

# COLLABORATIVE LAW

## PROMISES AND CHALLENGES

*By Victoria Smith. Printed in Interaction Magazine, December 2003*

At the International Academy of Collaborative Professionals' (IACP) Conference in Vancouver October 17 - 19, 2003, Leonard George, former First Nations' Chief, gave a moving blessing to start the plenary session. He told his audience that to get the wife you want you need to be that kind of husband. To get the child you want you need to be that kind of father... He declared that the time had come for healing and reconciliation in many areas of conflict. Those hearing his message could not help but conclude that to get the kind of client you want, you need to be that kind of lawyer.

Collaborative law invites lawyers to look inward and challenge our thinking and training about how we can best support our clients through separation and divorce. To provide a process allowing partners to divorce with dignity requires profound and ongoing changes in our approach and mindset.

At a minimum, collaborative law offers a way to stay out of court and reach efficient settlements. At its most expansive, the collaborative process provides an opportunity for healing and personal growth. Collaborative law seeks to transform the practice of law from a competitive, power-based system to a humanistic process of peaceful conflict resolution.

Collaborative law emerged in 1990 at the initiative of Stu Webb, a sole practitioner from Minnesota. Fed up with adversarial family law, Webb created a process in which clients and lawyers contractually agree not to litigate. Lawyers are hired to assist the parties to reach a mutually acceptable settlement through a process of interest-based negotiation. Negotiations take place in a series of face-to-face meetings in which the lawyers act as negotiation coaches as well as legal advisors.

Out of this early development, several collaborative models have evolved. In some places, the model has developed as a lawyer-centered approach. In other areas, Collaborative Law has become more interdisciplinary. Parenting coaches, parenting mediators, child specialists, financial specialists and other experts are integrated into the collaborative process when needed. In yet another approach, called "Collaborative Divorce" the clients retain a multidisciplinary team at the outset of the process.

The message of collaboration is being enthusiastically received by clients hungry for a respectful, cost-effective, empowering divorce process and by lawyers who seek meaning and value in their work. That's why the collaborative movement has been growing in leaps and bounds since its birth in 1990. The collaborative process has now been established in 28 US states and every province in Canada except the Yukon and Nunavet. Groups are organizing in England, Ireland and Austria.

The IACP has grown from a group of lawyers and mental health professionals in San Francisco in 1996 to an international association whose membership doubled to 540 in the last year. Local collaborative law associations number 100 at last count. The IACP has launched an international marketing campaign to ensure that every person faced with separation and divorce will know about the collaborative law option. In 2003, the law school curriculum at the University of British Columbia, the University of Ottawa, the University of Santa Barbara and the University of Texas was expanded to include the collaborative process.

Collaborative law may also be slowly moving into other areas of law where ongoing relationships between the parties are important. For example, the Cincinnati and Boston Collaborative Lawyers groups are working to bring collaborative law to civil lawyers.

The collaborative process is full of promise and potential. Based on the experience of collaborative law in the family context, proponents have identified many benefits:

### **CL produces better outcomes, more efficiently.**

Parties in adversarial negotiations communicate indirectly through their lawyers, and exchange limited, position-based information. Fear, anger and mistrust often lead to first strike and retaliatory actions. Extreme position taking and blame polarize the parties and exacerbate conflict. Outcomes are generalized and limited to those found within the legal model. In contrast, the collaborative process requires direct communication, full information sharing, an exploration of interests and needs and the generation of options from within and beyond the law. Settlements tend to be creative, customized to the unique needs of each family and

durable. The collaborative process is often faster and less expensive than traditional approaches.

### **CL protects children.**

It is universally recognized that the court process can do serious harm to the parties' ability to co-parent their children during and after divorce. We also know that children are damaged more by conflict between their parents than the divorce itself. The collaborative process promotes good working relationships between parents to minimize the effects of separation on children. Parents are assisted to focus on the needs of their children and learn how to communicate respectfully. They create workable parenting agreements and develop resources and processes for resolving future problems.

### **CL normalizes the healthy divorce.**

The adversarial approach assumes that people need strict rules to control their behaviour and cannot resolve their problems themselves. The collaborative model holds a view of people as able, with proper support, to make choices that promote the well-being of their restructured family as well as themselves. Values such as respect, integrity, humility and compassion are essential to the protocols and principles of the collaborative process. Collaborative professionals integrate their personal and professional values and discover enjoyment and satisfaction in their work. Clients achieve closure of their marital relationship honourably, and move on with their lives with some measure of peace.

### **CL provides the best possible expert service to clients.**

A range of experts may be needed to support individuals and children working through separation. Mental health professionals provide parent coaching and education, separation counseling, communication coaching and mediation of child issues. Financial experts assemble financial information, help create budgets, value assets and prepare projections for future planning. Since lawyers are usually the most expensive team members, and since the intervention of other professionals is often brief, informal and at shared cost, many believe the interdisciplinary approach provides the highest quality service, cost effectively.

### **CL is developing high standards for training and practice.**

A major IACP initiative is to develop standards for

collaborative trainers, training and practitioners. In March 2003 University of Windsor Law Professor Julie Macfarlane, brought together trainers from across Canada and the United States for two days to discuss standards for collaborative training. A consensus emerged that in addition to teaching the collaborative model, both as a dispute resolution mechanism and a process for modeling the skills and tools necessary for the positive reconstruction of interpersonal relationships, collaborative law training must impart knowledge about: negotiation theory, the dynamics of inter-personal conflict, effective communication skills, team building skills, the legal, financial, psychological and emotional elements of the client's circumstances, the interdisciplinary team approach, methods for assessing one's own level of understanding and competence and the capacity of the client for effective participation, and organizational and ethical considerations in collaborative work. Trainers should have substantial experience in both collaborative practice and training. Draft training standards were presented at the recent IACP conference for member input. Practitioner standards are also in the works. While the standards are aspirational, rather than for the purposes of accreditation, they will set high expectations for collaborative trainers and professionals.

Along with its profound benefits, the collaborative approach presents challenges that must be recognized and addressed.

### **Do we oversell CL?**

Some collaborative professionals see collaborative law as the only sensible option for divorcing clients. This may lead them to "sell" clients on the collaborative process rather than educate them about their process options, which also include mediation, traditional negotiation and litigation. Collaborative law is not for all clients, nor for every issue. Many partners will continue to function very effectively and less expensively with a neutral mediator. As well, collaborative lawyers must establish screening protocols for domestic violence, lack of basic honesty or trust, addictions and personality disorders, which may suggest that a traditional process is more appropriate.

### **Can we manage our clients' expectations?**

At the IACP conference, Dr. Macfarlane presented the preliminary findings of a three-year research study following several couples and their lawyers through the collaborative process. The study has raised some

challenging questions for practitioners. Mcfarlane asked the participants to consider what exactly collaborative lawyers and professionals are promoting? She warned that collaborative law is in danger of being seen as a panacea and that collaborative professionals must be careful to clarify and manage client expectations. No matter the process, divorce is always painful. It almost always costs more and takes longer than the parties imagine. Collaborative professionals must explain to potential collaborative clients the pacing of the collaborative process, which moves at the pace of the emotionally slowest person and requires time to establish a process built on trust. While the total cost is often the equivalent of one or two interim motions, collaboration isn't cheap. Ways to offer the process to low income families are being explored and must be found.

### **Who is CL really for anyway?**

Dr. Macfarlane queries how closely the values and aspirations of collaborative professionals and their clients are in alignment. Do collaborative clients really embrace the principles of collaborative practice or do some just want a cheaper, quicker divorce? And what about the commitment not to litigate? Do clients appreciate this is for their benefit or do they believe it is to hold back the lawyers who will rush into court if not restrained? Dr. Macfarlane suggests that we may be on shaky ground when we hold our clients to their highest selves and ask them to do the right thing. What if a client's objectives are inconsistent with what the collaborative professionals believe is in the interests of the whole family? When individual and family goals collide, whose values determine the outcome?

### **What does advocacy mean in the context of CL?**

Collaborative lawyers struggle to redefine the meaning of advocacy in the context of collaborative law. Can we really focus on process and detach from outcome? How do we advocate for our clients' interests, which are bound up in their needs, goals, legal entitlements and individual sense of fairness, and also maintain our commitment to advocate for the collaborative process and the family as a whole? Can we leave control with our clients, even when they want to trade away legal rights for intangible consideration, such as maintaining a positive relationship with the other parent or doing what they believe is morally right? And what about the role of legal advice? Some collaborative lawyers provide only legal principles and general legal

information out of fear that legal advice may polarize the parties or limit creativity. Advocacy in the collaborative context includes: maintaining strong working relationships with all participants; ensuring each client has all of the important information, including a clear understanding of the legal option as one of many; guiding the negotiations; and ensuring that the settlement meets the highest needs of each client and promotes the well-being of the children.

### **Are we skilled enough?**

Many lawyers are not skillful at handling strong emotions. Sometimes the collaborative team must understand the clients' feelings to enable the clients to uncover and explain their interests and consider options. Lawyers must learn how to guide these difficult conversations and refrain from enforcing strict behavioural guidelines, particularly if they are for our comfort, rather than our clients'. Lawyers also need to develop skill in principled bargaining, active listening and open questioning. Otherwise, we may slip back into positional bargaining and adversarial ways. While practice checklists and protocols are helpful, we must resist the urge to seize upon an overly prescriptive approach. Collaboration is an art that requires compassion, self-awareness, presence and a sense of humour. The transformation from adversarial to collaborative is a life journey. The learning curve is steep.

### **Is the law all that bad?**

While the collaborative process values private agreements over court imposed outcomes, and encourages the parties not to feel restricted by what the law provides, most lawyers recognizes the place of the law in determining family matters. Some people require the structure and protection of the traditional process. The law represents community standards of fairness as they evolve from time to time. It provides some measure of predictability and certainty and allows considerable scope for decision-making. While collaborative outcomes are often outside the box, many collaborative clients develop constructive settlements that align closely with the legal model.

### **Is CL alienating traditional lawyers and mediators**

In contrasting itself with the adversarial approach, the collaborative movement risks alienating traditional lawyers. Some clients need to go to court. And

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traditional lawyers should understand what collaborative law has to offer. We should also bring in judges, who can provide credibility and support to the collaborative approach. Some mediators feel excluded from the collaborative process. Mediators and collaborative professionals share the goal of client empowerment and informed autonomy. Couples who choose mediation would benefit from having collaborative lawyers as their legal advisors. Couples who choose to collaborate in a lawyer-centred process may obtain mediation to handle parenting and communication issues. Mediation, collaborative law and the traditional process sit on a dispute

resolution continuum. Clients have a right to be fully informed of the benefits, pitfalls and costs of each process before they choose which is appropriate for them.

While there are challenges for lawyers seeking to transform their practice and embrace a collaborative approach, the desire to have the clients we want and be the lawyers we want to be will continue to inspire the collaborative movement to deliver on its bold promise to transform the practice of law.