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Calming the Chaos: A Complexity Science Approach to Dispute Resolution on a Macro and Micro Level

Martha E. Simmons

It has been said that we live in an age of complex dynamic systems.¹ Evidence of the preponderance of such systems lies in the rapid rate of change and increasing lack of certainty experienced in many areas of life.² The legal dispute resolution world is not immune to this phenomenon.³ This paper will add these disciplines to the academic conversation of the emerging science of complexity.

The legal system indeed faces complex problems on both a micro and macro level.⁴ Moreover, the existence of such problems is on the rise.⁵ The Canadian Bar Association's recent *Futures* report states, "[t]he legal profession in Canada is entering a period of major change. The combined forces of globalization, technology, and market liberalization are creating new services, new delivery mechanisms, and new forms of competition."⁶ In addition to a changing profession, studies have documented failings of our legal system, as illustrated by comments such as, "Canadians do not have adequate access to family justice. For many years now, reports have been telling us that cost, delay, complexity and other barriers are making it

1. Reuben R. McDaniel Jr., *Strategic Leadership: A View from Quantum and Chaos Theories*, 22(1) HEALTH CARE MGMT REV 21, (1997); see BRENDA ZIMMERMAN ET AL., *EDGEWARE: LESSONS FROM COMPLEXITY SCIENCE FOR HEALTH CARE LEADERS* (2008). Examples of complex adaptive systems are vast and in Collaborative Law include the stock market, the brain, ecosystems, communities, and social systems. *Id.*

2. THE CAN. BAR ASS'N, *FUTURES: TRANSFORMING THE DELIVERY OF LEGAL SERVICES IN CANADA* 6 (2014), http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf [hereinafter THE CAN. BAR ASS'N].

3. THE CAN. BAR ASS'N, *supra* note 2, at 4.

4. *Id.*

5. *Id.* at 6.

6. *Id.*

impossible for many Canadians to exercise their legal rights.”⁷ These are examples of complex issues we now face.⁸ Despite these and other conversations—academic, governmental, and practice-based—that document the complexity in the legal system, there is little agreement on how to resolve them.⁹ Suggestions on process and protocol have been made.¹⁰ Programs have been attempted.¹¹ Although different strategies have been employed, none have proven to resolve the root issues.¹² The problems exist and persist.¹³ Why is this the case? This paper will argue that previous attempts at successful improvement of the legal system have largely failed because the complexity of the issues has not been appreciated or taken into consideration. Rational analytic approaches to the problems have been attempted, but such strategies are inutile for complex problems.¹⁴ Instead, processes that allow for discovery, participation, deep conversation, and strategic problem solving must be employed.¹⁵ Analytical reasoning, which legal scholars and lawyers are particularly adept at employing is insufficient to resolve complex problems.¹⁶

Complex systems have densely connected webs of interdependent agents.¹⁷ They are systems of relationships.¹⁸ Indeed, the legal system relies on relationships: relationships between disputants, relationships between lawyers, relationships between governmental actors, and relationships between communities.¹⁹ Complexity science is a useful way to conceptualize the legal system on both a macro and micro scale.²⁰ Given the increase in the magnitude and number of complex issues facing the legal

7. ACTION COMM. ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, MEANINGFUL CHANGE FOR FAMILY JUSTICE: BEYOND WISE WORDS 1 (2013), <http://flsc.ca/wp-content/uploads/2014/10/services5.pdf> [hereinafter ACTION COMM. ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS].

8. *Id.*

9. *See generally Id.* at 1-3.

10. *Id.* at 2-3.

11. *Id.*

12. *Id.* at 3.

13. *Id.*

14. *Id.*

15. *Id.* at 25-26.

16. *Id.* at 27-28.

17. *Id.* at 7.

18. *Id.*

19. *Id.*

20. *Id.*

world, it is prudent for lawyers and legal scholars to learn approaches that accept a greater level of interdisciplinary, uncertainty, and disagreement.²¹

To appreciate the value of complexity theory in resolving systemic issues, including those documented above, it is helpful and likely more manageable to begin by examining complexity on a smaller scale. On a micro level, one can imagine several individual legal disputes that are not being resolved optimally through traditional processes. For these, complexity science should be considered. One process that operationalizes complexity science in dispute resolution is Collaborative Law.²² Its application of complexity theory, even though not deliberate, makes the process a particularly appropriate case study for current research.²³ Simmons states, “They are complex problems that have not yet been adequately resolved in the adjudicative sphere.”²⁴

To begin, “Collaborative Law is a process by which parties and their lawyers enter into a binding contract, known as a participation agreement, [which] limits the representation to a facilitative problem-solving process with the intent to reach a negotiated settlement.”²⁵ Collaborative Law has a unique focus on settlement in a process with representation for both sides.²⁶ The participation agreement acts as a contractual commitment to particular processes, behaviors, and settlement.²⁷ Lawyers in Collaborative Law must settle or withdraw from representation if their clients cannot settle the case.²⁸

[P]rofessional experts, who can include mediators, mental health professionals, and financial professionals, are hired jointly by the parties with the goal of maintaining civility, saving time, and decreasing costs by avoiding duplication. Negotiations in Collaborative Law are predominantly conducted through a series of four-way meetings during which parties and their respective counsel attempt to craft a mutually beneficial solution. Collaborative Law has been touted by practitioners as reducing costs, expediting resolution, leading to better, more creative long-lasting solutions, and enhancing relationships.²⁹

21. *Id.* at 27.

22. PAULINE TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 4 (2d ed., 2008) [hereinafter *ACHIEVING EFFECTIVE RESOLUTION*].

23. Martha E. Simmons, *Increasing Innovation in Legal Process: The Contribution of Collaborative Law* 5 (Mar. 2015) (unpublished Ph.D. dissertation) (on file with Osgoode Digital Commons).

24. *Id.* at 3.

25. *Id.* at 2.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 3.

Collaborative Law has the potential to resolve complex problems “because of many of its characteristics.”³⁰ “In particular, the use of a multidisciplinary team, the execution of a sequenced negotiation process,” the contractual commitment to voluntary disclosure of all material facts, and active client participation, help to create a space where complex disputes can be resolved.³¹ Lessons can be learned from the characteristics of and processes employed in Collaborative Law, lessons that can be applied at a macro level.³²

Part I of this paper will introduce the theory of complexity, and will explain different types of problems addressed in the legal system. It will describe the history and progression of complexity theory as it pertains to natural science and organizational behavior. It will also explain why the legal field needs the same perspective. Part II will then apply complexity theory on a micro scale, using the practice of Collaborative Law as a case study. Finally, Part III will expand the consideration of complexity to the macro level, looking at the family law system and will consider the implications of looking at the broader legal system from a complexity lens.

The aim of this paper is to provide readers with a starting point from which to examine the extent to which their own areas of legal research can benefit from a complexity lens. The current research focuses on family law merely to provide an illustration. This work is particularly inspired by the research conducted by Glouberman and Zimmerman, who examined the medical system on both a systemic and individual patient level from a complexity lens.³³ It is from this foundation that this paper examines the legal system from both a systemic and individual dispute level, with a focus on complexity.

PART I – AN INTRODUCTION TO COMPLEXITY

This paper posits that complexity theory is applicable in a legal context on both an individual dispute and systemic level. To appreciate this claim, it is important that readers understand the nature and importance of complexity theory as it has been applied in other milieus. This section will provide such background by defining and contextualizing complexity theory. It will then

30. *Id.* at 4.

31. *Id.*

32. *Id.* at 318.

33. Sholom Glouberman & Brenda Zimmerman, *Complicated and Complex Systems: What would Successful Reform of Medicare Look Like?*, in COMMISSION ON THE FUTURE OF HEALTH CARE IN CANADA 21 (Pierre Gerlier-Forest, Gregory P. Marchildon & Tom McIntosh eds., 2002).

describe the important distinction between simple, complicated, and complex problems to present the framework from which to apply the case studies that will follow in subsequent sections.

Complexity Theory

What are complex systems and what do they have to do with the study and practice of law and dispute resolution? To answer these questions meaningfully and comprehensively, it is important to look more generally at complexity science as a discipline. Complexity theory is based on robust science and reflects a new way to conceptualize the world around us.³⁴ It began to amass a presence in scientific literature in the 1970s and then spread into the world of organizational behavior.³⁵ Complexity theory began as a backlash against Newtonian science, which viewed the universe as being governed by rational and understandable laws.³⁶ Complexity science, on the other hand, eschews such claims of rationality and studies the unpredictable, irrational and incomprehensible.³⁷ Currently, the Santa Fe Institute is the most active think tank that brings together complexity science researchers and scholars.³⁸ Their website states,

We find order in ubiquitous patterns that repeat throughout living nature: networks, conflict and cooperation, distributed decision making, the structured flow of energy, and elements of invention and novelty. These patterns are found at all scales,³⁹ from the molecular, through tissues, individuals, technology, the economy, and cultures.

As this suggests, complexity theory is employed by many scholars in many fields, spanning the natural and social sciences.⁴⁰ The study of complexity has focused on how microstate events self-organize into aggregate structures.⁴¹ Events in examination can range from molecules or neurons, to human agents or social systems.⁴² The fact that elements interact

34. Eric B. Dent, *Complexity Science: A Worldview Shift*, 1(4) EMERGENCE 5, 5 (1999).

35. ADAM KAHANE, SOLVING TOUGH PROBLEMS: AN OPEN WAY OF TALKING, LISTENING, AND CREATING NEW REALITIES 14 (2007).

36. Bill McKelvey, *Complexity Theory in Organization Science: Seizing the Promise of Becoming a Fad?*, 1(1) EMERGENCE 5, 8 (1999).

37. *Id.* at 10.

38. *Santa Fe Institute Mission and Scientific Principles*, SANTA FE INSTITUTE, (2016), <http://www.santafe.edu/about/mission-and-vision/>.

39. *Id.*

40. *Id.*

41. McKelvey, *supra* note 36, at 5.

42. *Id.*

creates the dynamic state of the systems.⁴³ In social systems, such as the legal system this paper will explore, the complexity increases as you add human free will and emotion.

Complexity science seeks to understand systems, their operations and their consequences through various methods, including game theory and non-linear dynamics, among others.⁴⁴ It is a lens through which we can examine causal, non-linear systems that are otherwise incomprehensible.⁴⁵ In complex systems, elements interact such that behaviors cease to be predictable but by thinking through a complexity lens, a solution can be generated that may not have been evident from the outset.⁴⁶ When attempting to resolve complex problems, small changes can have a profound impact, and drastic overhauls can retain status quo.⁴⁷ How is this the case? Some phenomena do not make sense.⁴⁸ Complexity theory allows, appreciates, and studies such ambiguity.⁴⁹

Complexity science is not without its critics.⁵⁰ Some theorists have posited that the application of complexity theory beyond physical and life science is unsubstantiated.⁵¹ It is difficult to measure. It is hard to quantify. It is messy. Despite the unattractiveness of complexity science, this paper pushes readers to consider the way in which the theory applies to dispute resolution and legal systems.

Distinguishing between Simple, Complicated and Complex Problems

How does adopting a lens of complexity become operationalized? To make use of complexity, we must distinguish between different types of problems.⁵² The recognition that not all problems are complex is essential.⁵³ The distinction between types of problems is at the heart of the discussion situated in this paper. Three types of obstacles are offered for consideration: those that are simple and can be solved quickly; those that are complicated and need to be simplified and analyzed; and those that are complex and need

43. *Id.*

44. Dent, *supra* note 34, at 10.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 16.

49. *Id.*

50. *Id.* at 6.

51. *Id.*

52. Simmons, *supra* note 23, at 141-42.

53. *Id.*

an innovative method of resolution.⁵⁴ Understanding each of these is important. It is also important to recognize that, while this paper presents three types of problems and describes each, the lines between them are not as clear cut as it may seem.⁵⁵ There may be overlap.⁵⁶ Some problems can be conceptualized in many ways.⁵⁷ Some problems are a combination of different types of problems.⁵⁸ Openness to such ambiguity is required.⁵⁹

Simple issues have direct answers.⁶⁰ They need merely to be resolved.⁶¹ A relevant analogy of a simple problem is that of following a recipe.⁶² Once the basic skills and terminology are learned, little thought must be employed for execution.⁶³ Moreover, the chance of success is practically guaranteed time after time if the recipe is followed.⁶⁴ The result of action is very predictable and cause and effect are known.⁶⁵

Simple problems are not readily found in the legal realm. Rarely, if ever, is there an effortlessly available certain answer to a legal problem or dispute. Human nature and interpretation allow for a variety of solutions in any given legal conflict.⁶⁶ Clear and predictable outcomes are hard to obtain in the legal field. Because of their relative non-existence in the legal sphere, this paper, which focuses on legal problems, will not consider simple problems at any length. The assumption will be made that legal issues rest in the world of the complicated or complex.

Complicated problems abound and are more difficult to resolve than simple problems.⁶⁷ They are those problems that require specialized expertise to simplify, analyze and solve.⁶⁸ Although such problems can be multifaceted, they can be clearly defined, and their solutions are

54. FRANCES WESTLEY et al., GETTING TO MAYBE: HOW THE WORLD IS CHANGED 9 (2007).

55. *Id.* at 7.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 10.

61. *Id.*

62. *Id.*

63. *Id.* at 8.

64. *Id.* at 9.

65. Dave Snowden, *Strategy in the Context of Uncertainty*, 6(1) HANDBOOK OF BUS. STRATEGY 47, 50 (2005).

66. *Id.*

67. WESTLEY et al., *supra* note 54, at 9.

68. *Id.*

unequivocal.⁶⁹ Those involved agree about what the solution is, although there may be disagreement about the way to get there.⁷⁰ There is no recipe.⁷¹ An analogy to describe a complicated problem is that of sending a person to the moon.⁷² Figuring out the intricate measures and technical details to know how to send humans to the moon is not simple.⁷³ Specific expertise and training are certainly required.⁷⁴ Many interconnected parts must be analyzed.⁷⁵ Implementation may require solving many different problems, but the desired outcome is understood and agreed upon.⁷⁶ In complicated situations, cause and effect can be separated by time, but the outcome is knowable and discoverable through analysis.⁷⁷ It is suggested that our adversarial system is predicated on and successful at resolving complicated problems.⁷⁸

Now consider the following description of complex problems: complex problems are unpredictable.⁷⁹ They are unique problems that have many uncertain and ambiguous components that must be understood and should not be simplified, lest the root issue be omitted.⁸⁰ Adding to the complexity, such problems often involve aligning multiple stakeholders.⁸¹ In addition, multiple perceptions of both the problem and the solution are generally held for complex problems, and the outcome of any solution is not ascertainable in advance.⁸² A common analogy that has been used to explain complex problems is the example of raising a child.⁸³ So many factors combine to produce the adult that a child will become.⁸⁴ Although the same parents may have several children, no two turn out the same.⁸⁵ It is truly complex.

69. WESTLEY et al., *supra* note 54, at 9; Ronald A. Heifetz et al., *THE PRACTICE OF ADAPTIVE LEADERSHIP: TOOLS AND TACTICS FOR CHANGING YOUR ORGANIZATION AND THE WORLD* (2009).

70. WESTLEY et al., *supra* note 54, at 8.

71. *Id.* at 9.

72. *Id.*

73. *Id.* at 8.

74. *Id.* at 9.

75. *Id.*

76. *Id.*

77. DAVID S. WEISS & CLAUDE LEGRAND, *INNOVATIVE INTELLIGENCE: THE ART AND PRACTICE OF LEADING SUSTAINABLE INNOVATION IN YOUR ORGANIZATION* 21 (2011).

78. *Id.* at 22.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 9.

84. *Id.*

85. *Id.*

For these problems, it is imperative to first gain insight into the uniqueness of the issue before discovering the most effective solution.⁸⁶ Pure analytical analysis is ineffective because of the unpredictable and emerging nature of the problems.⁸⁷ A different way of approaching these problems is required.

Resolution is particularly difficult because behaviors that emerge in complex systems are seemingly unrelated to underpinning causes.⁸⁸ Because of the interactive networks characteristic of complexity, such non-additive behavior results.⁸⁹ Indeed, cause and effect are often separated in both time and space and are hard to grasp from personal experience.⁹⁰ Confusing the matter further, because complex behavior can unfold in unfamiliar ways that may still appear familiar, it exists somewhere between predictability and unpredictability.⁹¹ People may think they know the answer, only to find they are completely mistaken.⁹² Creating even greater complexity, because people involved in complex problems often see the problem differently agreement is difficult and parties tend to become polarized when left out of decision-making.⁹³ Complexity is messy.⁹⁴

It is sometimes a challenge to decide whether a problem is complicated or complex, but the distinction is critical.⁹⁵ Making an initial determination of the nature of an issue allows for an accurate assessment of how the problem should be handled.⁹⁶ Weiss and Legrand describe the risk of failing to distinguish between complicated and complex problems,

Responding to complex issues by applying a process appropriate for complicated problems is an error. When leaders try to simplify complex problems, they often miss the underlying complexity and end up solving the wrong problem, which, many times, is only a symptom of the real issue.⁹⁷

86. *Id.* at 10.

87. WEISS & LEGRAND, *supra* note 77, at 22; WESTLEY et al., *supra* note 54, at 9.

88. Russ Marion & Josh Bacon, *Organizational Extinction and Complex Systems*, EMERGENCE 71, 75 (2000).

89. Marion & Bacon, *supra* note 88, at 75.

90. KAHANE, *supra* note 35, at 1.

91. *Id.* at 1-2.

92. *Id.* at 2.

93. *Id.*

94. *Id.* at 1.

95. WEISS & LEGRAND, *supra* note 77, at 22.

96. *Id.* at 26.

97. *Id.*

An example offered by Westley, Zimmerman, and Patton poignantly illustrates this risk.⁹⁸ The current approach to dealing with mental illness focuses on finding and manufacturing the correct psychiatric pharmaceutical intervention.⁹⁹ This approach ignores the complexity of the issue.¹⁰⁰ Despite the invention of effective medication, many patients are too ill to adhere to their prescribed drug regimen.¹⁰¹ Thus, efforts are futile.¹⁰² Disastrous effects can result from this mismanagement.¹⁰³ A different focus is required.¹⁰⁴ Indeed, one can similarly think of many situations of conflict in the legal system, both on an individual case and systemic level, which are not adequately resolved and are only treated symptomatically.¹⁰⁵ “They were likely complex problems that were not categorized as complicated and treated as such.”¹⁰⁶

Effective methods of resolving complex problems have been devised.¹⁰⁷ They are too numerous to list here.¹⁰⁸ What they share, however, is a focus on discovery, participation, and deep conversation, resulting in a strategic direction.¹⁰⁹ They depart from the typical rational, linear, top-down approach, which is effective to resolve complicated problems.¹¹⁰ An openness to arriving at a solution that no one had expected is required.¹¹¹ Resolving complex problems requires a particular and deliberate process.¹¹²

98. WESTLEY et al., *supra* note 54, at 10.

99. *Id.*

100. *Id.* at 10-11.

101. *Id.*

102. *Id.*

103. *Id.* at 10.

104. *Id.* at 11-12.

105. Simmons, *supra* note 23, at 143; WESTLEY et al., *supra* note 54, at 11-12.

106. Simmons, *supra* note 23, at 143; WEISS & LEGRAND, *supra* note 77, at 25.

107. *See generally*, Bernard Burnes, *Complexity Theories and Organizational Change*, 7 INT’L J. OF MGMT. REVIEWS 73, 74 (2005) (suggesting a more democratic, continuous process based on self-organization at the team and group level).

108. *See Id.* at 73.

109. ACTION COMM. ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, *supra* note 7, at 25-26; *see generally*, KAHANE, *supra* note 35, at 4.

110. Dent, *supra* note 34, at 19. “Classical science, as practiced in the twentieth century, for the most part makes the philosophical assumptions . . . which include underlying assumptions of reductionism, objective observation, linear causation, entity as unit of analysis, and others.” *Id.* at 5. “Complexity science opens up a whole new vista of perspectives, approaches, and techniques, because it is based on a set of underlying assumptions that differ from classical science.” *Id.* at 19.

111. KAHANE, *supra* note 35, at 4.

112. *See generally*, Dent, *supra* note 34.

PART II – A CASE STUDY OF COMPLEXITY ON A MICRO SCALE:
COLLABORATIVE LAW

The traditional legal dispute resolution world is premised on rational, linear decision-making.¹¹³ It is ideal to resolve the many complicated issues we face.¹¹⁴ However, as the previous section explained, this approach does not work when faced with complex problems.¹¹⁵ Although most processes are not equipped to deal with complex problems, this paper suggests that Collaborative Law is an example of one that does.¹¹⁶ Because Collaborative Law is the case study upon which this paper is focused, and since Collaborative Law deals mainly with family law issues, such problems are a natural focus.¹¹⁷ Family issues are not simple.¹¹⁸ Collaborative Law, having a unique ability to resolve complex problems, is a poignant example of the micro application of complexity theory.¹¹⁹ Part II will explore this connection.

The Adversarial System and Complex Problems

Most dispute resolution mechanisms, both adversarial and conciliatory, do not address complex disputes in an optimal way for long-term resolution.¹²⁰ Long-term resolution is difficult to achieve because traditional processes, particularly litigation, are alienating for parties involved in complex disputes.¹²¹

The recognition that some legal problems are more challenging to resolve than others is not new.¹²² Four decades ago, Fuller defined polycentric disputes as situations of interacting points of influence, which

113. Simmons, *supra* note 23, at 144; Dent, *supra* note 34, at 5.

114. *Id.*

115. Dent, *supra* note 34, at 5-6.

116. Simmons, *supra* note 23, at 1-2.

117. *Id.* at 1-2, 9.

118. *See, e.g.*, Simmons, *supra* note 23, at 13 (stating that courts are inequipped to deal with the complex issues of divorce).

119. Simmons, *supra* note 23, at 144.

120. *Id.* at 3-4.

121. William Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV., 63, 71 (1974).

122. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395, 397 (1978) (stating that the more polycentric elements a dispute has, the less suited it is for resolution by adjudication).

involve “many affected parties and a somewhat fluid state of affairs.”¹²³ “Indeed, most family law issues are perfect examples of polycentric disputes with many parties affected by potential results and long-term implications of any decision.”¹²⁴ Fuller looked at polycentricity in a different context, examining which problems are ill-suited for adjudication.¹²⁵ In addition to being ill-suited for adjudication, this research suggests that polycentric problems can also be characterized as complex.¹²⁶ Our adjudication system is not equipped to deal with complex problems.¹²⁷ Kahane notes, “[P]roblems with low complexity can be resolved perfectly well—efficiently and effectively—using processes that are piecemeal, backward looking, and authoritarian. By contrast, highly complex problems can only be solved using processes that are systemic, emergent, and participatory.”¹²⁸

A process is required, which marries the removal of polycentric or complex problems from adjudication (which can be described as piecemeal, backward looking, and authoritarian) with an innovative approach (which is systemic, emergent, and participatory) to resolve them adeptly.¹²⁹ As will be explained, Collaborative Law is such a process.¹³⁰

The litigation system, along with dispute resolution processes derived therefrom, focuses virtually exclusively on analytical-rational paradigms.¹³¹ Analytical mapping assumes that people are acting rationally in their self-interest.¹³² This is simply not a sustainable assumption.¹³³ When involved in a complex legal dispute, particularly one that is emotional in nature, people rarely act rationally.¹³⁴ Thus, processes built on assumptions of rational decision-making are not particularly useful.¹³⁵

The adversarial system applies a one-size-fits-all result to cases that would be more meaningfully resolved on a case-by-case basis.¹³⁶ A process more useful for complicated problems is being applied ineffectually to

123. Fuller, *supra* note 122, at 397.

124. Simmons, *supra* note 23, at 147.

125. Fuller, *supra* note 122, at 371.

126. *Id.* at 397.

127. *Id.*

128. KAHANE, *supra* note 35, at 32.

129. Simmons, *supra* note 23, at 148.

130. *Id.*

131. *Id.* at 144.

132. WEISS & LEGRAND, *supra* note 77, at 40.

133. *Id.*

134. Fuller, *supra* note 122, at 360.

135. *Id.*

136. Simmons, *supra* note 23, at 13.

complex ones.¹³⁷ Another process was required—along came Collaborative Law.¹³⁸

Collaborative Law and Complexity: A Definition and Description

Collaborative Law was created in part as a process to resolve family issues at a deeper level than others had previously provided.¹³⁹ Uniquely poised to resolve complex disputes, Collaborative Law holds much promise even beyond the narrow application in which it is currently employed.¹⁴⁰ Currently, Collaborative Law is used virtually exclusively in family law cases of separation and divorce.¹⁴¹

Despite this focus, the Collaborative Law process can be utilized in other spheres.¹⁴² However, for ease of analysis, this section will focus on family law, as that is the context in which Collaborative Law is currently most often employed.¹⁴³ As explained above, complex family law disputes are not adequately resolved in the adjudicative sphere.¹⁴⁴ “The most difficult family law issues share the following characteristics: . . . unchallenged assumptions, many stakeholders, and . . . unpredictable . . . elements. These issues are complex.”¹⁴⁵ These complex problems cannot be optimally resolved by a process that is created to deal with complicated problems.¹⁴⁶

Collaborative Law is a dispute resolution process with distinct components that allow for the resolution of complex problems.¹⁴⁷ It utilizes interest-based negotiation in a participatory and conciliatory multidisciplinary process.¹⁴⁸ In Collaborative Law, each party is represented by specifically trained counsel who commit to resolving the issues through negotiation.¹⁴⁹ Let us return to the elements that complexity scientists agree resolve complex problems: discovery, participation, and deep conversation resulting in strategic direction. These elements are all existent in

137. *Id.*

138. *Id.* at 13-14.

139. *Id.* at 9-10.

140. *Id.* at 13.

141. *Id.* at 28.

142. *Id.* at 9.

143. *Id.*

144. *Id.* at 11.

145. *Id.* at 147.

146. *Id.* at 144-45.

147. *Id.* at 5.

148. *Id.* at 31-32.

149. *Id.* at 3.

Collaborative Law but non-existent in adjudication.¹⁵⁰ The specific aspects of Collaborative Law that facilitate these elements are: complete and voluntary disclosure, client participation, the use of teams and a systemic process for the resolution of disputes.¹⁵¹ Before this process takes place, however, there must be an assessment of complexity.¹⁵²

Assessing Complexity

If one accepts this article's proposition that Collaborative Law is a process that can effectively resolve complex problems, the question becomes—how do you assess the complexity of a case? As was stated earlier in this article, it is essential to distinguish between those problems that are complicated and those that are complex.¹⁵³ Although Collaborative Law has the potential to resolve complex problems, the decision to embark on the process of Collaborative Law must be premised on an assessment of complexity.¹⁵⁴ Why utilize a highly strategic process that can be expensive and cumbersome if it is not required? Other processes, such as negotiation and mediation, exist to resolve complicated problems more readily while remaining outside of litigation.¹⁵⁵

What if the complexity assessment is erroneous? If Collaborative Law is used in complicated cases, the result may be a more expensive and cumbersome process.¹⁵⁶ Good outcomes may still result, but a simpler process would have sufficed.¹⁵⁷ Collaborative Law can be time consuming and expensive.¹⁵⁸ While some disputes are worthy of such time and cost, others simply are not.¹⁵⁹ The determination of complexity is crucial to a decision of whether to use Collaborative Law because the overuse of the process can be costly and time consuming.¹⁶⁰ Only once a determination of complexity is completed should the Collaborative Law process begin.¹⁶¹

150. *Id.* at 148.

151. *See generally* Simmons, *supra* note 23, at 46, 59, 53.

152. *Id.* at 255.

153. *Id.* at 141-42.

154. *Id.* at 146.

155. *Id.* at 18.

156. *Id.* at 310.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

Discovery through Complete and Voluntary Disclosure

Parties in Collaborative Law provide complete, honest and open disclosure of all relevant information.¹⁶² This affirmative duty to disclose “is mandated . . . and agreed upon in the participation agreement signed at the outset of a [Collaborative Law] process.”¹⁶³ This aspect of the agreement “negates the need for formal discovery.”¹⁶⁴ “[Collaborative Law] abandons formal discovery because of the polarization that tends to occur with the motions for production and examinations for discovery,” which are typical in the adversarial realm.¹⁶⁵ “By avoiding the polarization of discovery, parties can begin to build trust through the mutual sharing of information, trust that is not readily available in traditional divorce settlement. Holding one’s cards close to the chest incites a feeling of mistrust whereas sharing information invites a sense of trust.”¹⁶⁶ Complete disclosure is essential to resolving complex problems and this requirement in Collaborative Law leads the way to effective resolution.¹⁶⁷

In Collaborative Law, all relevant material must be disclosed.¹⁶⁸ But the question becomes, what information is relevant? Information that is relevant in litigation will certainly be material in Collaborative Law.¹⁶⁹ Moreover, additional information may be necessary in Collaborative Law that would not be available through formal discovery. For example, Collaborative Law requires lawyers to disclose “settlement facts,” which Menkel-Meadow states,

[M]ay not be legally relevant but which either go to the underlying needs, interests, and objectives of the parties—why they want what they want in a dispute—or such sensitive information as financial information, insurance coverage, trade secrets, future business plans that may affect the possible range of settlements or solutions but which would not necessarily be discoverable in litigation.¹⁷⁰

These settlement facts can be essential in determining solutions to complex problems. Where disagreements as to relevance arise, lawyers

162. *Id.* at 58.

163. *Id.* at 59.

164. *Id.* at 58.

165. *Id.*

166. *Id.*

167. *Id.* at 58-59.

168. Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 S. TEX. L REV. 407, 435 n.67 (1997).

169. *Id.* at 423.

170. *Id.*

work together with their clients to resolve discrepancies. Often, the default will be to err on the side of disclosure rather than non-disclosure.¹⁷¹ A deep understanding of the issues is required in Collaborative Law, and the only way to achieve understanding is through disclosure.¹⁷²

Participation through Active Client Engagement

The preponderance of legal negotiations and adversarial processes are lawyer-focused.¹⁷³ Shields explains, “Lawyers manage the flow of information; they make the decisions on how they will proceed, and they are the principal speakers.”¹⁷⁴ Although lawyers can focus on the clients, the clients are not at the center of proceedings or negotiations, and often, clients do not participate in negotiations at all.¹⁷⁵ Collaborative Law, on the other hand, has a unique focus on clients; it includes parties in every settlement meeting and asks them to participate actively in planning, option generation, and decision-making.¹⁷⁶ Focusing on clients’ participation is valuable in resolving complex disputes.¹⁷⁷ These unique perspectives allow parties to craft solutions that are authentic and workable. This is because the solutions are not as narrowly defined as those reached without significant client input and participation.¹⁷⁸

Such participation can be difficult for clients, but they are not left to their own devices.¹⁷⁹ Lawyers and other professionals, both at the table and behind the scenes, can assist the parties to better negotiate on their own behalf and can coach them to speak in a way that their spouse can hear them.¹⁸⁰ While most divorce clients are not their best selves at this difficult time in their lives, the client-centered focus in Collaborative Law can help bring out a better side of each spouse and improve their communication both

171. ACTION COMM. ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, *supra* note 7, at 52.

172. *Id.*

173. See generally Richard W. Shields, *On Becoming a Collaborative Professional: From Paradigm Shifting to Transformative Learning Through Critical Reflection and Dialogue*, 2008 J. DISP. RESOL. 427 (2008).

174. *Id.* at 431.

175. *Id.* at 430.

176. *Id.*

177. *Id.*

178. ACTION COMM. ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, *supra* note 7, at 52.

179. *Id.* at 34.

180. *Id.* at 21.

during and after negotiations.¹⁸¹ The rational decision-making involved in other processes is hence avoided in Collaborative Law.¹⁸² Collaborative Law, in employing a participatory, multidisciplinary approach, assists in removing assumptions of rationality.¹⁸³

Deep Conversation through the Team Approach

Deep conversation is facilitated in Collaborative Law through the use of a team approach.¹⁸⁴ Research has shown that diverse groups make better decisions about complex problems.¹⁸⁵ Collaborative Law's potential thus lies in the use of a team of professionals in the process. Often, the parties and lawyers benefit from collaborating with other professionals who can devise ideal outcomes that suit particular client needs, and also to ensure that all interests and options are considered.¹⁸⁶ A team approach has become an essential component of the Collaborative Law process in most practice groups.¹⁸⁷

The use of team models is generally derived from the health and mental health spheres where multiple disciplines help facilitate optimum outcomes for patients.¹⁸⁸ The Law Commission of Ontario has also noted the lessons that can be learned from the health care sector in resolving complex family law issues.¹⁸⁹ Multidisciplinary practice in healthcare has developed over the last forty years, and the best outcomes are achieved where both health and non-health disciplines can be coordinated, when input is informed by others, and when the outcome is as concise and inclusive as possible.¹⁹⁰

Indeed, Portnoy advocates for a team approach because of the holistic value it adds to the settlement of family law issues, including the "monetary,

181. *Id.* at 29.

182. Shields, *supra* note 173, at 435.

183. ACTION COMM. ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, *supra* note 7, at 26-7.

184. Michele DeStefano, *Non-lawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup*, 80 FORDHAM L. REV. 2791, 2801 (2012).

185. *Id.* at 2792.

186. *Id.* at 2797.

187. *Id.* at 2801.

188. *Id.* at 2800.

189. Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*, 78 (Feb. 2013).

190. DeStefano, *supra* note 184, at 2795.

custodial, psychological, and emotional components” of divorce.¹⁹¹ In response to the Law Commission of Ontario’s recommendation for a multidisciplinary approach to family law cases, the Ontario Collaborative Law Federation (OCLF) explained,

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.

. . . .
Collaborative professionals work together, not at cross purposes, and keep each other informed 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.¹⁹²

To be sure, some of the early criticisms of Collaborative Law surrounded the inability of lawyers alone to venture into emotional and financial forums without the requisite training.¹⁹³ Using multiple experts in these fields helps resolve this problem.

Collaborative law allows for the exploration of client needs beyond what lawyers alone can provide.¹⁹⁴ Neutral financial advisors and mental health professionals can provide expertise to help parties cope with all of the difficulties inherent in resolving complex family disputes.¹⁹⁵ As Macfarlane notes,

In the family area, family clients can benefit from the combined expertise of lawyers, therapists, child and family counselors, child welfare specialists, and financial planners. In each case, the added value for clients who can afford a range of integrated services is that they are able to build comprehensive, long-term solutions to planning for uncertainties, crises, or conflict instead of purchasing piecemeal advice, which may overlook opportunities for creative solutions or which may ultimately conflict or collide with advice from other professional consultants.¹⁹⁶

The way in which the combined expertise is used varies in collaborative law, but no matter the number or nature of team members, the

191. Sanford M. Portnoy, *The Psychology of Divorce: A Lawyer’s Primer, Part 2: The Effects of Divorce on Children*, 21 Am. J. of Fam. L. 126, 131 (2008).

192. LAW COMMISSION OF ONTARIO, *supra* note 189, at 75.

193. Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. DISP. RESOL. 73, 80 (2005).

194. *Id.* at 73.

195. *Id.* at 99.

196. JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 237 (2008).

interdisciplinary nature of collaborative law raises the bar for the negotiation of complex problems.¹⁹⁷

Strategic Direction through the Collaborative Law Process

Collaborative law follows a distinct strategic process intended to bring out the root issues of the dispute and resolve them creatively in the best interests of the parties.¹⁹⁸ The process follows through four distinct stages; each is critical.¹⁹⁹ Together, they allow for the resolution of complex problems.²⁰⁰

The collaborative law process begins by identifying the issues and laying out the framework for resolution.²⁰¹ It recognizes that the best process and ideal techniques to resolve the issues are not uniform.²⁰² This is where collaborative law and the traditional legal system diverge.²⁰³ There is no one size fits all approach. If the problem is complex, a tailored process is required.

A well thought out framework is critical to the successful implementation of a collaborative law process.²⁰⁴ It is at this stage that the parties are understood, the right team is assembled, and the strategy is built.²⁰⁵ It is essential that a common, collective understanding is held.²⁰⁶ Without such understanding, the process can continue based on faulty assumptions or differing understandings of the issues or acceptable solutions.²⁰⁷ Lawyers and clients lay a foundation together during this first stage of a collaborative law file.²⁰⁸ They communicate a great deal of information to each other and share this information with the other party and the other party's counsel in the manner described earlier.²⁰⁹ On the basis of this framework, important strategic process decisions can be made.²¹⁰

197. Fairman, *supra* note 193, at 103.

198. Simmons, *supra* note 23, at 9.

199. *Id.* at 149.

200. *Id.*

201. *Id.*

202. *Id.* at 151.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 152.

207. *Id.* at 153.

208. *Id.*

209. *Id.*

210. *Id.*

The second step in the collaborative law process delves deeper into the issues by asking the team to gain insight into their complexity and underlying root causes.²¹¹ The necessary actions at this stage include gathering facts, breaking down issues, looking at each issue from both rational and emotional points of view, understanding the root causes of each issue, and identifying any obstacles to the implementation of a solution.²¹² It is here that detailed information is shared, and goals and priorities are communicated.²¹³ A deep understanding of the issue and its root causes must be attained before any resolution can be considered.²¹⁴ Looking below the surface is integral.

It is only once the first two stages are complete that solutions should begin to be devised.²¹⁵ Option exploration should not occur haphazardly, but rather should be thoroughly planned and rigorously executed.²¹⁶ Collaborative law injects rigor into the many contributors of option exploration.²¹⁷ Some may sit at the negotiating table, and some may bring their views to the table through others.²¹⁸ Any input may be important in developing sustainable results. Particularly in inter-disciplinary teams, team members must take responsibility for their areas of expertise and contribute accordingly.²¹⁹ Areas of expertise may surpass vocational knowledge, just as brainstorming is optimal with different personalities.²²⁰ Diversity of both occupation and personality is a great benefit of multidisciplinary teams.²²¹ This benefit can be optimized by defining the roles and responsibilities of each team member.²²² This stage terminates with the development of a range of implementable ideas that fit within the parameters defined during the first stage.²²³

Once a range of employable solutions is determined, plans for the optimal solutions can be fully developed.²²⁴ In this fourth stage of the

211. *Id.* at 155.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 157.

218. *Id.*

219. *Id.*

220. *Id.* at 158.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 159.

collaborative law process, all risks must be examined and all implications must be explored.²²⁵ The result of this stage is the metamorphosis of the solution from concept to agreement and implementation of the agreement.²²⁶

The signing of an agreement and the drafting of any court papers certainly takes place at this stage of a collaborative law file.²²⁷ However, these actions are not the only ones considered. At its end, the collaborative law process focuses on the continuing lifespan of the agreement.²²⁸ Tesler explains,

In collaborative law practice, the lawyers recognize the human need of many clients to reach emotional closure at the end of the process. For that reason, elements can be built into the final events of the representation that help clients achieve a kind of homeostasis or resting place with respect to the life passage that divorce represents for them.²²⁹

It is important to consider the emotional toll of closure for collaborative law clients. Focusing on this implementation phase gives clients this opportunity.²³⁰ It is this final phase that proves the resolution of complexity, as it is here that ideas are put into action.²³¹

PART III – APPLYING COMPLEXITY ON A MACRO SCALE IN THE LEGAL SYSTEM

The previous section explained how discovery, participation, deep conversation, and strategic direction can lead to the resolution of complex problems in collaborative law. What lessons can be learned from the resolution of family disputes through collaborative law on a micro scale that can be applied on a systemic macro level? This paper began with a quotation about the family law system in Canada. It asserted that costs, delays, and other barriers are preventing justice from taking place.²³² In addition, the family law system has been said to be broken.²³³ This is an example of a complex systemic problem. The Law Commission of Ontario

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. TESLER, *supra* note 22, at 68.

230. Simmons, *supra* note 23, at 160.

231. *Id.*

232. ACTION COMM. ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, *supra* note 7, at 1.

233. Phillip Epstein, *Epstein's This Week in Family Law*, FAM. L. NWS. (Thomson Reuters Can. Ltd., Toronto, Ont., Can.), July 9, 2013.

notes various reforms to the family law system in the province.²³⁴ One must be wary of complex family law problems being addressed as if they were complicated problems. The family justice system remains too costly, too cumbersome, and too clogged.²³⁵ Let us examine whether complexity science is a relevant tool.

The first step is necessarily a complexity assessment. The problems faced by the family law system can be characterized as complex because they fit the criteria enumerated earlier in this paper; they are uncertain, ambiguous, and involve aligning multiple stakeholders. Few agree as to the root causes of the issue surrounding the family law crisis. Many have chosen to point to self-represented litigants as a cause of the problem, but this is likely just a symptom of the real issue. A complete examination of all concerns surrounding the family law system is beyond the scope of this paper. Suffice it to say that there are many different and interconnected complex problems. These problems are rooted in the lawyers, the clients, and the system. They remain complex and in need of resolution. If a complexity lens is applied to these problems, a process involving discovery, participation, and deep conversation would be required. Multiple stakeholders could be engaged to provide an interdisciplinary perspective. Only once a complete process is undertaken can a strategic direction result. In other words, the collaborative law process can be applied on a larger scale to address systemic issues. It is not easy to apply these models, however, because they contradict the models which we are accustomed to employing.

Law is not the only field to experience the problem of distinguishing and managing both complicated and complex problems at a systemic level. Glouberman and Zimmerman studied the Canadian Medicare system from the vantage point of complicated versus complex systems.²³⁶ As they noted, “The sophistication of our models, theories[,] and language for complicated problems can be . . . seductive . . . They provide better ‘light’ and clarity and yet can lead to investigations that are ill-equipped to address complex adaptive systems.”²³⁷ This research examined the medical system, and in particular, the circular and ineffective way in which emergency medicine is

234. Law Commission of Ontario, *supra* note 36, at 38.

235. Meaningful Change for Family Justice: Beyond Wise Words, *supra* note 3, at 5.

236. Sholom Glouberman & Brenda Zimmerman, *Complicated and Complex Systems: What would Successful Reform of Medicare Look Like?* 21 Discussion Paper No. 8 (July 2002), http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/future_health_care-ef/discussion_paper-e/no08/8_e.pdf.

237. Glouberman & Zimmerman, *supra* note 236, at 2.

being handled.²³⁸ Parallels can be drawn to the problems faced by the legal system.

Beyond the family law system, there are many examples of systemic problems. There is no shortage of complex problems in the legal system in need of resolution. Access to justice remains a persistent problem, which has not yet been successfully resolved. As Renee Newman Knake notes: “we have failed to develop sustainable models for delivering legal services that are affordable, accessible[,] and importantly, adopted by clients who utilize them on a regular, sustained basis.”²³⁹ Access to justice has been treated as a complicated problem and theories of complicated systems have been applied to try to resolve the problem. These resolutions would likely not be successful since access to justice is indeed a complex rather than complicated problem. The issue of access to justice possesses unchallenged assumptions, multiple stakeholders, and unpredictable and ambiguous elements. For the aforementioned reasons, access to justice is a complex problem. Innovation is required to create systemic change. Systemic change must take place if the problem of access to justice is going to be resolved.

It is appealing to avoid the necessary innovation required to resolve intractable complex problems. People are much more accustomed to the methods and mindset necessary for resolving complicated problems. We default to those methods and feel secure in their application, however, such security is false or temporary as the problem will inevitably rear its head again if not resolved properly.

CONCLUSIONS, IMPLICATIONS AND FUTURE DIRECTIONS

When we choose to treat the symptom instead of the system, we have addressed a complex problem in a less than optimal way. It is unrealistic to assume that all complex problems will be addressed in the way prescribed in this paper, after all, there are so many complex problems in existence. There is, however, an appetite to remedy a complex problem with a long-term solution, and people must be aware of the ways in which to do so effectively.

Complex legal problems, both on a macro and micro level, have yet to be solved effectively. A lawyer, as a problem-solver and process designer,

238. *Id.* at 11.

239. Renee Newman Knake, *Why Law Students Should be Thinking About Entrepreneurship and Innovation in Legal Services*, BLOOMBERG BNA (Nov. 28, 2012), <http://www.bna.com/innovation/>.

[Vol. 17: 157, 2017]

Calming the Chaos

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

must consider all relevant variables of an individual complex case to create a process that best suits the needs of the particular client and particular problem. Governmental actors and policy makers must understand complexity to address complex systemic issues. Change is required.

Complexity science is a useful tool to conceptualize the legal world on both a micro and macro level. It allows for the flexibility of scenario planning and encourages an openness towards emerging patterns. This paper has begun the conversation of how complexity science can be applied in the legal realm. It can help collaborative lawyers devise sustainable solutions and help resolve complex systemic issues. The conversation must continue. Only in having these conversations will the theory become operationalized.

Complexity science is applicable in a vast number of contexts. It is possible and probable that legal practitioners and scholars already incorporate complexity science, although they may not be aware of this. If so, the exposure to theories espoused in this paper may simply provide a framework for work that is already taking place. Whether to provide a framework for existing considerations or to define new territory all together, a discussion of complexity science in law is advantageous.

This paper ends with a few cautions. Viewing the legal system, whether on a micro or macro level through a complexity lens does not in and of itself answer the questions or solve the problems. On the contrary, it may create more questions and more ambiguity. In creating more fog, however, we may emerge with a clear and sustainable resolution to the complex problems we face. Embrace ambiguity, encourage collaboration, and enjoy the new challenge that complexity thinking can offer.