

Alberta Court of Queen's Bench gets the Collaborative Law Paradigm Shift

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We have good news. A judgment that was recently issued from the Alberta Court of Queen's Bench has specifically acknowledged the role of a collaborative lawyer which is to not only ensure that our clients understand their legal rights, but to also explore interests that matter a lot to the clients, and for which there may be no legal remedies available in court. This case also holds clients accountable with respect to decisions they make regarding the amount of disclosure they elect to proceed with prior to entering into a negotiated separation agreement.

The facts of *Webb* were as follows. Ms. Webb sought out a collaborative lawyer, Ms. Birkett, with the aim of reaching a divorce and settlement without going to court. Ms. Birkett sent a letter to Ms. Webb's husband and provided him with a list of registered CFL lawyers in the Edmonton area, and Ms. Webb's husband engaged the services of another experienced collaborative lawyer Ms. Miller. There were 4 four way meetings and two experts were brought into the process. The corporate accountant for the business enterprises of Ms. Webb and her husband, and a neutral financial expert who is a qualified Chartered Accountant and Financial Planner (FCA, FP).

A settlement was reached by Ms. Webb and her husband after they had a joint meeting with their corporate accountant and the financial neutral expert, but before the CFL process was completed. Specifically, they reached a settlement before all disclosure, appraisals and exchange of tax information was completed. The collaborative lawyers drafted the legal separation agreement to which Ms. Webb and her husband desired and then provided their clients with independent legal advice. In the Province of Alberta lawyers are required to swear certificates of independent legal advice acknowledging that we have advised our clients of all of the rights and entitlements that they might have under the Matrimonial Property Act of Alberta and acknowledging that our clients have advised us that they intend to give up their claims to the extent necessary to give effect to their Agreement, and these certificates are sworn and attached to all Separation Agreements.

Two years after Ms. Webb executed the Agreement she had second thoughts and saw a litigation lawyer, Mr. Tumbach, who gave Ms. Webb an opinion on non-disclosure and launched an action against Ms. Webb's husband and a negligence action against Ms. Birkett. After discoveries Mr. Tumbach discontinued the action against Ms. Webb's husband, leaving Ms. Birkett as the sole defendant to the law suit.

The court held that Ms. Birkett was not negligent. What is so very interesting about this case from a collaborative lawyer's perspective is that the court reviews the collaborative process and the role of a collaborative lawyer in detail. The court specifically cites Pauline Tessler from her book *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* (Chicago: American Bar Association 2001). In this case the court looks at the interests that Ms. Webb had identified which included: maintaining a positive relationship with her child, her husband, and her father in law; not relying on her husband for spousal support; and that she was not interested in seeking a share in the family business (the business was owned by her husband and his family prior to her marriage to him).

In the review of the lawyer's duty of care as it relates to disclosure, the court cites Pauline Tessler at p. 186: *The client, not the lawyer should decide how much investigation is needed for the client to be satisfied with the information base. The lawyer needs to advise the client fully, and hand over the decision.*

The court further accepted the expert evidence of Ms. Zwaenepoel who is an experienced collaborative family law lawyer and set out what, in her opinion, is the standard of practice with respect to disclosure:

In this case, a competent matrimonial lawyer would have ensured that Ms. Webb understood that disclosure of information to her satisfaction was available and that she understood that, in order to prepare a complete matrimonial property statement of the parties' assets and liabilities further information was required. The lawyer must confirm that Ms. Webb was willing to resolve this matter without such disclosure and that she was aware of the risks of settlement without completing that process.

The court states that although the lawyer has a duty to advise the client that they have a right to obtain disclosure or verify the information by the other party before entering into an agreement, it is the client, and not the lawyer who decides what effort and resources, if any, should be spent on exercising this right. If a client after being advised of his or her rights to disclosure is satisfied with the information provided by the other party, the client may instruct counsel to enter into a settlement agreement with that party.

Clearly the duty that is identified relating to disclosure is the same duty that arises for any family law lawyer that provides legal advice to a client that enters into a separation agreement. What is refreshing about this case from a collaborative lawyer's perspective is that the court thoroughly considers the collaborative context within which the clients made their decisions. The court acknowledges that client's interests are taken into consideration, and that it is the client who makes the decision after being educated and empowered by the lawyers to do so. It is a specific acknowledgment of the client empowerment model of collaborative law. This is an important case for all collaborative professionals to read. The IACP is maintaining a case bank relating to all collaborative cases that are heard. This case will be made available in that case bank. I would encourage all collaborative professionals to submit any other cases that they are aware of, to the case bank, so that we can share and support each other for further cases that may arise in the future.

