OBA
Alternative Dispute Resolution Section

Mediating Multi-Party Disputes

Program Participants

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Michael Cochrane has been practicing law in Ontario for over 30 years in both the public and private sector. He is a partner with Ricketts, Harris LLP in Toronto. His practice has an emphasis on civil litigation, family law, estates and public policy law. He has appeared before all levels of court. Mr. Cochrane was the host of BNN's "Strictly Legal" for three successful seasons and has appeared as a legal expert on numerous television and radio programmes, including CBC's "Counterspin", "As it Happens", TVO and "Canada AM." Mr. Cochrane is the author of a number of books on legal issues, including the best selling "Surviving Your Divorce: A Guide to Canadian Family Law" (4th Edition), "Strictly Legal II: Things You Absolutely Need to Know About Canadian Law" and the recently released titles, "Do We Need a Marriage Contract?" and "Do We Need a Cohabitation Agreement?" (both published by Wiley & Sons). He was the co-editor of the "Annual Review of Civil Litigation" (published by Carswell) from 2001 to 2004. He is the legal expert for Zoomer Magazine. In addition to being trained in negotiation and advanced negotiation at Harvard Law School, Mr. Cochrane was a Fellow at the National Association of Attorneys General in Washington, D.C. He has lectured at a variety of law schools in Canada, including the University of Ottawa, Osgoode Hall Law School and Ryerson University. Visit his website at www.michaelcochrane.ca and www.rickettsharris.com.

Leslie H. MacCleod, B.A., LL.B., LL.M. (ADR)

Leslie H. Macleod is the founder of Leslie H. Macleod & Associates, a firm providing conflict resolution services. Leslie has thirty years of combined experience as a lawyer, as an executive in industry and government, and as a mediator and educator in conflict resolution. Prior to establishing her firm, she was the Assistant Deputy Attorney General responsible for development of Mandatory Mediation in the Province of Ontario and for establishment of the Province's Dispute Resolution Office. Leslie practises as a professional mediator and facilitator, teaches conflict resolution to lawyers and other professionals, and designs and evaluates policies and systems for the management of conflict in organizations. She is an Adjunct Professor at Osgoode Hall Law School and Co-director of its Master of Laws Program in ADR. In 1999, the Mandatory Mediation Program that Leslie worked on received an Award from the CPR Institute for Dispute Resolution in New York for the collaborative approach that was used with the stakeholders. Leslie was also a recipient of the federal 2003 Head of Public Service Award for Collaborative Working Relationships for her work with the Immigration Appeal Board and the 2005 Ontario Bar Association Award for Excellence in Alternative Dispute Resolution.

Shari Novick (Program Chair)

Shari is a principal of Alternative Resolution Group, which she joined in late 2001. She has a full-time mediation practice, specializing in the resolution of tort, accident benefits and long-term disability claims, as well as employment law disputes. Shari also has an active arbitration practice, and is involved in the arbitration of priority disputes and loss transfer claims under the Insurance Act and regulations. Prior to joining AR Group, Shari spent ten years adjudicating disputes in the personal injury and employment areas. She worked as an Arbitrator at the Financial Services Commission for four years, where she gained extensive experience in accident benefits matters. Prior to that she served two terms as an adjudicator with the Office of Adjudication (now incorporated into the Ontario Labour Relations Board), arbitrating employment matters arising out of employment standards and occupational health and safety legislation. Prior to becoming a neutral, Shari practised as a litigator in the areas of personal injury, employment and commercial litigation. Shari is also active in the Ontario Bar Association, and sits on the Executive of the Alternative Dispute Resolution section.

M. Gaylanne Phelan, J.D.

Gaylanne was called to the Ontario Bar in 1978. Since that time she has had a law practice in the area of estates, trusts and substitute decisions. She is a former partner of the law firms of Lang Michener and Allen and Phelan. She currently acts as Counsel to Barmania Lawyers in addition to managing her own estates practice. She has acted as executor, trustee and attorney for property for large Canadian estates and as director of their affiliated private corporations. Gaylanne was a pioneer in the use of mediation for estates disputes, convinced from her experience as an estates practitioner that the courts were not the most appropriate forum for dealing with disputes of this kind. She co-founded the former Centre for Estate Mediation in 1999 at the time of the introduction of Rule 75.1, a Rule dedicated to the mandatory mediation of estates disputes. For a number of years the Centre handled a significant volume of the estate mediations in Toronto and the surrounding area. She is also a founding partner and current member of Strathgowan Estate Mediation, established in 2007. She is a past President and privileged member of the Estate Planning Council of Toronto. She has been an Executive member of the OBA's ADR Section for many years and is currently its Vice-Chair. In 2006 she acted as its representative on the OBA Civil Justice Reform task force. She is a past President of Le Groupe francophone de l'Association du Barreau Canadien de l'Ontario. On a different note, her favourite past-time is singing with the Royal Conservatory Repertory Choir and the Toronto Choral Society.

AN INTRODUCTION TO

THE PRINCIPLED NEGOTIATION

OF PUBLIC POLICY

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THE PROCESS OF PRINCIPLED NEGOTIATION OF PUBLIC POLICY: AN OVERVIEW

By Michael G. Cochrane

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INTRODUCTION

Over the last few decades governments have explored a variety of methods of public consultation in their efforts to develop public policy decisions that enjoy "popular support." Task Forces, Fact Finders, Royal Commissions, and Inquiries, in particular, have been utilized in Ontario, sometimes with good results.

The advantages of these methods of consultation include the opportunity to learn from experts, to obtain new ideas and, in some cases, to find common ground among those who disagree about the particular policy or reform. However, criticism and cynicism set in as government began to use these tools to delay, rather than develop, reform. The criticism usually arose because the "Task Force" would not report for 2 or 3 years, or because there was no government commitment to implement any recommendations that may be forthcoming.

PRINCIPLED NEGOTIATION: A CHANGE IN DIRECTION

Mediation in Family Law: Experiment Number 1

In 1989, Attorney General Ian Scott was under pressure to bring forward amendments in family law related to access enforcement and mediation in the family law court system.

Bill 124, An Act to Amend the Children's Law Reform Act, was proposed to deal with the access enforcement question. The amendments were developed within the public service after some limited, but helpful, consultation. The Bill produced a virtual firestorm of controversy in the family law community. Although it received Third Reading in the Ontario Legislature, it has never been proclaimed because the controversy continues.

A different approach was adopted for the issue of family mediation reform. The Attorney General established a Task Force of key stakeholders interested in this issue (lawyers, mediators,

judges, government officials, women's groups). The goal was to design a method of introducing mediation into the family law system in Ontario. I had the opportunity to chair the Task Force and, after about 18 months of experimenting with different techniques and some mediation training, the group reached a broad, but not unanimous, consensus on the shape of the reform.

The Attorney General had given a commitment to implement the proposed reform – if agreement was reached. In other words, no agreement meant no reform. Implementing mediation reform would involve program changes rather than legislative reform, so the Attorney General was able to make a firm commitment to implement the Task Force's recommendations.

As a result of that consensus, the Hamilton-Wentworth Mediation Pilot Project was established, and after years of success, mediation, public and private, is now a well accepted part of family law process around the province and across Canada.

Class Action Reform: Experiment Number 2

Shortly after the Mediation Task Force Report was delivered, the Attorney General announced his intention to bring forward class action reform. Class actions are a form of group litigation sometimes used against "business." There was a predictable and hostile response from the business community to the suggestion of reform. At the other end of the spectrum, environmentalists, consumers and lawyers spoke glowingly of the potential impact of class action reform. Then A.G. Ian Scott announced at that time that he intended to bring forward class action reform, the only question was what form the legislation would take. With this demonstration of political intent, he brought the key stakeholders to the table to negotiate terms of reference for a ground-breaking effort at public policy negotiation.

I had the opportunity to chair this process, which worked within very specific written terms of reference. These terms of reference included a specific commitment by the Attorney General to carry forward to Cabinet the Task Force's recommendations. This was important to the stakeholders who had come to the table because they believed that their efforts would bear fruit.

Six months later, the Task Force produced unanimous recommendations for class action legislation. This law, the Class Proceedings Act, 1992 and some related amendments to the Law

Society Act, were proclaimed in force on January 1, 1993. Had the government not changed in October of 1990, the law would have been passed much sooner. This was a remarkable achievement, given that in December of 1989, there was virtually no agreement, and by June of 1990, the legislation had been introduced to the House. This second effort was an important step in the evolution of some rules that could govern the process of public policy negotiation.

Environmental Bill of Rights: A Third Application

In October of 1991, Ruth Grier, then Minister of the Environment, announced her decision to establish a Task Force that would design the Environmental Bill of Rights within some very specific terms of reference. The EBR terms of reference were broken into three parts: Part I described principles that the Task Force wished to achieve in the Bill, Part 2 described some alternative methods that could be used to achieve the principles, and Part 3 described the process itself, including such details as the keeping of minutes for the meetings or whether stakeholders could have alternates attend on their behalf and so on.

The results of the Task Force's work were introduced to the Legislature for First Reading on May 31, 1993. Again, the relatively short period of time between total disagreement and unanimous consensus is remarkable. In October of 1991, there was no agreement on an Environmental Bill of Rights. Approximately 1 year later, unanimous legislation was available for the government.

Although the EBR process was more highly developed than the previous attempts, valuable lessons were learned and the next attempt could probably incorporate some of that learning.

CONCLUSION

Out of these three applications of public consultation, a powerful new method of developing public policy has arisen. I have been calling this process "Principled Negotiation of Public Policy." The discussions are interest-based, rather than positional. In other words, they do not revolve around traditional positions taken by key stakeholders (e.g. business is always against class actions, environmentalists are always in favour of more access to the courts, and so on). Instead, the process allows knowledgeable people to come to a table without positions, and to creatively develop legislation or program change to achieve some agreed principles. There are a

number of key rules or guidelines that should be followed in developing this type of process, which I have set out below under the heading "Principled Negotiation Guidelines."

Why Principled Negotiation Works

Before setting out the guidelines, however, it is important to understand why principled negotiation works, and why it is different from previous efforts at public consultation.

In 1990, I spent a year in Washington, D.C. on a fellowship working with the National Association of Attorneys General on Capital Hill. My job was to assist in lobbying the federal legislative process on behalf of State Attorneys General around law reform issues. While there I was able to witness some of the strengths and numerous weaknesses of the American political process. An obvious weakness is the concept of "gridlock" on Capital Hill. The Senate and Congress processes tend to cancel each other out. Very worthwhile reform initiatives are watered down to the point where they sound good but achieve little.

However, one strength of the American process is the very active involvement of interest groups and stakeholders in policy development. In a nutshell, the American process is designed to work when a Senator or Congressman/woman is approached by knowledgeable stakeholders with a suggestion for reform. The Member of Congress or Senator then takes the idea into the political/legislative process on behalf of the stakeholder. As the idea moves around Capital Hill, it becomes amended, altered, diluted and, in some cases, even perverted. Good ideas may be delivered to politicians in Washington, but the politicians themselves often do not have the political authority to see the reform through to a conclusion.

The contrary tends to be true in Canada and, in particular, Ontario. We have powerful politicians in our Cabinet Ministers. A Cabinet Minister can make a reform "happen" in certain circumstances. This had lead to Cabinet Ministers depending heavily on the provincial public service to develop policy ideas, sometimes in consultation with stakeholders, sometimes not. When I returned from Washington, D.C., it occurred to me that the best of both systems could be combined in Ontario. That is, if the power and authority of a Cabinet Minister could be connected to the knowledge and authority of key stakeholders around a particular reform, then the political process could develop "politically risk-free" reform in a very short period of time.

It is essentially an almost contractual relationship between the political forces in Cabinet and the public as represented by these key stakeholders. The Cabinet Minister agrees to deliver his or her authority to promote a particular reform in exchange for the stakeholders providing the content of the reform and eliminating the political risk through consensus. When it works, it is a perfect marriage. The government is able to introduce and enact important reform with a broad base of support. The stakeholders are able to have a hand in the process and tailor a reform that actually suits their needs. Political authority is exchanged for consensus based and politically risk-free reforms.

Although it sounds wonderful, it tends to make the public service nervous because traditionally its job has been the development of policy. However, this process of principled negotiation of public policy does not eliminate the need for a public service. Instead, it underlines the need for the public service to be at the table and to facilitate the use of the process by the stakeholders and the political forces. The public service should be using the principled negotiation process to solve problems around potentially controversial reforms. With legislative windows very narrow, speed is of the essence.

We know enough about this method of developing reform to be certain of its value. We also know enough to not assume that it can solve every problem that a government faces. It is simply one method of negotiating public policy in certain circumstances.

Having said all of that, the following guidelines may be of assistance.

GUIDELINES FOR PRINCIPLED NEGOTIATION:

1. Political Will/Need

   At the outset, there is a need for principled political commitment to undertake the particular reform. A Cabinet Minister must make a decision, for example, that there will be an environmental bill of rights or that there will be a class action reform. This commitment is then combined with flexibility about how the reform will be achieved through consensus.

2. Consensus Commitment

There must be a commitment to act on a consensus developed by those who know about the issues and who are interested in it. The Cabinet Minister must be prepared to say that, if the process produces a consensus, then the political forces will do everything in their power to enact the reform. This is critical, as it motivates the participants to deliver a consensus that they know will be acted upon.

3. Key Stakeholders/Interests

Who gets to be at the table? The appropriateness of participation by stakeholders is not related to their enthusiasm or the volume of the complaint. A question should be posed when considering a stakeholder for the table: Could this person or group "veto" the reform if not consulted? The negotiating table can only accommodate so many voices. The stakeholders invited to participate in the negotiations must be knowledgeable about the subject under consideration and they must have authority from their constituents. In the environmental bill of rights process, we also arranged for each of the stakeholders to act as the representative of a much larger network of interested groups. As many as 400 groups fed their views into the task force.

4. Common Goals

Stakeholders in the process must establish common goals and principles to be achieved by the reform.

5. Written Terms of Reference

Written terms of reference must be developed. These are signed by stakeholders committing them and the political forces to the principled negotiation process. The terms of reference can be detailed and include everything from the common goals and principles to specifics of how minutes will be kept for meetings, how frequent the meetings will be, and so on.

6. Interests – Not Positions

In the past, negotiations have often revolved around positions that have been taken by the interest groups. The process of principled negotiation does not respond to positional

bargaining, saw-offs, or splitting the difference. It operates on creating a trusting environment in which each participant listens to the needs and fears of other participants. The group then attempts to achieve the common goals or principles through a process that accommodates the needs and fears and wishes of everyone at the table. It has to be seen to be believed when traditional adversaries labour in an environment of goodwill to solve each other's problems with a particular reform. At one point in the Environmental Bill of Rights process, a business representative came to the defence of an environmentalist and articulated what he understood to be the environmentalist's position quite effectively, in an effort to convince his colleagues to change direction on a particular issue.

7. Timing

The timing of the process is important in two respects. First, the participants must be given sufficient time to be educated about the other interests at the table. As the consensus evolves, it is also necessary for them to have time to go back to their various networks and constituencies to educate the wider body of opinion. It is a process that sometimes calls for patience. On the other hand, the value of principled negotiation is that it tends to happen in a much shorter period of time than that to which people are accustomed. The mediation task force was much too long at 18 months. It could have completed its work in 8 months. The class action process was very close to the appropriate timing at about 6 months. The environmental bill of rights process was probably a little too long. Its original mandate was expanded after the release of its initial report. It was required to reconvene to consider public comment and revise the Bill. In my opinion, a principled negotiation should rarely take more than 10 to 12 months from beginning to end.

8. Resources

It is important to devote the appropriate resources to the process. This means a full time secretariat. It also means, in some cases, a research position. Here the public service can be of assistance. In some cases, participants also need funding to be able to devote the appropriate time and effort to the negotiations. Business interests often do not need financial assistance. However, environmentalists, consumers and others sometimes need funding.

9. The Chair

Last, but not least, it is important that the process be run by a strong, neutral, experienced and trusted chair. This individual takes responsibility for, among other things, setting up the meetings, structuring the agenda, meeting with participants outside of the process, preparing summaries of the consensus as it evolves, presenting information to the group, disciplining members of the process, making sure a timetable is adhered to, and of great importance, writing the final report that captures the entire consensus and how it was achieved. If the chair is not considered to be impartial and is not trusted, the process does not enjoy the necessary creative dynamic.

Conclusion

In conclusion, these are the essential guidelines for such a process. There is no doubt that this process could be used again on a variety of issues. In a time when governments may enjoy only one (majority) term, it is important that key pieces of their reform agenda be achieved quickly and effectively. The process of principled negotiation offers that opportunity for the right kinds of reforms.

EXECUTIVE SUMMARY OF OBSTACLES TO CONSENSUS BUILDING

THE X – FACTORS

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EXECUTIVE SUMMARY OF OBSTACLES

TO CONSENSUS BUILDING

THE X – FACTORS

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The X Factors are motivators. They keep people from changing and, while often fairly simple, they are not always obvious. It is sometimes only after long discussions involving genuine listening that out floats, like an epiphany, the X factor that has held that individual back from supporting a consensus for change.

During multi-party discussions in which I have participated, I have identified at least 10 recurring X Factors. Let's look at them briefly:

1. Positions: "We must have X..."

It is not uncommon to begin a consultative/consensus building process with firm statements by one or more participants about their "bottom line" positions. They are unable to describe their needs. Their script was written for them long before they sat down to talk. If they do not obtain or protect the things on their list, then they will be judged to have been a failure. A good process will allow this positional approach to be probed. "What is needed?" as opposed to "What is demanded?"

2. History: "We have always had X..."

Not unlike the positional X factor, this one at least contains a clue to its origins. "Where did X come from? Why was it put in place to begin with? Are those factors still applicable? And so on. Probing often reveals that history need not repeat itself.

3. Ideology: "We believe in X..."

With this X factor the motivation of the individual, or the group for whom he or she speaks, is linked to a belief. To be seen to abandon the belief could be interpreted as abandoning a core value. When was the last time you saw that happen?

4. Agenda: "If we get X, then we may get Y..."

In this situation, the party's thinking on a particular issue is linked to more than what is immediately obvious. Their goal is tied to their previous achievements or to what is considered to be next on the list.

5. Definitions: "We do not define X like you do..."

The language of the consultation/consensus building must be common. Key words and phrases should be explored, little can be taken for granted. An "apology" can mean three different things to a wrongfully dismissed employee, an employer and an insurance company worried about liability. I recall a negotiation that turned on the fact that a key participant misunderstood the meaning of the word "notwithstanding". Simple clarification and matters proceeded.

6. Lack of Will: "We do not care about X..."

It can be very difficult to engage a person in a consensus building effort if they are not motivated to be there. Why do they feel that the potential change does not concern them? Benefit them? Probing should reveal their stake in the process.

7. Losing is Winning: "If we do not achieve X, then it proves that we have been wronged."

Of all the X factors, this one can be the most difficult to comprehend and redress. The representatives of this interest may arrive at the table with a long list of grievances and demands designed to illustrate how terribly they have been treated. If the list of demands is accepted, then it is agreed that they were wronged. If the list is rejected, then it proves that the struggle must continue. Agenda and ideology may also be wrapped up in this factor.

8. Absence of Need/Urgency: "We are going to achieve X anyway..."

This factor is very different from the "lack of will" X factor. In this case the party perceives, perhaps mistakenly, that their own power is sufficient to achieve their goals without needing to talk to anyone.

9. Promises to Keep: "We promised X to our followers/partners."

In this situation, the motivation of the party is tied to commitments that may have been made to constituents or to third parties not involved in the change effort. As in the case of similar X factors concerning agenda, ideology and positions, probing of the underlying thinking is needed to expose the need opposed to the demand.

10. Loving Eyes Can Never See: "I love X ...plain and simple."

As the old song goes, "Loving eyes can never see." What they never see is the inherent flaw in the relationship. Warts and other flaws are not invisible, on the contrary, they are held up to praise. Why was that love kindled in the first place? Probing in a safe environment may reveal a co-dependency that can be remedied without losing the relationship.

Sometimes simply identifying the obstacle and naming it can go a long way to dealing with the motivations that lay beneath the surface of every consensus building effort.

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