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Negotiations: Why Do We Do It Like We Do?

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Executive Summary

George Adams gave this paper in May 1992 at the Annual Spring Industrial Relations Seminar. He, as a labour lawyer and a professor of labour law, mediated many disputes over the years. His views on the negotiation process are timely in view of the competitive challenges facing the workplace today.

- Western society has progressed little in undertaking important economic negotiations.
- The way in which we negotiate seems oddly out of touch with a technologically advanced and increasingly global society.
- Although negotiated solutions 'theoretically' have powerful advantages, they are seldom friendly, elegant or satisfying to both parties.

  `Positional' bargaining precludes an understanding of the other party's underlying interests. Communication is more by sign language — vague and unreliable, with real positions revealed only in the 'eleventh hour.'
- The outcome of collective bargaining negotiations is an important input into the viability of our companies, our communities, our families.
- Negotiating sessions should be brainstorming efforts aimed at inventing as many solutions for joint gain as possible.

  Brainstorming requires an honest look at all possible solutions and a candid examination of interests.
- Solutions arrived at through 'principled' negotiations are more elegant, more satisfying and more enduring.
- Principled bargaining requires earlier preparation, constant communication, training and, possibly, earlier party involvement.
- Collective bargaining conducted on this more sophisticated plane will achieve the kind of outcomes consistent with increasingly competitive and global marketplaces.

Negotiation: Why Do We Do It Like We Do?

One of my new responsibilities [as a member of the Ontario Court of Justice] is to sit on bankruptcy cases and situations where temporary protection is sought under the *Companies Creditors Arrangements Act* (Canada). These cases now come before a specialized group of judges who administer what is called 'The Commercial List.' To you, this would look like a specialized commercial tribunal. The idea is to provide expert and expeditious attention to complex and important commercial disputes. Other areas of specialization include family law, criminal law, estates and landlord and tenant. Integral to this approach is the court's commitment to offer parties a range of dispute resolution options including mediation, mini-trial, and advisory or binding arbitration. Historically, courts offered disputing parties only one resolution process — a trial.

Adjudication of a dispute usually entails:

- Total victory or total defeat, given the emphasis on rights;
- aggressive adversarial postures by the parties and their counsel in the search for truth;
- inelegant solutions because third party judges can only be superficially educated in a dispute by a trial process;
- Trials can also be very expensive. Indeed, manned by highly trained and highly paid lawyers, the court system tended to be geared to their availability. The resulting delay added to the expense of this method of dispute resolution.

There is a growing recognition that giving each case the 'cadillac' treatment is not appropriate.

Increasingly, however, our courts are attempting to design out many of these negative attributes. As well as spending much more time and money on case management, there is a growing recognition that giving each case the `cadillac' treatment is not appropriate. This awareness has been heightened with the dramatic growth in alternatives to our courts. The ancient process of commercial arbitration and the more recent explosion of administrative law systems such as labour law removed many important areas from the jurisdiction of our general courts.

Courts are also becoming more sensitive to the ongoing nature of relationships in conflict and the adverse impact on them of battle-like trials. Instead, adjustment is more likely to resolve the dispute and keep the relationship intact. Family law has been very much alive to this reality and the need for a more pro-active role for our courts in the set-dement process. Thus, the Ontario Court has come to see itself as an institution of conflict resolution and not just a place where trials are held. It may also prove to be one of

the most credible of such institutions because of the judiciary's long and important tradition of independence.

One recent example of this dispute resolution approach was my assignment to mediate a plan of arrangement between all the stakeholders at Algoma Steel. All involved understood the bankruptcy of that corporation would have a catastrophic effect on the city of Sault Ste. Marie. However, these multi-party restructuring negotiations had been going on for more than a year and between institutions exhibiting a wide range of familiarity and hostility to each other. By February the talks had bogged down and suffered from the absence of a facilitator to co-ordinate negotiations and provide a more principled focus to sticking points. In this sense, the Court intended its intervention as a life preserver for the parties to use as they wished. Yet from another, it represented an intrusion into the restructuring process and the usual forces at play in insolvency matters. However, with the survival of a community at stake and several billion dollars of public and private money at risk, the Court saw little that was usual about this problem and it wanted to do all it could to assist the parties in their deliberations.

I could describe how the mediation unfolded and how, over the course of two weeks, seven or eight diverse stakeholder groups arrived at a solution they were all able to endorse. I fear, however that to go into the details would break confidences and possibly add pressure to a situation that faces enough challenges. I can report that the Ontario and federal governments played key supportive roles and the innovative labour and financing aspects of the plan illustrate the contribution made by all involved.

It is amazing how little western society has progressed in undertaking important economic negotiations.

What I have decided to discuss with you, however, does arise from my involvement in those negotiations or, at least, it relates to my reflections on how we negotiate. With all the change around us today, it is amazing how little western society has progressed in undertaking important economic negotiations. Of course, in making this observation you may suspect I am just suffering from a bad case of Algoma burn-out due to the unusual complexity of those negotiations. Unfortunately, I believe Algoma was not unusual. I would argue the complexity of that situation is present in every set of collective bargaining negotiations but the complexity is masked or ignored until a crisis like Algoma occurs. I would further argue the way we negotiate has at least something to do with the competitive and workplace challenges now before us.

Every business needs to be financed; needs to keep abreast of market demands; and needs to stay ahead of the competition. Every employee needs a sense of worth beyond the receiving of a pay cheque. Suppliers, customers, bankers, employees, shareholders and government all have a common interest in the success of a business and in the fair distribution of its revenues. Not one of these parties can act in a manner oblivious to the

interests of the others. Every set of negotiations affecting this business is therefore by definition complex. Yet we continue to see such negotiations as a mere two-party exchange involving a compromise or change in positions. This view of bargaining often puts too big a premium on threat, bluff, exaggeration, little or no preparation and the need for eleventh hour soul searching. Outcomes are rarely elegant; complex and forward looking issues are regularly shelved; and, when its over, parties often believe they could have or should have got more or given less. In short, the way in which we negotiate seems oddly out of tune with a technologically advanced and increasingly global society.

The administration of justice is clearly in need of improvement but simply telling parties adverse in interest to 'negotiate' their differences will bring little improvement if negotiated solutions simply expedite the oppression of the weak or leave both parties feeling angry.

We are told negotiated solutions have some very powerful advantages.

- Parties are better able to control their own destinies and tailor solutions to their own needs;
- Potential outcomes are wide ranging and not merely a choice between winning or losing big;
- Parties can deal with each other directly and in an informal and friendly atmosphere
- Solutions can be very elegant;
- Both parties can be more satisfied with the result;
- Outcomes are therefore more enduring.

But their ideals are rarely achieved even in the much vaunted labour relations field. Negotiations are not friendly. Solutions are seldom elegant or sophisticated. Both parties are not satisfied when agreements are arrived at.

We seldom directly discuss each other's interests at the bargaining table. Instead we dwell on our positions.

Why do we consistently fail to see the negotiation process as a problem solving process? Enduring solutions to problems require an understanding of each party's underlying interests. Yet we seldom directly discuss each other's interests at the bargaining table. Instead we dwell on our positions. Positions, however, can conceal and obscure the opportunity for achieving creative and lasting solutions.

Roger Fisher tells the story of two people quarrelling in a library. One wants the window open. The other wants it closed. They bicker back and forth about how much to leave it open: a crack, halfway, three quarters of the way. No solution satisfies them both

Enter the librarian. She asks one why she wants the window open. 'To get some fresh air.' She asks the other why he wants it closed: 'to avoid a draft.' The librarian could not have invented the solution she did if she had focused only on the stated positions. Instead, she looked to their underlying interests of fresh air and no drafts. This difference between positions and interests is crucial.

In positional bargaining, and we all are victims of it, communication is more by sign language but with the signs vague and sometimes unreliable. Difficulties in communication are complicated by the early use of threats, deception and the politics of the parties. A party's opening position is usually extreme and hostile with stages of compromise gauged to the timing of a deadline not to shared understanding. In the eleventh hour, `real' positions are supposed to be revealed and compared with the costs of no agreement. Of course, both parties must believe these eleventh hour positions are the real positions and any lingering effect of earlier tactics, ideology or personality conflict must not impede the making of this last minute rational comparison.

With this nature of negotiations, it is unsurprising that solutions are not optimal and people walk away unhappy. The eleventh hour is not the opportune time to communicate complicated information and to devise sophisticated solutions. This should be done earlier in negotiations; however, at that time the parties are likely still communicating exaggerated positions and engaging in threats, posturing and public relations. The outcome of collective bargaining negotiations is an important input into the viability of our companies; of our communities; of our families. But positional bargaining is not a very efficient process for the conveyance of complex and reliable data about the health of a plant, a company or the needs of employees. In good times, companies may fear candour will encourage larger demands. And candour only in bad times breeds cynicism and disbelief. On the employee side, there is sometimes little appreciation of realistic goals and objectives. This is in part due to employers treating employees like mushrooms and in part to the reluctance of elected representatives to properly prepare or be the bearer of bad news. The lack of interchange between the players on either side is also a problem. An almost cultural misunderstanding results which breeds distrust and distorts communications.

We want our negotiation sessions to be more brainstorming efforts aimed at inventing as many solutions for joint gain as we can conceive.

If positional bargaining is at odds with the powerful ideals of negotiation, how can we design the negotiation process to better live up to its billing? We want to engage the creative energies of everyone who is at the bargaining table. We need to achieve maximum understanding of each other's interests. We will benefit from an exhaustive review of all available solutions based on these interests and in light of rational standards. In short, we want our negotiation sessions to be more brainstorming efforts aimed at inventing as many solutions for joint gain as we can conceive.

Inventing options for mutual gain expands the pie and makes agreement easier. Using objective standards reduces the battle of wills and the related hostility in negotiations which impede wise decisions.

Brainstorming, however, requires an honest look at all possible solutions before making any decisions. This takes time and is impeded by adversarialness and by eleventh hour pressure so central to positional bargaining. But are these immutable characteristics of collective bargaining? I do not think so and I say this because of my experience as a mediator. Mediators create a climate for principled negotiations because they are always seeking an objective justification for what is being sought. Third parties also do more than facilitate the exchange of true positions. They create a brainstorming atmosphere and encourage a candid examination of interests. On these occasions, the solutions arrived at are more elegant, satisfying, and, therefore, more enduring. On these occasions, few will also deny agreement could have happened sooner and that even more could have been accomplished had the parties known each other and their problems better.

Surely, as policy makers in our respective places of work, we can rejuvenate negotiations to cause this problem-solving phase to arrive sooner and in a much more sophisticated form. For private parties this means earlier and more circumspect preparation focusing as much on the interests of others as on their own. What do you want to achieve; why; and what are the implications to the other party in light of their interests? What can you invent that might be attractive to them but low in cost to yourself? Constant communication within and between groups is entailed in such negotiations. Consideration should also be given to the early involvement of third parties to facilitate an early discussion of interests and consideration of a full range of joint gain solutions. Training, training and more training is also required to teach people how to invent first and decide later.

For labour law policy, a commitment to problem solving might find expression in a revision of our bargaining duty. Indeed, this is happening. Much more disclosure is being considered and more emphasis on principled discussion is creeping into the legislation. More mandatory consultation on problems and issues which arise during the currency of a collective agreement is another way to break down positional barriers as might mandatory early mediation. The creation of tripartite industry research advisory committees with extensive report writing and conference responsibilities can heighten principled and informed discussion. Such bodies create objective standards to be used by parties and substitute for the current prevalence of bluff and threat. These initiatives, and they are only illustrations, would help support more rational discussion in negotiations and, ultimately, more sophisticated outcomes. We need negotiated outcomes consistent with meeting Germany and Japan in the marketplace. Our current commitment to positional bargaining and the results achieved have proved increasingly inadequate.

Industry studies on efficiency, investment, profitability, employee morale, and training are crucial to informed outcomes in collective bargaining.

As an aside, I can tell you I would have paid to be present at the discussions between the United Steelworkers and the bankers during the Algoma restructuring negotiations. The Steelworkers had retained sophisticated New York investment counsellors and the bankers had conducted their own year long study of Algoma and the Canadian Steel Industry. The preparation of these parties squeezed out much of the playing room for competing ideologies. Face to face intensive meetings with third party involvement may also have contributed to new awareness of several shared perspectives. At a minimum, third party presence helped achieve a problem solving atmosphere representative of business partners. More importantly, these people got to know each other and as I sat in these meetings, I wondered why such fundamental discussions between labour and capital were so rare in our system. Industry studies on efficiency, investment, profitability, employee morale, and training are crucial to informed outcomes in collective bargaining. How often does such data play a central role in our negotiations?

Employees are investors in Canadian business but are provided with little of the information real shareholders receive or have access to as of right. For trade unions to act responsibly, they must be treated responsibly. Similarly, employees and trade unions must understand they too have to be interested and informed in such matters to attract investment. Quality and efficiency as well as fairness in the workplace have to be seen by employees as job security issues not just management's agenda. Collective bargaining negotiations conducted on this more sophisticated plane will achieve the kind of outcomes consistent with increasingly competitive and global marketplaces. This is something we have control over.

In conclusion, while our courts are beginning to think in these broader dispute resolution terms, we need your guidance by example. As the historic experts in dispute resolution, you need to again lead the way in refining our time tested methods for resolving social and economic conflict. Clearly, principle and preparation rather than position and posture must become synonymous with negotiating strategy.

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