

ADR WITH SPIRIT
GROWING OUR SOULS THROUGH OUR WORK

Multi-party Institutional Conflict Resolution -- Final Paper

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PREFACE

In my final semester of law school at the University of Saskatchewan, the spring semester of 2001, I had the opportunity to participate in the first offering of a course called Multi-party Institutional Conflict Resolution. Our teacher, Professor Marjorie Benson, gave us the freedom to develop our own processes for this experiment: eighteen budding legal professionals, learning to work with each other toward a common goal, while representing conflicting interests.

Professor Benson assigned a few books on conflict resolution theory, arranged for guest lecturers who shared their wisdom and experience with us, and then turned us loose to work out our own solutions to the multitude of problems we encountered.

Our class chose to simulate the treaty implementation negotiations now taking place in Saskatchewan, among Canada, the Province of Saskatchewan, and the Federation of Saskatchewan Indian Nations. This allowed us to experience ADR in a multi-party setting, as well as from a cross-cultural perspective. We saw this as a real and immediate arena for dispute resolution, something that touches all of us in Canada today. We students chose our roles from among the major players in these three parties, then proceeded to work within our teams, and all together at the negotiating table. Throughout the course, we each attempted to be true to our chosen roles; but, beyond these roles, we tried to remain true to ourselves, in order to begin developing our own negotiating styles.

In keeping with the creative freedom that was the hallmark of the Multi-party Institutional Conflict Resolution course, the assigned written component was to be a personal journal. Here, we could record what we learned in an informal and subjective way, being guided by our own minds without the need to

conform our thoughts to any canon. This exercise allowed me to incorporate my imagination, and my love of symbolism and metaphor, into my assessments of our class activities.

The result has been a realization that conflict resolution can and should engage the whole person. Aside from achieving peace and the satisfaction of the parties' interests, ADR processes can lead to ongoing personal growth for the practitioner. We can let our souls into our work, as elusive as that concept is, and subtly heal ourselves of the wounds inflicted by the demanding profession we have chosen. This constant renewal can be the wellspring of fresh approaches to conflict resolution.

INTRODUCTION

Multi-party institutional conflict resolution could be, and is, the subject of lengthy volumes. These few pages are simply my impressions of the experiences and study I have undertaken over the last three months. While the subject matter encompasses an outer world of ideas and practices, and while the aim of multi-party conflict resolution is the restoration of outer harmony and cooperative action, the process of conflict resolution itself takes place within and among individuals. This is what I have learned, above all: Each person involved in the process is responsible for the result. There are no individual heroes, only the occasional heroic act. If one is not part of the solution, one is part of the problem, as the old saying goes. The process is difficult because it demands a setting aside of the ego and a willingness to acknowledge the other as equal. To resolve conflict, one must move beyond conflict; nothing less than the letting go of the personal, in pursuit of the good of all, is demanded.

The challenge for law students is truly great. We are trained in argument and groomed for a leading role in the win-lose problem solving of litigation. Conflict resolution in the sense we have been studying it is the antithesis of litigation. It is not only that we should be seeking win-win solutions; the very nature of the conflict we adopted – the struggle to form a new relationship between the First Nations and Canada and Saskatchewan – means that we need to begin the development of that new relationship at the negotiation table. It is not a matter of coming to an agreement, and *then* starting to be partners in governance: we *are* the start of the partnership. Everything we do and say becomes part of the history of the relationship, and affects

its future development. Trust is what is at stake in multi-party institutional conflict resolution. It is perhaps the most fragile presence of all at the negotiating table.

A FEW INSIGHTS GAINED THROUGH THE READINGS

The Third Side:

I am delighted by William Ury's use of the concept of the "third side" as the key to peace. Based on my personal study of ancient Celtic wisdom, I have been developing my own method of seeking understanding when two forces create an imbalance: look for that third element representing the dynamic between the two forces. How marvelous that in the peace process we can find our answer through the idea of three, rather than remain locked in the dichotomous thinking that characterizes so much of our public and personal debates, our litigation process, our ingrained way of seeing.

I am also delighted by the way Ury shows that the third side can remain completely nonviolent while actually stopping violence by others. He does this by reminding us of the story in the movie, *Witness*, where the non-violent Amish prevent violence from occurring simply by being present as witnesses.² This is a call to move beyond non-interference, to become involved in the actions of others, yet without the necessity of using force to make others conform to one's

own idea of what is good.

The success of witnessing would seem to depend on the level of moral development of the witnessed, or on their fear of facing repercussions upon being "caught." Sadly, we have seen many instances where being caught in the act seems to have no impact on perpetrators of violence. Much raw brutality has been shown on television in connection with warfare throughout the world. Being filmed by news cameras has not stopped murder, mayhem, and the use of unbridled force. Perhaps these events show that in witnessing, and in other methods of getting to peace, we who would seek peace have to move beyond our own conceptions of right and wrong and try to discover what *the violator* sees as right and wrong. We have to understand his or her mind in order to have an effect, to reach the violator with persuasion that touches him or her specifically. This reaching into the mind of another is perhaps the most difficult task precisely because it requires us to set aside our own paradigmatic beliefs.

Apologies:

My initial reaction to the idea of apologies as a critical element of restoring peace where great wrongs have been done³ was that it is insubstantial. Formal apologies have always seemed to me to be manipulative: the wrongdoer is forced to make a show of remorse, and the wronged is put on the spot to accept what seems insincere. Apologies seem too little, too late; they cannot assure that what was once possible will not again become possible. Martha Minnow's examination of the symbolic aspects of apology does help me set aside my cynicism in this regard. Her insights into the paradox of apology – that while it cannot undo what has been done, it does do so in some mysterious way – make the process understandable to me. I am particularly intrigued by her statement that "the methods for offering and accepting an apology both reflect and help to constitute a moral community."⁴ The key point is that the *methods* on both sides are what counts. This is the heart of the matter.

Memorials

Perhaps because I am more attuned to private spaces than public ones, I have not given enough thought to the function of modern memorial constructions. I suppose I have seen them as political, local, particular, and have missed their contribution to the psychological, the spiritual, the universal. Minnow speaks of historian Eric Foner and his vision of how the memorials created by one segment of a population – in celebration of the meaning of an event for them – can be extended in their meaning by the juxtaposition of the concretized memories of another, different segment. This seems a peaceful approach, one that has the potential to open minds, to push understanding over the brink to transcendence of the cherished and personal. I like the idea that rather than force the removal of memorials that serve a minority (such as statues of Confederate heroes), one could *add* memorials addressing the perceptions of other minorities, and thus, as Minnow says, "mark important junctions between the past and a newly invented present" and "render new meanings to memories."⁵

SELECTED JOURNAL ENTRIES

Guest Lecture by Professor Donna Greschner: January 18, 2001

Donna was a representative of Saskatchewan at the 1992 Charlottetown Accord constitutional negotiations. These were the largest multi-party negotiations in the history of Canada (although these are dwarfed by World Trade Organization negotiations which typically involve over a hundred different parties!). Donna emphasized the importance of context: knowing as much as possible about the parties, issues, and history; "more is better" when it comes to the knowledge base of participants. She drew a contrast to the Meech Lake Accord failure in 1990: there the negotiations were held in marathon sessions behind closed doors in an exclusionary and elitist process driven by the Prime Minister. This backfired: Aboriginal Peoples were excluded, and this led to Elijah Harper preventing the Accord's passing in the Manitoba legislature. The lesson for Canada was accepted: at Charlottetown there was an Aboriginal table, meetings were open to the media. The location of meetings was shifted from place to place for the first six weeks, then moved to Ottawa, then moved to Charlottetown for completion for symbolic purposes. Donna noted that reaction against the secretiveness of Meech Lake prompted the creation of a certain "picture" of the Charlottetown negotiations for public consumption.

The actual, day-to-day process Donna described struck me as one that was fundamentally geared toward the psychological aspects of negotiation – or perhaps I should say that her description revealed how much politics is driven by psychological factors. The marathon quality, the insularity, the deadline pressure for making a deal: all seem to me to be ways to let the

breaking-down force, the transformative force, work its magic on ordinary humans who otherwise – well-rested, comfortable, shielded – would have little incentive to let go of their favored notions in order to reach agreement.

Donna shared with us six lessons learned. (1) Knowledge is power (you *must* know the substantive area – you can't rely on your aides when negotiations are underway). (2) There is *a/ways* inequality of bargaining power – know at the outset that you are not going to get everything you want, and identify what it is you *real/v* want before you walk in. Team up with other parties where you share the same interest. (3) The most important work goes on away from the table. You must engage in coalition building. Keep the folks back home informed, and keep the media "fed." (4) Keep professional distance between yourself and other negotiators and teams. Friendship gets in the way of trust, where trust means that you won't play favorites. Don't make *personal* enemies! (5) Park your emotions at the door. (Interestingly, this may be contrary to feminist theory.) Separate the person from the argument, and don't be distracted by someone else's display of emotions. (6) "Know thyself." Know what you need in order to function, and find a way to get it. Know what triggers set you off, and watch that they don't interfere with your own professionalism.

Workshop with Robert Mitchell: February 9, 2001

Bob Mitchell, Chief Negotiator for the Federation of Saskatchewan Indian Nations in the treaty implementation negotiations, met with us today. Bob was able to give us some insights into how the negotiation process we are following plays out in real life.

One of the most impressive of Bob's accomplishments, in my mind, is that he was able to persuade Canada and the Province that the structure of First Nations governments should be the business of the First Nations. The previous push by Canada and the Province to recommend governmental structures was a carry-over from the historic relationship with the First Nations; thanks to Bob's negotiation skills,

the structure of government is not on the negotiating table. What an inspiration!

Asked to explain interest-based bargaining, Bob outlined the process from his perspective and experience. Each party brings a statement of interests (their bottom line) to the table: through this they declare their interests without taking any positions. He noted that the areas of common interest are larger than one would normally think. The parties then keep talking about solutions until everyone can get some of their interests met.

Because this notion of stating an interest rather than a position still seems to elude most of us, we asked for an example. An objectively based statement of interest would be: First Nations want a high school graduation rate similar to white students: a position would be: We want total control of schools on reserves. The Province would counter that position by saying no. The idea of joint or co-jurisdiction might be explored, or the Province might offer some improvements to their school system. The end result would be a lot of compromises to reach the goal of a similar graduation rate, even though only two possibilities have been considered. In any event, the Province would not want to give in and "lose" completely on their expressed position, even though First Nations jurisdiction would be good for the Province. In contrast, if neither side pushes a position, both are free to explore all sorts of options to bring the graduation rate up.

What is the message I take from this? Negotiation has much to do with saving face. And that face is all too human. It is disappointing to me to think that human ego, partisanship, and grasping for power can overwhelm the search for the good of the whole. But on the other hand, we have proof in Bob that with clear vision and humble patience, the negotiation process can be played out with the good of the whole as the highest value.

Meeting with Half the Group: February 28, 2001

Our meeting was small, but we felt an urgency to move toward action. With reluctance we made the necessary decisions, although we felt uncomfortable about making them without our other members. It seemed contrary to our accepted, consensus-based method of operating. I think that is why we did not try to formulate a definite plan of action. We made some progress toward defining our roles, and thus our group identity. We clarified our vision of what we need to do to be true to our "constituents."

Group Preparations for Negotiation: March 1, 2001

By this time most of us had settled on roles. I had left myself as a fill-in person, to serve in whatever capacity was needed. The group decided I should be Chief of FSIN. I still have some anxiety about the free-floating nature of our group. I find myself looking for a leader, and tending to look to Christine to take charge – she is following her own light in this respect, and is not taking a power role.

Our group process is an amorphous one. I am reminded of how I came to rely on the

word "process" after listening to elders and leaders in the Buffalo River Dene Nation. I have known for some time that for me – for my life – choosing a process and then following it makes more sense than choosing a goal and pursuing it. It is so easy to choose a goal wrongly, or mistakenly; so much easier and more sensible to choose a process based on my values and then let it take me where it will. My sense is that this approach will serve me in negotiations – so long as my process is founded in the interests of those for whom I speak.

I came away from this meeting with little more than a feeling for how we will proceed at our first

negotiation session. So much is unknown at this time. I guess we will just go to the table with our understanding of the issues, and see what happens when the other side reveals how it will proceed.

Negotiation Session 1: March 2, 2001

Yesterday was our first session of negotiations with the Federal and Provincial Governments. By the end of the four hours, I was exhausted both physically and mentally, and I needed time to let my mind process all the things that had happened -- and my reactions to them. This morning I am going to try to sort out the various elements of the experience, then weave and braid them according to their correspondences, knotting them back together according to their fit, to see what kind of pattern emerges. My hope is that the pattern will show me how to use our negotiation process to protect and further the interests of my group, to dispel confusion, and to keep out the negative influences that showed themselves yesterday.

Earth:

I had intended to arrive half an hour early, to be with my people and to assess the room and how we could best position ourselves to keep our strong group feeling and mutual support flowing among ourselves. Instead, frustrating circumstances resulted in my being ten minutes late: the worst way for me to begin, and a personal failure in my duty.

The physical arrangement of the room was difficult to work with. The table was conducive to separating the parties and keeping them at a distance from each other. The narrowness of the room led my group, initially, to spread ourselves out in a long line, crippling our ability to lean on each other for support and guidance; toward the end of the day (after 5:00 p.m.) we brought ourselves into a tight knot, by physically locating ourselves in a cluster where we could be in contact once again and share insights and information.

The caucusing rooms, especially the refreshments room, created a space apart in which we could reunite, reassess, and reinvigorate ourselves. These rooms were as important to the process as the main table room. It would have been difficult if we had had to stand in hallways instead of being able to sit together and relax our bodies, so that we could muse about our situation. If I am part of a "real life" negotiation in the future, I will try to have some input into the provision of caucusing rooms.

Air:

What struck me as I walked into the negotiations room for the first time was that I first saw the federal and provincial parties, and I had to hesitate and wonder if I was in the right place:

I hadn't seen these students in so long, they seemed unfamiliar. As the initial problems showed,

a pre-negotiations meeting might have been really helpful: it seems that each side had been

meeting on its own, building its preparations around different understandings of what we were going to negotiate. Initial differences of perception had grown into very different views of our common purpose.

In terms of understanding of the issues, the histories, and the present state of policies, I do believe the First Nations side was more aware and up-to-date. As one of my colleagues noted as we left the building, the people on our side tend to have a longstanding interest in these issues, through years of

personal experience and ongoing concern. To be fair, the students on the Federal and Provincial sides likely have had to try to learn these issues and histories quickly in preparation for negotiations, but it was extremely frustrating to have to deal with their lack of knowledge of what the actual governments have been saying and doing in recent times. In particular, we found that the actual, official stands of the governments in relation to treaty implementation talks were being ignored by the student role-players.

One of the shortcomings of the talks yesterday was the lack of listening. This seemed to be happening not only between my group and the government groups, but also to some extent within our own group, even though we were trying very hard to listen to each other. The problem was greatest in the beginning, and continued to the point when a neutral person (or should I say a person who was admirably capable of behaving in a neutral way) was accepted as the chair.

Our greatest teacher yesterday was the Chief Federal Negotiator, and we owe her respect for that. It is easy to want to speak of her as having been obstructionist, controlling, and yet out-of-control emotionally. But it is more helpful to see her behavior as mirroring our own inner

intellectual difficulties. It was not until she finally revealed *her interest* that we could begin to make sense of her approach and begin to relate to her as a person: she felt responsible for some future state of affairs (legislation to be enacted somewhere down the road, based on the agreement we *might* reach once we had agreed on a protocol for negotiating that agreement). She feared that she would agree to something now that would force the Federal Government to do something in the future that would be against its interests. Her resistance reflects our own resistance: ultimately the reason we resist small things and large is that we fear being responsible. In my group we tend to feel the weight of our responsibility very heavily: it is not our careers as negotiators or chiefs or advisors that we fear tarnishing so much as it is future of the First Nations that we fear damaging.

For all three groups, acting out our roles according to the rigid rules of the Canadian politico-legal system is problematic: we are afraid to catch our sleeves in the machinery, and so we try to keep a safe distance; we are afraid to stray from the safety of the prescribed and approved, and so we resist the beckoning of the creative impulse.

Fire:

The energies in the room were intense: a cocktail of frustration, anger, righteousness, defensiveness. The session began with what our group experienced as a scolding: we had been bad, we were told; we had pulled a fast one and disrupted the plan. This was an extreme approach that was offensive, not only because the accusation assumed an intention on our part that did not exist, but more importantly because it assumed a plan that did not even exist. The primary source of the aggressive energy in the room yesterday was the misunderstanding over the Gitanyow framework agreement that had earlier been suggested as a model: our side had never simply agreed to negotiate on that basis – our side understood the very object of the day's negotiations to be a mutually acceptable framework agreement or protocol. The very way in which the Gitanyow agreement had first been presented created the initial challenge for our group and set the ground for a battle: the Chief Federal Negotiator had taken a controlling and autocratic stance from the moment of her original presentation of the GFA – everyone on our side had perceived that moment as indicating that the Federal Government saw itself as having the power and authority to dictate the process, and that it would use heavy-handed tactics to control the course of the process.

Some fault lies on each side: my perception is that at the time (the initial in-class time), the federal side was not listening to and observing our side; looking back, I recognize that we did not meet their

forcefulness with an equally powerful force, and thus an imbalance was created. (As an aside, there is a form of synchronicity operating here: we all seem to have chosen roles to play that dovetail with our own personal styles. It makes me curious about the possibilities of a scenario in which people identify their preferred roles, and then are asked to play their counterparts.) I believe as individuals our group tended to take the view that because the Feds had tried to steamroller us in the beginning, the natural consequences would catch up to them and show them the error of their ways. It sounds self-righteous, but if they were not able to see themselves as we were seeing them, this was their mistake – if it cost them two and a half hours of negotiating time to reach the point of beginning to work on a mutually acceptable protocol, so be it. The lesson I see them needing to learn is the flip side of the lesson we need to learn: listen;

make explicit. The reason this playing out of the protocol issue was such a crucial point for our side is that it mirrored the whole history of Crown/First Nations relations.

Water:

A blessing on our group is the devotion of many of our members to the feminine ethic. It informed our relations to each other as well as our approach to our task. This strong force was at work balancing the more masculine ethic that appeared to move the other parties. In the end, when Pat took over as chair (bringing neutrality and respect into the process) the balance that was achieved allowed a flow to begin: where there had been a raging whirlpool, locking us into a spiral of confusion, a channel appeared, and we became possessed once again of our respective powers.

I was surprised by the intensity of emotions stirring within my group. Some were reluctant to speak, lest they lose composure. One said she felt she was defending the future of her own child, and although she expressed this in terms of her actual, real-life daughter, this mother-tiger emotion of which she spoke was symbolic of the protectiveness we all felt. Our group emotional component created much cohesiveness for us. I feel this was the source of our strength every bit as much as was our intellectual appreciation of the issues.

If I was surprised by my own group, I was taken aback by what seemed an even greater intensity of emotion in the federal group. Our teacher, the Chief Federal Negotiator, seemed to be suffering, and yet there was nothing we could do to ease that, or at least, nothing we could do right. The lesson I take from this is that when emotions become imbalanced, the negotiation process will suffer, the interests of each side will suffer, we will all suffer.

If I had to identify one particular emotion that surfaced most strongly, I would say it was the sense of betrayal. The Government groups felt betrayed by our last-minute proposal, and we felt betrayed by their belief that they were intended to be in charge of what we saw as fundamentally a three-way process. Personally, I was frustrated by this, because I didn't know how this impression had been created among them. Were they just making this up as a tactic? Was this a rule of the game that I had somehow missed? In any event, it seemed completely unfair for one group to have been given such an advantage, and so my group refused to concede.

My own personal emotional state was relatively calm by comparison to my group's state and the atmosphere in the main meeting room. I had not come with the expectation of speaking at the table, since we more or less were planning to let our chief negotiators do most of the talking. I was assigned to take my turn at the negotiating table for the first round of talks, with Shelley as our negotiator. Once things got underway, I found that my natural impulses were hard to deny: I found myself speaking more than I could have anticipated, because my strongly held values -- fairness, openness, equality -- were

being challenged. When we switched positions after 5:00 p.m., I took my seat in the second row support position, but our negotiator, Allison, asked me to sit beside her and continue in an active role. Others in the group expressed their appreciation of my activities, and were happy to let me continue as an active participant. There soon came my own most emotional moment: the Federal Chief Negotiator registered her complaint that I was being disrespectful, and I suddenly could see that, indeed, I was. I have seen this kind of behavior in myself before: when another person is saying things that I am certain are incorrect and unfair, and that person is getting away with it, I am prone to lose my manners and

make a show of my disgust. Certainly this is not productive, and I need to learn to see past the offensive behavior to discover the key to transforming it, rather than dissipating my emotional energy in a fruitless or even self-defeating way. I need to keep my eyes peeled for the Trickster.

The emotional element of negotiation exhausts one's energy as surely as the mental effort to be constantly alert and focused. The task seems to be that of monitoring, containing, and channeling emotional energy so as to allow it to shapeshift into a positive force driving toward realization of goals: no mean feat.

Spirit:

Thanks to one of our elders, we were able to smudge before negotiations got underway. This ceremony stayed in my mind and helped keep me grounded. If I was part of a group that did not have this particular tradition, I would try to encourage everyone to do something analogous that had meaning for our group. I intend to start building up a mental file of symbolic gestures that can be appreciated more or less universally, that would be appropriate for cleansing, strengthening, and grounding.

Much to my surprise, the Provincial team represented the unseen hands yesterday. I could hardly have guessed this would happen, because in real life I see the provincial governments as determined opponents of First Nations's governmental aspirations. My group had to back away from an instinctive mistrust in order to allow the provincial team to play mediator between our group and the Federal team. So long as we focused our attention on the behavior of the Federal party, so long were we blind to the possibility of aligning ourselves with the Province: we both had interests that were being frustrated by the Feds, yet our side was not easily available to be moved in that direction.

One of the frustrating aspects of the negotiations was the sense that the Federal party was clinging to the spirit of an age past, refusing to embrace the spirit of the present. Despite protestations, the retention of control seemed (to us) to be the principal interest of the Feds: a threshold was open to them, yet they balked at passing through. A fair future lies on the other side of the threshold, in a world unlike the one we know now. Our side, too, has its problems with entering that other world. My biggest concern is that we are afraid to give up the sense of security, such as it is, that comes with the fiduciary relationship. It is going to be hard to make a sound and convincing argument for a trilateral *partnership* until we can argue without reference to what is a position of inherent inequality. In this we are like the Feds, resisting the forward momentum out of a fear of being responsible for a future state that we cannot predict.

Knotting:

How now to take these elements and weave them back into a balanced, strong, and protective whole? The day of negotiation was marked for me by a disappointed expectation: I had understood that we would all be engaging in interest-based bargaining. I had read of the ever-present danger of falling back into position-based bargaining, but I didn't realize how powerful that tendency is. I have noticed that our group as a whole has been more focused on positions and tactics and predictions than on getting a grip

on how we are to present our interests. We seem to have been stymied by our belief that the other side is going to be high-handed and cutthroat. Can we trust a new process? Can we prevent ourselves from falling into a pattern of reacting, and instead keep turning the focus of negotiations back to interests? Can we even

formulate our interests and express them clearly to the other side? Can we make interest-based negotiation work?

We have experienced the physical set-up of the negotiations, and next time around we can rearrange the room to some extent to improve our group support. Decreasing the distances between ourselves and the other parties (one table-width away, instead of two) may enable us to relate better as persons, and yet we may end up too close for comfort. We need more room behind the main table for our back row people to be comfortable and accessible to our front row speakers.

Maybe we *are* more familiar with the issues and history and present, but perhaps this simply means that we should act as patient teachers, rather than assume some ulterior motive lying behind the ideas expressed by the other side. If we listen past the objectionable statements until we hear the underlying interests of the other side, perhaps we could reflect those back to them, and not only gain some trust, but also set a tone for the negotiations. We can also try harder to formulate our interests and present them explicitly. We have gained ground by accepting Pat as chair, and winning the "speaker's rock" as a mechanism for taking turns: it is a workable blend of Canadian rules and First Nations traditions. Now we have something to point to show that a creative approach can be good for all three parties.

Balancing the energies in the room is essential to forming a strong framework for the negotiations. Because we have quite different energies at work, there is a need to refine the expression of those energies. The power with which we meet their power has to be of a complementary nature: opposite in a way that opens a circuit, not opposite in a way that creates a collision and short-out. This is something that exists in a much different dimension than the rest of the elements, and it is very abstract: I don't see this as something that is going to take place in any perceptible way, but rather, this is an ideal to which to aspire. This is perhaps where the element of emotional self-control must be woven in with the even less tangible threads.

We have seen our emotional reactions, and those of the other parties, and we are now more aware of both our strengths and weaknesses. We also have gained insight into the emotions of the other sides. We have seen the calming effect of the rock, and the way it channels the flow of energy, the way a river rock diverts the flow of water according to its shape. The rock has brought success, and my feeling is that it should remain our mechanism for channeling the flow of talk. Our emotional distress can perhaps only be relieved by channeling that energy into preparation – knowing our deepest concerns and values, knowing where our demands may be less than fair, knowing where we will take our stand.

Where are the spaces we can leave open, so that we are receptive to inspiration? We have been focusing on predicting and discovering the tactics of the other side. I have been uncomfortable with this, and it has caused me to wonder if I am too naive to be a negotiator. I fear that if we set out to find signs of tactical moves, we are going to see everything as a tactic, and we will miss the moments where a threshold opens for something genuine to enter.

As good as our teamwork has been, it is clear that we each have our own approaches. We are only together as a working unit for a short time, and we have adopted an egalitarian style for our intragroup processes. The best I can do is try to use this brief experience to begin developing a style that conforms with my inner views: if it is a successful one, sometime in the future I may

be able to further the cause of peaceful co-existence in the real world.

An Informal Meeting Outside the Main Table: March 8, 2001

Today in the library I ran into Paul from the Federal side. I broached the subject of trying to get past the personal dynamic that had developed at our first negotiation, by trying to get down to interest-based negotiation, but he was reluctant to speak to me. He seemed to be of the view that we could not speak outside duly scheduled meeting times, and he felt he could not speak without first clearing it with the Federal Chief Negotiator. Sylvia from the Provincial side joined us, as did Tara from the First Nations side. The rest of us felt that personal exchange was not only O.K., it was a big part of the whole process of trying to reach agreement; but Paul left, and so we were unable to make any headway there. Sylvia, Tara, and I continued to talk about the possibility of reaching the Federal Chief Negotiator's heart, and departed company with a tentative proposal that one of the elders should take the Federal Chief Negotiator for a little walk and a little talk, with the hope of getting down to talking interests.

Personal and Group Preparations For the Second Round

I then read the news release. How damaging that little piece could be when circulated among a public with no other information about what had taken place. How unfair the piece seemed, how superficial. But in reality, that is one of the powers of the media: to trivialize and distort. How to deal with it? I guess just to dismiss it as a red herring flung in our path, an effort to tie up our energy in trying to defend ourselves – another vision of the Trickster.

I spent some time with the Tom Molloy book, musing on his definition of "certainty,"⁶ and preparing a few notes for the group meeting. Certainty includes the notion that the Nis'gaa Agreement sets out all the rights of the Nis'gaa under s. 35, *and the limitations to those rights*. Certainty imports a full and final settlement, and releases the government from any rights-based claim founded on past infringements or on as yet undiscovered rights that may be found in the future. So, certainty may be certainty for the government, but it doesn't sound like certainty for First Nations. Certainty is something the government wants, so it will be up to them to present compelling arguments for it. My feeling is that we can accede to the desire for certainty as regards the agreements for treaty implementation we reach, but not beyond that. And in our negotiations, we cannot commit to certainty until the contents of all sub-agreements are agreed upon.

I also spent time going through the draft sent to us by the Federal side last night. Contrary to what we had been told, instead of flagging contentious areas, the document had been redrafted to leave out the portions of our draft protocol that were not acceptable to the Feds and to leave in their portions. Also, words that were considered very important to us were changed. In our group meeting before last week's negotiations, we had given a lot of consideration to the choice of the word "jurisdiction" and what it signifies in comparison to what "governance" signifies. The choice to go with jurisdiction was an extremely important one to us – yet the other side had replaced it with governance. Good faith *bargaining?*

Our group met from 2:30 until 5:00 p.m. We were more focused this time, and better able to test our ideas against our perceptions of the process and the parties. As always, I am amazed at the egalitarian

ethic of this group. We are working better and better together. While I had previously interpreted our interactions as searching for a leader on some level, at this meeting I became comfortable with the fact that we are all looking to each other for guidance, and for "moments of leadership" depending on each person's unique ability to contribute. The pleasure of being with this group makes up for the frustrations of dealing with the other teams, and it is certainly a learning experience. It is "messy," but it works.

We have been able to set up a strategy for dealing with tomorrow's negotiation session. We plan to keep explaining our interests until the other side hears us and responds. Whether we will be able to do it is something we will have to find out. Through all our discussions I have had a wonderful opportunity to hear what others really feel about the negotiation process: each person brings forth something from within, and the result is a whole. I believe what we have is respect, and I hope we will be able to infuse tomorrow's process with that quality.

Negotiation Session 2: March 9, 2001

The second negotiation session proved to be much different from the first. In our group debriefing we all expressed, each in our own way, the feeling that the giving of gifts by our elder Christine had set the tone for the meeting and had turned the tide in a new direction. She had not only explained to the participants the historical protocols of the First Nations as they met with the representatives of the Queen to conduct treaty negotiations, *she followed those protocols*. To my mind, she had focused and directed the power of love to balance the powers that had been met at the last negotiation session. This power of love was able to deflect the power of fear and redirect the energy toward problem-solving. A space was opened for respect to flow in to moderate the strong emotions on both sides, enabling all of us to hear each other better. As the Federal Chief Negotiator expressed it, a demonstration of good faith had been made.

This is not to say that the strong personal dynamics that influenced the shape and tenor of the first negotiation were absent in the second; but, I believe cross-cultural dynamics were the strongest features of the second. The "meta-failure" of the second negotiation lay in what I will loosely call the normativity dynamic. The hard-fought struggle of last week had resulted in a process in which, while we had the right to speak in turns as governed by the rock and an impartial chair, that speech was mainly focused on working toward signing off on acceptable clauses of the protocol agreement and tabling unacceptable clauses. Our side's approach had coalesced around our plan to interject wherever possible an expression of our interests. The objective of this plan was three-fold: to try to model interest-based bargaining in the hope that this modeling would be contagious to the other side; to shame the other side into addressing our concerns (such as the education, employment, and poverty rates among First Nations peoples); and to channel our emotional energy into constructive education about the issues. Although we did that as often as we could, most of the precious negotiating time was snatched away by the normativity dynamics, even as the first negotiation had been snatched away by the personal dynamics.

We likely would not have dealt directly with substantive issues had it not been for the

Provincial Chief Negotiator urging us to break away from the formalities of signing-off and tabling in order to *talk* about the issues. In this way, he reopened a space for us all to experience interest-based

bargaining for at least a little bit of time.

Two substantive issues were actually addressed – certainty, and the "governance"/ jurisdiction" question – although Paul's comments indicated that he and the Federal Chief Negotiator had failed to see that this latter issue was really at the heart of the whole matter, and that our side had been talking about it all along. This is where the blinding effect of colliding cultures was perhaps most palpable.

Certainty: a collision point between bargaining positions, but more fundamentally, a collision point between the interests of two very different cultures. On this point, our side cannot say that the other side was misguided or uneducated as to the present reality and the historical relationship. Certainty was at the heart of the Crown's interests in the original treaty-making, and the words of the written treaty attest to this. The Crown sought the signing off on the ceding, surrendering and releasing of all the indigenous peoples' rights, titles, and privileges whatsoever

– certainty – so that settlement and development could move forward. Then as now, certainty is said to be in the best interests of First Nations. It is said to be necessary to enable the First Nations to develop! What is left unspoken is that it is only the existing uncertainty over land claims that is hindering non-indigenous groups in their quest to develop. And the uncertainty over when and what claims for infringement will arise in the future seems to be driving the Canadian government and the Canadian public crazy. Yet the First Nations are being offered certainty as the reward for granting certainty! And it's all in their best interest! It is *for them* that

the certainty clause is included in the first place! In telling us this at the negotiating table, the other side was indeed correctly mirroring the position of the real-life federal and provincial governments – but in the process they were losing any chance of trust.

As to the issue of governance vs. jurisdiction, lack of awareness did seem to be at play

here. The most startling indication to me that the other side was misreading or failing to read us altogether was Paul's bafflement that we had chosen not to include governance as a substantive issue to be addressed in the protocol agreement. I took this as revealing two related possibilities:

one, that he didn't understand the idea that by tabling it, we were indicating only that we were not prepared to agree to the drafting, and not that we didn't think it was important to the whole process; and, or, that he simply didn't understand how absolutely crucial the idea of governance is to a new relationship between Canada and the First Nations, even though we had been

indicating all along that this was our prime concern, and a fundamental aspect of a nation-to-nation relationship. Had we not run out of time -- because we had all gotten caught up in the normative process of going through the agreement line by line -- we would have attempted to

reach agreement on this key point: First Nations governance (the *conduct* of life and business) is not on the table. We want to hammer out the details of jurisdiction (the range of authority and

the persons, matters and territory over which it extends), but in keeping with the inherent right of self-government, the manner in which the First Nations govern within their jurisdiction is not a

negotiable matter that should require making deals with other governments. The blindfolding effect of normative thinking about the relationship between Canada and the First Nations

prevents this from being easy to grasp.

The ultimate lesson of the day, as so eloquently and powerfully expressed by our CoChief Negotiator, Shelley, at the close of negotiations, is that what we have been participating in is an encounter between two cultures. Not only are our interests very different, our respective approaches are fundamentally opposite. To me, the persuasiveness of Shelley's oration is born out of her unique location in this cross-cultural exchange: she occupies the threshold between the white/Canadian governors/hierarchical-patriarchal group on the one hand, and the indigenous! "excessively governed" / egalitarian-feminist group on the other. She made it plain that she had joined our side without a background knowledge of the issues and history, and so had no more time than the Federal and Provincial groups to learn those issues and history. She had never been part of a circle-style organization, yet she had learned to trust its process to find answers and work effectively. Her personal plea for giving "uncertainty" a chance was thus, in my view, a powerful invitation to the other side to rethink the possibilities: there is a potential future Canada in which both indigenous and non-indigenous ways of knowing can support us.

Debriefing

The overall effect of the debriefing was to cause me to wonder how I manage to function in a world where others see things so differently from me. Rather than identifying particular persons, I will simply note which side each was on, and the comments that surprised me:

Province: #1 – "I never heard the aboriginal team present any interests" [lesson for me: be more explicit]

#2 – "some people just like to hear themselves talk" [am I like this?]

Federal: #1 – although admitting to lack of knowledge about the issues, this person still says he/she was right in his/her opinion of how the negotiations should have worked – still calls our behaviour "throwing curve balls" – and claims to dislike causing conflict [lesson for me:

communication has to be tailored to the recipient – no matter how impossible a task that may seem – to do this I *must* understand the other]

#2 – "the protocols made for a stilted debate and stopped the free flow" [at least someone sees some things as I do - this is my point about the normativity of following a certain process]

#3 – "we talked about respect, but then accused each other of bad faith. . .everyone was just out to get as much as they could" [I need more patience and faith if I am to negotiate with others]

#4 – "the federal side was right in its position; the federal side had it all planned, but then the aboriginal side sank the whole negotiation; the newspaper article was an effort to be objective; the aboriginal side were simply pulling strategy tricks" [I'll have to think on this for a long time before I see how to deal with this kind of mind]

#5 – "the second negotiation session was worse than the first – the lack of communication [by the aboriginal side] resulted in the Federal side not being able to do their research" [this I cannot accept – I wouldn't excuse myself so easily]

First Nations: #1 – pointing out that the Federal side had simply tried to impose a protocol, a deadline for us to comply with their demands [lesson for me: communicate, communicate,

communicate – until you are understood]

#2 – "the negotiations were stuck in attitudes (toward First Nations) from 15 years ago" [lesson for me: getting people to change their attitudes is the key; doing so takes constant effort]

#3 -- "surprised by the accusations of strategizing [as was I]; the negotiations were stuck because they were mired in Canadian legal concepts" [lesson for me: scrutinize myself closely to see when I get mired in one way of thinking]

#4 – "we let each other down; we didn't do our interests well; we are all too adversarial" [when I heard these things I was not only surprised, I was ashamed, and I went into denial – now as I read these words again, I realize that there is truth here. I hear the word "devotion" as an answer – more hard work!]

#5 – "everything counts - because of differing perceptions, symbolism; we may have talked about interest-based negotiations, but what was going on was power strategies" [perhaps most people see others' actions as strategic, as having an ulterior motive, and hence being fraudulent – does *anyone* trust anyone? Is the world full of deception? Or am I being fooled again by the Trickster?]

#6 – "our performance was marred by conformity – if we had had a true circle instead of the standard table, it would have gone better" [I agree – I interpret this "conformity" as what I call the normativity dynamic – maybe interest-based negotiation has to be infused with the circle ethic]

The result of debriefing? I feel sad: some of us came face-to-face with our limitations,

our pettiness, our pride; some of us still see ourselves as being "right." On deeper reflection, we can all be a little kinder to ourselves. We didn't come to the table as experienced negotiators. We all learned something, and we each have the opportunity to take that which we have learned and try to create something fine with it. If I never sit as a negotiator, at least I will have some basis for understanding what those who do negotiate face. If I am given the task of negotiating, I will at least have some reference point, some experience to help me understand what happens in the process. This exercise is a starting point, not a finished task.

A METAPHOR TO REFLECT UPON AND REVISIT

Multi-party institutional conflict resolution: a spiral dance. Once engaged in the process, there is no straight progression, no unmoving ground, no easy answer. We each start from our own best understanding of the issues at hand and begin the long process of working our way to the center and back out again. As our words and actions issue forth, they take on a life of their own, hindering us or propelling us along, but always shaping our image in the eyes of everyone else. Everyone is listening, everyone is watching, everyone is dancing; eventually we each see each other person, each word, each action, not as they were when they came into the spiral, but as they appear before us anew at each turning. And each participant we see reflects our own image back to us, teaching us. In the end, we may accomplish what we set out to do, we may not. But we will have been revealed to each party at the table, in ways we can never control. Integrity is the key to maintaining self-respect in this intensely personal endeavor. The negotiation process is intimate. It is alive with a life and power of its own. We can't fool it, though through it we

can show ourselves to be fools. It changes us.

Endnotes

William L. Ury. *Getting to Peace: Transforming Conflict at Home, at Work, and in the World*. (Viking: New York, 1999).

² Ibid., pp. 170-175.

³ Martha Minnow. *Between Vengeance and Forgiveness* (Beacon Press: Boston, 1998.) pp. 112-117.

⁴ Ibid.,p.114.

⁵ Ibid., p. 140.

⁶ Tom Molloy. *The World is Our Witness: the Historic Journey of the Nisga 'a into Canada*. (Fifth House Publishers: Calgary, 2000). pp. 62-63.