

COLLABORATIVE PRACTICE Toronto

Previously Featured Article

COLLABORATIVE FAMILY LAW Revolutionary Approach Winning Converts Across Canada

This article was presented by Judith L. Huddart in February 2002 at the Moncton New Brunswick Continuing Legal Education program held in conjunction with the Canadian Bar Association's Mid-Winter meeting.*

Collaborative Family Law (“CFL”) may be single-handedly responsible for revitalizing the practice of family law in Canada. “Collaborative Law” began in the U.S., but has been increasingly embraced by lawyers in Canada as one of the newest and best options for alternate dispute resolution. Collaborative Law offers a non-adversarial resolution but requires lawyers to re-learn a career’s worth of behaviours to work with, not just for, their clients. It requires clients to actually participate in the resolution process themselves, open lines of communication with each other, and to resolve their differences creatively. This revolutionary approach is particularly appealing in family law, where shared responsibility for raising children forces parents to remain in touch for years after they separate.

Lawyers acting out the traditional role of gladiator gain little personal satisfaction in family law. Clients rarely express appreciation at the end of a bitterly fought court battle, no matter what the results, but are quick to share their dissatisfaction and disappointment if a case does not go well. Courts can seldom provide an acceptable long-term resolution for children’s issues. Aside from the tremendous costs, there is little accountability in the court process. The judge makes a decision based on the law and the parties and their children must live with it.

Adversarial behaviour, unfortunately, also tends to permeate traditional out-of-court negotiations. Lawyers are expected to follow instructions from clients who are often on an emotional roller coaster, unhappy and confused trying to protect their rights after separation. Ex-spouses may seldom even see or speak to one another. And chances are if they do speak, it may be only to share anger or hurt. If they agree to a 4-way meeting with their lawyers, it’s the lawyers who generally set the agenda and act as their clients’ mouthpiece. Lack of communication is cited as a main contributor to failed relationships; add to this lawyer-fronted negotiations and it may be no surprise that a couple’s ability to communicate after separation is at an all-time low. They part company

with their lawyers armed with a legal agreement but no ability to deal with each other to work out parenting arrangements.

But, just as traditional lawyer-based negotiations are not always satisfactory, mediation presents problems as well, particularly when one partner has been dominant throughout the relationship. In mediation lawyers are normally sidelined, leaving clients to advocate for themselves with the independent mediator, who may or may not be trained to recognize when one partner is controlling the process. The partner better or more comfortable at presenting their position has greater bargaining power and this is likely to leave the other dissatisfied with the results.

CFL encourages ex-partners to find ways of communicating respectfully with each other to arrive at a solution that works for both of them - and their children. It will only work if the lawyers involved are properly trained in “interest-based” negotiation skills and are prepared to let go of their traditional control over the process – not an easy task. Unlike mediation, lawyers take part as coaches to assist their clients in their negotiations, but unlike traditional negotiations, the parties themselves must take ownership of these negotiations. This does not mean that lawyers can simply sit in the wings and leap back into adversarial mode if negotiations break down – quite the contrary. Lawyers must work ethically and co-operatively with each to ensure their clients are participating fairly in the process, including providing full financial disclosure; and if negotiations fail in CFL, both lawyers must withdraw and different lawyers must be hired by the parties to take the matter forward to court.

It is really no surprise that family law lawyers have enthusiastically welcomed the CFL approach. They fight on the front lines in family law battles and understand what it is like to be frustrated and worn down by the process. The bonus is, CFL not only provides more personal satisfaction and less stress for their clients, but the lawyers themselves also experience this same result. With the family law bar in British Columbia and Alberta leading the way, over the past two years CFL groups of like-minded family law lawyers have sprung up from coast to coast to coast. What follows is an overview of the amazing growth of Collaborative Family Law as word of its success spreads across Canada, shrinking court lists and rallying support from lawyers and clients alike.

British Columbia:

Vancouver, Victoria and Kelowna currently have CFL groups. Nancy Cameron, one of the first lawyers to practice CFL in Canada, was co-founder of the CFL group in **Vancouver** in 1999. Nancy reports they currently have about 40 members made up of lawyers and some mental health professionals. The mental health professionals are a

key component of the Vancouver group, which offers a complete multi-disciplinary model. The impetus to start the group came after Nancy met with Pauline Tesler in California. The founders of the Vancouver group then sponsored a one-day training course in Vancouver in the summer of 1999 with U.S. CFL leaders Pauline Tesler, Peggy Thompson and Stu Webb, the U.S. founder of CFL. Over the next year a number of the lawyers and mental health professionals travelled to the U.S. to take further training with these same CFL leaders, plus Nancy Ross. Stu Webb was then invited up to Vancouver from Minneapolis in March, 2001 to lead their first in-province training. Vancouver continues to offer substantive training for the province. As of mid-January, 2002, approximately 80 lawyers and 20 mental health professionals have received training there. The Vancouver group has developed their own training materials as well as participation and retainer agreements and other client-centred materials. They also have their own website. To qualify for membership in this group, lawyers must complete 40 hours of mediation training plus a two-day course in Collaborative training. Accredited mental health and financial planner members have slightly different training requirements. Regular dinner meetings and case conferences help provide on-going education for members. Nancy reports that their membership has now reached a level where CFL can be offered as a real option for clients and a number of their members are no longer litigating any cases at all.

Chair of the CFL group in **Victoria**, Robert Klasssen reports that they currently have 25 experienced family law lawyers in their group. Two training workshops have now been completed in Victoria with local trainer and coach, Sharon Smallenberg. Sharon has also recently completed a training workshop in Duncan, B.C. with approximately 16 lawyers and other professionals involved in family law cases. The Victoria group has developed their own participation and retainer agreements. Recognizing the importance of getting the CFL option out to separating families, not only have they distributed a brochure to professionals involved directly in the separation and divorce process, the group has also taken out a large ad in the Yellow Pages with their phone number and their website. Members of the group have spoken to various community groups and on radio and television to promote the process. The approach must be working, as Robert Klasssen reports that he's now working on his 18th CFL case.

The Okanagan Collaborative Family Law Group in **Kelowna**, B.C. is Co-chaired by Nancy Johnson and Barbara Young. This group has been active for approximately 1-½ years, and has been able to share in some of the expertise offered by the Vancouver and Victoria groups, including contract precedents from Vancouver and a brochure precedent from Victoria. To date, Kelowna has about 20 lawyers as members, who agree to take either a CLE Mediation Course or the 2-day CFL Course in Vancouver. Nancy reports that they hope to be able to offer training locally in future and have recently started including "Divorce Coaches" in their planning meetings. While

developing their website and waiting for more cases with formal CFL contracts to develop in Kelowna, some members of the group have been honing their CFL skills by applying these co-operative techniques during 4-way meetings and other negotiations.

BULLETIN FROM B.C.: A one-day conference on Collaborative Law is planned for July 18th, immediately following the CBA/Federation of Law Societies National Family Law Program in Kelowna. Pauline Tesler, author of the excellent ABA-published book: *“Collaborative Law – Achieving Effective Resolution in Divorce Without Litigation”*, has been invited to come to speak about her view of the CFL paradigm shift in the practice of family law. There is also talk of offering some CFL training during this time frame. This could be welcome news for those family law lawyers attending the National Program who do not currently have CFL training available in their local areas.

Alberta:

Each city in Alberta where CFL is being practised has incorporated its own non-profit association. In the collaborative spirit, each of the associations has, as much as possible, attempted to mirror the structure, criteria and objectives of the other associations. This includes sharing the same website and maintaining fairly similar contracts and membership requirements. Although very popular in Calgary and Edmonton, CFL has achieved overwhelming success in the smaller southern community of Medicine Hat. There is also a group in Lethbridge and plans to develop a group in Red Deer. The Law Society in Alberta has even provided insurance rebates to lawyers who have completed the Edmonton association’s CFL course.

Victor Tousignant, Chair of the **Calgary** group reports they currently have 58 members, with 54 of these fully qualified as RCFL’s (Registered Collaborative Family Lawyers). This number equates to about 1/3 of the city’s CBA Family Law Section members. Qualifications are demanding – requiring 40 hours of family mediation, 1 advanced interest-based negotiation course, and a 2-day CFL course. Chip Rose, a well-known U.S. trainer, is reported to have said Calgary had the highest standards he’d seen for qualifications. Local people are offering the training, and Victor, who describes himself as “striving to become bilingual”, has also travelled to New Brunswick to speak on CFL to French-speaking lawyers. Most lawyers in Calgary continue to practice both CFL and regular family law. While some cases have reportedly taken a bit longer to negotiate, most importantly, the results have held together – especially those with children involved.

Marla Miller, a board member of the **Edmonton** CFL group reports that they currently have about 40 members. Training requirements are similar to Calgary's: a RCFL member must complete 40 hours of mediation training, 32 hours of interest-based negotiation training, and 16 hours of CFL training. While local people provide the mediation and negotiation training, currently CFL trainers still have to be brought in from outside the city. CFL has not only been approved as a litigation alternative covered in the province's Mandatory Parenting after Separation Course, but is also now taught in the Bar Admission Course.

In **Medicine Hat**, CFL leader and trainer Janis Pritchard reports that CFL has all but taken over their local family law bar. The drop in the demand on court time has been so dramatic that the province is now looking at ways of promoting CFL in even more Alberta communities. Janis and her colleague David Carter had mediation-based practices for a number of years, but were concerned that mediation did not adequately deal with power imbalances between partners. CFL, they believe, addresses this problem. The results reported by Janis are impressive – not only in providing more satisfying and permanent resolutions for partners, with more child-focused settlements, but also in providing more satisfaction for lawyers practising family law. Janis fields calls daily from enthusiastic lawyers in other Canadian communities wanting training, hoping to replicate Medicine Hat's success. And, as if their local success wasn't enough, Janis and David as well as Brad Hunter from Regina were recently invited down to Minneapolis by CFL guru Stu Webb to share their experiences with his group, the Collaborative Law Institute!

Saskatchewan:

The President of Collaborative Lawyers of Saskatchewan Inc., Brad Hunter of Regina, actively promotes his organization's ambitious goal of making CFL the predominant method of resolving family law disputes in Saskatchewan. So far, they appear to be on target. By the end of this April, there should be approximately 110 lawyers trained within the province in CFL. The **Regina** family law bar has been quick to embrace CFL. They have fast-forwarded from training their first group of 25 last September to having about 40 lawyers qualified by February of this year. **Saskatoon** also has training sessions underway and anticipates 27 members will be trained by the beginning of March. The group also has members in Moose Jaw and Assiniboia. Although not currently a part of his group, Brad reports that some lawyers are also being trained in Lloydminster.

Training follows along the lines of the Alberta model, including the Medicine Hat approach of permitting all lawyers to take the training and encouraging all clients to use

CFL. Brad estimates that several Regina lawyers now have 5 or more CFL contracts with a couple handling close to 10 cases. Not surprisingly, Regina, like other cities where CFL has caught on, is already seeing reduced court lists. The group was assisted by a \$16,000 grant from the Law Foundation to help promote CFL, which had its first official “launch” to the public last October. Brad’s focus on getting the message out to the public helps explain their success. He worked with a local designer and writer to prepare an up-beat but professional brochure that speaks to and not over the head of the average person. The brochure provides a toll-free number, mailing address, plus a website address to encourage the public to contact members of the group. In addition, Brad has prepared a practical “how to” primer for lawyers. “Starting a Collaborative Law Practice from Scratch” sketches out in point form, considerations and suggested approaches. Brad also offers to consult with others needing assistance setting up and marketing a CFL group. His group is planning to launch a second public awareness campaign in March to coincide with the completion of training of more new members in Regina and Saskatoon. It’s no wonder Brad was invited down to Minneapolis by Stu Webb to talk about his approach to setting up a collaborative law practice.

Manitoba:

Peter Bruckshaw is actively involved in Manitoba’s Collaborative Law Group. Peter reports that to date they have about 26 members, made up of 21 lawyers and 5 other professionals. Two lawyers now have practices comprised of 50% or more CFL. The association’s members are still working hard to promote CFL and to encourage more clients to choose this option. The Manitoba group requires four days of training in mediation techniques and two days training in CFL, which to date has been provided by trainers from outside the province. On-going educational programs for members are provided locally.

Northwest Territories:

According to Elaine Keenan Bengts in Yellowknife, although there is no formal association as yet, the concept of CFL is definitely being greeted with enthusiasm. With virtually every lawyer who practices any significant amount of family law expressing an interest in training, they have applied for funding from both the government of the Northwest Territories as well as the Law Foundation. Since no training is available locally, the NWT bar may look initially to Alberta to provide their training, as well as some precedents. They are currently aiming for June to have their first group of lawyers trained in CFL. The local family law bar is small, and initially it was anticipated this might present a challenge to make the CFL option practical for family law clients. Medicine Hat’s example, however, may help address such concerns.

Ontario:

Ontario currently has a number of local areas with either CFL groups or interested lawyers who have taken CFL training. It is estimated that there are now about 150 CFL lawyers in the province with some basic training. With some impetus from Margaret Opatovsky of the Niagara group, representatives from 8 communities met in January to see if there was sufficient interest to establish an umbrella group to co-ordinate efforts at on-going training of members, to promote public awareness, and to share precedents and CFL experiences. A further meeting is planned for March 23, 2002 in Hamilton. Compared to their western counterparts, the majority of the Ontario family law bar has been slower to educate themselves on the CFL option. This can be explained in part by the larger population, but may also be due to the many non-court options currently available in the province. Even litigation has an imposed settlement focus through case management. There has also been some delay in offering CFL as a result of the high standards of practice imposed by local CFL groups. Lawyers need to get up-to-speed on training before qualifying to practice CFL. It is also necessary to build to a "critical mass" of CFL lawyers and clients in each area to make this option viable. While a significant number of Ontario lawyers now have CFL training, they are spread out across the province and still represent a small percentage of the family law bar. There is also not likely to be a big demand for CFL until clients understand the benefits it offers. A province-wide public relations effort is now being co-ordinated to get the public turned on to the advantages of CFL.

On the local level, Ted Charuk, a founding member of the **Hamilton** group, reports that they have about 15 members, have been active for about 1-½ years and are now incorporated. They have developed some protocols, but still need to devote more effort to get a public profile for CFL. **London** has a more informal group, which started about 3 years ago and currently has about 17 members following the Chip Rose training model from the U.S. A number of these members were actually trained by Chip Rose in the spring of 2000. According to Kathleen Chapman, they meet regularly, have developed standardized precedents and have marketed themselves so far through a brochure, a website, and an ad in the Yellow Pages. While not incorporated after 1 year the **Niagara** group, according to Margaret Opatovsky, has moved ahead quite rapidly. They now have standardized agreements and handouts and are close to completion of a brochure. Membership requires at least one level of training plus 5 years in the practice of law, and an undertaking to complete the second level of training within 2 years. New members must also be sponsored by an existing member. Niagara's current membership is at 17, with 12 who have already completed the second level of training. Most members have at least one CFL file and several have more. The group is putting

together a “resource bank” of other professionals for referrals while at the same time talking up CFL in their community. Taking advantage of their close proximity to the U.S., they have also formed contacts with lawyers practising CFL in Buffalo and Rochester and look forward to some joint ventures with them.

Ed Rae reports that his **Nipissing** group in North Bay has been active for approximately a year and currently has about 15 members. They are not incorporated, but are organized with committees. All members have had at least one level of training and a second level will be offered in April. Both levels are required to offer CFL to clients. The group has standardized precedents, a discipline policy, and a brochure. Referrals between other professionals, as well as TV and newspaper coverage have helped give them some public exposure. To date they have 2 on-going cases and hope to have more as word spreads. **Ottawa** is incorporated with an executive structure and committees. Nigel MacLeod reports that they have spent most of their first year working on setting up their organization and taking training to qualify, including a 4-day intensive interest-based negotiation course adapted for CFL as well as 2 days of “process” training by Michael Porter, who practices and trains in Calgary. They now have 20 members who have completed the required 2 levels of training and another 20 associate members. The group, armed with training and plenty of enthusiasm, are preparing to go to the public with CFL through a launch at the beginning of February.

The **Peel** group is organized with an executive and committee structure but so far has chosen not to incorporate. They have been meeting regularly for about 1-½ years, during which time most members have received Level I training, and some Level II training. The group continues to develop protocols. Co-chair Vicki Smith reports that membership is currently at 15, but this group like many others, is still looking to attract more cases and is focusing on marketing to the public. They have now developed a website, launched in January, 2002. Anxious to ensure the best possible resolution for CFL clients, they are also discussing adding further training and mentoring to assist each other with their more difficult cases. Janet Whitehead and Peter Westfall of **Sarnia** are the only 2 to date in their community of approximately 20 family law lawyers who are committed to developing a CFL practice. They are hoping to attract more lawyers once the public becomes better informed about the benefits of the CFL process as an alternative to litigation. They are also considering joining forces with some of their U.S. colleagues across the river for training and mutual support.

Last, but not least, the **Toronto** group, headed by senior family law lawyer James MacDonald, reports that over the past 2 years they have incorporated, established an executive structure with committees, and developed precedent materials. Much effort

was devoted to developing the structure and criteria for training and membership. Now that membership is at 33, with all having completed level I training and 15 having completed level II, the group is focusing their efforts on attracting CFL cases by publicizing CFL and working on standards of practice and codes of conduct to ensure family law clients are well-represented in this settlement option. The governing Board holds monthly meetings in addition to regular dinner meetings and brown bag lunch meetings offered to members to discuss training and mentoring. Preliminary publicity includes broad circulation of a brochure and the launch of their website in mid-January. The Toronto website is focused primarily on the public and currently contains CFL principles, information on the participation agreement, questions and answers on CFL, information on events, articles, a list of members and their qualifications, and links to other CFL-related sites. The large family law bar and size of the population in Toronto presents special challenges. The group is looking for more opportunities to get the word out to the public on CFL and hopes to work with other groups across the province to enhance the public's understanding of the benefits of the CFL process.

Nova Scotia:

Doug Sealy is President and Robyn Elliott Vice-President of the newly formed Association of CFL lawyers in Nova Scotia. Robyn reports that when members of the family law bar initially got together to discuss starting a CFL group, they had 25 people expressing interest within 3 weeks, including a number of senior members of the bar. Their association was registered in early January this year with the Registry of Joint Stock Companies. Training generally follows the Calgary model with approximately 5 days of mediation training, 2 days of negotiation training and 2 more days of CFL training. The group also anticipates adding a continuing education requirement in the near future. The first module of training was offered in November to 17 lawyers and was provided by Michael Porter, from Calgary. Since then a further 10 have completed the first part of the training and more are expressing interest. In addition to the Halifax family law bar, they have managed to attract 5 participants from outside the area. The second phase of training is being provided locally by Annette Strug. As an indication of their commitment, many in the first group of 12 to complete this second phase devoted 7 days to training over the last 3 weeks. With the welcome assistance of CFL groups from other parts of Canada, Nova Scotia members have begun to work on bylaws, further training, and promotion. Now that a number have completed training, the excitement is building to start practising CFL as soon as possible. Robyn advises they aim to "go public" and offer CFL to clients by April, at which point their Yellow Pages Ad should be out and their brochure and website completed.

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