Dispute Resolution For Public Policy Makers

Swimming With Angels and Praying With Sharks

Conflict and Public Policy Design

The Need For Collaborative Based Decision- Making

A common thread weaving through the current public participation debate is the need for new approaches that emphasize two-way interaction between decision makers and the public as well as deliberation among participants. Increasingly complex decision making processes require a more informed citizenry that has weighed the evidence on the issue, discussed and debated potential decision options and arrived at a **mutually agreed** upon decision or at least one by which all parties can abide.

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Creating a culture of collaboration requires more commitment and change than, say, working collaboratively during a single meeting or project. For such relatively short-term activities it might be sufficient for the prevailing norms to be temporarily suspended or ignored, but to create a culture of collaboration requires norms that are consistent with and supportive of collaboration.

Collaborative decision making requires a shift in power and thus values in the development of how business is carried out. It is not consultation that government often does. It is a fundamental change in the way the business of government occurs. It is moving from a one dimensional approach of decision making to a multidimensional of *constituency based approach* of decision - making

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  To participate in decision making inherently requires that participants have pertinent information. A choice without information is hardly a choice at all. In the words of Thomas Jefferson, "I know no safe depositary of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education" (Lipscomb and Bergh, 1904, vol. 15, p. 278).

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- The Scholar Margaret Wheatley observed, "None of us exists independent of our relationships with others. … What is critical is the relationship created between two or more elements" (Wheatley, 1999, p. 35-36). Relationships provide the social context in which we exchange information and make choices. The dynamic health of our relationships affects, and is in turn affected by, the quality of our information and choices. Through our relationships, the knowledge, wisdom, and understanding of each individual have the potential to contribute to greater shared meaning and choices that provide greater mutual benefit. Meanings, choices, and relationships are inextricably and dynamically interdependent and are at the core of collaboration.

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WHAT IS ADR?

- Alternative Dispute Resolution (ADR) is a term used to describe a basket of procedures outside the traditional litigation process. Often an ADR process is entered into voluntarily by the parties to a dispute in an attempt to resolve it.

- The form of ADR which we will be discussing in this talk is conflict management that does not involve any form of litigation. Thus, we are discussing different forms of facilitated negotiations mainly by a third party.

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- Gaining agreement on public policy issues is often difficult.

- The policy-making process is fraught with such contentiousness that considerable amounts of time and energy are invested in reaching decisions and managing conflicts that arise with respect to them.

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The Need For Change On How We Resolve Our Disputes

Friday, March 9, 2007 - The Globe & Mail

Chief Justice of the Supreme Court in a speech to the Empire Club of Toronto states:

1. *People simply cannot wait years to obtain resolution to a business dispute.*

2. *The sources of many delays includes increasing complexity of legal motions under the Charter of Rights.*

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ADR as "alternative"

For ADR to be justified it must:

a. Be faster
b. Be cheaper
c. Be more effective in its outcomes, resulting in higher client satisfaction levels rather than lower satisfaction levels in litigation processes, including arbitration
d. Assist the parties in future disputes
e. Have an understanding that is relationship based as the approach in managing all negotiations

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- The court system is clogged with litigation over a myriad of governmental regulatory and civil matters.

- Administrative agencies, federal and provincial, are burdened with disputes.

- The development and implementation of regulatory policy is mired in legalistic and adversarial rule-making processes. Objectives can be lost in the process.

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What is Public Policy?

- The course of government action (or inaction) taken in response to public problems. It is associated with formally approved policy goals and means, as well as, the regulations and practices of agencies that implement programs.

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Contexts of Public Policy

- Social Context

- Economic Context

- Political Context

- Government Context

- Cultural Context

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- The last several decades has witnessed the growth of less costly and time-consuming ways to deal with disputes. These initiatives rest on consensual rather than adversarial models.

- In the **public policy** arena, **negotiation** and mediation predominate as processes that can produce stable and practical solutions to **policy** needs and enforcement problems.

- Understanding the legal context is critical to recognizing the value of alternatives to litigation. Accordingly, this talk will be discussing how to understand that context, the relationship of **law** to **policy**, the limits of **law** and legal process, and the place that **negotiation** and **conflict resolution** occupy in that universe.

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- Poorly handled conflict generates significant costs in corporate settings in terms of:
  - Frustration
  - Disappointment
  - Poor performance
  - Lost hours of management and employee time
  - Hampering of creativity and productivity
  - Souring of relationships
  - High employee turnover
  - Costs of attorneys hired to press or defend against legal suits

- Costly conflicts are not confined to issues within the organization; relationships with outside entities are also involved.

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- In the competitive global economy, companies have become increasingly and painfully aware of the effects of unresolved conflicts on the corporate bottom line.

- Shrewd managers are attempting to address this knotty problem in corporate culture.

- Dispute resolution systems design (DRSD) is gaining an increasing following as an approach to conflicts in modern corporations.

- DRSD is a focused process for developing new or enhanced systems for dealing with a wide range of conflicts.

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Why does government intervene?

- Political Reasons

- Moral or Ethical Reasons

- Economics and Market Failures

- When the market fails to be efficient

Four categories

1. The existence of monopolies or oligopolies

2. Externalities

3. Information failures

4. Inability to provide public or collective goods

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Role of Policy Analysis

Policy analysis is a systematic, organized way in which to evaluate public policy alternatives or the programs themselves.

- Used in a variety of ways
- Assessing problems
- Developing alternatives
- Evaluation
- You can use it to influence policy

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Ways of Analyzing Policies

- Effectiveness

- Efficiency or economic feasibility

- Equity and freedom

- Political feasibility

- May be others as well such as extent of

- participation or flexibility, etc.

- May not carry equal weight

Policy Strategies
Relationship Between Values and Participatory Level

Base on the degree of Participative -Consensual Decision Making in Developing Public Policy	High agreement on values	Low agreement on values
Lowest Agreement level vs Highest lowest level	Technical Solution Based on evidence based Decision Making: Consultative Approach	Chaos
Mid-Agreement Level for both Value Approaches	Negotiations: Between government and Stakeholders	Political Solution: Legislative
Highest Agreement level and Lowest Agreement level	Alternative Dispute Designed Processes: Jointly done by Government & Stakeholders a meditative approach to public policy development	Judicial Solution

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The ADR Model

- Recognizing participants' needs, cultural differences and variations in style, the mediation process allows participants to define and clarify issues, reduce obstacles to communication, explore possible solutions and, when desired, reach a mutually satisfactory agreement.

- Mediation presents the opportunity to express differences and improve relationships and mutual understanding, whether or not an agreement is reached.

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The Ideology of ADR Process Design

- Fair Standards: Defined by the parties, must be independent of each side and must make practical business sense.

- Setting the tone for the future: Long term relationship building.

- Building trust and respect between one another.

- Looking for the best deal, not the cheapest or most expensive.

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Managing Conflict in the Public Sector

- The task of managing conflict in a public organization differs from that same challenge in a private sector organization.

- Conflict management has two dimensions in the public sector that correspond to two distinct, identifiable levels of operation: organizational and political.

- The process and design function of implementing a Conflict Resolution Design also requires tailored systems for these two very different sectors.

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Common problems with traditional systems include:

- Conflict resolution procedures, such as multi-step grievance processes, take too much time.

- Even the parties that 'win' their disputes are often dissatisfied with the outcome.

- Many procedures do not provide any means for bringing the parties most concerned together to address the real issues. There is a need in public disputes involving Public Policy initiatives to establish a process from the first day that is based on finding common ground.

- In some cases, the relationships among the parties are actually worsened through this forum of adversarial dispute resolution process.

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- Few people enjoy dealing with conflicts particularly in the Canadian context. Attitudinal surveys have shown time and time again that Canadians avoid conflict in all aspects of their life, including the organizations they work in.

- Disputes can be distracting people from pursuing more productive endeavors, and they are expensive.

- Not all disputes are destructive, particularly in Public Policy Design. Debating options from the various stakeholders can be productive to the process. Some conflicts then may lead to a sharpening of critical issues and the creation of new systems and institutions beneficial to society.

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- To ensure common ground is the objective in the development of successful public policy design, in order to ameliorate against criticism of the conflict design process, the stakeholders must be involved in the development of the Public Policy Design process, as much as resources and practicality will allow for.

- This allows the stakeholders to agree on how their voice shall be heard. Which then allows the policy makers to bring them into the tent, and thus potentially ameliorating future conflict.

- The parties become part of the process with such an initiative. This cannot be window dressing or a tactic of manipulation of stakeholders.

- Their voice must legitimately count; if that is not your intent then just continue to keep them outside of the tent. There is no point in raising expectations when you have no intent in meeting them. Thus, forcing stakeholders to exit from the process accusing the policy decision-makers of bad faith, which will only create even greater conflict.

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How to Deal with Conflict using a Mediative Approach to Problem Solving: In Process Design

- Parties in dispute agree on a process
- Establish ground rules for the process
- Consider each party's perspective. Let the disputants tell their side of the problem. This may be done together or separately, depending upon how emotional the situation is.
- Focus on listening, restating, and reframing
- Look at the sources of conflict
- Mutually define the problem
- Look at interests behind positions: What are my needs vs. my wants?

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- At its broadest level, the encouragement to use Alternative Dispute Resolution (ADR) represents a challenge to the ethos of adversarial negotiating practices among public policy-makers and litigators.

- Even within the traditional culture, positional negotiators have some sense of a need to consider the costs of total intransigence. If one objective is agreement, a positional view will not allow for the behavioral changes to occur at all, or as quickly as the ADR model allows for.

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Integrative Bargaining

- **Integrative Bargaining** is unlike **Distributive Bargaining** which looks at a zero sum approach when one's interests or positions are in conflict; in other words a win-lose approach. Such an approach is high stakes in the development of public policy, sure to alienate certain stakeholder groups that decision makers will likely require their support in some other future initiatives.

- **Integrative Bargaining** refers to the process of seeking joint gains by the parties seeing themselves as having a joint problem. Where the parties have mixed motives in such negotiations, the parties attempt to look for trade-offs across the issues, that leave both parties better off, than if they dealt with each separately or through a distributive process.

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The Characteristics of Integrated Conflict Management Systems

- Options for all problems and stakeholders involved in the process.

- Welcomes good faith, dissent and encourages resolution of conflict at the lowest level through direct negotiation.

- Multiple access points in managing conflict: Each stakeholder leader sitting at the central table of policy making is responsible for managing the issues within their own constituency, on the basis of the ADR approach/model.

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The Characteristics of Integrated Conflict Management Systems

Support Structures

- A system requires support structures that are capable of coordinating and managing the multiple options.

- The structure should integrate effective conflict management into the organization's daily operation.

- Culture: A system should welcome dissent (or tolerate disagreement) and encourage resolution of conflict at the lowest possible level through direct negotiation.

- See the work of David Lipsky on this point

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The Characteristics of Integrated Conflict Management Systems

- This model is bottom-line

- Cost based: Must pay for itself

- Litigation/legislative process clearly remains an option

- Cultivates an atmosphere of resolution - Ideology of this Model:

    A)   We can resolve our own disputes as good managers

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The Characteristics of Integrated Conflict Management Systems

B) Creating a culture of openness

C) Train, train, train

D) Empowerment: Do what you believe is best for the organization, not what you believe the organization believes is "right". Taking risks and making judgment calls is the art of good management. Such flexibility must be built into the design of every conflict resolution system.

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The Characteristics of Integrated Conflict Management Systems

- Alignment with mission, vision and values

- Institutionalization of incentives

- Communication strategy

- Costs

- Resources

Escalation of Conflict in our Workplaces: Societal Trends

1.   Parties in dispute agree on a process.
2.   Establish ground rules for the process.
3.   Consider each party's perspective. Let the disputants tell their side of the problem. This may be done together or separately, depending upon how emotional the situation is.
4.   Focus on listening, restating, reframing.
5.   Look at sources of conflict.
6.   Mutually define the problem.
7.   Look at interests behind positions: What are my needs vs. my wants?

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The Characteristics of Integrated Conflict Management Systems

The key in using integrative /ADR decision making processes is designing such processes that are conducive to such objective interaction. The following are the key phases of Designing an Integrative Decision Making and Design Process:

1. The organization must be RIPE to enter the Design Process.

2. There must be a clear understanding at the senior levels of the organization of why the organization should enter into such a process, and what the outcomes are to be. The senior decision makers must be willing to allocate the necessary resources. Costs must be realized at this stage of the process and appropriately accrued for the future. Clear vision!

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3. An outcome document should be written up explaining the need for a Conflict Resolution Design Process. Explain the philosophical shift in managing that will be required in decision making and changing the culture of the organization. Not a overnight process!

4. The design committee should not be too large, but be as diverse as possible on a consistent basis. The design committee should report to the senior management committee of the organization. In public policy issues to avoid future disputes, external stakeholders should be invited to sit on the committee.

5. The running of the committee must be done of the principle of ADR.

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The Design Committee

- Once the committee has struck, its first take in hand is to operationalize the Vision Statement from the senior group and loop it back to them for approval. Once that is done, the committee now has its road map.

- Training, Training, Training

- Once the system is designed using the assistances of a Facilitator trained in leading conflict resolution design initiatives, this home grown system is rolled out slowly, first with training, then as a pilot project.

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- There is a need to have a communication plan to all stakeholders, first to internal stakeholders, then to external stakeholders.

- All of the parties must be trained in how this process operates, but more importantly, why it is in their best interest to use them. They would have been consulted as the design was created, so this is not news to these folks.

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- The role of the Facilitator in the design process is the key role to the success of the final design that the ADR Design Committee will put forward to the organization.

- The role of the Facilitator is not that of an expert, in the sense of "***this is what you do and this is how you do it".*** Although you have this knowledge, you do not express it in this form, rather your role is one of manager/keeper of the process.

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Role of the Facilitator

   a) The Facilitator is committed to an approach that focuses the committee on the micro and macro tasks at hand.

   b) To assist the committee to envision a future with a difference. How is this done?

   c) Through the art of questioning, the Facilitator helps the committee define problems in mutual and solvable terms. They offer hope, and encourage reflection, always searching for a consensus.

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A Secure Environment

- Part of the design of any process must be the environment of conflict resolution.

- Perhaps of most significance to clients, mediation/ facilitation is a safe environment where parties can talk candidly. They are free to experiment with ideas without worrying about being boxed in before they've reached a final workable settlement.

- We feel strongly that in today's environment any definition of mediation/ facilitation must therefore spotlight the **confidentiality** and freedom that parties can experience when mediating.

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<u>Selling the Process</u>

- The participants must have faith in the process-design. Without BUY-IN from the start of the design process, the process is *dead in the water* before it even commences.

- ADR Process Design is always a front-end loaded process. It is never a back-end loaded process.

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The Integrated Model of Conflict Resolution is based on a philosophy of rational choice, where groups must anticipate the outcomes of alternative courses of action and calculate that which will be for the best of the group. Thus, such group thinking choose an alternative that is likely to give them the greatest satisfaction depending on the circumstances of the matter being dealt with. Their **Best Alternative to** a **Negotiated Agreement (BATNA).**

Escalation of Conflict: Societal Trends

Social capital

- The notion of social capital has been around for decades. It is with the work of Jane Jacobs (1961), Pierre Bourdieu (1983), James S. Coleman (1988), and Robert D. Putnam (1993; 2000), that it has come into prominence. This is how Putnam (2000: 19) introduces the idea:

Escalation of Conflict : Societal Trends

Social capital

- Whereas **physical capital** refers to physical objects, and **human capital** refers to the properties of individuals; **social capital** refers to connections among individuals – social networks and the norms of reciprocity and trustworthiness that arise from them.

- In that sense, "social capital" is closely related to what some have called "civic virtue." The difference is that "social capital" calls attention to the fact that "civic virtue" is most powerful when embedded in a network of reciprocal social relations. A society of many virtuous but isolated individuals is not necessarily rich in social capital.

Escalation of Conflict : Societal Trends

Social Capital

- ***Political and civic engagement:***
  Voting, political knowledge, political trust, and grassroots political activism are all down. Americans sign 30 per cent fewer petitions and are 40 per cent less likely to join a consumer boycott, as compared to just a decade or two ago. The declines are equally visible in non-political community life: membership and activity in all sorts of local clubs and civic and religious organizations have been falling at an accelerating pace. In the mid-1970's the average American attended some club meeting every month, by 1998 that rate of attendance had been cut by nearly 60 per cent.
  Putnam(2000)

Escalation of Conflict : Societal Trends

- ***Informal social ties:*** In 1975, the average American entertained friends at home 15 times per year; the equivalent figure (1998) is now barely half that. Virtually all leisure activities that involve doing something with someone else, from playing volleyball to playing chamber music, are declining.

- ***Tolerance and trust:*** Although Americans are more tolerant of one another than were previous generations, they trust one another less. Survey data provides one measure of the growth of dishonesty and distrust, but there are other indicators. For example, employment opportunities for police, lawyers, and security personnel were stagnant for most of this century - indeed, America had fewer lawyers per capita in 1970 than in 1900. In the last quarter century these occupations boomed, as people have increasingly turned to the courts and the police.

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Social Capital and ADR

- The Interaction of such a process as ADR enables people to build communities, to commit themselves to each other, and to knit the social fabric. A sense of belonging and the concrete experience of social networks (and the relationships of trust and tolerance that can be involved) can, it is argued, bring great benefits to people.

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When the other side or all parties are not all that

Rational

How can a rational choice model be effective?

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A Modified Rational Choice Model

The elements to look at with the parties are the following:

1. Emotions
2. Problem
3. Objectives
4. Alternatives
5. Consequences
6. Trade-offs
7. Uncertainty
8. Risk Tolerance
9. Linked Decisions

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Emotions

- The notion that we should not feel the frustration and or anger from a a dispute, is not understanding the nature of social interaction as a process of social exchange, which can cause you to feel all different kinds of ways.

- My only point here is: Feel the emotional hurt or anger, don't bury it – it will only be expressed later in some dysfunctional manner.

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The Need to Forge Strategic Alliances

- The scholarly observation that pre-existing policy structure can affect the emerging coalitions around particular social policy outcomes, is new for social decision makers. Thus, the pathway by which pre-existing policies influence future political action have specified a variety of mechanisms by which policies produce politics!

  Lowi -1964

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The Need to Forge Strategic Alliances

- In order to forge the necessary alliances, there must be an understanding by the decision-makers of the diversity of different belief systems. Understanding the stakeholders motivation, not just their arguments, but why they are arguing what they are arguing?

- The core of any stakeholder belief system will likely give you some idea how the stakeholder will behave. Of course, leadership and the history of the parties' relationship also plays an important role here.

When Social Policy Fails: The Impact of Alienation

Aboriginal women

- The percentage of Aboriginal women living in poverty is more than double the percentage of non-Aboriginal women who are poor. At the time of the 2001 Census, based on before-tax incomes, more than 36% of Aboriginal women, compared with 17% of non-Aboriginal women were living in poverty. Like many other women living in poverty, Aboriginal women are particularly affected by the social assistance policies of provincial and territorial governments. Aboriginal women employed on reserves may not be covered by the Canada Pension Plan.

- High rates of poverty among Aboriginal people are having disastrous consequences. Their life expectancy is seven years less than that of the overall Canadian population. As well, there are almost twice as many infant deaths among Aboriginal peoples - a higher rate than the poorest neighbourhoods in Canada.

  From Statistics Canada - August 2005 Study

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Conclusion

- By continuing to use the efficient resolution of the dispute as a point of reference, parties who focus on negotiating or mediating those aspects of the dispute that do not require coercive adjudication, can reduce transactional costs and delay.

- They will simultaneously increase the likelihood of arriving at an acceptable joint resolution of the underlying factors causing the dispute. Failing that, traditional litigation remains an available alternative.

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Restlessness and discontent are the first necessities of progress.

[Thomas A. Edison](#)