The Association of Collaborative Family Law Lawyers (N.S.) came into being one year ago. Since that time, 25 Nova Scotia lawyers have committed to an extensive period of training in interest-based mediation, negotiation theory, and collaborative law. By devoting their time and resources to becoming a member of this group, they have shown their commitment to the collaborative process.

The Collaborative Process

When couples separate or when family law disputes arise, clients traditionally have had the following options open to them:

1. Do nothing.
2. Represent themselves in court.
3. Hire a lawyer to represent them in court.

The mediation movement grew as people sought options for resolving issues. The recent growth of collaborative law provides another option.

In the collaborative process, lawyers and clients sign an agreement that they will not go to court, nor will they threaten to go to court. In essence, the lawyers are being hired to assist the clients to settle the case - if they fail, their services are discharged.

Collaborative law differs from mediation in that a mediator cannot offer advice to either party. Like mediation, it is a private, confidential, and non-binding process – however, since lawyers are involved directly in the collaborative process, any agreements which are reached are almost certain to find their way into a legally binding Separation Agreement or Court Order – something that does not always occur with mediated agreements once they are reviewed by legal advisors. Like mediation, it is also a mutual process – no agreement is reached until both parties are satisfied. The clients and lawyers work together as a team to reach mutually satisfying solutions. Any experts who may be retained are retained with the consent of all, and such experts also become part of the team process.

The First Challenge - the Paradigm Shift for Lawyers

The role of the lawyer in the collaborative process is a crucial one.
Because court is not an option in a collaborative file, the lawyer must use analytical problem-solving skills to help both parties find mutually acceptable options.

Because of the nature of the process, however, the lawyer must shed the arsenal of weapons that are available in the adversarial process: pleadings, applications, Affidavits, Rules of Court, and letters stating the client's position. This has been described as a "paradigm shift" for lawyers. Their responsibility is to help the parties move from blame to empathy, from confusion to clarity, from focusing on the past to focusing on the present, from exploring of positions to exploring of interests, from being adversaries to problem solvers.

The traditional model of dispute resolution assumes that the outcome will be determined by someone other

than the client, that there is a winner and a loser, and what is decided today does not affect what might be decided tomorrow. The lawyers who are committed to the collaborative process, to undergoing the paradigm shift from taking full control and responsibility for the outcome to a facilitative role of empowering the client to assume those responsibilities, realize that the interest-based approach to problem solving has different assumptions. The challenges we face include exploring the interests of both parties and finding the common interests that exist, and empowering our clients to make their own decisions and take responsibility for those decisions: helping the clients find "win/win" solutions.

It is no longer necessary to define what is right and wrong, to have a winner and a loser, to have only one answer to a legal issue (the "law model" is only one option available to the parties).

In the adversarial process, lawyers are expected to answer legal questions without seeing the other party (except, perhaps, at a discovery hearing or trial), without knowing any of the background except what the client tells them. The collaborative process recognizes that most, if not all, family-related disputes arise out of a context where personal relationships and family dynamics are of the utmost importance. Since the collaborative process involves a series of four-way meetings, this allows those dynamics to play out.

Why should a lawyer be expected to have all of the answers after a few meetings with the client? Would an electrician be able to solve a problem without visiting the house? Would a mechanic without lifting the hood?

Another advantage of the four-way meeting process is that the possibility of miscommunication between the parties is minimized. Whereas, traditionally, a lawyer would convey the client's position in a letter to the other lawyer, the contents of which could be misconstrued. In a four-way meeting, clarification can be immediately sought, feelings can be freely expressed.

One other advantage is that all of the interests of the parties can be explored, their fears, concerns, hopes, and goals, whereas in the adversarial system, only those which fit within the framework of legal issues are relevant.

One challenge for lawyers is to recognize that being a busy trial lawyer means that you are under-utilizing your negotiation skills. An even bigger challenge is to enter negotiations without the traditional "armour" of adversarial practice - ie., to leave the guns at the door.

There are other challenges. If the lawyer has built up a reputation as a good trial lawyer or a tough negotiator, then a client may have that reputation in mind when the first call is made to the lawyer. Also, most clients have a vague idea, at best, about what the collaborative process really is or how it works, despite the best efforts of the lawyer to explain it.

Most lawyers who have practiced family law for a few years have witnessed firsthand the negative impact that an adversarial proceeding can have on families, personal relationships, and children. One of the unique aspects of family law is that there are many areas in the law where there is no finality to the issues – parenting issues, child support, and, in some cases, even spousal support and property division issues. We are familiar with appeals and applications to vary. And there can be difficulties with enforcement of

certain types of orders, particularly access orders. The necessity of an ongoing relationship between the parties emphasizes further the benefits of a respectful and balanced negotiation process.

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Collaborative law will not be appropriate in every case. A court resolution will still be required in a limited number of cases – another challenge for lawyers is to recognize those cases from the outset and to divert them away from the collaborative process.

The Second Challenge - Public Awareness of the Process

Chip Rose is a collaborative law lawyer and trainer from California and has helped pioneer the practice of collaborative law in North America. He tells the story of a client who demanded of a collaborative lawyer, "I want my legal rights." To the client's surprise, the lawyer replied, "Is that all you want?"

James C. MacDonald, Q.C., in his article "Collaborative Family Law" written for the 2002 National Family Law Program in Kelowna, British Columbia, explained this exchange as follows:

> "To the collaborative lawyer, legal rights are only the tip of the iceberg. Spreading down below the tip in ever widening circles is an assortment of needs, concerns, desires, fears, and preferences that can be lumped together as 'interests.' What Rose thinks [the client] should want - and probably really wants [especially when her higher self regains control] - is to satisfy her interests. It is the special value of her particular interests that gives her more than she would receive from a mere enforcement of her 'legal rights.'"

To give a further example, if a client wants to resolve a dispute in court concerning matrimonial property, then the lawyer would advise that client, quite properly, that the *Matrimonial Property Act* applies. The lawyer would then advise on the particular section of the Act, and the cases decided by the court as they may or may not apply to the facts of that client's case. In the collaborative setting, the possible solutions for the client are not limited to the *Matrimonial Property Act* in one particular jurisdiction. If that same client lived in British Columbia or Ontario or Prince Edward Island, then the advice that he or she receives might be different. Isn't the client more likely to find a solution that will meet his or her interests if the range of available options is broad, rather than narrow?
In the collaborative process, the client will have a lawyer who will assist in negotiating a solution that meets their particular interests, but one who will also remind the client that the most successful negotiations are those that satisfy interests of both parties. Agreements reached with this in mind tend to work better and last longer.

Collaborative negotiations are approached from the point of view that it is more than just dividing up a pie. Probing for interests can "make the pie bigger," thus increasing the chances of finding a positive solution for both participants.

How can we convince clients that the collaborative process might work for them?

I think that answering this question may create a dilemma for lawyers. On the one hand, if we oversell the

concept of collaborative law to clients, then they will expect results without putting in the effort required to make the process work. On the other hand, if we undersell the process, then there is, of course, a risk that the client will not understand it or will not choose the process in the first place.

It is important to point out to clients that although there is a good possibility that the collaborative process may not be as expensive as the adversarial process, there is no guarantee of this. In fact, there are no guarantees at all. They must commit themselves to working very hard towards finding mutually acceptable solutions.

According to statistics, approximately 95 percent of family law disputes are resolved without a trial. This begs the question of why mediation and collaborative law are referred to as methods of "Alternate Dispute Resolution."

From the client's perspective, if approximately 95 percent of cases settle without a trial, then isn't there an advantage if the client hires the lawyer to settle in the first case? Why should the client pay the lawyer to prepare pleadings and affidavits, attend discoveries, and do all of the other things associated with litigation if, in the end, the matter is likely to settle anyway? Would the client prefer to settle in the hallway of the court just prior to the hearing (where many cases settle) or in a four-way meeting in a lawyer's office?

Would clients prefer to be a party to all of the decisions concerning their future, or would they prefer that the court made those decisions?

At the root of collaborative law is the concept of client empowerment. By demystifying the process, creating clarity not confusion, and offering a system where court is not an option, clients realize that a process is available to them where they can make all of the decisions about their own future. The only proviso is that all solutions must be mutually acceptable. It should be explained to clients that there is no solution that a court can ultimately impose that they cannot come up with themselves. In fact, the range of options available to a court is restricted by the law model.

The Future

The process of collaborative family law has been available in Nova Scotia for approximately one year.

So far, it would be fair to say that the collaborative law process has not grown as quickly as anticipated. I think it is fair to ask the question "why not?"

Moving from a competitive model of dispute resolution to a collaborative model brings many challenges. For lawyers, the same challenges have been faced in other jurisdictions, some with a great deal of success. In Medicine Hat, Alberta, practically every family law file that is opened is a collaborative file. I believe this is a direct result of the leadership of the Bar in that jurisdiction and their willingness to put the principles of collaborative law into practice.

We are undertaking a campaign of public awareness of collaborative law in Nova Scotia. Ideally, clients will arrive at our door looking for the service. I do believe, however, that we need to do more than that. In some

respects, we need to change the way that we approach problem solving – habits that are ingrained after years of training and practice – changing our “learned behaviours” in respect to our responses to conflict is most likely the biggest challenge of all.

We have to be willing to allow our clients to control the outcome, to put a blank page in front of them and say, “make your own deal – we will advise you of the law and assist you in negotiating effectively.”

By encouraging and supporting a respectful, balanced and fair negotiation process where the clients ultimately make decisions that are best for them, without having to go to court, or threaten to go to court, both lawyers and clients will benefit in the end. As with most challenges, once they are met, the rewards will be great – in this case, both personally and for our profession.