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An Introduction to Representative Negotiation

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An Introduction to Representative Negotiation

Colleen M. Hanycz, Trevor C.W. Farrow, and Frederick H. Zemans

A Week in the World of Representative Negotiators

An Ottawa Real Estate Deal

On Monday afternoon, Samantha Jones calls Partha Kumar, an Ottawa real estate agent, and tells him that she is interested in buying the house owned by another woman who is moving to Nova Scotia to take on a new job. Samantha had been trying to purchase a house in Ottawa without the assistance of a real estate agent; however, she was having a tough time finding a house that was reasonably priced and in one of the centrally located neighbourhoods in which she wanted to live. Finally, she found a house she wanted to buy. Late last week, Samantha had a number of cordial discussions with the owner, who was selling her house on her own. The owner indicated that she hadn't had much serious interest in the house and that, as of Friday, only one firm offer had been made.

Samantha phoned the owner this morning and found out that nothing had changed over the weekend. However, by midday, as Samantha was getting ready to call the owner back and make an offer, she received a call from the owner's real estate agent. He indicated that there are now two offers on the house, one of which is \$15,000 higher than the other offer that Samantha and the owner had discussed last week and again earlier today.

The call from the agent and the information about the second offer took Samantha completely by surprise. She immediately called the owner, who confirmed that she is now represented by the agent. When asked about the second offer, however, the owner hesitated and then tried to hide from Samantha her obvious surprise about the information. Samantha

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is convinced, after her discussion with the owner, that the “second offer” is only a bluff and that the agent is simply trying to drive up the price in order to maximize the selling price and the agent’s commission.

Samantha asks Partha whether he thinks it would be helpful for him to represent her, particularly given her strong interest in this house and the potential bluff that the other agent may or may not be making. What should Partha say? On what considerations should he base his assessment? If he agrees to represent Samantha, how should he proceed?

A British Columbia Labour Dispute

On Wednesday evening, after three long days of unsuccessful and inflammatory discussions between representatives of management and labour at a timber mill in British Columbia, employees have gathered to discuss the possibility of walking off the job early the next morning. They are fed up of what they describe as poor working conditions, a poor mill safety record, and uncertainty about an outstanding pension dispute that has not been resolved for the past six months.

This week, the mill is completing a large shipment that is set to leave by rail on Friday morning to a long-standing customer in the United States. At the meeting, everyone is certain that a threatened job action at this point would be very disruptive for the mill and the purchaser and would, therefore, likely be an effective means of pressuring their employer for some kind of immediate concession. However, a number of employees are concerned about job action at this point. They have heard rumours about potential layoffs at the mill due to a slow US housing market that is having a ripple effect on the home-building sector. The shipment they are currently working on will certainly be lucrative for the mill and will likely maintain good relations with the US purchaser who, notwithstanding current slowdowns, seems poised to purchase further lumber from the mill in the near future.

After a long evening of discussions, employees agree to try to talk to management once more before walking off the job. However, given the previous three days of unsuccessful and acrimonious discussions, it is also agreed that negotiations should only proceed with the assistance of a representative negotiator. Even though it is late, the group decides to call Dina Williams, a friend of one of the employees and a long-time union-side negotiator. During the call, Dina is briefed about the situation. Before the end of the conversation, she is asked whether she thinks there is value in bringing a representative into the negotiations at this stage of the dispute. And, if she thinks there is value, Dina is asked to give an overview of the strategy she would use in the negotiation if she were to take the case. Dina says that she will think about the questions over night and get back to the group early the next morning.

Assuming that she agrees to take the case, what should Dina say about the value she would add and the strategy she would use? What considerations might influence her thinking?

Agent Orange Litigation

On Friday afternoon Jim LeBlanc, a partner at an established Montreal law firm, receives a call at his office from the CFO of a large Quebec chemical manufacturing company. The company—a market leader that has been in business for over 60 years—is a significant client of the firm in terms of its annual billings.

During the 1950s and 1960s, the company was involved in a number of different herbicide projects. It produced a chemical component that became an essential ingredient in the defoliating compound known as Agent Orange, which was used primarily in the late 1960s by the American armed forces in the Vietnam War. After the war, widespread reports of dioxin-related health problems stemming from the use of Agent Orange began to emerge. An estimated 3 million Vietnamese suffered physical problems as a result of the use of Agent Orange during the war. Countless others, including American war veterans, also had severe negative effects from the chemical.

Ultimately, legal action by victims, their families, and others is being taken on several fronts, including suits against a number of US chemical companies. There are various thorny legal issues at stake in the litigation, including disputes about causes of action, limitation periods, evidence, and jurisdiction. There are also significant political issues at stake. Vietnam is currently going through major social, political, and economic reforms and is increasingly seeking acceptance into the global economic community. At the same time, the US government and others are actively engaging with Vietnam on both political and economic levels. There is therefore significant interest in finding some kind of resolution to this difficult issue.

The Quebec company's CFO informs Jim that until recently the company has not been part of the litigation. However, given its involvement in the production of a component of Agent Orange, and further, given the wide-ranging jurisdictional issues that are at stake in the US litigation, the company has been recently brought into the dispute. The Canadian government has been informed of the situation and is sending a representative to Washington next week to discuss the situation with US authorities. At the moment, no one is certain how the situation will play out. While it seems in everyone's interest that a diplomatic resolution be reached, one does not seem to be forthcoming. As such, all of the litigants involved are both preparing for litigation as well as looking at ways of potentially negotiating a settlement.

A colleague of Jim's has been asked to lead a litigation team. Jim, however, is being asked to lead a separate settlement team on behalf of his Quebec client—alongside the litigation efforts—to see if the company can somehow either be let out of the litigation or at least play only a minor role in any kind of financial settlement. Jim agrees to take the brief. When approaching the negotiation, what considerations will inform Jim's negotiation strategy?

Representative Negotiation

These kinds of disputes, and countless others involving all aspects of social, political, and commercial relationships and endeavours, occur every day across Canada and around the world. They invariably involve very different individuals and organizations with very different problems and interests. What they all have in common, however, is the potential to become disputes that form the basis of a representative negotiation.

Negotiation is a dispute resolution process that has been around as long as disputes themselves. More recently, however, negotiation has become the subject of intense academic study and practical training. Scholars and practitioners—influenced by a wide range of research in areas such as sociology, economics, psychology, political theory, law, communication, and media studies—have over the past half century, and particularly over the past 25 years, made significant advances in the way that negotiation is thought about, taught, and practised.

Surprisingly, negotiation conducted *on behalf of* disputing parties—third-party, or “representative,” negotiation—has been much less studied and is less understood as compared with basic direct negotiation and its tools and processes. It is this important landscape that we sketch and depict in *The Theory and Practice of Representative Negotiation*.

This Book

This book examines the influences on and the issues related to representative negotiation. Unlike direct negotiation, when representatives are added to the negotiation mix, a number of other opportunities and challenges emerge.

A threshold decision is whether to use a representative in a negotiation. Will adding Partha to the Ottawa real estate negotiation, for example, assist Samantha in successfully dealing with a potentially difficult real estate agent? Adding Partha to the mix will certainly bring another set of interests to the negotiation—those of the representative—beyond the direct interests of the principal disputants. Deciding whether to add a representative, and then understanding, managing, and capitalizing on the extra interests of the representative—such as, self-interests, professional interests, and public interests—are all matters taken up in chapter 2.

The Process Model of Negotiation

In chapters 3 and 4, we introduce a novel negotiation framework that we advance throughout this book: the process model of negotiation. Usually, negotiation models are based on a particular strategic approach, such as distributive bargaining or integrative bargaining. Often these models focus primarily on disputants’ “positions” or “interests.” The process model of negotiation, on the other hand, is neither solely distributive nor integrative, and it is based neither solely on positions nor interests. Rather, our model is driven primarily by an assessment of the “value climate” of a negotiation: essentially an assessment of what is at stake in a potential negotiation settlement and what is available to satisfy the various divergent interests around the negotiation table. The assessment of what we are calling the negotiation’s “value climate” determines the strategic approach that should be adopted. For example, if there is value to be generated or revealed, then the model urges representative negotiators to adopt an integrative framework (that is, an approach that *creates* or identifies value). If, however, an assessment of the value climate indicates that there is little or no additional value to be generated—a point that, we argue, arrives in every negotiation—then the model urges representative negotiators, acting in the best interests of their clients, to shift to a distribute negotiating framework (that is, an approach that *claims* value).

So when Sandra is considering her approach to the BC labour dispute, one of the factors she will need to address is the value climate that is at stake in the negotiation. Clearly the dispute is not just about wages. Additional issues—mill safety, pension security, long-term employment security, and future contracts—are also at play. All of these factors provide moments for value realization and creation. The hybrid model of negotiation—which combines strategic frameworks and is based primarily on the assessment of a negotiation’s value climate—is one that will assist negotiators like Sandra to approach the various stages

of representative negotiation. The hybrid model is also, in our view, one of several unique and exciting offerings of this book.

Chapter 5 takes up the issue of ethics in representative negotiation. Ethics is a surprisingly understudied and underregulated area of negotiation. In our view, ethics and professionalism are central to any discussion of negotiation, including representative negotiation. And it is in chapter 5 that we address this issue head on. Is making a “bluff” offer, for example, by the Ottawa real estate agent ethical? Is it professional? If no, what should Partha do about it when acting on behalf of Samantha? Should he “fight fire with fire”? What is at stake for Samantha? For him? For others?

In the next five chapters (chapters 6 to 10), we examine a number of lenses through which to view representative negotiations, lenses that serve to further influence our approach to strategic negotiation. Culture, power, gender, emotion, and communication all play a significant role in the representative negotiation process at all levels: between representative and principal, between representative and representative, and often also—directly or indirectly—between principal and principal. Without seriously considering the role that these various factors play, representative negotiators risk impoverishing the potential for success in a given negotiation. For example, if Jim does not take seriously the culture, power, emotion, communication, and possible gender-related issues that are likely at stake in the Agent Orange dispute, he will have a severely limited understanding of the potential challenges of the negotiation, as well as the potential range of resources that might affect the value climate of that negotiation and its settlement. By contrast, if Jim is to look at this negotiation from as many different angles as possible, he will enrich not only his understanding of the matters in issue, but also the strategic gains that he is able to achieve using this process.

Finally, in chapter 11, we take a critical look at settlement advocacy. Sometimes, there are many good reasons why disputes should not settle, at least not in private with the use of informal negotiation tools. It is important to consider when representative negotiation should be used and when more formal, traditional, or public tools—such as litigation—should be used. This calculus is important both at the micro level (the client) as well as at the macro level (society). For example, would the private resolution of the Agent Orange dispute be to the benefit of Jim’s client? Likely so, given that reputational and other financial interests often motivate the desire to keep a lid on the client’s involvement in the dispute. However, from society’s perspective (which potentially comprises the views of members of various national and international communities), having the matter resolved in public—through traditional court-based tools that are the subject of attention and scrutiny by the media and non-governmental organizations—might address broader public interests regarding corporate and regulatory behaviour modification, public vindication, monetary compensation, etc. So depending on your—and your client’s—perspective, the choice to resolve cases by direct or representative negotiation engages significant public policy considerations.

As we know from the scenarios above and from our own daily lives, representatives are central to our negotiation culture. By examining the nature of the relationship between representatives, as professionals, and principals, we are better able to think about negotiation strategically. And by thinking about negotiation strategically, as representatives, we are able to optimize the interests of our clients.

We offer one model for thinking about negotiation, a model that is centred on the availability of value and resources to satisfy the needs and interests of the principals to a negotiation.

We also highlight some of the many other factors that should be considered by a representative when planning a negotiation strategy in order to achieve the best possible gains on behalf of someone else. And throughout this, we emphasize the crucial role played by ethics and professionalism in representative negotiation. Whether you represent your client as a lawyer, a business person, a real estate agent, or otherwise, you must continually be aware of your own distinct ethical position as you navigate the challenges posed by negotiating for someone else. You must also recognize that some disputes may not be best served by informal resolutions that tend to occur in private and without review.

In the pages that follow, we offer many bits of information and suggested perspectives that we believe should inform your approach to negotiation. We ask that you think about all of them as you begin to understand the inner workings of representative negotiation.