OCLF Ontario Collaborative Law Federation *A Different Way to Divorce*

April 27, 2012

VIA FAX # 416-650-8418 and Regular Mail for Enclosure
Law Commission of Ontario
Family Law Project
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Re: Interim Report -Towards a More Efficient and Responsive Family Law System

Thank you for the opportunity to comment on your interim report. As you may be aware, the Ontario Collaborative Law Federation represents 18 groups of specially trained professionals across the province. Our members provide a unique team approach, offering legal, family and/or financial support to couples during separation and divorce. In reviewing the interim report, and in particular your 2 paragraphs on page 46 where you address the collaborative option, we felt it would be helpful to clarify and correct some misconceptions and to offer our further input into your final report on this important issue for Ontario families.

Costs of a Collaborative Process

Many collaborative clients are of modest means, looking for a way to ensure they do not end up accumulating significant debt or eating up any retirement savings in a legal battle in or outside court. Most choose a collaborative option because they want to have some control over the process and the costs.

Collaborative lawyers, like other family lawyers, are advocates for our clients. We offer a range of experience and hourly rates. Some collaborative lawyers will also meet another lawyer's hourly rate if it is lower than their own, to assist in having collaborative clients equally engaged and represented in the process. The OCLF also supports JusticeNet and encourages collaborative lawyers to offer their services at reduced hourly rates to lower-income clients.

There are no studies, to our knowledge, that conclude a collaborative approach is more expensive than traditional adversarial negotiations. It *may* be more expensive than mediation, however, please see our comments below regarding some issues with mediation. It is misleading to call the collaborative approach a "high end" option – compared to what? Certainly not compared to adversarial negotiations under the threat of court where there is little or no trust between lawyers, polarization of positions, and often a

lack of civility. The collaborative option is certainly not “high end” compared with court, unless we factor in unrepresented parties or those “fortunate” enough to be so poor they qualify for one of the few legal aid family lawyers available.

In fact, the collaborative process is available under the Ontario Legal Aid Plan – although it would be difficult to discover this from their website. One of our members shared information on a case where her client’s husband qualified for legal aid. She referred the husband to a collaboratively-trained lawyer who offered legal aid. The parties signed a participation agreement and resolved matters after 2 or 3 meetings in a collaborative process. The collaborative lawyers acknowledged that it was a challenging file as the husband was unemployed and had addiction issues. However, with the advocacy and assistance of their lawyers, the clients were able to resolve matters and ensure that funds were preserved to support their children.

The exchange of full financial disclosure, required in every family law process, often takes place more quickly and less expensively in a collaborative process than adversarial negotiations or court, since clients agree to this as a fundamental requirement in the collaborative participation agreement.

One benefit of meetings, where both clients and the relevant professionals attend, is that everyone hears the same story at the same time. Time (and therefore money) is not wasted through possible miscommunication on issues related by clients through their respective lawyers, often in posturing letters. And, while each client should be provided with legal advice by their own lawyer, meetings with lawyers and clients may also be used to provide everyone with an opportunity to hear and understand each lawyer’s interpretation of the law, as it pertains to the case.

The scheduling of meetings also serves to hold everyone accountable and keep the file on track – whoever is assigned homework (often clients if they are willing and able) have a deadline to get a task completed and to bring the information back to the table. Summary notes are taken at meetings and circulated to everyone to ensure they are accurate. These notes may then be used as the basis for the separation agreement.

Another consideration when assessing the relative costs of process choices is the durability of the ultimate resolution. Our anecdotal experience has been that a collaborative process results in more satisfying and long-lasting agreements between our clients. Contrast this with the numerous variation motions that clog our court system due to dissatisfied litigants who either had a decision imposed on them by the court or rushed into a settlement to end their litigation when they were emotionally and financially burnt out, and subsequently regretted the settlement.

Collaborative professionals take responsibility for managing the process. The process steps (attached at the end of this letter) are often set out as a schedule to the participation agreement for clients to use as a reference. These process steps are not limited to a collaborative approach, but in our experience they are seldom applied in an adversarial

dispute resolution process. An adversarial environment promotes reactive rather than proactive behaviour, which is often why emotions and legal costs escalate.

Interdisciplinary Resources

We agree that the resources for families (entry points) should not be tied to the court system and in particular parties should not have to start litigation to avail themselves of these resources. It is interesting to note that your interim report supports the need for families to be able to access mental health (family) professionals and neutral financial professionals as well as lawyers. This inter-disciplinary team approach is unique to the collaborative process.

A mental health or "family" professional (acting as a collaboratively-trained coach, or a neutral facilitator or child expert) is able to assist lawyers in screening for any power imbalances, personality issues or significant communication challenges. They often work with clients outside meetings to help address non-legal issues and to develop parenting plans. Collaborative professionals work together, not at cross purposes, and keep each other informed. There is no requirement that every member of a team be at every meeting. The goal is to make the most efficient use of each professional's time so when team meetings take place everyone is prepared and the meetings are productive and focused on a resolution of the family's issues.

Often it is financial stresses that cause marriages to break down. Using a collaboratively-trained neutral professional can be much more efficient, effective and certainly a cheaper alternative than the traditional approach of two lawyers at higher hourly rates putting together parenting plans and budgets, or bringing in "duelling accountants" to address valuations, debt, or income tax issues.

Neutral financial professionals often coach the less knowledgeable client to ensure they understand the financial issues and the financial information provided. Financial professionals also add value by assisting clients to test out a financial arrangement to make sure it's durable and will meet expectations as they move forward. This focus on a family's financial future seldom occurs in other forms of dispute resolution.

Family law clients often need assistance with emotional and/or financial issues. Providing clients with the particular expertise they need helps expedite the time required to address their legal issues. As a result, collaborative lawyers working in a team approach with other professionals may in fact bill fewer hours and therefore charge less on a collaborative file than on a file using a "traditional" negotiation approach.

Alternatives to Mediation

We agree that mediation, and in particular mandatory mediation, is not a panacea – the fact that anyone can hang out a shingle calling themselves a mediator is of great concern. In fact most family lawyers have at least one horror story of a mediation (often by a non-

lawyer) that had to be re-done by lawyers to make it durable and reflect the clients' expectations.

One of our members related an example from a recent file where mediation clients were forced to spend additional money on legal fees to salvage work from their mediation and produce a proper legal separation agreement. While this was not a formal collaborative file, two collaborative lawyers were retained to work through the financial details that the parties assumed had been resolved in their mediation. What the clients in essence got from their mediation was a parenting plan and an outline of thoughts for a financial agreement. They did not consult with lawyers during the mediation. While the clients had some challenges due to financial transitioning, most of their issues could have been worked out in 2 collaborative meetings. They would have saved money by coming to these same 2 collaborative lawyers to work out the details of a financial agreement, with a collaborative family professional assisting on a parenting plan.

The OCLF has developed standards for professionals and recommends that all collaborative professionals – not just lawyers – be governed under an appropriate regulatory body.

Many clients, once educated about their process options, choose a collaborative process over mediation as they want to be supported and advised by their lawyer during negotiations. While this might appear to add to the costs, in fact it may ultimately save costs. In many mediated settlements the parties delay consulting with lawyers until a memorandum of agreement has been reached with the mediator. This means the clients are making decisions in mediation without independent legal advice and perhaps without sufficient financial disclosure. The lawyers they eventually consult may tend to second-guess the terms of the memorandum of agreement as they were not involved in the negotiations. These lawyers may even advise against the agreement or at least recommend certain terms be renegotiated. This is not cost-efficient.

Support for Vulnerable Parties

We are deeply concerned with the reference in the interim report cautioning that mothers may feel pressured to abandon legitimate claims in a collaborative process. In fact, it is not unusual for mothers to feel pressure to settle in the face of adversity in any process, as they may be predisposed to try to make life better and easier for their children (i.e. the Wisdom of Solomon test). The Wiegers and Keet paper you rely on for this statement was published in 2008. Since that time, many professionals in Ontario's collaborative community have taken courses on screening for domestic violence and power imbalances. Collaborative lawyers recognize that this issue is best addressed in consultation with their mental health (family) colleagues.

Many collaborative groups in Ontario now encourage interdisciplinary membership. Collaborative lawyers have the opportunity to work with mental health professionals and to learn more about the importance of screening for suitability for the process. There is also

an increasing awareness about the importance of providing families with resources in addition to legal information when a relationship breaks down.

A collaborative approach provides an opportunity for lawyers to work with the support of a mental health (family) professional to empower a vulnerable party so they can feel safe to say what needs to be said, participate in negotiations, and not feel the need to abandon legitimate claims. No such resource is built into adversarial negotiations and certainly not into the court option, which can be emotionally and financially intimidating for a more vulnerable party.

Advocacy for our individual clients remains each collaborative lawyer's professional duty and one which we take very seriously. While a collaborative process may encourage settlement, it does so with the expectation that the whole solution will be better than one made by a judge or in adversarial negotiations. Collaborative clients must be made aware of their rights and obligations under the law in order to assess any alternate interest-based solution. If clients cannot reach an agreement that is better than what the law provides, the law remains the default to be applied.

Your interim report raises many valid and challenging issues with our current family law system in Ontario. We trust that our feed-back offers some constructive comments which will be of assistance as you prepare your final report. We fully support your goal of transforming the current system to make it accessible to all separating families in Ontario. We are also enclosing (by mail) a DVD prepared by the OCLF for Ontario collaborative professionals which you might find helpful in adding to your understanding of the interdisciplinary collaborative process. If you would like to speak further about how we are making the collaborative option more accessible, or if you have any other questions, some of our many experienced collaborative professionals from across the province would be most willing to participate in a meeting or a conference call.

Yours very truly,

John Ferris
President,
Ontario Collaborative Law Federation

Encl. by mail

Collaborative Negotiation
Steps For Effective Problem-Solving

Step 1 BUILD THE FOUNDATION

- Introduction and overview of the collaborative process
- Decide problems to be solved
- Discuss the role for other professionals, such as family, child and/or financial specialists

Step 2 GATHER AND EXCHANGE INFORMATION

- Identify goals, needs and interests
- Identify what financial information is needed
- Agree upon and initiate any joint valuations

Step3 IDENTIFY INTERESTS

- Prioritize goals, needs and interests – immediate and long-term – regarding issues and process

Step 4 IDENTIFY CHOICES

- Explore widest range of possible solutions
- Consider everything, rule out nothing

Step 5 EVALUATE CONSEQUENCES OF EACH CHOICE

- How would each option affect each person and the children?
- Consider immediate, intermediate, long-term impacts

Step 6 COME TO A DECISION AND IMPLEMENT DECISION

- Generate settlement proposals that satisfy interests of both
- What do you see as the best solution for both?
- Prepare Separation Agreement incorporating joint decisions