



EXPECT THE BEST

Blaney
McMurtry
BARRISTERS & SOLICITORS LLP

MUTUAL GAINS BARGAINING

Mark E. Geiger

Blaney McMurry LLP

416.593.3926

mgeiger@blaney.com

MUTUAL GAINS BARGAINING

prepared by Mark E. Geiger

INTRODUCTION

The principles of mutual gains bargaining have been discussed for many years. Several books have been written outlining this approach. Notwithstanding the general availability of these texts and courses, relatively few human resources practitioners are fully aware of or use this approach in bargaining collective agreements.

There is a great deal of misunderstanding and misinformation concerning mutual gains bargaining. Some people consider it to be a "leftist" or union-friendly approach to bargaining, not to be utilized in the tough negotiations that in many ways have characterized the last decade of union/management relations. Terms such as "single team bargaining" have been used to describe the process. Often these terms have given practitioners the impression that adopting this approach to bargaining puts the employer at a disadvantage, especially in tough times. This misconception of the principles underlying mutual gains bargaining has led many practitioners to avoid learning about it and using it. In my view, this result is unfortunate.

Mutual gains bargaining at its foundation is based on the principle that a negotiated settlement of a dispute is usually superior to other alternatives available. In fact, in order to determine whether or not mutual gains bargaining can be of any advantage to you, you first must discover whether or not other alternatives will give you a better solution. If they will, the principles of mutual gains bargaining are probably inapplicable to your situation.

Mutual gains bargaining is based on the premise that both sides in a negotiation have something to gain from the negotiation. A settlement will be better than either party's best alternative. In collective bargaining, it is a very rare case indeed where no agreement is superior to a negotiated settlement. If both sides approach the bargaining table with the understanding that it is in their mutual interest to solve their disputes and to reach a negotiated settlement, the fundamental requirements for mutual gains bargaining to succeed are met. It only remains with the parties to decide whether or not this approach to bargaining will be more effective than the traditional, positional approach.

TYPES OF BARGAINING

Those of us who spend a great deal of our time bargaining collective agreements are familiar with the usual drill. The union prepares a series of demands. They prepare that series of demands by

discussion with their constituents and after a period of internal machination, a "proposal" is prepared. That proposal usually contains a number of actual contractual language changes that are put forward by the union, together with changes in wages and benefits. It is most common for unions to hold back on the "monetary" portion of a proposal until all or most of the "non-monetary" demands have been resolved.

Once the proposals have been formulated, a meeting is set up between the union and management at which time the proposals are formally made. Sometimes counter-proposals by the company are made at the same meeting. More often, the company listens to the proposals from the union, asks some questions and then retires to consider their response. The company then responds to those proposals and perhaps makes several proposals of its own. The practice of companies making proposals for changes in language of the collective agreement has only come to common usage in the last decade. Prior to that it was "union asks, company responds".

1. **POSITIONAL BARGAINING**

Positional bargaining is based on the premise that there is a given pie to divide. A win for the union means a loss for management. Human Resources people often say that the best collective agreement you will ever have is the first collective agreement you have. Changes to that collective agreement usually mean a diminution in the flexibility and/or authority of management. Thus, union demands equal company losses.

A great deal of time in positional bargaining is spent determining what the union "really wants". Management knows that the union does not expect to be successful on all of its demands. The union keeps secret those demands which it *really* wants as opposed to those which it has only put forward as bargaining chips in order to increase the "bargaining power" of any particular demand which later on in the process they agree to relinquish. By artificially increasing the perceived value of a particular demand, the thinking goes, the union can extract a bigger price when they withdraw that demand.

In very large measure, the parties in positional bargaining enact a ritual set piece until they get to the stage where real bargaining occurs. Too often, this happens in extended overnight sessions where the parties get down to "real bargaining". Only at this stage do people start to discuss in any meaningful way their actual interests. Often, at this stage, there are sidebar discussions between union representatives and the company where there is greater disclosure as to the bottom line and the real interests which need to be accommodated. Too often, too little time is spent by tired individuals whose flexibility has been greatly diminished and who are expected to come to a solution pending some threatened deadline established by either the company or the union. Not

surprisingly, solutions devised in these circumstances are often less than satisfactory to either side.

2. **MUTUAL GAINS BARGAINING**

Mutual gains bargaining is premised on the understanding that both sides to the bargaining process have legitimate interests to be protected and advanced. Often the interests are not the same. Sometimes they are directly opposing. But it is usually in the interest of both sides that to the maximum extent possible, the interest of both sides be maximized in the final solution. The more complex the problem, the more difficult it is to solve with positional bargaining.

In my view, good labour negotiators have always used the principles of mutual gains bargaining, but often they have done so unwittingly. The final negotiations which take place just before the settlement of a new collective agreement strike, or lock-out, almost always involve recognition on both sides that the other side has interests which must be taken into account. Too often this realization is only made when positions have hardened to the point where alternative and perhaps superior solutions are no longer on the table and where the politics simply do not allow for their examination. Traditional, positional bargaining can be inefficient. It produces agreements which are not as good as they could have been had the parties approached the problems in a different way.

THE ROLE OF POWER

In most negotiations, one side or the other has greater negotiating power. In union/management relationships, management is usually perceived as having greater power, but in some cases, this perception is false. The party with the greater negotiating power can change from one set of negotiations to another. Thus, positional bargaining based on bargaining power often results in alternating bargaining situations. In one set, the company has the advantage. In the following set, the union has the advantage. If the goal in bargaining is to always get as much as possible, this shift in power balance can result in extremely adversarial, counter-productive labour relations.

If on the other hand, the parties approach the issues as problems requiring resolution, and instead of seeking a win on their side, seek the best solution, this destructive cycle can be avoided.

POSITIONAL BARGAINING: THE USUAL APPROACH

- Each side starts the process by putting forth the "solution".
- Each side is left to guess which problem the solution from the other side is intended to solve.
- Each side becomes wedded to the solution they have suggested before there is any discussion about what, if anything, needs fixing.
- "Positions" are traded and packaged.

- Occasionally, alternative positions are suggested.
- A great deal of time is spent discovering what is really important to the other side.
- Each party plays its cards close to the vest.
- Each party tries to maximize its "bargaining power".

WHEN IS POSITIONAL BARGAINING APPROPRIATE?

One could argue that positional bargaining is *never* appropriate. However, in the real world, positional bargaining will continue to be used.

This positional bargaining is based on certain premises. Some of these are as follows:

- Limited Resources
- Each party strives to maximize its share of a fixed pie.
- The interests of the parties are not interdependent.
- The future relationship between the parties has low priority to them.
- A win for one side equals a loss for the other.
- Each party sees the other side as an opponent.
- The ultimate goal is to win as much as you can, recognizing that your win is the other side's loss.

MUTUAL GAINS BARGAINING: THE FUNDAMENTAL PRINCIPLE

Mutual gains bargaining in contrast is based on the premise that each side has interests. Each side examines its own interests and also becomes educated as to the legitimate interests of the other parties. Together the issues are addressed, having in mind the interests of all of the parties and how they can be best accommodated.

Interest based bargaining often takes longer. Because it requires open discussion about real issues, more time is needed for each of the bargaining teams to achieve a level of mutual trust. Only in an atmosphere of mutual trust can the parties honestly discuss their own interests. Neither side can view the process as merely a bargaining technique. If either side attempts to do so, the other side will sooner or later recognize that fact and the mutual trust essential for the process will be destroyed. Although the process is in some ways more time consuming, and in many ways more difficult, the results that can be achieved make the effort worth it, especially if the problems are complex.

AN EXAMPLE IN ACTION

I act for the Ontario Medical Association in its relationships with the Government of Ontario.

Anyone who has followed that relationship over the last decade will recognize that for many years it was extremely fractious. The problems which both the Government and the OMA are forced to deal with are complex and involve large sums of money, a large measure of public interest, and a very large number of interested parties.

When the Harris Government was elected, it immediately made significant changes to the relationship between the doctors and the Government. The previous NDP regime had negotiated Framework Agreements with the Ontario Medical Association, governing the 20,000 doctors practicing in the Province of Ontario. Virtually all of their income is derived from insured medical services, which, because of the *Canada Health Act*, cannot be provided by doctors to patients except through a provincial medical scheme. Over the past several years, the utilization of medical services by patients had been increasing at double digit rates. The new Harris Government was convinced that this increased utilization was at least in part driven by the doctor's themselves. Accordingly, early in their mandate the Government passed Bill 26, an omnibus piece of legislation which, among other things, nullified the agreements which had been reached with the OMA and the Government of Ontario. In addition, several arbitration decisions which had been rendered under that agreement were also nullified.

The Government indicated to the OMA that it no longer wished to discuss these matters with them, but would be content to deal directly with various interested groups. The effect of this decision, perhaps surprisingly for the Government, was to intensify the animosity between doctors and the Government. The OMA had represented all of the doctors in Ontario. Now groups of doctors either on a speciality specific basis, or on an interest basis sought the right to negotiate directly with the Ministry. When the Ministry did not respond effectively or quickly enough, various of the newly established groups threatened to withdraw or reduce services being provided in order to force the Government to negotiate with them.

It was against this back-drop of suspicion, distrust, ripped up agreements and claw backs that the OMA and the Government sat down to attempt to negotiate a new agreement. Both sides recognized that it was in their individual interest to come to a mutually negotiated settlement. The situation was chaotic and rapidly deteriorating. The public was concerned about lack of medical services. The doctors were concerned that the Government had nullified previous obligations to them and was refusing to negotiate in any meaningful way with them.

What followed was a lengthy negotiation which lasted more than eight months. During that negotiation, the Government and the OMA consciously chose representatives who would be prepared to discuss issues on a rationale basis. After a series of meetings where positional

bargaining took place, the parties quickly realized that the issues involved were far too complex to be amenable to positional approaches. Over a period of months of extensive discussions, the parties started to discuss the underlying issues which each of them had on a myriad of fronts.

Out of this discussion grew an Agreement which was far more about process than about specific contractual obligations. The parties set in place a committee, known as the Physician Services Committee. That committee has equal representation from both the Government on the one hand and from the OMA on the other. The committee is chaired by the Honourable George Adams who acts as a neutral facilitator. This approach prevents either side from high-jacking the agenda of the meeting.

The Physicians Services Committee has a number of sub-committees that report to it. These sub-committees are divided on particular issues which are complex or which require significant technical knowledge.

The agreement which established the PSC and its sub-committees also created an obligation for all of the members from both the Government and the OMA to be given a course on conflict resolution. That course was given with all members from both sides attending together. The intention was to attempt to establish a format and atmosphere in which issues could be discussed openly and honestly and where alternative solutions could be proposed by anyone without attribution. Further it was understood that agreement on everything would be unlikely. That doesn't mean that the relationship necessarily needs to end or that there necessarily needs to be sanctions of any sort.

This Committee has now been meeting for almost two years. A number of very creative and unique approaches to the problem of utilization have been developed by the PSC or its sub-committees and recommended to both the OMA and the Government of Ontario. To date, I can report that virtually every one of these recommendations has either been adopted by the Government and the OMA or is about to be adopted.

The process has not been easy. There have been many times when emotions have run high. However, because of the commitment made by the individual members of both the PSC and its sub-committees at the onset, very difficult problems have been approached and solutions achieved that otherwise would have been impossible.

MUTUAL GAINS BARGAINING: HOW DOES IT WORK

THE NEXT BEST SOLUTION CONCEPT

In order to properly commence a process of mutual gains bargaining, it is necessary for both sides to carefully examine the interests they need to protect. They also have to speculate about the interest which the other side needs to protect.

Each side then needs to inquire as to whether negotiations are necessary at all. This requires an examination of what I call the "next best solution" ("NBS"). The NBS is a solution to the issues which confront your side which can be solved without agreement of the other side. If your NBS is better than a negotiated settlement, you have no need to negotiate at all. On the other hand, if your NBS is not as good as a possible solution achieved through negotiation, then there is a reason for you to negotiate.

The other side goes through essentially the same exercise. If both sides come to the conclusion that their "NBS" is not as good as a possible negotiated solution, then the fundamentals exist for mutual gains bargaining.

Sometimes it will not be clear at the onset whether or not the NBS is inferior to a negotiated solution. In such case, either side can enter discussions, always keeping in mind its NBS. When it becomes clear that the NBS is superior to any negotiated solution, that side has the option to implement their NBS. Identifying your NBS not only provides you with an alternative to negotiation, it also provides you with a touch stone to which you can refer during the negotiating process.

It is important that you not only identify your own NBS, but that you also learn as much as you can about the other side's NBS.

When both sides recognize that their NBS and the NBS of the opposite number is not as good as a negotiated settlement, the opportunity exists for both sides to build on this recognition.

HOW TO BUILD THE PROCESS

In positional bargaining, each side attacks the other's proposal and attempts to convince them that their proposal is the right one. In mutual gains bargaining, both sides attack the problem and attempt to discover the solution which best deals with the interests of both sides.

The challenge for bargainers is to assist not only your own side but also the other side to approach the problem in this manner.

In this paper, I have broken down the process into a number of stages.

STEP ONE: IDENTIFYING THE INTERESTS

The first thing you need to do before getting started with negotiations is to identify those interests which both you and the other side have in the process. This is true whatever approach to bargaining you intend to take.

There are three types of interests that both sides need to consider:

1. Substantive Issues

Substantive issues are those issues which are usually put on the table in positional bargaining as "positions". They deal with money, resources, benefits, or other actual issues that need to be solved during the negotiating process. Often some of these issues will involve fixed resources. Fixed resources issues can easily degenerate into win/lose situations and that realization needs to be foremost in the minds of the negotiators on both sides if the process is to be successful.

2. Procedural Interests

These are interests with respect to how the process is to be carried out and how disputes will be resolved. In addition, parties need to deal with how the process of negotiations will be communicated to the principals and how the settlement will be implemented. Very often, procedural interests are not properly considered and as a result, the process breaks down. It is usually appropriate for these issues to be discussed at the front end of the negotiating process. Issues such as communication with principals, communications with the press, and statements as to the issues being dealt with are important because miscommunication on these issues can destroy trust and break down the bargaining. In complex negotiations, a negotiation protocol is often the first thing discussed. It certainly needs to be raised early in the process, especially if the issues are of interest to the press or the public.

3. Psychological Interests

In the negotiating process, these interests can be the most important. They involve how the opposite side is treated, the respect that is given to their positions and the way in which you respond to the proposals put forward by them. It is crucial to the process that you attack the problem, not the people. Negotiators often confuse positions with the people advocating them. This is true both for the advocator and for the person to whom they are advocating. Although people are not always constructive in their approach to a problem, they almost always expect the response to be. Throughout the process work hard to treat the individuals on all sides with respect.

CHOOSING THE TEAM

It is important that you chose people on the negotiating team who actually have the ability to make decisions, or to make effective recommendations. It is also important that you choose individuals who have credibility with people on the other side. They need to have the right mental approach to the problem. They need to realize that the endeavour in which we are engaged is not a power struggle, but is instead an attempt to reach mutually acceptable solutions, keeping in mind the interests of both sides to the bargaining table.

THE USE OF THIRD PARTIES AND OBJECTIVE CRITERIA

Much of the literature discussing mutual gains bargaining describes the importance of using third parties or objective criteria as a methodology to evaluate options that are created during the negotiating process. Although it is sometimes very difficult to do so, parties should agree upon objective principles with which they will evaluate the proposed solutions to any problem put forward by either side. The concept that both sides need to adopt at some stage in the negotiating process is that they are jointly seeking the right solution as opposed to the solution proposed by either side. The use of third party criteria, ie. standards elsewhere in the community, public opinion, the advise of third party mediators, or other similar inputs can be extremely useful in assisting the parties to view problems in this light.

STEP 1A: CHANGING THE GAME

It may be that one side of the bargaining table has decided to attempt to use a mutual gains bargaining approach to the set of bargaining in which they are about to become engaged. What steps can this side of the bargaining table take to move the bargaining in that direction, when the other side of the table has no experience with mutual gains bargaining and is using positional tactics? This is a difficult problem and one that requires patience and a real understanding of where you and your client want to go.

Firstly, it is crucial to defuse the initial antagonism and anger which often accompany positional bargaining, especially in tough times. The key to defusing this anger is listening.

1. The Art of Active Listening

- (i) "Active Listening" is one of the most important arrows in any negotiator's quiver. Contrary to popular opinion, an negotiator who can listen well is more important than one who can speak well. By listening to the other side, and by actually hearing what they say, it is possible to gain credibility. You need to demonstrate, not only that they have been given an opportunity to express their position, but that you have

actually heard what they said.

One of the most important skills that you can learn in this regard, is to "replay the tape". Having given them an opportunity to give their position, you then in your own words, and without the hyperbole, tell them what you have just heard. It is not necessary for you to agree with what they have said, it is only necessary that you establish that you have heard what they said.

- (ii) When they put forward a position, it is important that you do not respond with a counter position. Instead, attempt to understand what the position is and more importantly the interests behind the position. Ask questions to elucidate information about their position and more particularly, the reasons for that position. Where it is possible for you to agree with any of the statements they have made, you should agree. In some cases, it may be advisable for you to say something like this.

"I understand that you feel the following . . .If I was in your position, I would probably feel the same way."

You will note from the above statement that you have not said you agree with them, but you have said that their position has some validity. By saying to them that "If I were in your position" you are making it clear that you are not in their position. This opens the door for them to ask you further information concerning your position. This ability to open the door to rational discussion is a crucial skill for any negotiator, especially one who is interested in using the mutual gains bargaining approach.

- (iii) When responding to statements from the other side, it is more useful for you to comment with "I statements" as opposed to "you statements".

For example, it is far more effective for you to say,

"The effect of that on our side would be as follows.."

as opposed to saying

"Your position is ridiculous"

By posing your responses in your own interest terms, it is possible to greatly defuse anger and resentment and at the same time open the door to rational discussion.

- (iv) Many negotiators use threats as part of their arsenal. The problem with threats is

they normally invite counter threats. Instead of using threats, it is a more effective tactic to warn the other side as to what the consequences of any particular action could be.

Don't say,

"If you do this....we will do that".

Instead say,

"If you do this...we will have to examine our options. Some of those options could be etc.".

The difference in those two remarks is subtle, but by no means unimportant.

- (v) Sometimes the other side will attempt to influence your actions by using a power tactic or sanction. The way in which you respond to this use of "power" will be very important to the success of the negotiations. Experience of many negotiators and supported by theoretical research done using the prisoner's dilemma and other similar game theory approaches, would suggest that a tit-for-tat response is most likely to assist the parties to eventually reach agreement.

By this, I mean the following: If the opposite side uses a power tactic or strategy or sanction in an attempt to influence your actions, you should respond with a similar level sanction, but being careful that you do not escalate or use more power in response to their sanction than is absolutely necessary. At the same time as you use that "tit-for-tat" strategy, you should signal that you are prepared to continue to negotiate and that the use of further "power" on your part will only occur in response to a further use of "power" on theirs.

To respond by doing nothing, simply demonstrates weakness. To respond by using greater sanctions than absolutely necessary creates anger, resentment and escalation of the dispute. A measured "tit-for-tat" response coupled with a clear indication that you are prepared to continue to discuss the issues in dispute has been demonstrated to be the best way to respond in the long run.

2. **Controlling Your Reactions**

Negotiations is, by its very nature, an emotionally charged process. Usually one or more of the spokespersons for either side will have strongly held positions, to which these individuals will be committed. People often find it difficult to separate their own identity from the positions they are

taking. It is absolutely essential for a negotiator who wishes to move the other side from a positional bargaining approach to one based on mutual gains, that they control their own reactions. By controlling your own reactions, you will eventually help them to control their reactions.

Steps that are useful in controlling your reactions are as follows:

(1) **Listen Carefully**

Listen carefully and attempt to pick out from the hostility and anger, the underlying message and interests that are being conveyed.

(2) **Personal Attacks**

If they attack you personally, do not respond in kind. It is appropriate to indicate that personal attacks are not approaches that you intend to use and that you would appreciate it if they would separate personal attacks against you from the issues they wish to raise. If they are unable to do that, it is appropriate for you to call for a time out. A time out will allow them to get themselves under control and allow you to do the same thing.

(3) **Don't Respond Too Quickly**

Don't force yourself into a position where you are responding before being given an opportunity to carefully consider what you are going to say. If they attack with anger and hostility and personal attacks, indicate that you may need a little time to properly respond.

(4) **Become a Spectator**

When you are attacked personally, it is almost impossible to avoid the natural human responses of this attack. Learn to recognize the signs of emotional distress in yourself. Learn to recognize the physical signs associated with anger. Your pulse increases, you feel a knot in your stomach, you feel tense, your senses become more alert. These are characteristics of physiologists describe as the flight or fight response which prepare an individual to protect themselves or flee from a dangerous situation. While they prepare your body for sudden and immediate action, they do not prepare your mind for careful considered responses.

It is almost always inappropriate to respond to a position taken by the other side, while you are understandably reacting to this anger at a physiological level. In these circumstances, it is appropriate to ask for a time out and during that time out attempt to put yourself completely above the fray. Pretend you are a spectator at the SkyDome watching a game from the top level. Look down on what has just occurred and attempt to fashion your response only after you have calmed yourself down and looked at the problem from afar. By

not reacting in kind, you actually will defuse their anger and allow for the possibility of rational discourse.

(5) **Practice the Art of Listening**

When people are angry, they need time to blow off steam. Until they have been allowed to do so, they will be in no mood to listen to anything you have to say. Thus it's crucial that you give them the opportunity to be heard and then demonstrate to them, that you have heard what they have said. As indicated previously, it is always possible to agree to something that they have said or at least to indicate to them, that you understand their position. Saul Alinsky in his famous book, Rules for Radicals, advised people to use tactics that the other side doesn't expect. In negotiating, the other side doesn't expect you to agree with their position or to sympathize.

Anyone who has been exposed to training in the martial arts will realize that it is far more difficult to attack a person who is standing right beside them, then someone who is at a distance. Thus, showing understanding for the position and the reasons for the position, disarms the other side and puts them in a position where they become more amenable to rational discussion. That is the purpose of the exercise. Remember, they won't be prepared to listen to you until they believe they have been heard.

3. **Establishing Trust**

Anyone who negotiates for a living will tell you that trust between the spokespersons at the table is almost always required before there can be any settlement. I believe this to be true in positional bargaining or in any other kind of bargaining, but it is especially true in mutual gains bargaining.

There are many levels of trust. Most people operate according to the other's expectation and not according to their own potential. It is important in fact in order to establish trust, that you behave according to the *other party's* expectation. It is not absolutely crucial that they like what you do. It is important that they can rely on you to do what you say you will do. Trust takes a great deal of time to establish and can be destroyed instantly. If you actively mislead the other side at any time in the process, the chances of them ever trusting you again are virtually nil. On the other hand, if you come into a situation in which there is a high degree of mistrust, it takes a long time for you to establish a level of trust with the other side. It is therefore very important that you say what you mean and mean what you say. It is further very important that you deal with any misunderstandings in a forthright manner as soon as you learn that they have occurred. Negotiators that are the most respected are almost always the ones who have a reputation for personal integrity.

WHAT DO I LOOK FOR

If you have decided to attempt to change the bargaining from a positional approach to a mutual gains approach, there are several signs that you can look for which will tell you whether or not you are succeeding.

- (1) Positional bargaining is characterized by anger, hostility, high levels of emotion and tense atmosphere. If you have experienced that reaction at the beginning of the process and now the process is becoming more relaxed, there is actual discussion taking place and people are exchanging incidents with humour, you know you are on the right track.
- (2) Positional bargaining often focuses on personalities at the onset. Approaches are often characterized by attacks, often attacks on individuals. If the focus has moved from personalities to issues, you know you are on the right track.
- (3) Positional bargaining is often characterized by repetition of the same points over and over again. Each side gets the impression that the other side is not listening. If you have moved to an actual discussion of issues as opposed to positions and if it is clear that each side is listening to what the other side is saying, you are moving in the right direction.
- (4) Positional bargaining often results in individual positions hardening. One side merely indicates to the other that their position is the right position. If the discussion has moved from discussion of the position of each of the parties to the possible solutions to the problem, you are moving in the right direction.
- (5) Positional bargaining is often accompanied by high levels of mistrust. If individuals on both sides of the table are beginning to show signs that they trust what the other side is saying, whether or not they agree with it, you know you are moving in the right direction.
- (6) Finally, positional bargaining is almost always characterized by a discussion of who is right. "I say my solution is the right solution--you say your solution is the right solution". If this discussion has changed so that now both sides are talking about what is right, as opposed to who is right, you have a clear indication that the parties have moved in the direction of mutual gains bargaining.

WHERE DO WE GO FROM HERE

Assuming that you have made the decision to engage mutual gains bargaining as opposed to positional bargaining and that you have achieved some or all of the signs indicated above, you are now ready to begin the real bargaining.

STEP TWO: FRAMING THE ISSUES

In framing the issues, both sides attempt to indicate in a non-threatening and value neutral fashion, the issues and interests that are of concern to them. If the mutual trust has been established, then both sides can lower their guard and tell the other side what is truly important to them. On our side of the table, it is our position to listen to angry, often hostile, threatening positional statements and translate them into interests, problems or concerns that can be responded to productively. It is important however not to try to do this too early in the process.

You should be observing some or all of the signs referred to earlier before you attempt to outline to the other side, what you think their interests are. However, once you have managed to develop the trust required for this open discussion, you need to ensure that you really do understand all of the interests they need to address. Often parties will be very reluctant to be that forthright. It is therefore crucial that you ask questions and ensure that you understand all of the interests they have. It is also important for you to articulate to them the interests that you need to protect. This open discussion of interests that need to be taken into account on both sides is crucial to the process. The problems then need to be framed in terms of the various interests to be taken into account.

This process is often referred to as reframing. Once we have framed and reframed the problems, in terms that are value neutral, we next move the step three.

STEP THREE: IDENTIFYING THE PROBLEMS

Both sides agree on the problems that both sides need to address. Both sides identify the interests which both sides need to protect. Both sides test their own interests and the interests of the other side to ensure that everybody understands the issues, the problems and the interests. This testing is done by both sides asking each other to explain why interests are important to them.

STEP FOUR: GENERATING OPTIONS

There are a number of methods that can be used to generate options for solutions. The key to this process is that nobody owns any particular option. What we are attempting to do in this phase is to get as many possible solutions as there can be without evaluating any of them.

Brainstorming with everyone present can work very well. It is crucial for this process to be successful that no one immediately evaluates the solutions proposed by anyone else. The various

solutions are merely listed on flip charts or a blackboard. This process continues until no one comes forward with any further possible solutions. Other approaches involve individuals, on their own, listing the possible solutions that they conceive of and then the group looking at all of the lists and from that list identifying all of the options which have been proposed.

Whatever procedure is used, the purpose of this exercise is to be as creative as possible without the risk of immediate rejection or ridicule. Negotiators who practice this approach to bargaining will tell you that often the most creative solutions arise in just such a brainstorming session. They will also tell you that these solutions are often ones that would never have been achieved using traditional positional approaches. Often brainstorming sessions create a synergistic energy and an option will be generated as a variation on an option generated by somebody else. Brainstorming encourages people to think out of the box. For this process to work properly, whether or not brainstorming is used as the generator or not, it is crucial that generation and evaluation be separated.

STEP FIVE: EVALUATION OPTIONS

Once all of the possible options have been generated, we then move to the evaluation procedure. As much as possible, this analysis should be done jointly. If the process has worked up until this point, you will now be at the stage where individuals will indicate why a particular solution is not only acceptable to their own side, but also why it is not acceptable to the other side. This process is important to the final result because both sides need to understand why any particular option will create difficulties for the other side. Often this evaluative process will lead to a combination of options. Sometimes combinations will be such that they solve one set of interests for one side combined with another option which solves a different set of problems for the other side. Often options which have low costs for one side can have high satisfaction for the other. Pairing low costs/high satisfaction options for each side can often allow the parties to reach solutions on a number of different problems simultaneously.

As in any bargaining, it is far better to deal with the easier problems first. By finding appropriate solutions to easier problems, we build confidence and momentum to deal with the tougher problems.

Sometimes solutions are hard to find. In these cases, it is useful to develop principles which need to be satisfied in order for a solution to be found. If both sides can agree on the principles, they are well on the way to finding an appropriate solution.

STEP SIX: FINALIZING THE SETTLEMENT

It is a mistake to walk away from the table without formal documentation. Often the trust and good feelings which allow parties to solve difficult problems will leave them with the impression that it is not necessary to codify the solutions in writing. The failure to memorialize a solution in writing can lead to disaster. Often, it means, the parties have not in fact actually reached a solution. If you can't write down the agreement you have made, you don't have an agreement.

In the expression of the agreement in writing, it is important to establish monitoring mechanisms. The relationship that you have established across the table can be carried forward into the general relationship between management and the union. If you build in check points at regular intervals, you have an excellent chance of avoiding future problems that will blow up at your next set of negotiations.

It is also crucially important to agree on dispute resolution methodologies. Under the *Labour Relations Act*, all disputes must be settled by final and binding arbitration. However, there are a myriad of approaches to resolving disputes prior to arbitration. In addition, there are ways of proceeding to arbitration which are expeditious and which can take advantage of third party mediation.

Parties who are able to solve their contractual disputes using mutual gains bargaining will find the number of grievances proceeding to arbitration diminish significantly. Parties who agree to continue the dialogue are far more likely to maintain the mutual trust they have developed during the negotiating process.

FINAL COMMENTS

Mutual gains bargaining is not a panacea. It does not mean that all solutions can be solved without the traditional sanctions used in industrial relations. What it does give to the parties is a better opportunity to solve complicated problems and to build a relationship that allows both sides to maximize their interests.

Any experienced negotiator will tell you that it is a mistake to win too big. A win which humiliates or denigrates the other side is almost bound to lead to future problems. Either resentment will build over the currency of the collective agreement and explode in a protracted strike during the next set of negotiations or you will have effective terrorism throughout the operation of the agreement.

Bargaining is a human process notwithstanding the provisions of the *Labour Relations Act*. Mutual

gains bargaining works because it takes cognizance of the way in which human beings work best together.

This paper, is by its very nature, only a very brief discussion of the issues. There is a growing body of literature dealing with mutual gains bargaining. Over the last several years, a growing number of professionals in the area have come to realize the importance and validity of the techniques briefly described in this paper. Although some of these sources do not recognize the distinct difficulties which exist in the collective bargaining process, some of them have been written with collective bargaining specifically in mind. Even if you don't use the particular methodology as briefly set out in this paper, and in other materials, exposure to the approach will in my view improve your performance as a negotiator. I would encourage you to further reading or courses and have appended a brief list for your consideration.

February , 1999.