

## **TAB 1**

# **What Difference Does “Collaborative Family Lawyering” Make?**

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**Collaborative Family Law Practice**



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

**CONTINUING LEGAL EDUCATION**

What difference does  
"Collaborative Family Lawyering"  
make?

Dr Julie Macfarlane  
Faculty of Law, University of Windsor

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## **The Collaborative Lawyering Research Project**

- ☐ 2001-2004
- ☐ Funded by the Social Science and  
Humanities Research Council of  
Canada, and the Department of  
Justice, Canada

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## **Overview**

- ☐ An empirical description and assessment of  
US and Canadian experiences with CL
- ☐ Small volume, intensive focus
- ☐ Case studies in pilot sites
- ☐ Preliminary findings published May 2004
- ☐ Final Report completed October 2004

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### Data collection sources

- ☐ Year 1, 64 interviews with lawyers, clients and OCP's in 11 North American sites
- ☐ Case studies followed through at four pilot sites of Vancouver, Medicine Hat, San Francisco and Minneapolis (+1 in Regina)
- ☐ 155 case study interviews completed

### The claims of CFL (1)

- ☐ CFL offers a new (peaceful, constructive) practice choice for family lawyers
- ☐ CFL creates a safe and contained space for negotiation that goes beyond traditional positional bargaining

### The claims of CFL (2)

- ☐ This safe space is sustained by the disqualification agreement signed by counsel and clients
- ☐ The outcomes of CFL are qualitatively better than those reached via traditional methods

### A New Practice Choice

- ☐ "In litigation, even if you got a good legal result for the client..at the end of it there is just depression and ashes. It leaves more than a sour taste- it leaves a sickness in the stomach of the client, and in mine too"
- ☐ Case 16, Lawyer 2
- ☐ "Spouses are an open book to one another, and the language of affidavits attacks all the vulnerabilities of the other. This is so destructive between spouses as well as for kids. Then some idiotic jerk of a judge who probably has an IQ of about 10 decides what should happen to this family."
- ☐ Site Visit, Lawyer 20

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### After CFL

- ☐ "It was like pulling on a warm blanket and saying, 'I am home again'" (Field Visit Lawyer 2)
- ☐ "At times (in traditional family practice) I felt like I was assisting people but for the most part I felt I was Prometheus - rolling a rock uphill. When I found CL, everything fell into place" (Case 7 Lawyer 2)
- ☐ "Collaborative law is a means of saving one soul" (Field Visit Lawyer 18)

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### Lawyer motivations

- ☐ Abhorrence of litigation for family matters
- ☐ Seeking congruence with personal values
- ☐ Reduced stress
- ☐ Reduced personal responsibility for outcomes
- ☐ A better alternative to mediation

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### Principal Variations in CFL Practice

- The Traditional Legal Advisor who Commits to Co-operation
- The Lawyer as Friend and Healer
- The Team Player

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### The Cooperative Advisor

- ☐ Still researches and provides specific legal advice
  - ☐ Blending CFL principles into traditional practice norms
  - ☐ Clear about client focus
- "I absolutely think I have a special responsibility to my client... I am her attorney or his attorney and there is no question in my mind that that is my primary duty. I mean, that's what my job is, that's what I'm being retained for and if that's not the case, there can be a mediation with two mediators who are neutrals."

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### The Lawyer as Friend and Healer

- ☐ Therapeutic role
- ☐ Changed relationship with clients
- ☐ Too much focus on the law is "contaminating"

"I am becoming much less of a traditional lawyer and much more of a coach. So the language that I'm using with you is language of connection, it's the language of support. The concept that I have is that I'm walking with my client through the process."

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### The Team Player

- ☐ Focused on process and “collaborative principles”
- ☐ Primary relationship with other professionals in the team
- ☐ Has faith in the process and sees any failure as a process failure  
“Success ... is based on the strength of my relationships with colleagues”

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### Negotiations in CFL : Avoiding the Prisoner's Dilemma?

- ☐ The tendency to reactive defensiveness in legal negotiations
- ☐ Other characteristics of traditional family law negotiations : arms length, positional, clients generally not included, narrow range of outcomes

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### So is it really different?

- ☐ “(At first) I was skeptical, I felt I had done a good job negotiating for clients for a decade already, I didn't really think there was anything in particular that I could learn or needed to learn. So to be quite honest I wasn't sure what CL was offering. I actually find it quite different...you don't realize how poorly people communicate with each other. And I didn't realize it and had negotiated for years and I didn't realize how poorly people negotiate.”

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### Is it really different?

- ☐ "The difference is in a traditional litigation file, if I thought my client's claim was worth \$50,000 I'd ask for \$100,000. If the other lawyer thought the claim was worth \$30,000, they would say it's worth zero. In a CL file I have the confidence to say to my client 'Let's not talk about the 50 to 100, it's a waste of your time, it's not going to happen. Let's concentrate on the 30 to 50 that we all can agree on and make some creative options that suit you both within that 30 to 50.'"

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### Is it really different?

- ☐ "The reason why we don't do positional bargaining is that it doesn't work, not that it's morally reprehensible but that it doesn't work in a consensual process."

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### The impact of the DA

- ☐ ensures a shared and equal commitment
- ☐ constrains future choices
- ☐ creates a "container" for confidential without prejudice negotiations
- ☐ creates pressure to stay the course
- ☐ Creates a new specialism of negotiation

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### After CL has failed?

- " I understand having this clause in the agreement prevents any one of the parties to rush too quickly to litigate (or threaten to during the CL process) and to commit to the collaborative process, but there must be some point at which all parties can recognize the CL process may not continue. After the CL process has failed, I don't quite understand why the attorneys cannot then become the litigators. It becomes just another type of case and I would think having all the background information and knowing the other parties would make for a smoother litigation."

### CFL Outcomes

- The relationship between CFL outcomes, negotiated outcomes and litigated outcomes

### Are outcomes really different?

- The commensurability of CL outcomes to negotiated outcomes
- Timing issues
- The value-added dimensions of CL outcomes (immediate, mid to long term)
- ❖ "Different" conversations are "possible"
- ❖ Relationships may be maintained
- ❖ Creative co-parenting and support arrangements



What difference does "Collaborative Family Lawyering" make?

- ☐ CFL is providing a new practice "home" for disillusioned family lawyers
- ☐ The structure of collaborative networks appears to sustain collaborative negotiations

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What differences?

- ☐ CFL opens up the range of possible outcomes in divorce settlements
- ☐ CFL creates networks of like minded specialists in settlement advocacy

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Outstanding issues and concerns

- ☐ Ensuring CFL "ideology" does not take over client voice
- ☐ Clarifying and strengthening concepts of strong advocacy in a collaborative model
- ☐ Identifying "at risk" participants
- ☐ Ensuring diversity and flexibility in CFL practice

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