Guidance for Principled Bargaining*

(Revised 2019)

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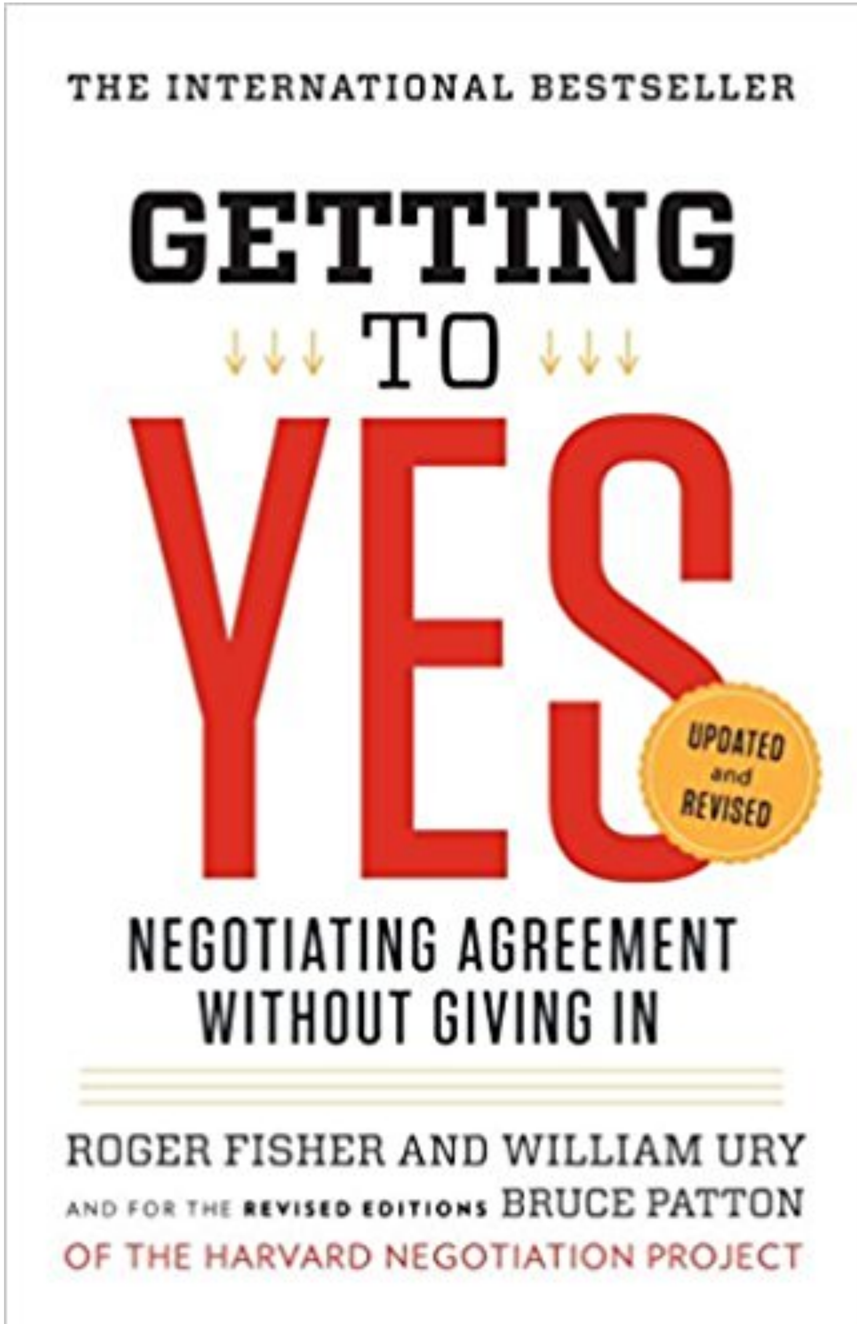
THE PRIMAY FOCUS OF MY KEY NOTE PAPER published by the Industrial Relations Centre, Queen's University at Kingston, in 1986. Is the work of Roger Fisher and Bill Ury of the HARVARD NEGOTIATION PROJECT. I have applied their

ideas successfully in major environmental, labor and constitutional negotiations where I have played an insiders role.



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FROM THE BOOK -

Introduction Like it or not, you are a negotiator. Negotiation is a fact of life. You discuss a raise with your boss. You try to agree with a stranger on a price for his house. Two lawyers try to settle a lawsuit arising from a car accident. A group of oil companies plan a joint venture exploring for offshore oil. A city official meets with union leaders to avert a transit strike. The United States Secretary of State sits down with his Soviet counterpart to seek an agreement limiting nuclear arms. All these are negotiations. Everyone negotiates something every day. Like Moliere's Monsieur Jourdain, who was delighted to learn that he had been speaking prose all his life, people negotiate even when they don't think of themselves as doing so. A person negotiates with his spouse about where to go for dinner and with his child about when the lights go out. Negotiation is a basic means of getting what you want from others. It is back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed. More and more occasions require negotiation; conflict is a growth industry. Everyone wants to participate in decisions that affect them; fewer and fewer people will accept decisions dictated by someone else. People differ, and they use negotiation to handle their differences. Whether in business, government, or the family, people reach most decisions through negotiation. Even when they go to court, they almost always negotiate a settlement before trial. Although negotiation takes place every day, it is not easy to do well. Standard strategies for negotiation often leave people dissatisfied, worn out, or alienated — and frequently all three. People find themselves in a dilemma. They see two ways to negotiate: soft or hard. The soft negotiator

wants to avoid personal conflict and so makes concessions readily in order to reach agreement. He wants an amicable resolution; yet he often ends up exploited and feeling bitter. The hard negotiator sees any situation as a contest of wills in which the side that takes the more extreme positions and holds out longer fares better. He wants to win; yet he often ends up producing an equally hard response which exhausts him and his resources and harms his relationship with the other side. Other standard negotiating strategies fall between hard and soft, but each involves an attempted trade-off between getting what you want and getting along with people. There is a third way to negotiate, a way neither hard nor soft, but rather both hard and soft. The method of principled negotiation developed at the Harvard Negotiation Project is to decide issues on their merits rather than through a haggling process focused on what each side says it will and won't do. It suggests that you look for mutual gains wherever possible, and that where your interests conflict, you should insist that the result be based on some fair standards independent of the will of either side. The method of principled negotiation is hard on the merits, soft on the people. It employs no tricks ' and no posturing. Principled negotiation shows you how to obtain what you are entitled to and still be decent. It enables you to be fair while protecting you against those who would take advantage of your fairness. This book is about the method of principled negotiation. The first chapter describes problems that arise in using the standard strategies of positional bargaining. The next four chapters lay out the four principles of the method. The last three chapters answer the questions most commonly asked about the method: What if the other side is more powerful? What if they will not play along? And what if they use dirty tricks? Principled negotiation can be used by United States diplomats in arms control talks with the Soviet Union, by Wall Street lawyers representing Fortune 500 companies in antitrust cases, and by couples in deciding everything from where to go for vacation to how to divide thei property if they get divorced. Anyone can use this method. Every negotiation is different, but the basic elements do not change. Principled negotiation can be used whether there is one issue or several; two parties or many; whether there is a prescribed ritual, as in collective bargaining, or an impromptu free-for-all, as in talking with hijackers. The method applies whether the other side is more experienced or less, a hard bargainer or a friendly one. Principled negotiation is an all-purpose strategy. Unlike almost all other strategies, if the other side learns this one, it does not become more difficult to use; it becomes easier. If they read this book, all the better.

I The Problem 1

.Don't Bargain Over Positions Whether a negotiation concerns a contract, a family quarrel, or a peace settlement among nations, people routinely engage in positional bargaining. Each side takes a position, argues for it, and makes concessions to reach a compromise.

Summary of "Getting to Yes: Negotiating Agreement Without Giving In"

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Summary of

Getting to Yes: Negotiating Agreement Without Giving In

By Roger Fisher, William Ury and for the second Edition, Bruce Patton

Summary written by Tanya Glaser, Conflict Research Consortium

Citation: Fisher, Roger and William Ury. *Getting to Yes: Negotiating Agreement Without Giving In,* 3rd ed. New York, NY: Penguin Books, 2011. <http://www.beyondintractability.org/library/external-resource?biblio=23737>.

In this seminal text, Ury and Fisher present four principles for effective negotiation, including: separating people from the problem, focusing on interests rather than positions, generating a variety of options before settling on an agreement, and insisting that the agreement be based on objective criteria. Three common obstacles to negotiation and ways to overcome them are also discussed.

A French translation of this summary is available in PDF format. To view it, please click here.

In this classic text, Fisher and Ury describe their four principles for effective negotiation. They also describe three common obstacles to negotiation and discuss ways to overcome them.

Fisher and Ury explain that a good agreement is one which is wise and efficient, and which improves the parties' relationship. Wise agreements satisfy the parties' interests and are fair and lasting. The authors' goal is to develop a method for reaching good agreements. Negotiations often take the form of positional bargaining. In positional bargaining each part opens with their position on an issue. The parties then bargain from their separate opening positions to agree on one position. Haggling over a price is a typical example of positional bargaining. Fisher and Ury argue that positional bargaining does not tend to produce good agreements. It is an inefficient means of reaching agreements, and the agreements tend to neglect the parties' interests. It encourages stubbornness and so tends to harm the parties' relationship. Principled negotiation provides a better way of reaching good agreements. Fisher and Ury develop four principles of negotiation. Their process of principled negotiation can be used effectively on almost any type of dispute. Their four principles are 1) separate the people from the problem; 2) focus on interests rather than positions; 3) generate a variety of options before settling on an agreement; and 4) insist that the agreement be based on objective criteria. [p. 11]

These principles should be observed at each stage of the negotiation process. The process begins with the analysis of the situation or problem, of the other parties' interests and perceptions, and of the existing options. The next stage is to plan ways of responding to the situation and the other parties. Finally, the parties discuss the problem trying to find a solution on which they can agree.

Separating People and Issues

Fisher and Ury's first principle is to separate the people from the issues. People tend to become personally involved with the issues

and with their side's positions. And so they will tend to take responses to those issues and positions as personal attacks. Separating the people from the issues allows the parties to address the issues without damaging their relationship. It also helps them to get a clearer view of the substantive problem.

The authors identify three basic sorts of people problems. First are differences on perception among the parties. Since most conflicts are based in differing interpretations of the facts, it is crucial for both sides to understand the other's viewpoint. The parties should try to put themselves in the other's place. The parties should not simply assume that their worst fears will become the actions of the other party. Nor should one side blame the other for the problem. Each side should try to make proposals which would be appealing to the other side. The more that the parties are involved in the process, the more likely they are to be involved in and to support the outcome.

Emotions are a second source of people problems. Negotiation can be a frustrating process. People often react with fear or anger when they feel that their interests are threatened. The first step in dealing with emotions is to acknowledge them, and to try to understand their source. The parties must acknowledge the fact that certain emotions are present, even when they don't see those feelings as reasonable. Dismissing another's feelings as unreasonable is likely to provoke an even more intense emotional response. The parties must allow the other side to express their emotions. They must not react emotionally to emotional outbursts. Symbolic gestures such as apologies or an expression of sympathy can help to defuse strong emotions.

Communication is the third main source of people problems. Negotiators may not be speaking to each other, but may simply be grandstanding for their respective constituencies. The parties may not be listening to each other, but may instead be planning their own responses. Even when the parties are speaking to each other and are listening, misunderstandings may occur. To combat these problems, the parties should employ active listening. The listeners should give the speaker their full attention, occasionally summarizing the speaker's points to confirm their understanding. It is important to remember that understanding the other's case does not mean

agreeing with it. Speakers should direct their speech toward the other parties and keep focused on what they are trying to communicate. Each side should avoid blaming or attacking the other, and should speak about themselves.

Generally the best way to deal with people problems is to prevent them from arising. People problems are less likely to come up if the parties have a good relationship, and think of each other as partners in negotiation rather than as adversaries.

Focus on Interests

Good agreements focus on the parties' interests, rather than their positions. As Fisher and Ury explain, "Your position is something you have decided upon. Your interests are what caused you to so decide."[p. 42] Defining a problem in terms of positions means that at least one party will "lose" the dispute. When a problem is defined in terms of the parties' underlying interests it is often possible to find a solution which satisfies both parties' interests.

The first step is to identify the parties' interests regarding the issue at hand. This can be done by asking why they hold the positions they do, and by considering why they don't hold some other possible position. Each party usually has a number of different interests underlying their positions. And interests may differ somewhat among the individual members of each side. However, all people will share certain basic interests or needs, such as the need for security and economic well-being.

Once the parties have identified their interests, they must discuss them together. If a party wants the other side to take their interests into account, that party must explain their interests clearly. The other side will be more motivated to take those interests into account if the first party shows that they are paying attention to the other side's interests. Discussions should look forward to the desired solution, rather than focusing on past events. Parties should keep a clear focus on their interests, but remain open to different proposals and positions.

Generate Options

Fisher and Ury identify four obstacles to generating creative options for solving a problem. Parties may decide prematurely on an option and so fail to consider alternatives. The parties may be intent on narrowing their options to find the single answer. The parties may define the problem in win-lose terms, assuming that the only options are for one side to win and the other to lose. Or a party may decide that it is up to the other side to come up with a solution to the problem.

The authors also suggest four techniques for overcoming these obstacles and generating creative options. First it is important to separate the invention process from the evaluation stage. The parties should come together in an informal atmosphere and brainstorm for all possible solutions to the problem. Wild and creative proposals are encouraged. Brainstorming sessions can be made more creative and productive by encouraging the parties to shift between four types of thinking: stating the problem, analyzing the problem, considering general approaches, and considering specific actions. Parties may suggest partial solutions to the problem. Only after a variety of proposals have been made should the group turn to evaluating the ideas. Evaluation should start with the most promising proposals. The parties may also refine and improve proposals at this point.

Participants can avoid falling into a win-lose mentality by focusing on shared interests. When the parties' interests differ, they should seek options in which those differences can be made compatible or even complementary. The key to reconciling different interests is to "look for items that are of low cost to you and high benefit to them, and vice versa."[p. 79] Each side should try to make proposals that are appealing to the other side, and that the other side would find easy to agree to. To do this it is important to identify the decision makers and target proposals directly toward them. Proposals are easier to agree to when they seem legitimate, or when they are supported by precedent. Threats are usually less effective at motivating agreement than are beneficial offers.

Use Objective Criteria
When interests are directly opposed, the parties should use objective criteria to resolve their differences. Allowing such differences to spark a battle of wills will destroy relationships, is inefficient, and is not likely to produce wise agreements. Decisions based on reasonable standards makes it easier for the parties to agree and preserve their good relationship.

The first step is to develop objective criteria. Usually there are a number of different criteria which could be used. The parties must agree which criteria is best for their situation. Criteria should be both legitimate and practical. Scientific findings, professional standards, or legal precedent are possible sources of objective criteria. One way to test for objectivity is to ask if both sides would agree to be bound by those standards. Rather than agreeing in substantive criteria, the parties may create a fair procedure for resolving their dispute. For example, children may fairly divide a piece of cake by having one child cut it, and the other choose their piece.

There are three points to keep in mind when using objective criteria. First each issue should be approached as a shared search for objective criteria. Ask for the reasoning behind the other party's suggestions. Using the other parties' reasoning to support your own position can be a powerful way to negotiate. Second, each party must keep an open mind. They must be reasonable, and be willing to reconsider their positions when there is reason to. Third, while they should be reasonable, negotiators must never give in to pressure, threats, or bribes. When the other party stubbornly refuses to be reasonable, the first party may shift the discussion from a search for substantive criteria to a search for procedural criteria.

When the Other Party Is More Powerful
No negotiation method can completely overcome differences in power. However, Fisher and Ury suggest ways to protect the weaker party against a poor agreement, and to help the weaker party make the most of their assets.

Often negotiators will establish a "bottom line" in an attempt to protect themselves against a poor agreement. The bottom line is what the

party anticipates as the worst acceptable outcome. Negotiators decide in advance of actual negotiations to reject any proposal below that line. Fisher and Ury argue against using bottom lines. Because the bottom line figure is decided upon in advance of discussions, the figure may be arbitrary or unrealistic. Having already committed oneself to a rigid bottom line also inhibits inventiveness in generating options.

Instead the weaker party should concentrate on assessing their best alternative to a negotiated agreement (BATNA). The authors note that "the reason you negotiate is to produce something better than the results you can obtain without negotiating."[p. 104] The weaker party should reject agreements that would leave them worse off than their BATNA. Without a clear idea of their BATNA a party is simply negotiating blindly. The BATNA is also key to making the most of existing assets. Power in a negotiation comes from the ability to walk away from negotiations. Thus the party with the best BATNA is the more powerful party in the negotiation. Generally, the weaker party can take unilateral steps to improve their alternatives to negotiation. They must identify potential opportunities and take steps to further develop those opportunities. The weaker party will have a better understanding of the negotiation context if they also try to estimate the other side's BATNA. Fisher and Ury conclude that "developing your BATNA thus not only enables you to determine what is a minimally acceptable agreement, it will probably raise that minimum."[p. 111]

When the Other Party Won't Use Principled Negotiation

Sometimes the other side refuses to budge from their positions, makes personal attacks, seeks only to maximize their own gains, and generally refuses to partake in principled negotiations. Fisher and Ury describe three approaches for dealing with opponents who are stuck in positional bargaining. First, one side may simply continue to use the principled approach. The authors point out that this approach is often contagious.

Second, the principled party may use "negotiation jujitsu" to bring the other party in line. The key is to refuse to respond in kind to their positional bargaining. When the other side attacks, the principles

party should not counter attack, but should deflect the attack back onto the problem. Positional bargainers usually attack either by asserting their position, or by attacking the other side's ideas or people. When they assert their position, respond by asking for the reasons behind that position. When they attack the other side's ideas, the principle party should take it as constructive criticism and invite further feedback and advice. Personal attacks should be recast as attacks on the problem. Generally the principled party should use questions and strategic silences to draw the other party out.

When the other party remains stuck in positional bargaining, the one-text approach may be used. In this approach a third party is brought in. The third party should interview each side separately to determine what their underlying interests are. The third party then assembles a list of their interests and asks each side for their comments and criticisms of the list. She then takes those comments and draws up a proposal. The proposal is given to the parties for comments, redrafted, and returned again for more comments. This process continues until the third party feels that no further improvements can be made. At that point, the parties must decide whether to accept the refined proposal or to abandon negotiations.

When the Other Party Uses Dirty Tricks

Sometimes parties will use unethical or unpleasant tricks in an attempt to gain an advantage in negotiations such as good guy/bad guy routines, uncomfortable seating, and leaks to the media. The best way to respond to such tricky tactics is to explicitly raise the issue in negotiations, and to engage in principled negotiation to establish procedural ground rules for the negotiation.

Fisher and Ury identify the general types of tricky tactics. Parties may engage in deliberate deception about the facts, their authority, or their intentions. The best way to protect against being deceived is to seek verification the other side's claims. It may help to ask them for further clarification of a claim, or to put the claim in writing. However, in doing this it is very important not to bee seen as calling the other party a liar; that is, as making a personal attack. Another common type of tactic is psychological warfare. When the tricky party uses a stressful environment, the principled party should identify the problematic

element and suggest a more comfortable or fair change. Subtle personal attacks can be made less effective simply be recognizing them for what they are. Explicitly identifying them to the offending party will often put an end to suck attacks. Threats are a way to apply psychological pressure. The principled negotiator should ignore them where possible, or undertake principled negotiations on the use of threats in the proceedings.

The last class of trick tactics are positional pressure tactics which attempt to structure negotiations so that only one side can make concessions. The tricky side may refuse to negotiate, hoping to use their entry into negotiations as a bargaining chip, or they may open with extreme demands. The principled negotiator should recognize this as a bargaining tactic, and look into their interests in refusing to negotiate. They may escalate their demands for every concession they make. The principled negotiator should explicitly identify this tactic to the participants, and give the parties a chance to consider whether they want to continue negotiations under such conditions. Parties may try to make irrevocable commitments to certain positions, or to make-take-it-or-leave-it offers. The principled party may decline to recognize the commitment or the finality of the offer, instead treating them as proposals or expressed interests. Insist that any proposals be evaluated on their merits, and don't hesitate to point out dirty tricks.

https://www.beyondintractability.org/bksum/fisher-getting

<http://www.beyondintractability.org/library/external-resource?biblio=23737

Lipset, Seymour Martin, *Consensus and Conflict, Essays in Political Sociology*, Transaction Books, Oxford, 1985.

Mankiw, N. Gregory, *Principles of Economics*, 1997.

McRae, Dr. Brad, *The Seven Strategies of Master Negotiators*, McGraw-Hill 2002.

Moore, Christopher W. *The Mediation Process, Practical Strategies for Resolving Conflict.* Jossey-Bass, London, 1986.

Mnookin, Robert H. *Beyond Winning, Negotiating to Create Value in Deals and Disputes,* Belknap Press of Harvard University 2000.

Minton et al, *Negotiation Readings Exercises and Cases*, Irwin, Boston, 1993.

Nierenberg, Gerard I. *The Art of Negotiating*. New York: Coernerstone Library,

1979.

Ohmae, Kenichi, The Mind of the Strategist, Penguin Books, 1983.

Pruitt, Dean. *Negotiation Behavior*, New York: Academic Press, 1981.

Raiffa, Howard. *The Art and Science of Negotiation*. Cambridge, Mass. Harvard University Press, 1982.

Pye, Lucian, *Chinese Commercial Negotiating Style*, The Rand Corporation, 1982.

Schelling, Thomas C. *The Strategy of Conflict*, Harvard University, Cambridge, Mass. 1981.

Sheppard and Valpy, *The National Deal, The Fight for Canadian Constitution,* Fleet Books, Toronto, 1982.

Ury, William, *Getting Past No: Negotiating with Difficult People*. New York: Bantam Books, 1991.

Weiler & Elliot, *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms,* Pacific Institute of Law and Public Policy, Vancouver, 1985.

Zartman, William & Berman, *The Practical Negotiator*. New Haven Conneticut, Yale Universtity Press, 1982.

The 4 Fundamentals of Principled Negotiations

Principled negotiations focus on merits, not positions. They are built on *4 key foundations*—people, interests, options, and criteria. Here's a quick overview: We'll now give an overview of the 4 principles. Do get the full details from **the book** or our **full 14-page summary**.

1) PEOPLE: Separate people from problems

Every negotiation involves 2 key elements: the issues and the people. Unfortunately, the 2 often become entangled, as we all have different perspectives, gaps in communication skills/understanding, and tend to get emotional/take things personally. To focus on the issues, you must first tackle the people issues separately. In the book / complete summary, we zoom in on *3 key types of people problems* and how to address them: perceptions, emotions, and communications.

2) INTERESTS: Focus on interests, not positions

Your positions are the solutions that you've chosen, while your interests are the real concerns, desires or objectives *behind* your positions.It's wiser to focus on the interests, since (a) they define the problem, (b) for every interest, there are many possible positions/solutions, and (c) we often have multiple interests, which open up even more options. In the book / full summary, we address what it means to *identify and communicate interests* on both sides.

Get a copy of the book for the full tips and examples!

3) OPTIONS: Generate options for mutual benefit

In the event of conflict, people often settle for splitting the pie or the middle ground. In the book / complete summary, we explain *4 main obstacles* in negotiations and the *4 remedies* to overcome them, namely: (i) Brainstorm, then decide (so you enter the negotiations with creative options), (ii) Expand your options (so you're not fixated on a single "best" solution), (iii) Grow the pie and seek ways for both sides to gain from the deal, and (iv) Make it easy for the other party to say "yes" (by presenting your proposal in a way that seems fair, legitimate, and aligned with their interests).

4) CRITERIA: Use Objective Criteria

In any negotiation, there will be some conflicting interests, and it's not always easy to reconcile differences, especially under pressure. Rather than depend on a battle of wills or subjective opinions, insist on using fair, objective criteria to jointly assess options. In the book / full Getting to Yes summary, we cover how to develop objective criteria, and use them in 3 parts during negotiations.

Overcoming the 3 Common Obstacles in Negotiations

However, the best negotiations strategy may not work due to several common challenges: when you're facing a much more powerful opponent, when they refuse to consider options, or even play dirty.

WHEN THE OTHER SIDE IS MUCH MORE POWERFUL

such cases, your goal should be to protect yourself and optimize your limited assets, and the best way to do so is to develop a BATNA: "Best Alternative to a Negotiated Agreement", since the better our BATNA, the better your bargaining power. Get more details in the book / our full 14-page summary on how to go about developing your BATNA.

WHEN THE OTHER SIDE WON'T BUDGE

When facing an aggressive counterpart who insists on a fixed position, refuses to explore options and continually attacks you, it may be tempting to fight back. Don't do that, as it will only lead to a downward spiral. Read more in the book / full summary on how to dodge attacks and deflect their points back to them, using "*negotiation jujitsu*".

WHEN THE OTHER SIDE PLAYS DIRTY

If you meet a counterpart who tries to deceive you, or even use unethical or illegal means to manipulate you, don't tolerate it, nor retaliate. Instead, use principled negotiations to *negotiate the rules of the game*. Learn to identify the 3 common types of dirty tricks, so you can address them. [More details in the book / full summary].

Integrative or Interest-Based Bargaining

Share

By Brad Spangler
June 2003
What is Integrative or Interest-Based Bargaining?
Integrative bargaining (also called "interest-based bargaining," "win-win bargaining") is a negotiation strategy in which parties collaborate to find a "win-win" solution to their dispute. This strategy focuses on developing mutually beneficial agreements based on the interests of the disputants. Interests include the needs, desires, concerns, and fears important to each side. They are the underlying reasons why people become involved in a conflict.
"Integrative refers to the potential for the parties' interests to be [combined] in ways that create joint value or enlarge the pie."[1] Potential for integration only exists when there are multiple issues involved in the negotiation. This is because the parties must be able to make trade-offs across issues in order for both sides to be satisfied with the outcome.

Why is Integrative Bargaining Important?

Integrative bargaining is important because it usually produces more satisfactory outcomes for the parties involved than does positional bargaining. Positional bargaining is based on fixed, opposing viewpoints (positions) and tends to result in compromise or no agreement at all. Oftentimes, compromises do not efficiently satisfy the true interests of the disputants. Instead, compromises simply split the difference between the two positions, giving each side half of what they want. Creative, integrative solutions, on the other hand, can potentially give everyone all of what they want.

William Ury tells how he managed to build trust with the leaders in Venezuela and through shuttle diplomacy and focusing on their interests got them working together to prevent violence.

There are often many interests behind any one position. If parties focus on identifying those interests, they will increase their ability to develop win-win solutions. The classic example of interest-based bargaining and creating joint value is that of a dispute between two little girls over an orange. Both girls take the position that they want the whole orange. Their mother serves as the moderator of the dispute and based on their positions, cuts the orange in half and gives each girl one half. This outcome represents a compromise. However, if the mother had asked each of the girls why she wanted the orange -- what her interests were -- there could have been a different, win-win outcome. This is because one girl wanted to eat the meat of the orange, but the other just wanted the peel to use in baking some cookies. If their mother had known their interests, they could have both gotten all of what they wanted, rather than just half.

Integrative solutions are generally more gratifying for all involved in negotiation, as the true needs and concerns of both sides will be met to some degree. It is a collaborative process and therefore the parties actually end up helping each other. This prevents ongoing ill will after the negotiation concludes. Instead, interest-based bargaining facilitates constructive, positive relationships between previous adversaries.

Identifying Interests: The first step in integrative bargaining

is identifying each side's interests. This will take some work by the negotiating parties, as interests are often less tangible than positions and are often not publicly revealed. A key approach to determining interests is asking "Why?" Why do you want that? Why do you need that? What are your concerns? Fears? Hopes? If you cannot ask these questions directly, get an intermediary to ask them.

The bottom line is you need to figure out *why* people feel the way they do, *why* they are demanding what they are demanding. Be sure to make it clear that you are asking these questions so you can understand their interests (needs, hopes, fears, or desires) better, not because you are challenging them or trying to figure out how to beat them.

Next you might ask yourself how the other side perceives your demands. What is standing in the way of them agreeing with you? Do they know your underlying interests? Do you know what your own underlying interests are? If you can figure out their interests as well as your own, you will be much more likely to find a solution that benefits both sides.

You must also analyze the potential consequences of an agreement you are advocating, as the other side would see them. This is essentially the process of weighing pros and cons, but you attempt to do it from the perspective of the other side. Carrying out an empathetic analysis will help you

Positional Bargaining

disputants are adversaries

goal is victory

demand concessions

dig into position

mislead, use tricks

insist on your position

apply pressure

look for win for you alone

Integrative Bargaining

disputants are joint problem-solvers

goal is wise decision

work together to determine who gets what

focus on interests, not positions

be open about interests, use fair principles

insist on objective criteria; consider multiple answers

use reason; yield to principle, not pressure

look for win-win

This chart was derived from a more complex chart in *Getting to Yes* [2]

understand your adversary's interests. Then you will be better equipped to negotiate an agreement that will be acceptable to both of you.

There are a few other points to remember about identifying interests. First, you must realize that each side will probably have multiple interests it is trying to satisfy. Not only will a single person have multiple interests, but if you are negotiating with a group, you must remember that each individual in the group may have differing interests. Also important is the fact that the most powerful interests are basic human needs - security, economic well being, a sense of belonging, recognition, and control over one's life. If you can take care of the basic needs of both sides, then agreement will be easier. You should make a list of each side's interests as they become apparent. This way you will be able to remember them and also to evaluate their relative importance.[2]

This chart was derived from a more complex chart in *Getting to Yes* [2]

Creating

Creating

Creating Options

Creating Options

Silke Hansen recommends that mediators focus on

parties' needs to come up with the widest range of possible solutions.

After interests are identified, the parties need to work together cooperatively to try to figure out the best ways to meet those interests. Often by "brainstorming" -- listing all the options anyone can think of without criticizing or dismissing anything initially, parties can come up with creative new ideas for meeting interests and needs that had not occurred to anyone before. The goal is a win-win outcome, giving each side as much of their interests as possible, and enough, at a minimum that they see the outcome as a win, rather than a loss.

Using Integrative and Distributive Bargaining Together

Although distributive bargaining is frequently seen as the opposite of integrative bargaining, the two are not mutually exclusive. Distributive bargaining plays a role in integrative bargaining, because ultimately "the pie" has to be split up. Integrative bargaining is a good way to make the pie (joint value) as large as it possibly can be, but ultimately the parties must distribute the value that was created through negotiation. They must agree on who gets what. The idea behind integrative bargaining is that this last step will not be difficult once the parties reach that stage. This is because the interest-based approach is supposed to help create a cooperative working relationship. Theoretically, the parties should know who wants what by the time they split the pie.[3]

[1] Watkins, Michael and Susan Rosegrant, *Breakthrough International Negotiation: How Great Negotiators Transformed the World's Toughest Post-Cold War Conflicts* (San Francisco: Jossey-Bass, 2001), 31.

<http://www.beyondintractability.org/bksum/watkins-breakthrough>.
[2] The principal ideas regarding identifying interests outlined here were drawn from: Roger Fisher and William Ury. *Getting to Yes: Negotiating Agreement Without Giving In*, 3rd ed. (New York: Penguin Books, 2011). <http://www.beyondintractability.org/library/external-resource?biblio=23737>.
[3] The idea that integrative or interest-based bargaining will always include distributive bargaining too, was originally put forth by David Lax and James Sebenius in *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*, 1986. <http://books.google.com/books?id=FN_OIG0-alEC>.

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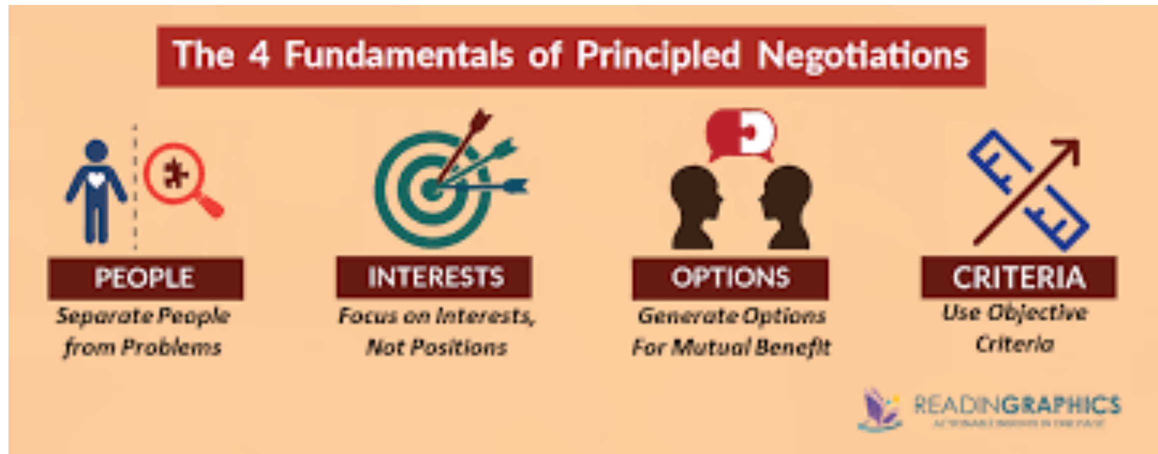
My purpose in writing is to illustrate how the theory of principled bargaining works in practice. **I will first share** ***my keynote published address at Queen's University it embraced and reinforced the ideas of GETTING TO YES with my experience in actual conflicts.***

Next I will share 5 conflict experiences where the story lends itself to a negotiation lesson of general application. Two conflicts failed and three succeeded.

I believe the case studies will track the "the four fundamentals of Principled Bargaining.



The first experience THE MAN WHO REFUSED TO DIE ended in tragedy with the loss of life at sea of 4 of my Polynesian friends.

**** The next negotiation was a major constitutional conflict over patriation and amendment of Canada's law. The cast including the Canadian federal government, 10 provinces and the Parliament of the UNITED KINGDOM.***

*** The third case study is about a failed negotiation between the BC province and Nippon Kokan NKK a major Japanes steel company. The purpose of the negotiation was to persuade NKK to invest , build and operate a steel mill in the province.***

**** The fourth conflict was over the flooding of the pristine Skagit Valley in Washington and BC. The local negotiators were the City of Seattle and the BC province. I was on the negotiating team and after more than 80 years of failure we made a deal that became an International Treaty between the US and Canada.***

**** The final case was the major rewriting of labour laws in BC in 1973.   For the first time in Canada the law removed labour injunctions from the jurisdiction of the civil courts. Also a new administrative body with very broad powers like a labour court given the power to regulate strikes, picketing and collective bargaining.***

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Industrial Relations Centre
Queen's University at Kingston

Reprint Series No. 55

Principled Bargaining

James G. Matkin

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"Tis the set of the sails and not the gales that determines the way we go." E1la W. hlilcox

It was with great pleasure that I received the invitation to come to Queen’s University to take part as keynote speaker at the annual spring seminar, Industrial Relations 1985.

This morning I want to speak to you about the age-oId problem of conflict. I believe that conflict resolution is a priority for better prospects for Canada’s industrial relations. I want to explore some fresh ideas that will help us to manage better the conflict that exists in our industrial relations environment.

First, conflict itself is not the problem in labour/management relations in Canada. Conflict arising from competing interests has been with us from the beginning of civilization. The problem is how we respond to conflict. How do we negotiate? As the poet said, "Tis the set of the sails and not the gales that determines the way we go." What is the set of our sails when we face a bargaining storm?

In British Columbia, for example, we have gone through strife in our collective bargaining and have weathered far too many storms. But from this very turbulent history there is now emerging a new opportunity for success. After years of confrontation we are on the road to reconciliation. There is a better attitude developing in the province that bodes well for the success of principled bargaining.

I believe that principled bargaining in labour/management relationsis a better way of setting our sails and one that deserves more attention by all Canadians. The concept of principled bargaining is an approach to negotiations that is based primarily on the work of Dr. Roger Fisherr of Harvard Law School.

I have seen its value in my experiences with many difficult disputes over the years. Principled bargaining is different from positional or adversarial bargaining, the traditional method of negotiating that causes many problems.

Positional bargaining comes down from the earliest times where, like an ancient rug market, the buyer and seller

haggle over fixed demands. Principled bargaining is different because it reduces the importance of haggling by creating a more constructive dynamic where objective criteria are debated. This is not an Utopian idea because it is drawn from practical with experience. Principled bargaining is based on five key practices: bargaining from principle rather than Position; treating your opponents with respect; responding to opposition with integration; finding an agreement based upon the justice of the situation; making tirnely and positive commitments.

The importance of using principle, respect, integration' justice and timeliness in bargaining is that these ingredients will create a more constructive negotiation experience. The idea of principled bargaining is of universal application and is particularly intended for study by both sides to a labour/management conflict.

I have struggled with many difficult conflicts in my career as a government trouble shooter. I was the Deputy Minister of Labour in British Columbia during some very serious confrontations between labour and management. I worked with the west coast longshore unions 15 years ago and helped the special mediator Chief Justice Nemetz appointed by an Act of the Canadian Parliament to find a successful resolution to a dispute over manning that threatened the economy of the nation. I was green, but I watched closely and learned from experience about the art of negotiating.

I learned from labour disputes in the mining industry, the forest industry, the fishing industry' construction, breweries, railways and the public sector about negotiations and I often saw what doesn't work.

I had first-hand experience with corrosive positional bargaining and the terrible tol1 it takes on relationships and the ability of contestants to generate options.

More recently I participated as Deputy Minister of Intergovernmental Relations in the major federal-provincial negotiations that produced the entrenched Charter of Rights and Freedoms in Canada. Why did these constitutional negotiations succeed in reaching agreement after 50 years of failure? One answer is the fact that

principled bargaining was employed.

Principled bargaining meant in the Canadian constitutional negotiations that the governments were prepared to look behind their positions to their interests and resolve the conflict of interests with principle. The basic conflict was between two fixed positions representing different values. 3 The provinces and the federal government looked behind their fixed positions of whether to patriate or not to patriate the constitution by identifying the competing principles. In this case' the competing principles were parliamentary supremacy and judicial review. And they arrived at their successful agreement for a new charter by negotiating the override clause into their agreement.

On the other hand, we have suffered from strikes and lockouts in Canada where the parties have been caught in the vice of positional bargaining. We saw the public sector unions in British Colunbia, in 1983, take issue with the provincial government over its nethod of imposing restraint (Bill 3, for example, before amendment allowed the government to fire public servants without cause). The result of this conflict was adversarial bargaining that brought us to the edge of a general strike.
Soon after this conflagration we suffered negative impact to our economy from a dispute in the pulp and paper industry that closed down all the pulp mills for 20 weeks and eost us millions of dollars. Again the value of principled bargaining was ignored by both parties as they held tenaciously to fixed positions out clarifying their interests. The pulp lockout was only ended by government legislation.

Five days later a major bus dispute cornrnenced in the city of Vancouver that lasted 90 days. This bus dispute was a paradigm of adversarial bargaining, with a major issue being the introduction of part-tirne drivers. There was a failure to look behind the positions taken on this issue and identify the principles or interests that were at stake in the demand for part-time drivers. Because the parties were locked into fixed positions, the dispute became a struggle of willpower rather than a constructive search for the right answer to a problem. During the struggle the relationship

between the parties deteriorated and effective communication ended and again government legislation was required.

There is a better way to negotiate and f have labelled this better way - principled bargaining. The concept of principled bargaining works because it meets our basic needs as human beings.

First of all, principled bargaining allows the parties to restructure the problem in such a way that it is easier to generate options and this is the key to reaching agreements. When options are easy to generate then conflict is easy to resolve. The value of restructuring is that it aIIows for an "imaginative reintegration of all the different items into a new pattern". h
Principled bargaining helps establish and maintain good working relationships with people, because it relies on the most basic human need - to be treated with dignity and respect.

Principled bargaining places value on the person.
Principled bargaining creates a win-vin solution, by meeting opposition or resistance with integration. Integration means the reconciling of the parties' interests and thus the provision of high benefits to each. Integration also means the creation of an inner unity as a centre of strength so that a negotiator "ceases to be a mere object acted upon by outside forces."

Principled bargaining produces results that are enduring because it is based upon the justice of the situation. An agreement is not concluded until the parties are satisfied with the merits of the deal.

Principled bargaining succeeds where adversarial bargaining fails because it helps with the timing of commitments. 'To everything there is a season' and this includes negotiations. There is a time to invent and a time to decide. It is important to separate inventing from deciding, or the parties will be out of phase with each other.

It is also important how negotiators make commitments because this will influence whether they can reach agreement with their opponents. Principled bargaining takes a positive approach to commitments.

Having looked at its advantages, I will now examine more closely each of the five key elements in principled bargaining that I mentioned at the outset of my remarks.

Bargaining from Principle Rather Than Position

In traditional bargaining the negotiators focus on their demands or positions and try to get the other side to capitulate. One side loses in order for the other side to win. This is positional.

In the principled approach, bargaining becomes an experience in clarifying interests and generating options. You focus on the interests or principles behind the demands and try to find the best position to satisiy the principle.6 'rVirtually every position ean be expressed in terms of a general principle: For everything there is a principle." Positions are, therefore, simply specific illustrations of principles.
For example, in the demand for part-time bus drivers there are at least two distinct principles or interests that may justify this position. First there is the interest of financial restraint. A part-time driver may be less costly to the system. The other possibility is the interest of increased service. This objective also could be accomplished with part-time bus drivers. This does not mean that positions are unimportant. It does mean that principles are more important in negotiations. Yet most people bargain as though positions were all that mattered.

They are firm on position and soft on principle when it is better if you are hard on principle and soft on position. Your interests must be satisfied, but there is usually more than one position that will do the job. tr'or example, for the buses there may be other options or positions besides part-time drivers (like working a longer week) that also will achieve financial restraint.

The reasons against positional bargaining are given in the bestselling text co-authored by Dr. Fisher, Getting to Yes: Negotiating Agreement Without Giving fn.7

> *When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. You now have a new interest in ttsaving facet' - in reconciling future action with past positions - making it less and less likely that any agreement will wisely reconcile the partiesr original interests.*

I believe that this 'locked in" effect occurred in the Canadian constitutional negotiations. It was therefore necessary to help the parties break free from fixed positions by inventing some new options. This was the reason we drafted the ‘no author single text’ that included a new idea (with an o1d history) of an override for the charter in order to make it more acceptable to the interests of the provinces.

There was some criticism of British Columbia’s role in the constitutional.negotiations, particularly from the Quebec provincial delegation, because of a failure to recognize that it is much better in resolving conflicts to clarify interests rather than hold tenaciously to positions.

Another major negotiation where the parties had been deadlocked for 40 years was a hydro dispute over the flooding of the sceenic Skagit Va11ey in the province of BC by the city of Seattle, Washington. The city and the province had become addicted to positional bargaining where the negotiations had become a debating contest with each side scoring public bargaining points instead of listening and negotiating by principle.

I joined the provincial bargaining team in 1982 and we tried a different approach. British Columbia proposed that instead of trading positional missiles in a contest of public relations we would adopt the technique of the single text bargaining. Seattle agreed.

Therefore, we stopped making offers and counter offers and started working from one text that framed our common positions as general principles.

The result was a dramatic change in the success of these
difficult negotiations. Six months later an agreement was reached
between seattle and BC that was turned into an International
treaty between Canada and the United States in 1984. Principled
bargaining helped in this success.

Likewise, I also believe that the locked-in effect of positional
bargaining occurred in the vancouver bus strike. The parties were
unable after 90 days of striking to break free from their fixed
positions and invent another solution. The government had to
intervene to break the deadlock.

In prineipled bargaining the idea is to negotiate from the
interest or principle which is more objective rather than from the
position or demand which is more subjective.

Treating Your Opponents with Respect

Many negotiators think they are expected to be unprincipled and wily about
the way they treat their opponents. For some, being a
shyster is slmonomous with being a negotiator. Deceit and taking
unfair advantage are considered part of the game.
Yet every highly successful negotiator takes the opposite view
and believes that integrity in your personal conduct and respect
for your opponent is absolutely imperative. Even in the sharpest
negotiations the most experienced say "integrity is so obvious that no one is
prepared to question itt'. e
Also, in traditional adversarial bargaining too often your opponent
becomes an enemy as positions harden and direct communication
ceases. The best reason for principled conduct and non-positional
bargaining is that it improves the negotiation rerationship and
relationships are very important in the labour/management fie1d.
we can learn fron Japanese businessmen the importance of showing
respect and courtesy in negotiations. The result is less conflict
wi.tnessed by the fact that there are ll?}th the number of lawyers
in Japan as in the US.
Effective communication between opposing sides happens when
people talk and listen to each other. This is the first principle

of negotiation.l0 ft is easy to get people talking, but it is
harder to get them to listen not only with their ears but also
with their eyes.tl Indeed it becomes unnecessary to hear what
your opponent says because you are so fixed on your own position.
By contrast communication becomes very much more effective when you
develop rapport with your opponent. How do you build
relationships in the competitive environment of negotiation. The
answer lies in the concept of respect through mutual aeceptance
and pacing. Mutual acceptance means that despite fundamental
differences each side accepts the other as a legitimate negotiating
partner with genuine interests.

Pacing means that you identify with the point of view of your
opponent by building on your common interests. But how is this
done? The golden rule makes a lot of sense for negotiations.
Therefore, treat your opponent with the same affirrnation, dignity
and respect that you would like to have. ff you value your opponent
as a person then the by-product will be more trust in the
relationship between the parties and this will greatly improve
your ability to communicate.
How does this work when you meet hostility from your opponent?
"As a general ru1e, itrs useful to regard another personts
resistance as something yourve created. This is so because the
other person can only resist something youtre doing or saying.ttr2
With this perspective in mind you realize how much power you have
to overcome resistance. The tougher the confliet, the more important
it is to build effective relationships by pacing with your
opponents and giving them respect and dignity.
An example of the dramatic effect that introducing more dignity
and respect into negotiations can have is given by Wayne Alderson
in his biography. An ugly strike occurred in the coal mines of
Pittsburgh involving 2,000 miners and lasting for 111 days. "ft
was marked by bitterness, violence and even murder, prodding some
to urge the invocation of the Taft-Hartley Act as Truman had done
in the days of John L. Lewis. Eventually it became the longest
coal strike in the nationrs history.rrl3
Alderson became a peacemaker by urging both parties to reconcile
on the conmon ground of the value of the person eoncept. It had a
positive effect. For example, to ease the tension Governor
Rockefeller issued a proclamation endorsing the value of the

person concept for the eoal fields, and supporting a National Day
of Prayer. To value people is not a religious movement. Rather
it is based on the fact that treating people right will be its own
reward.
Another advantage occurs when you bargain from interests rather
than position, because both parties are able to be much more
honest with each other. ft is very difficult to be completely
frank when you talk about your demands in bargaining. One reason
is that you donrt know exactly how firm your position really is.
Being honest is also important in treating people right. Honesty
is difficult in negotiations because there is always an element of
poker or bluff. The parties are t'creating" an agreement. If they
knew where the final outcome was they wouldn't be at the bargaining
tab1e, but they do know more precisely what principle they are
working towards.
Honesty is a virtue that has positive effeets on the success of
bargaining. Honesty will disarm some of the natural hostility of
your opponent to your bargaining position.
When you succeed in improving the relationship between the
parties you will also succeed in improving cormunication in negotiations.
Responding to Opposition with fntegration
In traditi'onal bargaining the approach is basically an eye for an
eye. If your opponent inflicts damage on you because you will not
7accept his position then you escalate the conflict by inflicting
damage on him. In many negotiations both parties become blind
from the retribution of the eonflict.
Under the alternative of principled bargaining the approach is
different. When faced with opposition, you turn this problem into
an opportunity to integrate, that is, by bargaining over interests
or principles you frustrate the struggle of will that leads to so
much damage. Bargaining becomes a more rational process.

Ours is the age of integration.

Integrated bargaining means matching or co-ordination of the parties
progress. It is achieved by timing the different phases in the process of
bargaining so everyone is on the same step or phase.
The four key phases of bargaining are-

1. Prenegotiation,
2. Formula
3. Crisis and settlement,
4. Detail and execution

If you get all parties into the same phase at the same time this is integrated bargaining. For example if one side has no will to negotiate they are in phase one and the other side starts offering options for a formula they are in phase two. This means the parties are not participating in integrated bargaining and as a result the negotiation often ends badly.

By looking for a solution that provides higher benefits to each side you disarm your opponent positional push. When you counter his opposition with support for a solution that meets his interests you take the negotiations to a higher level.

The tough side of integrated bargaining comes from the strategy of matching, to be employed once you have primed the pump with some co-ordinative behaviour. This involves "co-operating when the other side co-operates and failing to co-operate when he or she fails to co-operate* A negotiation then becomes a positive exchange of benefits.

Before integration is possible, the parties must clarify their interests. For example, in the Vancouver bus strike it was not possible to integrate the opposing positions of part-time drivers versus no part-time drivers because the parties did not clarify what interests or principle they were trying to achieve.

Also, integration is a concept that helps a negotiator with the "inner game" of bargaining. There is an inner game of negotiations just there is an inner game of tennis.'" The principle is that a negotiator who integrates his beliefs with his actions will more effective. This means that you believe what you say and what you believe.

The strength of inner unity is best illustrated by perhaps the most successful negotiator of all time - Mohandas K. Gandhi, who won the independence of India from England by practising some very simple virtues. Gandhi believed that one of the greatest problems

with our society was found in the failure to match our beliefs
with our actions. Self-control was key to the power of his personality.

He never retaliated against an enemy and he didn't
believe in the policy of "an eye for an eye". Gandhi was a man
without guiIe. He once explained that, "I never had recourse to
cunning in all my life."

Negotiation behaviour is an important part of success and the
concept of integration will make a difference in bargaining
behaviour, particularly because it creates more understanding of
the opposition.

Finding an Agreement Based Upon the Justice of the Situation

Traditional adversarial bargaining is viewed as a power struggle
between the parties with the most spoils going to the most powerful.
The notion of legitimacy or justice is often absent from
positional bargaining. There is no judge of what is right or
wrong and therefore anything goes.
What the parties believe to be "fair" is the test of the justice
of the situation.

How does the idea of justice work in negotiations?

Why did Seattle and BC finally reach consensus on the Skagit
Valley negotiations? I suggest that an important factor is that
the "justice" of the new formula influenced the key players to
consent to the dea1. I'Although it is not necessarily helpful to a
successful outcome to make that aspect of the discussion explicit,
it is useful for the parties to know what they are doing.

Negotiations' justice is relative between the parties and that
is different from legal justice where there is a third party handing down and
following objective rules. A further value of principled bargaining
is that the parties will be able to address the justice of the
situation more effectively than positional bargaining allows.

Under principled bargaining the justice of the situation does matter. This is true because the bargaining is focused on interests or principles that can be measured by standards or objective criteria.

The Vancouver bus dispute offers another vivid example. If the interest was to increase service during peak traffic periods, then this objective can be measured very precisely. How many more passengers are to be carried and on how many routes? With this objective information in hand it is possible to assess whether there are options that satisfy the justice of the situation better than increasing the number of part-time drivers.

For example an option may be to negotiate a longer working week. Because an agreement may be frustrated unless it satisfies the partiesr basic needs it is important to be concerned about the quality of an agreement. By looking at the justice of the situation between the parties it is more likely that an agreement will be reached that will endure.

Make Timely and Positive Commitments

Many veteran negotiators state that timing is everything in bargaining. Timing is very important to commitments. There is a basic need in negotiating to go through two distinct phases or seasons. The first phase is directed towards finding a formula. During this phase, the essential activity is inventing a variety of possible commitments. The next phase is directed towards making a deal based on the options available. During the second phase, the essential activity is deciding what commitments should be made.

The best advice is to invent first and to decide later.
A common mistake in negotiations is to mix the activity of "inventing" with the activity of "deciding.". The result is misunderstanding. Making commitments is of critical importance in negotiations. There are two kinds of conmitments: positive and negative. In traditional bargaining one of the problems is that too often commitments are negative. According to Dr. Roger Fisher, '*a*

negative commitment is the most controversial and troublesome element of negotiating power,' because the earlier you make a take-it-or-leave-it position the more difficult it becomes to generate options.

The principle, therefore, is to make positive rather than negative commitments. By focusing on what you want rather than what you don't want you help clarify your real interests and you leave more room for your opponent to find the common ground necessary for agreement.

For example, in the Vancouver bus dispute the transit union made a negative commitment on the issue of part-time drivers. Their position was that they were opposed to this change that management wanted. The union's negative commitment placed it in a head-on conflict with managements positive commitment. A preferred alternative would have been for the union to say what positive measure they would be prepared to support in order to resolve the problem, i.e. new equipment, more overtime or an increased work force etc. The result would have been to bring the bargaining back to the issue of principle.
And so we must know not only when to generate alternative solutions to a given problem but also what form is best to express our commitments.

Conclusion

I will reiterate the key elements of principled bargaining:

* bargaining from principles rather than positions;
* treating your opponents with respect;
* responding to oppositionwith integration;
* finding an agreement based upon the justice of the situation;
* making timely and positive commitments.

Principled bargaining means that you treat your opponent in the same way that you would like to be treated. The primary focus of this

approach is on the merits of the problem, or the justice of the situation and with the recognition that everyone wants to be treated with dignity and respect. Principled bargaining is therefore the golden rule of negotiating because it prescribes an approach based on the best practices of the veterans in this field of confliet resolution.

Principled bargaining is not a short cut or pat answer to complex problems. Being principled in bargaining does not mean being weak in the face of opposition. There will still be fighting when either party thinks it can win more by fighting rather than co-operating. But the fighting will be more constructive and less damaging when the bargaining has been over principle and the justice of the situation. In other words there are fair fights and there are unfair fights that are destructive and principled bargaining makes the difference.

Do you use principled bargaining if your opponent does not? Yes! It will enhance your negotiating success if you work from interests and integrate and make timely and wise commitments. Our problems with conflict resolution in Canadian labour/management relations are the impetus for the search for a better way of setting our sails. Principled bargaining presents an opportunity to make a difference in the success of our negotiations by using the power of rationality.

Notes

I Dr. Fisher is Williston Professor and the director of the negotiations project of Harvard Law School and co-author, with William Fry, of the best-selling book Getting to Yes: Negotiating Agreement Without Giving fn (Boston: Houghton Mifflin, 1981).

2 ln addition to Roger Fisher, I have taken advantage of the work of William Zarhman of Johns Hopkins. He co-authored, with Maureen R. Berman, the text The Practical Negotiator (New Haven: Yale University Press, 1982) and is the only scholar to emphasize the value of "justice" in negotiations.

3 Robert Sheppard and Michael Valpy, The National Deal: The Fisht for a Canadian Constitution (Toronto: Fleet Books, 1982). See also, for a useful overview of the conflict, Edward McWhinnev. Canada and the Constitution 1979-82: Patriation of

the CharteE o:t EighrEs (Toronto: University of Toronto Press, il
4 Kenichi Ohmae, The Mind of the Strategist: The Art of
Japanese Business (New York: McGraw-Hill, 1982), p. 13 where
the author emphasizes the opportunity to use "non-linear
brainpowertt.
5 Ernest Friedrich Shumaker, A Guide for the Perplexed (New York:
Harper & Row, 1977), p. 31.
6 Michael A. Gilbert, How to Win an ArFument (Toronto: McGraw-
HiIl, L979), p. 36.
7 Fisher and Fry, Getting to Yes, P. 5.
Ibid., p. tzl,
Zartman and Berman, , P. 29.
Howard Raiffa, The Art and Science of Negotiation (Canbridge,
MA: Belknap Press of Harviid University Press, 1982), p. 337.
George Mi}1er, in The Psychology of Cornrnunication; Seven EssaYs
(New York: Basic Books , L967) , p. 55, concludes: ". . . it is
quite clear that man is a miserable component in a
communication system. He has a narrold bandwidth, a high noise
1evel, is expensive to maintain, and sleeps eight hours out of
every twenty-four.'r See also regarding body language, Gerard
I. Nierenberg and Henry H. Calero, How to Read a Person Like a
Book (New York: Hawthorn Books, L97L).
Jerry Richardson and Joel
The Business of Negotiation
person is doing", at P. 51.
Margulis, The Magic of RaPPort:
(New York: Avon, 1984)r P. 139.
something similar to what the other
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R.C. Sproul, Stronger than, Steel: The Wanne Alderson Storv
(New York: Harper & Row, 1980), p. 153.
Dean G. Pruitt, Negotiational Behaviour (New York: Academic

Press, 1981), p. 116. See also at p. 137, co-ordination is "to collaborate with the other party in search of a mutually acceptable solutiontt.
"Every game is composed of two partsr 8n outer game and an inner game. ... [T]he inner game.. . is the game that takes place in the mind of the player.r' W. Timothy Gallwey, Inner Tennis: Playing the Game (New York: Randon llouse, L976).
Louis Fischer, Gandhi: His Life and Message for the World (New York: New American Library, 1954).
One of the best references on negotiation justice is Zartman and Berman, The Practical NeFotiator.
Fisher and Fry, Getting to Yes, p. 62.
Roger Fisher, I'Negotiating power: getting and using influence, American Behavioral Scientist 27 (1983): 160

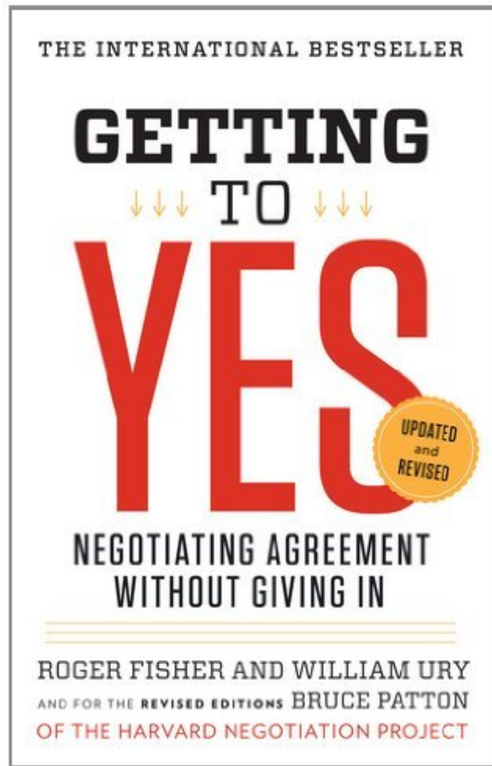
WHAT FOLLOWS ARE FIVE CASE STUDIES ABOUT MY DIRECT EXPERIENCE APPLYING THE CONCEPTS OF *GETTING TO YES IN KEY CONFLICTS.*

MY FIRST CASE STUDY – CRISIS LEADERSHIP

Negotiations are universal and ongoing everywhere and everyday. What about life and death crisis is negotiation smart for leaders in charge when every minute counts?

I THE PROBLEM..7 1.DON'T BARGAIN OVER POSITIONS ...

There is a third way to negotiate, a way neither hard nor soft, but rather both hard and soft. The method of principled negotiation developed at the Harvard Negotiation Project is to decide issues on their merits rather than through a haggling process focused on what each side says it will and won't do. It suggests that you look for mutual gains wherever possible, and that where your interests conflict, you should insist that the result be based on some fair standards independent of the will of either side. The method of principled negotiation is hard on the merits, soft on the people. It employs no tricks ' and no posturing. Principled negotiation shows you how to obtain what you are entitled to and still be decent. It enables you to be fair while protecting you against those who would take advantage of your fairness. This book is about the method of principled negotiation. The first chapter describes problems that arise in using the standard strategies of positional bargaining



From Chapter 1 the book (GETTING TO YES) pp 7 to 13 .

THINKING PITFALLS

I will begin with a check into our thinking systems. Let's take a quick survey – one of the things I love about Kim Campbell is her upbeat, optimistic perspective on life.

How about you?
Let's do a survey. Do you have a more optimistic or pessimitic temperament? [Answer: at least 90% of the class self-identified as optimistic.] The result is what is expected of a group of high achievers. As Nobel Prize winner Daniel Kahneman found, *Optimistic individuals play a disproportionate role in shaping our lives. Their decisions make a difference; they are the inventors, the entrepreneurs, the political and military leaders – not average people. They got to where they are by seeking challenges and taking risks. They are talented and they have been lucky , almost certainly luckier than the acknowledge."*
Yes, Kim Campbell proves optimism works in her leadership experiences, but there is down side.

MY FIRST STORY - LIVES LOST FROM UNWARRANTED OPTIMISM. [i]

My first story is a tragedy of leadership I witnessed working as a Mormon missionary on the remote atoll of Manihiki in the Northern Cooks in 1963. Life in Manihiki was very primitive with no electricity, running water, sewer, roads, trucks and stores. We had to fend for ourselves making us resourceful; we even made our own cement by burning coral rocks in deep

palm tree pits like the photo below.

Our survival also depended on the infrequent interisland bringing supplies from Rarotonga. But in early 1963, the boats did not arrive and no supplies of food and necessities came for 4 months. We ran out of everything, including flour, salt and baby food. We became very hungry.

We decided to take action and seek new sustenance by reaching our to Rakahanga a much bigger atoll 25 miles away. We divided the island into four and chose crews to sail four clumsy open boats. Rakahanga has three times the land base of Manihiki allowing it to grow much more staples like “puraka” a root crop like taro. See the two atolls side by side.

Manihiki

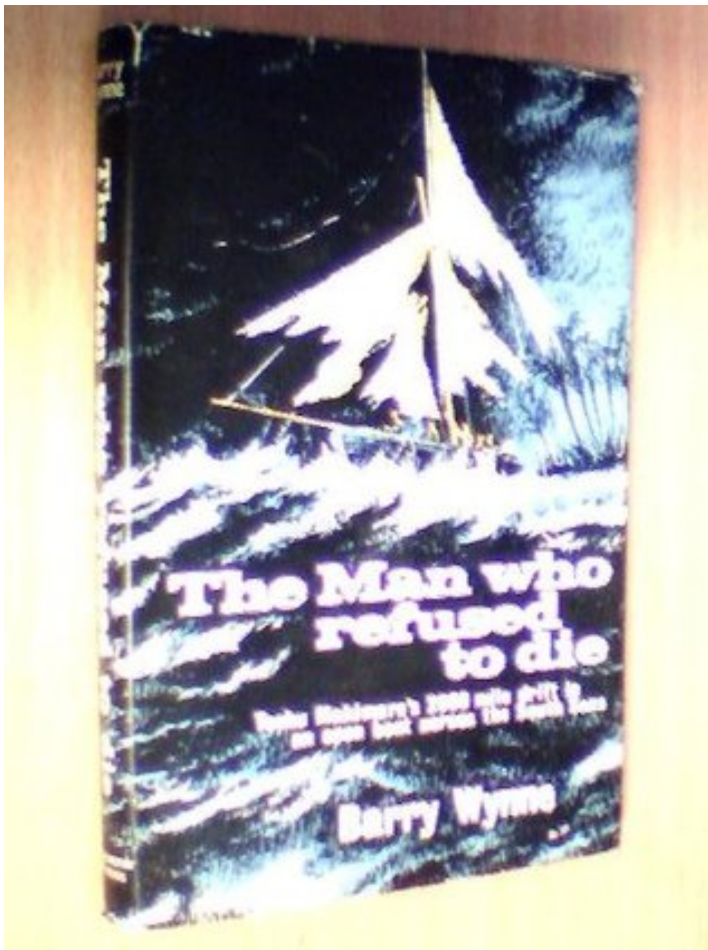
Rakahanga

The goal was to bring back puraka to add to our weak diet..
This humanitarian mission created an unnecessary tragedy and loss of life. The boat for my part of the island was a tiny sloop, not longer than 16 foot, with a huge sail. It was barely seaworthy on the open ocean. Our boat manned with seven strong men was lost at sea landing 2000 miles away in

the New Hebrides. Four of the seven died and Teehu Makimare my close friend is credited with saving the three remaining.
The tragedy came to the attention of the world when Queen Elizabeth, awarded the Stanhope Gold Medal for bravery to Teehu Makimare of Manihiki, Cook Islands. He was selected from all the Commonwealth for showing the most courage and leadership of the highest order.

Teehu Makimare, Cook Islander and citizen of the Commonwealth, is introduced to Her Majesty the Queen at Smithfield, London, December 1965

Also Barry Wynne wrote a book, THE MAN WHO REFUSED TO DIE, commissioned by the New Zealand government telling the story in detail. The images following are from his book.



The Prime Minister of New Zealand’s wrote the FORWARD saying, *The Pacific is noted for its epic voyages; Bligh of the Bounty; the Kon Tiki raft and most famous of all, those of our Maori people – the children of sunrise – voyaging from their homeland Manihiki.”*

ıs of a previous Stanhope
eneral.
H.M. the Queen at Smith-
l.
umane Society's Stanhope
ıvestiture. *Photo: Sport &*

Prime Minister
Wellington
New Zealand

FOREWORD

The Pacific is noted for its epic voyages; Bligh of the Bounty; the Kon Tiki Raft and most famous perhaps of all, those of our Maori people - the children of the sunrise - voyaging from their homeland Hawaiki. I am therefore very pleased to write the Foreword to a book which records another heroic chapter in this story.

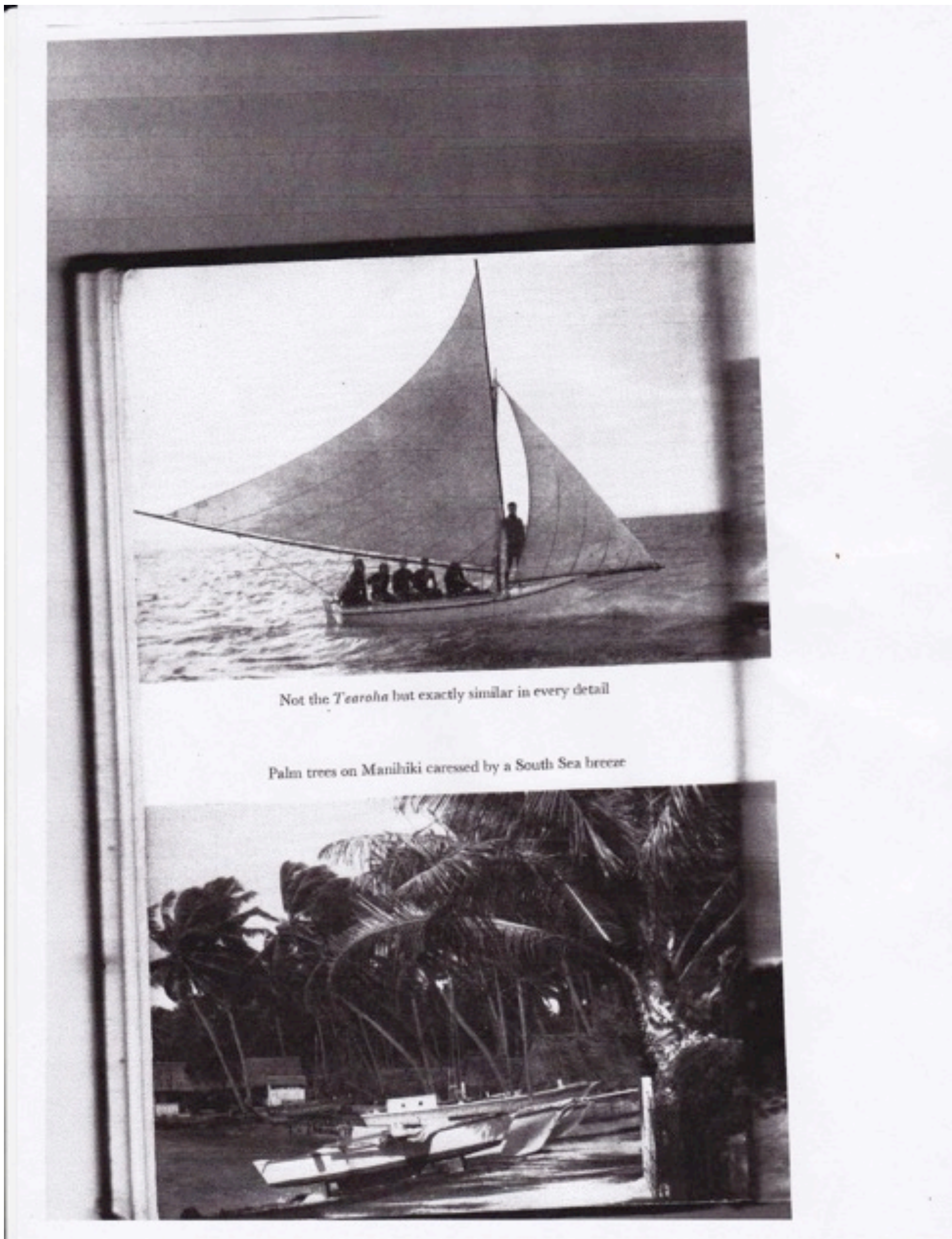
Although the endurance and skill of Polynesian navigators are well known we are inclined to think of them as legendary feats of endurance from the past.

This book reminds us that such is not the case. The spirit of the past is still alive and in these pages Makimare and his companions set before us an example of courage and steadfast faith that deserves a place with the older legends.

I am proud that these men are New Zealand citizens and that their renown will now reach far beyond the South Pacific where their struggle for survival took place.

Keith Holyoake

The story is of the terrible ordeal of seven Polynesians lost at sea returning from Rakahanga and the heroic efforts of Teehu to save them. Why? Sadly the apparent reason is hunger but the real answer is leadership failure.



Not the *Tearoha* but exactly similar in every detail

Palm trees on Manihiki caressed by a South Sea breeze

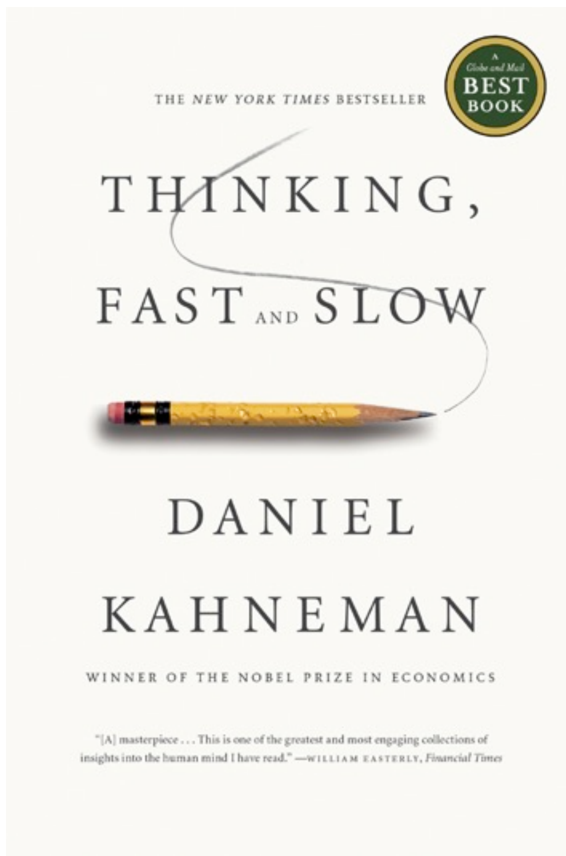
That they, or at least some of them, manage to survive a drift of 2000 miles shows that the Ocean has kept its clement side, It is the lack of food and especially drinking water that killed four of the seven sailors slowly.

Barry Wynne in his book recounting the tragedy, THE MAN WHO REFUSED TO DIE, writes, "Teehu watched the other boats set course for Manihiki and immediately observed that they were all taking a far more easterly direction. He decided to speak to Enoka again: "There, Enoka, I told you the others are sailing much closer to the wind. They are right, we are wrong, let us change course and follow them or we will be blown to the lee of Manihiki and have trouble getting in." Enoka Dean flared in retaliation, "I am the captain of the boat. We were second into harbor on the outward journey: I know what I am doing. Get on with your job!" (Page 39)

In the end Teehu was right Tearoha missed Manihiki and 60 days later beached on the shores of the New Hebrides 2000 miles away. Four men died of starvation. Three survived the terrible ordeal thanks to the heroic efforts of Teehu. Why did Enoka make this tragic mistake of leadership?

Did his leadership of the boat suffer from overconfidence and an unwarranted optimism? When he answered the crew's concern with the direction by saying he had done well in guiding the boat on the in coming journey (known known) he seems to ignore the storm and the overweight of the food and the fact the other boats are heading in a different course?

Recent research by Daniel Kahneman winning the Nobel Prize in economics offers a possible answer. Enoka likely was victim of his fast brain system and his cognitive and optimistic bias in the crisis moment.



https://d188rgcu4zozwl.cloudfront.net/content/B004R1Q2EG/resources/1663778631

The central idea of this book, “Thinking fast and slow” is a about research into two modes of thought: "System 1" is fast, instinctive and emotional; "System 2" is slower, more deliberative, and more logical. The book delineates cognitive biases associated with each type of thinking.
From framing choices to people's tendency to substitute an easy-to-answer question for one that is harder. Framing is also a key component of sociology, the study of social interaction among humans. The book highlights several decades of academic research to suggest that people place too much confidence in human judgment. He explains with the concept he labels *What You See Is All There Is* (WYSIATI). This theory states that when the mind makes decisions, it deals primarily with *Known Knowns*, phenomena it has already observed. It rarely considers *Known Unknowns*, phenomena that it knows to be relevant but about which it has no

information. Finally it appears oblivious to the possibility of *Unknown Unknowns*, unknown phenomena of unknown relevance.
He explains that humans fail to take into account complexity and that their understanding of the world consists of a small and necessarily un-representative set of observations. Furthermore, the mind generally does not account for the role of chance and therefore falsely assumes that a future event will mirror a past event. W
. A plausible explanation of the Manihiki tragedy is that Enoka was victim of the fast brain cognitive bias for optimism in crisis. Teehu and the crew on the other hand became concerned using their slow thinking system taking account of known unknowns – the storm and the overweight of food.

placed too much confidence in his past experiences and refused thinking slow as Teehu urged. After my talk a student asked as optimists is there anything we can do to avoid the pitfalls of fast thinking? Can our cognitive illusions be overcome? Kahneman answers that question, Remember despite its flaws, our System 1 works wonderfully most of the time (as in kicking the soccer ball or dancing etc.) and has gotten us to this point in the evolutionary game. In the book: "The best we can do is compromise: learn to recognize situations in which mistakes are likely and try harder to avoid significant mistakes when the stakes are high**.** The premise of this book is that it is easier to recognize other people's mistakes than our own." Think about this premise and Enoka who failed to listen to Teehu who surely saw his error. This is so important for leaders to understand that when you are captain it will be listening to your crew that is the only hope to prevent disaster from your fast brain mistakes!

POSTSCRIPT: When I returned to visit Teehu in Rarotonga 10 years later and asked about the book by Barry Wynne telling his survival story. He said the book failed to describe the pain of nearly starving to death. For me, when the sailors would not throw food overboard like the other boats saving it for us at home adds poignancy to the enormous debt of gratitude

I owe those Polynesians. Everyday I am reminded of the tragedy when I was only 21 and four strong Polynesians friends died trying to help me and the villagers in Manihiki.   The memory is poignant and spurs my resolve to make a difference in this crazy world so their sacrifice is not in vain.

I returned to Rarotonga in 1973 for a happy reunion with Teehu, The Man Who Refused to Die. Here is a cartoon to remind you of how vulnerable you are to the cognitive bias of optimism.

-

James Matkin • a minute ago

The Essex disaster is a riveting story of survival after shipwreck with an evocative lesson in flawed leadership when Captain Pollard's inepitude lets the crew override his PLan to seek safety in the nearby Society Islands.

"All the sufferings of these miserable men of the Essex might, in all human probability, have been avoided, had they, immediately after leaving the wreck, steered straight for Tahiti, from which they were no very distant at

the time, & to which, there was a fair Trade wind. But they dreaded cannibals, & strange to tell knew not that …it was entirely safe for the Mariner to touch at Tahiti –
But they chose to stem a head wind, & make a passage of several thousand miles (an unavoidably roundabout one too) in order to gain a civilized harbor on the coast of South America."
Quote from notes of Henry Melville in his copy of Chase's Narrative.

Why such feckless leadership at this critical moment? Philbrick gives us the answer pointing to the "profound conservatism" deeply entrenched in Nantucket of 1820. Spurning the Society Islands and sailing for South America, "the Essex officers chose to take their chances with an element they did know well: the sea." Psychology research of survival leadership supports the conservatism explanation because, negative emotions of fear and anger serve to narrow repertories in crisis. Kahn & Inés, 1993.

"Captain Pollard had known better, but instead of pulling rank and insisting that his officers carry out his proposal to sail for the Society Islands, he embraced the a more democratic style of command. Modern survival psychologists have determined that this "social" – as opposed to "authoritarian" – form of leadership is ill suited to the early stages of a disaster, when decisions must
be made quickly and firmly. Only later, as the ordeal drags on and it it necessary to maintain morale, do social leadership skills become important." P.100.
Survival history shows in my opinion that crisis leadership demands a broad perspective thinking of all viable options. Profound conservatism may be comforting but also disastrous as the fate of the Essex proved Tahiti would have been the much better destination.
In the Heart of the Sea is an upcoming biographical thriller film directed by Ron Howard. The film stars Chris Hemsworth, Cillian Murphy, and Tom Holland. It is based on Nathaniel Philbrick's 2000 non-fiction book of the same name, about the sinking of the whaleship *Essex*. The film is sc There is a parallel in the Essex

tragedy and the grueling fatalities suffered by 7 Manihiki Polynesians in the Te Aroha for 60 days at sea without food or water told by Barry Wynne in "The Man Who Refused To Die. " Here Captain Enoka under the spell of conservatism like Captain Pollard took the wrong course leading to disaster, his . Because I lived on Manihiki at the time and Teehu was my good friend I have a passion for these tragic sea stories.
See my Goodreads leadership failures review: https://www.goodreads.com/topic/show/2005247-leadership-failures

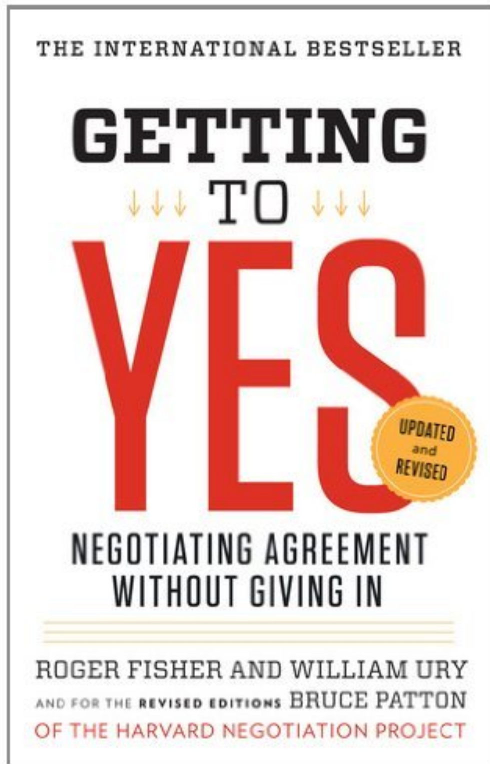
How to reconcile the contrasting survival democratic leadership of Philbrick and autocratic leadership Enoka? Both styles ended in tragedy. I submit that Daniel Kahneman two types of thinking is relevant. For Phibrick his crew's anxiety meant they were stuck in their fast brain thinking fear of the unknown Tahiti Polynesians. For Enoka he ignored the slow brain thinking of his crew resting on the lazy fast brain thinking that made him believe no change in course was needed.

CASE STUDY NEGOTIATE INTERESTS NOT POSITIONS.

3. Focus on INTERESTS,

Not Positions Consider the story of two men quarreling in a library. One wants the window open and 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 he wants the window open: "To get some fresh air." She asks the other why he wants it closed: "To avoid the draft." After thinking a minute, she opens wide a window in the next room, bringing in fresh air without a draft. For a wise solution reconcile interests, not positions This story is typical of

many negotiations. Since the parties' problem appears to be a conflict of positions, and since their goal is to agree on a position, they naturally tend to think and talk about positions—and in the process often reach an impasse. The librarian could not have invented the solution she did if she had focused only on the two men's stated positions of wanting the window open or closed. Instead she looked to their underlying interests of fresh air and no draft. This difference between positions and interests is crucial.



GETTING TO YES pp 23 to 31

MY SECOND STORY – NEGOTIATING A CHARTER OF RIGHTS BY FOCUSING ON INTERESTS RATHER THAN RIGID POSITIONS.[ii]

I had a direct hand negotiating the Charter of Rights and Freedoms and a

new constitution for Canada. I am the reputed advocate in the negotiations for the innovative *Notwithstanding clause or* override offered in BC's single text that I authored with Mark Krasnick. The override became a key impasse breaking measure for the deal.

Canada's struggle to bring home constitution had been on a long road of failure with the federal government trying to find provincial consensus for an amending formula. PM Trudeau decided to make the issue his crowning achievement. Our constitutional negotiations is a textbook illustration of why fundamental negotiation principles matter. It is a casebook study of the ideas presented in GETTING TO YES, by Fisher and URY.

"The answer to the question of whether to use soft positional bargaining or hard is "neither." Change the game. At the Harvard Negotiation Project we have been developing an alternative to positional bargaining: a method of negotiation explicitly designed to produce wise outcomes efficiently and amicably. This method, called principled negotiation or negotiation on the merits, can be boiled down to four basic points,

These four points define a straightforward method of negotiation that can be used under almost any circumstance. Each point deals with a basic element of negotiation, and suggests what you should do about it.

People: Separate the people from the problem.

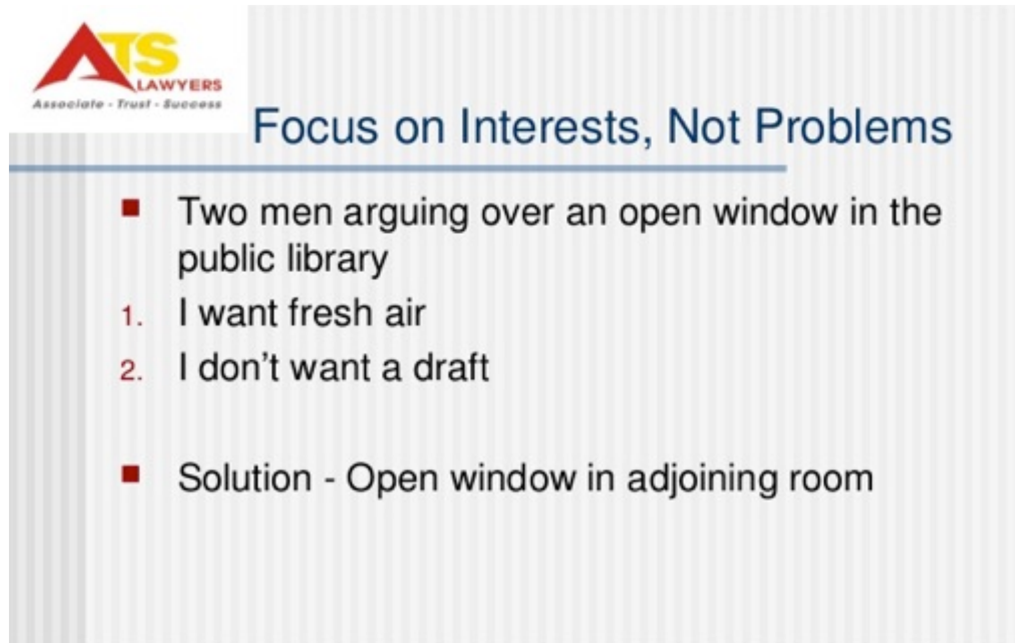
Interests: Focus on interests, not positions

Options: Generate a variety of possibilities before deciding what to do.

Criteria: Insist that the result be based on some objective standard."

I urge each of you to read this short book, as it is free in pdf form on the Internet here -

http://www.fd.unl.pt/docentes_docs/ma/AGON_MA_25849.pdf
I emphasize the principle to focus on interests, not positions as this turned out to be the key in Canada's constitutional negotiations. First review a couple of key of metaphors from GETTING TO YES showing the difference between a position and an interest.



Like the 18th camel solution when you find the parties interest like the open library window behind their positions a resolution is possible.

The orange story shows that if you just cut the orange in half both sides lose.

As time has gone by history has grudgingly been kinder to Premier Bennett and his role in the final negotiations. I told the Premier in early 1981, I had decided to go back to my law. He however made me an offer I could not refuse. He asked me to take over the constitution and international files role as DM of Intergovernmental Relations for BC. I loved the opportunity and knew there would be transferable skills from many intensive negotiations experience as DM of labor.

I had not been long in the job when the premier asked my help find a new DM for his office who could keep him out of hot water with the national media as happened to Sterling Lyon the previous year. I had the perfect

candidate working for me in Dr. Norman Spector – a fluently bilingual double PhD originally from Montreal. Norman turned out to be a great fit for Premier Bennett particularly on the constitution file. We worked well together. My approach immediately was to connect with the other side in the conflict and see if their interests left room for compromise. I first met with an old federal friend Allan Gotlieb who had the ear of the PM.

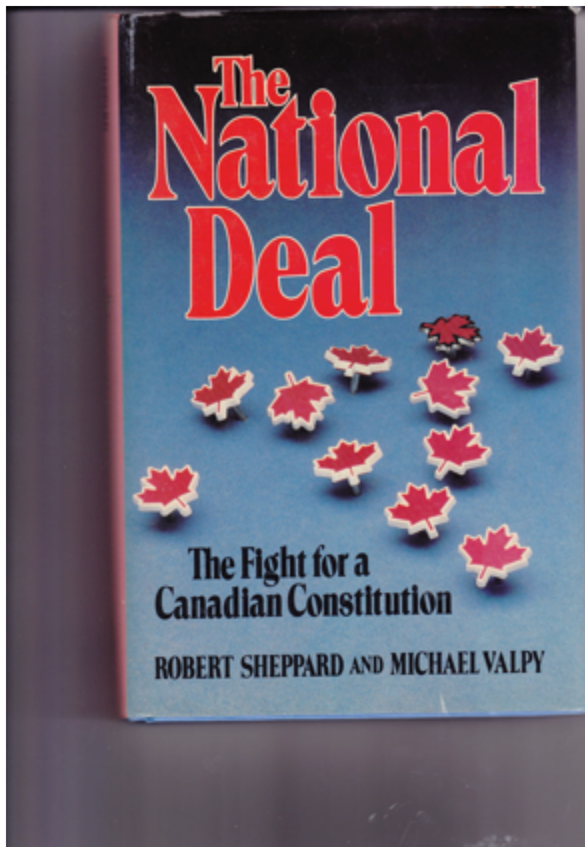
My efforts are recounted in the book, The National Deal by Sheppard and Valpy.

"*In June, six weeks after the signing of the April accord, Allan Gotlieb, the undersecretary of state for external affairs, came to Vancouver on business. James Matkin, B.C.'s deputy minister of intergovernmental relations, rang him up and hopped across the Strait of Georgia from victoria for a meeting. Matkin and Gotlieb knew each other from their former jobs – when Matkin was B.C.'s deputy minister of labour and Gotlieb was deputy minister of the old federal department of manpower and immigration. Matkin, knowing full well that Gotlieb was one of Ottawa's most influential mandarins, with full access to the innermost circles, told him that he wasn't happy with the April accord and asked if there was still room for a compromise. Goalie said yes. Makin, an intelligent and highly principled public servant - he had once been a Mormon missionary in the South Pacific – would not have spoken without being aware of what was on his premier's mind.*

The next feeler from British Columbia came in August, during the Canadian Bar Association's annual convention, held in Vancouver. Roger Tasse, the federal deputy justice minister, was in town, and Richard Vogel, B.C.'s deputy attorney general, arranged for him to meet Matkin over lunch. This time, with Gardom's knowledge and in front of Vogel - who was philosophically opposed to an entrenched charter- Matkin told Tasse that

the April accord was a mistake, that the gang of eight should have gone for at least some entrenched rights, and that he, Matkin, was personally in favour of the charter of rights. Matkin also hinted that Bennett could be moved on the charter. Tasse, in turn, indicated that his political masters might compromise on the amending formula.

Such talk could only kindle the flames of ardor in Ottawa. Tasse had hardly left town when Michael Kirby arrived, purportedly on some federal provincial matter to do with pensions. He met Matkin and went over the same ground that Tasse had, returning to Ottawa - briefly. In early September, he was back in Victoria, this time to arrange a private meeting between Trudeau and Bennett, who by now had become official spokesman for the premiers. NATIONAL DEAL, PP 248.



Premier Bennett told us a number of times that the constitutional debates were wasteful because the economy should be the priority. He saw the conflict as an unnecessary diversion.

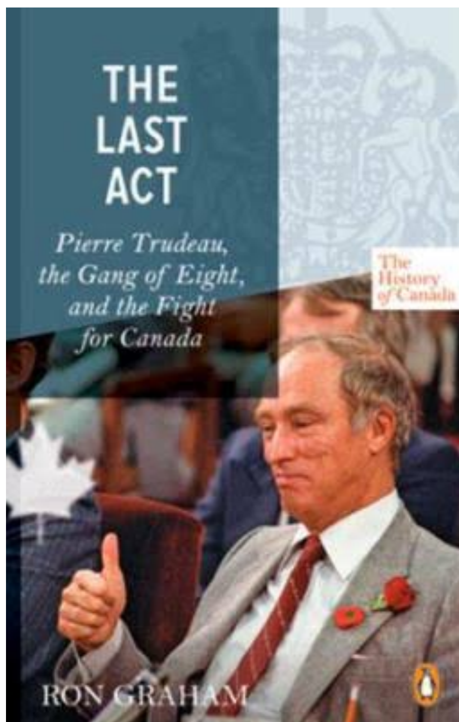
Ron Graham summarized Premier Bennett's constitutional strategy in his recent book, THE LAST ACT, pp. 184-85.

*B.C.'s had indeed become a bendable, not least because he wanted to escape the fate of Sterling Lyon, his predecessor as chair of the Annual Premier's Conference, whom the eastern media had branded a cantankerous, inflexible ideologue. Unlike Lyon, Bennett analyzed the situation as if it were a business problem in need of a workable solution. Unlike Lougheed or Blakeney he hadn't gone to Harvard or Oxford. He simply wanted to put an end to the constitutional bickering so that everyone could get back to dealing with the real problems of the economy. To that end, he held Two one-on-one meetings with Trudeau in a search for common ground and beefed up his constitutional team-led by Mel Smith, a hard-nosed conservative - with a couple of younger, less confrontational advisers. James Matkin, a former deputy minister of labour who brought with him a wealth of education and experience in negotiation theories***, [perhaps more relevant were >100 labour negotiations I helped mediate***] and Norman Spector, a junior bureaucrat on leave from the Ontario government, did not share Smith's view of Ottawa as the devil incarnate. Neither man was philosophically opposed to a charter of rights. Neither thought the April Accord was going to lead to success if the real goal was to reach a solution rather than simply to stonewall. With their premier's tacit approval, Matkin and Spector set out to establish friendly communications with the other camps and to come up with a "no author single text" that might satisfy everyone by being identified with no particular interests. Though Matkin once slipped a confidential document to Allan Blakeney while they were riding in a hotel elevator in Montreal - like two spies trying to evade the eyes and ears of the government of Quebec - it was hardly a state secret that B.C. was wavering. The press was full of stories about backroom meetings and trial balloons, and at a ministerial meeting in Toronto on October 27, 1981, Claude Morin denounced Matkin and Spector for conspiring with Roy Romanow. "These gentlemen were no doubt trying to be helpful," he said, "but they are*

weakening our position.*"38 [emphasis added]*

Quebec was not alone in its concern. Many of the constitutional veterans dismissed Matkin and Spector as boy scouts or rogue warriors, sowing confusion and tension as they improvised their way through a complicated dossier they didn't fully comprehend. When Bennett reported to his colleagues in the Gang of Eight that Trudeau seemed willing to compromise on the amending formula, Michael Kirby methodically set to work to undermine the premier's credibility. If the other premiers believed the B.C. premier, Kirby figured, they'd have no incentive to compromise on the Charter.

"There's always a creative need for crisis and uncertainty to get any deal" Matkin explained. "'We wanted to break the Gang and we weren't going to give Trudeau everything he wanted, so of course we were criticized. We were dismissed as dumbheads, but in fact, Trudeau did eventually compromise on the amending formula, which was all that really mattered to British Columbia."



In the negotiations that led up to the CONSTITUTION ACT, 1982, Lougheed was a driving force behind the formula that gave no province a veto, but which allowed dissenting provinces to opt out of amendments that would reduce their powers. Although later accused by Québec of having, on the so-called "Night of Long Knives," betrayed the agreement among the "Gang of Eight" (all provinces except Ontario and New Brunswick) to, in Lougheed's own words, "defend the provinces against [Pierre] TRUDEAU's steamroller tactics," Lougheed shared many of the concerns of Premier René LEVESQUE. He opposed the CHARTER OF RIGHTS AND FREEDOMS on the grounds that "the supremacy of the legislature must be preserved."

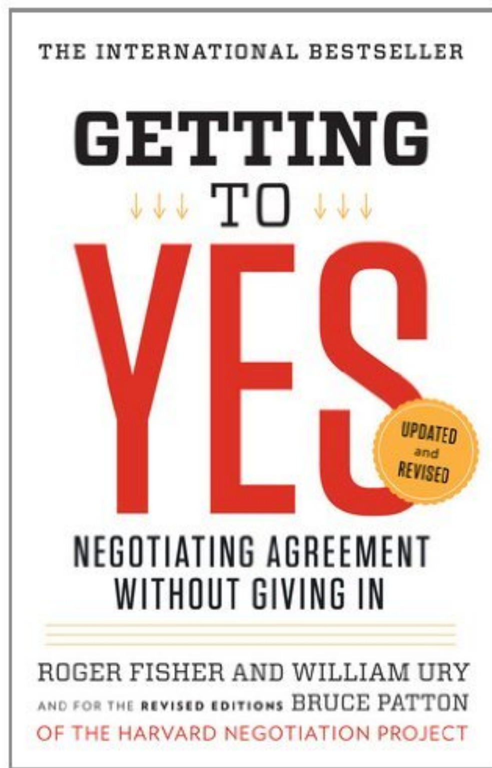
https://www.thestar.com/news/canada/2012/09/11/tim_harper_peter_lougheed_once_stood_tallest_among_premiers.html

Lougheed's opposition had merits. It was based on fundamental democratic values. He explained if the courts take over the result is parliament's interest and concern for human rights is weakened. Parliament passes the buck too easily he thought with binding judicial review. His opposition was supported on similar grounds by Premier Blakney.

To meet this opposition from Lougheed and Blakeney to the federal proposed Charter of Rights we came up with a restructuring like the 18th camel. The Notwithstanding clause became the compromise as it allowed

final say by parliament notwithstanding court rulings. The override was an integrative solution to the problem. The clause was limited and constrained. We said it would not be used often. In fact this is the case with only a handful of times has it been invoked and not yet by the federal government.

I think a potential use today of the override could be to settle the ongoing debate about assisted death rights. Many organizations are advocating this as the new law takes us so far, but not as far as some want.



GETTING TO YES pp 54 to 38.

- ***The third case study is about a failed negotiation between the BC province and Nippon Kokan NKK a major Japanes steel company. The purpose of the negotiation was to persuade NKK to invest , build and operate a steel mill in the province.***

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BC owned BC RAIL a regional resource railroad to move wood and mineral products to market on the coast. In the

late sixties there was a slump in the world supply of rolling steel and this hampered the future of BC RAIL.

BC RAIL near Lillooet.

Dave Barrett the new premier of BC decided to explore the potential of finding an investor to build a steel mill in the province. He succeeded in attracting Nippon Kokan NKK the second largest steel company in Japan.

NKK Steel

In Japan, NKK operates two integrated steel works, the Fukuyama Works and Keihin Works. The Fukuyama Works is one of the largest and foremost integrated steel works in the world with an annual raw steel production capacity of approximately 10 million tons. It is also ranked top internationally in terms of overall competitiveness, including cost and quality

I was added to the negotiating team and for most of 1974 we went back and forth between Tokyo and Victoria to see if we could find common cause.
Ultimately after many days of discussions both sides decided to terminate the negotiation. The interests did not meet. NKK wanted a much larger mill than we did to create efficiencies. We did not want to create a marketing challenge with a mill producing a lot more steel than we could use. NKK wanted the mill built on tide water near a large metropolitan population for contracting out a key paradigm for low cost production. Vancouver was the only city that met their criteria. BC did not want a major steel

mill close to Vancouver, rather BC wanted to diversify the economy with the stell mill to be built in the interior. As a result the parties interests in location and size were too far apart for the negotiation to succeed.

When we looked at the interest NKK had in outsourcing to a large metropolitan city we realized this interest was supported by objective criteria. See -

Why is outsourcing good business strategy?

by FESPA Staff | 07/01/2015

It improves efficiency, cuts costs, speeds up product development, and allows companies to focus on their “ core competencies”.

To many people, outsourcing is a frightening proposition. Yet this new business model, which has been adopted worldwide across both the private and the public sectors, provides multiple benefits. It enables an organization to achieve business objectives, add value, tap into a resource base and mitigate risk. In other words, from individual items all the way to systems management, choosing to use external providers allows the company or organization outsourcing a job (the “client”) to focus on what it does best.

Economies of scale

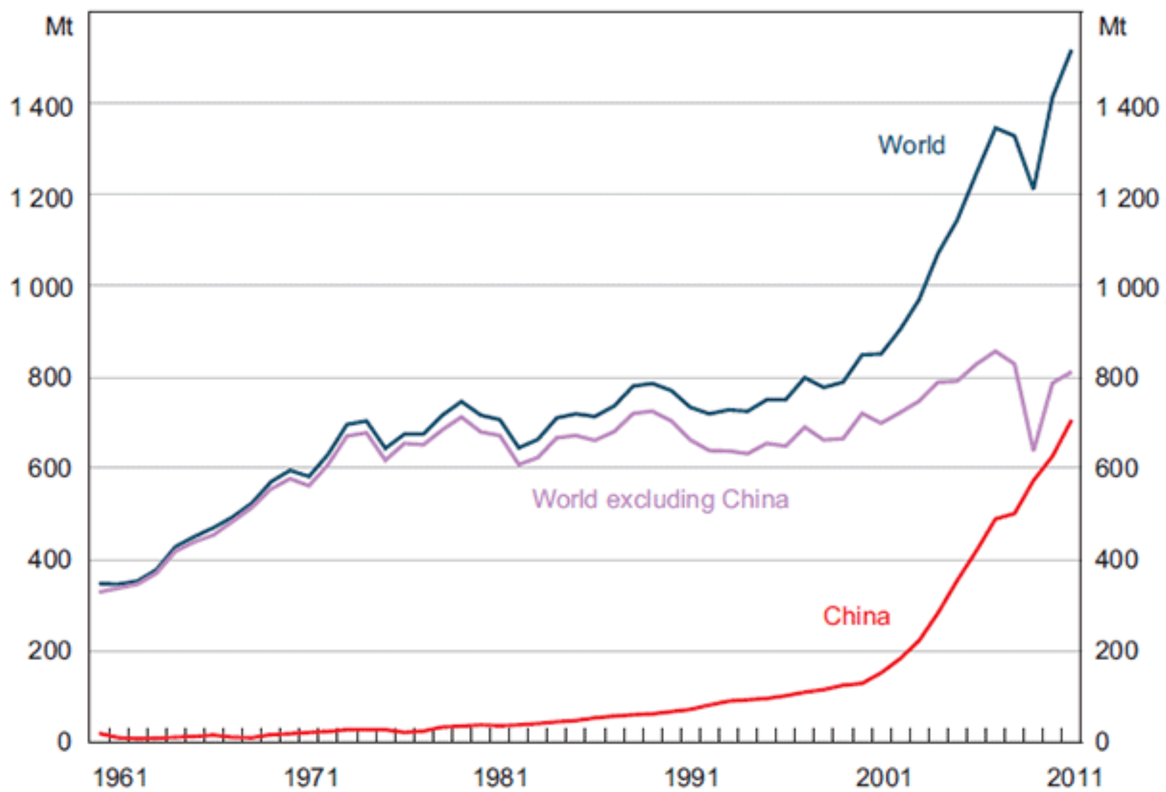
Though the “father” of outsourcing may well be the early 19th-century British economist David Ricardo with his economic principle of “comparative advantage”, it was only in 1989 that imaging solutions

company Eastman Kodak took the then revolutionary step of outsourcing its information technology systems.

Up until that time, the ideal model for business was a large and well-integrated company that owned, managed and directly controlled its assets. But large corporations found themselves unable to compete globally as bloated management structures hindered flexibility. Diversification became a rallying cry to broaden corporate bases and take advantage of economies of scale. For many large companies, this resulted in a strategy of concentrating on core business and competencies, identifying what was critical to the company's future growth and what was not.

https://www.fespa.com/en/news-media/features/why-is-outsourcing-a-good-business-strategy

Our key issue beside location was size. We did not want to be responsible for marketing major amounts of steel beyond our own use. This concern is objective. What happened. See this chart of world steel production history. The fact is if we had made a deal in 1974 we would have entered the steel industry at the beginning of "Stagnant Years 1975-2001 in Crude Steel production worldwide.



Crude steel production worldwide

Stagnant Years 1974-2001

Steel Boom 2002-2007

0
Source: WSA

1975 1980

Applying Poker Tactics in a Negotiation

• *Know When it is Not Your Night.*

There are times when you should not be in the game.

Building a world class steel mill with NKK in 1974 was not our night. This was a time to fold and look for other ways to meet of demand.

MY FOURTH CASE STUDY - THE HIGH ROSS DAM CONTROVERSY – THE SINGLE TEXT PROCESS HELPS SAVE THE SKAGIT RIVER VALLEY.[iii]

EXPERIENCE WITH THE ONE TEXT PROCEDURE TO BREAK AWAY FROM POSITIONAL BARGAINING.

7. What If They Won't Play?
(Use Negotiation Jujitsu)

Talking about interests, options, and standards may be a wise, efficient, and amicable game, but what if the other side won't play? While you try to discuss interests, they may state their position in unequivocal terms. You

may be concerned with developing possible agreements to maximize the gains of both parties. They may be attacking your proposals, concerned only with maximizing their own gains. You may attack the problem on its merits; they may attackyou. What can you do to turn them away from positions and toward the merits?

There are **three basic approaches** for focusing their attention on the merits. **The first** centers on what you can do. You yourself can concentrate on the merits, rather than on positions. This method, the subject of this book, is contagious; it holds open the prospect of success to those who will talk about interests, options, and criteria. In effect, you can change the game simply by starting to play a new one.

If this doesn't work and they continue to use positional bargaining, you can resort to asecond strategy which focuses on what they may do. It counters the basic moves of positional bargaining in ways that direct their attention to the merits. This strategy we call negotiation jujitsu.

The third approach focuses on what a third party can do. If neither principled negotiation nor negotiation jujitsu gets them to play, consider including a third party trained to focus the discussion on interests, options, and criteria. Perhaps the most effective tool a third party can use in such an effort is the one-text mediation procedure.

Consider the one-text procedure

Perhaps the most famous use of the one-text procedure was by the United States at Camp David in September 1978 when mediating between Egypt and Israel. The United States listened to both sides, prepared a draft to which no one was committed, asked for criticism, and improved the draft again and again until the mediators felt they could improve it no further. After thirteen days and some twenty-three drafts, the United States had a text it was prepared to recommend. When President Carter did recommend it, Israel and

Egypt accepted. As a mechanical technique for limiting the number of decisions, reducing the uncertainty of each decision, and preventing the parties from getting increasingly locked into their positions, it worked remarkably well. The one-text procedure is a great help for two-party negotiations involving a mediator. It is almost essential for large multilateral negotiations. One hundred and fifty nations, for example, cannot constructively discuss a hundred and fifty different proposals. Nor can they make concessions contingent upon mutual concessions by everybody else. They need some way to simplify the process of decision-making. The one-text procedure serves that purpose. 59

You do not have to get anyone's consent to start using the one-text procedure. Simply prepare a draft and ask for criticism. Again, you can change the game simply by starting to play the new one. Even if the other side is not willing to talk to you directly (or vice versa), a third party can take a draft around.

Single -Text Negotiation

2018-02-17Ewa SzejnerPodstawowe pojęcia

Single Text Negotiation (STN) can be translated as one-sided negotiation. It is a form of mediation in situations of highly polarized disputes, using a facilitator (mediator, project leader) and one preliminary draft agreement. The facilitator must be impartial and enjoy the trust of opposing parties. He presents the original document to both parties, patiently listens to their comments, is open to criticism, analyzes the collected materials and looks for optimal solutions. Finally, it develops a final version that reflects the best records and solutions tailored to the situation and securing the interests of all involved parties. Participants in the conflict and the mediator refine the text, which is a kind of "replacement agreement" and forms the basis for the final ratified agreement. The undoubted advantage of this model is the focus of the parties on the common interest, not on individual positions, and the avoidance of a situation in which the mutual reluctance of representatives of negotiating parties could adversely affect the outcome of the talks. In other words, STN helps the parties to divert attention from mutual feelings or relationships in favor of moving it to purely business areas, such as collective solution development, shared responsibility and substantive benefits. Negotiation with one text (STN) is particularly useful for more complex processes involving many stakeholders.

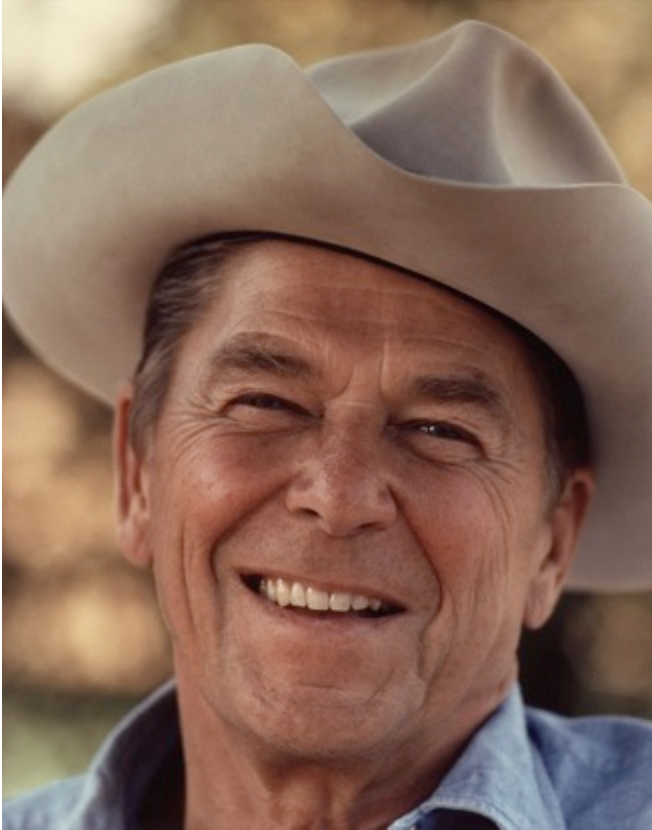
http://poradniknegocjatora.pl/single-text-negotiation/

My next story is about conflict over SEATTLE building a dam to flood

5000 pristine Skagit River and valley and the success of a singly text bargain with the help of a formal mediator.

My third story also garnered applause attention from a very famous person, United States President Ronald Reagan. Reagan said of the Skagit treaty between Canada and the US –

"*Resolution of the High Ross Dam controversy was hailed as a success on both sides of the border. President Reagan noted that it was "constructively and ingeniously settled." Canada's external affairs minister and the U.S. Secretary of State said it could serve as a model for resolving other trans boundary disputes. It was the process, however, not the resolution, that was the most interesting aspect of the dispute. Specifically, the successful negotiations took place between representatives of Seattle and British Columbia, not high-level officials from Ottawa and Washington. According to one negotiator involved in the process, both American and Canadian government officials told local officials to figure it out and then report back when they had a solution. In the end, it was the local negotiators who played the key role in resolving the dispute."***[10]***



I was one of the local negotiators that helped “figure it out.” Ben Marr was the lead official for our side. My role primarily focused on the negotiations process. What did we do to engender this acclaim?
Before getting into the details let’s try to answer another relevant math puzzle. This problem shows the importance of restructuring a difficult problem. William Ury co-author of GETTING TO YES used the story in his TED talk on conflict resolution.

“Well, the subject of difficult negotiation reminds me of one of my favorite stories from the Middle East, of a man who left to his three sons, 17 camels. To the first son, he left half the camels; to the second son, he left a third of the camels; and to the youngest son, he left a ninth of the camels. The three sons got into a negotiation -- 17 doesn't divide by two. It doesn't divide by three. It doesn't divide by nine. Brotherly tempers started to get strained. Finally, in desperation, they went and they consulted a wise old woman.”

IS THERE AN ANSWER TO THIS DISTRIBUTION PROBLEM THAT THE WISE OLD WOMAN COULD OFFER?

The wise old woman thought about their problem for a long time, and finally she came back and said, "Well, I don't know if I can help you, but at least, if you want, you can have my camel." So then, they had 18 camels. The first son took his half -- half of 18 are nine. The second son took his third -- a third of 18 is six. The youngest son took his ninth -- a ninth of 18 is two. You get 17. They had one camel left over. They gave it back to the wise old woman. ***William Ury LESSON OF THE EIGHTEENTH CAMEL.***
The walk from "no" to "yes"

STOPPING THE HIGH ROSS DAM

In 1942, Seattle City Light negotiated an agreement with the Province of BC to raise the Ross dam by 120 feet, which would have flooded over 5,000 acres of prime wildlife habitat, and recreation lands in BC. The Agreement was upheld by the Provincial Government in 1967 but generated intense opposition. Lengthy negotiations ensued.

In the 1984 Treaty, Seattle City Light agreed not to raise Ross Dam for 80 years in exchange for power purchased at rates equivalent to what would have resulted from raising the dam. The High Ross Treaty also created the Skagit Environmental Endowment Commission (SEEC) to manage an endowment fund to preserve the area, pristine wilderness and fish and wildlife habitat in the Upper Skagit Watershed until 2065.

THE VIRTUAL DAM SOLUTION. Instead of fighting over building the dam and flooding the Skagit we restructured the problem by adding an 18th camel. We changed the focus to accommodate Seattle's interest in cheap electrical power and our interest in exporting power to Seattle. More energy was the critical issue for them and was a benefit for us. This restructuring of the problem was like the story of the 18th camel. It was accomplished with a virtual dam concept and a unique single text negotiation process done at the local level.

ENVIRONMENTAL NEGOTIATIONS. I sat on the B.C. negotiating team that after decades of failure reached a settlement and international treaty with the United States preventing Seattle flooding of the pristine Skagit Valley.[4] The Skagit deal rightly called "an elegant solution" to a very difficult problem.[5]

What is Single-Text Negotiation? HOW DOES IT WORK?

A single-text negotiating strategy is a form of mediation that employs the use of a single document that ties in the often wide-ranging interests of stakeholders in a conflict. It is also called the "no author single text negotiation. I describe it as the "no sides negotiation process" because there are no sides and text belongs to all. Parties to the conflict add, subtract and refine the text based on agreement. The text represents a "placeholder agreement" and is intended to be the foundation for a final ratified agreement. However, since all parties must agree to the final document and offensive entries may lead to a cessation of the process, disputants must also be sensitive to how their changes to the text will be perceived by the other

parties. "The advantage of this model," Scott McCreary suggests, "is it encourages parties to talk to...focus on each other's interests instead of drafting competing positions. When we negotiated with Seattle as in the past we met back in forth in the two countries and the host typed up the text showing issues outstanding in parenthesis.

MAKING PERSONAL CONNECTIONS

Charles Royer as mayor of Seattle appointed his brother Bob to lead the negotiations in 1981. Bob is a journalist, public servant and an adventurous environment professional. He and I got along well. We had many meetings offline over food and drink to toss ideas around. The offline process has been vital all my life in resolving conflicts. As DM of labor I participated directly in resolving over 100 labor disputes over almost a decade. Getting key insights outside formal meetings (sometimes at the urinal) made a big difference to understand what is the real critical issue.

Bob Royer

International negotiation literature supports my repeated experience that “robust relationships ease tensions” facilitating agreement. **International Negotiation: Process and Strategies** By Ho-Won Jeong.

In my interventions in negotiations building connections and positive relationships with the opposing side was my first priority. Bob Royer and I connected in the Skagit negotiations especially meeting informally over food

and drink. I flew to New York City to meet face to face with their city engineer in the Hyatt Regency lounge. His work was key as he had calculated the exact cost of building and maintaining the dam so this became the price of energy sent from B.C.

I had the opportunity to spend a few days with Roger Fisher on his trip to Vancouver in the Nineties. He liked this story of the High Ross Dam and said it illustrated "*the power of an elegant solution.*" See page 87 of his book.

Abstract

The Skagit Treaty negotiations which resolved the conflict over raising the level of Ross Dam and flooding Canadian territory provided an interesting and useful model of regional conflict resolution between Canada and the United States. This article examines the background of the negotiations, the structure of conflict resolution and the lessons learned. The paper points to such factors as local control of the negotiations, the value of single text bargaining, the availability of respected impartial sources of data, good communication with all relevant constituencies and the addition of benefits to the agreement which go beyond the specific issues of contention as contributing to the ultimate success of the negotiations.

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JOURNAL ARTICLE

Regional Transboundary Negotiations Leading to the Skagit River Treaty: Analysis and Future Application

Donald K. Alper and Robert L. Monahan
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NIPPON KOKAN STEEL NEGOTIATION

Steel

Steel is the world's most important industrial material, with over 1.5 billion tonnes produced annually. Without steel, the world as we know it would not exist: from oil tankers to thumbtacks, from trucks to tin cans, from transmission towers to toasters. Given the huge quantities of steel produced, it is fortunate that the material is easy to recycle. In fact, many of Canada's steel plants make steel totally from scrap.

Despite Canada's formidable reserves of iron ore, the steel industry in recent decades has shrunk significantly as industrial markets have become increasingly globalized. Today, every remaining steel mill in the country is owned by foreign investors and Canada is a net importer of the manufactured product.

1972–1989[edit source]

British Columbia Railway logo (1972–1984)

The railway underwent two changes of name during this time period. In 1972, the railway's name was changed to the British Columbia Railway (BCR). In 1984, the BCR was restructured. Under the new organization, BC Rail Ltd. was formed, owned jointly by the British Columbia Railway Company (BCRC) and by a BCRC subsidiary, BCR Properties Ltd. The rail operations became known as BC Rail.

In 1973, the British Columbia government acquired and restored an ex-Canadian Pacific Railway 4-6-4 steam locomotive of the type known as "Royal Hudsons", a name that King George VI permitted the class to be called after the Canadian Pacific Railway used one on the royal train in 1939. The locomotive that the government acquired, numbered 2860, was built in 1940 and was the first one built as a Royal Hudson. The government then leased it, along with ex-Canadian Pacific 2-8-0 #3716 to the British Columbia Railway, which started excursion service with the locomotive between North Vancouver and Squamish on June 20, 1974. The train ran between June and September on Wednesdays through Sundays from 1974-2001. During this time, the Royal Hudson Steam Train was the only regularly scheduled, mainline steam operation on a Class 1 railroad in North America.

MY FOURTH STORY IS ABOUT TAKING THE LABOUR INJUNCTION AND THE COURTS OUT

OF REGULATING UNIONS AND COLLECTIVE BARGAINING. [iv]

A History of the British Columbia Labour Movement

On the line.

- **STORY:** *Rod Mickleburgh*

•

The following introduction, as well as the above imagery and captions, is excerpted with permission from "On the Line: A History of the British Columbia Labour Movement" by Rod Mickleburgh and published by Harbour Publishing (April, 2018). With thanks to the BC Labour Heritage Centre Society.

A militant labour movement has been part of British Columbia's identity going back to earliest times. The region's resource-based, frontier economy produced a toughened brand of worker, the result of onerous conditions, low pay and hard, hard work. Confrontations, when they took place, were often rough. For years the BC labour movement was the most combative in the land, full of radicals and talk of general strikes. There was rarely a time when the drive to increase profits at the expense of workers went unchallenged.

As with most movements, the influence of unions has ebbed and flowed. It has suffered painful divisions and enjoyed inspiring periods of solidarity. Unions have endured fierce, often violent opposition: firings, jailings, and red-baiting, not to mention

intimidation by vigilantes, militias, cops, courts and hostile governments determined to keep them in their place. Some activists sacrificed their lives. Yet against all odds, unions remain a vital force in today's world.

The scenes depicted in these pages are but snapshots—hopefully representative ones—from 150-plus years of working-class struggle in workplaces everywhere in BC. Collectively these examples represent a remarkable saga of workers and unions that stands with any in the province's history. The figures who people these stories are among the heroes of British Columbia—not merely the trade union leaders, but the millions of workers, their names forgotten, who confronted those who would deny their right to take collective action in pursuit of better lives. While we celebrate builders of industrial empires like Robert and James Dunsmuir—their name writ large on streets and in the province's chronicles—those who dared challenge their single-minded pursuit of wealth at the expense of workers are remembered minimally, if at all.

The practice of organizing to improve the workers' lot started early in BC history. In 1850, eight years before the province of British Columbia was formed, Scots miners imported to work in the Hudson's Bay Company coal mine at Fort Rupert went on strike to protest the employer's violation of their contracts. It was a sign of things to come. More than sixty years later, several thousand coal miners spent two years on strike fighting just for the company to recognize their union. Only when they had spent their last penny did they finally surrender to the multiple forces arrayed against them. Despite many more early defeats, softened by a few satisfying victories, the BC labour movement kept on growing.

Fishermen's union president Homer Stevens gives a wave as he heads off to jail to serve a one-year sentence for contempt of court in connection with the Prince Rupert Trawler strike in 1967. Behind him is union business agent Jack Nichol, acquitted on a technicality, who went on to lead the union for sixteen years after Stevens retired in 1977. UBC Rare Books and Special Collections, BC1532-10-1.

Striking longshoremen march to the waterfront on June 18, 1935, determined to roust strikebreakers from the docks. Medalled WWI veterans were at the front, headed by Victoria Cross winner Mickey O'Rourke (bottom left), carrying a Union Jack flag. The Battle of Ballantyne Pier erupted shortly afterward, when mounted police with truncheons turned them back. City of Vancouver Archives, 417-1.

https://montecristomagazine.com/community/history-british-columbia-labour-movement

Dave Barrett turned BC on its head winning the provincial election to the surprise of many including himself in 1972

Premier W.A.C. Bennett and his Social Credit government, in power from 1952 to 1972, positioned themselves as in favour of free enterprise, in contrast to the socialist CCF and later New Democratic Party (NDP). (87) In 1954, the Labour Relations Act replaced the ICAA 1947. The exclusion of workers in agriculture and horticulture continued. (88) Subsequent amendments and additions to the BC labour relations legislative regime in the 1950s and 1960s did not alter the situation for agricultural workers. (89)

BC had a bad international reputation for militant unions and very stormy labour relations with the highest percentage of the work force unionized in Canada. Wild cat strikes and disruptive picketing were frequent as the data for labour injunctions from 1946 to 1955 shows. Employers relied frequently on injunctive relief to fight the union tactics. Most of these injunctions were granted ex parte against picketing during collective bargaining.

THE EX PARTE INJUNCTION WAS FREQUENTLY INVOKED TO END PICKETING AND STRIKES.

This one sided justice is the principle criticism of the labour legistion in 1972 when our Special Advisors held hearing across the province. Ontario Premier Roberts appoined Justice Ivan C. Rand in 1966 to review the province's labour laws. Rand recommeded establishing a new INDUSTRIAL TRIBUNAL with fully authority to issue injunctions where needed. Rand criticized injunctions as one sided tools in labour disputes, especially the ex parte injunction and he virtually recommended its elimimation. He opposed injunctive evidence by affidavit and proposed that all evidence be presented orally.

See the following charts with data on BC injunctions is from the thesis AN EXAMINATION OF THE USE OF INJUNCTION IN LABOUR MANAGEMENT DISPUTES, by Edward William Rowney, UBC 1963. It shows a very lopsided picture with 1 in 4 injunctions ex parte.

TABLE V

CIRCUMSTANCES IN WHICH AN INJUNCTION WAS SOUGHT*

ACTIVITY	Number
Direct picketing during the course of negotiating a collective agreement:	
a) by a certified union	42
b) by an uncertified union	17
Secondary picketing	4
Grievance picketing	3
Unclassified	8
	75

*Carrothers, Injunction in B. C., P. 194.

TABLE IV

NUMBER OF INJUNCTIONS GRANTED 1946-1955

Year	EX PARTE		ON NOTICE	
	Granted	Denied	Granted	Denied
1946	2			
1947				1
1948		1		
1949	10			
1950	5			
1951	1			
1952	11	1	2	1
1953	27	1	1	1
1954	4		2	
1955	3	1		
Total	63	4	5	3

THE BC LABOUR CODE: 1973-82

In 1973, the newly elected ndp government enacted the Labour Code of British Columbia.59 Although the Code made modest substantive changes to the law, it struck a blow to the courts' historic role of regulating picketing through the use of damages and injunctions by conferring exclusive jurisdiction on the labour board to deal with these matters, except in situations where there was an immediate and serious danger to life and health.

US national labor law influenced the reforms of the new LABOUR CODE 1973 in particular the US history on restraining labor injunctions.

> *Deprived of the criminal law as a weapon to use against labor, employers in the nineteenth and twentieth centuries resorted to the courts for a different kind of assistance: the injunction.*
>
> *An injunction is an order from a court requiring some one to do something or to refrain from doing something. If the person under the injunction does not obey it, he/she can be made to pay a fine and /or be incarcerated. It can be a very effective tool if one knows how to use it.*
>
> *Employers found the courts more then willing to enjoin labor strikes during this time period. Judges, like most people, were appalled at the violence and destruction accompanying a strike. Thus, judges believed that by enjoining the strike, they would best serve the needs of society. In actuality, they wound up serving the needs of the industrialists because, by enjoining the strike, they deprived labor of its most potent weapon.*
>
> *Congress, in an attempt to help balance the scales, passed the Clayton Anti-Trust Act in 1914. Unfortunately for labor, the law contained technical flaws that rendered it virtually useless. This situation was rectified in 1932, however, with the passage of the Norris-LaGuardia Act which effectively banned federal courts from issuing injunctions in labor disputes except in certain narrow situations.*
>
> *https://calro.org/the-labor-injunction/*

https://www.bing.com/images/search?view=detailV2&id=F4470DC0369F5B42AEF3700091818D5AD14BD9A4&thid=OIP.udvI8tCDfBS9KqAj1TplXQHaIP&mediaurl=http%3A%2F%2Fdepts.washington.edu%2Fdock%2Fimages%2F1948%2FInjunction.jpg&exph=445&expw=400&q=THE+LABOR+INJUNCTION&selectedindex=3&ajaxhist=0&vt=0&eim=1,2,6

Here is a helpful LAW REVIEW ARTICLE of the US legal developments published by the CLEVAND STAT LAW REVIEW.
Recommended Citation Robert M. Debevec, The Labor Injunction - Weapon or Tool, 4 Clev.-Marshall L. Rev. 102 (1955). The focus on curtailing civil injunctions was timely to improve the labour climate of BC in 1972.

1955 The Labor Injunction - Weapon or Tool

Robert M. Debevec

The crippling effects of an injunction to a strike can readily be seen. The issuance of a restraining order or temporary injunction requires that the situation revert to its former status. This meant for many years that picketing, strike pay benefits and appealing to the public was banned-and even if the final injunction was not allowed after a trial, the litigation usually was so prolonged that the most important element of a strike, namely speed, and therefore the strike itself, was lost.5 4 Gompers vs. Buck Stove and Range Co. (1911), 221 U. S. 418, 31 S. Ct. 492. 5 Duplex Printing Co. vs. Deering (1921), 254 U. S. 443, 41 S. Ct. 172.

CLEVELAND-MARSHALL LAW REVIEW B. History and Background. An examination of the history of the injunction shows that it is an ancient device used centuries ago in the British Courts of Chancery to avoid the threat or continuance of an irreparable injury to land. However it became convenient as time went on to term as "property" other interests which were deemed to need protection. 6 Many modern issues with their newer complications became hidden under the misleading simplicity of old terms. As modern law is evolved over the years, the fact is often overlooked that present day conditions are not the same as they were when the law was originally made. Thus the later courts began to take the viewpoint that "property" was always meant to include business rights and the right to acquire property and conduct a business. Nothing could be further from the truth. This concept is pointed out in the Supreme Court decision in the

International News Service vs. Associated Press case in 1918:7 "The rule that a court of equity concerns itself only in the protection of property rights treats any civil rights of a pecuniary nature as a property right ... and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired." Thus the term "property" and its connotations became the nucleus which saw the build-up of the labor injunction as a powerful and devastating weapon on the part of employers in the United States. One of the first cases in which management attempted to apply the injunction against labor in the United States was in New York in the Johnston Harvester Co. vs. Meinhardt case in 1880.s The courts held, however, that the facts found did not show any wrongful conduct on the part of the strikers. This case proved to be a springboard for the injunction because from it the employers soon learned how to present their cases and the type of evidence required by the courts. The court had held that if the acts described by the complainant in this case (enticing laborers from the plaintiff's shops) were proved to be unlawful, an injunction would be proper relief. Management attorneys soon became adept in proving these points and the injunction boom was on in full force…

E. The Norris-LaGuardia Act. Labor organizations started a new campaign for further clearcut legislation to limit the use of the injunction in labor disputes. This agitation finally resulted in the passage of the Anti-Injunction Act of 1932, known as the Norris-LaGuardia Act.' 8 An unusual feature of this Act was that the public policy of the United States in regard to the employer-employee relationship and labor controversies was definitely defined. This declaration of policy by the Congress was put into the Act as a guide to the courts in their interpretations of it. This was to prevent the recurrence of the unusual interpretations by the courts of the Sherman and Clayton Acts. The judiciary was no longer required to decide what the intent of the Congress was in writing the law. 16 "Prentice-Hall Labor Course," par. 1043, page 1023, 1950, Prentice-Hall, Inc. 17 (1921) 254 U. S. 443; 41 S. Ct. 172. is Act of March 2, 1932, c. 90, 47 Stat. 70, U. S. Code, Title 29, sec. 101 et seq. Published by EngagedScholarship@CSU, 1955 The policy declaration established labor's right to

collective bargaining and the legality of unions and collective bargaining. The Act curbed the power of the Federal courts to issue injunctions and prescribed specific procedures to follow. The bill did not take away the power to issue injunctions when an unlawful act, violence or fraud was being enacted. Although the Act only restricted the power of injunction in the Federal Courts, many states adopted a similar policy in their legislatures. A Federal Court has jurisdiction when the parties involved live in different states or when a question involving rights under the Constitution of the United States arises. The Federal Court does not have jurisdiction unless the amount involved is over $3,000.00. Under Section 4 of the Act, no court of the United States has jurisdiction to issue a restraining order or temporary injunction or permanent injunction in any case involving or growing out of a labor dispute, to prohibit any person or group of persons participating in or interested in such dispute from doing either individually or together any of the following acts: 1) Ceasing or refusing to work or remain employed. 2) Being a member of any labor or employer organization. 3) Paying or withholding strike or unemployment benefits. 4) Aiding, lawfully, any person involved in any labor dispute lawsuit. 5) Picketing not accompanied by fraud or violence. 6) Assembling peacefully to promote an interest in a labor dispute. 7) Giving intent to do any of the above acts. 8) Agreeing with other persons to do or not to do any of the above acts. 9) Advising, urging, inducing or causing to do any of the above specified acts without fraud, violence or threats. Under section 7 of the Norris-LaGuardia Act the following conditions must be met before a temporary or permanent injunction may be granted in a labor dispute: 1) Both parties and their witnesses must be heard in open court.

2) Cross examination of both sides must be allowed. 3) An unlawful act will be or has been committed by the defendant of irreparable injury of which the complainant has no relief from the law. It is required that proper notice be given to the defendant unless the plaintiff under oath testifies that he will suffer irreparable injury to his property if a notice is given. In this case a temporary restraining order may be issued for five days but the plaintiff is required to file a bond

sufficient to cover all of the defendant's expenses if the injunction is found to be unjustified. Section 13 of this Act is interesting in that it defines a "labor dispute" as any controversy concerning conditions of employment regardless of whether or not the parties involved are employer or employee. Early decisions under this Act interpreted section 13 to mean that it did not apply to disputes between employee unions to which the employer was not a real party.19 Later decisions interpreted it to indicate that the disputes did not have to arise between those who stood in the proximate relationship of employer and employee. 20 One of the most famous cases involving an injunction under the Norris-LaGuardia Act was the United States vs. John L. Lewis case in 1946.21 After the Second World War, many strikes broke out as labor organizations attempted to raise wage levels to meet the rising cost of living. In April, 1946, the United Mine Workers under John L. Lewis failed to report for work, although no official strike was called. This occurred while Lewis and the mine operators were attempting to negotiate a new agreement. No coal was produced in April. On May 4, President Truman declared that the coal dispute was a national disaster. He tried to have the dispute submitted to arbitration, but both parties rejected this suggestion. The mines were seized under the Smith-Connally Act,2 2 on May 21 and the government took over their operation. A week 19 United Electric Coal Co. vs. Rice (7 Circ. 1925), 80 F. (2d) 1, cert. denied, 297 U. S. 714, 56 S. Ct. 500. 20 Senn vs. Tile Layers Protective Union, Local No. 5 (1937), 301 U. S. 468, 57 S. Ct. 857; Lauf vs. G. Shinner and Co. (1938), 303 U. S. 323, 58 S. Ct. 578. 21 67 S. Ct. 677. 22 Executive Order No. 9728, May 21, 1946, U. S. Code Cong. Service, 1946, p. 1803; War Labor Disputes Act, par. 1-11, 50 U. S. C. A. Appendix, par. 1501-1511. Published by EngagedScholarship@CSU, 1955 later the government entered into an agreement with the United Mine Workers with the provision that the agreement was to last as long as the government was in possession. In October, 1946, Lewis requested that the contract be reopened for further negotiations. The government refused to negotiate. It held that the agreement was in effect as long as the mines were under governmental control. Lewis informed the government that their contract would be terminated on November 20, 1946. On November 18, the

government served the union and John L. Lewis personally with a temporary injunction issued by Justice T. Alan Goldsborough of the United States District Court for the District of Columbia, restraining them from breaking their agreement, pending a hearing before the court. The union ignored the order and the workers stayed away from the mines on November 20. The government petitioned that Lewis and the union be punished for contempt of court for violating the injunction. The union held that under the Norris-LaGuardia Act this was a labor dispute as defined in that Act and therefore the court had no power to issue an injunction. Justice Goldsborough held that this Act was not meant to apply to the government when it was in the role of an employer. He found that the defendants were guilty of contempt and fined the United Mine Workers $3,500,000 and John L. Lewis $10,000. On January 14, 1947, the case was argued on appeal before the United States Supreme Court.23 The Supreme Court ruled that the Norris-LaGuardia Act prohibited the issuance of injunctions in labor disputes involving "persons" in their relationship as employers and employees but the government could not be considered in the same position as private persons or employers. Hence the Norris-LaGuardia Act did not apply. The fine against the union was reduced to $700,000 but Lewis' fine of $10,000 was allowed. The dissenting Court opinions stated that this was a labor dispute and that the Norris-LaGuardia Act should apply because the Act did not specifically exclude the government from the role of employer. However, the majority, five to four, ruled that the Act was not applicable in this case. 23 U. S. vs. John L. Lewis, supra.
https://engagedscholarship.csuohio.edu/clevstlrev/vol4/iss2/4 F. The Taft-Hartley Act. In 1947, the Taft-Hartley Act 24 was formulated and made law by Congress. Several provisions were made in this Act concerning injunctions: 1) All secondary boycotts are prohibited and can be made the grounds for an injunction. 2) The National Labor Relations Board may seek injunctions to stop unfair labor practice by a union or employer and must seek injunctions against all secondary boycotts and some jurisdictional disputes. The court may grant such injunctions without regard to any anti-injunction statutes. The statutes referred to are the Clayton and Norris-LaGuardia Acts. 3) When

a strike which may imperil the national health or safety is threatened, the president may apply for an eighty-day injunction.

G. Summary and Conclusions. The history of the labor injunction follows closely the history of labor's struggle for organization and legal recognition. When injunctions were first used so freely in the United States, the beliefs of many judges and other citizens were based on the old concept of master-servant relationship in which the servant had few rights. Public opinion gradually came to recognize that labor had rights of its own and this was reflected in the passage of such laws as the Sherman and Clayton Acts. Judicial opinion was slower to react to the change in the status of labor. This was shown in the interpretations of these Acts. The laws were used to block the activities of the unions on the grounds that either the ends sought or the means used in a particular strike were unlawful interference with interstate commerce. This blocking was done through the use of the labor injunction. The courts finally had to be guided through the intricacies of law interpretation without prejudice, by the passing of the NorrisLaGuardia Act which left little doubt that labor and its unions had certain rights which could not be disregarded by judicial whim.

As the unions increased in power and prestige, use of the labor injunction declined. The injunction has lost its power as a weapon of the employer over the employee. The judicial powers have been carefully narrowed and defined so that controversies over interpretations of the law are not so frequent. Labor's rights are now clearly enumerated and pecuniary penalties for wrongfully brought injunctions has caused them to become as unpopular with management as they formerly were with labor. Anti-injunction laws benefit both management and labor in the long run because without the threat of the injunction hanging over it, labor can afford to relax its defensive attitude towards management. Realizing that it is no longer forced to compete with the law as well as management, it can attempt to understand and analyze some of the employer's problems. The employer is forced by law to recognize the legality of the union and must realize that the success of his enterprise is dependent on mutual co-operation. The employer and

employee must, because of their positions, regard each other with an air of friendly antagonism. However, when it is known that there is no powerful third party taking sides with one against the other it is possible to negotiate intelligently, logically and openly. Since injunctive bargaining is no longer the fashion, collective bargaining becomes the logical answer for both factions.

https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=3725&context=clevstlrev

After a short time as a law professor at UBC teaching labour and constitutional law I was appointed Deputy Minister of Labour by the new NDP governmenet in 1973. My appointment was a surpise to many because of my youth and academic background.

Notwithstanding my junior status, the UBC law, the law faculty voted me onto the Senate as their representative when two stronger candidates split the votes. Justice Nemetz was the Chancellor and we immediately connected at the Senate.

Nemetz was appointed Special Mediator by the federal government to resolve the nasty longshore strike in 1970. He asked me to help him as his secretary and the rest is history. We succeeded without needing binding legislation. Nemetz taught me a lot about negotiations as we probed for the 18th camel. We often met informally with key players alone at his home to develop a relationship and find out the real "interests" of the parties.
Soon after the NDP defeated the old Socred Party of WAC Bennettt. After a slow start NDP premier Dave Barrett met with Nemetz for help. Nemetz

recommended a three person special advisors to reform the laws – Ted McTaggart. Dr. Noel Hall. Barrett or Bill King Minister of Labour did not know any us but took Nemetz's advice. The media made light of us and dubbed us 'THE THREE WISE MEN.' We had extensive hearings in private and public with union and management across the province. We made a privte report to Labour Minister Bill King. Our report surprisingly was never made public. Instead I was invited to be the Deputy Minister of Labout and turn our report in law. We did this and the government introduced THE LABOUR CODE OF BC in 1973. It was adopted by the house with support from all parties – a first and last time for this.

BC Labour History

After writing our report the Cabinet appointed me as DM to implement the reforms.

Looking back on our reforms shows the timing for reform was ripe after many years of turbulent labour disputes. Historians say*, The decade of the 1970s was a watershed in British Columbia's labour relations history. Until the early 1970s, the province had the reputation of having the most militant labour movement and the most turbulent labour relations on the continent*. Our most radical reform was to take civil court out of labour disputes the idea worked and rippled across the country in other jurisdictions. My close relationship over those years with CJ Nemetz gave me inestimable assistance.

Our reforms of the law did change the climate in B.C. - We advanced a new philosopy of labour relations "to the surprise of many in the province —

reversed decades of polarization reversed decades of polarization.
This philosophy, stripped to its essential elements, had three basic ingredients. First, there was an express legislative policy in favour of free collective bargaining for virtually all employees in the province. Second, all facets of labour relations were to be controlled by one agency — the B.C. Labour Relations Board. The power of civil courts in labour relations injunctions in particular was to end. Third, the **LRB** in exercising its new and considerable powers, was to adopt a position that responded to the interests of both employees and employers. As well, the "public interest" was to be considered in the board's decisions"
There is no doubt that the success of this new regime had a lot to do with the Paul Weiler who was the first Chairman of the all-powerful board. Weiler was a brilliant lawyer and arbitrator from Osgood Hall in Toroto. When first appointed the only criticism was that "was too heady wine for backwoods BC." They were wrong Weiler masterfully filled in between the lines of the new Labour Code with detailed thoughtful decisions that become precedents across Canada. Here is an article in the CANADIAN LAWYER extolling his success.

Paul Weiler - the new dean of labour law - Canadian Lawyer interview

Weiler does acknowledge that his contribution to the Lobour Code "obviously has had a tremendous influence" on the board's work. (Passed in November, 1973, the Labour Code of British Columbia Act repealed the existing three labour relations acts. Thought by many To be the most progressive labour code in North America, it

embodied the best of similar legislation across the continent. Where it was most Radical was in claiming exclusive jurisdiction and allowing no recourse to the courts. It also called for a Labour Ombudsman and gave substantial Discretionary powers to The board.) Weiler was responsible for the design of the board, Advised on the Code's substance in its final drafting and Was the prime mover of major amendments in 1975.
He has great faith in the controversial privative clause Against appeal to the courts. There Have been a few incipient constitutional Challenges but each was dropped. Any constitutional right to Judicial review cannot, Weiler belives, be derived from Section 96 of the British North America Act.
Weiler is confident, too, that he has built up jurisprudence for the 10 to l5 different areas of the Code, putting his personal stamp on them. He has been most concerned with collective bargaining, ar-bitration, strikes and picketing, and joint councils, with less involvement in unfair labour practices. Favouring collective bargaining more than either labour or management, board decisions have refined the bargaining process and made the board less necessary

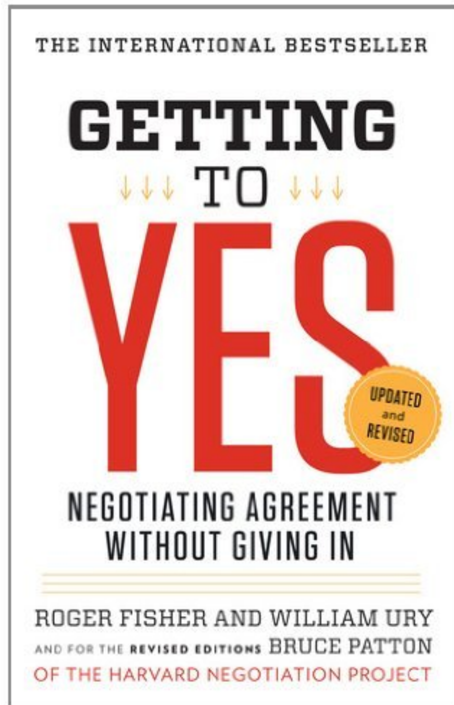
Needless to say, there is an aura around Paul Weiler.
People love to talk about him. They love to say they cannot speak too highly of him.
To an extent, this is a measure of How bad B.C. labour relations were Before he began working. Ministers of labour were assaulted(one with a 2 x4) and Unions boycotted hearings of the former Mediation Commission. Of course, it makes little sense for anyone unhappy with a Weiler decision To complain too vehemently if they are likely to reappear before the board. Weiler has his critics, certainly, but no one can name an enemy Weiler has a reputation for never gossiping or making ad hominem criticism. More important, adds Dorsey, Weiler's intellect enables him to synthesize and distill larger social situations as well as legal questions, without insulting the courts or

well-established practitioners, and always engendering loyalty in his co-workers. Although noted for laughing at himself, Weiler is said to be sensitive to criticism and conscious of his and the board'spublic image. This has made him the board's best public relations. "He uses the press", agrees Vancouver Sun labour reporter Rod Mickleburgh, "but not in a bad sense for his own ego"or to the detriment of the board.

CANADIAN LAWYER ARTICLE by
Kathryn Fowler, Volume 2 No 6

Paul Weiler's years as head of the BC Labour Relations Board will not soon be forgotten. Page 23

The key reforms of THE LABOUR CODE 1973 followed the philosophy of GETTING TO YES. The new law took labour relations and collective bargaining out the courts putting an administrative agency THE LABOUR RELATIONS BOARD in charge. The result the odious one sided ex parte injunctions ended. The new Board could delve into the substantive issues like a mediator. This increased the chance of compromise and decreased the harm to labour management relationship. The new problem solving and principled approach of THE LABOUR CODE 1973 met key insights of GETTING TO YES and the result was very positive.



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QUESTION 4: "What do I do if the people are the problem?"

Some people have interpreted the admonition "Separate the people from the problem" to mean sweep people problems under the rug. That is emphatically not what we mean. People problems often require more attention than substantive ones. The human propensity for defensive and reactive behavior is one reason so many negotiations fail when agreement would otherwise make sense. In negotiation, you ignore people issues — how you are treating the other side — at your peril. Our basic advice is the same whether people problems are one concern or the main focus of your negotiation:

Build a working relationship independent of agreement or disagreement. The more seriously you disagree with someone, the more important it is that you are able to deal well with that disagreement. A good working relationship is one that can cope with differences. Such a relationship cannot be bought by making substantive concessions or by pretending that

disagreements do not exist. Experience suggests that appeasement does not often work. Making
an unjustified concession now is unlikely to make it easier to deal with future differences. You
may think that next time it is their turn to make a concession; they are likely to believe that if
they are stubborn enough, you will again give in. (Neville Chamberlain's agreement to German
occupation of the Sudetenland and the lack of military response to Hitler's subsequent occupation
of all of Czechoslovakia probably encouraged the Nazis to believe that an invasion of Poland
would also not lead to war.)
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Nor should you try to coerce a substantive concession by threatening the relationship. ("If
you really cared for me, you would give in." "Unless you agree with me, our relationship is
through.") Whether or not such a ploy succeeds for the moment in obtaining a concession, it will
damage the relationship. It will tend to make it more difficult for the two sides to deal well with
future differences.
Rather, substantive issues need to be disentangled from relationship and process issues.
The content of a possible agreement needs to be separated from questions of how you talk about
it and how you deal with the other side. Each set of issues needs to be negotiated on its own
merits. The following list illustrates the distinction:
Substantive Issues
- *Terms*
- *Conditions*
- *Prices*
- *Dates*

• Numbers
• Liabilities
Relationship Issues
• Balance of emotion and reason
• Ease of communication
• Degree of trust and reliability
• Attitude of acceptance (or rejection)
• Relative emphasis on persuasion (or coercion)
• Degree of mutual understanding
People often assume that there is a trade-off between pursuing a good substantive outcome and pursuing a good relationship. We disagree. A good working relationship tends to make it easier to get good substantive outcomes (for both sides). Good substantive outcomes tend to make a good relationship even better.
Sometimes there may be good reasons to agree, even when you believe fairness would dictate otherwise. For example, if you already have an excellent working relationship, you may well decide to give in on an issue, confident that on some future occasion the other person will recognize that "they owe you one" and reciprocate the favor. Or you may reasonably decide that one or more issues are not worth fighting over, all things considered. Our point is that you should not give in for the purpose of trying to improve a relationship.
Negotiate the relationship. *If, despite your efforts to establish a working relationship and to negotiate substantive differences on their merits, people problems still stand in the way, negotiate them — on their merits. Raise your concerns about the other side's behavior and discuss them as you would a substantive difference. Avoid judging them or impugning their motivations. Rather, explain your perceptions and feelings, and inquire into theirs. Propose external standards or fair principles to determine how you should deal with each other, and decline to give in to pressure tactics. Frame your discussion as looking forward, not back, and operate on the assumptions that the other side may not intend all the consequences you experience, and that they can change their approach if they see the need.*

As always in negotiation, you need to have thought through your BATNA. In some cases the other side may come to appreciate that your concerns are a shared problem only when they realize that your BATNA, in the event you fail to reach a solution satisfactory to you, is not very good for them.

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Before joining the law school faculty, Charles B. Craver taught at the University of Illinois, University of California, Davis, University of Virginia, and University of Florida. He practiced law with Morrison & Foerster in San Francisco and clerked for Judge George MacKinnon of the U.S. Court of Appeals for the D.C. Circuit.
Professor Craver is co-author of *Alternative Dispute Resolution: The Advocate's Perspective* (4th ed. 2011), *Legal Negotiating* (2007), *Employment Law Treatise* (2 vol. 5th ed. 2014), *Employment Law Hornbook* (4th ed. 2009), *Human Resources and the Law* (1994), *Labor Relations Law* (12th ed. 2011), *Employment Discrimination Law* (7th ed. 2011), *Collective Bargaining and Labor Arbitration* (1988), and *Labor Relations Law in the Public Sector* (1991). He is the author of *Can Unions Survive?* (1993), *Effective Legal Negotiation and Settlement* (7th ed. 2012), *The Intelligent Negotiator* (2002), *The Art of Negotiation in the Business World* (2014), and numerous law review articles on various aspects of labor and employment law and dispute resolution.

Selected material from -

LEGAL NEGOTIATION

PROCESS AND TECHNIQUES

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I. UNDERSTANDING VERBAL COMMUNICATION/VERBAL LEAKS

A. Meaning apparent on face ("I cannot offer more").
B. Meaning equivocal ("My client is not inclined/ does not want to offer any more"; "I cannot offer more at this time"; "My client would like to get $50,000"; “That’s about as far as I can go”/”I don’t have much more room”).
C. Indicating item priorities: “I must have X, I really need Y, and I want Z”).
D. Negotiators should listen for "verbal leaks" that are associated with equivocal statements.

II. NEGOTIATOR STYLES(G. Williams, 1983 & A. Schneider, 2002)

Most negotiators tend to exhibit a "cooperative" or a "competitive" style, with "cooperative" advocates using a problem-solving approach and with "competitive" advocates

employing a more adversarial methodology. Certain traits
are used to distinguish between these two diverse styles.
COOPERATIVE/PROBLEM-SOLVING
COMPETITIVE/ADVERSARIAL
Move Psychologically Toward Move Psychologically
Opponents Against Opponents
Try to Maximize Joint Return Try to Maximize Own Return
Seek Reasonable Results Seek Extreme Results
Courteous & Sincere Adversarial & Disingenuous
Realistic Opening Positions Unrealistic Opening
Positions
Rely on Objective Standards Focus on Positions Rather
To Guide Discussions Than Neutral Standards
Rarely Use Threats Frequently Use Threats
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Maximize Information Minimize Information
Disclosure Disclosure
Open & Trusting Closed & Untrusting
Reason With Opponents Manipulate Opponents
A. Williams study of attorneys in Denver and Phoenix
found that 65% of negotiators were considered
“Cooperative/Problem-Solvers,” 24% “competitive/
Adversarial,” and 11% unclassifiable.
B. "Competitive" negotiators tend to act competitively
with both "cooperative" and "competitive" opponents,
while "cooperative" negotiators tend to act
cooperatively with "cooperative" opponents and
competitively with "competitive" opponents.
C. Williams study found that a greater percentage of
"cooperative" negotiators viewed as effective (59%) by
other lawyers than "competitive" advocates (25%), while
greater percentage of "competitive" persons considered
ineffective (33%) than "cooperative" persons (3%).
D. Schneider study found two significant changes compared
with prior Williams study.
1. “Competitive” negotiators viewed more negatively
today than in 1980 – nastier and more abrasive.
2. While 54% of “cooperative” negotiators viewed as
effective, only 9% of “competitive” advocates are
and while only 3.5% of “cooperative” negotiators

considered ineffective, 53% of “competitive”
bargainers seen as ineffective.
E. Although "competitive" negotiators are more likely
to obtain extreme results than "cooperative"
participants, they generate far more non-settlements
and tend to generate less efficient agreements.
F. Effective "cooperative" and "competitive" negotiators
are thoroughly prepared, behave in an ethical manner,
are perceptive readers of opponent cues, are
realistic and forceful advocates, observe common
courtesies, and try to maximize own client return.
These findings suggest that the most effective
negotiators are "competitive/problem-solving" lawyers who
seek "competitive" results, but do so in a seemingly
"cooperative" manner designed to maximize the joint
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returns of the parties.
G. Lawyers increasingly view opponents as the “enemy”
and are personally offended by opponent efforts to
advance client interests-- Attorneys must realize
that opponents are not the “enemy” but their best
friends, since they enable them to earn a living.

III. PREPARATION STAGE [Establishing Limits & Goals]

Knowing your own situation and as much as possible about
your opponent's circumstances is very important if you
wish to achieve optimal results.
A. Basic Areas
1. Be fully prepared regarding relevant facts and law,
Plus any relevant economic and/or political issues.
2. Prepare all relevant arguments supporting own
positions-- Consider innovative formulations.
3. Anticipate opponent's arguments and prepare
effective counter-arguments-- This will bolster own
confidence and undermine that of opponent.
4. Try not to over-estimate own weaknesses or to ignore
weaknesses influencing your opponent.
5. What is your BATNA [Best Alternative to Negotiated
Agreement] – i.e., your Bottom Line.
6. What is your opponent’s BATNA – Try to appreciate
Options and pressures affecting your opponent.

B. Assumptions
1. Regarding own position.
2. Regarding adversary's situation-- Try not to use your own value system when evaluating opponent's likely position but endeavor to really place yourself in shoes of opponent.
C. Establishment of Aspiration Level
This is a crucial factor, because negotiators who start with high aspirations usually obtain better results than those who do not begin with firm goals.
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1. Attorneys who occasionally wish they had done better at end of negotiations have usually established beneficial aspiration levels and have achieved desirable results.
2. Attorneys who always achieve their negotiation goals should increase their aspiration levels, since they are probably establishing inadequate objectives.
3. Negotiators should initially:
a. Seek high, yet seemingly "reasonable" initial positions that will not cause opponents to lose all interest -- Try to begin as far from actual objectives as you can while still being able to rationally defend your proposals.
Due to “anchoring”, people who begin with generous opening offers embolden opponents who think they’ll do better than they thought while those who begin with less generous offers undermine opponents who think they’ll not do as well as they hoped.
b. Lawyers should try to offer opponents terms that seem like gains rather than losses because of gain-loss framing – People offered sure gain and possibility of greater gain or no gain tend to be risk averse while persons offered sure loss and possibility of greater loss or no loss tend to be risk takers trying to avoid any loss.
c. Negotiators should also be aware of impact of the endowment effect – Persons who own something tend to over-value those items while people who

are thinking of buying the same items tend to
under-value those goods.
d. Successful negotiators are usually people who are
able to prepare for negotiations by convincing
themselves of the reasonableness of seemingly
unreasonable positions.
1. This bolsters their confidence when they
begin the negotiation process.
2. A confident manner often causes uncertain
opponents to reconsider their preliminary
assessments in favor of the confident party.
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e. Establish "principled opening positions" that
can be defended "objectively" when presented to
adversaries-- Prepare logical rationales to
explain each component of positions.
1. Bolsters own confidence and undermines that
of uncertain opponents.
2. Explains reasons for choosing overall
positions selected, rather than less
beneficial starting points.
3. Frequently allows person to control agenda,
by causing opponents to directly focus upon
each segment of stated positions.
D. Planning Strategy and Tactics
1. Carefully plan your desired methodology as if you
were choreographing the movement from your opening
offer to your desired objective.
2. Consider appropriate modifications to your plan that
may be necessitated by changed circumstances that
may arise during the negotiations (e.g., overly
generous first offer or unexpectedly large
subsequent concession by opponent).
a. Imagine a road map with various routes from
opening position to ultimate objective.
b. You must be prepared to change routes in
response to opponent tactics.
E. Negotiators must develop bargaining strategies that will
culminate in "final offers" that are sufficiently
tempting to risk-averse opponents vis-a-vis consequences
of non-settlements that opponents will be afraid to
reject the proposed terms.
F. Negotiators must always remember their Best Alternatives
to Negotiated Agreements, so that they can comprehend
the consequences of non-settlements-- If non-settlements

would be preferable to opponent last offers, negotiators should not hesitate to reject the proposed terms.

IV. PRELIMINARY STAGE [Establishing Identity & Tone]

Establishment of Negotiator Identities and Overt Tone For the Negotiations.

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A. Initial Exchange of Professional/Personal Information

1. Status Factors:

a. Name of law firm or legal agency with which participants are associated.

b. Educational background.

c. Possible professional name-dropping.

2. Experience Factors:

a. General legal experience.

b. Familiarity with areas relevant to particular matter to be negotiated.

B. Establishing Overt Tone of Negotiations-- Openly Competitive/Cooperative, Congenial/Unfriendly, etc.

1. Negotiators should initially reestablish rapport with opponents they already know and work to establish rapport with opponents they don't know.

a. They should look for common interests that may make them more likeable since it is harder to reject requests from people we like than from persons we dislike.

b. They may have attended the same schools, they may like the same sports, music, or other activities, or they may share other interests.

2. Studies show that the negotiator moods significantly affect the way in which bargaining interactions are conducted.

a. Negotiators who begin interactions in a positive mood behave more cooperatively, reach more agreements, and achieve more efficient distributions of the terms agreed upon.

b. Negotiators who begin an interaction in a negative mood behave more competitively, reach more impasses, and achieve less efficient distributions of the terms agreed upon.

C. When negotiators approach interaction with vastly

different views of tone to be set for the process,

different views of tone to be set for the process,
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"Attitudinal Bargaining" may be used to influence the manner in which bargaining will proceed.
1. Many attorneys are so enamored of the "adversarial" nature of the legal system that they view negotiations as "win-lose" endeavors.
a. Be wary of opponents who normally address you by your first name but formally address you as Mr. and Ms. during negotiations, since this technique permits them to depersonalize bargaining interaction in way that allows them to act more competitively.
When opponents depersonalize interactions, take the time to establish more personal relationships-- Use warm handshakes and other casual touching, and maintain non-threatening eye contact-- to make it more difficult for your opponents to employ inappropriate tactics against you.
b. If you are negotiating in opponent offices and feel uncomfortable, try to ascertain if your opponents have intentionally created an intimidating atmosphere by placing you in a short and uncomfortable chair or with your back literally against the wall, or by placing themselves in raised position of dominance.
1. Don't hesitate to rearrange the furniture or select another chair that will be more comfortable.
2. When your opponents leave the office to get a file or some coffee, take their seats and indicate, when they return, that you prefer

the view from those locations.
2. When opponents appear to begin interactions in negative moods, take the time to generate more positive moods by indicating the mutual benefits to be derived from the immediate interactions.
D. Since most negotiations can achieve "win-win" results where both sides are satisfied with the agreements achieved, it is beneficial to begin the process in a cooperative and trusting way.
1. Encourages cooperative behavior and enhances probability of negotiation success.
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2. Generates mutually beneficial relationships that will enhance future dealings.
E. Remember that the negotiation process begins with first contact with opponents-- Parties who initially dictate the time, date, and location for interactions may gain an important psychological advantage even before the substantive discussions have begun.

V. INFORMATION STAGE [”Value Creation”]

Focus Upon Opponent's Initial Positions and Underlying Needs and Desires to Ascertain What May be Divided Up.
A. Seek as much information from opponent as possible, while being careful not to disclose inadvertently information you wish to remain confidential.
Try to ascertain what options are available to opponent if no agreement is achieved with you, since this defines that party's bargaining power.
B. Initially ask Information Seeking Questions.
1. Narrowly-focused leading questions generally do not elicit new information, but tend to confirm information currently possessed.
2. Broad, open-ended questions tend to elicit the most new information since they induce opponents to talk-- Only narrow your questions during final stages of the information retrieval process.
a. Try to maintain good eye contact during the Information Phase-- Take as few notes as possible to permit you to focus upon opponent's verbal and nonverbal signals.

b. Restate in your own words important
information opponent has apparently
disclosed, to verify/clarify information
actually divulged.
C. Decide what information you need to disclose to
opponent to facilitate negotiation process and
determine how you plan to divulge this information.
1. Information you volunteer tends to be devalued
as self-serving ("Reactive Devaluation").
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2. Information you provide in response to opponent's
questions usually considered more credible than
information you voluntarily disclose in an
unsolicited manner.
3. Keep answers to opponent's questions short to avoid
unintended verbal and nonverbal disclosures.
D. Employ Blocking Techniques to avoid answering
opponent questions about highly sensitive areas.
1. Simply ignore apparent inquiry and move on to
some other area you would prefer to discuss.
2. Answer only the beneficial part of a complex
question, ignoring threatening portions of it.
3. Over- or under- answer the question propounded.
a. Respond generally to a specific inquiry.
b. Respond specifically to a general inquiry.
4. Answer a different question-- Respond to one
previously asked or to a misconstrued form of
the inquiry actually propounded.
5. Answer opponent's question with a question of
your own-- E.g., In response to "Are you
authorized to pay $100,000," simply ask
opponent "Are you willing to accept $100,000."
You may alternatively treat such question as
a new offer, placing opponent on defensive.
6. Rule the question out of bounds as an improper
or inappropriate inquiry.
E. Plan intended Blocking Techniques in advance, since
this will most effectively prevent unintended verbal
and nonverbal leaks.
1. Plan to vary your Blocking Techniques to keep

opponent off balance.
2. Use Blocking Techniques only when necessary to
protect your critical information to avoid needless
loss of credibility.
F. When both sides are aware of narrow settlement range
one side may begin with reasonable offer just inside
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range hoping to preempt negotiations and induce other
side to accept offer without any haggling.
G. In most other bargaining situations, it is generally
beneficial to induce opponent to make the first offer--
Be certain you get the first real offer, since
outrageous proposal really same as no offer.
1. Generous initial offer may provide unexpected
information-- Opponent may know more about own
weaknesses than you do, or has overestimated your
strengths-- Either occurrence should induce you to
contemplate an increased aspiration level.
2. After you receive opponent's initial offer, you can
begin with position that places your goal in the
middle, since parties tend to move toward center of
their opening offers [“Bracketing”].
3. Party who makes the first offer likely to make
the first concession, and studies indicate that
the party who makes initial concession tends to
achieve less beneficial results than opponent.
H. Observe carefully and probe opponent to ascertain
his/her perception of situation, because it may be more
favorable to own side than anticipated.
1. Categories of Information Regarding the Opponent:
a. Personal skill.
b. Negotiating experience.
c. Relevant personal beliefs and attitudes.
d. Opponent's perception of current situation.
e. Resources available to opposing party.
2. Sources of Information:
a. Choice of topics and sequence of presentation
critical when multi-item negotiations involved.
1. Some negotiators begin with their most
important topics in effort to get them

resolved quickly and diminish the anxiety
they are experiencing regarding the
possibility of no settlement.
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Increases likelihood of quick impasse
over critical items and non-settlement.
2. Other negotiators begin with their least
important items-- either intending to make
concessions on them to induce opponent to
make subsequent concessions on major items
or to obtain psychological advantage by
winning minor items while creating
concession-oriented attitude in opponent.
Enhances probability of settlement by
beginning process successfully and
developing psychological commitment in
participants to mutual accord.
b. Verbal leaks and nonverbal clues
3. Problems of Interpretation:
a. Credibility of information received.
b. Validity of your perceptions of opponent.
c. Attribution-- Meanings you attribute to
opponent's ambiguous signals (verbal and
nonverbal).
4. Verification Mechanisms:
a. Overall behavior patterns.
b. Consistency of verbal and nonverbal signals.
c. Use of questioning and probing.
I. Beneficial to ask relatively neutral questions for
purpose of ascertaining underlying bases (assumptions,
values, personal needs, goals, etc.) for opponent's
stated positions.
1. Explore relevant factual circumstances in an
objective, non-evaluative manner-- If both sides
can agree upon underlying factors in a
non-threatening way, probability of achieving
successful result increases substantially.
2. Endeavor to ascertain external pressures operating
on opponent and his/her client, since such factors
directly influence their assessment of situation.

3. Specifically focus upon underlying needs and
interests of both sides, rather than simply upon
expressed positions.
a. Emphasis upon stated positions more likely to
generate internecine conflict than exploration
of underlying interests.
b. Remember that positions frequently reflect only
some of underlying needs and interests– Use
Brainstorming to generate innovative options.
Discovery of undisclosed motivational factors
will often enhance possibility of settlement by
allowing parties to explore unarticulated
alternatives that may be mutually beneficial--
For example, you may find that a plaintiff in a
defamation action seeking a substantial
monetary sum would prefer to obtain retraction
and public apology or a corporate seller may
accept some goods or services instead of cash.

VI. DISTRIBUTIVE/COMPETITIVE STAGE ["Value
Claiming"]

Focus Upon Own Side's Objectives and Interests as Parties
Divide Up Items They Discovered During Information Stage.
A. Direct competitive phase during which each advocate
endeavors to obtain as much from opponent as possible.
Negotiators should:
1. Carefully think out "concession pattern" in advance
in manner that will not inadvertently disclose
confidential information. You may use bracketing
to keep own goal between current positions of the
parties, making equal concessions until you end up
in area you hoped to achieve.
2. Start from "principled opening position" to explain
and support initial presentation.
a. To reinforce confidence in own position.
b. To induce opponent to reassess own position.
3. Try to make only "principled concessions", instead
of unexplainable jumps, so they can convincingly
explain why a particular concession is being made
and why a larger concession cannot now be provided.

4. Avoid unreciprocated concessions in which they
19
bid against themselves without obtaining reciprocal
position changes from other side.
5. Focus on aspiration level, not bottom line,
throughout the distributive stage. Less proficient
bargainers tend to focus on bottom line and relax
once it is achieved, while skilled negotiators
focus on aspiration level and try not to relax
until they achieve real goal.
B. Common Techniques (usually occur in combination):
1. Argument (legal and nonlegal).
2. Overt threats or more subtle warnings.
3. Rational or emotional appeals.
4. Challenges to opponent's various contentions.
5. Ridicule of opponent or of his/her position.
6. Control of agenda (its content and order of items).
7. Intransigence.
8. Straight-forwardness.
9. Flattery (including real or feigned respect).
10. Manipulation of contextual factors (time,
location, etc., of negotiations).
11. Humor can be used by many people to ridicule
unreasonable positions being taken by opponent or
to reduce built-up bargaining tension.
12. Silence (people often talk to fill silent void,
thus inadvertently disclosing information).
13. Patience (powerful weapon since many negotiators
make concessions simply to end process)-- Time
pressure can be effectively used against opponent
who has an artificially curtailed time constraint.
14. Creation of guilt or embarrassment, since such
feelings often precipitate concessions.
C. Characteristics of Persuasive Argument:
1. Even-handed and seemingly objective.
20
2. Presented in logical, orderly, comprehensive, and
articulate manner to enhance cumulative impact.
3. Beyond what is expected, forcing the opponent to
reconsider his/her perception of matter in issue.

D. Characteristics of Effective Threats:
1. Carefully communicated to and completely understood by opponent.
2. Proportionate to the present situation (i.e., must constitute believable alternative to settlement).
3. Supported by corroborative information.
4. Never issue ultimatum you are not prepared to effectuate if necessary.
E. Distinguishing Between Threats and Warnings:
1. Threats are actions communicator may take to punish recalcitrant opponent while warnings are consequences that will result from actions of others if requested behavior not carried out.
2. Threats more disruptive than warnings since more direct affront to person being threatened than predicted actions of others.
3. Warnings more credible than threats since appear to be beyond control of communicator.
F. Affirmative Promise ("If you do this, I'll do ") more likely to induce position change and less disruptive than negative threat/warning, due to facesaving nature of promise, yet negative threat/warning more likely to be remembered than affirmative promise.
G. The purpose of power bargaining is to influence opponent's evaluation of:
1. His/her own situation.
2. Your position and your external options.
3. Your side's capabilities.
H. Counsel should consider the following consequences of settlement and non-settlement:
21
1. Likely outcome if no settlement is achieved, including transactional and psychological costs-- to own side and to opposing side.
2. Total monetary and emotional costs of settlement.
3. Impact on future dealings between the parties.
VII. CLOSING STAGE [”Value Solidifying”]
Critical point near the end of successful competitive phase when parties begin to realize that an agreement within their respective settlement ranges is likely and

they become psychologically committed to that result.
A. Parties who become overly anxious about achievement of accord frequently move too quickly toward closure.
1. They forget the patience, carefully planned concession pattern, and thought-out tactics that got them to this beneficial position, and they try to move directly to a final agreement.
2. Parties who make excessive and unreciprocated concessions in an effort to conclude transaction are likely to give up the gains they achieved during prior competitive phase.
65-75% of concessions made during last 20-30% of negotiation, although these position changes tend to be smaller than those made earlier.
B. Both parties need to close remaining gap together-- Alternating concessions of a reciprocal nature should be employed, to ensure that one side does not concede more than its fair share.
1. During the Closing Stage, parties occasionally make concessions that are larger than those made just prior to entry into this stage of process-- This is not inappropriate, so long as opponent is being equally generous and such reciprocal concessions do not unfairly disadvantage one side due to its previous position changes.
2. Continue to use principled concessions and relevant negotiating techniques to keep process moving inexorably toward a satisfactory conclusion.
22
C. As the parties enter the Closing Stage, each is concerned about the possibility of conceding too much– Assist opponent by using face-saving techniques to resolve the remaining issues.
1. Use of threats/warnings during Closing Stage is generally counter-productive, since threats/ warnings are offensive rather than cooperative and are more likely to disrupt the process.
2. Use of promise technique is particularly effective, since it permits parties to move together-- e.g., agreeing to "split difference" between positions

currently on negotiating table.
D. Important to remember that Closing Stage is highly competitive part of negotiation process.
1. If one party is more anxious to close than other party, he/she is susceptible to larger and more numerous concessions causing poor result.
2. Once you recognize that your opponent has become psychologically committed to settlement, evidenced by such closing behavior as more rapid and more generous concessions, do not move too quickly.
a. Be patient and encourage your opponent to close more of the remaining gap.
b. Indicate that you have minimal bargaining room left to induce opponent to believe he/she must close most of remaining gap.
c. Emphasize your prior concessions in effort to generate guilt that may induce your opponent to be more generous now.
d. Be supportive of opponent's position changes-- Praise that party's reasonableness and indicate that an agreement is certain if he/she can provide you with the few additional items you need to satisfy your client's minimal goals.
e. If opponent prematurely offers to split the difference between the parties, you may offer to split remaining difference inducing opponent to close 75 percent of gap.

VIII.COOPERATIVE/INTEGRATIVE STAGE ["Value Maximizing"]

23

This phase is applicable to nonzero sum negotiations in which one party can enhance his/her position with either minimal cost to opponent or perhaps even some benefit to other party-- Remember that what may initially appear to be a zero sum transaction may be converted to a nonzero sum negotiation, if parties explore alternative options that may prove to be mutually beneficial (e.g., personal injury case where unacceptably large current lump sum payment is replaced by defendant's promise to pay all of

plaintiff's future medical and rehabilitative costs).
A. When a tentative settlement is first achieved, it is often advantageous to explore alternative trade-offs that may enhance the interests of both sides – Look for items that may have ended on wrong side of table as parties over- and under-stated the value of items for strategic reasons during prior exchanges.
1. Although parties may be mentally exhausted and want to memorialize their agreement, they should briefly explore alternative formulations that may be mutually advantageous but were previously ignored.
2. While minimal candor is required during this part of interaction, even Cooperative Stage continues to have a competitive aspect, since each side is still trying to obtain as much as possible from opponent.
B. Be certain opponent recognizes that you are engaged in "cooperative bargaining" at end of "Closing Stage," since your proposed alternatives may be less beneficial to him/her than your tentative agreement, and if he/she does not realize that you are simply exploring possible alternatives, claims of bad faith or deceit may arise.
C. Once a final agreement is achieved, the parties should carefully review the final terms agreed upon to make sure there has been a complete meeting of the minds.
1. If any misunderstandings are found, this is the best time to resolve them since the parties are psychologically committed to a final accord.
2. If misunderstandings are not found until later, they are likely to be more difficult to resolve.
D. When the negotiation process concludes with a mutual accord, it is beneficial to draft the final agreement--
24
While no attorney should contemplate the deletion or alteration of term agreed upon or the addition of new provisions, since such behavior would be unethical and probably fraudulent, he/she should seize the chance to draft provisions that best reflect his/her understanding of terms negotiated.
E. If your opponent drafts the final agreement, you should carefully review that draft to be sure it is accurate.

1. Make sure the language selected reflects your
understanding of the terms agreed upon.
2. Be certain that nothing has been added that was
never agreed upon.
3. Make sure that nothing that was agreed upon has been omitted from the final text.

https://www.researchgate.net/publication/228138977_The_Negotiation_Process

WHY PRINCIPLES

Ours is the age of negotiation. In every field of endeavor there is an increased emphasis on unity, cooperation and consensus and much unhappiness when these impulses fail. Principled bargaining is based on the view that there are key negotiations principles based on experience and research. There is overlap with principles from economics, the psychology of human nature, the history of human connections, law and sociology.

This brief looks closely at principled bargaining because principles are the best guide to understanding and success. The major bargaining principles are identified and reviewed for their pragmatic value. The overriding idea of these principles is "integration" in negotiations. When negotiations are conducted using these bargaining principles there is greater integration of the process, substance and strategy and behavior of the parties. In principled bargaining, the negotiators yield to objective criteria. "Principled negotiation produces wise agreements amicably and efficiently" argues respectd Harvard Law professor, Roger Fisher who with William Ury published the best seller, "Getting to Yes". They suggest: "concentrate on

the merits of the problem, not the mettle of the parties. Be open to reason, but closed to threats."

GUIDANCE

In the context of bargaining, principles are fundamental or general truths that are
guiding theories for most negotiations. Some of the most famous insights have come from looking at principles. But guidance is as far as principles can go because of the diversity and complexity of various bargaining experiences. No easy formula or principle will work in every case. The bargaining principles outlined may be broadly and often applicable but they are not universal or absolute rules like the principles of physics. Key bargaining principles can only be used as the first checkpoint in any situation. In fact, there are many times when principles will collide with other principles.

Principles are seen as powerful value laden concepts in every field of study. History justifies this deference to principle. For example, William James wrote a classic magnum opus entitled *Principles of Psychology* in 1920 with more than 1200 pages of insightful analysis of human nature. The work of James spawned more research into principles. There is relevance and overlap when principles of disciplines related to bargaining like psychology and economics are considered.

A unique feature of principles is that, unlike concepts and procedures, they are discovered rather than invented. Principles are the only kind of content, which represents "truth" in any significant way. Educators have emphasized principles as the most effective way of explaining important ideas. For example, Charles M Reige an educator and expert in instructional design in Indiana summarized the value of principles. He explained that they could be either process principles or causal principles.

- A **process principle** is a sequence of natural events with the stages of a seed as an example.

A **causal principle** is a cause-effect relationship between two or more changes such as this basic principle of economics. "An increase in the price of a good cau

decrease in the amount demanded and an increase in the amount supplied".

- **Contrasted** with process principles: In process principles you can't say that one change causes the other.

Why are principles important?

According to Reige, "facts (which can only be learned on a memorization level) are often either true or false, but they are trivial compared to principles, they are particulars rather than generalities. Also, a procedure can either produce the desired outputs (the goal) or not. But procedures don't provide us with an understanding of how things work, and procedures can often be changed and still produce the desired outputs. Furthermore, there are often several different procedures for accomplishing the same goal.

- In contrast, principles provide us with an understanding of the world around us, among us, and within usual understanding of how things happen and why they happen the way they do. Therefore, principles are probably the most important kind of content for us to include in the majority of our instruction. And it is usually helpful to learn how to apply the principles to new situations. And/or multiple effects. "

Examples of relevant psychological principles include stimulation, socialization, identity, and control. When a person is aroused or stimulated, he or she is more alert, more creative, and more productive as well. Socialization is necessary because most people have a strong need to belong, and one of the best forms of socialization is simply talking to other people. Identity speaks to our need to define who we are. Being in control is a strong human need for most people, because the lack of control over one's life leads to a feeling of insecurity and may allow others to assume control over us.

Clearly the psychology of selling is relevant to bargaining. Whenever

anyone asks me what marketing books I recommend that will help them sell more, the very first one I point them to An excellent summary of the principles is in the book, *“Influence”* by Robert Cialdini, published in 1984.

to say yes to what you're asking.

- Reciprocity
- Commitment & Consistency
- Liking
- Authority
- Social Proof
* Scarcity

1. Reciprocity

The principle of reciprocity means that when someone gives us something we feel compelled to give something back in return. Have you ever gone to Costco ended up with an unplanned sausage purchase in your cart because you felt a nagging obligation to buy because you tried a free sample? Well, that was the principle of reciprocity in action.

2. Commitment & Consistency

The principle of commitment and consistency says that people will go to great lengths to appear consistent in their words and actions - even to the extent of doing things that are basically irrational.

That's why if you're trying to make a change in your life - losing weight, for example - it can be very helpful to state your goal publicly. Once you've committed out loud (or online) you will have much more incentive to keep up your end of the bargain.

As a retailer, if you can get customers to make a small commitment to your brand (like signing up for your email newsletter), they are more likely to eventually purchase from you. And if you can actually get products in their hand, even if there is no official commitment to buy them, your chances increase even more.

3. Liking

The principle of liking says that we are more likely to say yes to a request if we feel a connection to the person making it. That's why the sausage sample lady at Costco is always giving you a nice smile.

It's also why brands hire celebrities to endorse their products - so that people will transfer their love of Roger Federer to watches he's endorsing.

4. Authority

Most people have heard of the famous Milgram experiments, in which volunteers were convinced to continue delivering what they thought were incredibly painful electric shocks to unseen subjects, even when they could hear (faked) screams of pain. The presence of a man in a lab coat telling them to continue was enough to earn the compliance of nearly all the volunteers.

People appear hard-wired to respond to authority (or the appearance of authority). How can you use this to sell?

Expert Creation

Does your product have a scientific secret sauce? Display content from professionals with credentials like Herbalife:

5. Social Proof

The principle of social proof is connected to the principle of liking: because we are social creatures, we tend to like things just because other people do as well, whether we know them or not. Anything that shows the popularity of your site and your products can trigger a response.

6. Scarcity

Cialdini's final principle is the principle of scarcity, which states that people are highly motivated by the thought that they might lose out on something.

Call it the Eternal Teenager Principle: if someone tells you that you can't have it - boy, do you want it. This is probably the one I'm the biggest sucker for, personally.

Marketers trigger this effect by using all kinds of tactics to suggest that products (or low prices) might soon be gone, or that someone is trying to keep this product off the market.

- Principles help guide me in the right direction and serve as a canary-in-the-mineshaft to tell me when I'm going in the wrong direction. I say "guide" not "steer" because sometimes I knowingly violate those principles to serve some end. I do so with understanding of the consequences and that's OK.

Bargaining principles are of major significance and they can be learned and applied in every negotiation. They are especially relevant for major or multi-party negotiations. When negotiations stray from the basic principles mistakes of process, behavior and outcome occur. Unprincipled negotiations lack a sense of harmony and leave the parties disgruntled and at odds.
A professor of psychology and marketing, Cialdini lays out six ways you can get people

Making lists of the important principles is a well know project in all disciplines.

For example, famous economics text author Gregory Mankiw lays out 10 Principles of Economics here:

1. People face tradeoffs. CAUSAL

2. The cost of something is what you give up to get it. PROCESS

3. Rational people think at the margin. CAUSAL

4. People respond to incentives. PROCESS

5. Trade can make everyone better off. CAUSAL

6. Markets are usually a good way to organize economic activity. PROCESS

7. Governments can sometimes improve market outcomes. CAUSAL

8. A country's standard of living depends on its ability to produce goods and services. PROCESS

9. Prices rise when the government prints too much money. CAUSAL

10. Society faces a short-run tradeoff between inflation and unemployment. CAUSAL

These principles are a mix of both causal and process. They create

My analysis of negotiation principles is based largely on my own experience and the qualitative research studies of scholars. Canada's premier newspaper, Globe and Mail commented on my background in this editorial in 1991: "Matkin is an expert on negotiating, his skills honed in the continent's toughest labour relations arena…he is essentially a problem solver. His office is full of books on how to negotiate, how to resolve conflicts while letting the other guy save fact." (Oct. 09). By serendipity my work over the past 40 years has put me in the thick of most important

negotiations in Canada. I have participated directly in the mediation of a major longshore strike, the patriation and rewriting of the Canadian constitution, the negotiation of the Skagit international hydro treaty between Canada and the United States, the negotiation and settlement of the very contentious softwood lumber countervailing duty dispute between Canada and the United States, and support for both negotiation teams in the Canada U.S. free trade agreement negotiations, the signing of an important agreement with China to launch an alternative currency called Recipco, the merger of a UBC licensed technology company producing hydrogen for fuel cells.

I have participate directly in more than 100 major negotiations. I have also taught negotiation principles at the University of Victoria; lectured on Canada's constitutional negotiations at the Harvard University symposium and presented negotiation strategy in the early 2000s to medium sized businesses in Moscow, Russia funded by the Gorbochav foundation. I have been directly involved as a board chairman and business lawyer in negotiating major mergers and acquisitions. My broadest experience has been as a senior government official (Deputy Minister) working on major conflicts in labour, constitutional law and international relations in Canada.

Negotiating is a skill. Like all skills it can be learned. Negotiating is like the art of management or the art of teaching. While some are blessed with more talent and creativity than others, yet with training, everyone can improve their skills of management, teaching and negotiating. Principles of bargaining are both process and causal and timing for example emerges from an understanding of the four primary bargaining stages or phases.

Harvard Law Professor Roger Fisher has been a leading proponent of a focus on principle in all negotiations, particularly the principle of interest based bargaining as opposed to positional bargaining.

The Seven key negotiation principles are:

1. **MAKE TIMELY TRADEOFFS COUNT**

2. **BE INQUISITIVE TO DEVELOP DEFAULT ALTERNATIVES**

3. **PERSUADE WITH NARRATIVE AND OBJECTIVE CRITERIA,**

4. **CREATE POWER TO SOLVE PROBLEMS AND SATISFY INTERESTS**

5. **USE INFLUENCE MANAGEMENT SKILLS**

6. **CREATE AND CLAIM VALUE**

7. **BARGAIN IN GOOD FAITH**

Analyzing bargaining principles begins with the 5 Ws The **Five Ws** and H are questions whose answers are considered basic in information-gathering. They constitute a formula for getting the complete story on a subject.[2] A]:

Who? – expand beyond parties
What? - make tradeoffs count
Where? – face to face meetings.
When? - parties are in sync.
Why? – to create new value.
How? - use BATNA, narratives, objective criteria, good faith and your BATNA.

MAKE TIMELY TRADEOFFS COUNT

1. **Tradeoffs make bargaining work.** The economic reality is that people have to give up something to get something. This is often the primary reason parties decide to negotiate rather than fight.

Tradeoffs are the first principle of both economics and of negotiation. In negotiations one problem affects another like a spider web. The tradeoff is often money for goods and no bargaining is necessary if the zone of agreement is certain like selling goods or a fixed price. Therefore the essence of bargaining is uncertainty. It is this uncertainty of outcome that is definitional and makes the whole business an exercise in creativity. The expectation about tradeoffs is that they will involve some compromise. This is expected as a matter of principle.

Figure 1 Linkage is a spider web

"Negotiation that does not involve give and take does not deserve that name." (New York Times , Jan. 20, 1978). Therefore, it is very important to manage tradeoffs to maximize outcomes. In applying this principle a very critical factor is the timing of tradeoffs.

9. **Matching the negotiation stages is the clock of the negotiation process.**

"Timing is everything" is widely argued by those with strong history of negotiation success. But how do you manage the timing of the deal?

The answer in my view is all about matching the stages of the negotiation process.

Henry Kissenger is the genius, Nobel laureate of the world of international negotiations. He thought outside the box and coloured outside the lines. Kissinger made tradeoffs count. His timing and realism were his most powerful bargaining powers. A recent Atlantic Monthly review said, "….the greatest humanitarian gesture in my own lifetime was President Richard Nixon's trip to the People's Repbulic of China in 1972, engineered by Kissinger. By dropping the notion that Taiwan was the real China, by giving China protection against the Soviet Union, and by providing assurances against an economically resurgent Japan, the two men helped place China in a position to devote itself to peaceful economic development; China's economic rise, facilitated by Deng Xiaoping, would lift much of Asia out of poverty. And as more than 1 billion people in the Far East saw a dramatic improvement in living standards, personal freedom effloresced." (May 2013, Robert D. Kaplan) .

Timing is imperative to behavior modification because this is not torture or litigation or fighting. Only voluntary outcomes succeed and you cannot get ahead or behind the agreement curve. But how do you apply this principle in practice and how do you know when the time is right or not? Success with timing is about integrating or synchronizing the negotiation phases with the key negotiation activities. Good timing is all parties on phase while bad timing is when the parties are out of phase so understanding in detail the negotiation phases is the key. Let's analyze the negotiation phases and how key activities blend in during bargaining and see how this analysis is key to applying the timing principle.

NEGOTIATION PHASES

Every negotiation goes through distinct periods. There is a negotiation cycle and sequence. Some scholars define six stages, while others focus on three periods. What is important is to recognize that there is

a sequential pattern to the negotiation process that requires attention. In the classic text about the stages of the negotiation process, _The Practical Negotiator_, 1982 Zartman and Berman define three stages of negotiations. They explain that there are "sequences" in the process that dictate the behavior of the parties in each stage. I find it helpful to identify four stages as the process blueprint. The phases are:

*** _First Phase_. Diagnosis and Definition (desire) – parties decide what problem should be negotiated by whom and they set the outer limits of bargaining.**

*** _Second Phase_. Orientation and Formula (Options) – parties reach the turning point of seriousness and begin defining framework solutions by trial and error.**

*** _Third Phase_. Selection and Commitment (Choice) – parties work out details and consummate a draft agreement usually in the face of some deadline or crisis.**

*** _Forth Phase_. Detail and Execution (Commitment) – the parties finish and begin to execute the deal.**

First Phase

What influences the diagnosis for negotiation? There are many answers to this question. Zartman concludes: "A dispute may remain non-negotiable if all parties do not perceive that they would be better off with an agreement than in the absence of one…The negotiability of an issue is therefore ultimately a subjective matter of perception and will. As Vladimir Velebit, who represented Yugoslavia in the successful negotiation of a once intractable dispute over Trieste, phrased it, "I am certain there is no such

problem, no such conflict in the world which cannot be settled if both sides are determined to find a settlement." (Campbell 1976, p. 105)."

The first phase of a negotiation is then the threshold phase when the parties are deciding whether to walk through the door. They must perceive the possibility and the need of a solution to some problem for the negotiation process to begin.

Think of the four phases as cycles similar to this asset graph because the cycles or phases may be repeated depending on progress. Each party follows its own cycle moving up and down in the negotiation. When you put together the various stages of all parties you will see if the negotiation is in or out of sync.

The four-phase economic cycle used to switch asset allocations graphed below is similar to the four-phase negotiation cycle.

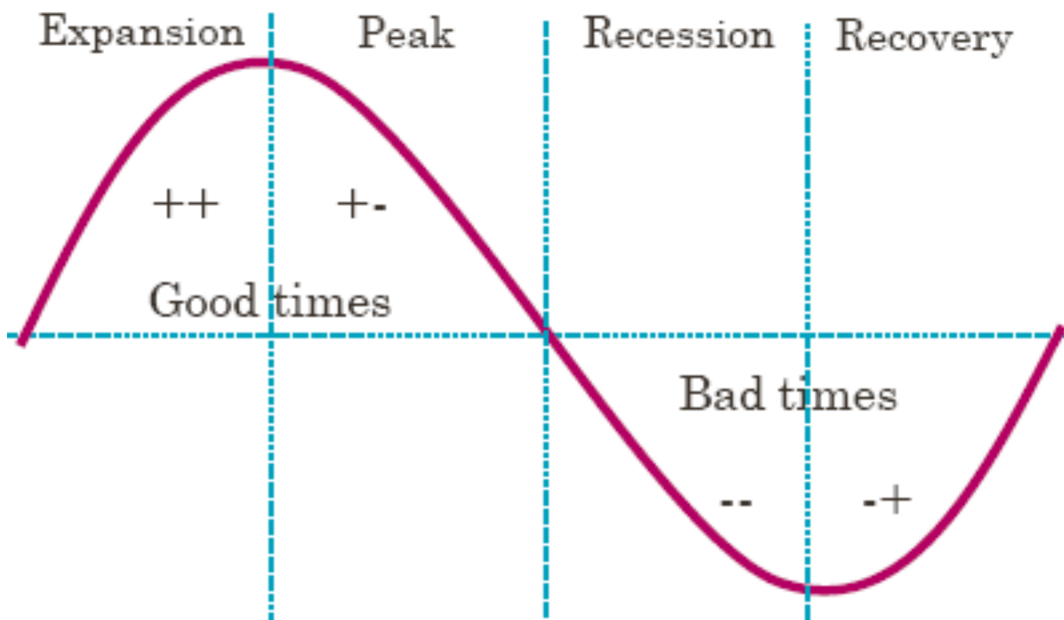


Figure 2 four-phase cycles of negotiations.

The matching process is focused on the negotiation phases and the goal is to follow lock step with all parties going forward (or back) at the same time. Unless you are rigorous about matching the 4 primary stages will be out of sync. The first two wave diagrams with two different colors representing opposing parties shows the phases are matched and thus the timing is on track.

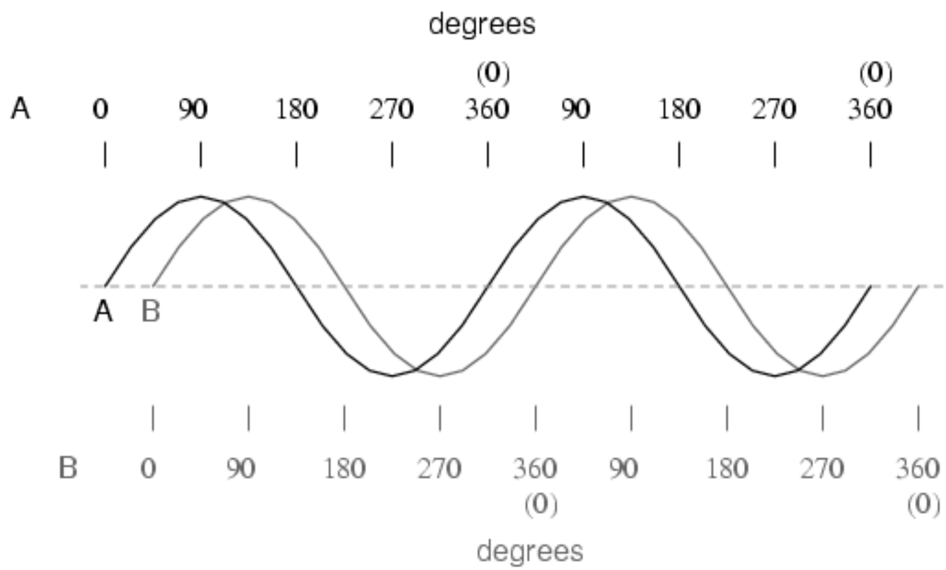


Figure 3 Parties are matching by working on the same phase.

The next wave diagram with two colors represents the parties when they are out of sync. Blue party is in phase 1 while the red party has got ahead and gone to phase 2. The phases are not matched.

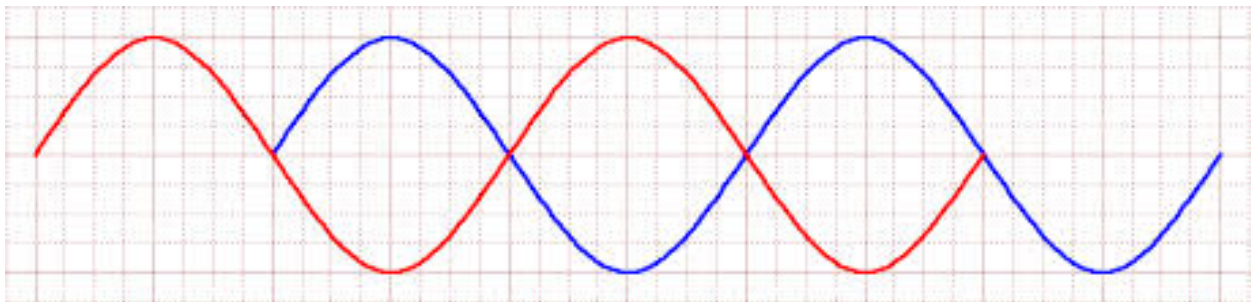


Figure 4 Parties are not matching as they are out of phase.

Diagram above represents negotiation phases that are out of sync.

All parties must be in sync with a common understanding of the phase in play and its purpose. If not the negotiations will stumble because of bad timing. In the beginning one party can thwart moving forward into the second phase.

In the first phase the parties frame the problem to resolve and decide what objectives they have and whether to take the next step. The early structure of the issues to resolve sets the scene and often determines success or failure. Here the danger of misfiring on the **timing** is that when one party goes forward with his counterpart lacking the will to negotiate may lead to unnecessary compromise or frustrating waste of time.

Reaching a full out impasse puts the parties back to the first phase and may require some change in circumstance or crisis to get everyone back at the bargaining table.

Illustration

This happened in Canada's constitutional negotiations where litigation by the Supreme Court of Canada broke the impasse. Ron Graham in an excellent history of the events explains the impasse. "For a year and a half, the prime minister and the premiers warred like the gods on Mount Olympus in their battle over their vision of Canada. In the House of Commons, the Official Opposition used every parliamentary tactic at its disposal to delay or derail the government's motion. The Gang of Eight (provinces) came up with an alternative amending formula and attacked the draft charter in whole or in part." (Graham, at 4) What forced a return to the bargaining table was a key decision of the Supreme Court of Canada holding that the government's unilateral action was technically legal, but a violation of constitutional convention. The court changed the landscape of the negotiations by tilting the law towards the Gang of Eight provinces. This broke the impasse.

Second Phase. Orientation and Formula (Options) – parties reach the turning point of seriousness and begin defining framework solutions by trial and error.

While uncertainty is still dominant the parties have a common purpose. They are ready to limit the issues and they want to negotiate a formula or best plan. The parties have reached "the turning point of

seriousness." Again if they are not together and congruent in their thinking about the purpose of the negotiation their **timing** is off. The dispute will be unresolved. The bargaining begins in earnest during the second phase and the parties attempt to define the problem and find the options that resolve it. Argument and debate characterize this stage in the negotiation. Proposals are exchanged and trail balloons floated. It is the time for extended contact between the parties.

The negotiating team is chosen and the opportunity exists to test various options for the purpose of building a framework agreement.

What influences the search for a successful formula? Using the approach of principled bargaining is critical in this phase because the emphasis is on interests no positons and the goal is to understand and meet as far as possible the needs of the other side.

Understanding your opposer's needs

One important reason for making personal contact is to enable you to get information about your opposer's needs. This is the most critical question in a negotiation. Of course, the easiest thing to do is to work on your own needs, but too much effort in this direction will not produce an integrated negotiation. On the other hand, if you make a conscious effort to find answers to the problems of your opposer, you will invariably bring your needs closer to his.

First, you need to know what your opposer really needs. The dilemma of bargaining is that the most important question: What is your bottom line? Will not be answered. To answer this question directly is to give away the reason for bargaining. As a result, you must be skillful in your analysis of the situation to find out what your opposer really needs. "We must negotiate so that our opposer will reveal himself to us" explains Gerard Nierenberg in his book, Fundamentals of Negotiation (at 146). Nierenberg gives some very useful advice in a couple of chapters on the "Use of Questions". He explains how to create the right environment to ask hard questions and most

importantly how to listen and how to read the non-verbal messages or mannerisms of your opponent. He concludes with this valuable perspective:

> "We do not have to "understand" people to communicate. Understanding and empathy are long-term goals. But in our time it almost seems that failure to communicate occurs because the parties feel they understand each other too well… I would however, agree with Doestoevsky, in The Brothers Karamazov: "If people around you are spiteful, callous, and will not hear you, fall down before them and beg for their forgiveness; for in truth you are to blame for their not wanting to hear you." This failure in the communication chain is in oneself."

This perspective that puts the responsibility on you to help your opponent to understand is essential to achieve an integrated negotiation. It requires you to focus your energies on assisting your opponent find his way to an agreement.

Illustration

An example of the right approach to the challenge of effective communications was found in the Canadian constitutional negotiations. There were two major issues that separated the contending states. First, what should be the amending formula, the Group of Eight agreed that no province should have a veto, while the Federal side was opposed to any proposal that allowed for a patchwork opting out formula. The other major problem was an entrenched charter of rights. The Group of Eight was opposed to it for the reason that it would substitute judicial supremacy for parliamentary supremacy. The Federal side wanted the unifying impact of a charter that applied to all governments.

The Premier of Ontario, Bill Davis and his ministers and officials played a major role in bridging the gap on these primary issues. Essentially, they focused their energies on the needs of the Group of Eight. On the

issues of principle, regarding the charter they were prepared to compromise in favour of a partly entrenched charter that could be overridden by the legislatures with the insertion of a *non obstante* clause. Ontario opened the final round of negotiations by offering to give up their historical claim to a veto in the amending formula. This was a very important concession because Ontario is the largest province and had the most to lose. The move went a long way to meet needs of the Group of Eight and create the momentum for settlement. In playing this constructive role the Premier of Ontario relied on intermediaries like Prof. Paul Weiler who had the confidence of both sides. He helped the Group of Eight meet their needs.

Third Phase. Selection and Commitment (Choice) – parties work out details and consummate a draft agreement usually in the face of some deadline or crisis.

The options have been discussed and it is now **time** to use rapport and skills of persuasion to settle on the best deal. Confusion is often the first characteristic of a final compromise in a difficult conflict. The parties have been looking at a number of options and usually some force is necessary to influence them to choose a solution. The status quo is upset and a sense of uncertainty is created. It is time for change.

What influences this third phase of crisis and compromise? Time is a very significant factor in clinching a deal. In the give and take of negotiations, there will be many delays in the progress of bargaining. Time often works against the needs of one or both parties. Patience is usually a virture. As Howard Raiffa concluded: “most people are far to impatient to see a deal consummated.” (79)

Key Issues

Timing is the most significant question in the third phase. When do you make your move?

A general rule is to wait until there is a change or will be a change in the circumstances of the dispute. At this time, the negotiation is brought to a head, and it is a good opportunity to change position if necessary.

Illustration

During the Canadian constitutional negotiations all parties followed this rule when the circumstances of the dispute changed because of the decision of the Supreme Court of Canada holding that the Federal Government's unilateral action on patriation was unconstitutional. The changes and compromises resulted in an agreement.

How much should you risk losing the deal? Should you take the safe road or go for broke?

> "Let your risk-taking stance flow with the variables of the given negotiation. Base your decision on an examination of the potential gain versus the potential loss on how valuable the gain might be and how damaging the loss might be. The result will be most salutary for your negotiations; you'll hold out when you should hold out and settle when you should settle." (Page 177)

Every negotiation shares an element of poker or bluff in it.

Would mediation assist? A third party is rarely brought into a negotiation until an impasse is reached and by that time the positions of the parties are often frozen. An outside fact finder would be very helpful to both parties earlier in the bargaining. Strong mediators may be very helpful in problem solving. They can see the problem from a new perspective with more information now available than either has if they have established trust in their role.

Forth Phase. Detail and Execution (Commitment) – the parties finish and begin to execute the deal.

The parties make their agreement binding and formal at least notionally**.** Of course everything does not end with an agreement. The negotiation often continues after the contract or agreement is finalized and being executed or implemented. Conditions change or one party reneges and more negotiations are required.

Illustration

In the classical musical The King and I, the monarch of Siam makes a letter agreement with an English lady to tutor his many children (67 by one count). The agreement is that the tutor is to be paid a monthly sum in pounds and be provided with a house of her own next to the palace. When the English tutor arrives the King decides that he also wants his wives to be tutored and so he refuses to provide the house as agreed because he wants the tutor to live in the palace. The King's action forces a renegotiation of the deal, which in the end is achieved only by the attractive lass providing further consideration to the King to help convince the British that he is not a barbarian.

While there are not Clear lines that divide the above phases yet being cognizant of this reality is very important to timing of the deal. There is an overlap and movement back and forth from one phase to the other. For example, the parties may be in the closing period and return back to the formulas phase because the detail shows a weakness in the earlier approach. The negotiation phases are then like the colours of the rainbow. They merge into each other and are rather illusive when you look too closely.

Power influences each phase of the negotiation. Power in bargaining may lead to conflict and conflict is one of the ways to test the acceptance of any deal. For example, in collective bargaining the strike or threat of strike is the union's power in bargaining. When timely the strike matter may help to resolve the dispute because it tests the will of the parties not to agree

A common problem in bargaining is for the parties to be out of phase with each other, that is, you are in phase two looking for a formula when your opponent is in phase one deciding whether to negotiate. Negotiating is like lining up the focus on a camera. You must match your behavior with your opponent to get the **timing** right. If you do the result will integrate the phases and in my experience you will greatly enhance your chance of success.

> In labour relations on the eve of a strike or lockout, there is a sense of crisis. Time is running out and an opportunity will be lost forever because once a strike begins the dispute will be harder to resolve. In the confusion of these last few moments, many disputes are settled. The crisis promotes compromise and achieves matching in the negotiation phases.

> When bargaining for tradeoffs you have a choice between two very different t strategies: distributive and competitive versus interest and needs based.

Competitive Bargaining

Distributed bargaining is the classic hard competition over how the pie is shared. In labour relations distributed bargaining is the dominant mode. My direct experience is that the parties have fine tuned the process like a religious ritual. Friedman argues that distributive bargaining dominates because, as the 'old,' traditional system, it works and makes sense. Far from being irrational or illogical, the 'traditional negotiation process represents an institutionalized pattern of behaviors and helps negotiators respond sensibly to the demands placed on them' (1994, 3). He argues that the negotiation process is not an arbitrary set of actions. It is a carefully crafted ritual that has evolved to achieve a set of practical and symbolic goals. The barrier to

change lies not in negotiator irrationality but in the fact that the traditional process represents the way in which sensible people respond to the role structure of labour negotiations. The current system . . . enables negotiators to manage constituent pressures, maintain group identity, and act as leaders of a team. (1994a,17)

> *The ultimate goal of interest-based bargaining is lasting change of the labour relations system.* But the problem is that the negotiating process is heavily scripted, with expected behaviour, language, and roles (lead bargainer, for example) for each side. The script 'reinforces antagonisms between the two sides, the conversations are highly constrained, and many people are unable to contribute' (Friedman 1994a, 5).

Illustration

During the constitutional negotiations in Canada there was a impasse between the federal government and 8 of the 10 provinces over two key matters – the Charter of Rights and the new amending formula. Both sides were dug into their positions. the tradeoff was clearly between the Charter of Rights proposed by the federal government and the amending formula proposed by eight of ten provinces. The provinces held off making the tradeoff until the federal government agreed to an override or notwithstanding clause weakening the Charter.

During these constitutional negotiations the value of making personal face to face meetings to assess the right tradeoff was proven. The conflict was between eight of the provinces including Quebec, on the one hand and the Federal government and two other provinces including Ontario.

The leadership of the Group of Eight (as they were called) rotated and in 1980, it was the responsibility of Sterling Lyon from Manitoba. During his tenure in the chair there was no personal contact between the Prime Minister, Pierre Elliot Trudeau and Mr. Lyon. They communicated only by telegram and letter. There was not even telephone exchange between them.

The relations between the groups were very hostile during this time and there was very limited personal contact at lower levels in the hierarchy of ministers and officials.

The following year in 1981 the leadership of the Group of Eight shifted to Premier Bill Bennett of British Columbia. The approach changed also. The two leaders Trudeau and Bennett met face to face alone in private dinner meetings lasting for more than four hours. During these meetings they got a feeling for each other and learned form the discussions what their real needs were. They each learned things about the other side that their various constituencies did not fully understand. For example, Bennett learned the critical fact that Trudeau would compromise on the Charter of Rights as long as he achieved the entrenchment of language rights. Also, in preparation for these meetings, there were also other meetings of their officials and ministers that were very helpful in understanding where the common ground was.

QUAERE: Should you fake an extreme opening position to make a large tradeoff compromise later? My experience is what you gain in appearances you lose in credibility with this tactic. However, there is a strategy of keeping a so-called "sh.t hammer" on the table that is clearly unacceptable and traded away when the zone of settlement is reached.

How far should you compromise? The next bargaining principle about your BATNA sets boundaries for compromises.

QUAERE: What if you come into a negotiation where you do not want to compromise or trade off because you are in a values conflict and it would be mean compromising your principles? Search for options or alternative positions that protect your values. Even values can be multifaceted.

DEVELOP DEFAULT ALTERNATIVES

The cost/ benefit principle or the BATNA analysis says negotiators must always know the Best Alternative to No Agreement (BATNA) and never settle for less.

From the beginning of any negotiation it is essential to work hard on any alternative you can imagine that would be an alternative to no deal.

"Vigorous exploration of what you will do if you do not reach agreement can greatly strengthen your hand." (Fisher & Ury, 108). This is called your BATNA and in a sense you are only as strong as your BATNA is strong. If you have no alternative then you may settle for a bad deal because that is the best you have.

Sometimes negotiations will not produce a deal because any agreement within the zone of settlement is more costly to one party or both than no agreement. This is called the "*agreement bias*" and is a negotiation trap characterized by settling for terms that are worse than one's alternatives. This principle is paramount and must govern all bargaining discussions. Therefore, "it is not always desirable or advantageous to reach a deal in negotiation." (Cohen et al, at 4).

Example

I was a member in the early seventies of the negotiating team for British Columbia that studied with Nippon Kokan NKK the feasibility of a joint venture to build a major steel mill on the coast to address a shortage of steel for badly needed rail cars. We soon learned with NKK that to be efficient we needed to build a mill with much larger output than BC needed for rail cars. Further this large mill needed to be of the coast and near a large city so for example the Japanese chose Roberts Bank at Tswassen as the best site.

The cost benefit analysis of such a venture failed both for environmental/political reasons and for reasons of market risk. Because steel is a global commodity BC's giant new steel mill would be in competition with supply from across Canada, US, Europe, Asia and more. In the end the risk of succeeding in this global steel market easily exceeded the risk of being short rail car steel. Therefore the alternative of waiting for other steel mills to catch up to our demand had much less risk than embarking on such a major stand alone business. This meant our BATNA was in fact no agreement.

QUAERE: Should you tell the other side about your alternative? First will they believe you? Realtors have a bad reputation for example of faking the interest of another buyer.

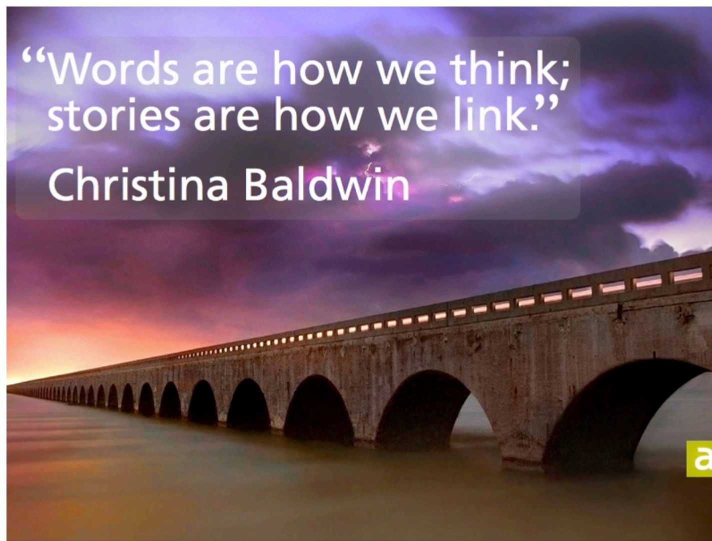
It may be critical to consider the other side's BATNA as it may be worse than any deal. In the Canadian constitutional negotiations it became clear that if the in person negotiations over whether to have a Charter of Rights failed to reach agreement with the provincial premiers the federal government might take the issue to the public by referendum. This BATNA was not welcome by the Western premiers because they did not want to publicly figth against the "motherhood" aspect of the Charter. As a result the other sides BATNA helped push the provinces to a deal.

PERSUADE WITH OBJECTIVE CRITERIA AND NARRATIVE

Narratives will often be more effective than arguments in persuading the other side. Bargaining is by definition a voluntary exercise based on *influence management.* This is a world of using communication skill and the psychological power of intimacy and telling stories to develop rapport with your counterparts. Work on relationships to *connect and* reach consensus.

Jonathan Gottschall, author of *The Storytelling Animal*, says science backs up the long-held belief that story is the most powerful means of communicating a message.

But over the last several decades' psychology has begun a serious study of how story affects the human mind. Results repeatedly show that our attitudes, fears, hopes, and values are strongly influenced by story. In fact, fiction seems to be more effective at changing beliefs than writing that is specifically designed to persuade through argument and evidence.



What is going on here? Why are we putty in a storyteller's hands? The psychologists Melanie Green and Tim Brock argue that entering fictional worlds "radically alters the way information is processed." Green and Brock's studies shows that the more absorbed readers are in a story, the more the story changes them.
And, in this, there is an important lesson about the molding power of story. When we read dry, factual arguments, we read with our dukes up. We are critical and skeptical. But when we are absorbed in a story we drop our intellectual guard. We are moved emotionally and this seems to leave us defenseless.

This is exactly Guber's point. The central metaphor of *Tell to Win* is the Trojan Horse. You know the story: After a decade of gory stalemate at Troy, the ancient Greeks decided they would never take Troy by force, so they would take it by guile. They pretended to sail home, leaving behind a massive wooden horse, ostensibly as an offering to the gods. The happy Trojans dragged the gift inside the city walls. But the horse was full of Greek warriors, who emerged in the night to kill, burn, and rape.

Guber tells us that stories can also function as Trojan Horses. The audience accepts the story because, for a human, a good story always seems like a gift. But the story is actually just a delivery system for the teller's agenda. A story is a trick for sneaking a message into the fortified citadel of

the human mind.

Guber's book is relentlessly optimistic about the power of story to persuade. But as the bloody metaphor of the Trojan Horse suggests, story is a tool that can be used for good or ill. Like fire, it can be used to warm a city or to burn it down.

Example,

In the negotiations for the Skagit River Treaty there was one little known connection that had a very major impact on finding success after all the years of failure. This was Charles Royer the younger brother of Bob Royer, the Mayor of Seattle. He had the ear of the mayor and he did not want the Skagit flooded with the Ross dam. He saw clearly the environmental degradation. We developed a very friendly easygoing relationship over meals and drinks. We were so much on the same page. Charles pushed his brother to engage with us use in the unique "Single Text" bargaining process documented by Fisher and Ury in Getting to Yes. According to a summary by M Shane Smith:

A single-text negotiating strategy is a form of mediation that employs the use of a single document that ties in the often wide-ranging interests of stakeholders in a conflict. Parties to the conflict add, subtract and refine the text, which represents a "placeholder agreement" and is intended to be the foundation for a final ratified agreement. However, since all parties must agree to the final document and offensive entries may lead to a cessation of the process, disputants must also be sensitive to how their changes to the text will be perceived by the other parties. "The advantage of this model," Scott McCreary suggests, "is it encourages parties to talk to...focus on each other's interests instead of drafting competing documents that meet only the interests of smaller coalitions."[1] In other words, it helps disputants shift their attention from grievances and ill feelings of one another toward areas of agreement, mutual

recognition of responsibilities and potential solutions.

Single-text negotiation can be more product than other types of mediation, such as shuttle diplomacy, when faced with heavily polarized disputants. Drawing off of William Ury's influential book, *Getting to Yes*, Paula Young argues that other forms of mediation often turn into a process of "concession-hunting," whereby the third-party moves between private caucuses and focuses on positions rather than interests.[2]

The Process
Dayle and William Spencer, of the International Negotiation Network, describe the process of using a single-text negotiation.[3] They suggest that a third party manage the development of a single working document that reflects the issues and interests mutually held by the disputants, in an effort to better dovetail the interests of the parties to expose the areas of agreement. The third party drafts a document that reflects an initial inquiry and clarification of the disputant's interests, not hard positions. No one is initially committed to the document. The third party presents the document to each disputant to gather criticisms of the draft, not concessions, incorporates the comments and moves between the parties asking for more criticisms. The intended product is a document from which all major objections have been removed but one that sufficiently expresses the interests of the disputants in a manner that is acceptable and brings about an agreement that guides their future behavior.

4. **Chemistry among negotiators is enhanced with frequent ‘face to face’ meetings.**

Creating the right chemistry among participants is a major boon to success. No doubt more ‘face to face’ discussions helps to understand objectives and improve outcomes recognizing that bargaining is a defiantly human process**.** “Trust determines the quality of the relationship between

people…If you're fundamentally duplicitous, you can't solve the low-trust problem; you can't talk yourself out of problems you behave yourself into." (Stephen R. Covey, *Principled Centered Leadership*, at 171).

Harvard Business Review Report "Managing Across Distance in Today's Economic Climate", 2009:

Ø In a global survey of 2,300 Harvard Business Review subscribers, 69% said their companies had reduced their overall travel budgets. The average travel budget of executives surveyed shrank by 17%.

Ø However, 95% said that face-to-face meetings are both key to successful long-term relationships and to building strong relationships. Furthermore, 89% agreed that face-to-face meetings are essential for "sealing the deal."

People are everything and understanding their needs comes first in negotiations. Treat your opponent with respect, have empathy so you can understand where they are coming from. Be soft on people while hard on the problem. The best way to expand insights into the parties' primary interests or objectives is from listening intently and observing clues in the body language of the participants. Like poker player's negotiators will open up most in informal situations. . Rapport means a relationship is characterized by harmony, accord and affinity.

A tough negotiation is a contest and therefore it is not easy to establish rapport and the right chemistry. A good negotiator is always on guard and views his opponent's actions with some suspicion and this makes it difficult to develop relationships.

Research into human behaviour offers some useful techniques for building rapport. Experience shows that the following ideas will increase your skills of persuasion:

> * Reframe problems to emphasize the similarity between you and your opponent. Reframing created a more positive atmosphere. It is the glass half full rather than the glass half empty. The choice of how a problem is presented is very important.

* Validate the beliefs of your opponent (Pacing) and then look for an opportunity to lead into a new direction.

* Communicate information in the dominant perceptual mode of your opponent – visual, auditory or feeling.

- Use active listening techniques to increase support. This approach focuses on the way we process information.

Also management research into teams and lateral or facilitative leadership is a rich source of ideas. For example, the Harvard Business Review blog explained:

"Chemistry becomes even more important, Conger adds, in virtual teams. In these increasingly common work groups, members have few chances to meet face to face and engage in the "sizing up" that humans do instinctively. Without these nonverbal exchanges, people can't build the trust that makes lateral leadership possible. Thus, people on virtual teams must be particularly intentional about their networking. Face-to-face meetings—even if they require expensive travel—are often well worth the cost. Lunches, coffees, and other casual social gatherings can further cement working relationships."

Exerting Influence without Authority
This article appeared in the December 2003 issue of Harvard Management Update.

Understanding the patterns of behaviour that influence successful communication will enable you to increase your powers of persuasion. A basic concept of psychology is "neurolinguistic programming" which is the idea of pacing. "In this context, pacing means meeting the other person

where he or she is, reflecting what he or she knows or assumes to be true, or matching some part of his or her ongoing experience. In other words, you are pacing another person to the extend that you are in agreement or alignment with him or her, or bear some likeness to him or her." Pacing is then the technique that captures the psychology of persuasion. What follows are some specific modes of pacing.

Reframe problems to emphasize the similarity between you and your opponent. Reframing creates a positive atmosphere. It presents the same information, but in a better light. It is the perspective of the glass half full rather than half empty.

Example

I have seen the way that an issue is framed affects the outcome of the negotiation. In 1972, I was involved in a difficult labour dispute on the Vancouver waterfront where one of the issues brought forward by management failed because of the way the proposal was framed. The issue was manning of the spareboard and the problem was that casual workers were not getting proper access to part-time jobs because of the existing system. The employers wanted to bring more order to the system and improve its fairness and efficiency.

The management proposal was framed as a new "computer referral system". The reaction of the union was very negative to this proposal because they were afraid of losing control to the computer.

The word "computer" caused the trouble. It raised the hackles of the union. This was unfortunate because the scheme really didn't rely on a computer. In fact the concept was to use the services of a telephone more than the services of a computer. When the issue was lost, management looked back and admitted that if they had framed the proposal as a "telephone exchange" rather than as a "computer referral", their chances of success would have been much greater.

Pacing

Search out those beliefs of your opponent that you can agree with and validate in an effort to bring as much alignment as possible between you. This process is called pacing. It is very important in building rapport. It is something less than trust, but it is more than empathy. The validation must be genuine in order to build rapport. After pacing look for an opportunity to lead your opponent.

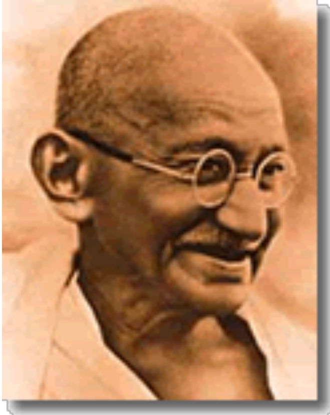
Pace → Lead

Example

Mahatma Gandhi was one of the most successful negotiators that the world has ever known. He was a master at the art of persuasion. He invented the power of passive resistance for political change and recognized the importance of pacing in his negotiations with the British Government. An example of is found in the address he made to the British Parliament advocating independence for India. He said:

"I have come here to win freedom – freedom for the dumb, semi-starved millions whom I represent…I have not come to London to bargain. I have a specific mandate from the Congress, which gave me little freedom of action. In all the fundamentals I am hidebound. I know you have your budget troubles," but the budget never will be honestly balanced until the balance between India and Great Britain is set right…India has been held by the sword. Gandhi reminded them. I do not for one moment minimize the ability of Great Britain to hold India in subjection under the sword."

Pacing disarms an opponent.



Ghandi

While most negotiations are not intended to change the world like Ghandi's struggle for India yet Ghandi's profound example using passive resistance for bargaining power is also relevant for much smaller changes. Ghandi engaged with the outer world in the revolt against Great Britain and his inner world through meditation to make himself a strong warrior. His story shows that to achieve greater harmony and less strife we need to learn to become more adept at handling our emotions and gain integration of interests with more patience and kindness. He relied on his inner strength for genuine awareness and pacing to overcome the enormous conflicts of his time. He urged his followers to cultivate "lovingkindness" and mindfulness that would result in more compassionate responses to conflict.

Figure 5 Passive resistance and pacing works.

5. **The principle of 'non-verbal' communication - listen more talk**

less and phrase your views with the subtlety of metaphor, example and indirect arguments.

The negotiator's axiom is say less, listen more and above all else ask many probing questions.

Willy Loman captures the issue in Arthur Miller's, Death of a Salesman.
"WILLY: But I gotta be at it ten, twelve hours a day. Other men – I don't know – they do it easier. I don't know why – I can't stop myself – talk too much. A man oughta come in with a few words. One thing about Charley. He's a man of few words, and they respect him."

The value of indirect discourse is that it sends messages without causing a direct confrontation. It avoids provoking a negative response from the other side. Some skilled negotiators give only hints at where their bottom line is to test timing and conditioning. In negotiations, it is more important to listen than to talk because you must find out what motivates the other party. Listen with your eyes as well as your ears.

Understanding nonverbal communication is a very important skill for the successful negotiator. Your facial expressions, gestures, eye movements, posture and body movements are the window into the mind and feelings of your opponent for those who read the language of the body. In fact the art of becoming an expert in non-verbal communications is as real a learning process as acquiring fluency in a foreign language.

Of course, no single gesture is reliable by itself as there are ambiguities in any non-verbal behaviour. For example, downcast eyes mean a proposal is either being reject or given more consideration. What is most important is congruence between body language and verbal expression. "It

is the gesture – endorsing spoken word that is important for total communication" (Nierenberg & Calere). When someone says "I agree with you", yet the body behaviour shows agitation and tensing of facial muscles and a tapping of the feet you must question the veracity of the verbal communication.

The ability to read people's behaviour will be increased by the more contact you have with them in different situations. Married couples become very adept after many years of living together and are able to read their spouse's non-verbal behaviour very accurately.

The following points on non-verbal communication are offered to help understand the language of the body.

- Look for clusters of body gestures to ensure you are reading a complete thought.

- Facial expressions are the easiest to read. The eyes are very helpful because pupil movement is involuntary.
- Incongruency between body language and verbal message is usually evidence that the verbal message is wrong.
  For example, if your opponent says he is interested in your proposal, but then he squints his eyes, rubs his nose with his index finder and taps his foot you are witnessing incongruency and should question the accuracy of the verbal message.

Illustration
For example, in labour negotiations union leaders may ask a question when management knows they know the answer. The question is therefore a hint to test possible settlements. This subtle discourse in bargaining moves the parties forward while leaving the formal right to stay in the same place.

Caution

Negotiations are not debates. As a member of the University of Alberta Varsity debating team I had lots of experience making arguments and, while we won many debates I am certain that we rarely if ever persuaded our opponents to *agree* with our point of view. Advocacy is a great skill for the court room, but not the negotiation table. Negotiation is rooted in the art of persuasion In a negotiation, your opponent is your judge and the purpose of an argument is to persuade him or her to your point of view.

Figure 6 Negotiations are not vague debates.

For principled negotiation, there is very useful advice given in a text by Michael A. Gilbert entitled: “How to Win an Argument”. Gilbert offers some rules of principles for argument. They are first: “The Principle of Rationality”. He explains that this principle means that “we will be given reasons for a position, but it says nothing about

their quality. There is no guarantee we will be given good reasons." This is one of the purposes of argument that is, to scrutinize the reasons for positions taken. Gilbert's second principle is intended to assist in this process of scrutiny. It is "The Principle of Similar Cases. Where two cases or situations are similar, a reason must be offered for not treating them the same." This principle will help focus the argument on the reasons and evidence behind a claim.

The third rule suggested by Gilbert is at the heart of principled negotiation. It is called "The Principle Principle". It means that "every position can be expressed in terms of a general principle: for everything there is a principle." This idea ties in with integrating the issues in negotiation where every demand is grounded in an objective principle. For example, when you argue the merits of wage decrease you base your demand on the principle that the result will be increased productivity and greater job security. Then the
attractiveness of productivity and job security becomes the issue rather than the unattractive demand of a wage decrease.

Another method of integrating your negotiation arguments is restructuring the presentation to ensure that you emphasize the evidence over the warrant and claim. The three parts of every argument are: (1) a claim or conclusion (eg. Union leaders represent the interests of their membership); (2) a warrant or reason for the conclusion (eg. Union leaders are elected and therefore to remain in office they must represent the interest of their membership.); and (3) evidence or facts that support the claim and warrant. (eg. Strike votes by the membership follow the lead of the union officials in more than 96% of the cases). You focus on the evidence to connect the claim and the warrant and thus help to integrate the negotiations.

Further, the advice of practitioners is to build your argument from the evidence up rather than from the claim down because there is more chance of finding consensus about the facts. The facts are less subjective and can be the common ground for both sides of the argument.

QUAERE: Where should you draw inspiration for stories or metaphors of the issues in negotiation?

Causes of Conflicts

In the first phase it is important to understand the causes behind the need to negotiate in order to respond appropriately. In his book, *The Mediation Process,* Christopher Moore outlines the main causes of conflicts for mediation and relevant to negotiations:

(1) Value conflicts: caused by parties having different criteria to evaluate ideas, or by different lifestyles, ideologies, or religions.

Canada's conflict over patriation and the Charter of Rights had major value conflicts. Leaders in the Group of Eight like Peter Lougheed and Alan Blakney opposed an American style judicial review model because it diminished the value of the democracy. They saw the dispute as a fundamental difference over democratic values. For this reason the option of inserting the non-obstante or notwithstanding clause as an override went part way in addressing this value by giving parliaments an override of court decisions in narrow circumstances.

(2) Relationship conflicts: caused by strong emotions, misperceptions, miscommunications, and regular, negative interactions.

Most divorce negotiations have relationship conflicts with strong emotions and thus require structures that lessen the interaction of the parties. See graphic example in the famous play, *Who is afraid of Virginia Wolf.*

(3) Data conflicts: caused by a lack of information, different interpretations of data, and different views on what is relevant. The world wide conflict over whether man made carbon emissions

are changing the atmosphere and dooming the planet is largely a conflict over data.

(4) Interest conflicts: caused by competition over substantive interests, procedural interests, or psychological interests.

(5) Structural conflicts: caused by destructive patterns of behaviour, unequal control and ownership of resources, unequal power and authority, time constraints, and geographical/environmental factors that hinder cooperation.

Moore's book offers a comprehensive chart printed on the next page of this article that offers valuable advice as to the right intervention for each different conflict.

Interventions

(1) Value conflicts: Search for superordinate goal that all parties share; avoid defining the problem in terms of value; allow parties to agree and disagree; create spheres of influence in which one set of values dominates.

(2) Relationship conflicts: Control expression of emotions through procedure, ground rules, caucuses and so forth; promote expression of emotions by legitimizing feelings and providing a process; clarify perceptions and build positive perceptions; improve quality and quantity of communications; block negative repetitive behavior by changing structure; encourage positive problem solving attitude.

(3) Data conflicts: Reach agreement on what data are important; agree on process to collect data; develop common criteria to assess data; use third party experts to gain outside opinion or break deadlocks.

(4) Interest conflicts: Focus on interests not positions; look for objective

criteria; develop integrative solutions that address needs of all parties; search for ways to expand options or resources; develop trade-offs to satisfy interests of different strengths.

(5) Structural conflicts: Clearly define and change roles; replace destructive behavior patterns; establish a fair and mutually acceptable decision-making process; change negotiation process from positional to interest-based bargaining; modify means of influence used by parties (less coercion, more persuasion); change physical and environmental relationships of parties (closeness and distance); modify external pressures on parties; change time constraints (more or less time).

PERSUADE WITH OBJECTIVE CRITERIA, NARRATIVE AND PROBLEM SOLVING

Expand the pie by joint problem solving before claiming your share of the pie.

The principle is create value using empathy and problem solving skills as well as claiming value by being assertive of one's own needs, interests, and perspective.

Incentives are a principle of economics and negotiations – therefore create value by making the negotiated pie larger giving the parties incentive for higher rewards when claiming value. This is a well-recognized negotiation principle. Creating value is problem solving for all and requires both empathy and assertiveness. There is tension in bargaining between empathy and assertiveness.

Empathizing does not mean agreeing or even liking the other side. "Instead, it simply requires the expression of how the world looks to the other person." Assertiveness does not mean "dominating the conversation or the other negotiator. Instead, it means identifying one's own interests, explaining them clearly to the other side, making arguments if necessary, and having the confidence to probe subjects that the other side may prefer to leave untouched." (Mnookin, at 47).

Problem solving is greatly improved when empathy and assertiveness skills are well honed; even if the other side does not follow.

Illustration

The Conflict Consortium of the University of Colorado published this summary in 2013 of the research of Davis Lax and James Sebenius about tension between creating value and claiming value.

"Davis Lax and James Sebenius argue that creating value and claiming value are linked activities. Creating new value improves both parties' outcomes. However, having created new value, negotiators must still divide the resulting "pie." Unfortunately, the cooperative strategies needed to create value tend to undermine the competitive strategies used to claim value (and vice versa). The exaggeration and concealment needed for effective competition is directly opposed to the open sharing of information needed to find mutual benefits. On the other hand, taking an open cooperative approach makes one vulnerable to the hard bargaining tactics of a competitive negotiator.[3] Therefore, if both parties cooperate, the result is usually good, while if one cooperates and the other competes, the competitor usually does better. However, if both compete, they usually come out worse than they would if both cooperated -- which is the same "payoff structure" as that of the prisoners' dilemma game. The assumption, however, is that claiming value in integrative (i.e., cooperative) situations is more likely to be balanced. This is because the parties are expected to develop cooperative relationships and communicate freely, which is not generally allowed in prisoners' dilemma games."

3. Only change your positions if you continue to satisfy your interests.

Bargain from principle rather than from positions is very powerful advice. In traditional bargaining the parties focus on their demands or positions and try to win over the other side. In this tug of war one side loses in order for the other side to win. This is positional bargaining and it is very adversarial. It is contrasted with principled bargaining where the focus is not on positions, but on the interests and the objectives of both parties. Interest focused bargaining encourages new options and new positions to achieve the original objectives. It brings more integration in the bargaining

discourse and reduces the negative effects of personality conflicts. To identify interests or underlying objectives may take time and effort. The key question is **“why**”. Why do you need that? What are your concerns? What are you trying to accomplish with your position? This is your interest.

Illustration

The following diagram is a simple illustration of interests and positions when two people bargain for the same orange. No deal is possible if there is no inquiry into their interests. There is only one orange, but in fact they have compatible interests. One wants the orange for the juice while the other wants it for the rind to make a cake. Simple, yet too often parties stay stuck in the rut of their unmovable positions and fail to understand enough about the interests in play.

1

Figure 7 Example of interest based win/win outcome

From "*Getting to Yes*" splitting the orange story by Roger Fisher and Bill Ury. When you succeed in moving the focus to interests over positions the result is the negotiators are more problem solvers than adversaries. This focus allows objective criteria to govern the outcomes. The second step is to determine and become familiar with the interests that are in issue. "The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns and fears" (Fisher, 42). Like a detective, the negotiator searches out the interests of himself and his opponent.

To improve your skill in investigating the following skills are suggested.

a. Begin early to prepare for negotiations by fact finding the problems and the people involved.
b. Research previous bargaining experiences of the same parties.
c. Establish as much personal contact with your opponents as possible in a variety of circumstances to help you understand body language.
d. Keep a diary or record of the bargaining encounters and identify the interests, concerns and responses.
e. Use computer programs to give you access to data banks on the problem and decision programs for advice and support programs.
f. Test options for settlement with an intermediary or other third party before conveying them to your opponents to find any weaknesses.

A major environmental dispute going on for decades between the city of Seattle and Victoria is a fine example of how moving to interests made all the difference. Seattle wanted to raise the High Ross dam to expand access to cost effective hydropower. The dam however would flood and destroy the beauty of the Skagit valley all the way to Canada. BC opposed the project. Both parties had dug in on their positions yes and no for decades and there seemed no compromise possible. If the dam was built the environment would be destroyed. Looking at interests opened a unique

opportunity that resulted in a win win solution. Seattle wanted more hydropower at just the time that BC had significant excess power which it willingly sold. With the help of the IJC and hydro engineers and a single text bargaining process we were able to build a virtual solution. BC gave Seattle a firm agreement over a 100-year term exactly the amount of electrical power that the Ross dam would produce. Seattle paid BC exactly the amount of money for this power that they would have expended to build and maintain the dam over that term. Seattle achieved its interest more long-term cheap power and BC achieved its interest no flooding of the scenic Skagit valley. Professor Roger Fisher described our deal as the power of an elegant and creative solution.

Single Text Negotiaion

Single Text Negotiating (STN) is especially useful to reduce relationship friction and for more complex multi-stakeholder processes. In many negotiations, especially those in which the lead negotiators are agents for others, there is a tendency to exchange and mark up separate drafts. A STN document rests drafting responsibilities with a facilitator, mediator, or project leader who moves one draft around to all parties for successive revisions. This also helps avoid the "reactive devaluation" syndrome in which people discount the value of a proposition simply because it is coming from someone they don't trust.

Fact Finding

The first need in negotiation is the need to know what you must achieve. "Needs and their satisfaction are the common denominator in negotiation" (Nierenberg, 89). Information is the lifeblood of negotiation. The quality of information impacts all other decisions. Recognizing the importance of motivation some experts have proposed a "Need theory of Negotiation" that relies on the psychological studies of authors like Abraham Maslow. I find these studies difficult to use in practice. The needs

theory provides a better description of what happens than it does a prescription of what to do.

Illustration

Mediating labour disputes you often learn the most about the real interests from casual asides intentionally dropped during a bathroom or coffee break or over a few drinks. In the constitutional negotiations for the first time Prime Minister Trudeau met for long private dinners with Premier Bennett of BC who represented all provinces. In these meetings we discovered that while the Charter was important it was the provision guaranteeing language rights that mattered the most. Other terms of the Charter could be compromised with an override in Trudeau's view.

Where do we look for negotiation information? It may help to look well beyond the facts rooted in past positions and interests. New facts may create the opportunity to restructure the bargain. For example, new facts in the Ross dam dispute with British Columbia changed the structure lead to success after decades of failure. A hydro engineer calculated about the costs of building and maintaining the massive Ross dam extension over a term of 100 years. The dam threatened pristine valleys in Southern BC and surprisingly these costs had a positive correlation to the price of exported power from BC. With these unusual facts in play the parties made a new deal where Seattle paid out the simulated costs of the virtual dam to BC in exchange for just the amount of electrical power the dam would have produced over the 100 years. See D.K. Alper, Robert L. Monahan, "Negotiations Leading to the Skagit River Treaty: Analysis," Canadian Public Policy, Vol. 12, 1, 163-174.

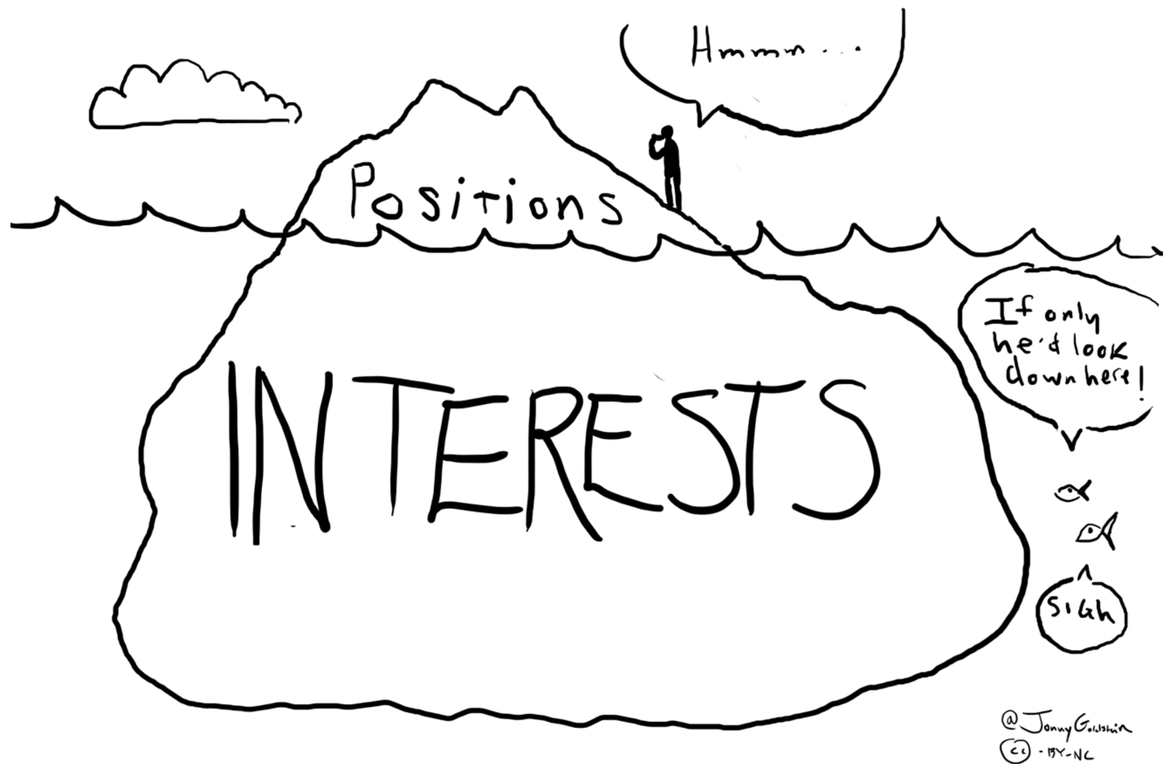


Figure 8 Thinking outside the box is NB.

Quaere: What if the other side refuses to participate in principled bargaining and is stubbornly positional refusing to discuss their interests or looking for alternatives. Are you vulnerable or disadvantaged if you continue with principled bargaining? No. Principled bargaining is your advantage even if you are facing a fully positional counter party. The reason is that you will benefit from your focus and work on your interests and avoid being mired in the rut of hard positions.

5. **Be more inquisitive and specific about your needs.**

   The principle is to engage in a rigorous inquiry by framing the parameters of discussions with concreteness and asking questions instead of giving answers because negotiations need facts and specificity.

> "Ninety percent of the way a negotiation finishes depends on the way it starts."

(McRae at 88). The principle of concreteness is all about how you frame the parameters of the negotiation. Because at the heart of any negotiation is power and power is the pressure that each party has over the other and it rarely is distributed equally it is critical to have a bargaining agenda that is with the reach of all parties. ..

It is essential to reduce the number of issues tackled in bargaining to increase the chance of success because less is more when negotiating. Experience suggests that no more than a handful of issues should be bargained at one time. Indeed sometimes it is wise to agree on no more than one or two major issues. Overloading the bargaining table will increase the likelihood of failure. Everything undecided between the parties does not have to be wrapped up in a final deal.

Henry Kissinger described the principle of concreteness in these terms: "We would insist that any negotiations between the United States and the Soviet Union deal with specific causes of tensions rather than general atmospherics." Concreteness means that you define the problem to be negotiated. The demands of your opponent are only the starting place because they may not reflect his real needs.

Figure 9 Questions and more questions win bargaining marathons

CREATE POWER TO SATISFY YOUR INTERESTS

There are many different useful categories of the factors that influence bargaining power. A checklist would include the following:

POWER CHECKLIST

1. knowledge
2. organization
3. competition
4. risk taking
5. persistence
6. coercive deficiency
7. legitimacy
8. conflict
9. patience
10. elegance
11. personality and integrity
12. conditioning
13. momentum
14. publicity

These different factors will all enhance one negotiating power. What is important is to recognize that the use of one-factor impacts on another. Therefore, it is necessary to integrate the factors of power.

Power in bargaining may lead to conflict and conflict is one of the ways to test the acceptance of a formula for agreement. For example, in collective bargaining the strike or threat of strike is the union's power in bargaining. When timely, it may help to resolve the dispute because it tests the will of the union negotiators to reject the offer of a formula by management for settlement of the dispute. In this circumstance, conflict is used to resolve conflict.

1. Increase your knowledge of the opposition by being empathetic and applying negotiation skills for information retrieval.

KNOWLEDGE IS POWER

Example

"In interviews, a group of North American diplomats and students of negotiation associated with the United Nations peacekeeping identified empathy and integrity as the negotiator's most important personal skills…Empathy involves the crucial ability to understand the other party's point of view, if only to counter it more effectively, and encompasses both the intellectual and the emotional components of his stand….Charles Yest, who served as ambassador to the United Nations as well as to several countries, added:

> "If you don't make an attempt to understand the other point of view, or your attempts fail, you're almost sure to miss out in negotiating unless you hold all the cards and can simply bully your way through….The best negotiators have to have the right combination of pertinacity and tact – that is, they have to be

able to push the central issues repeatedly and indefinitely if necessary, until a final solution is reached, but they have to do it with great understanding of the other side.'" (Zartman, 17-18)

2. Organize your resources to consolidate allies to maximize teamwork, to discipline expression and to find the best alternative to no agreement

ORGANIZATION IS POWER

Example

"The management controlled corporation, the trade union, the modern bureaucratic state, groups of farmers and oil producers working in close alliance with governments, trade associations, and lobbies – all are manifestations of the age of organization. All attest to a relative decline in the importance of both personality and, though in lesser measure, property as sources of power. And all signify a hugely increased reliance on social conditioning as an instrument for the enforcement of power." (Galbraith, 132)

Example

Most of the more than 100 hospitals in B.C. are certified by trade unions that are organized on a provincial or national basis. In earlier times, the unions were able to use their provincial structure to organize a strategy of choosing the hospital with the weakest management position to settle the first agreement and then use this agreement as a precedent for the other hospitals. The employers finally developed as the antidote to this whipsawing tactic a provincial organization of their own that had the authority to bargain on behalf of all hospitals thereby preventing an individual hospital from being picked off.

Example

Victoria is the capital of B.C. located on an island with transportation to the mainland provided by a fleet of ferry boats owned by the provincial government. A labour strike over hours of work shut the ferry system down in 1976.

A crisis emerged when the government invoked the special power to order the workers back to work under a cooling off order and the unions refused to obey the order. The Labour Relations Board dealt with the union defiance of the law and arranged a settlement on condition that the government appoint an expert in transportation policy to provide the parties with an objective report. Dr. Karl Rupenthal of U.B.C. was appointed to do the study. This dispute graphically illustrated the failure of management, government, and the unions "to understand the other point of view." (Zartman, 17-18) Underscoring the need for better information, following the strike, new labour legislation was introduced to provide "fact finding" and the possibility of preventative service for essential service disputed.

3. Create competition for the products of services that you to negotiate and you will enhance your position.

COMPETITION IS POWER

Example

You are negotiation a renewal of the property lease for your business, but you are locked into the lease for another five years. While you cannot "create competition" with another lessor you may be able to develop some competitive uses of the property, such as sub-letting, that will enhance your power in the lease rate negotiations.

4. Be prepared to take a calculated risk where the potential benefits are worth more than the possible cost of failure.

RISK TAKING IS POWER

Example

> "Intelligent risk taking involves a knowledge of the "odds", plus a philosophical willingness to shrug your shoulders and absorb a manageable loss without whining ("that's the way the ball bounces"). Obviuosly, the chance of a setback is the price you must pay for any progress. When I say you should be willing to take risks, I am not advocating that you do anything as idiotic as risking your savings account on the spins of a Las Vegas roulette wheel." (Cohen, 61).

5. Coercion may be used to harm your opponent's interests, but sometimes it is more effective to threaten to harm yourself and thereby put pressure on your opponent.

LEGITIMACY IS POWER

Example

During the Canadian Constitutional crisis of 1981, the negotiations centred on whether to entrench a charter of rights like the U.S. The provincial and federal governments were split on the issue with the largest English speaking province (Ontario) in favour of a fully entrenched charter while the major French speaking province (Quebec) and the four western provinces and three maritime provinces were opposed to any charter of rights in a national law.

As the negotiations progressed, British Columbia taking its turn as lead spokesman for the provinces began to advocate for a compromise position between the extremes of a fully entrenched charter, or none at all. The compromise was to have a charter that was only partly entrenched and could therefore be overridden by parliament. In order to give legitimacy to

this idea the opinion of a Harvard Law Professor, Paul Weiler, who was born and raised in Canada, was sought. He had published a scholarly article in the Dalhousie Review suggesting the *non obstante* or override clause as a solution to the constitutional dispute. Weiler's opinion influenced the Premier of Ontario, Bill Davis, who was pivotal in the negotiations. Weiler's impeccable professional and academic credentials gave legitimacy to the compromise solution.

7. When using ultimatums or threats, provide an alternative or "limited menu" of coercive options.

PRESSURE IS POWER

Example

"In August of 1977, Croations skyjacked a TWA Aircraft scheduled to go from New York's La Guardia Airport to Chicago's O'Hare. In a stall for time, the plane was flown a serpentine route via Montreal, Newfoundland, Shannon, London, and ultimately Charles de Gaulle Airport outside Paris, where French authorities shot out its tires.

"The plane sat on the runway for three days. Finally, the French police, meeting my criteria, gave the terrorists a limited menu ultimatum, which I'll paraphrase as follows: "Look…you guys can do whatever you want. However, American police have arrived, and if you give up and go back to the States with them now, you'll get two to four years in prison, tops. That means you'll probably be let out in about ten months."

"Waiting for a moment so that would sink in, the French continued, "But if we have to capture you, the penalty is execution, according to the law of France. Now, …what would you like to do?"

"Believe it or not, the skyjackers decided to surrender and take their chances with the American judicial system." (Cohen 44-45)

8. Respond to an unreasonable proposal or unjustified attack with silence and wait for a more acceptable move by the opposition.

PATIENCE IS POWER

Example

"Silence is one of your best weapons. Use it. If they have made an unreasonable proposal or and attack what you regard as unjustified, the best thing to do may be to sit there and not say a word.

If you have asked an honest question to which they have provided an insufficient answer, just wait. People tend to feel uncomfortable with silence, particularly if they have doubts about the merits of something they have said…

Silence often creates the impression of a stalemate, which the other side will feel impelled to break by answering your question or coming up with a new suggestion. When you ask questions pause, don't take them off the hook by going right on with another question or some comment of your own. Some of the most effective negotiating you will ever do is when you are not talking." (Fisher & Ury, 117-18).

Figure 10 Be inquisitive, listening more than talking.

PERSISTENCE IS POWER

The old saying that the squeaky wheel gets the grease is relevant in bargaining. Power will come from dogged persistence and tenacity. Persistence has the power to yield positive outcomes. Children understand this power and will not give up nagging a parent to buy them something. A mother may have said no 20 times but the little child just keeps persisting in his endeavour to get the desired object. He may have even begun whining or crying. Children know that persistence will pay off most of the time and mum and dad will give in if enough whining or crying occurs. –

Example

The wonderful children's writer, Dr. Seuss. His book, *"And to Think I Saw It on Mulberry Street"* was rejected by 27 publishers before finally getting a *yes.* Many people would have given up after a handful of rejections, but he persisted. Dr. Seuss went on to become one of the greatest children's book writers around, selling more than 200 million copies of his books.

Persistence may make the difference between life or death. I witnessed first hand the tragic loss of life when 7 Polynesian pearl divers made a valiant effort in a small 13 foot pearl diving boat ,*Tearoha* to sail some 25 miles to Rakahanga in order to bring back much needed food from Rakahanga to our island of Manihiki in 1964. The details of the ill-fated mission are told in the book, *The Man Who Refused to Die,* by Barry Wynne. Sadly the story illustrates the consequences for negotiators who give up too soon in trying to persuade their captain that he was following the wrong course in a storm. Wynne interviewed three survivors with these details of the failed negotiation.

"Looking back over his shoulder, Teehu watched the other boats set course for Manihiki and immediately observed they were all taking a far more easterly direction. He decided to speak to Enoka again: "There, Enoka, I told you, the others are sailing much closer to the wind. They are right, we are wrong, let us change course and follow them or we will be blown to the lee of Manihiki and have trouble getting in." Enoka Dean flared in retaliation, "I am the captain of the boat. We were second into harbor on the outward journey; I know t=what I am doing. Get on with your job!"
One other Polynesian persisted weakly, "Make sure we don't go too far to the west, Enoka, otherwise we'll have the current against us." "In true Polynesian style the argument was soon forgotten…"

As a result the boat never made it back to Manihiki and finally 60 days later landed 2000 miles away in the New Hebrides. The three survivors owed there lives to the unwavering courage and tenacity of Teeu Makimare my close friend who had given up in trying to persuade the captain to change course.   Teehu received the Stahope Medal of Bravery presented by the Queen of England as the most courageous hero of the more than 600 million Commonwealth members for his actions in 1964.

COERCIVE DEFICIENCY IS POWER

Example

The most dramatic example of an effective coercive deficiency is a hunger strike. It has been used successfully by prisoners to change their conditions of confinement and by political demonstrators to influence decisions of government. No one can forget the compelling story of the hunger strike of children aboard the "Exodus" in their valiant effort to influence the British Generals to allow their ship to sail for Palestine. Leon Uris tells the poignant story of how the might of British forces was punctured by a few hundred determined waifs on the "exodus" whose only weapon was the fact that they were prepared to harm themselves even to death in order to gain their objective. The balance of power was so distorted against them that they had little choice, but to attempt some desperate plan, or surrender. In the result, the British decided to let the Jews go rather than being responsible for watching children starve to death. Public sympathy was strongly in favor of the "Exodus", partly because the terribleness of the Holocaust was beginning to be understood and partly because of the British tradition of fair play. To influence a man's conscience is to exert a mighty power. Leon Uris captures this experience when he has one of the British Generals explain his feelings during the "Exodus" crisis:

"This is a bad business to be in for a man with a conscience," Sutherland said. "Two wars, eleven foreign posts, six decorations, and three orders. Now I've been stopped in my tracks by a band of unarmed children. A fine way to end thirty years of service, eh, Sir Clarence?"

Figure 11 No alternative to entry or death to all.

The Exodus, 1947, which carried over 4500 passengers hoping to land in Palestine without permission.

9. Search for an “elegant” solution to the conflict that meets the needs of the parties.

ELEGANCE IS POWER

The Skagit Valley Treaty is one of two international treaties, the other being the Columbia River Treaty, that BC Hydro is responsible for implementing on behalf of Canada and the Province of British Columbia.
The International Joint Commission and the Province of BC granted Seattle City Light the right to raise the Ross Dam in 1942. The Ross Dam is located on the Skagit River in the US and its reservoir floods a short distance into Canada.
The prospect of further raising the height of the Ross dam continued to be discussed into the 1970s. Raising the dam further would have increased the energy capability of the Ross project by about 318 GWh but would have entailed significant flooding in Canada. To avoid the flooding in Canada, the Skagit Valley Treaty was entered into in 1984 and the resulting agreements provided for Seattle City Light giving up the right to raise the Ross Dam and BC Hydro supplying energy to Seattle City Light in the amount equivalent to what would have been produced by raising of the Ross Dam. This supply is for a period of 80 years from 1 January 1986 through 31 December 2065 of 310 GWh delivered. Seattle City Light agreed to pay BC Hydro the

cost that it would have incurred in implementing the raising of the Ross Dam both in terms of capital and incremental operating cost.
The benefits and obligations of the Treaty were assigned by the Province of British Columbia to BC Hydro. BC Hydro and Seattle City Light are the operating entities.
The delivery obligations under the Skagit Valley Treaty are treated on the same basis as firm domestic load and form part of BC Hydro's load forecast.

Example

An international conflict between the City of Seattle and the province of British Columbia over the Ross Dam was resolved after negotiations had been stalemated for 40 years by a rather elegant formula that saved the valley in exchange for power thereby stimulating for both sides the full range of benefits they would have received if the Ross damn had been built. Seattle agreed to pay British Columbia the amount of money (approximately 21 million dollars per year for 40 years) that they would have spent on the financing of the dam and British Columbia for its part agreed to provide exactly the same amount of hydro power out of its own system to Seattle to make up for the power lost by not building the Ross Dam.

10. Maintain or establish a good personal relationship with your opponent.

PERSONALITY IS POWER

Example

In the anatomy of power the importance of personality is well documented. Gerald William of Brigham Young University Law School

conducted a very impressive research project evaluating how more than 2,000 lawyers in Denver, Colorado and Phoenix Arizona negotiate. Good personal relations were one of the highest rated characteristics of effective cooperative negotiators gleaned from the empirical research.

11. By changing the conditions under which the negotiation functions you may modify the behavior of the opposition in your favour.

CONDITIONING IS POWER

Example

> "Kindness will melt a man when heat and hardness will only make him harder. Of course we wouldn't want to say that everyone we cultivate with kindness will immediately return kindness. Sometimes it takes a long time for the remedy to work…Seemingly there are some incorrigibles…But whether we can see it or not, kindness cannot help but cause some softening inside. And if we persist sincerely even the most difficult cases are likely to show results after long labour. I wouldn't want to guarantee that it would always work at once. But this I would be willing to guarantee: that kindness will work oftener than anything else in the world will work."
> (Richard L. Evans, Mormon leader)

MOMENTUM IS POWER

15. Develop a momentum of success in discussions by agreeing to some smaller items before taking on the giant issues in the room.
16. Publicity is power. Use the media if necessary to shine a spotlight on your negotiations when your opponent is intransigent.

SIXTH PRINCIPLE

MATCH BARGAINING PHASES

10. **The principle of integration bringing the bargaining phases together by matching bargaining interests and separating the people from the problem.**

.

When negotiation are integrated activities are harmonized to create an activity pyramid that begins with information and ends with commitment. Then, the negotiation process is harmonized to bring together the different phases of the different parties and to match the key activities with the appropriate phase. The negotiation issues are integrated to connect the general interests with the specific positions or demands. Finally, negotiation behaviour is harmonized to combine a cooperative and competitive style.

The integrated strategy is contrasted with the disjointed adversarial approach followed in many bargaining situations, where the process and activities are not in phase, the general interests are not identified, with "positional bargaining" creating a struggle of will. In disjointed negotiation, the bargainers are isolated from each other pursuing a style that is either too hard or too soft. The parties do not make contact! Frustration and failure abound.

Integrated negotiation as a principle begins with the reality of the key negotiation phases and activities. All negotiations are divided into two key activities – 1. Creating value and 2. Claiming value. All negotiations go through four key phases and bringing the activities in sync with the phases is the heart of the integration principle.

We have all experienced the opposite of integration, when bargaining is disjointed and the parties behave like two ships passing in the night. The result is either hostility or distortion. How do you prevent this kind of frustrating experience? The result of my study and experience is a strategy of integrated bargaining. Strategy means in this context a way of thinking about a problem that creates new ideas for resolving the problem. Illustration

During the difficult Canadian constitutional negotiations the value of intergration advancesd by fully engaged personal contact of the government leaders. The conflict was between eight of the provinces including Quebec, on the one hand and the Federal government and two other provinces (including Ontario). The leadership of the Group of Eight (as they were called) rotated and in 1980, it was the responsibility of Sterling Lyon from Manitoba. During his tenure in the chair there was no personal contact between the Prime Minister, Pierre Elliot Trudeau and Mr. Lyon. They communicated only by telegram and letter. There was not even telephone exchange between them. The relations between the groups were very hostile during this time and there was very limited personal contact at lower levels in the hierarchy of ministers and officials.

The following year in 1981 the leadership of the Group of Eight shifted to Premier Bill Bennett of British Columbia. The approach changed also. The two leaders, Trudeau and Bennet,t met face to face in long private dinner meetings lasting for more than four hours. During these meetings they got a feeling for each other and learned form the discussions what their real needs were. They each learned things about the other side that their various constituencies did not fully understand. For example, Bennett learned the critical fact that Trudeau would compromise on the Charter of Rights as long as he achieved the entrenchment of language rights. Also, in preparation for these meetings, there were also other meetings of their officials and ministers that were very helpful in understanding where the common ground was.

(a) *by making personal contact*

In the first priority for getting information through the strategy of integrated negotiation is making personal contact. This means meeting and communicating with your opponent (not his agent or lawyer) face-to-face. The purpose of this contact is to convey information about your needs and to obtain information about his needs. During these meetings the skill of questioning will be the method of obtaining information.

Indeed, the art of questioning is probably the most important talent a negotiator possesses, because negotiators frequently conceal the most important in order to gain an advantage. In many ways a good negotiator is like a good detective. They both rely on clues. "Essentially what people say they want (their demands) may not be what will actually satisfy their needs" (Cohen, 112). Finding clues to these hidden motives is the real purpose of making contact.

(b) *by working on your opposer's needs*

One important reason for making personal contact is to enable you to get information about your opposer's needs. This is the most critical question in a negotiation. Of course, the easiest thing to do is to work on your own needs, but too much effort in this direction will not produce an integrated negotiation.

The challenge of bargaining is that the most important question: what is your bottom line always goes answered partly because the answer may change with time and circumstance. To answer this question directly is to give away the reason for bargaining. As a result, you must be skillful in your analysis of the situation to find out what your opposer really needs. "We must negotiate so that your opposer will reveal himself to us" explains Gerard Nierenberg in his book, Fundamentals of Negotiation (at 146). Nierenberg gives some very useful advice in a couple of chapters on the "Use of Questions". He explains how to create the right environment to ask hard questions and most importantly how to listen and how to read the non-verbal messages or mannerisms of your opponent. He concludes with this valuable perspective:

> “We do not have to “understand” people to communicate. Understanding and empathy are long-term goals. But in our time it almost seems that failure to communicate occurs because the parties feel they understand each other too well… I would however, agree with Doestoevsky, in The Brothers Karamazov: “If people around you are spiteful, callous, and will not hear you, fall down before them and beg for their forgiveness; for in truth you are to blame for their not wanting to hear you.” This failure in the communication chain is in oneself.”

This perspective that puts the responsibility on you to help your opponent to understand is essential to achieve an integrated negotiation. It requires you to focus your energies on assisting your opponent find his way to an agreement. It is a matter of adopting the right perspective.

© by making good judgments

Good judgment comes from within and therefore integrity is one of the greatest assets a negotiator can possess and its absence will always jeopardize the success of negotiation.

“Despite representations of negotiators as wily and Machiavellian, many point to the absolute essentiality of integrity. Scaetzel commented on his extensive experience in negotiating with Europeans, “Integrity is so obvious that no one is prepared to question it. Even in the sharpest negotiations you will have the Europeans saying, ‘I am having great difficulty but I have complete trust in this man. I know that he is absolutely honest in what he is trying to do.’” (Zartman, p. 28-29)

SEVENTH PRINCIPLE

BARGAINING IN GOOD FAITH

11. The principle of fairness and persuasion because fairness is a compelling force to win the hearts and minds of parties.

First, lying about material facts in issue is both unfair and illegal and will be very costly in the long run. However, all bargaining has built into its communication process conveying some truthful information as well as some false information. In fact "bargaining is incompatible with completely truthful communication." (Ilke, Fred Charles, *Bargaining and Communication.)* For example, bluffing is part of the bargaining game.

Bargaining experience may seem to be driven by the law of the jungle where might is right. However, fortunately human nature universally is influenced by basic fairness in relations. Might or power is relevant because you need power to get what you want and any bargain that does not reflect the relative strength of the various parties will lack credibility in terms of fairness. But negotiation power is not just muscle, money and status, but what about the power of lying or misrepresenting the truth. Of course under the law fraud

or deliberate misrepresentation of the facts is illegal. In bargaining the consequences could be devastating.

Is bluffing, particularly regarding your bottom line and whether you are willing to make any further concessions illegal? "The art of bargaining, as most of us eventually learn, is in large part the art of sending misleading messages about [reservation prices]" (Frank, at 165.) The cases show that lying about your reservation price will not be punished. The best advice as to the ethics of bargaining in my view comes from H. Ross Perot, "Don't govern your life by what's legal or illegal, govern it by what's right or wrong." This is the righ test of fairness.

Summary conclusion

MAKE TRADEOFFS

1. *Tradeoffs make bargaining work (Also an economic principle.)*

HAVE AN ALTERNATIVE

2. *Work hard on your best alternative to no agreement BATNA.*

PERSUADE WITH SUBTLETY

3. *Use narratives, metaphors and face to face meetings with "pacing" for chemistry.*

PROBLEM SOLVE

4. *Bargain from your interests or specific needs, not your positions and be inquisitive about their needs to create value by joint problem solving*

CREATE POWER

5. *Bargaining power is multifaceted using skill and ingenuity.*

MATCH BARGAINING PHASES

6. *Match the stages of negotiation activity as the clock for timing.*

BARGAIN IN GOOD FAITH

7. *Value fairness and honest persuasion.*

In my view principled bargaining is about following workable fundamental principles relevant to the process, timing, substance and the behavior of the parties, but recognizing that these principles of negotiation may occasionally conflict with one another. Thomas Schelling explained, 'Compromising a principle sounds wrong; but compromising between principles sounds right.' And compromising, after all, is what negotiation is all about."

Professor Roger Fisher of Harvard Law summarized principle negotiations urging these four habits:

1. **Separate the people from the problem.**
2. **Focus on interests rather than taking a position.**
3. **Invent new alternatives or options to fill those interests.**
4. **Insist on objective criteria for evaluation.**

Here are my TOP TEN principles for principled negotiation success.

- **The principle of linkage - Make Tradeoffs accepting the reality that people have to give up something to get something.**

- **The principle of interest based bargaining in contrast to positional bargaining in order to compromise your positions without compromising your interests.**

- **The principle of psychology with 'face to face' discussions to understand objectives and improve outcomes accepting that bargaining is a defiantly human process.**

- **The principle of creating value as well as claiming value and embracing the power of incentives as proven in economic research.**

- **The principles of inquiry by framing the parameters of discussions with concreteness and asking questions instead of giving answers because negotiations need facts, specificity and uncertainty**.

- **The principle of 'non-verbal' communication - listen more talk less and phrase your views with the subtlety of metaphor, example and indirect arguments.**

- **The cost/ benefit principle or the BATNA analysis says negotiators must always know the Best Alternative to No Agreement (BATNA) and never settle for less.**

- **The principle of timing and conditioning by matching stages of the negotiation process.**

- **The principle of integration bringing the bargaining phases together by matching bargaining interests and separating the people from the problem.**

- **The principles of fairness and persuasion.**

In the end:
"*No matter how difficult or unprecedented the problem, a breakthrough to the best possible solution can come only from a combination rational*

analysis; based on the real nature of things, and imaginative reintegration of all the different items into a new pattern, using non-linear brainpower."

Ohmae, Kenichi, *The Mind of the Strategist,* 13 (1983).

Some contend that in a successful negotiation everyone wins. This is a laudable ambition, but often not true. Why? Negotiation skill is the important variable over which all parties have differing experience and this affects the outcomes of all bargaining. The use of principles and integration strategies is the most important skill in my view.

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BIBLIOGRAPHY

Bolton, Robert, *The Evolution of Co-operation*. New York: Basic Books. 1984.

Calero & Oskam, *Negotiate the Deal You Want, Talking your way to success in business, community affairs and personal encounters*. Dodd Mead, New York 1983.

Cohen, Herb. *You Can Negotiate Anything*. New Jersey: Lyle Stuart, 1990.

Cohen, Leonardelli, Thompson *The Agreement Bias in Negotiation: Teams Facilitate Impasse*

Corry, Herb David J. *The Art of Mutual Gains Bargaining*, Airora: Canada Law Book, 2000.
Covey, Stephen R.. Principle Centered Leadership, New York: Summit Books, 1991.

De Bono, Edward. *Conflicts: A Better Way to Resolve Them*. New York: Penguin Books, 1985.

Deutsch, Morton. *The Resolution of Conflict: Constructive and Destructive Processes.* New Haven Conneticut: Yale University Press, 1973.

Dunlop, John T. *Dispute Resolution, Negotiation and Consensus Building*. Auborn House, Dover Mass. 1984

Fisher, Roger and William Ury. *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed.) New York: Penguin Books, 1991.

Fisher, Roger. *Beyond Machiavelli: Tools for Coping with Conflict*. New York: Penguin Books, 1994.

Fisher, Roger & Ertel, Danny*, Getting Ready to Negotiate*, Penguin Books, 1995.

Funkhouser, G.Ray, *The Power of Persuasion*, Times Book, New York, 1986.

Galbraith, John Kenneth, *The Anatomy of Power*, Houghton Mifflin, Boston, 1983.

Gilbert, Michael A.*, How to Win an Argument*, McGraw Hill Books, 1979.

Graham, Ron, *The Last Act, Pierre Trudeau, the Gang of Eight, and the Fight for Canada*. Allan Line, 2011.

Karass, Gary, *Negotiate to Close, How to Make Morel Successful Deals*. Simon and Schuster, New York, 1985.

Klob & Williams, *Everyday Negotiation, Navigating the Hidden Agendas in Bargaining*, Jossey-Bass, 2002.

Lax, David and James Sebenius. "*The Manager as Negotiator: The Negotiator's*
Dilemma: Creating and Claiming Value," New York: Free Press, 1987), 30-32. <http://books.google.com/books?id=FN_OIG0-alEC>.

Goldberg, Stephen, Frank Sander and Nancy Rogers, eds. *Dispute Resolution*. 2nd ed. Boston, MA: Little, Brown and Co., 1992. 49-62. <http://www.beyondintractability.org/artsum/lax-themanager

Levine, Stewart, *Getting Resolution, Turning Conflict Into Collaboration*. Berrett Kohler, San Francisco, 1998.

CONCLUSION

While my talk is laced with famous personalities and leaders I am not engaging in the vanity of name dropping. Because the boon of my work has been successful interventions in major public disputes or wicked problems, therefore, by definition these very public problems will attract very public leaders.   When you try to amend the constitution and succeed, or challenge US enviromnetal action, or change the fundamental law of collective bargaining for millions of union and management you should attract and engage presidents, premiers and other leaders of our nation like Kim Campbell.

I am writing a book as Kim Campbell mentioned with more detail and analysis of these experiences. I have also attached references already published about the four stories. Of course, there have been more

experiences not mentioned in my talk today, including a surrepticious constitutional challenge to the US international trade system by a famous Harvard Law Professor that helped Canada win the first softwood lumber countervailing duty case. Also my experiences heading up the first independent regulatory inquiry into the foibles of the rogue Vancouver Stock Exchange after death threates against a Vancouver Sun reporter is also relevant to the theme of creating change.

Finally, what are fundamental principles of leadership from my four experiences:

1. **Your optimitic bias in times of crisis may cost you your life, if you fail to listen to others who are thinking slow and disagreeing with your authoritarian leadership.**
2. **Restructuring long standing negotiation conflicts using the no author single text or "no side" process helps you find an innovative breakthrough or 18th camel and a win-win solution.**
3. **Bargain over interests not positions and separate the people from the problem. If you engage informally with your opponents to really understand their "interests" and build relationships you will overcome rigid and persistent inertia from positional bargaining.**
4. **Leadership skills are transferable from one discipline to another making experience your most valuable asset. Be proactive in your career when an opportunity arises to assist proven leaders. Take the role and go the extra mile to learn and build reference support.**

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[i] TEEHU -
[ii]https://www.academia.edu/24952300/WHY_THE_NOTWITHSTANDING_CLAUSE_SAVED_THE_CHARTER_OF_RIGHTS._How_the_no_author_single_text_helped_make_the_famous_kitchen_deal_in_November_happen
[iii] SKAGIT -
https://www.academia.edu/7278770/How_a_PAPER_DAM_and_single_

text_bargaining_finally_saved_the_BC_pristine_Skagit_valley_from_Seattle_flooding._My_Globe_and_Mail_articlehttps://www.academia.edu/24995906/My_Paper_on_MUTUAL_GAIN_STRATEGIES_-_A_GOOD_NEIGHBOUR_POLICY_presented_to_Canadian_American_Committee._BC_hydro_electricity_exports_to_Seattle_saved_the_scenic_Skagit_valley._Also_job_creation_under_NAFTA_proves_valuable_for_both_countries

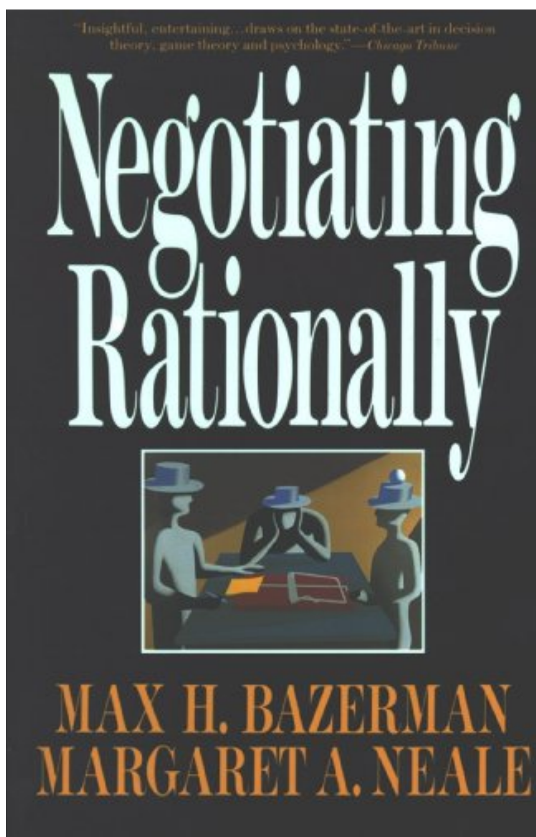
[iv] LABOUR CODE https://www.academia.edu/8169545/FUNDAMENTAL_LABOUR_LAW_REFORM_in_BC_from_my_leadership_in_ending_court_injunctions._New_flexible_Board_rule_does_improve_labour_relations._Alan_Antibise_Prof._Harry_Arthurs_and_Meggs_and_Mickleburgh_analysis

ADDITIONAL READING

The art of international negotiation can be learned, according to William Zartman and Maureen Berman. Their purpose in this book is to teach aspiring diplomas and others how to negotiate most effectively. Drawing on a wide range of sources—historical material

from past negotiations, interviews with experienced negotiators, the theories and ideas of other students of the problem, and findings on bargaining behavior from experiments and stimulations—they introduce their own scheme of organization to clarify the nature of negotiation.

They portray negotiation as a three-stage process involving prenegotiation, developing a formula, and working out details, and they provide insights into the appropriate behaviors for each phase. Their examples from several dozen postwar negotiations, based on the reflections of seventy participants interviewed for this study, are particularly vivid and illuminating. Viewing negotiation as a paradoxical process in which both conflict and cooperation are required, Zartman and Berman present a more positive and constructive model than previous studies have done. Their major prescription—that negotiators try to find agreement on a formula before turning to matters of detail—clearly facilitates the framing of joint decisions among opposing parties.



In *Negotiating Rationally*, Max Bazerman and Margaret Neale explain how to avoid the pitfalls of irrationality and gain the upper hand in negotiations.

For example, managers tend to be overconfident, to recklessly escalate previous commitments, and fail to consider the tactics of the other party. Drawing on their research, the authors show how we are prisoners of our own assumptions. They identify strategies to avoid these pitfalls in negotiating by concentrating on opponents' behavior and developing the ability to recognize individual limitations and biases. They explain how to think rationally about the choice of reaching an agreement versus reaching an impasse. A must read for business professionals.