

The Changing Role of the Neutral in Dispute Resolution

**The Honorable Mr. Justice
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We are in a period of profound change. The combination of new technology, global trade and recurring recessions has resulted in the demise of many Canadian workplaces and the restructuring and re-engineering of many others. Today's watchwords have become 'flexibility' and 'competitiveness.' There have been many casualties. Older workers who have lost their jobs have not easily found alternative employment. Where work has been found, it is seldom comparable in content or remuneration to what was lost. Younger workers have also been adversely affected. Caught by surprise, they too often lack the skills required in the new economy. They therefore find themselves lining up to apply for the fewer assembly and unskilled jobs that remain or for work in the service sector which pays considerably less and for which they must compete with their elders who are now unemployed. Increased structural unemployment in the double digit range has been the result.

The public sector has not escaped these changes. The money markets have refused to support the rising public indebtedness in Canada and governments at all levels have been forced to scale

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Some trends in the role of the neutral

- Mediators trained in creative interest-based and problem-solving techniques.
- Neutrals used as multi-disciplinary consultants during the term of an agreement.
- Neutrals with specialization in an industry.
- Interest-based mediators used as facilitators to convert an adversarial relationship to an interest-based relationship.
- Of More than one mediator assigned to a dispute.
- Neutrals as 'conflict resolution professionals.'
- The institutionalization of mediation, early neutral evaluation, factfinding, arbitration and med-arb in a wide range of areas.

back expenditures. Because most of these costs are wage costs, employees have had to be shed and new technology adopted where practical.

Collective bargaining has been caught in the middle. It is attacked as a barrier to change when trade unions fight to resist what they view as ill-considered initiatives by management held hostage by investors and financial institutions. Unions are political as well as social and economic institutions. Giving up benefits others fought hard to win is a challenging political exercise. Many union leaders do not see their role as helping workers walk backwards. On the other hand, Canadian employers are subject to unforgiveable market forces. The issue for them is also one of survival. Where wages are a significant portion of total costs, down-sizing, outsourcing, and restructuring are obvious steps within an employer's control. Other initiatives require union cooperation, take time and require disclosure and sharing of information. With bankers, investors, and parent companies looking for immediate change, unilateral initiatives have a certain appeal.

Unfortunately, no one has a real grasp of the new economy and the institutional change needed to restore stability, competitiveness and civility in our everyday lives. The future is quite uncertain and we are all vulnerable to those selling quick fixes – the industrial relations equivalent to snake oil. What is certain, however, is the resulting conflict and lost investment in human capital.

Fortunately, labour and management throughout Canada are responding to these challenges and collective bargaining is once again an economic and social policy frontier. We are seeing important changes in bargaining approaches and the related use of neutrals. These are exciting developments. They are, quite literally, transforming the role of the neutral.

The changes centre on the recognition that positional bargaining is insufficiently sensitive to the problems that labour and management now face. By this I mean, positional bargaining entails making decisions about goals and walk-away positions before ever sit-ting down with the other side. The bargaining that ensues involves hiding these 'resistance' and 'target' points, while attempting to determine and alter those same decisions of the opponent. The latter objectives are usually accomplished by argument, bluff and threat in the early stages of bargaining which do little to build the necessary trust that will be needed to reach agreement in the later stages. The information that is communicated is related indirectly through argument and persuasion as well as by the 'tea leaf' interpretation of offers and counter-offers. Bargaining ritually begins with the high demand followed by the low offer and then come incremental responses in a custom

known well to labour and management. Only in the eleventh hour, as the deadline draws near, are the parties encouraged to be more candid with each other in order to avoid the adverse consequences of a strike.

It is not pretty. Many important issues are swept off the bargaining table in the crisis of eleventh hour bargaining. Much gamesmanship takes place throughout, particularly in the form of vague and ambiguous contractual language which both parties understand assigns responsibility to some unsuspecting grievance arbitrator who will conduct the arbitration that will inevitably follow. Solutions are seldom elegant or optimum. Viewed against the fundamental problems of the new economy facing our workplaces, this style of bargaining does little to inspire confidence in the future of collective bargaining. Nevertheless, several changes in the role of neutrals, which are a response to our troubling positional bargaining practices, are heartening. These changes suggest the new economy is reshaping the delivery of neutral services.

Parties who have recognized or experienced the lethal effect of positional bargaining during previous boom/bust recessionary cycles are attempting to convert collective bargaining into a more complex problem-solving instrument. With the assistance of neutrals, these parties are trying to engage in more interest-based bargaining. Interest-based bargaining, as we now are aware, is a form of problem-solving bargaining that emphasizes the underlying needs and interests of the parties in contrast to the positions developed to express those interests. It embraces the simple reality that the real differences between parties are often much narrower than their respective positions or demands indicate.

Ideally, interest-based bargaining actually uses problem-solving procedures. The parties meet face to face. They express their needs and interests in terms of the problems to be resolved. They then develop together all conceivable solutions to the problems without evaluating those options. This is described in the literature as brainstorming or side-by-side problem-solving. Only then do the parties begin to evaluate the options they have generated and they do so by reference to objective criteria. The separation of inventing options from their evaluation permits the development of a rich array of possible solutions. Brainstorming can be both highly creative and infectious when parties are unencumbered by the need to evaluate and to make firm proposals. The use of objective standards to evaluate the resulting options produces a more rational and more principled process. The evaluation stage will usually isolate a few of the options as practical, effective, and thus, possible solutions. It is at this point that the parties may revert to

more traditional bargaining techniques in the form of trade-offs and package bargaining or they may simply 'leap' to a final outcome.

This integrative approach contrasts with the binary nature of positional bargaining which combines evaluation with inventing and only looks at two options at any one time. Moreover, these two options are not presented as likely outcomes but as positions or proposals which may be as much a bluff or a threat as a serious offer.

Despite this criticism, converting a distributional bargaining regime, with its positional traditions, into an interest-based one is easier said than done. If both parties do not share the need to introduce such a change into their bargaining practices, there is real risk in setting out alone. Interest-based bargaining has more candor and disclosure associated with it than does its positional counterpart. Thus, if only one party is employing an integrative method, the other party may exploit the unilateral openness. It is also possible to mistake a cooperative style of positional bargaining for interest-based bargaining with the result of never detecting that one of the parties is exploiting the other's greater candor.

Central to the task of adopting interest-based bargaining where a zero-sum mentality has prevailed is the very nature of distributional bargaining. Game theorists tell us, by the example of the prisoner's dilemma, that there is a high risk of defection where parties are dividing a resource of fixed quantity or dimensions so that more for one is less for the other. The resulting distrust arises from the human instinct to get as much of a good thing as possible. In effect, the bargaining goal is to claim as large a share of a fixed resource as the other party and your bargaining power will allow. In this environment, parties conceal what they would be satisfied with because of the chance of obtaining more through deception, persuasion and the exercise of bargaining power. This is why most students of conflict resolution advise that distributional disputes are not as amenable to interest-based bargaining as others.

Unfortunately, collective bargaining is a distributional regime. Indeed, I suspect the labour relations skepticism concerning interest-based bargaining exists because many believe greed or self-interest to be an ineluctable ingredient of human nature.

Collective bargaining, however, has both distributional and integrative characteristics arising out of the ongoing nature of labour and management relationships. If the company thrives, there will be more for everyone. If the company is uncompetitive, the reverse will be true. Each party has multiple objectives and bargaining occurs over many issues. Accordingly, trade-offs are possible. The accommodation of a party's interests in respect of one issue provides an incentive for that party to do likewise for its opposite

number on some other issue. In fact, collective bargaining has always exhibited interest-based attributes in the eleventh hour as parties have cooperated to avoid the mutually destructive results of a strike. Moreover, mediators have routinely assisted in this transition by emphasizing the broader interests underlying stated positions, by supplying more neutral criteria in the evaluation of proposals, and by helping to invent options not previously considered. What enlightened labour, management, and neutrals are doing in the new economy, which is so exciting, is working on bargaining techniques to make collective bargaining more consciously interest-based and to bring eleventh hour cooperation closer to the commencement of bargaining. How is this being done?

Agencies like the Federal Mediation and Conciliation Service are training their staffs in interest-based techniques. Freelance neutrals are also going back to school. Mediators who are expert in positional bargaining are receiving specific instruction in interest-based methods. They then are pioneering in the development of techniques to make problem-solving a more conspicuous feature of collective bargaining. Since the publication of *Getting to Yes*, by Fisher and Ury (1981), there has been an explosion of interest in interest-based bargaining. The result has been a great deal of study and experimentation in negotiation and mediation procedures in fields other than labour relations, for example the Alternative Dispute Resolution (ADR) movement which is changing the way courts resolve conflict and which has show-cased the use of mediation in family, environmental, commercial, international and community disputes. This has led to the creation of new and respected programs dedicated to training negotiators and mediators. All of these developments have emphasized an interest-based approach to bargaining. However, anyone familiar with the work of Walton and McKersie and their book *A Behavioral Theory Of Labor Negotiations* (1965) will appreciate that Fisher and Ury did not invent the interest-based approach. Walton and McKersie reported on the use and nature of integrative methods in collective bargaining over thirty years ago. In this sense then, collective bargaining is just rediscovering its roots.

So the first and most fundamental change for neutrals in the new economy is their recognition that it is not enough today for mediators to have had previous positional bargaining experience. They must be exposed to and become expert in the most recent theory and practices of interest-based mediation techniques. The intuitive strategies of our best labour mediators have been identified, explained, elaborated and refined by leaders in the field of conflict resolution. Active listening, reframing, paraphrasing, summarization, grouping, ordering, structuring, fractionating, probing, and translation are all identifiable and transmittable techniques used by mediators to help parties find and create common ground. Unfortunately, until recently, labour relations had taken

mediation for granted and neglected to develop and refine its techniques to keep abreast of increasingly complicated challenges. An interest-based approach, however, is very demanding on the neutral.

Interest-based mediation requires a mediator to be more active and therefore more knowledgeable in the parties' differences. It also brings the mediator more directly in contact with bargaining committees and changes the way he or she relates to the lead negotiators. Working directly with committees which may be composed of inexperienced representatives requires more than just positional bargaining experience to draw on. To encourage lead negotiators to adopt problem-solving methods for particular issues in the form of either smaller joint subcommittees or mediator involvement in bargaining committee decision-making also demands that the mediator be trained in creative interest-based techniques which will instill confidence in his or her procedural suggestions. Thus, related to the interest-based training of neutrals is the more active role of mediators in implementing integrative techniques in eleventh hour bargaining or on other occasions of traditional contacts. This, I suggest, will ultimately change the very form of mediation.

In the future, I predict that a mediator will be routinely assigned an industry expert to assist in analyzing the issues in dispute. Indeed, because interest-based methods are labour intensive, we are seeing more than one mediator assigned to a dispute and more mediator specialization. In last year's railway dispute, I used the services of several research assistants and a team of mediators. One mediator was also an industry expert. In the 1992 Algoma Steel restructuring negotiations, I worked with a team of advisors and the parties participated in many specialized subcommittees to develop a side-by-side problem-solving atmosphere as well as to cope with the immense number of issues requiring answers.

Trained interest-based mediators working at traditional times sometimes find the parties confronted with problems which cannot be resolved by a problem-solving approach given the time available. These mediators, however, now encourage the parties to agree on interest-based procedures which can be implemented during the agreement's term. For example, the railroad negotiations included a demand by the employers that several skilled trades be combined. This demand had great implications for seniority application, job security, and training. On the other hand, the Canadian Auto Workers recognized that change may be required. The interest-based solution in the available time was to agree on the principles by which skilled trades integration might occur; to agree that the parties would work with a knowledgeable facilitator for a fixed period of time; and, failing resolution, to agree upon arbitration in the light of the negotiated principles.

Another related interest-based procedure is to agree to an expert fact finding exercise which will produce a range of thoughtful options for the parties to consider during the term of the contract and provide, at the very least, a much greater opportunity for the parties to adopt an integrative approach to the issue in following rounds.

Not only can interest-based mediators have a positive impact in any particular dispute, their interest-based training may also influence the style of bargaining in subsequent rounds. Indeed, this is happening in two ways. First, the experience of working with an interest-based trained mediator in the eleventh hour has a training effect on the parties who are involved. A successful resolution of their differences by more problem-solving methods can actually change the style of bargaining for those parties or at least encourage them to explore the potential in their relationship to adopt more integrative bargaining methods. For example, we now see parties in subsequent rounds more sensitive to the identification of potentially intractable problems which may merit the early and selective intervention of an interest-based mediator.

A second and related development is the use of an interest-based mediator as a facilitator during the currency of an agreement to assist in converting an entire adversarial relationship into an interest-based one. These consensus-building mandates are changing the role of the neutral into that of a mid-term consultant to the parties. This multi-disciplinary role draws on the academic learning of organizational development, psychology, sociology, anthropology, human resource management, as well as industrial relations. Indeed, these assignments are enlisting as neutrals professionals who have never engaged in collective bargaining. The neutral as a facilitation consultant, if you will, requires that the mediator possess tactful investigative and analytical skills to detect the underlying problems and map out a program for change. An early expression of this new role was the relationship-by-objective initiatives (RBO) developed by mediation services in the United States and Canada in the 1970s and '80s. Still offered today, RBO initiatives provide troubled bargaining relationships with assistance in their important efforts to change. In their simplest form, RBOs involve three to five day seminars for union stewards and front-line supervisors away from the workplace. The seminars are designed to identify the sources of conflict and a range of shared objectives obtainable through a more cooperative or interest-based relationship.

More recently still, less pathological relationships have turned to neutrals to help them adopt mutual gains or interest-based bargaining. Mutual Gains Bargaining and Interest-Based Negotiations initiatives consist of joint union and management training in interest-based bargaining at all levels. A Vision and Value consultation, another mid-term initiative, is aimed more at generally enhancing a labour and management relationship.

Because these parties have recognized there is no systematic line of distinction to be drawn between union-management relations during the process of collective bargaining and the conduct of the relationship during the term of the contract, they have retained neutrals to act as facilitators of broader changes in their relationships. In other words, it is understood that interest-based bargaining cannot survive in isolation from the entire labour and management relationship. The role of the neutral as a multidisciplinary consultant to parties during the currency of a bargaining relationship is therefore another important development.

There has also been the growing recognition that a collective bargaining agreement cannot contain all the answers to mid-term problems. Long-term contracts in the context of a dynamic economic environment severely test the zero-sum nature of grievance arbitration and the goodwill of the parties. One important response has been the innovation of grievance mediation. This is a real manifestation of continuous collective bargaining, long talked about in theory but lacking a practical policy vehicle until grievance mediation came along. Grievance mediation helps the parties overcome the adversarial rigidities of encrusted or distressed grievance procedures. The grievance mediator can encourage candor; can help review the likely success at arbitration; and can facilitate an interest-based examination of all the creative options open to parties which will not be available to the arbitrator. I believe this development will change the role of the grievance arbitrator, which is now exclusively adjudicative, into one of offering mid-term and mid-hearing mediation and evaluation services. This change in role will produce more enduring bargaining relationships and support the efforts of labour and management who seek to create more flexible, fairer, and more interest-based bargaining relationships. This is another role for the neutrals in the new economy.

All these developments reveal that the labour relations neutral is no longer a specialist arbitrator or mediator. He or she must now offer services as a conflict resolution professional and cannot be confined to resolving individual disputes in any particular manner. Neutrals in fact are beginning to design conflict resolution procedures for both labour market parties and users in other fields.

This particular role change for labour neutrals leads naturally to their regular involvement in dispute resolution in fields other than labour relations. The ADR movement in the United States has encouraged the institutionalization of mediation, early neutral evaluation, fact finding, arbitration and med-arb in a wide range of areas. They now include family, environmental, consumer, community and budgetary disputes. This is also happening in Canada. In the context of the courts, I believe we will soon see

compulsory mediation, and possibly arbitration, of most matters before parties will be entitled to a trial.

In the United States, these developments have been supported by a number of prominent not-for-profit organizations of neutrals like the National Institute for Dispute Resolution (NIDR), the Society of Professionals in Dispute Resolution (SPIDR), the National Academy of Arbitrators (NAA), and the American Arbitration Association (AAA). In fact, the membership and activities of SPIDR and the AAA are now concentrated outside of the labour relations arena. Neutrals who began in labour relations are now very active in many other fields and vice versa. This cross-fertilization has enriched the sophistication of neutral services and helped to counter the decline in influence of traditional community institutions such as family, religion and neighborhoods. Canada is following suit, but less quickly. Our prominent labour neutrals are active in other areas, but they are not leaders in the ADR movement in our country. This, I think, is partly symptomatic of Canada's size and the fact that our problems may be correspondingly small. But I also believe it to be the product of a shortcoming we need to address in order to build on and consolidate the new roles of neutrals in Canadian society. Healthy and has led to a rediscovery of the value of neutral dispute.

Here I have in mind the absence of any comprehensive not-for-profit association of neutrals in Canada such as the AAA, NAA, SPIDR. There is also no Canadian policy vehicle which is equivalent to the NIDR, so prominent in the United States. Labour arbitrators in Canada constitute a collection of freelance professionals who may or may not have formed loose associations on a province-by-province basis. The associations that do exist are little more than paper associations. They do not employ full-time staff, conduct training and certification programs or provide neutral services. They are essentially volunteer groupings of labour arbitrators. There are even fewer full-time private providers of mediation services.

This failure to develop freestanding centres for dispute resolution in Canada by the most successful of full-time neutrals—labour relations neutrals—has impeded the evolution of a recognized and valued profession. It has also resulted in a professional vacuum in the many other fields now in need of reliable neutral services. This vacuum is being filled by a proliferation of for-profit dispute resolution companies offering 'certified training' to would-be neutrals and neutral services to users. While all of this is healthy and has led to a rediscovery of the value of neutral dispute resolution outside of our labour neutrals could provide much of the needed leadership in the ADR movement in Canada if they came together to form one or more real 'bricks and mortar' institutions of dispute

resolution dedicated to building upon the developments which I have identified. I believe this step is not far off.

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