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Crystal Baron

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Negotiating aboriginal issues

Managing the unmanageable

Crystal Baron

Introduction

Negotiations are difficult. Anyone with a child knows that first hand. Consider negotiating with someone from a cultural background different from your own. What if there are more than two parties to the negotiations? What if teams rather than individuals are responsible for negotiating the issues? What if each member of the negotiation team has a constituency to which he or she must report? What if the parties differ as to their negotiation styles? Any one of these factors complicates the negotiation process. All of these factors combined in one set of negotiations are enough to make anyone involved want to

stock up on antacids.

Negotiations between western-based businesses, governments and aboriginal communities concerning such politically charged issues as native title and aboriginal rights are wrought with such complexities. The process tends to be protracted, volatile, cumbersome, and expensive and holds no promise of reaching a mutually agreeable conclusion. This article discusses some of the impediments posed by negotiations in Canada between aboriginal communities and western entities and offers suggestions as to how to effectively manage negotiations of this nature.

The impediments***Multiparty negotiations***

The sheer number of participants involved in negotiations concerning aboriginal issues makes for a complicated process. The negotiators at the table are usually agents representing constituencies.¹ Aboriginal chiefs, Band Council [Editor's note: these are Canadian equivalents of Land Councils] members, elders and respected members of an aboriginal community represent the interests of the community or Aboriginal Band. Department managers, government officials, lawyers and professional negotiators sit at the table and negotiate on behalf of government or industry.



Other parties exist on the periphery. They are known as 'bystanders',² and although not directly involved in the negotiations, they are nevertheless interested in and directly or indirectly affected by the progress and outcome of the negotiations. Bystanders may include other aboriginal groups, businesses and industry, such as fisheries, mining and forestry. They keep a watchful eye on the progress of negotiations, and their actions are often guided by the outcomes of negotiations with which they are not directly involved.

Because of the political and legal nature of disputes concerning aboriginal people, proposed solutions often require the participation of third parties such as governments, government agencies and other industries operating within an alleged aboriginal territory. Third parties may be drawn into a dispute, albeit reluctantly, for the specific purpose of helping to resolve it.³

Multilateral negotiations of this nature involve simultaneous negotiations, occurring between any combination of the actual parties to the negotiation, bystanders and third parties. Agents continuously negotiate with their respective constituencies. Every participant has an interest that requires accommodation if a solution satisfactory to all is to be achieved. As stated by Saadia Touval, '[t]he larger the number of participants, the greater the likelihood of conflicting interests and positions, and the more complex the interconnections among the parties.'⁴

Intra-party differences

Interests and goals differ not just between the parties to the process, but also within the parties. Members of an aboriginal community may have diverging interests and goals. Conflict between aboriginal communities exists. One community may harbour resentment and mistrust of another because the latter, having more financial resources or simply because of its geographic location, appears to enjoy more benefits from local businesses and industry. Value conflicts arise as judgments are passed as to whether a community is holding true

to traditional aboriginal values or is giving way to western ideals.

Likewise, the interests and goals of western entities, which have relationships with these aboriginal communities, and the departments within those entities, are often in conflict. For example, a hydro-electric company may be in negotiations with aboriginal people concerning the construction of facilities on alleged aboriginal land. The aspirations of the company's transmission department may differ from that of the generation department. The interests of the legal department may be different from both the transmission and generation sides of the business.

Within each constituency, whether it be an aboriginal community or a private corporation, reside a few 'hawks' and 'doves'.⁵ Hawks and doves 'take opposing positions with respect to external relations. The hawks favour a tough, contentious defence of collective interests; the doves favour negotiation and problem solving with the outgroup in question'.⁶ Both hawks and doves play an important role in the resolution of conflict. Doves are needed 'to work out agreements and hawks to avoid giving away the store'.⁷ Because of the conflict between hawks and doves, the negotiators of each party face a challenging task – negotiating an agreement with which both the hawks and doves can live.

Once a negotiator has orchestrated a delicate balance in the form of an agreement from his constituency's hawks and doves, the negotiator may feel he or she has no choice but to be unbending when the issue arises during another level of the negotiations. A change in the negotiator's position would mean more protracted negotiations with his constituency or with other parties. Thus, seemingly uncompromising positions are commonplace in multilateral negotiations.

Agents

As previously stated, every participant has his or her own interests and goals. An agent delegated with the task of negotiating on behalf of a constituency or principal is a participant in their own right and may

be motivated by their own interests.

When a principal hires an agent to act on his behalf in negotiations across the table with another party, he may expect – naively – that the agent will be motivated solely to serve the principal's interests . . . But in the real world, agents always have interests of their own. As a result, the principal-agent relationship is rife with potential conflicts that demand skillful management behind the table.⁸

Chiefs and council members of aboriginal communities, lawyers and various corporate or government representatives may each have motivations that differ from those of their respective constituencies. Robert Mnookin explained the dilemma presented by the principal/agent relationship thus:

The basic problem is that the incentives for an agent ... negotiating on behalf of a party to a dispute may induce behaviour that fails to serve the interests of the principal itself ... This divergence may act as a barrier to efficient resolution of conflict.⁹

The approach taken by an aboriginal chief may be motivated by his political ambitions. A representative of government could be vying for re-election. A lawyer may be interested in developing a reputation for being a relentless advocate of aboriginal people's rights. A corporate representative hired to spearhead the negotiations may be concerned that his or her position will be eliminated once the negotiations are concluded.

Motivated by their own interests, agents can unwittingly take positions or approach the negotiations in a way that is inconsistent with the interests of their constituencies. A negotiator whose job depends on the ongoing negotiation process may behave in such a way that resolution of the issues will surely be a thing of the distant future. This may be so even though his or her constituency would prefer to remove the financial cost of the negotiations from the accounting books.

Third parties

In addition to their own interests, negotiators must also be cognisant of the interests of bystanders and third

parties, who are likely to face the repercussions of a negotiated agreement. A company may agree to obtain consent from an aboriginal community prior to undertaking certain action, such as excavation in alleged aboriginal territory. This may be a small issue to the company at the negotiation table, however it may have a greater impact on bystanders and third parties. With one business willing to obtain consent from the aboriginal community prior to operating within alleged aboriginal land, other communities may expect consultation from other industries under similar circumstances. Such demands can seriously impede the productivity of bystanders and third parties and the abilities of these industries to conduct their respective lines of business.

Concessions

This example illustrates another integral aspect of negotiations – concessions. All negotiations require a certain give and take between the parties. Without concessions, negotiations would not exist.¹⁰ In multiparty negotiations, the concept of reciprocal concessions takes on a different meaning. The difficulties imposed by multiparty negotiations on reciprocal concession-making can be summarised as follows:

The reciprocal exchange of concessions often loses its meaning in multilateral negotiation because a concession offered to one participant may have a differential effect upon the rest, and may even be considered by some as detrimental to their interests.¹¹

A significant interest of a company involved in negotiations with aboriginal groups may be to avoid establishing precedents. Concessions may be approached with great caution, for a company may fear that any commitment it makes to one aboriginal community may be expected by other communities whether involved in the negotiations or not.

Take the example of a hydro-electric company negotiating with an Aboriginal Band. If the company agrees to move a transmission line from the property of one Band member, then every member and every nearby community may demand the removal

of transmission lines from their land. Furthermore, relocating transmission poles from one Band member's land may conflict with the interests of his or her neighbour and actually create additional grievances. In one instance, the relocation of transmission poles may be quite feasible. Perhaps the poles need to be replaced in any event. The financial cost to the company of relocating the poles may even be within its budget. However, it is unlikely such a concession will be offered given the ramifications such an offer would cause.

Managing information

The sheer number of parties involved in negotiations of this nature is not the only challenge faced. Multiparty negotiations involve the exchange of huge volumes of information and communication that needs to be managed.¹² With multiple sets of eyes and ears trading information back and forth, opportunities for miscommunication abound. Miscommunication often results in an escalation of the conflict. Sentences in letters may be misconstrued and oral communications can be interpreted in a way the sender never intended. Communication errors can and do result in prolonged disruptions in the negotiations.

Managing the multiple parties and volumes of information generated during multilateral negotiations is only one piece of a very complex pie. Negotiations of this type are usually approached not by single negotiators, but rather by teams. Team-led negotiations present their own unique challenges.

Team based negotiations

Teams of negotiators often represent parties in complex, multilateral negotiations. For some team members, their involvement in the negotiations is a full-time job. For the majority of team members, however, participating in negotiations is just another task assigned to an already overloaded job description.

Negotiating in teams has certain advantages. Responsibilities can be shared, creative ideas as to how to resolve disputes are generated more

readily, and each team member brings a particular area of expertise to the table. Negotiating in teams also has certain disadvantages. Conflict among team members is likely; stalemates can occur within the team and team decisions may be of poor quality.¹³ Poor team decisions occur when participants disengage from group discussions and decision-making. Individuals may defer to the opinions of other team members, who they believe offer specialist knowledge. As a result, these individuals withdraw from group discussions.

A team member may lack confidence in his or her ideas, preferring to remain quiet during group meetings.¹⁴ This behaviour limits the number and quality of ideas generated when the team is contemplating proposals or decisions.

Rather than being a safe environment conducive to the expression of creative thought, team meetings may be nothing more than venues for playing out intra-group hostilities. Within a negotiation team, domineering personalities can take centre stage, inadvertently overshadowing insightful suggestions from more inhibited team members. Left to their own devices, team members may openly criticise one another's ideas. As Jeanne Brett indicates, 'group members can quickly stifle the creative exchange of ideas by pointing out their negative aspects'.¹⁵

The lead negotiator must ensure that a dysfunctional decision-making climate within his or her team is not allowed to fester. Disorganised team meetings quickly lead to frustration. Team members who are ill prepared for brainstorming sessions and team meetings may affect the team's ability to make good group decisions. This culminates in conflict within the team environment. As a result, no matter what the combined expertise of a party's negotiation team, it may have difficulty living up to its true potential.

May I have this dance?

The steps involved in a negotiation have been compared to dance steps. When both parties know the dance it can be a thing of beauty. But have you ever danced with a partner who seems to be moving to the music of a



different drummer? In order for the choreography to proceed smoothly, all of the dancers must know the steps and must agree to dance to the same music. The same is true of negotiations. If one party is positional and the other trying to problem-solve collaboratively, toes will be stepped on, the dance will be laborious and one or all parties may leave the dance floor in frustration. As Mnookin, Peppet and Tulumello comment, 'collaborative problem-solving may be difficult if the opposing party ... doesn't have the same approach'.¹⁶

Common characteristics of positional bargaining include:

- A solution is suggested early in the negotiations.
- The solution is clearly favourable to one side and unfavourable to the 'opposition'.
- The posed solution is offered as an alternative to a threatened decision imposed by a judge.

Many positional bargainers demonstrate poor listening skills and constantly repeat the perceived strengths of their own arguments.¹⁷ Jeanne Brett adds that positional tactics are marked by an unwillingness to concede and a willingness to resort to the use of threats.¹⁸ In the case of aboriginal people, cultural differences, language barriers and power imbalances may prevent grievances from being brought to the forefront in a timely fashion. Conflict may be left to escalate, to build and to boil.

In an effort to be heard, some aboriginal groups in countries such as Canada participate in acts of civil disobedience, such as the construction of roadblocks, or the destruction or threat of destruction of facilities constructed on what aboriginals claim as their land. The use of threats continues in the negotiation room. Threatening to commence litigation is commonplace. Threats to walk out of the negotiations; threats to obstruct access through aboriginal reserve land (access which is needed by the other party in order to conduct its business) may permeate the negotiation process. Proposed solutions tend to be no solution at all, but rather unrealistic demands.

Regardless at which side of the

negotiation table a party sits, negotiation teams consist of human beings. At times, a negotiator may feel empathy, sympathy, shame and guilt with respect to the plight of the other side. Feelings of sympathy or guilt interfere with the team's ability to negotiate effectively. Motivated by these feelings, a negotiator may respond to another's positional tactics by yielding. By yielding to another party's demands, one lowers his or her own aspirations.¹⁹

The most effective negotiators 'empathise and assert in their interactions with others'.²⁰ Instead of empathising and asserting, however, people tend to deal with conflict either by competing, accommodating or avoiding.²¹ As Rubin, Pruitt and Kim state, yielding and contending strategies are inconsistent with problem-solving efforts.

In negotiations involving aboriginal and western interests, parties often have conflicting negotiation styles. These conflicting negotiating styles contribute to an ineffective and frustrating negotiation process.

Overcoming the impediments

Although negotiating complicated issues with multiple parties with different cultural backgrounds, different negotiating styles and competing interests presents many obstacles, the obstacles are not insurmountable.

Managing multiparty negotiations

Appoint a neutral chairperson to facilitate the negotiations. A 'chairperson functions as a third party who has no stake in any particular outcome but does have a strong interest in assuring that the group works toward achieving the best possible outcome'.²²

A neutral chairperson assists the multiparty negotiation process by:

- Listening for interests and commonalities. He/she encourages people to express interests, and to identify not only what they want, but also why they want it. A chairperson listens for priorities and concerns.
- Introducing external information (studies, reports, statistics, facts, testimony from experts) that will

help illuminate the issues and interests.

- Assuring parties that once they are familiar with the issues, simultaneous discussion of several issues can take place. This will permit trade-offs among issues rather than forcing a compromise on each individual issue.²³

With so many issues on the table, it may be tempting to proceed with the negotiations on an issue-by-issue basis. Multilateral negotiations that proceed in this manner, and which have the goal of resolving each issue independently of one another, hold little promise of reaching a mutually satisfactory conclusion. This approach limits the likelihood of integrative solutions being generated by not allowing for trade-offs between and packaging of issues. A chairperson is better positioned to identify opportunities for trade-offs among issues than are the negotiators, who may be too close to the issues.

As mentioned above, another difficulty in multiparty negotiations stems from the negotiators' abilities to manage their respective constituencies. Negotiators are more effective in the negotiations if they control the amount of information provided to their respective constituencies. Jeanne Brett explains:

Successful negotiating groups communicate the minimum amount of information needed for their constituencies to maintain confidence in their negotiating behaviour. Too much information communicated to the constituency early in the negotiation reduced the negotiating teams' flexibility; too little information communicated late in the simulation precluded the constituencies' acceptance of a negotiated agreement.²⁴

No matter what may be agreed to at the negotiating table, the parties to negotiations concerning aboriginal issues cannot proceed to the stage of agreement without the support of their respective constituencies. Such support may be more forthcoming if the negotiators find the right balance in terms of how much information and when information regarding the negotiations is disseminated to their respective constituencies.

Managing negotiation teams

In order to take advantage of the benefits offered by team-based negotiations, the teams must be managed effectively. Ground rules for team meetings are essential. Without them, negotiators run the risk of wasting time mediating intra-group hostilities. Perhaps the most important rule for an intra-team meeting is tolerance for conflicting points of view.²⁵ A rule that discourages negative comments during brainstorming deliberations also encourages creative thought and contributions from all team members. As a result, the quantity and quality of proposals generated by the team increases.

A significant problem for many negotiating teams is the lack of time devoted to preparations for intra-team meetings. Researchers suggest that intra-team meetings should be approached as though each meeting is a negotiation session. Prior to the meeting, each team member is asked to identify their own and other members' interests associated with the various issues on the agenda.²⁶ An 'issue-by-group member matrix'²⁷ may assist in accomplishing this task. Team members identify the interests associated with all issues to be discussed²⁸ and the issues are then priority ranked for each member of the team.²⁹ A column in the matrix should be dedicated to the identification of other parties' interests, including the interests of bystanders and third parties. The use of such a matrix provides a structure for team meetings and focuses attention on ways in which the various interests associated with the issues may be fulfilled.

Controlling the dance

One of the greatest challenges of any negotiation occurs when the negotiating styles of the parties are at odds with one another. How can negotiations be effective if one party is attempting integrative negotiations and the other is negotiating from a positional standpoint?

As Fisher and Ury write:

While you try to discuss interests, they may state their position in unequivocal terms. You may be concerned with developing possible agreements to maximise the gains of both parties. They may be attacking your proposals,

concerned only with maximising their own gains.³⁰

It is common for parties to spend much time in the negotiations defending their proposals rather than asking questions of the other side. Instead of interviewing the other parties to discover underlying interests and priorities, negotiators gravitate toward positions, trying to convince the other side of the merits of their arguments. Too many statements are made and very few questions are asked.

A party can influence another's style of negotiation by responding to demands or positions with questions as opposed to defensive statements.³¹ The following types of questions may encourage the other party to engage in integrative negotiating:

- Why do you feel your proposal is the best way to proceed?
- Why do you feel our suggestion is not feasible?
- How will your recommendation address the grievance?
- What would happen if we proceeded as you have suggested?
- If you were in our shoes, what would you do?

By asking questions, a party is encouraging others to move from positional bargaining to integrative negotiations. Rather than using negotiation sessions as an opportunity to present, challenge and defend positions, the parties should use the time to brainstorm and to generate ways in which all of the parties' needs and interests may be met. When engaged in problem solving negotiations, Carrie Menkel-Meadow suggests that negotiators think in terms of 'categories of human needs – legal, economic, social, psychological, religious, moral and political'.³² If negotiating teams consider each issue in terms of these categories, parties' underlying interests can be explored and understood which, in turn, increases the likelihood of creating solutions to address the collective interests of the parties. Such solutions can reflect the 'totality of [the parties'] real needs, goals and objectives in the short and long term'.³³

Conclusion

Negotiations concerning weighty issues of political and legal importance

such as those pertaining to aboriginal rights and title can easily take on a life of their own. The challenges of managing multiple parties, negotiation teams and conflicting negotiation styles, if not met head on, can result in lost opportunities and wasted resources. Negotiators may be left frustrated and emotionally spent, and conflict may remain unresolved and vulnerable to further escalation. No matter what the stage the negotiations are at, it is never too late to introduce effective negotiation management strategies.

The appointment of a neutral chairperson to govern inter-team negotiations can assist parties in keeping the negotiations primarily interest-based as opposed to positional. Intra-team negotiations can be improved by introducing ground rules. Devising an issue-interest matrix to be completed by team members prior to meetings can facilitate the effective use of time. Reframing positional statements as questions designed to uncover underlying interests can foster a problem solving environment.

The challenges discussed in this article are likely to be encountered in any multilateral, team-based negotiation regardless of subject matter. Preparation, proper management and a focus on problem solving can increase the likelihood of achieving integrative agreements. ●

Crystal Baron is a Canadian lawyer who has been involved with several negotiations involving aboriginal rights and title in Canada. She can be contacted at crystal_baron@hotmail.com.

Endnotes

1. A 'constituency' has been defined as 'one or more parties who have designated someone else (the agent) to represent their positions and interests in a negotiation': Lewicki R, Saunders D, Minton J, *Negotiation*, 1999, Irwin McGraw-Hill Companies, Boston Massachusetts, p 268.

2. Lewicki R, Saunders D, Minton J, *Negotiation*, 1999, Irwin McGraw-Hill Companies, Boston Massachusetts, p 269.

3. Ibid.



4. Touval S, 'Multilateral Negotiation: An Analytical Approach' (1988)
- 5 *Negotiation Journal* 159 at 163.
5. Rubin J, Pruitt D, Kim S, *Social Conflict: Escalation, Stalemate, and Settlement*, 1994, McGraw-Hill, Inc, New York, p 194.
6. Ibid pp 194-5.
7. Ibid p 195.
8. Mnookin R, Peppet S, Tulumello A, *Beyond Winning*, 2000, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, p 70.
9. Mnookin R, 'Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict' (1993) 8(2) *The Ohio State Journal on Dispute Resolution* 235 at 242.
10. Above note 2 p 88.
11. Ibid p164.
12. Above note 4 p 163.
13. Brett J, 'Negotiating Group Decisions' (1991) 7 *Negotiation Journal* 291 at 291.
14. Above note 2 p 350.
15. Above note 13 at 297.
16. Above note 8 p 4.
17. Wade J, 'The Last Gap in Negotiations: Why is it Important? How can it be Crossed?' (1995) 6 *ADRJ* 93 at 4.
18. Above note 13 at 304.
19. Above note 5 p 28.
20. Above note 8 p 46.
21. Ibid p 51.
22. Above note 2 p 343.
23. Ibid p 349.
24. Above note 13 p 296.
25. Ibid p 297.
26. Ibid p 298.
27. Ibid.
28. Ibid.
29. Ibid.
30. Fisher R, Ury W, *Getting to Yes: Negotiating Agreement Without Giving In*, 1981, Penguin Books, New York, New York p 112.
31. Ibid., pp 114-116.
32. Menkel-Meadow C, 'Lawyer Negotiations: Theories and Realities - What We Learn From Mediation' 1993 (56) *The Modern Law Review* 361 at 367.
33. Astor H, Chinkin C, *Dispute Resolution in Australia*, 2002, LexisNexis Butterworths, Chatswood, New South Wales, p 120.