COLLABORATIVE PRACTICE IN THE CANADIAN LANDSCAPE

Nancy Cameron

This article looks at the growth of collaborative practice in Canada in the last decade and the legal and Canadian cultural underpinnings influencing this growth. Government recognition of and support for collaborative process has come from both the federal and provincial governments. Statutory support in family law statutes and in ethical standards for lawyers encourage alternate dispute resolution and have helped normalize consensual dispute resolution options. The article also looks at decisions from Canadian courts relating to the practice of collaborative law, including the confidentiality of collaborative process negotiations as set out in the participation agreement and the standard of care necessary for collaborative lawyers.

Keywords: *Collaborative Practice*; *Collaborative Law*; *ADR processes*; *Collaborative Law Statute*; *privilege*; *confidentiality*; *ethics*; *collaborative participation agreement*; *Canada*

I. INTRODUCTION

We know that conflict is a constant in human relationships. Not that it is always present, not that we do not have times of harmony, but so long as we are a vibrant and interactive community, we will have conflict. How we react to conflict, how we engage or choose not to engage, and how we attempt to resolve conflict, are all a part of the fiber of the family and the community we are raised in, and the community we come to call home.

I have often heard the theory that Canada's collective conflict norm differs significantly from that of the United States. Unlike the United States, Canada did not take up arms against Britain in order to gain independence; Canada moved towards independence slowly, over decades of statutory change. The Canadian collective conflict conscience, if there is such a thing, appears to be more accommodating, less adversarial, and perhaps more conflict avoidant than that of our neighbours to the south. This is not to say that Canada has not had its own share of systemic and situational aggressive conflicts. Yet the multicultural mosaic is an often articulated goal that overarches both our interpersonal interactions and our systemic and institutional approaches.

Collaborative practice grew out of one American attorney's frustration and personal response to what he perceived as a toxic system for resolving family disputes, and was Stu Webb's personal "laying down of arms." Given the cultural imperative of conflict and conflict resolution, how does a conflict resolution process grow beyond borders and adapt to the cultural specifics of different locations?

The longest undefended border in the world was a natural border for collaborative practice's first cross-border migration. Sharing both language and common law systems, it is not surprising that collaborative practice began in English speaking, common-law parts of Canada. By the early 2000s, groups had formed in British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario. Within a few years, practitioners were trained in collaborative practice in Quebec, Prince Edward Island (PEI), Nova Scotia, Newfoundland and Labrador, and the Yukon Territories. Today there are at least thirty-seven practice groups across Canada.

The adoption of collaborative practice by Canadian lawyers and the relatively noncontentious integration of the process into a spectrum of ways to resolve family disputes perhaps mirrors Canada's non-aggressive slide from British colony to independent nation.

In Canada, a normalization of alternate dispute resolution processes for family matters has minimized debate about the ethics of collaborative practice, and has allowed practitioners the luxury

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of tapping into some government support for collaborative process. The first qualitative study of collaborative practice, a research project and report by Dr. Julie Macfarlane, was funded with core funding by the Social Sciences and Humanities Research Council and additional funding from Justice Canada.[1]

Government support (both on the provincial level and on the federal level) has resulted in a dialogue about collaborative process which has helped educate the public about process options, train practitioners, and helped give collaborative practice momentum.[2] In British Columbia, a major reform initiative was embarked upon in March 2002 with the appointment of the Justice Review Task Force. The Family Justice Reform Working Group included recommendations to increase the use of collaborative practice.[3] At least two provinces have formally incorporated collaborative practice into their family legal aid schemes.[4]

II. THE CANADIAN LEGISLATIVE ARENA OF FAMILY LAW

In Canada, divorce falls under national jurisdiction, while property is a matter of provincial jurisdiction. Because of this legislative division, each province administers family law matters subsequent to marriage breakdown under two statutes: the Divorce Act of 1986, which is a federal statute and covers divorce, custody, child and spousal support, on marriage breakdown, and a provincial statute, which covers division of property[5] as well as child custody and support and spousal support (with the custody and support provisions applying to both married and unmarried couples). Across Canada, marriages are legally defined to include same sex married couples.

Because of these two jurisdictions, both federal and provincial governments have a stake in family law matters. As well, there are two levels of courts (provincial courts and federal courts) that handle family matters. Divorces are granted in the superior (federal) court, which can hear all matters ancillary to divorce (custody, support, and property division). The provincial court has jurisdiction over custody and support, but cannot grant a divorce, nor can it make orders for division of property on marriage breakdown.

Statutory change is neither quick nor efficient. Since the Divorce Act is a federal statute, it is, as a matter of practice, harder and more difficult to change and amend than the provincial statutes. The first Divorce Act was not legislated until 1968. Prior to 1968 divorce was cobbled together in most provinces under the *English* Divorce and Matrimonial Causes Act, amended in different ways in the different provinces. In the provinces of Newfoundland and Quebec, divorce was unavailable prior to 1968 except by private bill as an act of federal parliament. Provincial statutes tend to be more responsive to change. However, since these are not coordinated federally, they vary from province to province.

III. STATUTORY SUPPORT FOR ADR PROCESSES AND SUPPORT WITHIN ETHICAL CODES OF PRACTICE

A. FEDERAL DIVORCE ACT

In Canada there is statutory endorsement for negotiation and mediation in family disputes. The federal Divorce Act sets out a requirement for all lawyers to follow (signified by endorsement when they start a divorce action) indicating they have complied with s. 9 of the Divorce Act:

> Divorce Act, Canada—s. 9
>
> (2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.

This section of the Divorce Act, enacted in the 1986 amendments, mandates a negotiation approach, wherever practical. For twenty-five years, Canadian family lawyers have been statutorily compelled to discuss the "advisability of negotiating" and inform the family client about mediation facilities. In this culture, it is no surprise that another form of negotiated process has been easily incorporated into the Canadian legal community. I believe this statutory support for nonlitigated processes in family matters has helped set the stage for support for collaborative practice, minimizing the "is it really ethical" debate that has arisen in the United States.

B. PROVINCIAL LEGISLATION

1. Alberta

In the province of Alberta, s. 5(1) of the provincial *Family Law Act* has been amended to read: s.5(1) Every lawyer who acts on behalf of a party in an application under this Act has a duty (a) to discuss with the party alternative methods of resolving the matters that are the subject of the application, and (b) to inform the party of collaborative processes, mediation facilities, and family justice services known to the lawyer that might assist the parties in resolving those matters.[6] In the documents to commence an action, the lawyer must certify that (s)he has complied with this section of the act.

2. SASKATCHEWAN

The Law Society of Saskatchewan is the only law society that has promulgated a rule setting out the training necessary for lawyers to be able to refer to themselves as a collaborative lawyer:

Rule 1620: A lawyer may not, in any marketing activity, describe him or herself as being qualified to practice collaborative law unless he or she has successfully completed a course approved by the Admissions and Education Committee. (This has been set out as two courses—a Collaborative Practice course and an interest-based negotiation course).

C. CODES OF PRACTICE

The Canadian Bar Association (CBA) is a voluntary-membership, lawyer-only group with chapters in each province. The CBA has a code of professional conduct which was last modified in July, 2006. The CBA Code of Professional Conduct, in and of itself, is not a binding code on lawyers. Lawyers are governed by provincial law societies, and each provincial law society has its own Code of Professional Conduct. Some provincial law societies have adopted the CBA code of professional conduct with modification, some have adopted parts of it, and some refer to it for guidance in disciplinary matters. The CBA Code of Professional Conduct includes the following in the commentary to the rule titled "Lawyer as Advocate":

Encouraging Settlements and Alternative Dispute Resolution

8. Whenever the case can be settled reasonably, the lawyer should advise and encourage the client to do so rather than commence or continue legal proceedings. The lawyer should consider the use of alternative dispute resolution (ADR) for every dispute and, if appropriate, the lawyer should inform the client of the ADR options and, if so instructed, take steps to pursue those options.

The Federation of Law Societies is the national coordinating body of Canada's fourteen law societies.[7] The Federation of Law Societies Model Code of Professional Conduct[8] sets out the following:

Encouraging Compromise or Settlement 2.02(4): A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

Commentary: A lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options.

In alternate years there is a national family law conference, sponsored by the national Federation of Law Societies. Collaborative practitioners have met at this conference since 2000, sometimes informally, but always with support of the conference organizers.

IV. PROTECTING THE FUNDAMENTAL PRINCIPLES OF COLLABORATIVE PRACTICE—IS THE PARTICIPATION AGREEMENT ENOUGH OR IS A STATUTE NECESSARY?

Despite growing public dissatisfaction with problems of cost, delay, and accessibility of the court system, changing the culture of dispute resolution is a long, slow, and sometimes tedious task. Although mediation has become common in Canada and has significant institutional support, there is no national mediation statute that defines mediation or sets out parameters for mediators. There has been some movement to set out a skeleton of requirements for lawyers as mediators within professional codes of conduct, but this is specifically to define the lawyer as neutral, which is a different role than lawyer's traditional role as advocate.

Unlike the experience in the United States, no provinces have enacted collaborative statutes. Likewise, neither law societies nor bar associations have expressed the view that there may be an ethical problem with the underlying requirements of the disqualification agreement, or any conflict arising out of the fact that both lawyers and both clients sign the participation agreement.[9]

It is common practice in Canadian provinces that couples enter into the collaborative process prior to commencing any court proceedings. Since the timing for the issuance of a divorce in Canada begins running once the parties are living separate and apart, there is no need to file an order to commence "running the clock" for purposes of the final issuing of a divorce. The usual practice in Canada is to commence proceedings at the completion of the collaborative process for an order for divorce.[10]

Because it is unnecessary to create a statute to limit otherwise mandatory court scheduling intervention, are there other reasons that a collaborative statute may be helpful or useful in Canada? The creation of a collaborative law statute may in itself raise the profile of collaborative practice and increase public knowledge about this process choice. A collaborative statute could also be designed to protect confidentiality within the collaborative process by creating privilege for communications within formal collaborative practice negotiations and by statutorily protecting professionals (including collaborative interdisciplinary professionals) from subpoena if the collaborative process breaks down. Also, a collaborative statute could statutorily enshrine the disqualification clause, disqualifying collaborative professionals from acting for collaborative clients if litigation ensues.

A. RAISING THE PROFILE OF COLLABORATIVE PRACTICE

The International Academy of Collaborative Professionals has worked diligently in raising the profile of collaborative practice and in setting standards.[11] As the Canadian experience has shown, liaisons with government aimed at public education about process options help educate the public about collaborative practice. The opportunities for these liaisons may increase if collaborative practice is statutorily enshrined.

B. ENSURING CONFIDENTIALITY AND ENFORCING THE PROHIBITION AGAINST SUBPOENA OF PROFESSIONALS

With no statute defining mediation or setting out confidentiality for mediation, Canadian law has generally relied on the common law privilege for settlement communications, as well as the

contractual provisions of the agreements to mediate. Both of these (common law privilege of settlement communications and contractual provisions within the participation agreement) also apply in collaborative practice.

The confidentiality portions of the participation agreement are a fundamental component of collaborative practice. The promise of confidentiality helps encourage frank and full discussion, expands opportunities to increase the range of problem-solving strategies, and allows clients to discuss and weigh different settlement options without the fear of prejudicing themselves or of having a tentative agreement prematurely enforced.

In British Columbia, the confidentiality portions of the participation agreement were considered in *Banerjee v. Bisset.*[12] Ms. Bissett terminated the collaborative process within days of attending the first four-way meeting with the lawyers. Mr. Banerjee brought an action seeking a declaration that the parties had entered into a valid and binding agreement in the collaborative four-way they had attended. He sought to adduce evidence (including lawyer's notes) from the four-way meeting to prove a settlement. The court set out the normal rule in British Columbia relating to evidence of an alleged agreement:

> It is clear that evidence of an alleged settlement agreement having been reached by the parties or by their counsel is normally admissible, as are lawyers' notes of the terms of purported agreements; see, for example, *Frolick v. Frolick*, 2007 BCSC 84; *Baldissera v. Wing*, 2000 BCSC 1788; *Sekhon v. Khangura*, 2009 BCSC 670; and *Lunardi v. Lunardi*, [1988] O.J. No. 1882. The issue in this case, however, is whether the parties agreed that different rules would apply to their negotiations, or, more properly, any settlements they may reach.[13]

The court went on to enforce the confidentiality provisions of the participation agreements signed, striking the evidence of Mr. Banerjee that related to conversations and notes from the collaborative meeting:

> In choosing to participate in the collaborative law process, and signing the *Brakeley* and *Alexander [Participation] Agreements*, the parties agreed to have a confidential process; they agreed to forego access to court unless either or both of them withdrew from the collaborative law process; and they agreed that no agreements would be enforceable unless they were agreements in writing. They also, necessarily, agreed to forego disclosing negotiations which stopped short of a written agreement for the purpose of trying to prove that an oral agreement was made and should be enforced. In other words, they agreed to a different set of rules than apply to normal litigation.

Of particular importance in determining confidentiality is determining when a collaborative case is over. Assuming the confidentiality provisions of a collaborative case (including the prohibition against subpoenaing any of the collaborative professionals) extend from the commencement of the case (executing the participation agreement) to the end of a collaborative case, defining when a case ends is imperative. However, this detail is often not contained in the collaborative participation agreements commonly used in Canada. When a collaborative case is terminated (either by a party or a lawyer) the case should be over. But is it over when a party sends written confirmation of withdrawal? Or is it over when the written confirmation is received? If the participation agreement sets out that the process can be terminated by delivering written notice to the other side, is it terminated if someone gives verbal notice?

If the collaborative process is successful in reaching a signed separation agreement, is the process over as soon as the separation agreement is signed? If there continues to be communication between counsel after the agreement is signed, is this covered by the participation agreement? If divorce coaches continue to work with the couple on parenting matters after the separation agreement is signed, is this covered by the confidentiality provisions of the participation agreement or should the parties enter into a further participation agreement with their divorce coaches to ensure confidentiality? If the professional practitioners are not abundantly clear about when confidentiality begins and

ends, they cannot expect that clients will understand this. If practitioners are depending upon the participation agreement to set the parameters for confidentiality, then the participation agreement must indicate when a collaborative case begins and when it ends. If the participation agreement specifically sets out that the collaborative process is over once an agreement is signed, then practitioners need to turn their minds, on a case-by-case basis, to whether or not the participation agreement needs to be extended for any reason. This provision should then be put in writing. This can be done either in the form of a further participation agreement or in the separation agreement, setting out the reasons for extending the participation agreement (or confidentiality portion of the participation agreement) and the time frame governing the extension.

As more collaborative practice groups move to working in interdisciplinary teams, the necessity for overlapping contractual provisions in the participation agreement that covers *all* collaborative professionals is imperative if we wish to maintain the confidentiality and integrity of the process. To the extent collaborative professionals are unclear about the parameters and definition of the professionals' roles in the interdisciplinary models, the public will not be clear. Perhaps the greatest risk to the growth and acceptance of collaborative practice is directly related to the degree its practitioners are unclear about professional role definition, clarity and process parameters.

C. ENFORCING THE DISQUALIFICATION AGREEMENT

The disqualification agreement, which is the hallmark of collaborative practice, provides that the collaborative professionals cease to act if contested litigation is commenced. Without a statute, enforcement of the disqualification agreement relies upon the participation agreement. If one of the collaborative lawyers continued to act in contested litigation, a party would need to bring on an interlocutory application to enforce the provisions of the participation agreement and remove the lawyer as litigation counsel.

Aside from the contractual remedy, a lawyer's reputation may be the strongest motivator to dissuade lawyers from breaching the disqualification agreement. As lawyers, we all understand that our best resource is our reputation. Any lawyer who fails to abide by their contractual obligation under the participation agreement risks her reputation as a trusted collaborative colleague. The interpersonal professional relationships among collaborative practitioners are a profoundly important aspect of client service. In order to build and strengthen these relationships, professional practice groups are a common feature of collaborative practice. These practice groups strengthen the working relationships in collaborative teams. For all collaborative practitioners, being able to trust one's professional colleagues is a central component of our work. Like all relationships of trust, this is built over time, and is strengthened by an agreement on shared values. For any professional to disregard a core value of collaborative practice would likely irreparably affect that professional's relationship with other collaborative practitioners.

In the last decade, the landscape of dispute resolution in Canada has changed dramatically. Part of the impetus for change has been clients not only desiring but demanding non-litigious approaches to resolving family disputes. Yet without practitioners willing to completely rethink dispute resolution systems, retrain, and build new skills, this cannot be offered to clients. Peace building is a value that helps inform the work of this type of systems change. Holding this value allows us to frame the question more broadly than: "Should Canada have a collaborative statute?" If we think about statutory change, what can we do within our jurisdiction to support fundamental statutory change? How do we effectively advocate for change to existing statutes that encourage consensual dispute resolution processes; that support families in resolving disputes instead of assuming families will be in a courtroom? How do we influence statutory change so that statutes provide process options that support healthy post-divorce transitions for children and for adults?

Collaborative statutes aim to address certain legal aspects of collaborative practice. As interdisciplinary collaborative groups grow around the world, the interdisciplinary relationships that develop as well as the ethical issues both within and across professional boundaries are complex.

Our primary task at this time may be, as Dr. Macfarlane cautioned us in her early research, to avoid the rush to orthodoxy. We have the luxury in Canada, of being able to build collaborative practice without having to engage in adversarial battles about whether or not collaborative practice is ethical. If we choose not to squander this luxury, we may instead turn to creating a fuller understanding of the complexity of our professional working relationships, to build abundant clarity about the fundamentals of collaborative practice (including when a case begins and ends) and to bring as much rigour and expertise to our professional roles as possible. It is through providing a sound, efficient, expert model of resolution for families that collaborative practice will grow in use, acceptance, and in profile.

NOTES

1. Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (2005), *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/annexa.html.

2. Examples of early provincial support: the British Columbia Dispute Resolution Office (AG's department) website provided information about collaborative practice as a process option in family matters, providing links to collaborative groups. The province of Saskatchewan received early support from the provincial Department of Justice to help train collaborative lawyers within the province and to develop public education materials. The federal Department of Justice supported training of practitioners in the Yukon and the Northwest Territories. More recently, the province of Ontario has received funding support from the Law Foundation of Ontario for public education and for a project to train collaborative practice trainers.

3. The Justice Review Task Force involved a collaborative effort between the bench, the bar, and the government; the task force was made up of the Chief Justice of the BC Supreme Court, the Chief Judge of the BC Provincial Court, a representative from each of the provincial Law Society and provincial Canadian Bar Association Chapter, the Deputy Attorney General and the Assistant Deputy Attorney General. The Justice Review Task Force appointed working groups in the Civil, Family and Street Crime Areas. The Family Justice Reform Working Group completed its report and recommendations in May, 2005, "A New Justice System For Families and Children." This report recommends mandatory mediation or collaborative process for family disputes before accessing a court process, and recommends the creation of a provincial roster of collaborative practitioners. BC JUSTICE REVIEW TASK FORCE, http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf (last visited Nov. 16, 2010).

4. The most ambitious legal aid project to date has been the government of Manitoba's Legal Aid Collaborative Pilot Project, which made collaborative process the preferred model for legal aid clients. In British Columbia, the legal aid tariff has been revised to include collaborative practice. Legal Services Society of British Columbia has supported collaborative practice training for many of the legal aid staff lawyers.

5. In Saskatchewan, Manitoba, the Northwest Territories, and Nunavut, there are provisions for division of property for both married and unmarried couples. In the other provinces, division of property applies to married couples only, unless parties have specifically entered into a cohabitation agreement covering property division (New Brunswick, Newfoundland, Ontario, PEI, British Columbia, and the Yukon) or, in the case of Nova Scotia, registered as a domestic partnership. On July 19, 2010 the AG's office in British Columbia released a whitepaper detailing proposed changes to the *Family Relations Act*, the family statute in British Columbia, which includes a proposal to include common law spouses in the statutory scheme for division of property.

6. Family Law Act, S.A. 2003, c. F-4.5 (2010). *available at* http://www.canlii.org/ab/laws/sta/f-4.5/20080515/whole.html (last visited Dec. 16, 2010).

7. Each provincial law society regulates lawyers and the practice of law within the province.

8. COUNCIL OF THE FED'N OF LAW SOC'YS OF CAN., THE MODEL CODE OF PROF. CONDUCT, *available at* http://www.flsc.ca/en/pdf/ModelCode.pdf.

9. On February 24, 2007,the Ethics Committee of the Colorado Bar Association issued an advisory opinion stating that it was unethical for lawyers to sign a collaborative agreement. ETHICS COMM. OF THE COLO. BAR ASS'N 2007, ETHICAL CONSIDERATIONS IN THE COLLABORATIVE AND COOPERATIVE LAW CONTEXTS 115, *available at* http://www.abanet.org/dch/committee.cfm?com=DR035000. A critique of the opinion is on the IACP website, at https://www.collaborativepractice.com/lib/Ethics/EthicsTFArticleColoradoOpinion.pdf.

10. Although clients can choose to enter the collaborative process after litigation has commenced, most clients in Canada choose the collaborative process prior to commencing litigation. In most cases there is no reason to commence proceedings until after an agreement has been reached, when proceedings are then commenced for uncontested or joint divorces.

11. INT'L ACAD. OF COLLABORATIVE PROF'LS, STANDARDS, ETHICS AND PRINCIPLES (2005). The IACP Standards include: Principles of Collaborative Practice, Minimum Standards for Collaborative Practitioners, Minimum Standards for a Collaborative Basic Training: Ethical Standards for Collaborative Practitioners; and Minimum Standards for Collaborative Trainers. These can all be accessed at the IACP website www.collaborativepractice.com.

12. *Banerjee v. Bisset* 2009 B.C.L.R.2d.1808 (Can.).

13. *Id.* at para. 12.

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