

Alternative Dispute Resolution

“If you come to help me, then you are wasting my time. But if you come here because your liberation is bound up in mine, then let us begin.”

Lily Walker

We must view dispute resolution as a method of conflict management rather than conflict elimination. This management approach may lead to progressive solutions if the participants see their differences as opportunities to pursue alternative solutions rather than as sources of competition where the strongest and most persistent prevails. While an approach that advocates shared responsibility for solutions has a greater chance of resulting in a win-win situation, a more aggressive and one-sided approach usually results in a win-lose scenario.

In our encounters with organizations involved in regional economic development, disputes may originate in two major areas: (1) conflicts within or between community-based organizations and (2) differences between community-based organizations and governments related to development issues identified in Performance Contracts. In both cases, we should always try to address disputes, differences, or conflicts believing that a skilled management approach has the best possibilities for a positive (and possibly more innovative) solution. We should, therefore, approach any negotiation or intervention as an opportunity to use a shared decision-making model. We would concentrate on finding solutions that are in the best interests of all parties rather than masking differences of opinion.

The Government of British Columbia recently went through a comprehensive forest management planning process. According to early indicators, for Government to be successful, it would have to use a public participation model. Government reserved its authority for final approval and adoption, but the involvement of the public ensured a greater level of support for the final outcome.

What is Shared Decision-Making?

Resource planning in British Columbia is similar to Newfoundland and Labrador's own situation where community-based organizations and Government will negotiate a partnership for economic development. The B.C. definition of shared decision-making states that "on a certain set of issues, for a defined period of time, those with authority to make a decision and those who will be affected by the decision are empowered to jointly seek an outcome that accommodates rather than compromises the interests of all concerned." The cornerstone of this definition is its cooperative approach. Participants in the process are motivated by the fact that one party cannot obtain results for its own agenda without the support of the other.

The key to the success of the negotiations with the community lies in the structure of the process. The parties design and develop the process, experiencing their first success even before they start to negotiate the more substantive issues. In fact, they become involved in every aspect from the initial assessment of the appropriateness of the approach, through to the negotiations, the implementation, and, ultimately, the evaluation and monitoring of the outcomes.

Power

Power may be defined as the capacity to produce an intended and foreseen effect on another. Negotiations have traditionally relied on the exercise of power to persuade others to know, understand, and agree to a different point of view. Unfortunately, the more we rely on the exercise of power to achieve a desired result, the more positioned our requirements for solutions become.

One of the problems with dispute resolution is the imbalances created through the use of power. In most negotiations, the use of power is a major factor in determining solutions. Power may be real or perceived, obvious or hidden, stated or inferred. If the imbalances are too great, the parties must decide whether it would be advantageous to proceed, to seek help, or to conclude that negotiations cannot be productive. If we are to be successful, the objective must be to try to bring some balance so that the environment is conducive to exploring solutions.

There are many sources of power and its exercise may affect outcomes in different ways. Power may have a formal, legal, personal (charismatic), or knowledge basis or it may be gained through money, racial affiliation, age, or emotional manipulation. It may be used or abused and may contribute to either finding solutions or creating even more unrest.

In this unit, we advocate an approach that reduces the influence of power by exploring a process that is based on addressing interests instead of positions, win-win instead of win-lose scenarios, and expanded options instead of lists of demands.

A Continuum for Negotiating Solutions

There are a number of ways to resolve disputes, with some approaches being more formal than others. We will attempt to describe a number of resolution or negotiation methods, ranging from the most aggressive to the most passive. The appropriateness of each method depends on the situation. The following continuum sets out these techniques:

VIOLENCE (fight)

NON-VIOLENT DIRECT ACTION

LEGISLATION

LITIGATION

ARBITRATION

MEDIATION

CONCILIATION

NEGOTIATION

INFORMAL PROBLEM-SOLVING

AVOIDANCE (flight)

(Based on Fisher, Roger and William Ury. *Getting to Yes: Negotiating Agreements Without Giving In*. New York: Penguin Books, 1983.)

Violence, Non-Violent Direct Action, and Legislation

One party gains control, resulting in a win-lose scenario. The decision is forced upon the other party, leaving it feeling oppressed. This solution will yield results, which are nevertheless minimal, only as long as the winning party maintains power.

Litigation and Arbitration

The parties introduce a third party decision-maker to the process. The opposing parties in the dispute have little control over the final outcome after having made their representations. Again, this process results in a win-lose scenario and does little to achieve a solution where parties attain either ownership or implementation support.

Mediation, Conciliation, and Negotiation

Here, the affected parties resolve the dispute with intervention. This can lead to a win-win situation. The role of the third party is to ensure open and continuous communication, the identification of common ground, and the resolution of outstanding issues. If the parties show confidence in the mediator or conciliator, minimum concessions are required. The parties can move to expanding the range of possible solutions. This expansion can, in turn, lead to more innovative approaches, resulting in both parties coming closer to achieving their original interest. Other important benefits of using a shared decision-making approach are (1) more ownership of the outcomes, (2) the empowerment of those affected, (3) a redistribution of authority due to a shared commitment, (4) the responsibility for successful implementation, and, in many cases, (5) a saving of time and money.

Informal Problem-Solving

This approach depends on the goodwill of both parties to the dispute striving for solutions and, in many cases, will only work in an environment of mutual trust. Normally, informal problem-solving is useful for solving minor issues that do not need a more formalized process.

Avoidance

Avoidance, like the first two types of approaches, ends in a win-lose situation. This very passive approach gives no indication that there is agreement, since one of the parties fails to engage in the process. Avoidance may indicate a lack of interest, support, or agreement.

All decisions on this scale run from “hard” to “soft.” To be effective, the process should be “hard on problems and soft on people.” This ensures that the relationships between the parties survive, that the solutions are arrived at without the perception of loss, and that no party is required to “give in.”

The Negotiating Process

In their book *Getting to Yes*, Fisher and Ury set out a number of principles for negotiating solutions. By combining them with those advanced by Stephen Lewis, a former Canadian ambassador to the U.N., we can identify six tactics in negotiating conflict:

1. Separate the people from the problem.
2. Focus on interests, not positions.
3. Invent options for mutual gain.
4. Know the best and worst alternatives to a negotiated agreement.
5. Respect the opinions of all.
6. Empathize, do not sympathize.

Successful negotiations will result only if we proceed in an orderly manner. Going to the table without adequate preparation and a clear understanding of the environment and the issues will lead to failure and result in a loss of trust and credibility. It will also lead to a deteriorated environment for future encounters between the parties. It is, therefore, essential to define the process and ensure that it is strictly adhered to.

The Participants

A person may be suitable for participating in negotiations if he/she:

1. demonstrates an ability to listen deeply and accurately;
2. works to build trust, facilitates communication, works beyond perceptions, and questions assumptions;
3. ensures that the discussions deal with interests rather than positions;
4. looks for imaginative and innovative solutions as well as mutually acceptable outcomes;
5. asserts his/her point of view in terms of the needs, concerns, desires, and hopes of constituents;
6. comes to the table well-prepared with facts and research; and
7. remains as open as possible to solutions.

Preparing

All negotiations will begin with adequate preparation by each party. Each should possess information on (1) the existing levels of agreement, (2) the opposing party in the negotiations, (3) the other options available to resolve the issues, (4) any third parties that should be involved, (5) the relative importance of relationships and outcomes, and (6) the locations and times of the meetings.

Introducing and Establishing Expectations

The goal of the first meetings should be to establish commitment to the process, the authority of negotiators to make decisions, and a mutual desire for an acceptable outcome. One should start by establishing any ground rules, for it may be too late after the negotiations begin. In acknowledging areas of existing agreement, the negotiators set a positive, future-focussed tone. They should ensure that there is no conflict in communication style before proceeding.

Discussing and Defining the Issues

Introducing all the issues before negotiations start increases the level of trust and lowers the possibility of surprises later. To avoid creating friction with the other party, it is best to present the issues without stating positions. It is also important to recognize interests and clarify/summarize information, emphasizing any areas of agreement.

Identifying Interests

Negotiations should be based on interests and not on positions. Stating positions has a tendency to create barriers. The objective becomes changing the other's position or defending one's own. If the negotiations are based on interests, there is a much greater chance that negotiators will look ahead to try to satisfy these interests rather than explore ways to try to undermine positions.

Generating Options and Solutions

If, in the negotiations, the parties have refrained from taking strong positions on issues and have been able to resist the compulsion to put forward their intended solutions or lists of demands, the possibility of advancing solutions that result in win-win situations is greatly enhanced. Parties have been successful if they have generated as many options as possible and selected those that maximize mutual gains and support joint goals.

Negotiating Meetings

Firstly, it is essential that all parties having a stake in the negotiations have a seat at any negotiation table. If a party to be affected by the agreement is not present, it may withhold support for implementation. Secondly, each party at the table will want proof that the others can make decisions which will be binding on their constituencies. There is a need to build in opportunities for each party to consult with its constituency so that agreements will hold.

In two-party negotiations, the issue may be sensitive enough that the parties agree to have a limited number of participants at the table, with steering committees advising the negotiators and ensuring constituency approval. In some cases, the negotiators may want to explore alternatives without being perceived to be weakening their positions. In the preparation stage, negotiators should know they may partake in exploratory talks with the agreement that any discussions or possible solutions be brought back to the table for ratification and sign-off.

There should be agreement on whether more than one voice may represent a party. If only one voice is recognized, then the table will recognize as legitimate any communications from other members of a constituency with the spokesperson. To recognize more than one voice is to allow for discussions to get out of control and argumentative. Finally, as the parties agree upon an item, they should initial it so that there can be no argument later on its status. If there are initial agreements before the negotiations start, these should be signed off first, allowing the proceedings to begin on a positive note.

Bibliography

Fisher, Roger and William Ury. *Getting to Yes: Negotiating Agreements Without Giving In*. New York: Penguin Books, 1983.