agreement (over 50 pages),[21] and additional agreements negotiated under the auspices of the previous three agreements. These agreements deal with such far-reaching matters as regulation of land, resource use, rights of third parties, compensation, law-making jurisdiction, ratification procedures, and return of cultural property.

Even local disputes over the allocation of a single resource could raise complex issues requiring expert opinions as well as balancing of competing interests. A fishing dispute, for example, might involve consideration of differing opinions from experts on the available fish stock, the impact of quotas on the economic well-being of non-Aboriginal people involved in commercial and sports fishing, the importance of the resource for First Nation sustenance, and the cultural significance of fishing in

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[17] *Supra* note 11 at 216.

[18] *Supra* note 2 at 1134-35.

[19] *Nisga'a Final Agreement*, online: Department of Justice Canada site, <http://laws.justice.gc.ca/en/N-23.3/>.

[20] *James Bay and Northern Quebec Agreement, 1975*, online: Grand Council of the Crees site, <http://www.gcc.ca/Political-Issues/jbnqa/jbnqa_menu.htm>.

[21] Canada, Minister of Indian Affairs and Northern Development, *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of Yukon* (Ottawa: Minister of Supply and Services, 1993).

traditional areas.

If negotiations need to be a part of resolving land and resource disputes, what should these negotiations attempt to accomplish? In my view, simply invoking the desirability of "win-win" agreements suggested by the Harvard Negotiation Project does not do justice to the complexity of the challenges in this area. As Mark Doxtator pointed out, merely arriving at a static agreement may not be the objective of the Aboriginal parties. Nor would it be in the public interest to prize concluded agreements without attempting to evaluate the merits of the result. What would be more useful is to require negotiations to fulfil objectively assessable functions that cannot be carried out well (or at all) in litigation. I argue below that there are three such functions: the collaborative exploration of "sound science," the facilitation of "careful policy analysis,"[22] and the promotion of ongoing relationships. Courts should intervene primarily to ensure that the negotiation process is achieving those ends.

A. *Sound Science*

Given the importance and fragility of the environment, it goes without saying that any agreement relating to lands and resources should be based on the best scientific information available. The task of determining what is sound science is facilitated in negotiations that can promote a "collaborative inquiry" that "breaks down a complex problem into a series of mutually agreed-upon pieces."[23] This inquiry should include advice from experts in appropriate disciplines, including indigenous knowledge. When experts disagree, the parties should identify areas where there is consensus and make informed decisions about how best to address those where there is no consensus.

Litigation does not facilitate this process because it tends to produce "advocacy science," where "legitimate scientific and technical differences are exaggerated, as each side attempts to bolster its position by attacking the validity of the information provided by others."[24] Because there are few incentives for the parties to identify areas of scientific consensus, it is left to the court to make difficult decisions based on

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[22] This phrase is borrowed from Melanie J. Rowland, "Biodiversity and Ecological Management: Bargaining for Life: Protecting Biodiversity through Mediated Agreements" (1992) 22 Envtl. L. 503 at 511 ("To be successful, conservationists must formulate clear objectives and priorities for protecting biodiversity in the context of a particular dispute, and these objectives and priorities should be based on sound science and careful policy analysis.").

[23] Susskind & Cruikshank, *supra* note 5 at 30.

[24] *Ibid.* at 29.

polarized information.

B. *Careful Policy Analysis*

Decisions with respect to lands and resources usually involve questions of allocation: How much of the land or resource is available for the proposed use? How will it be allocated among users? The first issue depends on the sound science described above. The second can be answered through careful policy analysis that identifies the strengths and weaknesses of a number of options for dealing with competing interests and formulating a coherent basis for choosing among the options.

The structure of litigation is not suited to developing broad policy options based on input from a large number of diverse interests, many of whom are not actually part of the litigation. Litigation is better suited to examining and testing plans and policies that have already been developed. As Justice Sharpe of the Ontario Court of Appeal pointed out in *R. v. Powley*, "[t]he 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."[25]

Negotiators are able to facilitate the input of a large number of interests into the development of such regulatory schemes by creating chains or networks for those who are not at the negotiation table.[26] In lands and resource disputes, this role may involve the Crown meeting with non-Aboriginal user groups directly or conferring with other government bodies. For the First Nation, it may mean meeting with elders in the community or conferring with representatives of regional First Nation organizations.

In addition, negotiations would allow the parties to exercise flexibility throughout the process to modify and recast their positions in order to arrive at a broadly acceptable set of solutions. Such flexibility would be difficult, if not counterproductive, in a litigation process.[27]

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[25] *R. v. Powley* (2001), 53 O.R. (3d) 35 (C.A.) at 89, aff'd 2003 SCC 43.

[26] For a description of the "chains" and "networks" needed to provide advice to the parties at the table, see Dean G. Pruitt & Peter J. Carnevale, *Negotiation in Social Conflict* (Pacific Grove, CA: Pacific Grove, 1993) at 154-63.

[27] See note 39, below, and accompanying text, where the Supreme Court of Canada dismissed attempts by the Mohawks of Akwesasne to modify their position in response to decisions made by lower courts in the course of proceedings.

C. *Ongoing Relationships*

The third reason why negotiation is necessary in disputes over lands and resources is the nature of the ongoing relationships between the Crown and the First Nations. There are many points of contact between each First Nation and the provincial and federal governments. At a local level, it may be funding agreements for daycare centres or housing. At a regional level, the First Nation may be part of a tribal council negotiating an agreement on lands and resources in the region. And at the national level, the First Nation may participate in making decisions about a response to federal proposals for changes to the *Indian Act*. It is in the interests of the Crown and the First Nation to resolve disputes as quickly and as amicably as possible because disputes at any one of these points of contact may reverberate in other aspects of the relationship. Collaborative negotiation could promote resolutions that satisfy the needs of each party. The process of finding a resolution to a specific dispute could set a pattern for resolving future disputes. In fact, there is nothing to stop the parties from resolving one dispute by making trade-offs in another unrelated dispute.

Conventional litigation cannot promote these relationships. Litigation requires parties to formulate uncompromising descriptions of their positions and to relate to each other as adversaries.[28] The court can deal only with the narrow issues and the limited number of parties that appear in the proceedings. It cannot trade off the resolution of other disputes that have no legal relation to the matter under consideration.

D. *The Relationship of Courts to Negotiation*

The results of negotiation are mixed. Several significant agreements have been reached with Yukon First Nations, the Nisga'a, and the Inuit. In contrast, the British Columbia Treaty Commission, which was established in 1992 to facilitate negotiation between the Crown and 120 First Nations, has yet to complete a single treaty.[29] Attempts to negotiate disputes that arise outside of formal negotiation have also encountered difficulties. Sonia Lawrence and Patrick Macklem point out that a dispute over logging

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[28] See *e.g.* Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 593 [*Royal Commission*], "[T]he adversarial and formal procedures of courts of law are all too likely to be damaging to the relationship of the parties and their domination by lawyers tends to exclude the active participation of the parties themselves."

[29] These negotiations include over 120 *Indian Act* bands. See Indian and Northern Affairs Canada, online: <http://www.ainc-inac.gc.ca/bc/ftno/index_e.html>.

involving the Kitkatla included some informal consultation by the Crown but still resulted in a dozen court proceedings:

> In fact, the Kitkatla litigation suggests that the duty to consult has produced the very effect that it was designed to minimize, namely excessive reliance on the judiciary to reconcile competing interests of the parties. Consultation processes, by and large, have not led to lasting settlements. Instead, consultations increasingly serve as a kind of pre-trial discovery process, closely resembling the litigation they were intended to forestall, and constituting the first step in protracted legal disputes.[30]

Negotiation cannot supplant the decision-making functions of the courts. The question is not whether litigation or negotiation is better, for both are necessary. Rather, the question is whether the two modes of dispute resolution will be complementary or will exist independently in a given case.

It is fair to say that the courts are ambivalent about their role in relation to negotiation. In *Reference re Secession of Quebec*[31] the Supreme Court of Canada raised the duty to negotiate to the level of constitutional principle by saying that Canada and the provinces would be obliged to negotiate with Quebec should a "clear majority" of Quebecers vote to secede from Canada. The Court indicated, however, that its role in overseeing the process was limited and it would not "interpose its own views on the different negotiating positions of the parties."[32] This ambiguity was also reflected in *Delgamuukw*, where former Chief Justice Lamer said there was a "moral, if not a legal duty to enter into and conduct ... negotiations."

If the courts have been ambivalent, dispute resolution commentators have largely ignored the role courts should play in negotiation. Although Susskind and Cruikshank, for example, suggest that there are disputes that are more appropriate for litigation,[33] the cumulative effect of the movement towards alternative dispute resolution is the sense that courts are inadequate vehicles for resolving disputes. This thinking has resulted in focus on the negotiating process itself, with little systematic

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[30] Sonia Lawrence & Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 70 Can. Bar Rev. 252 at 254 [Lawrence & Macklem].

[31] [1998] 2 S.C.R. 217 [*Secession Reference*].

[32] *Ibid.* at 253.

[33] *Supra* note 5 at 17:

> Constitutional disputes, such as those surrounding school desegregation, abortion, prayer in schools, homosexual rights, the teaching of creationism, affirmative action, and the right to die, hinge primarily on interpretations by the courts of constitutionally guaranteed rights. When fundamental constitutional rights are at stake, we properly turn to our judicial system.

thought about its relationship to court decisions because all they do is render win-lose verdicts.

The idea that courts do nothing more than render a verdict is simplistic. Judges regularly encourage parties to narrow the issues in dispute both before and during the hearing. They attempt to establish rules that parties would find fair and that would reduce conflict in the future. In many cases, judges are engaged in the same dispute resolution project as negotiators and mediators; however, the structure of the process for reaching resolution is different. Although the structure of litigation prevents the judge from playing the role of mediator or negotiator, this restriction does not mean that courts should not supervise negotiation.

On the contrary, Sujit Choudhry and Robert Howse point out that in the context of the *Secession Reference*, the Supreme Court of Canada could have gone further than telling the parties to negotiate. They argue that the Court should play a more directive role in negotiations after a vote of secession:

> It is not at all clear, for example, that the Court is incapable of adjudicating upon both the pre-conditions to, and the process and outcome of, constitutional negotiations. The interpretation of the terms "clear majority" and "clear question," the enforcement of the obligation to negotiate in good faith, and even the compliance of a negotiated agreement with certain basic constitutional principles, are not totally beyond the realm of judicial competence.[34]

Likewise, in my view, there is a coherent role for courts in resolving disputes over lands and resources of Aboriginal people. As I have indicated, the courts should facilitate and supervise negotiations to promote decisions based on sound science, careful policy analysis, and ongoing relationships.[35]

I should clarify two points. First, I am not addressing the need for courts themselves to engage in more dispute resolution through pre-hearings and so on, which makes access to hearings more difficult. Rather, I am addressing how this decision-making function is exercised by the judiciary. In my view, courts continue to have an important function in making decisions.

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[34] Sujit Choudhry & Robert Howse, "Constitutional Theory and The Quebec Secession Reference" (2000) 13 Can. J.L. & Juris. 143 at 160.

[35] A development consistent with the approach is found in *Doucet-Boudreau v. Nova Scotia*, 2003 SCC 62. In that case, the Supreme Court upheld the decision of a trial judge to require the province to provide periodic progress reports on the construction of French-language school facilities. Justices Iacobucci and Arbour, writing for the majority, noted at para. 73 that "the range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts."

Second, the nature of the problem and the remedies available to the court will depend on the type of proceeding in which the issues arise. There is not sufficient space here to discuss how decisions can be made in such disparate proceedings as judicial reviews, motions for declarations, interlocutory injunctions, criminal prosecutions, and civil actions.[36] Instead, I attempt to outline in a general way the types of court decisions that would complement negotiations, recognizing that such remedies may not be available to the court in all circumstances.[37]

III. THE NEGOTIATION FRAMEWORK AND RIGHTS PARAMETERS[38]

One function of the courts is to establish the broad legal parameters within which agreements can be made. Without such guidance, parties would find it difficult to narrow their focus sufficiently. On their own, judgments setting out rights will not necessarily lead to negotiations, however. Courts must also establish a framework that creates dynamic tensions conducive to negotiation.

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[36] For a thoughtful discussion on the difficulties with adjudicating a treaty claim in the context of a summary conviction trial, see in *R. v. Bernard*, [2003] N.B.J. No. 320 at para. 312-29, Robertson J.A.

[37] Kent Roach, "Remedies for Violations of Aboriginal Rights"(1992) 21 Man. L. J. 498 at 542:

> Remedies such as temporary 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 *Royal Commission*, *supra* note 28 at 564 [footnotes omitted], "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."

[38] The ideas in this section are discussed more fully in Shin Imai, "Creating Disincentives to Negotiate: *Mitchell v. M.N.R.*'s Potential Effect on Dispute Resolution" Windsor Y.B. Access Just. [forthcoming in 2003].

A. *The Negotiation Framework*

The first decision by the Supreme Court of Canada interpreting section 35(1) of the *Constitution Act, 1982* was *R. v. Sparrow* in 1990. That case set out the negotiating framework for all future cases. Chief Justice Dickson and Justice LaForest stated that "[s]ection 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place."[39] They then set out a scheme for giving priority to the rights of Aboriginal people over conflicting Crown legislation, but they also held that federal laws could infringe those rights in limited circumstances when such infringements could be justified. Chief Justice Dickson and Justice LaForest outlined two stages for justification. First, the Crown would be required to establish that there was a "compelling and substantial" objective for the legislation, such as the need to conserve the resource. Second, the Crown would have to demonstrate that it had acted honourably, in a manner that was consistent with its fiduciary relationship with Aboriginal people. The Crown could show that it had acted honourably in a number of ways, such as by ensuring that there was as little infringement as possible by consulting with Aboriginal people before implementing the legislative scheme.[40]

This basic negotiating framework was used in *Delgamuukw*. In that case, the Court elaborated on the extent of Aboriginal title (for example, exclusive possession of land), but also provided for wide grounds of infringement, such as settlement of foreign populations. This approach created a dynamic tension that would be conducive to negotiation. A First Nation that focused exclusively on articulating its rights would risk a court finding that infringements of those rights by legislation were valid. A Crown government that focused exclusively on denying the existence of Aboriginal rights might find itself without the legislative tools to interfere with those rights if a court affirmed that such rights did exist.

By contrast, a decision that is not supportive of a negotiating framework is *Mitchell v. Minister of National Revenue*.[41] In that case, the Mohawks of Akwesasne argued that they had an Aboriginal right to trade with other First Nations and to cross the border from the United States to Canada without paying duty to carry on that trade. The Mohawk reserve

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[39] [1990] 1 S.C.R. 1075 at 1105 [*Sparrow*]. A member of the Musqueam First Nation was charged with fishing with a net that was longer than that permitted by the federal *Fisheries Act*. In his defence, he argued that he had an Aboriginal right to fish for food in his traditional territory, and that the federal law interfered with this right.

[40] *Ibid.* at 1119.

[41] [2001] 1 S.C.R. 911 [*Mitchell*].

straddles the Canada-U.S. border. While the Mohawks won at both the Federal Court Trial Division and the Federal Court of Appeal, those courts recognized a progressively narrower scope for the exercise of the Aboriginal right to trade. In response to these decisions, the Mohawks advanced even more modest versions of their claim. The federal Crown, meanwhile, steadfastly argued that there were no Aboriginal rights to trade and appealed each decision without negotiating. Whether the modifications made by the Mohawks 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 negotiation. Rather than accepting the gesture and addressing the modified Mohawk claim, however, the Supreme Court of Canada resurrected the initial expansive claim, then rejected it for being too broad and unfounded. In the course of the discussion, Chief Justice McLachlin dismissed the Mohawk attempt to accommodate government interests:

> 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.[42]

These comments are unfortunate if considered from a broader dispute resolution perspective for they may discourage parties from modifying their positions in order to enhance the likelihood of achieving a resolution.

The problems raised by the Court's dismissal of the Mohawks' "negotiating strategy" in the *Mitchell* decision are compounded by the way in which the Court decided to reject the Mohawk claim. Chief Justice McLachlin decided that there was not enough evidence of trade across the St. Lawrence four hundred years ago to support a contemporary Aboriginal right to such trade. Justice Binnie found that the Mohawk claim was "incompatible with national sovereignty." Neither judgment would require the Crown to consult or justify its actions, nor encourage the parties to exchange technical information on whether some accommodation could be made for the Mohawks.[43] In fact, any discussions, based on these

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[42] *Ibid.* at 931.

[43] For example, the Court expressed concern about the contemporary impact on trade if this Aboriginal right were recognized. Yet the Court did not seem to have information on technical matters that could have been addressed in negotiation. For instance, there would not appear to be any difference in principle between non-Aboriginal people crossing the border taking advantage of their duty-free limit and Mohawks crossing the border taking advantage of their Aboriginal right. In both cases, they would be exempt from paying duty. The difference would be in the volume and the type of

judgments, would be about historical truth or abstract notions of sovereignty, both of which are difficult to pin down with any precision. Inevitably, they would turn into battles over inflexible positions because the interests of the parties—in a workable contemporary accommodation—would not be on the table. In my view, it would have been better if the Court had written its judgment in a way that required the Crown to provide justification for infringement. That approach would have injected contemporary issues amenable to a negotiation process.

It is appropriate for the Court to consider the historical origins of claimed rights in any particular case, as well as their compatibility with Canadian sovereignty. Decisions made on those grounds, however, do not have to preclude an expectation that the parties would have engaged in an attempt to develop proposals for a workable contemporary accommodation. A court could still come to the same conclusion 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 need to focus on the concrete dimensions of the dispute in order to have specific proposals to present, both in the negotiations and before the court. Focusing on the concrete would increase the possibility of achieving the negotiated agreements that the Court has consistently encouraged.

B. *The Rights Parameters*

The legal boundaries within which negotiation is conducted can have a significant impact on negotiations. Colin Gabelman, the former attorney general of British Columbia, says that, without the decision in *Delgamuukw*, which established expanded rights parameters for Aboriginal title, "the balance of power [in favour of the Crown] would have been so lopsided as to make treaty making almost impossible."[44] Yet it is hard to

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goods being traded. The Court did not consider whether any mechanisms could be employed to control the volume and the type of goods. If the Mohawks were to engage in the small-scale trade contemplated, would existing methods for controlling the sale of tax-free gasoline on reserve to reserve members be adequate? There may have been other government concerns and options for meeting those concerns that were not explored in the decision.

[44] UVic Institute for Dispute Resolution, *supra* note 7 at 45. In my view, the grounds for justified infringement are much too broad. According to Lamer C.J. in *Delgamuukw*, *supra* note 2 at 1111, they include:

> [T]he development of agriculture, forestry, mining, and hydroelectric 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.

know where to begin in creating a rights framework. Starting from the assumption of Crown sovereignty over lands and resources is as problematic for First Nations as starting from the assumption of Aboriginal sovereignty is for the Crown. With disagreements at such a fundamental level, a framework that could encompass both Aboriginal and larger Canadian visions of the state would seem almost impossible.

The Court has approached this problem by attempting to balance the recognition of Aboriginal and treaty rights required by the constitution against the unknown consequences of too broad an articulation of those rights. However, the latter consideration has tended to predominate, with the result that, in the words of former Yukon negotiator Julie Jai, "the rights were virtually frozen in the past, rather than permitted to evolve over time."[45] For example, in *R. v. Van der Peet*, then Chief Justice Lamer held that the burden was on the First Nation to prove that a practice was an "integral part" of Aboriginal society before contact with Europeans in order to qualify as an Aboriginal right.[46] This proof would require an exercise in historical anthropology reaching back two to four hundred years to recreate societies with no written records of their own.

More contemporary reference points for establishing substantive parameters are available to courts in a number of remarkable collaborative documents produced in recent years. The most far-reaching effort was by the *Royal Commission on Aboriginal Peoples*. The co-chairs were Georges Erasmus, former National Chief of the Assembly of First Nations, and René Dussault, a judge of the Quebec Court of Appeal. The four Aboriginal commissioners represented a cross-section of the Aboriginal people and one of the non-Aboriginal commissioners was Bertha Wilson, a former judge of the Supreme Court of Canada. The commissioners produced an extensive review of state-Aboriginal relations, including recommendations on the allocation of lands and resources.[47]

Several comprehensive agreements have also been signed between Aboriginal people and the Crown. They cover most of northern Canada from Nunavut to the Yukon, as well as northern Quebec and the Nisga'a in British Columbia. These agreements include detailed provisions for resource allocation and for First Nation participation in decision making

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See also Shin Imai, "Treaty Lands and Crown Obligations: The 'Tracts Taken Up Provision'" (2001) 27 Queen's L.J. 1 at 18-19.

[45] *Supra* note 15 at 78. See also John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1998) 22 Am. Indian L. Rev. 37.

[46] [1996] 2 S.C.R. 507 at 554-55.

[47] *Royal Commission, supra* note 28, c. 4.

concerning resource use. Jai argues that these negotiated agreements could provide helpful guidance to courts on contemporary, mutually acceptable arrangements:

> Greater understanding of modern agreements would ... assist the courts in determining how to define their own role, so that court decisions could be fashioned in such a way as to encourage, rather than impede negotiations. Judges could draft their decision using the principles from modern agreements as a reference point, asking themselves if their reasons for judgement are consistent with the goals which the parties have articulated in successful negotiations, such as a holistic approach and mutual respect, or will work at cross-purposes to what the parties would likely agree to in negotiation.[48]

Neither the agreements that have already been negotiated nor the proposals of the *Royal Commission* can be applied indiscriminately to other disputes. The courts have held that Aboriginal and treaty rights must be decided on a case-by-case basis with specific reference to the historical and geographical location of the Aboriginal group, as well as to the contemporary state of non-Aboriginal land and resource use.[49] Nonetheless, in formulating broad legal parameters, the results of collaborative efforts such as the *Report of the Royal Commission on Aboriginal Peoples* and land claims agreements could provide valuable concrete contemporary examples of workable solutions.

Actual negotiations conducted within the broad framework described above can encounter problems on one or more sub-issues. The next section, Part IV, discusses the role of the courts when limited issues in a broader dispute are brought forward, often in interlocutory proceedings.

IV. CONSISTENCY WITH PRINCIPLES OF DISPUTE SYSTEM DESIGN

The likelihood of success in negotiation depends in part on how the specific negotiation is conducted and on how the negotiation is integrated into an overall framework for resolving the dispute. Here, I will discuss the latter issue: Where is it best to insert adjudication to support efficient negotiation? The answer to this question can be informed by the principles found in the literature on dispute system design.

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[48] *Supra* note 15 at 80.

[49] See *e.g.* the comments of Lamer C.J. in *Van der Peet, supra* note 46 at 552:

> 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 practice, custom or tradition being relied upon to establish the right.

A. *Dispute System Design*

After the publication of *Getting to Yes*, members of the Harvard Negotiation Project produced another important book, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*.[50] In this second publication, William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg approach disputes not as discrete instances of disagreement, but as phenomena embedded in ongoing relationships in workplaces and institutions. The primary reason for resolving a particular dispute in these situations is to preserve the overall viability of the relationship. To do so, the authors advocate designing a system for resolving disputes that focuses on meeting the interests of the disputants.[51] Their approach can be summarized around three broad principles.

First, dispute system design is based on establishing a variety of mechanisms for parties to meet and address their concerns. These mechanisms follow a logical progression from low-cost preventative measures, such as consultation or notification, through more costly formal processes such as negotiation or adjudication.[52]

Second, the system design should include safety valves so that when parties encounter temporary difficulties in negotiation, they can seek clarification of facts or legal parameters. These mechanisms could include non-binding procedures, such as an expert opinion[53] or a low-cost adjudication limited to the point in dispute.[54] After the point is settled, the parties should "loop back" to negotiations.

Third, the system should ensure that the parties have the appropriate incentives to negotiate.[55] The advantages of a negotiated settlement must outweigh the risks of not negotiating.

These dispute design principles were applied in the *Nisga'a Final Agreement*. Echoing the sentiments expressed by Chief Justice Lamer in

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[50] William L. Ury, Jeanne M. Brett & Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, (San Francisco: Jossey-Bass, 1988).

[51] For a further development of dispute system design, see Cathy Costantino & Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (San Francisco: Jossey-Bass, 1996) [Constantino & Merchant]. For a review of the literature on dispute system design and the contexts in which it has been applied, see John P. Conbere, "Theory Building for Conflict Management System Design" (2001) 19 Confl. Resol. Q. 215; Macfarlane, *supra* note 16 at 709.

[52] Ury, Brett & Goldberg, *supra* note 50 at 62-64.

[53] *Ibid.* at 52-56.

[54] *Ibid.* at 56-60.

[55] *Ibid.* at 42-52.

Delgamuukw, the preamble to the Agreement states:

> Whereas Canadian courts have stated that the reconciliation between the prior presence of aboriginal peoples and the assertion of sovereignty by the Crown is best achieved through negotiation and agreement, rather than through litigation or conflict;
>
> Whereas the Parties intend that this Agreement will result in this reconciliation and establish a new relationship among them ...[56]

Disputes arising under this complex agreement are to be guided by a process that closely follows the dispute system design principles advocated by Ury, Brett, and Goldberg. The objectives of the process are identified clearly:

> a. to cooperate with each other to develop harmonious working relationships;
>
> b. to prevent, or, alternatively, to minimize disagreements;
>
> c. to identify disagreements quickly and resolve them in the most expeditious and cost-effective manner possible; and
>
> d. to resolve disagreements in a non-adversarial, collaborative, and informal atmosphere.[57]

The agreement then sets out a three-stage process for addressing disputes. In stage one, the parties agree to participate in unassisted collaborative negotiations. If that fails, at stage two, the parties may seek non-binding advice from a neutral third party, such as a mediator, expert, or an elders advisory council. Matters that proceed to stage three go to binding arbitration or judicial proceedings.

The dispute resolution mechanisms in the *Nisga'a Final Agreement* are available to the signing parties only—the federal, provincial, and Nisga'a governments—and are restricted to matters arising from the agreement itself. This institutional context is similar to the closed systems, such as workplaces, in which dispute system design is currently used. In these closed systems, there are a limited number of issues, a limited number of parties, and the ability to set up and control the entire dispute system.

Disputes over lands and resources between the Crown and Aboriginal nations do not share any of these characteristics. They arise in the public domain, implicate fundamental constitutional rights, affect many interests that are not parties to the dispute, and can involve a variety of tribunals, courts, and legal proceedings, all of which exist independently of

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[56] *Supra* note 19.

[57] *Ibid.* at c. 19, s. 3.

the parties. Is it possible to apply dispute design principles in theses circumstances?

Certainly, an important characteristic of Crown-Aboriginal disputes provides a compelling reason for attempting to apply these principles: the Crown and the First Nations have deep, complex, ongoing relationships. Disagreements on a variety of issues are unavoidable, and, unless a particular dispute is addressed properly, it may detrimentally affect the relationship as a whole. This fact led the *Royal Commission* to recommend the creation of specialized commissions and tribunals that would employ both mediation and adjudication.[58] Although such tribunals have yet to be established, the British Columbia Court of Appeal has made a series of remarkable decisions that implement dispute system design principles using mechanisms that exist in the public domain. The Court's decision in *Haida Nation v. British Columbia*[59] illustrates this approach.

B. *The* Haida Nation *Case and the Structure of the Dispute Resolution System*

Disputes over lands and resources in British Columbia are numerous, highly contentious, and very public. Partly in response to this state of affairs, the province developed a number of mechanisms for consultation with First Nations in situations where Aboriginal or treaty rights could be affected by resource development. In addition, the province helped to establish the British Columbia Treaty Commission to facilitate negotiations on Aboriginal title. For issues that could not be resolved in those processes, the parties turned to the courts for low-cost interlocutory or judicial review proceedings as well as the higher-cost option of full trials on the existence of Aboriginal or treaty rights. Given the volume of litigation, it is not surprising that the British Columbia courts are in the forefront both in developing the law on the existence of Aboriginal and treaty rights and in requiring the parties to engage in consultation and negotiation before litigation.

In proceedings involving the Haida Nation, the British Columbia Court of Appeal took a fresh look at the way in which land and resource disputes could be resolved in the province. Rather than maintaining distance between litigation and negotiation, the Court promoted a more

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[58] *Royal Commission, supra* note 28 at 591-613.

[59] [2001] 2 C.N.L.R. 83 (B.C. S.C.) [*Haida Nation (B.C. S.C.)*] and *Haida Nation v. British Columbia (Minister of Forests)*, [2002] 2 C.N.L.R. 121 [*Haida Nation (B.C. C.A.)*].

coherent approach to dispute resolution.[60]

The Haida live on Haida Gwaii (the Queen Charlotte Islands), off the coast of British Columbia. They have never signed a treaty or surrendered their lands. Yet the British Columbia government issued logging licences to the area. The province took the position that it had no obligation to consult or to consider the evidence of Aboriginal rights until a judicial determination of the existence of such rights had been made.

The Haida had a strong prima facie case for Aboriginal title including evidence of exclusive occupation of their traditional territory. Justice Halfyard, the judge on the British Columbia Supreme Court who heard the judicial review application, found that there was "a reasonable probability that the Haida will be able to establish Aboriginal title to at least some parts of the coastal and inland areas of Haida Gwaii"[61] and came to the "inescapable" conclusion that old-growth red cedar was an integral part of Haida culture. The proposed area to be logged was found to be one-quarter of the land claimed, large amounts had already been logged, and the Haida concern about preserving the old growth forest was, "understandable."[62] Finally, the court held that the province had failed to follow its own internal guidelines for early consultation with First Nations.

Justice Halfyard held that the enforceable duty to consult arose only after a judicial determination of the existence of the Aboriginal right. Since a court had yet to confirm that the Haida had Aboriginal title to the area claimed, there was only a moral duty to consult at the earlier stage.[63] Even though that moral duty had not been fulfilled, the court held that the honour of the Crown had not been diminished and that there was no role for the courts in supporting dispute resolution, beyond exhorting the parties to negotiate:

> 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.[64]

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[60] While I focus on the decision of the British Columbia Court of Appeal in *Haida Nation (B.C. C.A.)*, it should be noted that this case followed an earlier decision of the same court that set out important principles on the duty to consult. See *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2002] 2 C.N.L.R. 312 [*Taku River*].

[61] *Haida Nation (B.C. S.C.)*, *supra* note 59 at 101.

[62] *Ibid.* at 104.

[63] *Ibid.* at 105.

[64] *Ibid.* A similar decision, in the context of treaty rights, was made in *Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Ltd.*, [2000] 3 C.N.L.R. 15, leave to appeal to S.C.C. refused, [2000]. In this case, the Ontario Court of Appeal held that it would not enforce

The British Columbia Court of Appeal overturned the decision of the British Columbia Supreme Court and issued a declaration that the province had a fiduciary duty to endeavour to accommodate the concerns of the Haida. The Court of Appeal's decision is consistent with the emergence of a coherent system for resolving disputes that adheres to the three principles of dispute system design.

C. *The First Principle: Organizing Procedures in a Low- to High-Cost Sequence*

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 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.

The initial decision of Justice Halfyard, on the other hand, would have turned the sequence for resolving disputes on its head. The parties would have had to begin with a full trial in order to establish an Aboriginal right. They would relate to each other as adversaries until a final, unappealable decision was reached. Only when all litigation was exhausted would the Crown be required to consult and, presumably, to enter into negotiations.

The decision of the British Columbia Court of Appeal requires the province to consult even before a judicial determination of Aboriginal rights in order to seek "workable accommodations"[65] with Aboriginal people. The Crown does not have to carry out this duty in the same way in all cases, as "the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential

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consultation until the Aboriginal or treaty rights in question had been established in judicial proceedings. The court held that such rights could not be established in proceedings of a summary nature such as judicial review. See also *Perry v. Ontario* (1997), 33 O.R. (3d) 705 at 734 ("... 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 create the right conditions for negotiation and are not consistent, it is submitted, with the developing law in this area.

[65] *Haida Nation (B.C. C.A.)*, *supra* note 59 at 140:

> [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.

soundness of the claim for Aboriginal title and Aboriginal rights."[66] This begins the process at the low-cost end of the scale.

D. *The Second Principle: Providing "Loop Backs" to Negotiations*

In the dispute system design approach, the adjudicatory function is focused on resolving the issues necessary to complement negotiation, so that adjudicated resolutions are timely and relatively inexpensive. In the *Haida Nation* case, the matter initially came before Justice Halfyard on a judicial review application, a low-cost process. The question to be decided was a focused one: Should the province be required to take into account the interests of the Haida on Haida Gwaii? The issue in the proceeding was not the existence of Aboriginal title, nor the justification for infringement, as those matters had already been set down for a full trial.

The initial decision of Justice Halfyard to make consultation an unenforceable "moral duty" would have taken away this interlocutory procedure from the overall dispute resolution process by requiring that parties go first to a full trial on the merits. The British Columbia Court of Appeal established a positive role for courts in assisting parties who encounter obstacles in the course of negotiations by making low-cost interlocutory decisions available to the parties. This role is consistent with the "loop backs" contemplated in dispute system design.

E. *The Third Principle: Incentives and Motivation to Negotiate*

In order for negotiation to be successful, there must be incentives to accommodate the interests of the other parties at the table. If one party sees no downside to avoiding negotiations, then that party will not negotiate or will negotiate perfunctorily. The initial decision of Justice Halfyard in *Haida Nation* would have favoured the Crown and the resource companies by making consultation unenforceable. For those parties, there would have been no meaningful downside to avoiding negotiation. They could continue their resource extraction activities until the matter had been litigated and all subsequent appeals exhausted many years later.

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[66] *Ibid.* at 138. See also Lawrence & Macklem, *supra* note 30 at 267 ("... 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.").

The British Columbia Court of Appeal was cognizant of the lack of incentive provided by the decision of Justice Halfyard and addressed that issue directly:

> If the Crown can ignore or override aboriginal title or aboriginal rights until such time as the title or rights are confirmed by treaty or by judgment of a competent court, then by placing impediments on the treaty process the Crown can force every claimant of aboriginal title or rights into court and on to judgment before conceding that any effective recognition should be given to the claimed aboriginal title or rights, even on an interim basis.[67]

In summary, by making it mandatory to accommodate Aboriginal interests before rights have been judicially confirmed, the British Columbia Court of Appeal in *Haida Nation* ensured that prior consultation, an important low-cost mechanism, remained part of the dispute resolution system in that province. In doing so, the court also set out an important role for the judiciary: to provide interlocutory decisions that support a "loop back" to negotiations and provide incentives to negotiate.

This approach was implemented by Justice Tysoe in declaring that the Crown must consult and accommodate First Nation interests arising from the change of ownership of a forestry company. The judge stated:

> If the process does not succeed, the matter can be brought back before the Court for further directions or further declarations. For example, if the Minister fails to properly consult with the Petitioners following the issuance of these Reasons for Judgment, it will be open to the Petitioners to renew their request that the Minister's decision be set aside.[68]

These decisions have helped to establish a coherent, multi-faceted system for resolving disputes in British Columbia.

V. THE INTEGRITY OF THE PROCESS

The previous two parts of this paper have outlined the importance of providing a framework for negotiation and discussed the possibility of structuring existing mechanisms to be consistent with dispute system design principles. I will now discuss the role that courts could play in ensuring that negotiation is carried out in ways that enhance its three objectives: agreements based on sound science, careful policy analysis, and ongoing

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[67] *Haida Nation (B.C. C.A.), supra* note 59 at 124. See also *Taku River, supra* note 60 at 380, "To say, as the Crown does here, that establishment of the aboriginal rights or title in court proceedings is required before consultation is required, would effectively end any prospect of meaningful negotiation or settlement of aboriginal land claims."

[68] *Gitxsan First Nation v. British Columbia (Minister of Forests)* (2002), BCSC 1701 at para. 106 [*Gitxsan*].

relationships.

While both the adjudication and the negotiation processes aim to produce good resolutions of disputes, each produces these results in different ways. In the ideal adjudication process, each party puts forward its best experts and arguments and reveals the weaknesses of the position of the opposing party. In this situation, the adjudicator or judge bears the responsibility for integrating the information and producing a coherent resolution. Detailed written rules of procedure that apply to similar proceedings govern. Court review of this process is based on interpreting rules that are known in advance in order to set precedents that will apply in future cases.

In the ideal negotiation, on the other hand, the parties attempt to approach the problem collaboratively, using the experts to provide the best information available. The responsibility for integrating the information and developing a "wise" agreement[69] lies with the parties. As the process itself should be developed by the parties, there can be considerable variation among negotiations. In order to review negotiation processes such as these, courts look at different standards that focus on the application of broad principles[70] rather than the interpretation of detailed rules.[71]

In my view, the following four principles concerning the process of negotiation should be applied to lands and resources disputes. First, the parties should bring the appropriate level of expertise to the table. Second, the process should be collaborative. Third, power imbalances should be addressed appropriately. And fourth, the parties should act in good faith.

A. *The Consideration of Appropriate Expertise*

In litigation, expert evidence is tested through cross-examination and the presentation of opposing expert evidence. This can lead to what Susskind and Cruikshank call "advocacy science"[72] whereby the assertion of unambiguous "truths" is valued more than the exploration of areas of

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[69] Fisher & Ury, *supra* note 4 at 4, "A wise agreement can be defined as one which meets the legitimate interests of each side to the extent possible, resolves conflicting interest fairly, is durable, and takes community interest into account."

[70] Taylor *et al.*, *supra* note 6 at 96 suggest that courts should have limited review powers for agreements reached through environmental mediation, "More broadly, however, perhaps the courts themselves need to develop a more flexible standard of judicial review to account for the unique administrative dynamic raised by the application of ADR techniques."

[71] For guidance on how to conduct negotiations, see *e.g.* Susskind & Cruikshank, *supra* note 6 and Round Tables on the Environment and Economy in Canada, *supra* note 5.

[72] *Supra* note 6 at 29.

uncertainty. The fact that negotiation is used to address a problem does not lessen the requirement for appropriate technical advice. However, that advice can be used differently. In ideal collaborative negotiation, the advice of experts could both identify areas of consensus and areas of uncertainty. Depending on the dimensions of the dispute, lands and resources negotiations could include engineering information, scientific knowledge, indigenous knowledge, culture, history, economic impacts, and the law. Based on this information, the parties could arrive at a resolution that follows the advice of experts in areas where there is agreement. Where there are differing expert opinions, the parties could make informed judgments.

Although the responsibility for producing, considering, and shaping the information lies in the hands of the parties in negotiation, the court could ensure that the appropriate expertise is taken into consideration. For example, if the information were offered by only one party, the public could be deprived of a resolution that is based on the best information available. This problem is well-recognized by those advocating mediation in environmental disputes. A report prepared by a group of Canadian environmental tribunals proposed to address this issue either by making funding available to the parties or by ensuring that the parties have access to expertise from a neutral body.[73]

The technical and scientific information that can be produced in negotiation or consultation will be important even if the parties do not reach an agreement. In *Halfway River First Nation v. British Columbia (Ministry of Forests)*, Justice Finch noted that the failure of the Crown to consult adequately with the First Nation deprived the court of important information:

> The District Manager's failure to consult adequately means that we cannot know what additional information might have been available to him regarding the nature and extent of the Treaty 8 right to hunt or of other aboriginal rights not surrendered by the treaty. Nor can we know how he might have weighed that information with information he might have sought regarding other possible cutting areas to meet Canfor's needs while minimizing the effects on the Halfway River First Nation's treaty right to hunt.[74]

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[73] Taylor *et al.*, *supra* note 6 at 81:

> At present, Canadian environmental tribunals are seeking to address this problem in two ways. First, the Nova Scotia Environmental Assessment Board is attempting to create a trust fund to provide parties with legal and technical advice during the course of ADR proceedings. ... Second, some other tribunals ... will make their own expertise or the expertise of their staff available to the parties on an ad hoc basis during the course of a mediation.

[74] (1999), 64 B.C.L.R. (3d) 206 (B.C. C.A.) at 255 [*Halfway River*].

B. *Fair Participation in a Collaborative Process*

In negotiation, resolutions should be developed through collaboration. While courts cannot force parties to act in a collaborative manner, they can facilitate a process that makes collaboration possible. In order to do this, courts would need to do more than simply ensure that the Crown fulfilled the standard administrative law requirements, such as the right to notice, the right to information, and the right to be heard.[75] These remedies alone would not provide the Crown with the incentive to negotiate because they focus on easily satisfied formal rules rather than more challenging substantive content. In recognition of this, the British Columbia Court of Appeal has encouraged a fair process by requiring the Crown to incorporate the concerns of First Nations in their final plans. In *Taku River*, Justice Rowles stated that consultations should have "effectively addressed the substance of the Tlingits' concerns with respect to when, and on what terms and conditions, the mineral rights to be exploited by Redfern should be developed."[76] In *Halfway River*, Justice Finch suggested that representations from First Nations should be "wherever possible, demonstrably integrated into the proposed plan of action."[77]

The process for addressing substantive concerns of First Nations should include an opportunity for the parties to "participate in a fair

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[75] See *e.g. Westbank First Nation v. British Columbia (Minister of Forests)*, [2001] 1 C.N.L.R. 361 (B.C. S.C.) at 385. Sigurdson J. held that the Crown had a duty of procedural fairness only to the First Nation. In this case, an exchange of information was all that was required.

[76] *Supra* note 60 at 124. See also *Haida Nation (B.C. C.A.)*, *supra* note 59 at 140, where the court held that the Crown had:

> [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.

[77] *Supra* note 74 at 255:

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

See Richard F. Devlin & Ronalda Murphy, "Contextualizing the Duty to Consult: Clarification or Transformation?" (2002-2003) 14 N.J.C.L. 167 at 210-14 for a discussion of the difference between procedural rights and substantive rights in the context of consultation.

manner"[78] in negotiation. Fairness would require meetings where there was an exchange of ideas, an opportunity to review the required expert advice, and a joint attempt to develop an agreement.[79] It may be difficult in lands and resources disputes to determine how elaborate a process must be in order to be fair because of the range of issues involved. In *Delgamuukw*, Chief Justice Lamer suggested that the more serious and far-reaching the dispute, the more extensive the consultation should be:

> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.[80]

A dispute that is geographically contained with limited legal and factual issues may be accommodated by an informal process with no set rules of procedure. A more extensive process, like the negotiations in the Yukon, in Nunavut, or for the Nisga'a, may involve full-time staff, an office, and third party facilitators. In order to decide where on this scale to place a particular negotiation, the following factors could be considered by the parties and, if negotiations fail, by the courts.

1. The Importance of the Land or Resource to the First Nation

The need for preservation of their lands or resources is of paramount importance for First Nations. For example, the Haida Nation showed that the old growth red cedar that was being logged was "an integral part of Haida culture"[81] and its preservation was critical. Because the "obligation [to consult] extended to both the cultural interests and the

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[78] Taylor *et al.*, *supra* note 6 at 97. See Principle #6 (Equal Opportunity) in Round Tables on the Environment and Economy in Canada, *supra* note 5 at 13 ("All parties must be able to participate effectively in the consensus process. Unless the process is open, fair and equitable, agreement may not be reached and, if reached, may not last.").

[79] See *e.g. Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries and Oceans)* [1997], 134 F.T.R. 246 at 260, for an interpretation of a provision of the Nunavut Land Claims Agreement: "[C]onsultation and consideration must mean more than simply hearing. It must include listening as well."

[80] *Delgamuukw*, *supra* note 2 at 1112-13.

[81] *Haida Nation (B.C. S.C.)*, *supra* note 59 at 95.

economic interests of the Haida people,"[82] the consultation should be extensive and should review expert advice on such matters as forestry practices, culture, and economic impact.

On the other hand, where a resource is important only as a source of cash and the negotiation is simply about the amount of compensation, the process could be less extensive. In *Tsay Keh Dene Band v. British Columbia (Minister of Environment, Lands and Parks)*, Justice Cowan stated that the First Nation had asked for a cash payment of $1 million in addition to $500,000 per year from the resource company. If this were the only issue in the case, the negotiation process would be less complex.[83]

2. The Extent of the Potential Harm to the Interests of the First Nation

Courts have weighed the formality of the process against the extent of the potential harm to the interests of the First Nation. In *Liidlii Kue First Nation v. Canada*, Justice Reed found that exploratory drilling for diamonds did not have great potential for harm and the process used was adequate:

> The potential infringement is minimal and temporary. As noted, it involves drilling twelve holes with helicopter supported diamond drills. The individuals doing this work will be flown in and out of the various locations; there will be no camp. A commitment was given by Ms. Keough that there would be no drilling through cultural or burial sites, assuming she was told of their location.[84]

In this case, the consultations included an offer of $5,000 from the government for the First Nation to study the potential impact of test drilling on hunters and trappers. The band had asked for a study on the impact of a full-scale mining operation conducted by someone other than a civil servant, which would have cost $66,575. The court found that such an extensive study was unnecessary because there had not been a decision to proceed with a full-scale mining operation.

In the *Haida Nation* case, the potential for harm was much higher. The disputed logging licence would have removed a quarter of the forests on the land claimed, and there was an indication that it would take five hundred years for the old growth red cedar to return. A case like this

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[82] *Haida Nation (B.C. C.A.), supra* note 59 at 137.

[83] [1997] 24 C.E.L.R. 66 at 70-72 (B.C. S.C.). It should be noted that the First Nation raised the cultural importance of the land, but the judge came to the conclusion that the only real issue was the amount of monetary compensation.

[84] [2000] 4 C.N.L.R. 123 at 134 (F.C.T.D.).

should merit an extensive process of negotiation that encompasses more than operational decisions on where to cut. The discussions should include a consideration of whether logging should be permitted at all.

3. The Strength of the Potential Claim

As negotiation will occur before a court decision on the merits, courts have held that the formality of the process should depend on the strength of the claim. In *Haida Nation*, the British Columbia Court of Appeal stated:

> The strength of the Haida case gives content to the obligation to consult and the obligation to seek an accommodation. I am not saying that if there is something less than a good *prima facie* case then there is no obligation to consult. I do not have to deal with such a case on this appeal. But certainly 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.[85]

An example of a weaker prima facie case is found in *Chemainus First Nation v. British Columbia Assets and Lands Corp.*, in which the Crown was proposing to sell land that it had expropriated from private parties thirty years before.[86] The Crown appointed an individual to look into First Nation concerns in the area and published a notice to the public. The Crown eventually entered into an agreement with the Tsawwassen Band, which had lands nearby. The Chemainus First Nation claimed an interest in the lands although, according to Justice Melvin, "[t]he plaintiffs have not used or occupied these lands for 110, 120, maybe even 130 years."[87] There had not been significant discussion or consultation with the Chemainus First Nation, but the court found that the process was appropriate in the circumstances.

These three factors—the importance of the land or resource to the First Nation, the potential for harm to the land or resource, and the strength of the potential claim—should assist in determining the scope of the negotiation or consultation.

One consideration I have not mentioned is the strength of the potential justification for Crown infringement of the claimed Aboriginal or treaty right. Even if the First Nation has a strong prima facie case for establishing an existing Aboriginal right, the Crown may have just as strong

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[85] *Supra* note 59 at 138.

[86] [1999] 3 C.N.L.R. 8 (B.C. S.C.) [*Chemainus First Nation*].

[87] *Ibid.* at 17.

a case for justifying infringement. In my view, the potential for justification should not be a factor when considering whether the negotiation or consultation process is adequate. Part of the purpose of requiring consultation under the *Sparrow* test[88] is to help the Crown determine how to tailor the proposed measures to minimize the infringement. Whether or not the Crown has sufficient justification is dependent on how the Crown responds to the concerns expressed in the consultation.

A similar point was made by Justice Tysoe in *Gitxsan*. In that case, the Crown claimed that the lack of adequate consultation with First Nations was a result of a decision to balance other competing interests. The judge stated that the necessity of balancing interests did not preclude consultation because "[o]ne of the principal purposes of consultation is to enable the Minister to gain a proper understanding of the aboriginal interests and to seek ways to accommodate those interests."[89]

C. *Power Imbalance*

In spite of the importance of negotiation, there are dangers in the process for less powerful parties. Ury, Brett, and Goldberg point out that a group that is "particularly susceptible to having its rights violated"[90] may lose rights and that an "unintended consequence" of mediation may be that it will "deter ... change in the distribution of power."[91] In a similar vein, Mara Schoeny and Wallace Warfield refer to the dangers of "systems maintenance," "[I]f systems maintenance is the objective (or unintended result?) of conflict resolution and if the system has already been judged to be calibrated against certain members of society, then conflict resolution by definition becomes a handmaiden to suppression."[92]

In negotiation between Aboriginal nations and the Crown, the greater power of the Crown is manifested in several ways, including greater access to legal and technical resources, deeper financial pockets, the power

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[88] See *supra* note 39 and accompanying text for an explanation of the *Sparrow* test.

[89] *Supra* note 68 at para. 85. See also Hansen J. in *Mikisew Cree Nation v. Canada (Minister of Canadian Heritage*, [2002] 1 C.N.L.R. 169 at 219:

> The question of whether the Crown's actions were consistent with the its fiduciary duty in this case hinges on consultation. In fact, it is premature to consider the issues of priority, minimal infringement and compensation, given that the consultation that would enable the Crown to satisfy those branches of the test was not undertaken.

[90] *Supra* note 50 at 51.

[91] *Ibid.* at 52. See also Costantino & Merchant, *supra* note 51 at 43.

[92] Mara Schoeny & Wallace Warfield, "Reconnecting Systems Maintenance with Social Justice: A Critical Role for Conflict Resolution" (2000) Negotiation J. 253 at 258.

to determine the extent of the funding to be provided to the Aboriginal nation, and the legal authority to act unilaterally.[93] These advantages in the negotiation process are compounded by significant structural advantages that are further removed but nonetheless significant, such as the right to appoint judges and the right to pass legislation.

This power imbalance is counterproductive. In the words of Susskind and Cruikshank, "[t]he potential parties to a consensus-building effort cannot participate in a relationship in which one party holds all the power."[94] This imbalance may be a disincentive for weaker parties to engage in negotiation because they may believe they have more effective extra-legal options[95] or they may believe there is more built-in protection in the adjudicative system. Michael Coyle, a former facilitator with the Indian Commission of Ontario states, "[T]he absence of general requirements of disclosure and of evidence under oath, combined with the absence of formal procedural protections for weaker or relatively impecunious parties, already renders mediation a process that is vulnerable to abuse by stronger or manipulative parties."[96]

A power imbalance may also detrimentally affect the quality of the resolution. Without equal resources to test each other's expert information, the resulting agreement will not benefit from the best information available.

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[93] Michael Coyle, "Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?" (1998) 36 Osgoode Hall L.J. 625 at 659. See also The Indian Claims Commission, [1995] 2 ICCP at 11 ("There are many distinct conflicts of interest inherent in the present claims policy. Most of these arise from the fact that, when a claim is brought forward, Canada is the accused, the banker, and the judge and jury.").

[94] *Supra* note 5 at 190. See also Bernard Mayer, "The Dynamics of Power in Mediation and Negotiation" (1987) 16 Mediation Q. 75 at 82, "[A]greement forced on a party primarily because of a power differential and not through the satisfaction of the party's interests is likely to be less durable over time and may create unintended future consequences."

[95] Stuart Gale, a former associate of the Commission on Resources and Environment in British Columbia, said of the land use planning process in UVic Institute for Dispute Resolution, *supra* note 7 at 248, "A significant barrier is power imbalance. ... Sometimes First Nations have to demonstrate to the government that if the government doesn't come around to negotiating the issue, they are going to have many difficulties facing them."

[96] There is a strong undercurrent of concern about power imbalances in negotiation. The classic statement is provided by Owen Fiss in "Against Settlement" (1984) 93 Yale L.J. 1073 at 1078:

> There is, moreover, a critical difference between a process like settlement, which is based on bargaining and accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgment, which knowingly struggles against those inequalities. Judgment aspires to an autonomy from distributional inequalities, and it gathers much of its appeal from this aspiration.

In the context of environmental mediation, see Brett A. Williams, "Consensual Approaches To Resolving Public Policy Disputes" (2000) J. Disp. Resol. 135 at 147.

If there is no agreement and the matter goes to court, the court will only have the benefit of information from one side. Two ways to address power imbalance are to use third parties and to provide funding for participation.

1. Third Party Neutrals

In order to address power imbalances, Susskind and Cruikshank urge the use of a third party neutral to mediate or facilitate the discussion. The third party can act as a buffer between the parties, direct the discussion toward possible solutions, and provide alternatives if difficulties arise. While Susskind and Cruikshank outline certain conditions when unassisted negotiation might be successful, they are not optimistic about the success of such negotiation when there is a power imbalance:

> One of the most common reasons why an unassisted negotiation fails to begin, or fails to produce a satisfactory outcome, is an imbalance of power among stakeholders. ... In negotiations, each group must protect its own interests. Without assistance, less powerful parties often have trouble protecting their interests at every step in the consensus-building process.[97]

As Alex Robertson, former chief commissioner of the British Columbia Treaty Commission, noted, the neutral body is important to ensure that there is a "level table":

> The expectations of the First Nations in particular are that our role is to be keepers of the process and to endeavour to bring about a "level playing field" or a "level table." It is a recognition that in reality these tables are not level. There is a power imbalance, and the governments necessarily have access to the experience, to information and to resources that are not available to the First Nations. And so, to the First Nations generally, we are seen as important in trying to redress some of the imbalance.[98]

Third party neutrals are not used in a systematic way in the majority of less formal negotiations. Courts could consider nudging the parties toward greater use of such neutrals.[99] A mediator or facilitator will not only

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[97] Susskind & Cruikshank, *supra* note 5 at 134.

[98] UVic Institute for Dispute Resolution, *supra* note 7 at 70. The British Columbia Treaty Commission was established under a tripartite Federal-Provincial-First Nation agreement. Michael Coyle suggests that mediators have an obligation to address power imbalance because of "empirical evidence that negotiation parties that enjoy a significant power imbalance appear more prone to non-cooperative, manipulative, or exploitative behaviour."

[99] The extent to which it is open to the court to "nudge" the appointment of a neutral would depend on the type of proceeding. One place it could come into play is in the review of the adequacy of consultation. An "unassisted" consultation process may be found to be inadequate in certain circumstances.

be important for the particular negotiation, but, hopefully, for establishing a pattern that will assist in the larger ongoing relationship between the Crown and the First Nation.

2. Funding

In addition to the presence of a third party neutral, power imbalance can be addressed by ensuring that parties have the resources to participate in the development of a "wise agreement." Both the Canadian Round Tables on the Environment and Economy and the American Association for Conflict Resolution suggest that adequate resourcing of the parties is integral to the success of the entire negotiation.[100] In disputes involving Aboriginal and treaty rights, the principle that such funding is necessary in litigation is beginning to be recognized.

In *British Columbia (Minister of Forests) v. Okanagan Indian Band*,[101] the First Nations argued that they could not afford to pay counsel for the costs of a full trial and no other funding was available. The fact that the bands did not have funds to pay was not disputed—because of the lack of housing on their reserve, the bands were logging to build their own houses. Justice Newbury held that there was jurisdiction to order costs in special or exceptional circumstances, and that the exercise of that jurisdiction had to be informed by the honour of the Crown:

> [T]he honour of the Crown is at stake in dealings between it and aboriginals... The broad discretion exercisable by the Supreme Court in making costs orders must surely be informed by that principle in the particular circumstances of this case. In my view, it is simply unrealistic for the Crown in this case to fold its hands and say that the Bands will have to manage without counsel.[102]

Orders for funding should not be restricted to litigation. If negotiation is to be considered an integral part of the dispute resolution process, negotiation in which there is a power imbalance should raise concerns for the court. Those concerns can be alleviated if there is a third party neutral as well as funding available for the parties to participate.

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[100] See Principle #6 (Equal Opportunity) in Round Tables on the Environment and Economy in Canada, *supra* note 5 at 13 and the *Report and Recommendations of the SPIDR Environment/Public Disputes Sector Critical Issues Committee*, online: <http://www.acresolution.org/> [*SPIDR Report*]. See also Lawrence & Macklem, *supra* note 30 at 274, who argue that in order to enhance the possibility of negotiated settlements the Crown must provide "adequate funding to a First Nation to ensure effective participation and the sharing of information in consultation processes."

[101] [2002] 1 C.N.L.R. 57. Affirmed by the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71.

[102] *Ibid.* at 75.

D. *The Conduct of the Parties—Good Faith*

A fourth requirement in the negotiation process is that parties act in good faith. Several cases have imposed this standard on negotiation between the Crown and First Nations, both in situations where there is a structured negotiation with a third party neutral[103] and in situations where the Crown is to consult on a potential infringement of an Aboriginal right.[104] Areas that may merit court supervision are fraud and misrepresentation, cultural appropriateness, and the scope of negotiation.

1. Fraud, Misrepresentation, and Collaborative Conduct

Courts have already found bad faith to include fraud and misrepresentation.[105] In *Gitanyow*, Justice Williamson of the British Columbia Supreme Court wrote that the "duty must include at least the absence of any appearance of 'sharp dealing,' disclosure of relevant factors, and negotiation 'without oblique motive.'"[106] First Nations would also be held to a good faith standard, so that they could not derail a project by remaining silent during the consultation and later complaining about inadequate information.[107]

2. Cultural Appropriateness

A further aspect of good faith is the flexibility shown by the Crown in ensuring that the negotiation process is appropriate in the context of negotiation with First Nations. Jack Woodward, a senior practitioner who has handled many high profile cases for First Nations, told a conference that "interest-based" bargaining was not an appropriate model for his

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[103] See *Gitanyow First Nation* v. *Canada*, [1998] 4 C.N.L.R. 47 (B.C. S.C.) at 54 [*Gitanyow*].

[104] *Haida Nation (B.C. C.A.)*, *supra* note 59 at 140.

[105] See *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, [1998] 4 C.N.L.R. 68 (F.C.T.D.), where Heritage Canada was planning to create a park in the territory that was the subject of negotiation.

[106] *Supra* note 103. See also *Chemainus First Nation*, *supra* note 86 at 16:

> [O]nce the government commences negotiation with First Nations in my view it is a furtherance of its fiduciary duty. It must negotiate in good faith. I do not restrict that expression to lack of fraud or misrepresentation. In my view the good faith component imports a duty on the Crown as fiduciary to genuinely negotiate with the claimant, that is, without oblique motive. There is no duty to agree nor is there a duty to negotiate endlessly as either party may terminate the process, it appears, at will.

[107] *Cheslatta Carrier Nation v. British Columbia (Project Assessment Director)* (1998), 26 C.E.L.R. 37 (N.S.) at 57. This does not mean that First Nations must participate in a process that will not likely be collaborative: *Gitxsan*, *supra* note 68 at para. 89.

clients, because Aboriginal rights are not interests that can be traded away, "Negotiations concerning Aboriginal rights fail when the parties start with the assumption that the process is about measuring, purchasing and thereby extinguishing the special constitutional rights of Aboriginal people."[108]

His concerns are echoed by Andrew Pirie who cautions against the unthinking imposition of interest-based negotiation techniques onto Aboriginal disputes, pointing out that "the theory and practice of interest-based bargaining may have little meaning and may even smack of neocolonialism and ethnocentric biases."[109] A unilateral imposition of this method of dispute resolution by the Crown can lead to what Kevin Avruch calls "home court advantage" for the Crown.[110]

One way to address the problem of cultural imposition is to ensure that both parties decide on the structure of the negotiation process. Stuart Gale says of his experience with the British Columbia Commission on Resources and Environment:

> Another issue is lack of consultation before processes are set up. Often planning processes are presented as: "We're doing a planning process here, and we've set up a planning table. How would you like to come to the first meeting next Saturday?" Rather than: "We're thinking of doing some land-use planning. What do you think about it? What kinds of issues or concerns would you like to see built into the design of the planning process?"[111]

Gale points out that the offer to collaborate on the design of the process is itself a step toward creating an appropriate process for negotiation as a whole.[112]

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[108] UVic Institute for Dispute Resolution, *supra* note 7 at 171.

[109] Andrew Pirie, *Alternative Dispute Resolution: Skills, Science and the Law* (Toronto: Irwin Law, 2000) at 302, n. 104. See also the statement by Mark Doxtator, *supra* note 9 and accompanying text.

[110] See Kevin Avruch, "Culture and Negotiation Pedagogy" (2000) Negotiation J. (October) 339 at 343. See also J.Z. Rubin & F.E.A. Sander, "Culture, Negotiation, and the Eye of the Beholder" (1991) 7 Negotiation J. 249; J.P. Lederach, *Preparing for Peace: Conflict Transformation Across Cultures* (Syracuse: Syracuse University Press, 1995).

[111] UVic Institute for Dispute Resolution, *supra* note 7 at 248.

[112] See also Justice Tysoe in *Gitxsan*, *supra* note 68 at para. 113 who says, "I agree that the first step of the consultation process is to discuss the process itself, and the discussion in that regard would logically include the provision of relevant information." For a discussion on "self-design," see G. Cormick *et al.*, *Building Consensus for a Sustainable Future: Putting Principles into Practice* (Ottawa: National Round Table on the Environment and the Economy, 1996) at 44-48, "[C]onsensus offers the opportunity to adapt the rules to the situation. This can prove especially valuable when parties come from vastly different social and cultural backgrounds, since it allows the invention of hybrid approaches that are as consistent as possible with all parties' needs and expectations." See also *SPIDR Report*, *supra* note 100.

3. Scope of the Negotiation

Courts often prefer negotiation over litigation because it can address a wider range of issues and provide a wider array of solutions. While a negotiation that is too broad is unproductive, the advantage cannot be realized if its scope is too narrow. In *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, the Federal Court found that there was bad faith on the part of the Crown when it de facto restricted the scope of negotiation by attempting to deal unilaterally with what was being negotiated.[113]

Courts should be reluctant to support the Crown's attempt to narrow the scope of negotiation. If the immediate dispute concerns where to log and the court requires consultation on that issue alone, there will be no discussion of the more fundamental dispute about whether there should be logging at all.[114]

This does not mean that every consultation and negotiation can address all possible issues in dispute between the parties. However, in my view, the law at present places too much emphasis on immediately identifiable short-term economic impacts, such as profits and seasonal employment at the expense of the long-term non-liquidatable losses to culture and environment. For example, a suspension of resource extraction activity for a few weeks or a season, should be weighed against the permanent loss to the environment or to culturally significant connections by Aboriginal people, such as hunting, fishing, and trapping. Negotiation that takes a broader, more comprehensive approach would prevent the incremental destruction of lands and resources. Lawrence Watters observes:

> Each instance of the degradation of nature in the traditional heartland and each incursion in rights may occur over a period of time, leading inexorably to the slow demise of environment and culture. The cumulative effect of countless individual actions by agencies, municipalities and the private sector results in step by step destruction.[115]

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[113] *Supra* note 105. In this case, the Inuit were engaged in land claims negotiations with the federal Crown that would lead to a treaty. The Crown announced its intention to create a park within the territory under negotiation. Richard A.C.J. of the Federal Court held that there was a fiduciary duty to negotiate in good faith, once negotiations were commenced, and ordered the government to consult about the park.

[114] See *Haida Nation (B.C. S.C.)*, *supra* note 59 at 104.

[115] "Indigenous Peoples and the Environment: Convergence from a Nordic Perspective" (2002) 20 UCLA J. Envtl. L. & Pol'y 237 at 297. Broader negotiation on lands and resources is also necessary in order to prevent incremental extinguishment of treaty rights. See Imai, *supra* note 38.

Taking a broad approach to the scope of matters in issue is consistent with the decision of the British Columbia Court of Appeal in a dispute between the Nuu-Chah-Nulth Tribal Council and MacMillan Bloedel over logging on Meares Island. Justice Seaton stated in *MacMillan Bloedel v. Mullin*:

> Meares Island is of importance to MacMillan Bloedel, but it cannot be said that denying or postponing its right would cause irreparable harm. If an injunction prevents MacMillan Bloedel from logging pending the trial and it is decided that MacMillan Bloedel has the right to log, the timber will still be there.
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> The position of the Indians is quite different. It appears that the area to be logged will be wholly logged. The forest that the Indian know and use will be permanently destroyed. The tree from which the bark was partially stripped in 1642 may be cut down, middens may be destroyed, fish traps damaged and canoe runs despoiled. Finally, the Island's symbolic value will be gone. The subject matter of the trial will have been destroyed before the rights are decided.[116]

In this section, I have outlined the four ways that courts could supervise the conduct of specific negotiations. First, courts could ensure that agreements are based on sound expert advice and that such advice is available to all parties. Second, courts could ensure that there is an appropriate collaborative process that takes into account the importance of the land or resource to the Aboriginal party, the extent of the potential harm, and the strength of the Aboriginal claim. Third, courts could judge whether issues arising from power imbalances have been addressed by the use of a third party neutral or funding to the parties to facilitate participation. And fourth, courts could evaluate the good faith of the parties by looking at issues such as the presence of fraud or misrepresentation, the cultural appropriateness of the process, and the scope of negotiation.

This discussion was not meant to suggest that all disputes can be structured in the same way. A negotiation involving a comprehensive claim to Aboriginal title will require an elaborate structure with a multi-year work plan. More limited disputes can involve less structure and fewer meetings. In my view, however, it is possible for all negotiation to adhere to the four broad principles I have outlined here.

VI. CONCLUSION

For the most part, cases on lands and resources disputes arise from the mundane realities of day-to-day cultural and economic survival for

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[116] [1985] 2 C.N.L.R. 58.

Aboriginal people. For example, take these cases from the Supreme Court of Canada. Donald Marshall was charged for selling eels worth $787.10;[117] Dorothy Van der Peet for selling ten salmon for $50;[118] Franck Coté with failing to pay a park fee on his way to teach young people about fishing in a traditional fishing area;[119] Régent Sioui, under Quebec's *Parks Act*, for cutting wood and building a fire for a traditional ceremony;[120] Steve Powley for shooting a moose for food for the winter;[121] and George Henry Howard for participating in a well-publicized attempt to assert a treaty right to fish for food.[122] Bert Horseman shot a grizzly bear in self-defence while he was hunting moose for food. A year later, in need of money to support his family, he obtained a permit and sold the hide. He was convicted for not obtaining the permit before shooting the bear.[123]

In other cases, the scale of the matter in dispute is much greater. In *Ontario (Attorney General) v. Bear Island Foundation*, a First Nation claimed it had been left out of treaty negotiations in the mid-1800s and, consequently, still retained Aboriginal title over 4,000 square miles in northern Ontario.[124] In *Delgamuukw v. British Columbia*, the Gitskan and Wet'suwet'en did not have a treaty and claimed Aboriginal title over 58,000 square kilometres of northern British Columbia.[125]

Although these cases show that there are enormous differences in

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[117] *Marshall, supra* note 3.

[118] *Van der Peet, supra* note 46.

[119] *R. v. Coté*, [1996] 3 S.C.R. 139.

[120] *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1075.

[121] *Powley, supra* note 25.

[122] *R. v. Howard*, [1994] 2 S.C.R. 299.

[123] *R. v. Horseman*, [1990] 1 S.C.R. 901.

[124] *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570.

[125] *Delgamuukw*, supra note 2. Other cases dealing with lands and resources include *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture*, [2002] 2 C.N.L.R. 143 (finding that the province had the authority to allow destruction of 116 culturally modified trees); *R. v. Sundown*, [1999] 1 S.C.R. 393 (finding that the right to hunt for food included building a hunting cabin in a provincial park); and *R. v. Nikal*, [1996] 1 S.C.R. 1013 (finding that a requirement for a fishing licence did not infringe an Aboriginal right to fish for food.

Two cases deal with larger amounts of fish. In *R. v. Gladstone*, [1996] 2 S.C.R. 723, members of the Heiltsuk Bank attempted to sell 4,200 pounds of herring spawn on kelp without a commercial licence. The Court held that the commercial sale of herring spawn was an Aboriginal right, which had been practised since pre-contact times. A case where the court found no basis for the large commercial sale of fish was *R. v. N.T.C. Smokehouse*, [1996] 2 S.C.R. 672, where the Court upheld a conviction against the company for purchasing over 100,000 pounds of fish caught by 80 members of the Sheshaht and Opetchesaht Indian Bands. While the cumulative amount sold by the company was significant, the financial gain for each of the 80 individual fishers would be modest.

the scale of the disputes, from a dispute resolution perspective, resolutions can be facilitated in all cases by integrating the role of adjudication with the role of negotiation in a systematic and coherent way. I have outlined three roles for the courts that would advance this objective. First, courts should establish a negotiation framework and rights parameters in order to provide incentives to negotiate and boundaries for the negotiation.

Second, courts should encourage the integration of negotiation and adjudication in a way that is consistent with dispute system design principles. The processes should proceed from low to high cost. There should be opportunities for adjudication, but the decisions should loop back to negotiation. And the courts should ensure that the parties have sufficient motivation to negotiate.

Third, the courts should supervise individual negotiations to ensure that they are consistent with four broad principles: the negotiation should have the benefit of appropriate expert advice; the parties should have a fair opportunity to participate; issues relating to power imbalance should be addressed; and the parties should act in good faith.

In the future, as the success or failure of ongoing negotiation becomes apparent, and as the law in this area develops, the relationship between the courts and the negotiating process will be further clarified. Both the parties and the courts should continue to shape negotiation and adjudication in ways that will enhance the opportunities for resolution, keeping in mind the importance of sound science, careful policy analysis, and the ongoing relationship between the Crown and Aboriginal people. In my view, coordinating the role of negotiators and the role of judges along these lines will help create a framework for resolutions to be achieved, not on the basis of superior power, but rather on the merits of the agreement itself.