APPLYING INNOVATION THEORY ON A MICRO LEVEL IN DISPUTE RESOLUTION: THE CONTRIBUTION OF COLLABORATIVE LAW

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ABSTRACT

Innovation is beginning to be considered by the justice system on a macro level. The potential of innovation at the micro level, however, has yet to be studied. This research will begin such work, examining the way in which individual disputes are resolved and suggesting ways in which innovation theory can benefit the dispute resolution process. In particular, this research will utilize the process of Collaborative Law as a case study in examining the role of innovation in resolving complex disputes. In Collaborative Law, parties and their lawyers enter into a binding contract that limits the representation to a facilitative problem-solving process with the intent to reach a negotiated settlement. Through an interdisciplinary team approach that employs a sequenced negotiation process, complex problems can be aptly and innovatively resolved through Collaborative Law. This cross-Canada research study examines the capacity of Collaborative Law to exemplify innovation on a micro level using methods of ethnographic study, specifically participant observation and key informant interviews. Interviews with 31 lawyers who practise Collaborative Law were conducted in four Canadian research sites, namely, Halifax, Simcoe County, Toronto and Vancouver. Through these interviews and through practice group observations, common themes were generated. When superimposed atop of innovation theory, this research demonstrates that Collaborative Law indeed supports innovation on a micro level.

INTRODUCTION

Innovation has garnered considerable attention in academic and popular literature of late. Despite becoming increasingly ubiquitous, the study of innovation is just beginning to permeate meaningfully into the legal realm.[1] Until recently, any discussion of law and innovation was focused predominantly on law and technology, or copyright and patents.[2] Also common was the use of the word ‘innovation’ in legal text without any accompanying definition or explanation.[3] The focus of such discourse, where there is one, is on the product of innovation outside the legal world rather than the process of innovation within it. This paper takes a different approach and defines innovation as a process of applied creativity that creates unique value for disputants. As this bifurcated definition implies, innovation requires both creativity and application. As stated by Evans and Saxton, “A creative person will make new connections; an innovative person will find a way to apply these connections”.[4] Innovation in process design and implementation, is increasingly germane in the legal context. This paper undertakes to study innovation, as a process, in dispute resolution. Specifically, this research examines the applicability of innovation theory to dispute resolution, using the practice of Collaborative Law (CL) as a case study.[5]

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1. See, for example, Canadian Bar Association Legal Futures Initiative, *The Future of Legal Services in Canada: Trends and Issues* (Ottawa: Canadian Bar Association, 2013).
2. See, for example, Sarah Tran, “Prioritizing Innovation” (2012) 30(3) *Wisconsin International Law Journal* 499 (examining the measures the U.S. Patent and Trademark Office can take to promote the innovation of technologies); Charles Silver, “Ethics and Innovation” (2011) 79(2) *George Washington Law Review* 754 (examining the ethical duties of lawyers in mass class actions and their impact on innovations); Herbert Hovenkamp, “Restraints on Innovation” (2007) 29(1) *Cardozo Law Review* 247 (examining the restraint on innovation in the technology sector).
3. See, for example, Julie Macfarlane, *The New Lawyer: How settlement is transforming the practice of law* (Vancouver: UBC Press, 2008) at 3, 20, 235; Often, ‘innovation’ is simply used to refer to something new or changed.
4. Elisha Evans & Joe Saxton, *Innovation Rules! A roadmap to creativity and innovation for not-for-profit organizations* (London, UK: NFP Synergy, 2004).
5. Collaborative Law as it is explored in this study should be distinguished from “collaborative lawyering” used to describe an “approach to practice in which lawyers work

CL is a unique yet somewhat controversial dispute resolution process. It has embraced much of the theory of innovation, albeit unknowingly, both in its creation and execution, making the process a particularly appropriate case study for the current research. In CL, participants enter into a binding contract that commits parties and counsel to a facilitative problem-solving process.[6] Currently, CL is mostly utilized in cases of separation and divorce and so this research will focus on these types of cases.

The CL process is in and of itself innovative because of its unique focus on settlement in a process with representation for both sides. Parties agree, through contractual commitment, to particular processes and behaviours as well as to settlement.[7] Lawyers relinquish the ability to represent their CL clients in any adversarial proceedings. Other characteristics of the process include: voluntary disclosure of relevant information; participation with integrity; and, confidentiality within and following the CL process.[8] Neutral experts, including mental health and financial professionals, are often utilized and are hired jointly by the parties. The negotiation process in CL takes place in the presence of parties, their respective counsel and any neutrals deemed necessary. These individuals all work together to attempt to craft a mutually beneficial solution. Resolution is a team effort.

Why does this research focus on the dispute resolution mechanism of CL? CL has been touted by practitioners as reducing costs, expediting resolution, leading to better, more creative solutions and enhancing relationships.[9] Proponents of CL argue that the process offers more creative, longer-lasting outcomes than litigation and other dispute resolution mechanisms because of both the commitment to settlement from the outset, through lawyer disqualification, and through the integral involvement of counsel in the negotiation process.[10] Agreements can defy traditional limits: They can be innovative.

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collaboratively *with* lower-income, working class, and of-color clients and communities in *joint* efforts to make social change", Ascanio Piomelli, "The Democratic Roots of Collaborative Lawyering" (2006) 12 *Clinical Law Review* 541 at 542.

6. Pauline Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation*, 2d Ed. (Chicago: ABA Family Law Section, 2008) [hereinafter "*Achieving Effective Resolution*"].
7. Richard Shields, Judith Ryan & Victoria Smith, *Collaborative Family Law: Another way to resolve disputes* (Toronto: Thomson Carswell, 2003).
8. Tesler, *Achieving Effective Resolution*, *supra* note 6 at 161.
9. See, for example, *ibid*.
10. Martha E. Simmons, "Collaborative Law at 25: A Canadian Study of a Global Phenomenon" (2016) 49 *UBC Law Review* 669.

This research will examine how and why innovative results are possible through CL. It will focus on the way in which the execution of a sequenced negotiation process, led by lawyers trained to look at issues in different ways, helps to create a space where innovation can take place. CL, as a process, is the embodiment of innovation. Many lessons can be learned from this model of dispute resolution. In order to learn from the process, this research examines innovation from both a theoretical and empirical standpoint, reviewing the literature and eliciting data from CL lawyers. The paper begins with an exploration of the cross-section of innovation and CL. This initial section, Part I, will consider the overlap between CL and innovation. It will propose that CL has the potential to service clients optimally because if its use of the innovation process. The paper will then turn, in Part II, to report on findings, derived from first-hand narrative of research participants as well as through observation at research sites, the ways in which innovation and CL overlap. This Part will begin with a description of the research methodology before turning to the results of the study.

Through this research, CL will indeed be shown to be an illustration of innovation at a micro level. It will be shown to have the capacity to produce long-term outcomes that, through innovation, are tailored to the specific clients. In a legal system where dispute resolution mechanisms that were formerly considered “alternative” are now becoming mainstream, looking at innovation from this perspective can be of great benefit.

PART I: INNOVATION AND COLLABORATIVE LAW – THEORY

In order to explore how the innovation process overlaps with the CL process and to ponder the factors that support and impede innovation in CL, it bears considering what the innovation process entails. This section will explore topics critical to this determination. First, it will consider when innovation should be employed and how the innovative process can be utilized. The discussion will then turn to the specific techniques and characteristics shared by the innovative process and CL. Specifically, this section will explain that CL is capable of producing innovative outcomes because it progresses through the four-step innovative thinking process with the help of a multidisciplinary team.

Different authors have outlined the stages through which innovations pass.[11] This section will attempt to merge their ideas to construct a

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11. The names of the phases are largely taken from David S. Weiss & Claude P. Legrand, *Innovative Intelligence: The Art and Practice of Leading Sustainable Innovation in*