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**INCREASING INNOVATION IN LEGAL PROCESS: THE CONTRIBUTION OF
COLLABORATIVE LAW**

MARTHA E. SIMMONS

**A DISSERTATIO SUBMITTED TO THE FAULTY OF GRADUATE STUDIES IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF
DOCTOR OF PHLOSOPHY**

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ABSTRACT

This dissertation examines the role of innovation in resolving complex disputes, using Collaborative Law as its case study. Innovation, for the purposes of this research, can be defined as applied creativity that leads to optimal resolution for clients. The process of innovation is required to resolve complex problems, which are increasingly prevalent in legal, economic and social spheres. Collaborative Law indeed has the capacity to resolve such issues in the legal realm. Collaborative Law is a process by which 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 research examines the capacity of Collaborative Law to resolve complex problems using methods of ethnographic study, specifically participant observation and key informant interviews. Attendance at conferences and practice group meetings provided the researcher with insight through observation. The researcher subsequently interviewed 31 lawyers who practise Collaborative Law in four Canadian research sites, namely, Halifax, Simcoe County, Toronto and Vancouver. Through these interviews and observations, common themes were generated. When superimposed atop of innovation theory, this research demonstrates that Collaborative Law supports innovation on both a macro and micro level.

Collaborative Law itself is an example of an innovative process and individual innovations are possible in executing the Collaborative Law process, where used and executed appropriately. These results have implications for Collaborative Law practice, for the practice of law, and for legal education that will be explored through this study. Such implications will be examined, along with suggestions for future research.

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Chapter I. Introduction

This research will examine the applicability of innovation theory to dispute resolution, using the practice of Collaborative Law as a case study.¹ Innovation has garnered considerable attention in the academic and popular literature, particularly in the context of business and technology. Despite becoming increasingly ubiquitous, the study of innovation has yet to permeate meaningfully into the legal realm. Where discussion of law and innovation does occur, the focus is predominantly on law and technology, copyright and patents. Increasingly more common, the word ‘innovation’ is used in legal text without definition or explanation. 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. Innovation, as a process, is indeed germane in the legal context. We need innovation in legal process, legal education, legal practice and legal discourse. Innovation is a strategic priority in virtually every sphere. Why is this priority effectively ignored in the legal world? It is relevant. It is necessary. This dissertation undertakes to study innovation, as a process, in dispute resolution.

One form of legal practice has embraced much of the theory of innovation, albeit unknowingly, both in its creation and execution. This practice area is Collaborative Law, a unique yet somewhat controversial dispute resolution process that has vehement

¹ 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 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.

supporters and equally vehement detractors. When it comes to Collaborative Law, there seems to be no middle ground. Its application of innovation theory, even though not deliberate, makes Collaborative Law a particularly appropriate case study for the current research.

Collaborative Law is known by various monikers. Beginning as “Collaborative Family Law”, the process began to be known as “Collaborative Practice” when other professionals began to be included regularly in the process. Others refer to the process as “Collaborative Divorce Law”. Each of these terms is sometimes used interchangeably; however, some note process differences between the different labels. This dissertation will utilize the term “Collaborative Law” to refer to all models of collaborative practice. Since the key features to be examined in this study are common to all approaches, the amalgamated consideration is warranted.

Collaborative Law is a process by which parties and their lawyers enter into a binding contract, known as a participation agreement, that limits the representation to a facilitative problem-solving process with the intent to reach a negotiated settlement.² The process is in and of itself innovative because of its unique focus on settlement in a process with representation for both sides. The participation agreement acts as a contractual commitment to particular processes and behaviours as well as to settlement. Lawyers in Collaborative Law must settle or withdraw from representation. In addition to

² Pauline Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (2d Ed.) (Chicago: ABA Family Law Section, 2008) [hereinafter *Achieving Effective Resolution*].

this Disqualification Agreement, whereby the lawyers relinquish the ability to represent those clients in any adversarial proceedings should the Collaborative Law process terminate, other requirements commonly delineated in the participation agreement include: “full, complete, early voluntary” disclosure of relevant information without formal discovery; “good faith negotiation” and participation with integrity; and, confidentiality within and following the Collaborative Law process.³ Additionally, professional 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 solutions and enhancing relationships.⁴ Proponents of Collaborative Law 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. There is general agreement that Collaborative Law provides a negotiating environment with less posturing and gamemanship than traditional negotiation, although substantive outcomes often

³ *Ibid.* at 161.

⁴ See, for example, *ibid.*

mirror those available and achieved through adversarial means.⁵ Such a negotiating environment should have the capability of resulting in a solution that meets the needs and interests of the parties. As the mantra goes, the solution need not mimic the range of solutions available in the legal system but, rather, can exude all the creativity required to attain a mutually acceptable solution, an innovative solution. Agreements can defy traditional limits.

This dissertation will examine how innovative results are possible through Collaborative Law because of many of its characteristics. In particular, the use of a multidisciplinary team, the execution of a sequenced negotiation process and the participation of lawyers trained to look at issues in different ways help to create a space where innovation can readily take place. The disputes that Collaborative Law addresses are particularly ripe for innovation. They are complex problems that have not yet been adequately resolved in the adjudicative sphere. The distinction of complex disputes, as opposed to complicated ones, is one which has not yet been considered in relation to legal issues. It is, however, a critical consideration when looking at innovation and will be examined in some depth in this research. Collaborative Law, as a process, is the embodiment of innovation. Many lessons can be learned from lawyers who practise under this model of dispute resolution. The empirical portion of this study will elicit such data from Collaborative Law lawyers.

⁵ Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (Ottawa: Department of Justice Canada, 2005). Online: http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/index.html [hereinafter, *Emerging Phenomenon of CFL*].

When utilized in appropriate cases, the Collaborative Law process has the potential to resolve complex disputes more effectively than other dispute resolution mechanisms. Collaborative Law, as a movement, has been initiated and furthered by legal practitioners. Proponents have written extensively in bar journals, newspapers, newsletters and magazines.⁶ However, scholarly research remains relatively minimal and almost exclusively theoretical. Its constituent elements have been dissected in the literature but the broader utility of the process must be appreciated. This research will delve into the question of the type of problems that lend themselves to Collaborative Law and innovation and the ways in which the Collaborative Law process can aptly resolve them through innovation. The interviews and observations in this study will examine the potential for Collaborative Law to yield innovative outcomes in appropriate cases. An examination of Collaborative Law is timely as the process has been said to be going through “growing pains of an ADR process”.⁷ Perhaps the time has come to make changes to the process or accept the changes that have taken place in its evolution.

This research will focus on the process of Collaborative Law but will also turn a focus to the major players in the process, the lawyers. This study will explain how lawyers have become stuck in an analytical mindset through years of achieving success in that model. Asking lawyers to depart from the mode of thinking they successfully employ is not easy. Lawyers must learn to appreciate innovative thought before they can comfortably do so within the Collaborative Law framework. Simply asking lawyers to innovate is not

⁶ An overview of the leading literature will be presented throughout this dissertation.

⁷ Christopher Fairman, “Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics” (2008) 30 *Campbell Law Review* 237.

enough. Teaching innovation should begin early and should be reinforced continually. Innovative thinking is a skill honed in those professions and occupations that value its use. To this point, law has not been such a profession. In order for innovation to happen, this history must change. What needs to be instilled in lawyers, all lawyers, is the good judgment to determine which kind of thinking is required in a particular situation. They must know when it is time for analysis and when it is time for innovation.

The format of this dissertation will proceed as follows: Part A will provide a literature review on the essential elements of Collaborative Law. In particular, Chapter II will outline the history of Collaborative Law and its relation to other dispute resolution processes. Chapter III will describe the nature of the process, its value-base, benefits and challenges. Chapter IV will focus on two essential elements in Collaborative Law: the lawyers and the disqualification provision and will comment on their impact on the Collaborative Law process.

Part B of this research will turn to look at innovation in more depth, correlating the innovation process and Collaborative Law. Chapter V will define innovation and situate innovation within a historical context. Chapter VI will describe the process of innovation and its requisite components, looking at why Collaborative Law has the potential for innovation. Here, the theory of innovation will be examined in tandem with that of Collaborative Law. It will then be useful to understand the increasing need for innovation by taking a step back in time to explore the legal landscape at the cusp of the 1990s, the time at which Collaborative Law was envisioned. This examination will be articulated in

Chapter VII, including a look at the professionalism movement, the Alternative Dispute Resolution movement and changes in divorce law as well as the economy. Chapter VIII will discuss the skills, propensity and support required for lawyers to embrace innovation, and will examine the benefits and challenges associated with the Disqualification Agreement in terms of innovation.

Part C will then begin the empirical portion of this research. Chapter IX will explain the research methodology employed in the current study. Therein a detailed discussion of the ethnographic approach to participant observation and informant interviews will take place. The results of the research will be shared in Chapter X. It is the hypothesis of this dissertation that common themes will be generated from observations and interviews that will bear on the topic of innovation. An analysis of the findings will take place next, in Chapter XI, followed by a conclusion and summation.

The study of innovation in Collaborative Law has implications both on a micro level, to suggest improvements to Collaborative Law and individual dispute resolution, and on a macro level to provide a window into what innovation in legal process can look like. This research study will report on findings related to both of these factors. The specific results from the observations and interviews conducted in this study suggest a model for innovation in the provision of individual legal services. This model is increasingly necessary in the ever-changing legal, economic and social world in which we reside.

PART A – COLLABORATIVE LAW: AN INTRODUCTION & LITERATURE REVIEW

“Every truth passes through three stages. First it is ridiculed. Second, it is violently opposed. Third, it is accepted as being self-evident”.

- Arthur Schopenhauer, 1788-1860

Chapter II. Collaborative Law: A Definition and History

In order to understand the relationship between the innovation process and Collaborative Law (CL)⁸ and to ponder both lawyer disqualification and the aptitude of lawyers to think innovatively, the definition and history of CL must be explained. This chapter aims to provide such background information. Since CL is rooted in family law and began as a method to resolve family law disputes, this research will focus on family law as a locus for CL. Other areas of law have adopted CL on a smaller scale and future research could examine whether the theories espoused herein can be broadened to include these. This Chapter will also situate CL within other dispute resolution processes and will explain how the process of CL came to be.

Defining Collaborative Law

To begin, let us ground this discussion with a current comprehensive definition of CL. The International Academy of Collaborative Professionals (IACP) has defined CL in its most recent strategic plan as,

...a voluntary dispute resolution process in which parties settle without resort to litigation.

In [CL],

1. The parties sign a Collaborative Participation Agreement describing the nature and scope of the matter;
2. The parties voluntarily disclose all information, which is relevant and material to the matter that must be decided;
3. The parties agree to use good faith efforts in their negotiations to reach a mutually acceptable settlement;
4. Each party must be represented by a lawyer whose representation terminates upon the undertaking of any contested court proceeding;

⁸ For a glossary of all short-forms used in the research, see Appendix A.

5. The parties may engage mental health and financial professionals whose engagement terminates upon the undertaking of any contested court proceeding; and
6. The parties may jointly engage other experts as needed.⁹

Elements of this definition will be explained and elaborated upon in subsequent Chapters.

While the disqualification of lawyers from litigation seems to be a singular focus of academics and critics, this research will explore the various features that combine to create CL. But first, a distinction between CL and other dispute resolution processes is offered for consideration.

Locating Collaborative Law in Relation to Other Dispute Resolution Processes

When CL was created, other processes had begun to be used to settle family law disputes. Certainly, litigation and the adversarial settlement that accompanies it were the predominant methods, but there were other mechanisms as well. For example, prior to the creation of CL, mediation was introduced to family law practice in an attempt to ameliorate problems associated with litigation. Mediation has many forms but at its broadest, can be characterized as a dispute resolution process in which a third-party neutral facilitator helps parties to reach a negotiated agreement. In fact, mediation remains the most prevalent alternative to litigation in family matters, sometimes even used in tandem with arbitration and litigation processes and has fundamentally changed the litigation process.

⁹ Diane Diel, “The Definition of Collaborative Practice: Moving from Branding to Unification” (2013) 13(1) *Collaborative Review* 22 at 22.

Since CL exists amidst both traditional family law and mediation, it is useful to locate CL in relation to these processes. While each of these methods of dispute resolution is inextricably linked, and can have substantial overlap depending on models of practice, each has unique aspects and features that merit consideration.

Very few family law cases are decided in court. Generally, the statistic lies around 2% of cases that are litigated to decision.¹⁰ The reality that this statistic suggests is that the vast majority of cases settle in negotiation of some sort. This section will detail three spheres of family dispute settlement: traditional adversarial settlement in the litigation system, mediation and CL. The lack of a detailed consideration of the litigation process is not intended to suggest, however, that the litigation system is not important. The litigation system is pervasive and controls many of the settlement mechanisms available in family law, it is just rare that a case is litigated to decision. Thus, litigation will be considered in tandem with traditional settlement.

Traditional settlement within litigation

CL was developed to respond to many complaints about the traditional family law system. The adversarial system has long been critiqued as an insufficient mechanism for resolving intimate interpersonal disputes.¹¹ The legal system, as rights based, is bound by

¹⁰ Nancy Ver Steegh “Book Review: The Unfinished Business of Modern Court Reform – Reflections on *Children, Courts and Custody* by Andrew I. Schepard” (2004) 38(2) *Family Law Quarterly* 449.

¹¹ See, Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (San Francisco: Jossey Bass, 2005); Jay Folberg & Ann Milne (Eds.) *Divorce Mediation: Theory and Practice* (New York: Guilford Press,

rules and procedure. In Canada, such procedural rules by which the family law system runs, are governed by the respective provinces. In Ontario, for example, the *Family Law Rules*¹² sets out how a case is to be filed, what evidence is admissible, what timelines are to be followed, among other procedural rules. Such set protocols, while helpful, remove the power from disputants and can cause significant delays attributable to the court system and often to the parties. Even where settlement is achieved in the traditional system, such settlements are often achieved close to a triggering event such as a pre-trial, settlement conference or trial. Pacing and protocol are not necessarily based on the needs of the disputants.

Beyond procedural roadblocks, much has been written about the ineffectiveness of a litigated outcome, particularly in terms of the relationship between parties. As Goodpaster explains, the mere filing of a claim changes a dispute into an “adversarial contest the judicial system can resolve. The litigation process formally ‘legalizes’ the dispute, framing it in terms of legal concepts, proofs, and argumentation the judicial system can process”.¹³ Mediation proponents have always, in differing degrees, asserted that litigation is flawed as a process for managing intimate personal disputes.¹⁴

1988).; Desmond Ellis & Noreen Stuckless, *Mediating and Negotiating Marital Conflicts* (Thousand Oaks, CA: Sage, 1996).

¹² *Courts of Justice Act*, Ont. Reg 114/99.

¹³ Gary Goodpaster, “Lawsuits as Negotiations” (1992) 8 *Negotiation Journal* 221 at 225.

¹⁴ *Ibid.*

The court process is alienating for parties involved in litigation.¹⁵ In a study of American legal culture, Marc Galanter indicates that, “litigation is not only incompatible with the maintenance of continuing relationships, but with their subsequent restoration”.¹⁶ The harmful effects of the litigation system are particularly pervasive in divorce. Courts are not equipped to deal with the complex interdisciplinary issues involved in divorce.¹⁷ The distinction between complicated and complex issues will be vital in this research and will be described in depth in Chapter VI. Studies have been conducted which describe the insufficiency of the adversarial system to settle divorces. Pruett and Jackson, for example, found that families felt the traditional system was too lengthy, too costly, too inefficient, and not tailored to their individual needs.¹⁸ Similarly, Cathgart and Robles found 50-70% of participants in their research thought that the adversarial legal system was “impersonal, intimidating, and intrusive”.¹⁹ Guidelines have developed in the adversarial system that apply a one-size-fits-all result to cases that would be more meaningfully resolved on a case-by-case basis. The traditional legal system is also slow, which impacts families in a negative way. A study of Canadian divorce cases found that

¹⁵ William Felstiner, “Influences of Social Organization on Dispute Processing” (1974) 9 *Law and Society Review* 63.

¹⁶ Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” 9 *Law and Society Review* 95.

¹⁷ Janet Johnson & Vivienne Roseby, *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce* (New York: The Free Press, 1998) at 223.

¹⁸ Marsha Kline Pruett & Tamara D. Jackson, “The Lawyer’s Role During the Divorce Process: Perceptions of Parents, Their Young Children and Their Attorneys” (1999) 33 *Family Law Quarterly* 283 at 298.

¹⁹ Mary R. Cathgart & Robert E. Robles, *Parenting our Children: In the Best Interests of our Nation* (Washington: US Commission on Child and Family Welfare, 1996).

about 50% of all cases remain in the litigation system over a year, and many considerably longer.²⁰

Although scholars do acknowledge that conflict is inherent in divorce and that the conflict stemming from divorce is not purely legal, additional adversarialism is not seen as helpful.²¹ Even when not litigated, traditional family law settlements are generally achieved through positional and adversarial negotiation. The method of negotiation used in traditional family law is based on the position of the parties, rather than focusing on interests. As explained by Foran, traditional negotiations tend to focus on a positional stance and often include mistrust and unreasonableness as part of the game.²² Moreover, clients are often left out of the negotiations all together. Sarat and Felstiner found, in their study, that divorce lawyers were “overwhelmingly pro-settlement”, and the threat of litigation was often used to push clients toward a settlement.²³ They state, “The major ingredient of this settlement system is the primacy of the lawyers. They produce deals while the clients are limited to initial instructions and after-the-fact ratification”.²⁴ Moreover, settlements were largely based on the legal model. CL departs from these types of negotiations by focusing on an interest-based model. More discussion of interest-

²⁰ Mary Bess Kelly, “Family Court cases involving custody, access and support arrangements 2009/2010”, *Juristat*, (March 29, 2011), 8. Online: <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11423-eng.pdf>.

²¹ See, for example, John M. Haynes, *Divorce Mediation: A Practical Guide for Therapists and Counselors* (New York: Springer Publishing, 1981); Joan Blades, *Family Mediation: Cooperative Divorce Settlement* (New Jersey: Prentice Hall, 1985).

²² Patrick Foran, “Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and the Right Reasons” (2009) 13(3) *Lewis & Clark Law Review* 787.

²³ Austin Sarat & William Felstiner, “Law and Strategy in the Divorce Lawyer’s Office” (1986) 20 *Law and Society Review* 93.

²⁴ *Ibid.* at 110.

based negotiation and how it can be compared to traditional negotiation can be found in the following Chapter.

Mediation

Before the advent of CL, mediation sought to address some of the aforementioned issues with litigation and traditional family law settlement. As explained by Folberg and Milne, mediation endeavored to take parties to a different realm, where they could learn “...about each other’s needs and [be provided with] a personalized approach to dispute resolution...mediation can help the parties learn to solve problems together, isolate the issues to be decided, and recognize that cooperation can be of mutual advantage”.²⁵

These goals appealed to many lawyers and clients. Indeed, mediation was and still is effective. Empirical studies note that 50-90% of mediated family disputes reach resolution in the mediation process.²⁶ More than just reaching resolution, research has shown mediation to have many positive outcomes in family law cases. Elrod and Dale, in their study, found a reduced burden on courts, as well as improved parents’ relationships with their children.²⁷

CL is particularly indebted to mediation for its role in helping to shape the CL process. To be sure, the goals of both processes are to resolve disputes in an efficient and effective

²⁵ Folberg & Milne, *supra* note 11 at 9

²⁶ Joan B. Kelly, “Family Mediation Research: Is there empirical support for the field?” (2004) 22 *Conflict Resolution Quarterly* 3. It is important to note that randomized studies have not been conducted so it is unclear whether the high settlement rates are due to self selection of process success.

²⁷ Linda D. Elrod & Milfred D. Dale, “Paradigm Shifts and Pendulum Swings in Child Custody” (2008) 42(3) *Family Law Quarterly* 381.

manner while offering additional benefits such as self-determination.²⁸ These, and other, values of CL will be discussed in greater depth in a later section of this Chapter. So what are the differences between CL and mediation? In mediation, a neutral third party works with disputants to facilitate achieving a voluntary and consensual resolution. The impartiality and neutrality of the mediator are considered the critical defining characteristics of mediation²⁹, although these features have been repeatedly challenged.³⁰ Schwab explains that both mediation and CL have the potential to achieve better results than those attainable through traditional family law.³¹ CL, however, is not characterized by the presence of a neutral facilitator, although neutrals can be a vital part of the process, as discussed in the subsequent Chapter.

The extent of the differences between CL and mediation vary depending on the precise qualities of the mediation being compared. Three predominant differences between mediation and CL are as follows: uniformity, cost and the inclusion of lawyers. The first two, if not all three, of these differences are linked. Each of these differences will now be outlined.

²⁸ See, Nancy Welsh, “Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation” in Jay Folberg, Ann Milne, & Peter Salem (Eds) *Divorce and Family Mediation: Models, Techniques and Applications* (New York: Guilford Press, 2007).

²⁹ Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd ed (New York: Wiley, 2003).

³⁰ See, for example, Trina Grillo, “The Mediation Alternative: Process Dangers for Women” (1991) 100(6) *Yale Law Journal* 1545; Sara Cobb & Janet Rifkin, “Practice and Paradox: Deconstructing Neutrality in Mediation” (1991) 16 *Mediation, Law, and Social Inquiry* 35; Hilary Astor, “Rethinking Neutrality: A Theory to Inform Practice Parts 1 and 2” (2000) 11 *Australasian Dispute Resolution Journal* 73.

³¹ William H. Schwab, “Collaborative Lawyering: A Closer Look at an Emerging Practice” (2004) 4(3) *Pepperdine Dispute Resolution Law Journal* 351.

Uniformity is illusive in mediation. There are many models of mediation, ranging from purely interest-based facilitative mediation on the one hand and highly evaluative mediation on the other. While facilitative mediators aim to empower parties to reach their own settlement, and focus very little on substantive rights, evaluative mediators offer substantive legal knowledge to advise parties.³² McEwen, Mather and Maiman explain that such a variety of theories of mediation exist because the definitional requirement for mediation is simply that a neutral third party facilitates a negotiation between disputants.³³ In some mediations lawyers are present, in others parties go alone. In some mediations an interest-based approach is utilized, others are very positional. Some mediations take place before litigation is initiated and others are delayed until the eve of trial. Many different types of professionals can act as mediators, including but not limited to mental health professionals, lawyers, and judges. Some mediations are settled in a single session, while others can span several sessions. Little is uniform in the practice of mediation. As will be discussed in the next Chapter, there is a greater sense of uniformity of process and style in CL. Many elements are definitional in CL, creating greater uniformity of practice.

Another difference between CL and mediation is the use of lawyers in the process. Many family mediations do not include lawyers in the sessions, although some certainly do.

³² Folberg, Milne & Salem, *supra* note 28.

³³ Craig A. McEwen, Lynn Mather & Richard Maiman, *Lawyers Mediation and the Management of Divorce Practice* (1994) 28 *Law and Society Review* 149 at 153-154.

Even when lawyers are included in mediation, research has found that they can hamper the process. Langan states,

...attorneys may hinder the success of mediation through an unwillingness to retreat from litigation positions for fear that eagerness to negotiate will be viewed as a sign of weakness. Concern about potential professional liability claims may also cause attorneys to complete all discovery before engaging in mediation. Because traditional law school education focuses on litigation training, the concept that an attorney's primary role should be problem-solver-as opposed to litigator-has not necessarily taken hold among the practicing bar.³⁴

Cost is a related criterion that divides CL and mediation. While both processes are said to be less expensive than litigation, mediation is often less expensive than CL, particularly because clients need not have lawyers attend the mediations.³⁵ Indeed, Lande and Herman state that mediation is more appropriate for parties who have limited resources.³⁶ Since CL requires each party to have his or her own lawyer, such costs are unavoidable. This research will, in later sections, address the potential for CL to avail itself to parties with less resources, but to this point little success has come of the limited efforts to decrease the cost of CL, mostly because of the high cost of lawyers.

The greatest similarity between CL and mediation lies at the core of both areas of practice. On a philosophical level, CL returns to the root goals of mediation. Indeed, many CL practitioners are also mediators for whom the goals resounded. The processes,

³⁴ Elena B. Langan, “‘We Can Work it Out’: Using Cooperative Mediation – a Blend of Collaborative Law and Traditional Mediation – to Resolve Divorce Disputes” (2011) 30(2) *The Review of Litigation* 245 at 275.

³⁵ Gay G. Cox & Robert J. Matlock, “The Case for Collaborative Law” (2004) 11 *Texas Wesleyan Law Review* 45.

³⁶ John Lande & Greg Herman, “Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law or Cooperative Law for Negotiating Divorce Cases” (2004) 42(2) *Family Court Review* 280.

however, are quite different. Degoldi, in interviewing lawyers who conducted both mediation and CL, found that lawyers who offered both services reported marked differences between the processes. Specifically, he found that lawyers felt an inability in mediation to offer the support needed by clients.³⁷ The perceived insufficiency of mediation is one factor that sparked the growth of CL. Specifically, Tesler describes four drawbacks with mediation as a dispute resolution process³⁸ namely: (i) the lack of legal advice and advocacy; (ii) the emotional and other imbalances between spouses trying to bargain face-to-face without partisan assistance; (iii) the tension between compromise and informed consent after agreement is reached and (iv) the lack of licensing, regulation and uniform standards of competency for mediation.³⁹ She proposes CL as a dispute resolution process, which can aptly satisfy those families for whom mediation is not appropriate. Despite such critiques, mediation remains a valuable option for certain clients experiencing separation and divorce. Particularly useful are those mediations that remain interest-based and focused on the emotional rather than legal issues at stake.

In addition to the potential problems outlined above, lawyers acting as mediators, can find the fundamental assumption underlying mediation, that of an impartial facilitator, difficult to sustain in challenging cases. Lawyer mediators, along with researchers, such as Macfarlane, have explained that mediation is more appropriate for higher functioning

³⁷ Brett Degoldi, “Lawyers’ Emerging Experiences in Interdisciplinary Collaborative Law” (2008) 15(3) *Psychiatry, Psychology and Law* 396.

³⁸ It is worth noting that many of these drawbacks reflect a mediation process in which parties are not represented by counsel at the mediation table.

³⁹ Pauline Tesler, “Collaborative Law: A New Paradigm for Divorce Lawyers” (1999) 5 *Psychology, Public Policy & Law* 967 [hereinafter, *New Paradigm*] at 968.

clients than for parties less able to handle high conflict.⁴⁰ Partly because of the fact that many clients were coming to mediation with greater need than mediation could handle adeptly, the centrality of the mediator as neutral proved problematic for many lawyers. Gerami, for instances, states that lawyer mediators, as inevitably biased, found difficulty remaining neutral in more complex cases.⁴¹

Theoretical challenges to the concepts of both neutrality and impartiality have become important in the mediation literature. These critiques are applicable for CL, as the CL process employs professionals who are often deemed “neutral and impartial”. First, a definition and distinction of these terms is in order. Christopher Moore explains that “impartiality refers to the attitude of the intervenor and is an unbiased opinion or lack of preference in favour of one or more negotiators. Neutrality on the other hand refers to the behaviour or relationship between the intervenor and the disputants”.⁴² Moore addresses the tension between the mediator’s personal biases and their mandate to be neutral by distinguishing between substantive and procedural interests.⁴³ While mediators retain a commitment to the procedural standards of mediation such as open communication, equity and fair exchange and settlement, they should not have commitments to particular substantive outcomes such as the amount of money of a settlement or other settlement

⁴⁰ Macfarlane, *Emerging Phenomenon of CFL*, *supra* note 5.

⁴¹ Arghavan Gerami, “Bridging the Theory-and-Practice Gap: Mediator Power in Practice” (2009) 26(4) *Conflict Resolution Quarterly* 433.

⁴² Moore, *supra* note 29 at 445.

⁴³ *Ibid.*

details.⁴⁴ As many have begun to say colloquially, mediators should be advocates for the process and not the outcome.

As mediation developed, however, an increasing number of mediation practitioners assumed evaluative roles, blurring impartiality and making mediation more similar to the adversarial process it was designed to replace.⁴⁵ Lande characterizes this trend as “liti-mediation”⁴⁶, an homage to Marc Galanter and his theory of “litigotiation”, the “strategic pursuit of a settlement through mobilizing the court process”.⁴⁷ Although mediation proponents had high hopes that the process would resolve the problems with the family law system, this was not the case. Macfarlane notes,

...the emergence of family mediation has done less than was first hoped to change the way that family law is practiced. There is relatively little overlap in service provision—although many family mediators are also lawyers, the small number who have been successful in developing large family mediation practices often abandon legal practice altogether. Few maintain a balance of mediation and representation within one professional practice. Where lawyers participate regularly in mediation as client advocates (for example, where mediation is mandatory within court programs), the tension between the contrasting roles played by the mediator and by legal counsel is not fully resolved.⁴⁸

⁴⁴ *Ibid.*

⁴⁵ Larry Spain, “Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation can be Ethically Incorporated into the Practice of Law” (2004) 56 *Baylor Law Review* 141.

⁴⁶ John Lande, “How will Lawyering and Mediation Practices Transform Each Other” (1997) 24 *Florida State University Law Review* 839 [hereinafter *Lawyering and Mediation*].

⁴⁷ Marc Galanter, “Worlds of Deals: Using Negotiation to Teach about Legal Process” (1984) 34 *Journal of Legal Education* 268 [hereinafter *Worlds of Deals*].

⁴⁸ Macfarlane, *Emerging Phenomenon of CFL*, *supra* note 5 at 3.

Mediators began to act like judges, analyzing and assessing cases. Advocates hungered to turn the process of mediation into one that looked more like adjudication than the initial conception of mediation. Jacqueline Nolan-Haley has contended that mediation has become the new arbitration because of the increase in lawyers visibly representing parties in mediation.⁴⁹ According to Nolan-Haley,

...legal mediation has taken on many of the features traditionally associated with arbitration: adversarial posturing by attorneys in the name of zealous advocacy, adjudication by third party neutrals, whether implicitly through mediator evaluations or explicitly in the med-arb process, and the practice of mediator "spinning." Instead of trying to persuade an arbitrator to rule in her client's favor, the mediation advocate tries to "spin" the mediator in the hope of influencing the outcome of mediation. In doing so, the mediation advocate is free to engage in deceptive behaviors that would be considered unethical for lawyers in arbitration. Lawyers generally control the mediation process, often preferring evaluative rather than facilitative models. They often consider mediation as the functional equivalent of a private judicial settlement conference, and act accordingly in an adversarial fashion.⁵⁰

Part of the reason for this change is the ever-presence of litigation throughout mediation. In most mediation cases, Abney states, "litigation hangs like the sword of Damocles over the lawyers' heads and they are unable to focus 100% of their skills on settlement. Mediation generally employs positional bargaining that seldom addresses the concerns of the parties".⁵¹ Particularly with lawyers in the role of mediator, Abney found the potential bargaining employed by mediators to fail to lead to long-term solutions.⁵² Kovach and Love explain that when lawyers act as mediators, they "revert to their default adversarial

⁴⁹ Jacqueline Nolan-Haley, "Mediation: The 'New Arbitration'" (2012) 17 *Harvard Negotiation Law Review* 61 at 62.

⁵⁰ *Ibid.* at 63-64.

⁵¹ Sherrie R. Abney, "The Evolution of Civil Collaborative Law" (2009) 15(3) *Texas Wesleyan Law Review* 495.

⁵² *Ibid.* at 496.

mode, analyzing the legal merits of the case in order to move toward settlement”.⁵³ Moreover, McAdoo and Hershaw note that, even when trained in a facilitative model, lawyer mediators inevitably take evaluative roles.⁵⁴

As experience with mediation grew, the practice of mediation evolved. The evolution of mediation is inextricably linked to the history of CL. From a historical perspective, mediation paved the way for the creation of CL. This heredity, along with a comprehensive history of CL will be detailed next.

History of Collaborative Law

The story of CL begins with one man. Stuart Webb is the hero, protagonist, and idol of CL. A lawyer and mediator, Webb first conceived of the process of CL in 1990 as a way to address a growing unhappiness on the part of matrimonial lawyers, which he termed “family law burnout”.⁵⁵ To Webb, incivility among family lawyers seemed on the increase, a phenomenon he met with dismay. On a personal level, Webb wanted to keep the parts of his practice he enjoyed and eliminate the parts he did not, seeking to represent clients purely for settlement.⁵⁶ Webb’s concern was that settlement in the traditional system was clouded by litigation and thus had strong positional overtones. The

⁵³ Kimberlee K. Kovach & Lela P. Love, “Mapping Mediation: The Risk of Riskin’s Grid” (1998) 3 *Harvard Negotiation Law Review* 78 at 92-93.

⁵⁴ Bobbi McAdoo & Art Hinshaw, “The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri” (2002) 67 *Missouri Law Review* 473.

⁵⁵ Stuart Webb, “Collaborative Law: An Alternative for Attorneys Suffering ‘Family Law Burnout’” (2000) 13(6) *Matrimonial Strategist* 7 [hereinafter, *Family Law Burnout*]; The broader societal issue of lawyer professionalism and incivility occurring at this time will be detailed in Chapter VII.

⁵⁶ *Ibid.*

only way he saw to get through these positional stances was to have lawyers perform exclusively as settlement counsel.⁵⁷

Webb was not the only professional seeking another method of resolution for families. Beginning in 1992, Peggy Thompson, Nancy Ross and others began a parallel movement of “Collaborative Divorce”. By 1997, however, CL and Collaborative Divorce practitioners converged to spread the word and practice of resolving family matters through interest-based out of court settlements.⁵⁸ The first CL practice group in North America was created in Webb’s hometown of Minneapolis. CL practice groups are self-governed groups of lawyers trained to practise CL. They set training requirements and act as communities of practice for referral and continuing education purposes. They also fill an important role in providing marketing and public and professional education about CL. A number of such CL networks developed in the San Francisco Bay area and throughout California shortly after. Other early sites of the spread of CL include Cincinnati, Ohio; Medicine Hat, Alberta; Atlanta, Georgia; Salt Lake City, Utah; and Vancouver, British Columbia.⁵⁹ Practice groups have been integral to the growth and development of CL.

Macfarlane describes the progression of CL groups from ad hoc assemblies of lawyers to organizations with formal constitutions, local rules of membership, renewal requirements,

⁵⁷ Stuart Webb. “Note, Collaborative Law: A Practitioner’s Perspective on Its History and Current Practice” (2008) 21 *Journal of the Academy of Matrimonial Lawyers* 155 [hereinafter, *A Practitioner’s Perspective*].

⁵⁸ Diel, *supra* note 9.

⁵⁹ Macfarlane, *Emerging Phenomenon of CFL*, *supra* note 5 at 5.

and other formalities.⁶⁰ CL practice groups are integral to the existence of CL as a process as they perform a gate-keeping function, including those who fit the mold of CL and excluding those who do not. Macfarlane notes the importance of CL groups, stating, “The commitment is strengthened by the ‘club’ culture of CL groups as well as by their sense of shared values. The CL group becomes a critical ‘community of practice’ for individual CL lawyers, and it is highly influential in shaping and maintaining informal practice norms and behaviours.”⁶¹ Jackson explains how lawyers should start a practice group, “Before you make any public pronouncement, or issue invitations to join your group, form a small (six or seven people) core group of like-minded individuals to develop the principles, rules and documents for your practice group as a whole”.⁶² Such like-mindedness ensures consistency within the practice group, but global consistency also became important in order for CL to prove itself as a legitimate dispute resolution mechanism.

In order to provide some level of uniformity and efficiency, a networking organization was formed in 1998 under the name American Institute of Collaborative Professionals (AICP). The movement began spreading to Canada and around the world and hence the name of the organization was changed to the International Academy of Collaborative Professionals (IACP). The IACP remains the umbrella organization, which provides training, networking, standards and guidelines to practice groups around the globe.

⁶⁰ *Ibid.*

⁶¹ *Ibid.* at 36.

⁶² Jennifer Jackson “Starting Your Own Collaborative Law Practice Group...A Tale of Two Cities” (2000) 2(1) *Collaborative Law Quarterly* 14 at 14.

The initial growth of CL came from lawyers trained in mediation who saw a way of combining their skills of advocacy with a commitment to problem solving. By the 1990s, mediation had become predominantly mainstream and many lawyers trained in mediation sought a way of applying their knowledge as problem-solver advocates rather than as third-party neutrals. At least in its early days, mediation practitioners were the instigators of the CL movement.

If most lawyers involved at the beginning of CL were mediators, why did CL evolve? To answer this query, one can look to the founder of CL. Webb, himself, was a family law mediator; however, he was unsatisfied with the mediation process because clients routinely attended mediation without counsel and lacked the requisite legal advice while negotiating.⁶³ As the mediator, Webb experienced frustration at being unable to level the perceived unlevel playing field because of his role as a neutral.⁶⁴

CL appealed to discontent family lawyer mediators because of the real-time legal advice and direct face-to-face involvement in the process while maintaining a commitment to settlement. Proponents of CL have a pervasive sense that CL is a more complete process than mediation as it couples expert legal advice as well as a multidisciplinary approach to dispute resolution.⁶⁵ Many lawyer-mediators quickly adopted the ideals of CL as reaping the benefits of mediation with the added benefit of partisan expert legal advice.

⁶³ Webb, *A Practitioner's Perspective*, *supra* note 57.

⁶⁴ *Ibid.*

⁶⁵ Macfarlane, *Emerging Phenomenon of CFL*, *supra* note 5. It is important to recall that some mediations indeed include real-time legal advice by including lawyers in the process.

Not all authors view the heredity from mediation in a positive light. Beyer, for instance, states that CL differs very slightly from mediation and notes the only difference as CL being a “more expensive, longer, and less efficient process than the average mediated lawsuit, while accomplishing the same goal”.⁶⁶ As this research will suggest, the innovative capacity of CL is a fundamental difference between CL and mediation that has as yet not been explored. In addition, the nature of disputes that lend themselves to either mediation or CL has not yet been the subject of theoretical analysis. More will be said about this distinction in later Chapters, but, in brief, there are disputes that would be better handled in mediation because CL would be unnecessarily cumbersome and expensive, while other disputes require the innovative process of CL to be adequately resolved.

Despite some concern, on a theoretical level, regarding the utility and ethics of CL,⁶⁷ CL quickly evolved and interest in it grew exponentially among lawyers and clients until the present day. Lawyers enjoyed the opportunity to collaborate with their colleagues and enhance their professional lives. They saw CL as a way to serve their clients in a more holistic way. Now, CL practice groups exist throughout Canada, the United States and

⁶⁶ Elizabeth F. Beyer, “Comment: A pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation” (2009) 40 *St. Mary’s Law Journal* 303 at 328. at 308.

⁶⁷ See, for example, Spain, *supra* note 45; Sandra S. Beckwith & Sherri Goren Sloven, “The Collaborative Lawyer as Advocate: A Response” (2003) 18 *Ohio State Journal on Dispute Resolution* 497; John Lande, “Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering” (2003) 64 *Ohio State Law Journal* 1315 [hereinafter, *Possibilities for Collaborative Law*].

internationally. To date, CL is predominantly utilized in family law cases⁶⁸ and although supporters tout the benefits of expanding CL into other areas of legal dispute, growth in such areas has been slow to take off.⁶⁹ Although the use of CL in other areas of law is not the specific subject of this research, some hypotheses will be posed in the results and analysis portion of this research, which may suggest why CL has as yet been limited almost exclusively to family law.

The history of CL is now 20 years old. As has been described in this Chapter, CL arose out of a perceived insufficiency with both the traditional litigation settlement and mediation of family disputes. The extent to which CL permeates into other areas of practice remains to be seen. Innovation is the key to the future of CL.

⁶⁸ Since family law fueled CL and represents the vast majority of CL cases, this dissertation will focus on the area of family law.

⁶⁹ See, for example, John Lande, *Possibilities for Collaborative Law*, *supra* note 67.

Chapter III. Collaborative Law: Process, Values, Benefits, and Challenges

Now that the history of Collaborative Law (CL) has been outlined, the process of CL will be examined. Notwithstanding its deliberate and marked departure from the rule-based litigation system, CL has a relatively rigid set of game rules, or as one author calls it, a specific “choreography”.⁷⁰ Slovin suggests that, “A shared choreography provides counsel with a road map of the process and creates predictability and an atmosphere for efficient negotiations”.⁷¹ Moreover, as stated in the previous Chapter, set rules and greater uniformity distinguish CL from its more loosely defined cousin, mediation. Time will tell whether this strict uniformity remains as CL develops and expands or whether it will assume greater fluidity, such as did mediation. This study will examine this issue further.

One characteristic component of CL negotiations is that they almost always take place in “four-way meetings”. This terminology is used to describe negotiations that occur “in the presence of and with the active involvement of all four participants, two attorneys representing two clients respectively”.⁷² Apart from the initial lawyer-client consultation, preparation for the four-way meeting, and debriefing following four-way sessions, the preponderance of time in CL is spent in the four-ways themselves.⁷³ It is within these meetings that process is agreed to by the execution of the participation agreement, signed

⁷⁰ Sherri Goren Slovin, “The Basics of Collaborative Family Law: A Divorce Paradigm Shift” (2004) 18 *American Journal of Family Law* 74.

⁷¹ *Ibid.* at 76.

⁷² Tesler, *Achieving Effective Resolution*, *supra* note 2 at 10; if neutral experts are included and an interdisciplinary approach is employed, meetings may be 5-way, 6-way and so on, depending on the number of people included.

⁷³ *Ibid.*

by all of the parties to the agreement and their lawyers, and it is within these meetings that information is shared and decisions are made.

CL provides a basic framework but allows some flexibility to customize the process for clients. The DA, disqualifying lawyers from litigating on behalf of their clients, remains the most discussed element in CL.⁷⁴ Pauline Tesler wrote:

There is only one irreducible minimum condition for calling what you do “collaborative law”: you and the counsel for the other party must sign papers disqualifying you from ever appearing in court on behalf of either of these clients against the other. Beyond that requirement, all else is artistry, and you are free to accept, reject, and adapt what is presented here to suit your personal style.⁷⁵

Although this theory is espoused by many CL practitioners, the current research will suggest that other elements of CL are equally if not more salient than the DA as definitional elements. It is difficult to imagine a CL case in which the DA is included but all other characteristics are haphazardly left to the lawyers alone. Despite the variation that Tesler describes, many features of the CL process are consistent. For example, the great majority of CL cases share the goals of maintaining an environment of interest-based bargaining which is client-centred, adopting a team approach and involving full and voluntary disclosure. This Chapter will detail these aspects of the CL choreography. While none of these characteristics is unique to CL, their combination creates the process that is CL. It is these characteristics and these steps that enable innovation. In addition, clients sign on to each of these criteria in the participation agreement. This Chapter will

⁷⁴ Many authors have expressed the primacy of the DA in CL. See, for example, Stuart Webb, “From the Collaborative Corner” (2002) 4 *Collaborative Review* 14; Tesler, *Achieving Effective Resolution*, *supra* note 2.

⁷⁵ Tesler, *ibid.* at 6.

also outline the values, benefits and challenges of the CL process in an attempt to prepare the reader for a discussion of how these impact on innovation in CL.

The Collaborative Law Process

Interest-Based Negotiation

Interest-based negotiation is a critical component of CL. While distributive bargaining is the predominant negotiation style that underlies the adversarial paradigm,⁷⁶ interest-based negotiation dominates the collaborative framework. CL is not bound by the zero-sum game of a distributive strategy and disputants are able to craft mutually acceptable solutions that meet their individual needs and interests. Interests are, “the salient movers behind the hubbub of positions” and the “needs, desires, concerns, and fears underlying statements of what disputants want”⁷⁷. Through negotiations in the collaborative process, lawyers and neutral experts work with clients to help uncover these interests, which may not be fully formed at the outset of negotiations.

Various conceptions of negotiation that focus on interests have been described in the literature, each featuring different terminology and some noting assorted distinctions.⁷⁸

This dissertation utilizes the terminology of interest-based negotiation as it is this stream of cooperative bargaining that is most often used in CL literature and practice. The

⁷⁶ Carrie Menkel-Meadow, “Toward Another View of Legal Negotiation: The Structure of Problem Solving” (1984) 31 *UCLA Law Review* 754 [Hereinafter, *Toward Another View of Legal Negotiation*].

⁷⁷ Roger Fisher, William Ury and Bruce Patton, *Getting to Yes, Negotiating Agreement Without Giving in (2d ed.)* (New York: Penguin Books, 1991) at 42-43.

⁷⁸ See, Alex J. Hurder, “The Lawyer’s Dilemma: To Be or Not To Be a Problem Solving Negotiator” (2007) 14 *Clinical Law Review* 253.

subtleties and intricacies, which differentiate one definition of negotiation style from another, are not of critical importance here. The most important distinction for this research is the binary distinction between, on the one hand, problem-solving, principled, cooperative, interest-based negotiation, which CL promotes, and, on the other, competitive, adversarial, positional negotiation, which CL denounces. Even where settlements are sought in non-CL cases, negotiations generally take the form of the latter. It is, however, useful to outline the history of the development of interest-based bargaining theory to understand its application in CL. This section will specifically discuss three stages of theoretical development, from cordial bargaining, to principled bargaining and then to problem-solving bargaining, which combine to describe the interest-based approach utilized in CL.

As noted, interest-based negotiation is not unique to CL. Various ADR mechanisms advocate for the use of an interest-based approach thus the literature in the area is quite extensive. The focus on interest-based negotiation began with early theories of cordial bargaining. Such theories emphasize sociability and equate being nice with being successful in negotiation. Gerald Williams' research in the 1980s is the backbone of this theory.⁷⁹ He states, "the most effective [legal] negotiators [are] characterized by positive social traits and attitudes and by the use of more open, cooperative, and friendly negotiating strategies".⁸⁰ He advocates for a negotiation strategy that avoids insults, rudeness, and threats and promotes valuing the adversary's interests, sharing information,

⁷⁹ Gerald R. Williams, *Legal Negotiation and Settlement* (Minnesota: West Publishing, 1983) at 14.

⁸⁰ *Ibid.* at 42-44.

and assessing claims realistically.⁸¹ Each of these components is of critical importance in CL. Much of the time preparing clients for negotiations is spent identifying interests through deep questioning and reframing the issues so that they may be viewed from alternate perspectives. Additionally, ground-rules set at the start of the CL process and documented in the participation agreement mandate respectful communication. Williams' data, while displaying the importance of cordiality, also found a relationship between legal astuteness and effective negotiation.⁸²

The theory of principled bargaining refined cordial bargaining by taking a stronger focus on the importance of legal knowledge by using objective criteria as a central aspect of negotiation. Principled bargaining was brought to the forefront of negotiation literature with the publication of the book *Getting to Yes: Negotiating Agreement Without Giving In*⁸³. Therein, Fisher and Ury outline the skills involved in reaching a negotiated outcome without succumbing to positional tactics. Principled negotiation invites negotiators to “separate the people from the problem”, focus on interests not positions, create options for mutual gain and use “objective criteria” to create agreement.⁸⁴ In articulating these skills, the dichotomy of principled versus positional negotiation was born. Fisher and Ury suggest that people routinely engage in positional bargaining, taking a position, arguing for it and making concessions to ultimately reach a compromise.⁸⁵ Although sometimes

⁸¹ Gerald Williams et. al. “Effectiveness in Legal Negotiation”, in Harry T. Edwards & James J. White, *The Lawyer as Negotiator* (Minnesota: West Publishing, 1977) at 27.

⁸² Williams, *Legal Negotiation and Settlement*, *supra* note 79 at 40.

⁸³ Fisher, Ury & Patton, *Getting to Yes*, *supra* note 77.

⁸⁴ *Ibid.* at 11-12.

⁸⁵ *Ibid.* at 3.

necessary, positional bargaining fails to create meaningful agreements because the underlying concerns of parties are ignored. They explain,

In positional bargaining you try to improve the chances that any settlement reached is favorable to you by starting with an extreme position, by stubbornly holding to it, by deceiving the other party as to your true views and by making small concessions only as necessary to keep the negotiations going...each of those factors tend to interfere with reaching a settlement promptly.⁸⁶

Instead, Fisher and Ury advocate for principled bargaining in which negotiators must recognize that negotiators are people first, who,

Get angry, depressed, fearful, hostile, frustrated, and offended. They have egos that are easily threatened. They see the world from their own personal vantage point, and they frequently confuse perceptions with reality. Routinely, they fail to interpret what you say in the way you intend and do not mean what you understand them to say.⁸⁷

By recognizing human needs and frailties, negotiators are able to separate the people from the problem. Much like Williams' theory of cordial bargaining, principled bargaining requires both sides to examine issues from the other side's point of view, insofar as this is possible. Certainly, each disputant's own implicit biases make a complete understanding of other side difficult to attain, but the aim is for the disputant to look beyond their initial assessment of the problem and seek a more fulsome understanding.⁸⁸ The departure from cordial bargaining resides in the inclusion of objective criteria as a critical factor. This component recognizes the situation of legal

⁸⁶ *Ibid.* at 6.

⁸⁷ *Ibid.* at 19.

⁸⁸ The implicit bias literature is vast and beyond the scope of this research. For an example of the consideration of implicit bias in the legal realm, see Jerry Kang & Kristen Lane, "Seeing through Colorblindness: Implicit Bias and the Law" (2010) 58 *UCLA Law Review* 465.

negotiation as resident in a system of justice and legitimizes results.⁸⁹ Although classified as an alternative to the legal system, the law is the objective criteria to which to compare potential solutions. CL relies on the legal knowledge of representatives to impart necessary information surrounding legal rights. These rights sit in the background of negotiations and hence exist as a critical starting point for solution generation. They are the necessary fall back if a more tailored agreement cannot be reached.

Around the same time as the publication of *Getting to Yes*, Howard Raiffa published *The Art and Science of Negotiation*⁹⁰ in which he advocated for the use of integrative negotiation. The concepts expounded therein complement those of Fisher and Ury such that the terminology of principled bargaining and integrative negotiation are often used interchangeably.

Carrie Menkel-Meadow takes into account the principled and integrative approaches in describing the problem-solving model of bargaining, which attempts to solve the problem rather than win the argument.⁹¹ The problem solving approach, though articulated as different from integrative negotiation, is strikingly similar to its predecessor. The problem solving approach has the same goals as its predecessors and is encouraged in CL because this “orientation to negotiation may lead not only to better solutions, but to a

⁸⁹ Robert J. Condlin, “Bargaining with a Hugger” (2007) 9 *Cardozo Journal of Conflict Resolution* 301 at 10.

⁹⁰ Howard Raiffa, *The Art and Science of Negotiation: How to Resolve Conflicts and Get the Best Out of Bargaining* (Boston: Harvard University Press, 1982).

⁹¹ Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 76.

process which could be more creative and enjoyable than destructive and antagonistic”.⁹²

Problem-solving negotiation acknowledges that there are numerous client interests to be served.

Aside from ‘winning’, these might include, for example, recognition and acknowledgment, business expansion or solvency, future relationships both domestic and commercial, vindication and justice, emotional closure, and reputation. These interests have both short-term and long-term elements. They reflect not only outcome goals but also the importance of procedural justice- feeling listened to, being taken seriously, and being fairly treated. In a conflict resolution model of advocacy, it is not only the final deal that matters but also how the client feels about how it was reached, which includes a sense that the outcome is fair and wise in light of the client's interests and a recognition of the limits of the system to offer alternative, better solutions.⁹³

The articulated difference between principled and problem-solving approaches is the greater focus, in problem-solving negotiation, on the bargainer in order to avoid legal argument from turning adversarial.⁹⁴ Problem-solving negotiation takes lawyers away from the legal argument that tends them towards adversarial bargaining. Condlin suggests that it is in its forward-looking approach to how best to use resources that the two approaches differ.⁹⁵ Both objective criteria, in the form of law, and a view to the particular future of the bargainers are key in CL. Problem-solving thus becomes the predominant strategy employed in CL.

⁹² *Ibid.* at 817.

⁹³ Julie Macfarlane, “The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law” (2008) *Journal of Dispute Resolution* 61[hereinafter *Evolution of the New Lawyer*], at 68.

⁹⁴ Condlin, *supra* note 89 at 39-40.

⁹⁵ *Ibid.*

Problem-solving negotiation is critical in CL because it allows lawyers and clients to break free from the confines of court precedent and legally recognized solutions in favour of solutions that meet the needs of the parties. Again, the law acts as the objective criterion from which to weigh different options. Party needs can be constructed in a way that is consistent with the value system of the parties themselves, rather than necessarily mimicking the value system upon which the law is based. In other words, legal rules and precedent play a role by offering one possible solution among myriad solutions that the parties may achieve. The law is the chorus dancer and the party interests the prima ballerina.

In problem-solving legal negotiation, the remedial powers and precedents of courts do not limit goals and solutions. While legal negotiation has tended to confine itself to goals and solutions recognized by law, the interdisciplinary study of negotiation has embraced more creative solutions. In problem-solving negotiation, the only limits on the goals and solutions of the negotiators are the needs of the negotiating parties.⁹⁶

It is each of these characteristics, the use of interdisciplinary teams, creativity, and limitlessness that makes interest-based, problem-solving negotiation central to CL. Additionally, lawyers in CL agree to address and integrate the other party's goals and interests to attempt to devise a mutually beneficial agreement.⁹⁷

Part of the reason to utilize an interest-based negotiation strategy in CL lies in the subject-matter for which the process was created. While interest-based negotiation is documented as beneficial in many different types of cases, nowhere is this need more

⁹⁶ Hurder, *supra* note 78 at 259.

⁹⁷ Gary L. Voegelé, Linda K. Wray & Ronald D. Ousky, "Family Law: Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes" (2007) 33 *William Mitchell Law Review* 971 at 1017.

salient than in divorce. Divorce is a complex interpersonal event which impacts many individuals, including children and family members, who are not directly involved at the negotiating table. Pure legal rights and an adversarial approach do not aid at bringing forward all the issues and needs of those both at the table and behind the scenes.

Maccoby and Mnookin state,

Joint problem-solving and negotiation work best with clear communication and good listening skills. Many couples lacked these skills during the marriage itself, and divorce is obviously an extremely difficult time to develop them. Indeed, many couples may replay in the divorce process old and dysfunctional patterns of dealing with each other during the marriage, and these patterns may make cooperation difficult or impossible.⁹⁸

Lawyers, with the help of mental health professionals, thus have to help parties to come to the table ready, more informed and able to negotiate. Despite its potential to create beneficial agreements, an interest-based strategy is not always adopted in divorce cases as,

Divorce bargaining is sometimes seen as a purely distributive (zero-sum) game in which any benefit to the wife necessarily comes at the husband's expense, and vice versa. Both the money issues and the custody issues do have distributive elements with zero-sum characteristics...But divorce bargaining is hardly a zero-sum game in its entirety: in many circumstances, cooperation can "create value" and improve the outcome from each party's point of view. First, and most fundamentally, not all of the father and mother's interests are at odds. Parents often share a fundamental interest in the well-being of their child.⁹⁹

⁹⁸ Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Cambridge, MA: Harvard University Press, 1992) at 55.

⁹⁹ Ronald J. Gilson & Robert H. Mnookin. "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation" 94 *Columbia Law Review* 509 at 541-542 [hereinafter *Disputing Through Agents*].

In fact, the well-being of children is often the paramount feature that encourages parents to use CL, and hence force negotiations into an interest-based problem-solving framework. Parents can conceptualize well-being in whatever way suits their needs. A variety of parenting models can be employed through CL.

The characterization of negotiation in CL as interest-based should not be interpreted as stating that lawyers in CL do not take positions. Positionality is sometimes critical to defend a vital entitlement held by a client. Macfarlane's research documents that, especially in high conflict cases, "split the difference" distributive bargaining does occur, usually to get over temporary barriers and generally at the endgame.¹⁰⁰ Positional bargaining, however, should be used at a minimum to obtain optimal results. As will be explained later in this research, it is complicated problems that may benefit from pure positional bargaining, while more innovative approaches will be required in complex matters.

Client-Centred Focus and Active Client Participation

In addition to requiring an interest-based focus, CL lawyers and clients sign on to a process that is client-centred. This section will outline the ideal of client-centredness that CL attempts to exercise.

The preponderance of legal negotiations, whether interest-based or distributive, remain lawyer-focused. Shields explains, "Lawyers manage the flow of information, they make

¹⁰⁰ Macfarlane, *Emerging Phenomenon of CFL*, *supra* note 5 at 32.

the decisions on how they will proceed, and they are the principal speakers”.¹⁰¹ Although lawyers can focus on the clients, the clients are not at the centre of negotiations, and often do not participate in negotiations at all. CL, on the other hand, aims to be client-centred by including parties in every settlement meeting and asking them to participate actively in planning, option-generation and decision-making. The focus on clients is valuable in resolving disputes with a problem-solving orientation. Families are much more likely to understand the dynamics involved in a dispute related to their own personal matters than lawyers negotiating on their behalf. The same would hold true of an executive who would be much more familiar with the nuances of her business and the impact on that business of proposals by a counterpart.¹⁰² These unique perspectives allow parties to craft solutions that are authentic and workable for them because the solutions are not as narrowly defined as those reached without significant client input and participation.

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

¹⁰¹ Richard W. Shields, “On Becoming a Collaborative Professional: From Paradigm Shifting to Transformative Learning Through Critical Reflection and Dialogue” [2008] *Journal of Dispute Resolution* 427 at 431 [hereinafter *On Becoming a Collaborative Professional*].

¹⁰² Jethro K. Lieberman and James F. Henry, “Lessons from the Alternative Dispute Resolution Movement” (1986) 53 *University of Chicago Law Review* 424 at 431.

This section will describe the client centred approach to legal representation as it exists both inside and outside CL.

What precisely does a client-centred approach entail? Client centredness is not unique to CL. In fact, the client-centred approach debuted long before CL, in 1977, with the publication of the text, *Legal Interviewing and Counseling: A Client-Centered Approach*.¹⁰³ The term “client-centred lawyering” has been used to describe different qualities and goals of lawyering. The first, and perhaps simplest, aspect is that clients alone should determine the “goals to be sought and the outcomes to be accepted”.¹⁰⁴ The client-centred approach views the role of lawyers differently and transfers the lawyer’s attention away from purely legal analysis and onto the clients and the solutions that best meet their needs, whether legal or not.¹⁰⁵ Katherine Kruse aptly describes the benefits of a client-centred approach:

(1) it draws attention to the critical importance of non-legal aspects of a client’s situation; (2) it cabins the lawyer’s role in the representation within limitations set by a sharply circumscribed view of the lawyer’s professional expertise; (3) it insists on the primacy of client decision-making; and (4) it places a high value on lawyers’ understanding their clients’ perspectives, emotions and values.¹⁰⁶

¹⁰³ David A. Binder & Susan C. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* (Minnesota: West Group, 1977).

¹⁰⁴ Robert A. Baruch Bush, “Mediation Skills and Client-Centred Lawyering: A New View of the Partnership” (2013) 19 *Clinical Law Review* 429 at 447 [hereinafter *Mediation Skills*].

¹⁰⁵ Hurder, *supra* note 78 at 287.

¹⁰⁶ Katherine Kruse, “Fortress in the Sand: The Plural Values of Client-centered Representation” (2006) 12 *Clinical Law Review* 369 at 377.

CL allows these benefits to be fulfilled by maintaining a focus on remedies beyond those circumscribed by law, encouraging a process in which clients are at the forefront of negotiations and ensuring a constant spotlight on current client needs and future interests. A further goal of some proponents of a client-centred approach aims to empower clients to make decisions in a broader context as this approach “aids clients by allowing them to exercise control over their lives”.¹⁰⁷

Escaping the constraints of legal remedies and empowering client decision-making serves the deepest of client interests. Carrie Menkel-Meadow describes different kinds of needs that parties may possess supplementary to legal needs.¹⁰⁸ These include economic, social, psychological, ethical, and moral needs.¹⁰⁹ A client-centred process takes each of these needs into account. While this is difficult, the supports offered in CL, including the neutral experts and communities of practice, make such a focus feasible. CL does so by making extra-legal interests a focus of all discussions. CL lawyers are trained to pick up on subtleties that may indicate underlying interests and focus on emotional aspects that are often ignored and filtered in legal negotiation. CL trainings focus on the problem-solving and interactional support skills required in client-centred lawyering.¹¹⁰ Continuing education through conferences and additional training support this growth. Also, mental health professionals, where involved in the process, can impact the topics of

¹⁰⁷ Robert D. Derstein, “Client-Centred Counseling: Reappraisal and Refinement” (1990) 12 *Arizona Law Review* 501 at 517.

¹⁰⁸ Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 76 at 803.

¹⁰⁹ *Ibid.*

¹¹⁰ Baruch Bush, *Mediation Skills*, *supra* note 103 at 449; training and capacity of lawyers will be discussed later in Chapter IV.

discussion in a meaningful way by imparting a different view from that which is commonly offered by legal experts alone.

In addition to needs, a client-centred process must be focused on cultural aspects specific to individual clients. The client's history and experience moves to the forefront and lawyers must have sensitivity in this respect.¹¹¹ Some cultural conventions that are second nature to the client will be entirely foreign to the lawyer. In the CL context, lawyers must understand clients and support them but enable them to have a voice in the process. In CL, the ability for clients to express themselves is fostered, in part, by conducting negotiations in four-way meetings. In being ever-present, clients have a perpetual voice and the lawyers and neutrals must encourage that voice to be heard. Additionally, lawyers and neutrals in the CL process must ask different questions than they would in traditional legal cases. They must be prepared to spend time asking questions about the client as a person and then must be comfortable giving up some control traditionally exerted by professionals. This task is more natural for mental health professionals than it is for lawyers. Many lawyers outside a CL context utilize a client-centred approach. Bush notes that "There is no clear evidence on what proportion of lawyers follow each of the two models – traditional and client-centred...although there is recognition that the appropriate method may vary depending on the type of client being represented".¹¹²

¹¹¹ Alex J. Hurder, "The Pursuit of Justice: New Directions in Scholarship About the Practice of Law" (2002) 52 *Journal of Legal Education* 167 at 172-174.

¹¹² Baruch Bush, *Mediation Skills*, supra note 104 at 448.

The client is, throughout the CL process, meant to retain a position of control. Lawyers and other professionals support the framework of the process but clients dictate the content. Although clients must approve of final settlements in any legal process, lawyers traditionally conduct most aspects of negotiation without clients present and guide clients toward the result that the lawyer deems most appropriate.¹¹³ CL is different and the structure of the collaborative process ensures that lawyers do not dominate. Lawyers are present to offer support and guidance to their clients, an essential role. They are available to help guide the problem-solving approach, an approach that is by nature client-focused. CL lawyers are meant to model appropriate behaviour and guide clients to productivity. However, clients are intended to be the predominant focus of the negotiations, attending every session and voicing ideas and opinions throughout. No settlement can be made without full involvement and understanding of the parties. Lawyers as well as neutral experts are there to ensure this focus. A truly client-centred focus is indispensable in CL.

It is recognized that, although a client-centred process is sought, power can be held by lawyers, acting as facilitators, which changes the nature of the process. A study conducted by Colleen Hanycz examined the power of mediators in the mediation process.¹¹⁴ She found that, mediator power was far greater than that held by disputants or their advocates.¹¹⁵ Moreover, she suggests that this power can create a mediator self-interest in achieving high settlement rates, regardless of whether settlement is in the best

¹¹³ See, Sarat and Felstiner, *supra* note 23.

¹¹⁴ Colleen Hanycz, "Through the Looking Glass: Mediator Conceptions of Philosophy, Process and Power" (2005) 42 *Alberta Law Review* 819.

¹¹⁵ *Ibid.*

interests of the disputants.¹¹⁶ Such studies must be considered in the context of CL to ensure that lawyers are aware of their power and their own self-interest in settlement.

Despite the potential challenges to a client-centred process, through their participation in negotiations, parties help to ensure an interest-based negotiating environment. Indeed, such an environment may be dependant on the active contribution of clients. Mnookin has written extensively on the barriers to reaching negotiated agreement.¹¹⁷ One such barrier is the “principal/agent problem”. The problem is described as follows: “...the incentives for an agent (whether it be a lawyer, employee or officer) negotiating on behalf of a party to a dispute may induce behavior that fails to serve the interests of the principal itself”.¹¹⁸ Lawyers in CL negotiation indeed act as agents for their clients, but the perpetual presence of clients at the negotiating table helps to resolve the principal/agent problem. Lawyers are no longer bargaining for positions in isolation of the familial reality that a solution will impact. In being ever-present, clients exert considerable influence. The prominence of their voice can help to ensure cooperation. If parties have difficulty communicating their views, the CL process can be adapted to ensure their views are heard. Mental health professionals are critical in helping to ensure that each party has the capacity to participate meaningfully in the CL process. Interest-based negotiation relies heavily on the needs of parties and by institutionalizing their presence, it is difficult to escape the relevant interests.

¹¹⁶ *Ibid.*

¹¹⁷ Robert H. Mnookin, “Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict” (1993) 8 *Ohio State Journal on Dispute Resolution* 235.

¹¹⁸ *Ibid.* at 242.

In addition to its benefit in facilitating client-centred negotiation, client participation in CL is important because it allows both parties to hear each other, while they each have the support of their lawyers and any other professionals involved in the process. Welsh found that parties in a dispute care deeply how the other party treats them during the dispute resolution process.¹¹⁹ CL can, to some extent, control both the way that a client expresses him or herself and the way that message is received. Ongoing coaching from the lawyers and mental health professionals allow for such control. The active involvement of clients is not attractive to all clients and this, despite its potential benefits, may be a deterrent for some clients to enter the CL process. Process choice will be discussed later in this research, but it is important to note that the CL process is not ideally suited for all families.

Team Approach

As alluded to in the previous section, client-centredness and other features of CL are possible because of the potential to use a team of professionals in the process. Often, the parties and lawyers benefit from collaborating with other professionals to devise ideal outcomes that suit particular client needs and interests. A team approach has become an essential component of the CL process in most practice groups. While not envisioned by Stuart Webb initially, it did not take long for this to become the case.

The use of team models, generally, is derived from the health and mental health spheres where the use of multiple disciplines helps facilitate optimum outcomes for patients and

¹¹⁹ Nancy Welsh “Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories” (2004) 54(1) *Journal of Legal Education* 49.

clients. 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.¹²⁰ Multidisciplinary practice in healthcare has developed over the last 40 years and it has been determined that the best outcomes are achieved where the disciplines, both health related and non-health related, can be coordinated, where each input is informed by others and where the outcome is as concise and inclusive as possible.

Indeed, Portnoy advocates for a team approach because of the holistic value it adds to the settlement of family law issues, including the “monetary, custodial, psychological, and emotional components” of divorce.¹²¹ In response to the Law Commission of Ontario’s Interim Report’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.¹²²

¹²⁰ Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity* (Toronto: Law Commission of Ontario, 2013) at 75 [hereinafter *Increasing Access to Family Justice*].

¹²¹ Sanford M. Portnoy “The Psychology of Divorce: A Lawyer’s Primer, Part 2: The Effects of Divorce on Children” (2008) 21(4) *American Journal of Family Law* 126 at 131.

¹²² Law Commission of Ontario, *Increasing Access to Family Justice*, *supra* note 119 at 75.

To be sure, some of the early criticisms of CL surrounded the inability of lawyers alone to venture into emotional and financial forums without the requisite training.¹²³ Using multiple experts in these fields helps resolve this problem.

The combination of interest-based, client-centred bargaining, described above, lends itself to exploring client needs beyond what lawyers can provide. Neutral financial advisors and mental health professionals can provide expertise to help parties cope with all the difficulties inherent in resolving complex family disputes. 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.¹²⁴

The way in which the combined expertise is utilized varies in CL. The remainder of this section will discuss the variety of team members that can be employed in CL and the various methods in which they can participate as members of a team.

(a) Team Members

Team members from a variety of fields can be engaged in the CL process. The most commonly used team members are financial specialists or mental health practitioners.

¹²³ Christopher Fairman “A Proposed Model Rule for Collaborative Law” (2005) 21 *Ohio State Journal on Dispute Resolution* 73.

¹²⁴ Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: University of British Columbia Press, 2008) at 237.

Mental health professionals are often helpful to address emotional challenges faced by clients. As explained by the Law Commission of Ontario,

The emotional consequences of family breakdown are often a significant impediment to the resolution of the matter. Frequently, the hurt and anger become a driver of hostility and escalation of the legal matter. Family law matters can be characterized by irrational decision-making and inflexibility. When these consequences are not adequately dealt with, it can create great difficulty in legal cases. Lawyers are not trained to deal with the emotional consequences of marital breakdown and being required to act for someone who is trying to deal with the emotional fall out without assistance can be taxing for counsel.¹²⁵

Mental health professionals in the CL process can meet with clients both outside the meetings and within meetings to help address emotional issues and to develop parenting plans.

The Law Commission of Ontario's research also documents a significant need for therapy or social work when it comes to children.¹²⁶ The report states,

According to some consultation participants, these considerations are even more important when children are involved. They mentioned that parenting is a long term responsibility and sharing that responsibility after separation is a challenge, especially for parents who did not share care-giving activities during the relationship. Parents do not have a choice but to have at least minimal interaction with their children and with each other after they separate. Counselors and social workers have skills to help people understand their parenting role and transition from parenting together to parenting separately. In high conflict cases, social workers can also act as parenting coordinators, which means they can help parents develop parenting plans as well as mediate and arbitrate disputes that arise in the application of this parenting plan...In short, consultation participants

¹²⁵ Law Commission of Ontario, *Increasing Access to Family Justice*, *supra* note 119 at 34.

¹²⁶ Law Commission of Ontario, *Voices from a Broken System: Sharing Consultation Results* (Toronto: LCO, 2013) online: <http://www.lco-cdo.org/family-law/family-law-process-consultation-results.pdf> [hereinafter *LCO Report*].

believed that coordinating social and legal services was an important consideration for family justice reform.¹²⁷

Indeed, the child specialist is an example of a mental health practitioner often used in CL. A child specialist can be vital in assisting parents to understand their children's needs and inform their choices and decisions throughout the CL process.¹²⁸

While the views of mental health professionals are certainly helpful, a critical literature on assessments is worth examination here, as assessments cannot be viewed as entirely unbiased. As one author explained of evaluations in the court setting, "At first blush, what appears to be a routine practice...is upon closer examination, a not-so-nuanced expression of a very real value judgment about litigants who appear in the...family courts".¹²⁹ Undoubtedly, the mental health professional's own social values, biases and ideologies will play into their recommendations at the CL negotiating table.

While not related to the CL context, a recent study of custody evaluators' beliefs on domestic abuse allegations is helpful to examine.¹³⁰ That study noted many differences among custody evaluators based on a number of factors. A detailed description of each is

¹²⁷ *Ibid* at 27.

¹²⁸ Susan Hansen, Jeanne Schroeder, & Kathy Gehl, "The Child Specialist Role in Client Choice of Process: Focusing on the Children and Adding Value" (2013) 13(1) *Collaborative Review* 13.

¹²⁹ Leah A. Hill "Do you see what I see? Reflections on How Bias Infiltrates the New York City Family Court – the Case of the Court Ordered Investigation" (2007) 40 *Columbia Journal of Law and Social Problems* 527.

¹³⁰ Daniel G. Saunders, Kathleen C. Faller & Richard M. Tolman, *Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody Visitation Recommendations* (U.S. Department of Justice, 2012).

beyond the scope of this research, but for example, male evaluators were more likely than female evaluators to believe that domestic violence allegations were false.¹³¹ Another interesting finding for the context of CL was that evaluators with degrees in social work and marriage and family therapy were more likely to recommend custody to the victim of domestic violence than evaluators who were psychologists and counselors.¹³² Deeper differences in core beliefs about patriarchal norms, justice and social dominance were also found among study participants.¹³³ This study supports the assertion that there is no completely objective or neutral basis on which to provide advice on parenting plans and custody. Discussions with a child specialist throughout the CL process, however, help to educate parties as to what may be in the best interests of their children.

Financial experts such as accountants or business valuers can also be of critical importance in a CL process. They can assess a variety of options, give projections as to future earnings and help provide financial literacy to a spouse that has not been conducting the financial matters of the family. Economic decisions are difficult, as the income that had been used to support one household shifts to supporting two.

There is no set composition of team members that is utilized across the board. Different geographical communities have different norms, as will be discussed in a subsequent section and in the results of this research. Generally, however, each case should be examined at the outset to determine the appropriate team to constitute. Additionally, as

¹³¹ *Ibid.* at 9.

¹³² *Ibid.* at 11.

¹³³ *Ibid.*

the negotiations progress, it may become apparent that supplementary or alternative experts may benefit the process and should be added at that point. Although experts are employed in traditional family law or mediation, rarely are such experts retained jointly to provide neutral advice. The neutrality of experts in CL is of central importance as it removes the divisiveness automatically created with competing partisan experts. As stated above, this neutrality cannot be absolute, as personal beliefs undoubtedly play some role in advice given. However, the fact that the mental health professional is generally not aligned with one of the parties and that competing assessments are not part of the process help to avoid such divisiveness.

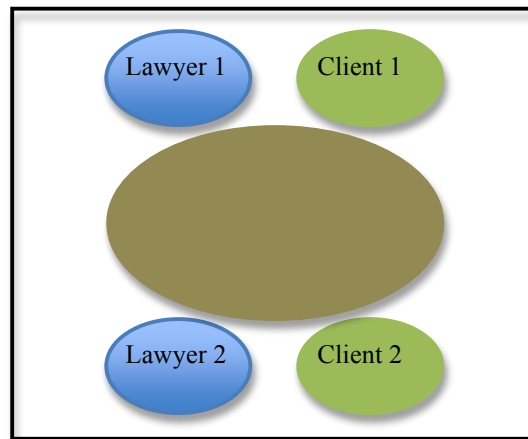
Jointly retained experts, be they experts in the financial or familial realm, can gather all the requisite information from both sides. They can then synthesize and summarize information in a manner that is useful to educate and help the parties down the road to resolution. In addition to the benefits in terms of divisiveness, joint experts are less costly than individually retained experts.

(b) Team Models

Borrowing again from mental health literature, four different team models have been adopted in CL. The difference between these four models lies in the decision of whether to include different professionals and how these other professionals are organized to participate once included. The different models are: unidisciplinary, multidisciplinary, interdisciplinary and transdisciplinary. The team model in CL has adopted each of these models, often varying between different practice groups and local norms.

The original conception of CL, which is still utilized in many cases and many practice groups, is the unidisciplinary team model. Unidisciplinary teams are comprised of professionals from a single background. All group members share the same profession, training and education and function in the same role within the group. In CL, this model features as its core members, two lawyers and their respective clients. The graphic in Figure 1, below, depicts this model.

Figure 1: A Unidisciplinary Model of Collaborative Law



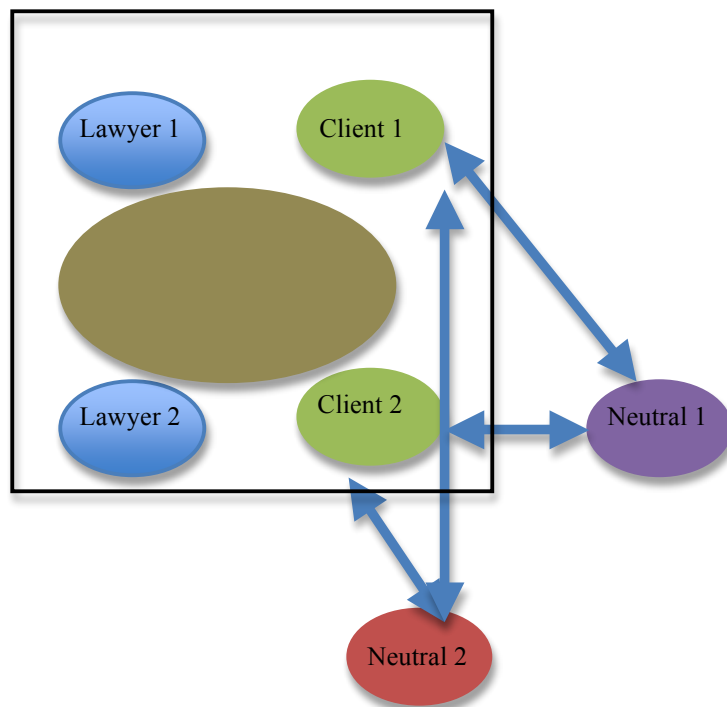
While this model may look like many non-CL cases, it is the conception of the four-way meeting as a team process that is vastly different in CL. Lawyers view each other in an entirely different light when they approach a case as a team. In addition, most meetings take place in the four-way composition, rather than negotiations happening without the clients present. Lawyers may meet with their individual clients before or after four-way meetings but the two lawyers rarely meet or discuss the case outside the process.

In a study by the IACP, 43% of 933 reported cases used a unidisciplinary model.¹³⁴ Indeed, while called ‘unidisciplinary’, even these teams represent more than one professional background, as clients are integral parts of the team and bring their own unique experience, both professional and personal, to the negotiating table. Unidisciplinary teams, while more effective in the CL process than traditional settlement, do not benefit from the exposure to experts from different disciplines that is truly unique and beneficial in CL.

A multidisciplinary team differs from a unidisciplinary team in that it is composed of members from more than one profession. Greater breadth of service can thus be offered. A multidisciplinary approach, also known as a “referral model” involves referring clients to experts as needed. In a multidisciplinary CL model, clients meet with mental health or financial professionals independently. The results of such meetings are then brought to the collaborative process through written or verbal conveyance to either the lawyers, clients or both. In this way, the professionals inform the CL process from a distance. In this way, each professional does his or her own piece with little or no awareness of the work of those from other disciplines. An example of this model is depicted in Figure 2.

¹³⁴ International Academy of Collaborative Practitioners, “IACP Practice Survey”, (2010) 12(1) *Collaborative Review* 6.

Figure 2: A Multidisciplinary Model of Collaborative Law



This model is certainly more comprehensive than the unidisciplinary model, offering clients the expertise of professionals other than lawyers. The major disadvantage with this approach is that there is a lack of communication within and across the disciplines and teams can lose sight of how each issue is inextricably linked to others.

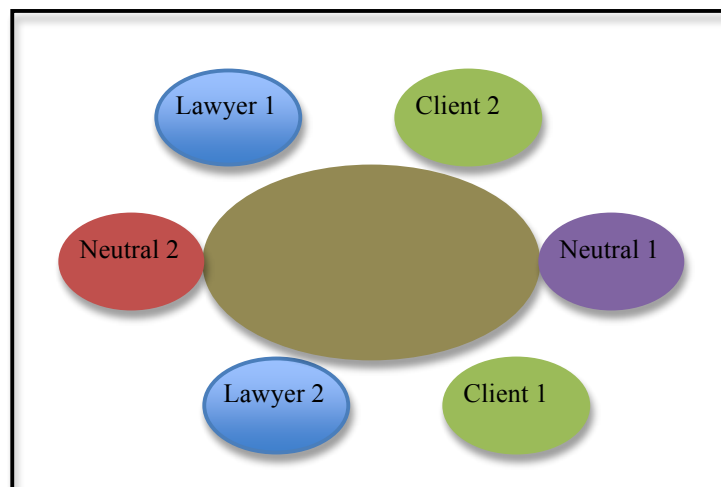
In yet other models, experts form part of the core CL process from the start, offering insights throughout the open meetings. These are interdisciplinary models. An interdisciplinary team is a group of professionals from different disciplines that works independently but interactively in the same setting. Some work may be done separately

with the clients but the team members also come together to achieve a common goal. A definition is offered by Clark, Spence and Sheehan, interdisciplinary implies,

...a group of persons who are trained in the use of different tools and concepts, among whom there is an organized division of labour around a common problem with each member using his own tools, with continuous intercommunication and re-examination of postulates in terms of limitations provided by the work of the other members and often with group responsibilities for the final product.¹³⁵

The respective professionals have a seat at the negotiating table and share their insights and data. An example of this model is depicted in Figure 3.

Figure 3: An Interdisciplinary Model of Collaborative Law



Interdisciplinarity is beneficial to individual cases, in the ways described, but it also supports the practice of CL for lawyers. Tesler explains that the more interdisciplinary experience a CL lawyer has, the more easily that lawyer will facilitate conflict resolution

¹³⁵ Phillip G. Clark, Donald L. Spence, & Judy L. Sheehan, “A service/learning model for interdisciplinary teamwork in health and aging” (1986) 6(4) *Gerontology Education* 3.

even when the team is absent.¹³⁶ The added support from the neutral experts allows the lawyers to focus on specific expertise as they can feel comfortable that others at the table service the extralegal needs of clients. Lawyers are not, and need not be, mental health or financial experts. The CL system accounts for the need to have these views presented by knowledgeable individuals.

In the transdisciplinary model, much like the interdisciplinary team, all team members have a seat at the negotiating table. Where this model differs, however, is in the appreciation on the part of each professional of the information shared by the others. A deep understanding and appreciation gleaned from a mutual sharing of all information, the quality of problem solving can be improved. A transdisciplinary model requires each professional to become sufficiently familiar with the concepts and approaches of her colleagues as to blur disciplinary boundaries.

While optimal to resolve complex client conflicts, the transdisciplinary model depends very much on the knowledge and experience of everyone at the table. It is thus not the most practical approach to employ. It is costly, both from a client perspective, and in terms of the amount of additional knowledge and education required of each expert. Of course, there are hybrids of each of these options and many CL lawyers move fluidly between the models. Often the terms “multidisciplinary” and “interdisciplinary” are used synonymously in error. The transdisciplinary model is still the least often utilized model.

¹³⁶ Pauline Tesler, “Collaborative Family Law, The New Lawyer, and Deep Resolution of Divorce-Related Conflict” [2008] *Journal of Dispute Resolution* 83 [hereinafter *Deep Resolution*].

There is little debate that the team model, as utilized in CL, is effective to achieve the goals of the CL process. The greatest concern that has been raised, however, is the potential increase in economic burden associated with bringing on additional professionals. This has been a concern for both lawyers and clients. While no cost/benefit study has yet been conducted, anecdotal evidence suggests that the value of the team model outweighs its cost. This research will delve deeper into such an analysis.

Full and Voluntary Disclosure

Working alongside the team approach to retain a non-litigious environment is the requirement that parties provide complete, honest and open disclosure of all relevant information. This affirmative duty to disclose negates the need for formal discovery. CL abandons formal discovery because of the polarization that tends to occur with motions for production and examinations for discovery. 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. That being said, given the current disclosure requirements in adversarial family law, little can now be hidden. Lawyers adhering to their professional obligations in all processes are more apt to disclose quickly and completely to help their clients reach settlement. This section describes the difference between disclosure in traditional family law and CL and explains the benefit of early complete disclosure.

The requirement for early, ongoing, voluntary disclosure is critical to the process of CL. Such disclosure is mandated by and agreed upon in the participation agreement signed at the outset of a CL case. Voluntary disclosure ensures that disputes remain outside of the litigation system and helps maintain an interest-based, trusting negotiation environment. Discovery in the litigation process can be time consuming and can serve to protract parties to more positional stances. Indeed, conventional divorce settlement negotiations have been likened to the poker derivative game of “Texas Holdem”.¹³⁷ Both parties have private information as well as information that they are willing to share; they use known factors to their advantage and keep secrets concealed. The negotiations resulting from this “game” lead to suspicion and mistrust and have the potential to impact the communication between the parties long into their continuing relationship.¹³⁸ CL attempts to remove the risk of exposing valuable information and hence relieves parties from such mistrust and suspicion. The absence of formal discovery encourages problem-solving in CL and allows parties to build trust through the mutual sharing of information. A sense of safety and civility is thus built through the disclosure process of CL. Parties must recognize that if the process breaks down, however, and they choose to litigate following unsuccessful negotiation, such information will be subject to discovery in the normal course.

Foregoing the formal discovery rules of the traditional legal process changes the timelines and extent of disclosure and can expedite the process. Formal discovery is

¹³⁷ Gregg Herman, “Are Divorce Settlement Negotiations Like Games?” (2004) 18(1) *American Journal of Family Law* 5. While this description cannot describe all divorce negotiations, it is a common characteristic in such cases.

¹³⁸ *Ibid.* at 5.

governed by provincial statute. In Ontario, for example, the *Family Law Rules* determine what must be disclosed and when.¹³⁹ By abandoning a strict reliance on rules of procedure and evidence, lawyers in CL can encourage fuller and earlier sharing of information. In CL, all relevant material must be disclosed. But the question becomes, what information is relevant?

Information that is relevant in litigation will certainly be material in CL. Moreover, additional information may be necessary in CL that would not be available through formal discovery. For example, CL requires lawyers to disclose “settlement facts”, which Menkel-Meadow describes,

...may 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.¹⁴⁰

These settlement facts can be essential in determining mutually beneficial solutions. Where disagreements as to relevance arise, lawyers work together with their clients to resolve discrepancies. Often, the default will be to err on the side of disclosure rather than non-disclosure.

Full and voluntary disclosure requires complete honesty and good faith on the part of all involved. Thus, parties must be aware of the increased standard from the start. As Abney

¹³⁹ *Family Law Rules*, O.Reg. 322/13.

¹⁴⁰ Carrie Menkel-Meadow, “Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyer’s Responsibilities” (1997) 38 *South Texas Law Review* 407 at 423 note 67.

writes, “[w]hen collaborative lawyers have their initial consultation with prospective clients, and the lawyers get an uncomfortable feeling about the parties’ [ability] to be honest, the attorneys would do well to decline representation of those parties” within the collaborative process.¹⁴¹ Certainly, some clients may self-select out of CL because they do not want to disclose freely. In CL, lawyers and clients must adhere to an increased standard. Wetlaufer has characterized lying as an acceptable feature in advocacy.¹⁴² Moreover, Chanen queries whether the “puffery” commonly used in settlement negotiations is acceptable in CL.¹⁴³ While some amount of deception or concealment may be acceptable in the adversarial realm, such behaviour is frowned upon in the CL context. Lying in CL is detrimental to the settlement process and can impinge upon the future relationship that is fostered in CL. Lying or omission can simply play no part. If a spouse is in a new relationship, for example, such information will be revealed at some point either during or following the negotiation. Either way, such revelation has the potential to derail the negotiation or the compliance of any agreement if not revealed in a sensitive and timely fashion.

Honesty and complete disclosure is vital in CL but a problem arises if one or both parties do not abide by the disclosure requirement. Since participants have no power to obtain discovery forcibly, since they must remain outside of the litigation system, the process may be compromised or terminated because of a less than forthcoming spouse. As

¹⁴¹ Sherrie R. Abney, *Avoiding Litigation: A Guide to Civil Collaborative Law* (Victoria, BC: Trafford Publishing, 2006) [hereinafter, *Avoiding Litigation*] at 73.

¹⁴² Gerald B. Wetlaufer, “The Ethics of Lying in Negotiation” (1990) 70 *Iowa Law Review* 1219.

¹⁴³ Jill Schachner Chanen, “Collaborative Counsellors: Newest ADR Option Wins Converts while Suffering some Growing Pains” [2000] *ABA Journal* 54.

warned by Beyer, “Collaborative clients could be falsely reassured by the collaborative agreement’s requirement that the parties engage in complete disclosure of all relevant information early in the process”.¹⁴⁴ The lawyers, along with any neutral professionals, play an integral role in ensuring disclosure and encouraging candour on the part of their clients. Disclosure is one element that has to be considered from the outset of a file as the willingness and ability to disclose is a major factor to consider when opting for a CL process. The issue is in screening for the appropriate dispute resolution mechanism, an issue that will be addressed throughout the remainder of this research. If CL is indeed the right mechanism, suitable safeguards must be put in place to ensure parallel disclosure. Innovation can be used to determine and implement such safeguards.

Values, Benefits and Challenges of Collaborative Law

As explained in Chapter II, Stuart Webb was propelled to create Collaborative Law (CL) for lawyers who were disenchanted with the litigation of family law disputes. However, it cannot be said that the benefits of CL are borne by lawyers alone. Benefits of CL are felt by lawyers, by clients and their families and by the community at large. Tesler states,

Ten years of experience with collaborative law indicates that no other dispute-resolution modality presently available to divorcing families matches collaborative law in its ability to manage conflict, elicit creative “out of the box” solutions, and support parties in realizing their highest intentions for their lives after the legal process is over.¹⁴⁵

Goals of dispute resolution processes often centre around increased efficiency, decreased conflict, increased cooperation and decreased costs. Similarly, the value base of most

¹⁴⁴ Beyer, *supra* note 66 at 328.

¹⁴⁵ Tesler, *Achieving Effective Resolution*, *supra* note 2 at 5.

Alternative Dispute Resolution (ADR) systems surrounds values such as self-determination, privatization, and informalism. CL is no different. Ultimate goals of meaningful resolution and increased compliance are also at the root of CL. Although these benefits and ideals are advantageous, they are each subject to critiques, which will be discussed throughout this section. CL also faces particular challenges with informed consent and screening for appropriateness. This section will highlight the benefits, values and challenges of CL. The specific benefits and challenges of lawyers in CL and of the disqualification requirement will not be detailed here, as they are the subject of the subsequent Chapter.

Values and Benefits of Collaborative Law

A very specific set of values is embodied in the practice of CL, as with other dispute resolution mechanisms. Amy Cohen explains that social conditions shape the moral values that a process adopts.¹⁴⁶ The social conditions surrounding the birth of CL were explored in the previous Chapter and will again be examined through a historical lens in Chapter VII. These contexts cannot be ignored. CL's ideals of settlement, self-determination, privatization and informalism are certainly a product of the time and circumstances around the process' development. These values come alive, in CL, through the benefits most often referred to by proponents of the process: (a) more meaningful resolution, (b) more expedient and cost effective resolution, (c) greater privacy, and (d) increased compliance.

¹⁴⁶ Amy J. Cohen, "Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values" (2010) 78 *Fordham Law Review* 1143.

It is useful to note that most of these goals are not unique to CL, and, integral to this research, none of them are explicitly dependent on any one aspect of the CL process. Instead, they are the result of the combination of characteristics that are CL. Also, the characterization of these as benefits is not without debate. The following sections will describe such benefits in detail and will articulate the criticisms that accompany each. It must also be recognized that clients opt in to the CL process on a voluntary basis. Thus, many of the articulated benefits may be possible because of the clients who choose to embark on the process. As random selection studies are not practicable, one can only speculate as to whether these benefits are available purely because of the process offered by CL. The current research is undertaken under the premise that benefits are derived from the cumulative effect of many characteristics of CL.

(a) Meaningful resolution through Informal Settlement

By touting meaningful resolution as a benefit of CL, the implication that the process values settlement over adjudication is clear. This value is particularly rich in CL because of the requirement for lawyers to withdraw and for clients to seek new counsel should the case not settle within the CL process.¹⁴⁷ Settlement is not only a goal of the CL process, but its defining feature.¹⁴⁸ Owen Fiss famously explains that the purpose of settlement differs from adjudication, which is intended “to give meaning to public values, not

¹⁴⁷ Disqualification will be explored further in Chapter IV.

¹⁴⁸ See, for example, Tesler, *supra* note 2; Richard Shields, Judith Ryan & Victoria Smith, *Collaborative Family Law: Another way to resolve family law disputes* (Toronto: Thomson Carswell, 2003).

merely to resolve disputes”.¹⁴⁹ Public values about what resolutions should be have little place in CL, where the focus is on the private values of the individuals involved in the process. These may or may not echo the public values as they are articulated in either legislation or precedent.¹⁵⁰ Fiss criticizes settlement precisely for this focus on individuals, rather than on notions of social justice.¹⁵¹

The assessment of whether a settlement process is beneficial undoubtedly must look at the nature of the resolution attained. By virtue of the difficult issues and deeply personal nature of family disputes, few family law clients reach agreement happily. As described by a participant in Sarat and Felstiner’s study of family lawyers, the “best way of looking at divorce is to understand that each party has to be mutually dissatisfied with the result”.¹⁵² Is mutual dissatisfaction sufficient to be characterized as meaningful resolution? CL sets the bar higher than that. CL seeks an agreement with which both parties are content and which is sustainable in the long term. Preliminary findings of an Exeter/Kent study, indicate that this is being achieved, noting client preference with CL results over those in mediation.¹⁵³

¹⁴⁹ Owen M. Fiss, “Foreword: The Forms of Justice” (1979) 93 *Harvard Law Review* 1 at 44 [hereinafter *Forms of Justice*].

¹⁵⁰ The focus on private values is said to produce meaningful resolution in CL. Meaningfulness, in this context, will focus on the particular meaningfulness of settlements for clients and will not examine the social implications of such settlements.

¹⁵¹ Fiss, *Forms of Justice*, *supra* note 149.

¹⁵² Sarat & Felstiner, *supra* note 23 at 139.

¹⁵³ Anne Barlow, Rosemary Hunter et al. “Mapping Paths to Family Justice – A National Picture of Findings on Out of Court Family Dispute Resolution [2013] *Family Law* 306.

The discussion of meaningful settlement is not synonymous with the discussion of settlement rates. The reality is that most cases settle, whether using traditional family law processes or various ADR mechanisms. Thus, a comparison of settlement rates is futile.

Tesler pointedly makes the distinction:

The disagreement is not...about rates of settlement. Whatever the mode of settlement negotiations employed, it is a commonly accepted proposition among divorce lawyers that nearly all divorcing couples will sooner or later resolve their legal issues in a settlement agreement rather than a judgment after trial. Instead, collaborative lawyers increasingly describe qualitative differences in process and outcome between the settlements they have facilitated via collaboration and those they have facilitated via mediation or friendly settlement.¹⁵⁴

Why is meaningful settlement, rather than simply any settlement, important? Divorce is unique, as it represents both the end of a relationship and the beginning of a reconceived relationship. When children are involved, co-parenting may remain a dominant feature in the lives of all involved. Acrimonious divorce makes co-parenting virtually impossible as it polarizes parents. Hence, the search for meaningful resolution is especially pivotal in family law. Meaningful and durable resolution is sought, in CL, by encouraging productive communication between parties, providing a sense of procedural justice and playing a therapeutic role. In addition, CL avoids placing the dispute in a litigious framework by beginning prior to the filing of a legal claim and remaining outside the court system.

CL has the potential to offer meaningful resolution to clients, but what does the concept of meaningful resolution mean? Meaningfulness generally is dependant on clients sensing fairness in the result. CL can offer such fairness. Nancy Welsh's research on fairness of

¹⁵⁴ Tesler, *Achieving Effective Resolution*, *supra* note 2 at 101.

outcomes yields compelling results.¹⁵⁵ In reviewing years of fairness research, she found that the four elements most important to the perception of fairness are: an opportunity for disputants to express views (also referred to as “an opportunity for voice”), a consideration by the other side of what was said, even-handed treatment by third parties, and treatment with dignity and respect.¹⁵⁶ Tom Tyler’s research also focuses on clients having a “voice” in the process, having greater input in decision-making, and feeling respected by authorities.¹⁵⁷ He suggests that the more control clients have over the outcome of their case, the more likely they will experience satisfaction with the fairness of process and outcome.¹⁵⁸ Indeed, the ability to express oneself and participate in a decision-making process has been shown in many studies to increase the perception of fairness.¹⁵⁹

In precisely the ways imagined by both Welsh and Tyler, by valuing self-determination through direct participation, CL attempts to increase fairness. Through an individualist framework, CL assumes that families have the capacity to participate in the CL process and to determine what is best for them. Mnookin explains,

Some might think the stresses and emotional turmoil of separation and divorce undermine the essential premise of private ordering – individual’s

¹⁵⁵ Welsh, *supra* note 119.

¹⁵⁶ *Ibid.* at 52.

¹⁵⁷ Tom Tyler, “Procedural Justice”, in David B. Wexler & Bruce J. Winick (eds.) *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (North Carolina: Carolina Academic Press, 1996) at 3-15.

¹⁵⁸ *Ibid.*

¹⁵⁹ See, for example, Robert Folger, “Distributive and Procedural Justice: Combined impact of ‘voice’ and improvement on experienced inequity” (1977) 35 *Journal of Personality and Social Psychology* 108, E. Allan Lind, Tom R. Tyler & Yuen J. Huo, “Procedural Context and Conflict: Variations in the antecedents of procedural justice judgments” (1997) 73 *Journal of Personality and Social Psychology* 767.

capacity to make deliberate judgments. I disagree. For most persons, the emotional upheaval is transitory, and the stresses are an inevitable consequence of having to make a new life. Temporary incapacity does not justify state paternalism for an extended period of time.¹⁶⁰

Amy Cohen suggests that ADR has successfully introduced the idea that “people can and should manage conflict without the direct coercion of state law”.¹⁶¹ She proposes that the combination of social rationalities associated with the family and the efficiency of market domains explain the success of ADR.¹⁶² This indeed embodies the values held by CL of self-determination and autonomy. CL, by involving clients in every aspect of negotiation and decision-making, has the potential to provide clients with a sense of fairness, hence increasing its ability to result in meaningful resolution.

The extent to which meaningful resolution can be achieved in CL is somewhat dependent on the lawyers and their view of the lawyer’s role in the process.¹⁶³ Once again, the salience of lawyers in the CL process is reinforced. Macfarlane describes that many CL lawyers view their role as that of friend or healer.¹⁶⁴ Lawyers who believe in this ideal see themselves as playing a therapeutic role, healing clients by healing their relationships while terminating their marriage. In this respect, some have coupled CL practice with the therapeutic jurisprudence model. Therapeutic jurisprudence is a discipline created by David Wexler and Bruce Winick around 1990. Therapeutic jurisprudence has been defined as “the use of social science to study the extent to which a legal rule or practice

¹⁶⁰ Robert H. Mnookin, “Divorce Bargaining: The Limits of Private Ordering” (1985) 18 *University of Michigan Journal of Law Reform* 1015.

¹⁶¹ Amy J. Cohen “Family, the Market and ADR” [2011] *Journal of Dispute Resolution* 91.

¹⁶² *Ibid.*

¹⁶³ Macfarlane, *Emerging Phenomenon of CFL*, *supra* note 5.

¹⁶⁴ *Ibid.*

promotes the psychological or physical well-being of people it affects”.¹⁶⁵ Daicoff elaborates, “It simply says, given two different options for achieving a particular legal result, if one option is more therapeutic than the other, the lawyer should attempt to pursue the more therapeutic course of action”.¹⁶⁶ Daicoff defines the sentiment of the therapeutic jurisprudence model as follows, “since law and legal processes have an impact on psychological functioning...efforts should be made to optimize law’s positive impact and minimize its negative effects on the individuals involved”.¹⁶⁷ CL seeks to minimize the negative impact of divorce in any ways possible.

It must be recognized that therapeutic jurisprudence does not, however, limit itself to processes outside of court, recognizing that sometimes litigation is the most therapeutic course of action. For example, in some cases of power imbalances or abuse, the chance to assert oneself in court can be cathartic and important for future dealings with the other party.¹⁶⁸ Whether in CL or other dispute resolution processes, extra-judicial or within the court system, the way lawyers play their role has inevitable therapeutic consequences for the client.¹⁶⁹ In CL, lawyers are trained and expected to be mindful of this therapeutic role in their attempt to facilitate meaningful resolution.

¹⁶⁵ Christopher Slobogin, “Therapeutic Jurisprudence: Five Dilemmas to Ponder” (1995) 1 *Psychology, Public Policy and Law* 193.

¹⁶⁶ Susan Swaim Daicoff, “Law as a Healing Profession: the Comprehensive Law Movement” (2005) 6(1) *Pepperdine Dispute Resolution Law Journal* 1 [hereinafter *Healing Profession*] at 12.

¹⁶⁷ Susan Swaim Daicoff, “Collaborative Law: A New Tool for the Lawyer’s Toolkit” (2009) 20 *Florida Journal of Law and Public Policy* 113 [hereinafter, *New Tool*] at 133.

¹⁶⁸ Bruce Winick, “Symposium: Creative Problem Solving Conference – Therapeutic Jurisprudence and the Role of Counsel in Litigation” (2000) 37 *California Western Law Review* 105.

¹⁶⁹ *Ibid.*

While specific studies of the nature of results attained in CL are yet to be conducted, mediation studies have begun to explore the quality of settlement, looking at a variety of factors. Dwight Golan, for example, conducted a study that looked at the ability of mediation to repair relationships.¹⁷⁰ In that study, he found that in only 20% of cases was there a repair of the relationship between disputants.¹⁷¹ While this statistic is not promising for mediation, one must recall the increased protections available in CL to foster a reparation of relationship and meaningful result. Meaningful resolution may be achieved more easily in CL because of the use of a team model and other unique aspects of the process. The lawyers working as a team, as well as the use of non-partisan experts, and a prescribed innovative process, help clients to create sustainable meaningful resolution in a therapeutic and responsible manner.

The notion that CL produces more meaningful substantive outcomes is not supported by all research. Macfarlane found that negotiated outcomes in CL were not all that different from expected litigated outcomes.¹⁷² However, the same research found that, while core outcomes were not that different, there were qualitative differences in the agreements reached and the manner in which they were reached.¹⁷³ Macfarlane states,

While most [CL] lawyers did not regard the core substantive outcome of their collaborative files to be substantially different from that of a negotiated or litigated file, they did point to differences in other procedural

¹⁷⁰ Dwight Golan, “Is Legal Mediation a Process of Repair – or Separation? An Empirical Study and its Implications” (2002) 7 *Harvard Negotiation Law Review* 300.

¹⁷¹ *Ibid.*

¹⁷² Macfarlane, *Emerging Phenomenon of CFL*, *supra* note 5.

¹⁷³ *Ibid.*

and psychological aspects of the resolution that translated into ‘value added’ dimensions of the settlements.¹⁷⁴

She points specifically to the increased communication between the parties, which allowed them to explore what they felt was fair and to “finesse” details that might have taken a more standardized form.¹⁷⁵ This research will examine the issue of quality of settlement more closely to distinguish whether the CL process indeed yields more meaningful and more innovative results.

(b) More expedient and cost effective resolution

Along with offering meaningful resolution to disputes, a large thrust toward CL lies in its propensity to settle cases quicker and cheaper than other modes of dispute resolution. Menkel-Meadow says that such “quantitative-efficiency claims” differ from “qualitative-justice claims”, such as the meaningfulness of settlement, because they come from vastly different ideologies on how disputes should be resolved.¹⁷⁶

The efficiency discourse has been prominent in the field of ADR almost since its inception, for a variety of reasons. Silbey and Sarat explain, for example, that,

...the establishment bar and legal elites...have promoted ADR as a way of dealing with the contemporary crisis of the courts. Theirs is not a critique of the essence or ideals of adjudication; instead, they seek to save adjudication by limiting it, to preserve the space of law by not overtaxing its institutional capacity. Elite lawyers want to conserve judicial resources

¹⁷⁴ *Ibid.* at 58.

¹⁷⁵ *Ibid.*

¹⁷⁶ Carrie Menkel-Meadow, “Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or ‘The Law of ADR’” (1992) 19 *Florida State University Law Review* 1 [hereinafter *Pursuing Settlement*].

for the resolution of business and commercial disputes and are willing to see other matters removed from the courts if not from the legal field itself.¹⁷⁷

Family law matters would, thus, likely fit into those cases not “worthy” of court adjudication by Sibley and Sarat’s “elite lawyers”. Further discussion of the historical context of the efficiency rationale will be discussed in Chapter VII.

Law and economics scholars have also examined the efficiency claims of settlement processes, such as CL. Such scholars examine the extent to which disputants elect for settlement when it is rational and efficient for them.¹⁷⁸ Bronsteen explains, for example, that civil litigants settle when they perceive the cost of proceeding to litigation to outweigh the perceived benefits.¹⁷⁹ Family litigants differ in some critical respects from civil litigants; however, the economic balancing cannot be discounted. Lawyers interviewed in the current study, for example, often explained to their clients that the cost of going to litigation would significantly outweigh the cost of settlement processes, including CL.¹⁸⁰

¹⁷⁷ Susan Silbey & Austin Sarat, “Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject” (1989) 66 *University of Denver Law Review* 437 at 446.

¹⁷⁸ See, for example, Robert D. Cooter & Daniel L. Rubinfeld, “Economic Analysis of Legal Disputes and Their Resolution” (1989) 27 *Journal of Economic Literature* 1067.

¹⁷⁹ John Bronsteen, “Some Thoughts About the Economics of Settlement” (2009) 78 *Fordham Law Review* 1129.

¹⁸⁰ See Chapter X for detailed results from the interviews in this study.

The reduction in cost is partly because CL files are resolved more expeditiously than traditional divorces.¹⁸¹ While the traditional divorce process takes between eight and fourteen months to complete, whether by trial or settlement, the resolution of a CL divorce takes between four and eight months.¹⁸² Data generated by the International Academy of Collaborative Professionals (IACP) supports this assertion, indicating that collaborative cases can often be resolved in a mere four to six conferences held over a few months time.¹⁸³ This data is based on self-reported questionnaires answered by lawyers in 377 North American cases.¹⁸⁴ No data exists, to date, which documents whether or to what extent process benefits vary depending on the number of conferences held. It must be noted that the existent data was not generated by an unbiased researcher; however, these numbers seem to be corroborated by anecdotal evidence from lawyers practicing CL.

Practical realities, however, cannot be ignored. Part of the reason for the expediency of resolution in CL is the ability for parties to schedule cases along a timeline that works for them. Court schedules need not be accounted for and a convenient location can be found. Even where mediation or negotiation are employed in traditional family law cases, parties

¹⁸¹ Stuart Webb & Ronald Ousky, *The Collaborative Way to Divorce: The Revolutionary Method that Results in Less Stress, Lower Cost, and Happier Kids – Without Going to Court* (New York: Hudson Street Press, 2006) at 135.

¹⁸² *Ibid.*

¹⁸³ International Academy of Collaborative Professionals, “Collaborative Practice Survey Cumulative Data Results for 10/15/06 Through 12/31/07, online: www.collaborativepractice.com [hereinafter, *IACP Study*]; While this information is helpful, one must be mindful in its interpretation, as the data is not independently collected and thus determining its reliability is difficult.

¹⁸⁴ *Ibid.*

and lawyers often wait for various court steps before getting serious about settlement. This is not the case with CL.

As explained above, the expediency of dispute resolution, relates to a decrease in financial strain. Monetary matters are critical in divorce situations, as protracted litigation depletes family resources at a time when financial demands are often increased. Thus, potential cost savings are a critical factor in opting to settle a case via CL. Indeed, CL settlement is generally less expensive than achieving a litigated decision.¹⁸⁵ Tesler states that a CL file “will cost from one third to one fifth as much as being represented conventionally”.¹⁸⁶ She also notes that “[i]t is not uncommon for the bills for a single temporary support motion to equal or exceed the lawyer’s fees and costs for an entire collaborative law representation”¹⁸⁷. In the IACP study cited above, the “average total cost of average cases” was just under \$18,000, and the average cost of “difficult” or “very difficult” cases was \$28,535.¹⁸⁸ The cost savings occur partially because of the decreased time to complete the settlement, but other factors also play a role. For example, the engagement of joint experts saves the cost of having duplicate experts completing the same task. Additionally, the use of voluntary disclosure negates the need for formal discovery, a time and cost-intensive process in the traditional system. Again, a neutral study conducted by independent researchers would be required to confirm or negate the IACP results. This study will further examine the issues of expediency and cost effectiveness as they pertain to the use of the innovation process in CL.

¹⁸⁵ Webb & Ousky, *supra* note 181 at 137

¹⁸⁶ Tesler, *Achieving Effective Resolution*, *supra* note 2 at 354.

¹⁸⁷ *Ibid.* at 355.

¹⁸⁸ IACP Study, *supra* note 183.

(c) Greater privacy

In addition to the time and cost associated with family law litigation, the privacy of individuals is at stake in litigating a family law matter. Privacy is an important criterion for clients deciding upon which process to embark for divorce. Privacy operates, in CL, at both a macro and micro level.

On a micro level, by avoiding the issuance of public claims and defenses, CL retains greater privacy for clients than does litigation, or other processes derived therefrom. Tesler explains, “Because of the privacy and control that come with staying outside the formal court system, the collaborative law process is well-suited to public figures and people of substantial means who often prefer to keep their financial and personal affairs out of the public record”¹⁸⁹. As this comment suggests, the public record and public disclosure of information required in the litigation system are absent in CL. By ensuring privacy, parties and their children are protected from the public nature of traditional cases. While cases in which information is readily available to the public are rare, the advent of the internet makes researching cases particularly easy if information is sought. Court documents can be made available to the public if someone is interested in finding out about the contents of pleadings. The avoidance of filing pleadings makes CL particularly discreet. Confidentiality is also stipulated for in the participation agreement, providing further assurances of privacy.

¹⁸⁹ Tesler, *Achieving Effective Resolution*, *supra* note 2 at 18-19; it is recognized that, through privacy, information may also be kept out of spouse’s hands, but the author found no evidence to that effect in this research or reported elsewhere.

Privacy is not only ensured within the confines of a CL process that ends in settlement. Existing safeguards, such as the confidentiality provision in the participation agreement, protect information gleaned through CL, both during and after the process whether successful or not. Jennifer Kuhn outlines some ways in which American evidentiary safeguards protect the privacy of the collaborative process.¹⁹⁰ She points to rules of privilege and confidentiality to suggest that the information gathered within a collaborative negotiation remain within the process. Such rules have similar counterparts in Ontario and thus the same logic can be applied in a Canadian context. Such provisions will now be discussed.

Confidentiality of information and documents exchanged in the CL process are expressly mandated in the participation agreement. Thus, any unsworn document is considered “without prejudice” and cannot be used as evidence in a later trial. The Supreme Court of Canada has asserted that parties can indicate settlement documents as “without prejudice” and in that way ensure that, if there is no settlement, their legal rights are unaffected by the negotiations.¹⁹¹ Settlement discussions, in any process, are privileged in order to

¹⁹⁰ Jennifer M. Kuhn, “Working Around the Withdrawal Agreement: Statutory Evidentiary Safeguards Negate the Need for a Withdrawal Agreement in Collaborative Law Proceedings” (2008) 30 *Campbell Law Review* 363.

¹⁹¹ *Maracle v. Travelers Indemnity Co. of Canada* (1991), 3 O.R. (3d) 510 (note), 1991 CarswellOnt 450, [1991] S.C.J. No. 43, 3 C.C.L.I. (2d) 186, 50 C.P.C. (2d) 213, [1991] 2 S.C.R. 50, 47 O.A.C. 333, 80 D.L.R. (4th) 652, 125 N.R. 294, [1991] I.L.R. 1-2728 (S.C.C.) at para. 17; see also *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] SCC 37 [hereinafter *Sable Offshore Energy*] for the most recent and authoritative statement as to when settlement privilege arises and the scope of such privilege.

encourage an open exchange of information. These protections are available in CL as well. The test for settlement privilege has been stated as follows:

- (a) A litigious dispute must be in existence or within contemplation;
- (b) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event the negotiations failed; and
- (c) The purpose of the communication must be to attempt to effect a settlement.¹⁹²

These criteria work in CL to preclude the use of information gained through the CL process in any future litigious claim. By making the decision to enter the CL process, clients have deemed that a litigious dispute is within contemplation, although it has been set aside in favour of negotiating a mutually satisfactory outcome. Additionally, communication in the CL setting is made with express intention, through the execution of the participation agreement, that it will not be disclosed. And, finally, the information exchanged through the CL process is by nature intended to effect a settlement. Since the three criteria for the privilege are fulfilled, information exchanged in CL negotiations would not be available in future litigation. The privilege, as it extends to all involved in the negotiations, constrains information gathered in the settlement process. Settlement privilege belongs to both clients, and thus, cannot be unilaterally waived or overridden by either of them.¹⁹³

A recent case explored the admissibility of evidence gleaned in the CL process in a later trial.¹⁹⁴ In that case, the petitioner sought to introduce an unsigned property statement of

¹⁹² John Sopinka, Sidney N. Lederman, & Alan W. Bryant, *The Law of Evidence in Canada*, 2d. ed. (Toronto: Butterworths, 1999) at para. 14.207.

¹⁹³ *Ross River Dena Council v. Canada (Attorney General)*, [2009] Y.J. No. 7 (S.C.), at para. 51.

¹⁹⁴ *Hogan v. Hogan*, [2011] SKQB 479 (CanLII).

the respondent, which was provided to the petitioner in the CL process.¹⁹⁵ The respondent brought a motion to strike out this evidence, using the CL participation agreement's confidentiality provision as a defence. The court stated that the rules that should be applied are those that apply to disclosure and solicitor/client privilege.¹⁹⁶ Specifically, the court stated, "Applying those principles to the circumstances at hand, the draft property statement and the draft financial statement were prepared for the purposes of the collaborative law process and as a result falls within the confidentiality provisions of the collaborative law contract and cannot be used in the subsequent litigation process".¹⁹⁷ Thus, parts of the documents that were created specifically for the CL process were excluded from admissibility merely because they formed part of settlement discussions. As this case demonstrates, clients may be comforted knowing that the information shared in the CL process is private both during and after the CL process, whether settlement is achieved or not. Certainly, this implies that clients wish the information to remain private, which may admittedly not always be the case.

The Supreme Court of Canada explored settlement privilege in two recent decisions, *Sable Offshore Energy Inc. v. Ameron International Corp.*¹⁹⁸ and *Union Carbide Canada Inc v. Bombardier Inc.*¹⁹⁹ In *Sable Offshore Energy*, the Court confirmed that settlement privilege attaches to any communications made with an eye to settlement and that an exception should apply where a competing public interest outweighs the public interest in

¹⁹⁵ *Ibid.* at para. 5.

¹⁹⁶ *Ibid.* at para. 10.

¹⁹⁷ *Ibid.* at para. 12.

¹⁹⁸ *Sable Offshore Energy Inc. supra* note 191.

¹⁹⁹ *Union Carbide Canada Inc. v. Bombardier Inc.*, [2014] SCC 35 [hereinafter *Union Carbide*].

encouraging settlement.²⁰⁰ In *Union Carbide*, the Court addressed the question of whether a confidentiality clause in a mediation contract can displace the common law settlement privilege and found that private contract is indeed able to supplant the common law, if it reflects the clear intention of the parties to do so.²⁰¹ This decision is relevant in the CL context because of the express provision for confidentiality in the participation agreement signed at the start of the CL process. By analogy, *Union Carbide* confirms the privacy of the CL negotiation process. However, the exception to the privilege may apply in cases of agreements reached with incorrect or insufficient information, or agreements made under duress. No cases have yet argued this exception in the CL context, however.

The micro implications of privacy of particular agreements and negotiations are not the only privacy considerations to be considered. At a macro level, a settlement process such as CL privatizes public values and holds particular values about concepts of the family, including, *inter alia*, views about equality and the best interests of the child.²⁰² CL assumes, for example, that the state should exist separate from the family. In allowing, indeed encouraging, parties to come to their own solutions surrounding their family, the CL process eschews the state values of the family.

Such private ordering of dispute resolution processes, for the reasons explained throughout this section, is not without critics. Indeed, the private nature of settlements is

²⁰⁰ *Sable Offshore Energy*, *supra* note 191.

²⁰¹ *Union Carbide*, *supra* note 199.

²⁰² See, Cohen, *Family, the Market and ADR*, *supra* note 161.

one of the most criticized aspects of ADR processes, generally.²⁰³ First, critics claim that the confidentiality of such processes allows for private justice for wealthy parties and large corporations.²⁰⁴ Fiss has stated, for example, that “Adjudication is more likely to do justice than conversation, mediation, arbitration, settlement...or any other contrivance of ADR, precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason”.²⁰⁵ Also skeptical of the privatization of dispute resolution, Delgado states,

Minorities recognize that public institutions, with their defined rules and formal structure, are more subject to rational control than private or informal structures. Informal settings allow wider scope for the participants’ emotional and behavioral idiosyncrasies; in these settings, majority group members are most likely to exhibit prejudicial behavior. Thus, a formal adjudicative forum increases the minority group member’s sense of control and, therefore, may be seen as a fairer forum.²⁰⁶

Further, it has been argued that private settlement leads to the erosion of the public realm. The lack of public record has also been criticized as preventing the public scrutiny of the process and outcome of the agreements. Tyler notes, for example,

...alternative dispute resolution threatens the ongoing process of establishing legal precedents and dealing with issues of public policy. Alternative dispute resolution procedures typically privatize a dispute by resolving it in a private agreement reached outside of a public forum. Consequently, the reasons for the decisions made are not articulated and no public record is available. As a result, the public airing of disputes occurs only to the extent that cases currently end up in court.²⁰⁷

²⁰³ See, for example, Owen Fiss, “Against Settlement” (1984) 93 *Yale Law Journal* 1073; Tom Tyler, “The Quality of Dispute Resolution Processes and Outcomes: Measurement problems and possibilities” (1989) 66 *Denver University Law Review* 419.

²⁰⁴ Lauren K. Robel, “Private Justice and the Federal Bench” (1993) 68 *Indiana Law Journal* 891.

²⁰⁵ Fiss, *Against Settlement*, *supra* note 203 at 1672.

²⁰⁶ Richard Delgado et al. “Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution” [1985] *Wisconsin Law Review* 1359 at 1391.

²⁰⁷ Tyler, *supra* note 203.

The private ordering of CL certainly deprives the court of the ability to create legal precedent. This tradeoff cannot be denied. It is a sacrifice that CL makes in favour of valuing individual rights and freedoms to conduct their lives in the way they see fit. Despite these critiques of privacy, CL proponents tout the benefit of privacy to the CL process and its clients.

(d) Increased compliance

The benefits of achieving meaningful, timely and cost effective private settlement are important in CL but the durability of the agreement is also of particular importance. What good is a process that ends in swift agreement if parties do not adhere to the terms of such agreement? Compliance is essential.

Compliance is related to the concept of procedural justice outlined in reference to meaningful settlement.²⁰⁸ The more content clients are with the outcome of their resolutions, the more likely they are to adhere to them. As stated by Welsh, "...they are more likely to *comply* with the outcome of the dispute resolution process if they feel they have been treated fairly".²⁰⁹ The active involvement of clients throughout the CL process should result in increased ownership of the result and hence increased compliance. No data yet exists to support this claim, but anecdotal and theoretical reports suggest its truth.

Studies on the compliance with CL agreements are yet to be conducted, thus this discussion remains purely theoretical. An examination of empirical data from mediation,

²⁰⁸ See *supra* section (a).

²⁰⁹ Welsh, *supra* note 119 at 53, italics in original.

however, can offer some insight. Hahn and Kleist conducted a ten year review of mediation literature and found greater compliance in mediated cases than in litigated agreements.²¹⁰

The same level of increased compliance has been reported on an anecdotal level from practitioners in the CL field. Because of the dearth of research, it is unclear whether the increased compliance, if it indeed exists, results from the CL process or the skills developed through the process or whether the people who tend to embark on CL processes would be more likely to comply regardless of the process used to achieve settlement. This research will touch on such factors but a randomized independent comparative study would be required to achieve determinative results. Such research is beyond the scope of this study.

Challenges of Collaborative Law

Now that the benefits and values of CL have been described, including those critiques associated with each, it is important to turn ones mind to the broader challenges of the CL process. CL is not appropriate in all cases. The specific types of cases in which the innovative process of CL should be utilized will be outlined in a subsequent Chapter. For now, it is important to note the vital role that parties and lawyers have in considering whether CL is the right process to settle the disputes at hand. This decision involves both informed consent and screening for appropriateness of CL. Because of the nature of CL, this is an “all or nothing” decision. Either the case is collaborative or it is not. This

²¹⁰ Robert A. Hahn & David M. Kleist “Divorce Mediation: Research and Implications for Family and Couples Counseling” (2000) 8 *The Family Journal* 165.

research will recommend a more fluid approach, but for the meantime let us focus on informed consent and screening in the current CL landscape. Much debate about the appropriateness of CL rests with the disqualification of lawyers. This particular aspect will be the subject of detailed discussion in Chapter VI and will be covered only as necessary here.

(a) Informed consent

Informed consent is of critical importance when deciding whether to embark upon a CL process. Particularly because of the potential for lawyer disqualification, such a decision must be rooted in a critical examination of process choices and options. It must also be based on a detailed understanding of CL. Parties may be giving up legal entitlements in the negotiation process and they must be made aware of this potential. As stated by Condlin,

[Those who] use the legal system...are entitled to presume that their disputes will be resolved according to law. They may choose to waive this entitlement for non-legal considerations such as fear of publicity, an immediate need for cash, personal feelings for the adversary, intolerance for conflict, moral sensibilities, and the like, and this decision is not troublesome if it represents the free choice of one value over another, when both choices are known. But the selection of a negotiated outcome over an adjudicated one, by itself, should not be seen as a waiver of this entitlement.²¹¹

Clients cannot be assumed to understand the entitlements they are renouncing and lawyers must be able to apprise them of such. Hoffman explains the need for full and complete understanding of options before a process decision can be made:

²¹¹ Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role* (1992) 51 *Maryland Law Review* 1 [hereinafter *Bargaining in the Dark*] at 81-82.

The bottom line in comparing the advantages and disadvantages of the parties' various options is that there is no substitute for independent, unbiased professional advice in making the choice. There are so many variables in each case that it is virtually impossible to prescribe a set of factors that would work as a matrix for the successful triage of all cases. And even with the best professional advice, there is an irreducible element of uncertainty in predicting how the mix of skill, experience, objectives, and interpersonal chemistry between and among the lawyers and clients will affect the process of negotiation, and therefore professionals will often be surprised to find that cases that seem like excellent candidates for cooperative or collaborative processes become highly contentious, just as there are seemingly contentious cases that surprise professionals with amicable resolutions.²¹²

The key is for lawyers to understand all of the process options and to match, as best they can, the particular case to the particular process by suggesting the most appropriate processes to their clients. In the end, however, process choice rests within the purview of the client who must provide informed consent. The nature of informed consent required in CL was articulated by the committee that formed the Kentucky ethics opinion on CL practice. Therein was stated,

The kind of information and explanation that is essential to informed decision making includes the differences between the collaborative process and the adversarial process, the advantages and risks of each, reasonably available alternatives and the consequences should the collaborative process fail to produce a settlement agreement. Although the collaborative law agreement may touch on these matters, it is unlikely that, standing alone, it is sufficient to meet the requirements of the rules relating to consultation and informed decision making. The agreement may serve as a starting point, but it should be amplified by a fuller explanation and an opportunity for the client to ask questions and discuss the matter. Those conversations must be tailored to the specific needs of the client and the circumstances of the particular representation. The Committee recommends that before having the client sign the collaborative agreement, the lawyer

²¹² David Hoffman, "Cooperative Negotiation Agreements: Using Contracts to make a Safe Place for Difficult Conversations", in Kelly Browe Olson & Nancy ver Steegh (eds.) *Innovations in Family Law* (California: Association of Family and Conciliation Courts, 2008) at 9.

confirm in writing the lawyer's explanation of the collaborative process and the client's consent to its use.²¹³

Mosten suggests that, in order to attain consent, lawyers must explain the concept of CL, the model of CL that they employ, as well as other CL models available that they do not offer.²¹⁴ In addition, they must compare CL representation with both traditional representation and mediation and explain how mediation and CL can be used in the same matter.²¹⁵ The results section of the current study will discuss the extent to which this is taking place.

(b) Screening for appropriateness

Related to informed consent, lawyers must screen whether CL is the appropriate process for clients and for their particular disputes. Although process choice must rest with clients, lawyers can help to advise clients as to which processes would be most effective and safest for them to select. Abney writes,

[if] collaborative lawyers consider the parties and the nature of the disputes, they should be able to screen out a number of parties who would not be appropriate candidates for the collaborative process...To accept parties that do not fit the profile of collaborative participants as clients will set up the collaborative process for failure.²¹⁶

Factors that have been examined by various authors include: personal motivation and suitability, trustworthiness, domestic violence, mental illness, substance abuse, and fear

²¹³ Kentucky ethics opinion, Op. E-425 (2005), online: http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf at 4.

²¹⁴ Forest Mosten, "Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making" [2008] *Journal of Dispute Resolution* 163.

²¹⁵ *Ibid.*

²¹⁶ Abney, *Avoiding Litigation*, *supra* note 142 at 73.

or intimidation.²¹⁷ While no authors state that any of these criteria is determinative in a decision of whether to utilize CL or not, they suggest considering whether these criteria indicate a need for particular additional professionals.²¹⁸ This study will expand this list to include an increasing number of factors and an increasing number of neutral experts who can help achieve the types of resolutions possible through CL.²¹⁹

Shields et al. describe some characteristics that are necessary to embark on a CL process, and, perhaps more importantly, they illustrate when a CL process will not be appropriate.

They state,

[I]t is essential to screen clients to assess whether they are suitable for the [CL] process. Lawyers must determine whether the prospective client has, or can develop, the capacity to participate effectively in the [CL] process. Clients must share a similar commitment to work with rather than *against* the other for mutually acceptable results. They must demonstrate an acceptance of the fact of their separation, the willingness to manage or learn to manage their emotions, an interest in the well-being of the other side, and a commitment to an honourable divorce process. They must value the benefits of maintaining their relationship, or taking a long-term view of the issues, and of retaining control over their own solutions.

Clients who wish to prove a point, punish or control the other spouse, enforce legal rights, or establish legal precedent are not suitable for this process...A client who does not believe the other spouse will ever provide honest disclosure or negotiate in good faith is not suitable for the process.

Individuals who suffer from serious drug or alcohol abuse, who have clinical issues, who are unwilling to take responsibility for their own choices, or who have difficulty following through with commitments made must be scrutinized carefully at the outset to determine whether sufficient support can be put in place to allow effective participation.²²⁰

²¹⁷ John Lande and Forest Mosten, “Collaborative Lawyers’ Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients’ Informed Consent to Use Collaborative Law” (2010) 25 *Ohio State Journal on Dispute Resolution* 347.

²¹⁸ *Ibid.* at 358.

²¹⁹ See *infra* Chapter XI for such a discussion.

²²⁰ Shields, Ryan & Smith, *supra* note 149 at 55-56, emphasis in original.

A variety of tools to assist in screening have also been offered.²²¹ The assumption made by these and other CL authors and practitioners, however, is that lawyers are capable of screening whether and to what extent clients can and should participate in CL. This challenge and corresponding assumption exists in many family law cases, as there is no ideal process. For example, where there is a substantial history of domestic violence, problems arise in litigation, mediation, negotiation, and CL.²²² As stated by Wieggers and Keet, “Managing these issues requires intensive lawyer-client communication such as open, ongoing feedback from the client to the lawyer through initial screening and preparatory interviews”.²²³ Various studies suggest that this is simply not being done. Lawyers express an insufficiency in training on how to screen, ambivalence about the severity of entering a process without screening, and a feeling that power differentials can be remedied through strategies in the CL process.²²⁴ Better training and an invocation of mental health professionals early in the process can help remedy these problems. However, parties may not be able to afford such support or may not want to employ it.

Screening is not an easy task for many personal and pragmatic reasons. Effective screening requires more than checking off items on a list of factors.²²⁵ Challenging dynamics of family cases and a reluctance or inability to share information in an initial

²²¹ See, for example, Lande & Herman, *supra* note 36 at 286.

²²² Lande & Mosten, *supra* note 217 at 387.

²²³ Wanda Wieggers & Michaela Keet, “Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities” (2008) 46 *Osgoode Hall Law Journal* 733 at 759.

²²⁴ *Ibid.* at 751-756.

²²⁵ Lande & Mosten, *supra* note 217 at 383.

client consultation make screening tremendously difficult. Additionally, screening whether CL is appropriate in difficult cases may depend on the availability of additional professional services and a client's willingness to employ such services.²²⁶ Moreover, biases inherent in the screening process make effective screening additionally difficult.²²⁷ Because of these challenges, screening cannot always be done at the front end of a file. Continuous screening must take place throughout negotiations so that additional supports, accommodations or process changes may be made as needs arise. If mental health professionals are participating in the process, their input may be useful in the screening process as well.

²²⁶ *Ibid.*

²²⁷ See critical discussion of assessments, which similarly applies in the context of screening, *supra*.

Chapter IV. Lawyers and Disqualification in Collaborative Law

The preceding Chapters have described the nature of Collaborative Law (CL) and its particular values, benefits and challenges. Two prime characteristics of CL, which differentiate the process from other mechanisms, are that clients must be represented by counsel and that such counsel is disqualified from representing those clients if the negotiations should not end in agreement. Other processes, including litigation, have accommodations for self-represented clients and allow representatives to take cases to trial if a settlement is not achieved. Such is not the case in CL. Other models of dispute resolution allow for self-representation and leave litigation as a last resort; CL takes away this option and this last resort. This Chapter will consider both the role of lawyers and disqualification in CL. Each of these characteristic properties of CL impact significantly on innovation and thus a detailed examination of each is warranted in this research.

Because of their integral presence, lawyers who navigate the CL process must be able to do so adeptly. This Chapter will first delve into the requisite propensity and training of lawyers practising CL and will look at the importance of reputation in creating CL communities of practice. Each of these topics is of critical importance in maintaining a collaborative negotiating atmosphere. The characteristics and propensity of CL lawyers are essential in determining their competency to practise CL. If lawyers are going to negotiate collaboratively, they must have the capacity and understanding to do so. This ability and understanding entails a combination of personality, training, and reputation. Some lawyers are unable to participate meaningfully in a CL case. As stated by Abney,

some lawyers “never realize that half of their cylinders are still firing in the litigation mode”.²²⁸

In addition to the role of lawyers in CL, the impact of disqualification is of utmost importance in this research. It is not the quality of the Disqualification Agreement (DA), but rather its mere existence that has an effect on innovation, either supporting innovation or imposing an unnecessary constraint on the negotiation process. Thus, this research will delve into the topic of the DA in some depth. Many have critiqued lawyer disqualification for a variety of reasons. This Chapter will detail these reasons.

Lawyers in Collaborative Law

Lawyers in CL must step up to the plate and become particularly adept at dispute resolution. Macfarlane explains that this is being accomplished, stating,

[CL lawyers] have a sense not only of when to be accommodating but also of when to be tough in order to protect their clients' interests, working incrementally to create trust and enhanced solutions. They understand and develop norms of reciprocity with the other side, beginning with establishing comfort and rapport. This process requires good interpersonal and communication skills, including the ability to put the other side at ease, demonstrate respect and perhaps even empathy, and, most challengingly, create a shared sense of trust.²²⁹

Whether through natural propensity, self-selection, training, threats on reputation or mentoring, CL lawyers anecdotally report being quite able to adopt this new paradigm.²³⁰

This research will further examine this capacity to adopt CL.

²²⁸ Abney, *Avoiding Litigation*, *supra* note 141.

²²⁹ Macfarlane, *The New Lawyer*, *supra* note 123 at 70.

²³⁰ Shields, *On becoming a Collaborative Professional*, *supra* note 101.

Training

Shifting a practice to CL is neither a simple nor natural progression for lawyers. Indeed, most practice groups require lawyers to be trained before participating in a CL process.

Shields et al. explain the minimum requirement,

...the [CL] process cannot be followed unless both lawyers are qualified to conduct the process. Qualification requirements vary from jurisdiction to jurisdiction but generally a minimum of five days of training is required. The lawyer should refuse to enter into a Participation Agreement with another lawyer who has not been trained in [CL].²³¹

This is not always the case, though. Cameron discusses whether lawyers should participate in a CL case without the required training. She states that lawyers “will need to decide whether or not [they] are willing to work with [untrained] lawyers in the collaborative process”.²³² Currently, the decision of whether to enter a participation agreement with a lawyer who is not trained in CL rests with individual lawyers or practice groups.

What does training entail? Shortly after the creation of CL, specified training programs were developed. Such training draws from the pedagogy of other ADR training programs offered by both academic and professional organizations.²³³ Training is essential since

²³¹ Shields, Ryan & Smith, *supra* note 148 at 55.

²³² Nancy Cameron, *Collaborative Practice: Deepening the Dialogue* (Vancouver: Continuing Legal Education Society of British Columbia, 2004) at 159 [hereinafter *Deepening the Dialogue*].

²³³ Harvard Law School, for example, founded its Program on Negotiation (PON) in 1983 and offers both mediation and negotiation training which involves process overviews and role-playing exercises (Program on Negotiation at Harvard Law School, <http://www.pon.harvard.edu>); many other training programs exist, a list of some is attainable at <http://www.mediate.com>.

“Effective legal problem solvers must learn to *think* differently before they learn to *act* differently”.²³⁴ Tesler describes the difference between the role of the lawyer in a litigation context from that in a CL context,

A conventional litigation lawyer might well assume that achieving the greatest dollar value outcome for each of the legally cognizable issues is the obvious and sole task or representation, and might therefore (as taught to do in law school) probe efficiently from the first interview to spot the issues, weed out irrelevancies, and shape the messy facts into a theory of the case for trial. In contrast, the collaborative lawyer does something different: he or she begins the representation by listening carefully, asking searchingly, and advocating for the long view, for enlightened self interest, and for attention to relational as well as economic issues. He or she assumes nothing about the goals to be achieved.²³⁵

This different type of representation, even from the very outset, clearly requires specific and intense training. Interest based negotiation, for example, is seldom available in law school but is a major focus of the CL training regime.²³⁶ After all, CL lawyers perceive themselves as negotiation specialists. These skills, while not uniquely suited to CL, rarely form part of formal legal training and thus lawyers will have varying degrees of experience or training with them.

The training required to understand and undertake CL is multifaceted, since the change to a lawyer’s approach to practice is complex. Tesler describes such training as “retooling”, entailing both a change in the lawyers’ inner perceptions and outward behaviour.²³⁷ Shields depicts the learning required in CL training as a transformative learning

²³⁴ Carrie Menkel-Meadow, “The Lawyer as Problem Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering” (1999) 72 *Temple Law Review* 785 [hereinafter *Lawyer as Problem Solver*] at 707 (italics in original).

²³⁵ Tesler, *Achieving Effective Resolution*, *supra* note 2 at 33.

²³⁶ Although some courses offered in Canadian law schools are beginning to introduce the concept of interest-based negotiation, such skills are still rarely taught.

²³⁷ Tesler, *Achieving Effective Resolution*, *supra* note 2 at 26.

experience.²³⁸ A transformative learning model requires critical reflection and perspective transformation²³⁹, both elements that Shields explains as essential to the paradigm shift required of lawyers in CL. Those who complete training in CL do so committedly, involving significant cost, time commitment and effort. The goal of the training process is to impart the requisite knowledge and understanding of the principles of CL and to enable lawyers to determine when CL is appropriate. In addition, upon completion of the training, lawyers must be able to utilize appropriate CL skills including effective communication and interest-based negotiation.

Training protocols for CL have become, in some jurisdictions, quite standardized and stringent. The IACP adopted training standards in 2004, which require that CL professionals have at least twelve hours of basic training as well as at least thirty hours of training in client-centred, facilitative conflict resolution, such as mediation training.²⁴⁰ Local practice groups can provide for more detailed training requirements as they see fit. The specific training regimes utilized in the research sited documented in this study will be outlined in the research methodology, in Chapter IX.

At the end of the training process, lawyers are free to hold themselves out to the public as CL lawyers and are free to register as members of relevant CL groups. Richard Shields

²³⁸ Richard Shields, *Collaborative Family Law Training: From Making the Paradigm Shift to Experiencing Transformative Learning*, Unpublished PhD Thesis, (Proquest Dissertations, 2007) [hereinafter *Collaborative Law Training*].

²³⁹ Dean Elias, "It's Time to Change Our Minds: an Introduction to Transformative Learning" (1997) 20(1) *ReVision* 1.

²⁴⁰ International Academy of Collaborative Professionals, "IACP Minimum Standards for Collaborative Practitioners", online: www.collaborativepractice.com/lib/Ethics/IACP_Practitioner_Standards.pdf.

conducted a considerable amount of research on the CL training regime, interviewing both participants and trainers about their experience and conducting a case study of a two-day workshop.²⁴¹ His findings illuminate the training process of CL as well as the propensity for lawyers to practise CL.

Shields explains that the goal of the training is indeed affective, in addition to behavioural.²⁴² There must be a change in attitude as well as action. He describes a polarity map, which defines the particular changes that must take place in the training for a particular lawyer. To create the following grid, he draws from the research of Leonard Riskin and his mediator orientations grid. The following figure is derived from Shields' work.

Figure 4: Shields' Paradigm Shift Grid

		Lawyer Directed			
Rights based		Lawyer Directed Rights Based		Lawyer Directed Interest-Based	Interest-based
		Client-Centred Rights Based		Client-Centred Interest-Based	
		Client-Centred			

²⁴¹ Shields, *Collaborative Law Training*, *supra* note 238.

²⁴² *Ibid.*

Lawyers tend to fit along these continua and, through training, can be guided to adopt a particular affective approach. While the grid suggests the movement lawyers may have in adopting CL through training, it does not suggest how that movement takes place.²⁴³ Shields suggests that a questionnaire could be created which would locate lawyers on this grid so that training could be customized to adapt to student starting points.²⁴⁴ Training could thus be customized to meet the individual needs of participants.

Training in CL is indeed critical, as it combines a detailed description of the process of CL, a process which may be a marked departure from a lawyer's current practice, with an affective component, or paradigm shift, which may or may not be vastly different from a lawyer's paradigm-in-practice.²⁴⁵

Propensity

As can be gleaned from the brevity of the CL training, which involves procedural, behavioural and affective elements, lawyers likely possess some propensity to adopt CL principles before training begins. Although CL requires a different type of lawyering than traditional practice, a difference that has been likened to a right-handed person, taking a left-handed approach, lawyers do not necessarily have such a disparate starting point.²⁴⁶

²⁴³ *Ibid.* at 324.

²⁴⁴ *Ibid.* at 329.

²⁴⁵ *Ibid.* at 323.

²⁴⁶ See, for example, Graham B. Strong, "The Lawyer's Left Hand: Non-analytical Thought in the Practice of Law" (1998) 69 *University of Colorado Law Review* 759; Chris Guthrie, "The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering" (2001) 6 *Harvard Negotiation Law Review* 145; Martha E. Simmons, "Paradigmatic Conversion: An Analogy of

Lawyers working in a consensus-building process do face a challenge that is conceptually and practically different from the zero-sum environment to which they may be accustomed. Even in an environment where most cases are settled, settlements often follow the same zero-sum framework of the litigation system. However, the notion that lawyers enter the CL training as adversarial “bulldogs” and exit fully changed collaborators is untenable. Shields’ research indeed found that none of the participants he observed and interviewed described an adversarial practice orientation as their starting point.²⁴⁷ Even in litigation files, these lawyers described an orientation that was more collaborative. This finding makes sense as it indicates a willingness to adopt a collaborative approach and a synergy between propensity and practice once training is complete.

Even though lawyers opting to practise CL likely have some propensity toward an interest-based approach, trainers and leaders in the CL field describe the training process as difficult. Pauline Tesler, for example, aptly describes the challenge for lawyers deciding to practise CL,

...no one should engage in collaborative representation without understanding that doing this work well requires undoing a professional lifetime of conscious and unconscious habits, and requires rebuilding from the bottom up an entirely new set of attitudes, behaviors, and habits. To do this work well, we must become beginners, and unlearn a bundle of old automatic behaviors before we can acquire the new, more conscious attitudes, behaviors, and habits of a good collaborative lawyer.²⁴⁸

Religious Conversion and Collaborative Law” (2011) 30 *Windsor Review of Law and Social Issues* 149.

²⁴⁷ Shields, *Collaborative Law Training*, *supra* note 238.

²⁴⁸ Tesler, *Achieving Effective Resolution*, *supra* note 2 at 24.

Tesler explains the inner and outer changes that must take place to embrace CL, stating, “Each of the four dimensions of the paradigm shift include both inner and outer transformation; in other words, transformation of the lawyer’s inner perception of who he or she is and what he or she is doing and transformations of objective visible behaviours toward clients and professionals involved in a collaborative case”.²⁴⁹ Certainly, CL requires such differing attitudes, behaviours and habits but the reality remains that lawyers are making the conscious choice to abandon litigious means and to enter the realm of interest-based resolution. There must be a reason behind such abandonment and entrance. Studies have examined the nature of lawyers who decide to practise CL.

Julie Macfarlane also notes that many CL lawyers embraced CL as a synthesis of their personal and professional values.²⁵⁰ This finding suggests that lawyers felt somehow uncomfortable with an adversarial legal practice and chose CL as an alternative. Research has also been conducted on the proclivity of CL lawyers, with a focus on the personality types of lawyers opting to practise CL.²⁵¹ This research aligns with the findings in Shields’ and Macfarlane’s studies. In particular, the research found substantial differences between the personality types of CL lawyers and lawyers practising traditional family law, using the Myers Briggs Type Indicator (MBTI) as a measure.²⁵² A

²⁴⁹ *Ibid* at 27.

²⁵⁰ Macfarlane, *Emerging Phenomenon of CFL*, *supra* note 5.

²⁵¹ Martha E. Simmons, “Collaborative Practitioners: Born or Bred?”, unpublished Masters Thesis, on file with author.

²⁵² *Ibid*.

variety of studies have examined lawyers' personalities with the use of the MBTI.²⁵³ The MBTI is based on the theory of psychological typing developed by Swiss psychiatrist, Carl Jung. Through years of observing people, Jung concluded that much apparently random variation in human behaviour was due to differences in the way individuals exercise aspects of their personality.²⁵⁴ Further, Jung posited that fundamental preferences remain unchanged throughout the life course.²⁵⁵ A more comprehensive examination of Jungian theory is beyond the scope of this research but in order to understand the underpinnings of the MBTI, a cursory review of Jung's typology theory is appropriate. Jung viewed a person's psychological type as comprised of three dichotomies. The first, either extraversion or introversion, describes the way in which individuals gain energy, whether from the external world or from inner reflection. The next describes a person's perceiving function, sensation or intuition, whether that person prefers to receive information from their senses or from broader theories. The final set of functions described by Jung is Thinking or Feeling, which describe a person's predisposition to analytical or emotive decision-making. Each of these attitudes and functions work together in different ways to dictate the way in which individuals naturally operate in the environment.

Katherine Briggs and Isabel Briggs Myers developed the MBTI instrument and in so doing they made Jungian theory more accessible. Myers and Briggs, extrapolating from

²⁵³ See for example, Lawrence Richard, "The Lawyer Types" (1993) 79 *ABA Journal* 74; Raymond Marcun, "Psychological Type Theory in the Legal Profession" (1992-1993) 24 *University of Toledo Law Review* 103.

²⁵⁴ Carl G. Jung, *Psychological Type* (New Jersey: Princeton University Press, 1976) at 3, 6.

²⁵⁵ *Ibid.*

Jungian theory, determined that there were four personality preference scales and sixteen distinct personality types. The MBTI measures these four dimensions of personality, three articulated by Jung and the last created by Briggs and Myers, who felt that it was implied in Jung's work. The questionnaire, which forms the basis of the instrument, outlines these four type preferences that generate the sixteen personality types. Each scale is dichotomous such that high scores on one preference necessarily result in low scores on the corresponding preference.

In creating the MBTI in the 1940s, Myers sought to create a self-reported questionnaire to assess Jungian personality types with an aim to enhance the self-awareness of those who completed the instrument.²⁵⁶ While the instrument measures different ways of interacting, no one given set of preferences is better or worse than another. Personality preferences are no more than simply preferences. They do not dictate behaviour, nor do they suggest that the opposing preference cannot be used adeptly. An individual's preference is merely his or her home base: a set of behaviours or tendencies with which the individual is most comfortable. While everyone uses each of the preferences some of the time, individuals innately tend to prefer one of each pair of preferences. The MBTI is by no means the only measurement of personality. Another commonly utilized measure is the five-factor model, which measures five personality dimensions: Conscientiousness, Extraversion, Agreeableness, Neuroticism and Openness to Experience.²⁵⁷ While trait

²⁵⁶ Peter Myers & Isabel Briggs-Myers, *Gifts Differing: Understanding Personality Type* (Palo Alto, CA: Consulting Psychologists Press, 1995).

²⁵⁷ Paul T. Costa Jr. & Robert R. McCrae, *Revised NEO Personality Inventory (NEO-PI) and NEO Five-Factor Inventory (NEO-FFI) Manual* (Odessa, FL: Psychological Assessment Resources, 1992).

theories, such as the five-factor model, may yield interesting results in terms of lawyer personalities, these were not examined in the current research. These would be a useful future contribution to the literature in the field.

While new behaviours are certainly important in CL and can be addressed by the training, the research conducted to date has helped to demonstrate that there is something different about those individuals who opt to undertake CL. The propensity for collaborative lawyers to tend towards certain practice orientations and personality types suggests that these individuals either never or no longer “fit” in the typical lawyer persona or role. Some research does indeed suggest that such a typical persona does exist.²⁵⁸ It may be an innate predisposition, as suggested by the MBTI study, or it may be related to the legal education and models of lawyering they have been exposed to through mentors, both formal and informal. The findings in each of these studies suggest that the collaborative process attracts a particular subset of lawyers, lawyers who value a problem-solving, client-centred orientation to dispute resolution. If this was not the case, they would not self-select into CL.

Reputation and Practice Groups

In addition to training and propensity, the role of reputation in CL is of importance. Family law practice generally has an institutional structure that allows lawyers to build and maintain reputations for either cooperation or non-cooperation. This reputational

²⁵⁸ See for example, Richard, *supra* note 253; Marcun, *supra* note 253.

market is fueled by repeated exposure as well as professional organizations.²⁵⁹ In a study of divorce lawyers, Maiman, McEwan and Mather found that, due to collegial influence, 70% of participants noted that they preferred to begin with a fair opening offer rather than extreme positions.²⁶⁰ In the same study, 3% said they would begin with extreme positions in anticipation of later compromise, while 27% said it would depend on the circumstances.²⁶¹ Defining an area of practice such as CL makes the decision of who to retain even easier for clients wishing for a cooperative lawyer.

CL communities of practice depend on their reputation to remain in existence. Moreover, the CL practice groups in all areas are relatively small and so lawyers will encounter each other again and again on files. Gilson and Mnookin propose that, if two parties negotiate against each other repeatedly, they build reputations, which serve as signals as to the type of negotiator they are.²⁶² In the world of CL, lawyers mostly know each other and negotiate together repeatedly. In so doing, they build reputations, which serve to signal their cooperative strategy to their counterpart.²⁶³ This reputation is critical and lawyers would not want to risk its demise. In the normal course, CL lawyers are retained by word of mouth referral, often by the other party's lawyer. One experience with an uncooperative lawyer can mean the end of that lawyer's CL career. This is not a risk many would be willing to take. Reputation is key. CL lawyers are under considerable pressure from the need to retain a collaborative reputation that it constrains and shapes

²⁵⁹ Gilson & Mnookin, *Disputing Through Agents*, *supra* note 99.

²⁶⁰ Richard J. Maiman, Craig McEwen & Lynn Mather, "The Future of Legal Professionalism in Practice" (1999) 2(1) *Legal Ethics* 71.

²⁶¹ *Ibid.*

²⁶² Gilson & Mnookin, *Disputing Through Agents*, *supra* note 99.

²⁶³ *Ibid.*

their behaviour. Their strategy can be trusted as a cooperative one. Reputation also ensures that lawyers control the behaviour of their clients as possible.

The reason reputation can be of such impact in CL is because of the status of CL lawyers as “regulars”. Wayne Brazil has written on the role of “regulars” on lawyer behaviour. He defines “regulars” as,

...groups of lawyers (1) who are experienced and regularly practice in a few closely related substantive areas of civil litigation... ; (2) who practice for the most part in the same city or limited geographic area; (3) whose work is likely to bring them into contact with one another more than occasionally; (4) who know one another or at least one another's firms; and (5) whose practice ‘styles’ are either similar or well known and essentially accepted by one another.²⁶⁴

As “regulars”, CL lawyers are under considerable pressure that constrains and shapes their behaviour. CL lawyers often know each other well, as their unique practice area defines those they work with repeatedly. Family law, by virtue of its focus on families, often is constrained geographically. Additionally, by selecting CL, lawyers can signal their practice style and ensure that the other lawyer has a similar style.

If reputation of individual lawyers was not sufficient, CL practice groups serve as additional “peer pressure” to maintain collaborative styles. Gilson and Mnookin note that organizations of practice can influence levels of cooperation.²⁶⁵ Without specific reference to CL groups, Gilson and Mnookin described the benefit of such groups aptly,

²⁶⁴ Wayne Brazil, “Views from the Front Lines: Observing Chicago Lawyers About the System of Civil Discovery” (1980) *American Bar Foundations Research Journal* 217 at 240.

²⁶⁵ Gilson & Mnookin, *Disputing Through Agents*, *supra* note 99.

Imagine an organization that limited its membership to attorneys who specialized in cooperative representation. Such an organization might promulgate standards defining cooperative conduct and defection in various contexts. The organization might then certify an attorney as cooperative, but only after intensive screening and review: a number of existing members might have to vouch for the fact that the nominee had consistently behaved appropriately over an extended period of time and had never defected. The organization might also stand ready to impose sanctions-including suspension or expulsion-in order to maintain cooperative norms.²⁶⁶

CL groups have not gone so far as to impose formal sanctions on their members. However, if one is to want to retain a CL practice, their style must fit that of the practice group.

In limiting membership to those lawyers who maintain the spirit of CL, practice groups are among the factors that negate the need for the DA to manage the behaviour of lawyers in the process. Even without disqualification, CL lawyers are under significant pressure to maintain their cooperative reputation lest they be noted as lawyers who do not follow the protocols of the practice group.

The legal culture of CL and its practice groups is based on cooperation. Cooperation is the dogma of CL. If a CL lawyer becomes known for defecting from such cooperation, that lawyer will no longer be trusted in the CL realm and lawyers will be weary of signing a participation agreement with them. CL lawyers in particular geographic areas come to know each other well. Social gatherings and informal meetings are often held among CL practice groups to ensure a close-knit community. Because of the relationship

²⁶⁶ *Ibid.* at 561.

shared by many CL lawyers, they can cooperate in negotiations with a high degree of confidence that such cooperation will be reciprocated.

Disqualification in Collaborative Law

Lawyers, through training, propensity, and reputation must be equipped to practise CL. Additionally, these lawyers must be prepared to act on behalf of their clients purely for settlement, as the DA mandates that they disqualify themselves from any future litigation with the parties. Whether lawyer disqualification is ethical or unethical, practical or impractical is not the focus of this study, although these aspects will be discussed in order to provide context. Disqualification on a broader level is important to consider for the purpose of determining the innovative potential of the CL process.

Research conducted to date has not answered the question of the utility or necessity of the disqualification provision in CL. However, much demand from the academic and professional community has called for such an inquiry. Julie Macfarlane, for example, states, “Further research should examine how far the disqualification agreement is a critical enabler of settlement-only lawyering”.²⁶⁷ Lande echoes this statement, noting that no empirical research exists that analyzes how people have used the DA and what the results have been.²⁶⁸ Similarly, Zylstra explains that research utilizing control or comparison groups is needed.²⁶⁹

²⁶⁷ Macfarlane, *Emerging Phenomenon of CFL*, *supra* note 5 at x.

²⁶⁸ John Lande, *Possibilities for Collaborative Law*, *supra* note 67.

²⁶⁹ Alexandria Zylstra, “A Call to Action: A Client-Centered Evaluation of Collaborative Law” (2011) 11 *Pepperdine Dispute Resolution Law Journal* 547.

Because of the call for research, the debate surrounding disqualification and the theoretical, ethical and practical intricacies related to this feature of CL, a section devoted to its discussion is warranted. This section will outline the nature of and rationale behind disqualification, will articulate the mechanics of how it is used and will conclude with a discussion of the debate surrounding disqualification. The purpose of this section is to prepare the reader for the subsequent Part in which hypotheses will be made as to whether disqualification helps or hinders innovation in CL.

Nature of and Rationale for Disqualification

At the start of a CL case, before any negotiation or disclosure takes place, the participation agreement is signed, which includes, *inter alia*, a stipulation regarding lawyer disqualification, the DA. The DA requires that the lawyers in a CL case not represent those clients in subsequent adversarial proceedings against each other. The DA also requires that lawyers and clients not threaten litigation during the CL process. Because of the nature of the agreement, if one party decides to withdraw from the CL process and litigate, the other party's lawyer must withdraw as well.

It is important to stress the fervor with which disqualification is required in CL. Many authors explain that disqualification is not simply *a* requirement, it is *the* essential requirement without which CL does not exist.²⁷⁰ What role, then, does the DA serve that makes it so integral? The DA supports many of the characteristics and benefits of CL explained in the preceding Chapter. Specifically, four rationales for disqualification have

²⁷⁰ See Voegelé, Wray & Ousky, *supra* note 97.

been enunciated in the literature: (a) removing disputes from the litigation realm; (b) aligning lawyers' financial interests with client's settlement; (c) supporting disclosure and an interest-based negotiation environment; and (d) enhancing cooperation by resolving the "prisoner's dilemma". While worded differently by different authors, these categories encapsulate the argument for the mandated use of disqualification in CL. Each of these rationales will be explored in order to understand what the DA seeks to accomplish. It is only in understanding these objectives that one can reflect on the utility and practicality of the DA.

(a) Removing disputes from the litigation realm

The first reason for the perceived necessity of lawyer disqualification is that it removes disputes from the litigation realm. While the parties still have the ability to litigate after an unsuccessful CL negotiation, the lawyers do not have this option. For the lawyers, the case is removed from the litigious sphere. The law, although still present, takes a back seat.

Even in conventional settlement, adjudication remains a compelling presence whether it occurs in the end or not. As discussed in Chapter II, Marc Galanter explains that legal negotiation has shifted to a mobilization of the court process, a phenomenon he terms "litigotiation".²⁷¹ This view of negotiation as particularly fueled by the litigation system impacts to a large extent the perceived need for disqualification in CL. When litigation is entirely removed from the picture, negotiations may be conducted differently.

²⁷¹ Marc Galanter, *Worlds of Deals*, *supra* note 47; see *supra* Chapter II, for further discussion.

Disqualification maintains the negotiation environment as one that does not involve courts. This keeps negotiation from the risk of turning into litigation. Other dispute resolution mechanisms, such as mediation, have suffered this fate, becoming increasingly evaluative and adversarial.²⁷² The DA seeks to address the need for this change not to occur for CL. Legal presence in the CL process need not and should not turn the process into an adversarial, litigation or arbitration-like process.

By remaining outside the litigation system, negotiations are transformed for both lawyers and clients. Cochran explains,

[CL] changes the focus of lawyers and clients during negotiation from preparing for trial to developing the best settlement terms for all concerned. It identifies a fair resolution of the dispute as the objective of both lawyers and both clients. This substantive aspiration, coupled with [CL]'s procedural change - requiring both lawyers to withdraw from representation if the case moves to litigation - harness the energies of both parties and both clients.²⁷³

As Cochran suggests, the CL process harnesses energy toward settlement rather than trial and creates incentive for parties to work together. Proponents of CL point to the DA as the impetus for this focus and incentive, which may be non-existent once claims are filed in court. Goodpaster explains that the filing of a claim changes a dispute into an “adversarial contest the judicial system can resolve. The litigation process formally ‘legalizes’ the dispute, framing it in terms of legal concepts, proofs, and argumentation

²⁷² Lande, *Lawyering and Mediation*, *supra* note 46.

²⁷³ Robert F. Cochran Jr. “Collaborative Practice’s Radical Possibilities for the Legal Profession: ‘[Two Lawyers and Two Clients] for the Situation’” (2011) 11 *Pepperdine Dispute Resolution Law Journal* 229 at 250-251.

the judicial system can process”.²⁷⁴ By abandoning the need to file claims, CL seeks to avoid legalizing the dispute in such a way. The DA is intended to create, in the CL process, a focus on settlement that is not seen in conventional cases.

(b) Aligning lawyer and client interests

In addition to removing disputes from the adversarial system, disqualification beneficially aligns lawyers’ financial interests with clients’ settlement interests thereby enhancing the commitment of all participants. The potential for lawyer disqualification encourages lawyers to negotiate with no ulterior motive inconsistent with settlement and encourages clients to pursue negotiation, even when such pursuit seems futile. Encouragement of this sort is required since, as Coyne explains, “...we live in a society in which both the lawyer’s real incentives and the client’s expectations frequently cut against settlement, particularly early settlement”.²⁷⁵ Without inducement, client and lawyer interests naturally diverge.

Lawyers, paid an hourly rate, benefit financially from protracted discoveries and litigation more than from early settlement.²⁷⁶ An elongated process ending in either trial or settlement on the courthouse steps provides lawyers with the greatest financial gain. This interest in prolonging the dispute resolution is generally not shared by clients. Although clients, in anger, sometimes look to adjudication to resolve their problems, it is most productive to settle as quickly as possible. Early settlement usually saves money

²⁷⁴ Goodpaster, *supra* note 13 at 225.

²⁷⁵ William F. Coyne Jr. “Using Settlement Counsel for Early Dispute Resolution” [1999] *Negotiation Journal* 11 at 11 [hereinafter *Using Settlement Counsel*].

²⁷⁶ *Ibid.*

and avoids the emotional toll of litigation and the discovery that accompanies it. The disparity between the lawyer's financial interest, which operates against early settlement, and the client's financial and emotional interest to settle promptly is resolved, in part, by the operation of the DA. The DA removes the incentive for lawyers to litigate or hold out for settlement on the courthouse steps as neither of these are possible alternatives. Settle or lose the client.

Aligning the interests of the parties and lawyers commits everyone at the table to settlement and disqualification allows everyone to assume that commitment is shared. CL is uniquely settlement focused because of the operation and saliency of the DA. James Lawrence describes the commitment available in CL in a memorable way: "Comparing the collaborative lawyer's commitment to the settlement process to that of the litigator is like comparing the pig's commitment to his farmer's breakfast to that of the chicken who survives to lay another egg".²⁷⁷ The CL client's commitment is similarly robust because of the cost associated with retaining new counsel. By increasing the costs of abandoning collaboration for both lawyer and client, the temptation to become adversarial or to otherwise take advantage of the other side is reduced.²⁷⁸ As stated by Peppet, "In order to signal credibly a commitment to collaboration, both lawyer and client must lose something if they fail to collaborate".²⁷⁹ The DA creates this mutual loss because, upon the breakdown of negotiations, the client loses as she must expend the cost to find, hire

²⁷⁷ James K.L. Lawrence, "Collaborative Lawyering: A New Development in Conflict Resolution", (2002) 17 *Ohio State Journal on Dispute Resolution* 431 at 433.

²⁷⁸ Wieggers & Keet, *supra* note 223 at 763.

²⁷⁹ Scott R. Peppet, "Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism" (2005) 90 *Iowa Law Review* 475 at 488.

and bring up to speed new counsel and lawyers lose the fees they could expect if negotiations continued. As explained by Wiegers and Keet, “The underlying behavioural assumption is that increasing the costs of defection will reduce the temptation to become adversarial or to otherwise take advantage of the other side”.²⁸⁰ The bilateral commitment, created by aligning lawyer and client interests are intended to allow the process and the lawyer client relationship to thrive.

(c) Supporting disclosure and an interest-based negotiating environment

In ensuring commitment to a negotiated settlement and providing safety in disclosure, the DA also aims to maintain an interest-based negotiation environment. As the previous Chapter explains, distributive bargaining is the predominant negotiation style that underlies the adversarial paradigm,²⁸¹ while interest-based negotiation dominates the collaborative framework.²⁸² Proponents of CL, articulate that disqualification encourages interest-based negotiation. For example, Cochran states,

[CL’s] withdrawal provision reinforces interest-based negotiation. The most effective advocates in any negotiation seek to develop settlement proposals that meet the needs of the opposing party. Successful negotiation requires a lawyer to step back from her client and consider the whole situation, envisioning all of the futures that could emerge from the conflict.²⁸³

Knowing that court is not a fathomable option hence allows parties and lawyers to envision possibilities in this way and create the best resolution for all involved.

²⁸⁰ Wiegers & Keet, *supra* note 223 at 763. Certainly, this assumption can be challenged and other malicious or strategic factors may be at play.

²⁸¹ Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 76.

²⁸² See, *supra* Chapter II for a fulsome discussion of the interest-based approach to negotiation.

²⁸³ Cochran, *supra* note 273 at 240-241.

Crafting resolution based on interests necessitates sharing information to ascertain the interests of all stakeholders. This approach is different from the adjudicative “winner takes all” method, in which information is tightly concealed and interests are not necessarily considered.²⁸⁴ Interests can only be gleaned by sharing relevant information but sharing information can risk exploitation by the other side. Mnookin explains,

How can you create value while minimizing the risks of exploitation in the distributive aspects of a negotiation?...The challenge of problem-solving negotiation is to acknowledge and manage this tension...The goal is to design processes for negotiation that allow value creation to occur, when possible, while minimizing the risks of exploitation.²⁸⁵

The CL process, through the DA, seeks to minimize exploitation in this way by creating a safe environment, where clients and lawyers can feel free to divulge information. Voegelé, Wray and Ousky suggest that the DA, in creating a safe feeling, prevents parties from withholding their best proposals and critical facts because it rewards candor, openness and cooperation.²⁸⁶ In CL, lawyers need not save information that may be used strategically at trial, were a trial needed. Once lawyers disqualify themselves from representing clients in litigation, they are free to reveal information that would otherwise be concealed. Deceptive tactics and withholding of information is often used in adversarial negotiations in order to protect clients but these tactics also hinder the creative interest-based negotiations integral in CL.²⁸⁷ Carrie Menkel-Meadow describes the “culture of adversarialism”, which has “an emphasis on argument, debate, threats,

²⁸⁴ Raiffa, *Art and Science of Negotiation*, *supra* note 90 at 33-35.

²⁸⁵ Robert H. Mnookin, Scott R. Peppet & Andrew S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge, Mass.: Harvard University Press, 2000) at 27.

²⁸⁶ Voegelé, Wray & Ousky, *supra* note 97 at 980.

²⁸⁷ Peppet, *supra* note 279.

hidden information, deception, lies, persuasion, declaration and toughness”²⁸⁸. The DA comes with the benefit of abandoning this culture, creating a safe information-sharing environment completely separate from litigation.

Interest-based negotiation requires some degree of perspective and the ability to walk proverbially in someone else’s shoes. Lawrence suggests that the DA

...forces the client to take a more positive approach to the possibility that the other side has a rational, legitimate interest in a mutual gains solution. As a result, both sides are able to see the process as a mutual gains experience, because they are working together, not independently, to find a solution.²⁸⁹

The safety and security offered by the DA allows for such introspection and perspective not often available in conventional legal negotiation. It is recognized, however, that parties may require a certain pre-existing ability to be introspective and empathetic. The DA is meant to support these propensities.

(d) Enhancing cooperation by resolving the “prisoner’s dilemma”

A commitment to negotiate with an open, interest-based strategy, is important in CL but incentive is often required to ensure cooperation. As stated by Gilson and Mnookin, “...if the payoff structure establishes cooperation as the most desirable strategy and supportive institutional structure exists, lawyers may be able to dampen conflict, reduce transaction costs, and facilitate dispute resolution”.²⁹⁰ The DA, as it is employed in CL, goes beyond making cooperation the most desirable strategy and indeed ensures that it is the only

²⁸⁸ Carrie Menkel-Meadow, “When Winning Isn’t Everything: The Lawyer as Problem Solver” (2000) 28 *Hofstra Law Review* 905 at 907.

²⁸⁹ Lawrence, *supra* note 277 at 434.

²⁹⁰ Gilson & Mnookin, *Disputing Through Agents*, *supra* note 99 at 564.

employable strategy. It locks negotiators into an interest-based approach and alerts the other side to the cooperative strategy. In so doing, the DA aims to resolve the “prisoner’s dilemma”.

The prisoner’s dilemma is a heuristic often used in negotiation literature.²⁹¹ It involves some variation of the following fictional scenario: two people are arrested for the same crime and since the police have insufficient evidence to charge them, they separate the prisoners for interrogation, hoping to get each one to turn in evidence against the other. The best scenario for the prisoners is for each to cooperate and refuse to talk, in which case they both get a short sentence of one month’s imprisonment. However, if one of the prisoners defects by talking to police, the defector will walk free and the other prisoner will receive a year-long sentence. If they both talk, they will be punished with three-month sentences each. The dilemma is in the decision to cooperate or defect without knowing what the other side will do.

Gilson and Mnookin describe this dilemma as the problem faced by negotiators who wish to cooperate.²⁹² As articulated by Peppet,

A negotiator must try to determine the ‘type’ of her counterpart – is the counterpart an honest, collaborative type or a more hard-bargaining, deceptive type? The counterpart, meanwhile, may be sending off misleading signals about his type. He may present himself as a collaborative, honest type in order to mask that he actually plans to deceive for personal gain.²⁹³

The pressure to defect from cooperation is simply too great in an environment where it is

²⁹¹ See, William Poundstone, *The Prisoner’s Dilemma* (New York: Doubleday, 1992).

²⁹² Gilson & Mnookin, *Disputing Through Agents*, *supra* note 99.

²⁹³ Peppet, *supra* note 279 at 482.

unclear what strategy the opponent will take. This rationale explains the frequency of a competitive approach and the corresponding infrequency of truly interest-based negotiation.

The push to negotiate competitively remains strong, despite an overwhelming acceptance that cooperative strategies result in better overall outcomes in situations of long term relationships. Lawyers engage in competitive tactics to protect their clients from the potential defection from the other side. One study, conducted by Heumann and Hyman found that although the majority of lawyers studied wanted to engage in collaborative, honest, open manner, they employed hard-bargaining tactics instead.²⁹⁴ Fear of being taken advantage of is too great when acting as a representative negotiator.

Lawyers have noted the difficulties they face in attempting to remain interest-based and cooperative as adversarial norms pervade the profession.²⁹⁵ Macfarlane explains that there is an intrinsic bias in litigation against cooperative problem-solving.²⁹⁶ Herein lies the critical purpose of the DA for lawyers: disqualification gives counsel on both sides sufficient incentive to remain in the cooperative framework and acts as a signal of cooperation. Disqualification serves as a reminder of the commitment to remain in an interest-based cooperative framework and in that way resolves the prisoner's dilemma.

²⁹⁴ Milton Heumann & Jonathan Hyman, "Negotiation Methods and Litigation Settlement Methods in New Jersey, 'You Can't Always Get What you Want'" (1997) 12 *Ohio State Journal on Dispute Resolution* 253.

²⁹⁵ Wiegers & Keet, *supra* note 223 at 767-768.

²⁹⁶ Macfarlane, *The New Lawyer*, *supra* note 124.

Negotiators can feel safe using a cooperative strategy in CL because they know that the other side will either match their approach or the process will end.

Mechanics of Disqualification

Now that the rationale behind disqualification has been outlined, it is useful to articulate just how the DA is invoked and what transpires after such an invocation.

(a) Form and substance of the disqualification provision

Lawyer withdrawal is authorized in two separate documents executed at the commencement of a CL file. The first, the participation agreement, is signed by both parties and their lawyers. Although the exact wording of such disqualification provisions varies, the IACP recommends the following wording:

The parties agree that a collaborative lawyer who represented a party under this collaborative process, or any lawyer in a law firm with which a collaborative lawyer is associated, shall be disqualified from representing a party in a court or other proceeding related to the collaborative matter(s) under this collaborative process. The parties agree that they will not engage for such purpose a collaborative lawyer under this collaborative process, or any lawyer in a law firm with which a collaborative lawyer is associated.²⁹⁷

Disqualification of counsel is generally mandated by the CL participation agreement in three circumstances: (1) either party wishes to withdraw from the CL process; (2) either party threatens litigation; or (3) a lawyer suspects that his or her client is negotiating in bad faith by failing to comply with interim agreements, withholding information, or

²⁹⁷ International Academy of Collaborative Practitioners, “Model Collaborative Participation Agreement”, online:
http://www.collaborativepractice.com/lib/PDFs/IACP_MPAsandGuides.pdf.

undertaking unilateral actions.²⁹⁸ As these circumstances indicate, withdrawal from CL by one party necessarily implies withdrawal for the other party. A sample participation agreement can be found in Appendix B.

In addition to the presence of the DA in the participation agreement, lawyer disqualification is accounted for in the retainer agreement between each lawyer and his or her client. This stipulation effectively creates a limited representation. Such provisions often resemble the following:

I am obliged to withdraw from the Collaborative Team Process if you have misrepresented or failed to disclose material facts to me and if you continue to withhold and misrepresent such information or to refuse to give me instructions to make full disclosure to the other participants. I will withdraw from your case if you have acted so as to undermine or take unfair advantage of the Collaborative Team Process.

Further, my representation is terminated by any party's decision to litigate, whether or not it was your decision. If your case cannot be settled on terms acceptable to you and your spouse, both lawyers will withdraw from the case. I will assist you to obtain another lawyer.²⁹⁹

The wording of either type of agreement and the behaviour of those adhering to it is critical as, in interpreting whether withdrawal provisions are to be upheld, Canadian courts look to whether withdrawal provisions are "fair and reasonable" by examining the circumstances during the performance of the contract. The issue of the manner of withdrawing is the subject of the next section.

²⁹⁸ Tesler, *Achieving Effective Resolution*, *supra* note 2 at 130.

²⁹⁹ The Divorce Team, "Retainer Agreement", online:
www.thedivorceteam.ca/Downloads.../RetainerAgreement_Lawyer.doc.

(b) Manner of withdrawing representation

The decision to withdraw under the DA most often rests with the client but in some circumstances, the lawyer may push for disqualification. If a client wishes to abandon CL and litigate, it is within their purview to do so. If either client makes such a choice, this decision terminates the CL process and each client must hire new counsel to proceed. Beyond these basics, there is no set protocol as to manner of withdrawing. Jurisdictional rules of professional conduct offer limited guidance on this matter.

For example, the Law Society of Upper Canada's *Rules of Professional Conduct*³⁰⁰ state, at Chapter 3, Section 3.7-1: "A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances".³⁰¹ Also relevant is the subsequent Section which states, "...where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw".³⁰² The *Rules of Professional Conduct* are of little help though, because they do not stipulate how lawyers are to use withdrawal provisions at the beginning of a lawyer-client relationship. The amendments to the *Rules of Professional Conduct*, adopted in 2011, and amended in 2014, clarify the ability for lawyers to accept cases on a limited retainer basis.

³⁰⁰ Law Society of Upper Canada, "Rules of Professional Conduct" (2014), online: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159>.

³⁰¹ *Ibid.* at Section 3.7-1.

³⁰² *Ibid.* at Section 3.7-2.

The *Rules of Professional Conduct* speak to manner of withdrawal in Section 3.7-8 explaining that lawyers shall, upon withdrawal, minimize expense and do what can be reasonably done to facilitate a transfer of the file to another lawyer.³⁰³

Other provinces have similar provision for limited retainers. British Columbia's Rule 10 in Chapter 10 (withdrawal) in its *Professional Conduct Handbook*, for example, states,

A lawyer who acts for a client only in a limited capacity must promptly disclose the limited retainer to the court and to any other interested person in the proceeding, if failure to disclose would mislead the court or that other person.³⁰⁴

Thus, in the CL context, lawyers should do everything practicable to facilitate the transition of a file upon process termination. This facilitation can include easing the transfer of the file to a new lawyer.

The Debate about Disqualification

Although the DA is the integral piece of the CL puzzle, it is the aspect most criticized and scrutinized. Lawyer disqualification is problematic. Lande notes the DA paradox: "...the feature that CL practitioners believe is to be indispensable may actually conflict with ethical norms and harm some clients".³⁰⁵ This section lays out the problems theorists have cited in relation to the DA. The ethical challenges of the DA and the strategic

³⁰³ *Ibid.* at Section 3.7-8.

³⁰⁴ Law Society of British Columbia, *British Columbia Professional Conduct Handbook* (1993), online: https://www.lawsociety.bc.ca/docs/publications/mm/ProfessionalConductHandbook_2012-09.pdf.

³⁰⁵ Lande, *Possibilities for Collaborative Law*, *supra* note 67 at 1329.

hampering of negotiations caused by the DA are of particular importance and will be outlined.

(a) Ethical opinions

The ethical debates surrounding the viability of CL and whether it can fit within the existent ethical regimes, while concerning, have somewhat been abandoned or at least have failed to materialize.³⁰⁶ Despite the validation of CL as an ethical practice by various ethics opinions and a formal opinion issued by the American Bar Association, there remain ethical issues with the DA in the public and professional consciousness that cannot be ignored.³⁰⁷ As Fairman states, “Collaborative law’s glass ceiling is legal ethics”³⁰⁸; in fact, the DA is the glass with which the ceiling is built. The predominant areas of concern are: issues of informed consent; the risk of coerced settlement; to whom duties are owed and the nature of those duties; and the problem with the ability to discharge your opponent’s counsel and your own client. This section will review these major ethical issues as they have been discussed in the academic literature.

The importance of informed consent and screening for appropriateness in CL was discussed in Chapter III. A particularly challenging aspect of such informed consent revolves around the DA.

³⁰⁶ Tesler, *Deep Resolution*, *supra* note 136. The ABA Ethics Commission, as well as all states that have considered the issue, namely Kentucky, Maryland, Minnesota, Missouri, New Jersey, North Carolina, Pennsylvania, Texas, and Washington (with the exception of Colorado) have validated CL as an ethical practice: Richard T. Cassidy, “ABA Delegate’s Report” (2010) 36 *Vermont Bar Journal* 6.

³⁰⁷ ABA Committee on Ethics and Professional Responsibility, “Formal Ethics Opinion #07-447: Ethical Considerations in Collaborative Law Practice” (2007), online: <http://cocollaborativelaw.com/Portals/0/EthicsOpinionABACL2007.pdf>.

³⁰⁸ See, for example, Fairman, *Proposed Model Rule*, *supra* note 122 at 74.

In utilizing a DA, counsel must be certain that they are clear about its ramifications. As articulated by Spain,

Limiting the scope of representation undertaken obligates a collaborative lawyer to take extra care and be very explicit, both in all discussions with the client prior to formally entering a lawyer-client relationship as well as in any written documents such as the retainer agreement and engagement letter, by noting the extent of the representation that will be undertaken on the client's behalf and any limitations on the scope, objectives, and means of their engagement.³⁰⁹

Critics of the DA state that clients may misunderstand the meaning and impact of disqualification and how it changes the obligation of the lawyer vis a vis her client. Ignorance and misunderstanding of the effect of the DA makes it very difficult to get sufficient informed consent for clients to sign the DA. Clients may not believe that the circumstances, which lead to disqualification, will happen to them or may not appreciate the financial and psychological ramifications of lawyer withdrawal. Additionally, lawyers may not be capable of meaningfully or effectively communicating the risks of limited representation. Part of the reason for this possible inability lies in the different estimates of riskiness exhibited by experts (here the lawyers) and laypeople (the clients). Empirical studies have noted that experts tend to view the world as less risky than laypeople.³¹⁰ Moreover, experts tend to base a risk assessment on quantitative measures such as probability estimates while laypeople tend to base risk assessment on qualitative variables such as the nature of the harm.³¹¹ Indeed, as will be reported in Chapter X,

³⁰⁹ Spain, *Critical Reflection*, *supra* note 45 at 159.

³¹⁰ Eric W. Macaux, "Limiting Representation in the Age of Private Law: Exploring the Ethics of Limited-Forum Retainer Agreements" (2006) 19 *Georgetown Journal of Legal Ethics* 795.

³¹¹ *Ibid.*, citing various studies of risk analysis.

lawyer participants in this research did not view the DA to be of much significance, particularly because withdrawal happens so rarely. This seems to be a typical quantitative expert analysis. Would clients feel the same through a qualitative lens? Although this study does not examine this issue further, it is certainly one that remains open to scrutiny and future research.

Although these are surely issues faced by CL because of the operation of the DA, Abney notes that it cannot be said that clients in a litigation file always fully comprehend the circumstances surrounding the litigation process and all that it entails.³¹² She states, “Considering the amount of information given to clients by litigation lawyers, collaborative lawyers are more than meeting the requirements of obtaining informed consent”.³¹³ Perhaps the threshold is or should be higher when embarking on a process outside the confines and controls of the litigation system.

The LSUC’s *Rules of Professional Conduct* are helpful in explaining the nature of informed consent when providing legal services under a limited scope retainer, such as CL. Therein is stated,

3.2-1A Before providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and , where appropriate, whether the services can be provided within the financial means of the client.

³¹² Abney, *Evolution of Civil Collaborative Law*, *supra* note 51.

³¹³ *Ibid.* at 509.

3.2-1A.1 When providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.³¹⁴

Nova Scotia's Barristers' Society Code of Professional Conduct also provides helpful commentary in Application 3.12, stating,

A lawyer may accept a limited retainer, but in doing so, the lawyer must be honest and candid with the client about the nature, extent, and scope of the work which the lawyer can provide within the means provided by the client. In such circumstances where a lawyer can only provide limited service, the lawyer should ensure that the client fully understands the limitations of the service to be provided and the risks of the retainer. Discussions with the client concerning limited service should be confirmed in writing. Where a lawyer is providing limited service, the lawyer should be careful to avoid placing him or herself in a position where it appears that the lawyer is providing full service to the client.³¹⁵

CL lawyers, if they are to abide by their duties of informed consent, must be cognizant of the increased standard applied to limited retainers.

Supposing lawyers sufficiently explain the effects of the DA and that clients appreciate the risks to be undertaken, a second potential ethical danger arises. Once a realization of the implications of disqualification is achieved, there is a heightened risk of coerced settlement from the temporal and financial consequences of the DA. Such consequences apply both to lawyers and clients. Hence, coercion can manifest as both external pressure to settle by lawyers and internal pressure on clients to settle to avoid additional burden. Because CL lawyers may not represent their clients in trial, their sole interest is in seeing

³¹⁴ Law Society of Upper Canada, *supra* note 300 at Section 3.2-1A and 3.2-1A.1.

³¹⁵ Nova Scotia Barristers' Society, *Code of Professional Conduct* online: http://nsbs.org/sites/default/files/cms/menu-pdf/2013-04-22_codeofconduct.pdf at Rule 3, Application 3.12.

that their clients settle. Coercion to force settlement is thus a potential risk to be considered.

Coerced settlement is certainly not exclusive to CL and remains an issue in traditional settlement. For this reason, the American Bar Association created a document entitled “Ethical Guidelines in Settlement Negotiations” which is helpful in understanding the lawyer’s role in encouraging settlement. Therein, the following is provided:

The lawyer's role in connection with settlement negotiations is one of advisor to and agent of the client. The lawyer should adhere to that relationship even when the lawyer's judgment or experience leads the lawyer to believe that the lawyer more fully appreciates the wisdom of a proposed course of action than the client does. While a lawyer can and often should vigorously advise the client of the lawyer's views respecting proposed settlement strategies and terms, that advice should not override or intrude into the client's ultimate decision making authority.

Lawyers should be particularly sensitive to the risk that the client's practical dependency on the lawyer may give the lawyer immense power to influence or overcome the client's will respecting a proposed settlement. A lawyer also should not threaten to take actions that may harm the client's interests to induce the client's assent to the lawyer's position respecting a proposed settlement. Efforts to persuade should be pursued with attention to ensuring that ultimate decision-making power remains with the client.³¹⁶

Merely reminding clients of the DA treads dangerously into the territory of “threatening to take actions that may harm the client’s interests”. All litigation has a corresponding pressure to settle but the coercive impact of the DA creates an unbridled risk. Lande states that the DA has the potential to invite abuse, creating “incentives for lawyers to

³¹⁶ American Bar Association Litigation Section, “Ethical Guidelines for Settlement Negotiations” (2002), online: <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf> at § 3.2.4; these guidelines were recommended by the American Bar Association as a resource to facilitate and promote ethical conduct in settlement negotiations.

pressure their clients to settle inappropriately and leave clients without an effective advocate to promote their interests and protect them from settlement pressure”.³¹⁷ The notion of lawyers pushing their clients to settle when litigation may, in fact, be in their best interest is concerning.

Even if not pressed by counsel, the coercion is ever-present as clients place on themselves significant pressure to settle. Because of the significant financial burden and added time required to hire new counsel if the CL process fails, parties may agree to settlement terms that would otherwise be considered unacceptable. Should disqualification be necessary, significant barriers are created. Clients must forfeit the money paid to the CL lawyers, expend significant costs in retaining new counsel and incur the added time and corresponding expense of acquainting the new lawyer with the case. Such expenditure creates coercion that can result in two problematic circumstances: clients may be led to continue to negotiate even when it is no longer in their best interest or settlement may be forced when it would be in the client’s best interest to litigate. Neither of these options is within the purview of what CL seeks to offer. Lawyers must remain aware of this risk and converse with their clients regularly to avoid coerced settlement. Discussions around settlement options and the reasons why the client may want to accept an offer should be held to ensure the client is sure about the ramifications of entering into a particular settlement. In addition, settlement terms should be explicitly spelled out in the agreement, to prove, if necessary, that settlement is voluntary.

³¹⁷ Lande, *Possibilities for CL*, *supra* note 67 at 1329.

A third concern with the DA is that the agreement effectively permits an opposing party to force the discharge of another party's counsel. CL clients are in a unique position of power, since withdrawing from the CL process means that *both* parties must retain new counsel. This reciprocation effectively allows one party to fire the other party's lawyer. Manipulative clients can use this ability to remove an opponent's counsel strategically, at a critical time of negotiation. One party's ability to fire another's lawyer can mean that party's financial ruin. "Where an abusive party bargains in bad faith, or does not fully disclose, the [DA] will operate to penalize the innocent spouse through the loss of his or her counsel".³¹⁸ This potential can unfairly prejudice a client who is in an inferior bargaining or financial position.

Smith and Nelson, both CL practitioners, note that this potential has not yet come to fruition, having never heard of such a situation occurring.³¹⁹ Bad faith, however, is a possibility. Tesler notes, "If a party is misusing the collaborative process by not participating in good faith...the bad faith will become apparent to that party's lawyer fairly soon as well as to all other participants, because there is nowhere to hide in collaborative negotiations".³²⁰ It is certainly the case that manipulative clients, no matter the process or protocol, could find ways in which to exert their power in a calculating

³¹⁸ Wieggers & Keet, *supra* note 223 at 763.

³¹⁹ Victoria L. Smith & C. Ann Nelson, "Collaborative Practice: Why Court is Not an Option" in *Family: the changing world of family law: substantive law and practice tips: [papers presented at] the 33rd annual Institute on Continuing Legal Education, February 4-5, 2008, Metro Toronto Convention Centre-Toronto* (Toronto: Ontario Bar Association, 2008) at 16.

³²⁰ Tesler, *Deep Resolution*, *supra* note 136 at 209.

way. The DA, however, may make such manipulation simpler and thus more likely to occur.

(b) Impact on negotiation strategy

The potential ethical problems with the DA are not the only issues to be considered. There are practical problems with the application of the DA that create potential inhibitions in negotiation strategy. Litigation, or the possibility of litigation, plays an integral role in traditional lawyer-to-lawyer negotiations. Access to litigation allows lawyers to measure the progress of their negotiations and determine the best steps in either going forward with negotiations or terminating them in favour of adjudication. Litigation is a tool. The negotiation process is also a tool. As stated by Mnookin and Kornhauser, “The actual bargain that is struck through negotiation – indeed whether a bargain is struck at all, depends on the negotiation process”.³²¹ The DA unavoidably changes the negotiation process. The debate surrounds whether the process is changed for the better or worse. Although proponents of CL articulate that disqualification aids interest-based negotiation³²², the opposite has also been claimed. Negotiation literature outlines three potential ways that the DA inhibits negotiations: (i) it removes the only alternative available to parties; (ii) it alters the power dynamic at play in the negotiation; (iii) it removes the deadline that the adversarial system imposes which can help parties achieve settlement. Each of these will now be discussed.

³²¹ Robert H. Mnookin & Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 *Yale Law Journal* 950.

³²² See *supra* section (2)(c) of this Chapter for a detailed account of the way in which the DA may encourage interest-based negotiation.

As has already been explained, interest-based negotiation is central in CL. Interest-based negotiation relies on a negotiator's BATNA in creating and accepting resolutions.³²³ As stated by Fisher and Ury, "Whether you should or should not agree on something in a negotiation depends upon the attractiveness to you of the best available alternative".³²⁴ The goal of negotiating is to attempt to reach a resolution that is at least as good as an alternative outcome, but hopefully better. However, in choosing to use CL, parties elect to use an interest-based strategy and simultaneously sign away their BATNA, litigation. Litigation is a family law client's *only* alternative to a negotiated agreement; thus, signing a DA is a significant encumbrance to resolution if CL fails.³²⁵

While litigation can loom in the far off distance, it is often not a practicable alternative due to the cost associated with retaining new counsel and embarking upon a litigation process. Mnookin and Kornhauser assert, "To divorcing spouses and their children, family law is inescapably relevant. The legal system affects when a divorce may occur, how a divorce must be procured, and what the consequences of divorce will be".³²⁶ Because of the significant involvement of the legal system in divorce, removing access to the courts can be impracticable. The assessment of whether to continue negotiating or to settle on particular terms becomes skewed by the absence of the litigation alternative. What exactly is the alternative to coming to a negotiated agreement? There is no longer an alternative if the parties cannot afford to hire new counsel to proceed.

³²³ Fisher, Ury, & Patton, *Getting to Yes*, *supra* note 77.

³²⁴ *Ibid.* at 101.

³²⁵ Zylstra, *supra* note 269.

³²⁶ Mnookin & Kornhauser, *supra* note 321 at 951.

Additionally, Susan Apel argues that, “Even if [litigation] has marginal value in some cases, the good problem-solver should not reject any rational means of achieving an end, particularly at the very beginning of representation”.³²⁷ It is certainly difficult, if not impossible, to make process decisions before the first stages of information exchange have occurred. How can a BATNA be determined and evaluated before any information is exchanged? Litigation is sometimes the best alternative and this may only become apparent long into the negotiation process. CL lawyers may become settlement specialists but they need not be settlement exclusivists. The ability to maintain litigation as an alternative, even an unattractive alternative, can be useful.

Beyond the BATNA of litigation itself, the threat of litigation can be a powerful tool. Hilary Linton queries whether and to what extent CL eliminates the power that can be yielded by the litigation threat.³²⁸ Utilizing one’s BATNA to generate power in a negotiation is integral even if such power is derived from a threat to litigate. This theory is also advanced by Russell Korobkin who states,

Relative bargaining power stems entirely from the negotiator’s ability to explicitly or implicitly, make a single threat credibly: I will walk away from the negotiating table without agreeing to a deal if you do not give me what I demand. The source of the ability to make such a threat, and therefore the source of bargaining power, is the ability to project that he has a desirable alternative to reaching an agreement.³²⁹

³²⁷ Susan B. Apel, “Collaborative Law: A Skeptic’s View” (2004) 30 *Vermont Bar Journal* 41 at 41.

³²⁸ Hilary Linton, “Collaborative Law: Thinking About the Alternatives” (2008) 311 *Canadian Family Law Matters* 1.

³²⁹ Russell Korobkin, “On Bargaining Power”, in *The Negotiator’s Fieldbook: The Desk Reference for the Experienced Negotiator* (Washington: American Bar Association, 2006) at 251.

While, in many ways, the type of power Korobkin is discussing is exactly the type of coercive power CL is trying to avoid, the idea of being able to threaten to walk away from a negotiation that is not proceeding in a beneficial way is critical. Otherwise, it is a slippery slope to accepting a resolution that is simply not in one's best interest. CL lawyers and their clients are contractually prevented from threatening to litigate by virtue of the DA.

The threat and subsequent follow-through with litigation is of further importance in maintaining the pace of negotiation. In this way, although counter-intuitive, litigation can have a positive influence on settlement by creating deadlines by which settlement must be reached. Such deadlines help parties to overcome psychological barriers to settlement.³³⁰ Ross and Stillinger discuss the problem of attribution in settlement: When one side makes a concession, the other side is apt to ask why such a concession was made and why it was made at a particular time.³³¹ The existence of a deadline provides an explanation for a new concession that “precludes the need for reassessing or reconstructing the significance of the various concessions offered and sought”.³³² In addition, the deadline of looming litigation prompts settlement as it forces both parties to examine the terms proposed and compare them to other alternatives. Deadline of trial or settlement conference can act as an impetus to arrive at settlement that would otherwise not be achieved. Sometimes such motivation is required. However, the operation of the DA prevents such motivation from being threatened or acted upon.

³³⁰ Lee Ross & Constance Stillinger, “Barriers to Conflict Resolution” (1991) 7(4) *Negotiation Journal* 389.

³³¹ *Ibid.* at 398.

³³² *Ibid.* at 399.

The potential inhibitions to the negotiation process shaped by the DA are juxtaposed to the negotiation benefits that CL offers. As with the ethical issues posed by the DA, lawyers must remain on guard for the impacts of the process they are managing.

PART B – INNOVATION AND COLLABORATIVE LAW - THEORY

“A profession, like an individual, has come of age when it has developed capacity for interdependent relationships, notable qualities of which are readiness to give and take without anxiety and without need to dominate or to suffer loss of identity.”

- Charlotte Towle, *The Learner in Education for the Professions* (Chicago: University of Chicago Press, 1954) at 19.

Chapter V – Innovation: A Definition and History

Part A of this dissertation has intended to introduce the reader to Collaborative Law (CL) and all that the practice entails. It outlined the dispute resolution process and explained its particular characteristics, benefits, and challenges. These are all relevant and useful to the subsequent discussion and research. Part B will now turn to innovation, the second vital component of this study. Before any discussion of CL and innovation can take place, though, a common understanding of the concepts surrounding innovation must be shared. This Chapter will thus introduce innovation as it is used in the present study and will relate this concept to the legal world. Such discussion is intended to situate the reader to move on to the following Chapter, which considers CL as an example of innovation at work.

Defining Innovation

Definitions of innovation abound. Some definitions focus on innovation as an outcome or product and others define innovation in terms of a process. It is the latter type of innovation that is pertinent here and that will be discussed in this research. It is through the innovative process that innovative outcomes result. Just as it is the process of CL that allows for resolution, it is the process of innovation that allows for innovation.

Theodore Levitt classically defined innovation simply as “putting ideas to work”.³³³ Weiss and Legrand refine this definition, describing innovation as “applied creativity that

³³³ Theodore Levitt, “Creativity is not Enough” (1963) 41(3) *Harvard Business Review* 72.

achieves business value”.³³⁴ Both these definitions have dual components: the ideas and the execution. Together, these elements have the potential to achieve innovation. Alone, they do not. The dual aspect of innovation is also stressed by Steven Hobbs who notes, “Innovation is fueled by imagination, but is often considered, in part, the applied process of the creative impulse...the innovative process must move toward bringing into reality an idea that will [lead to value]”.³³⁵ Various types of innovation exist. This research does not look at innovation as technological advance or business value. Instead, the innovation available through CL, both on a macro and micro level, are social innovations. Social innovation, much like other forms of innovation, deals with new ideas that work. Instead of working toward business value, however, social innovations work to meet social goals. The social goal to be reached by the kind of innovation in this research is optimal client outcomes.

It must be recognized that, as Mulgan explains, “New social ideas are also rarely inherently new in themselves. More often they combine ideas that had previously been separate”.³³⁶ Indeed, CL is a product of social innovation in and of itself but also has the potential to create small innovations for each family who uses the process. Hence, on both a macro and micro level, social innovation is integral to CL.

³³⁴ David S. Weiss & Claude P. Legrand, *Innovative Intelligence: The Art and Practice of Leading Sustainable Innovation in Your Organization* (John Wiley & Sons: Mississauga, Ontario, 2011) at 6.

³³⁵ Steven H. Hobbs, “Entrepreneurship and Law: Accessing the Power of the Creative Impulse” (2009) 4(1) *Entrepreneurial Business Law Journal* 1 at 10-11.

³³⁶ Geoff Mulgan, *Social Innovation: What it is, why it matters and how it can be accelerated* (Oxford: SAID Business School, 2007) [hereinafter, *Social Innovation*] at 22.

Locating Innovation in Relation to Creativity

As the various definitions offered above suggest, the bifurcated elements of innovation display that both creativity and application are required. Many people wrongly equate innovation and creativity. Creativity is indeed one part of innovation but it is not enough. As Levitt expounds, “Ideation and innovation are not synonyms. The former deals with the generation of ideas, the latter with their implementation...creativity without action-oriented follow-through is a uniquely barren form of individual behavior”.³³⁷ Innovation and creativity are related but different concepts. Much like mediation and CL, discussed in Chapter II, innovation and creativity have similar components but innovation adopts these characteristics in a more uniform fashion. Let us examine the distinct and overlapping characteristics of innovation and creativity.

Creativity has the potential but does not inevitably lead to innovation: The latter is not the automatic consequence of the former. As stated by Evans and Saxton, “A creative person will make new connections; an innovative person will find a way to apply these connections”.³³⁸ Broad creativity is the first step to achieving innovation, but it is not sufficient. Indeed, an examination of psychological theory of the creative process, led by Maslow, describes a two-pronged approach to creativity.³³⁹ This examination can be considered the starting point for the growing discussion of innovative process. The first stage that Maslow described, termed “primary creativity” refers to the inspirational free-

³³⁷ Levitt, *supra* note 333 at 78.

³³⁸ Elisha Evans & Joe Saxton, *Innovation Rules! A roadmap to creativity and innovation for not-for-profit organizations* (London, UK: NFP Synergy, 2004).

³³⁹ Abraham H. Maslow, *The Farther Reaches of Human Nature* (New York: Viking Press, 1971).

association phase, where fantasy and wild thoughts rein. It is this stage that most people colloquially refer to as creativity. The second stage, secondary creativity, relies heavily on stubbornness and patience in placing new insights within the confines of practicality.³⁴⁰ Although Maslow did not use the term, the combination of primary and secondary creativity indeed describes the innovation process.

Why stress the distinction and relation between the concepts of creativity and innovation? Is it not merely a semantic difference? Within the context of law, the distinction is surprisingly important, as lawyers often fear or dismiss the concept of creativity.³⁴¹ This fear may be rooted in the lack of parameters generally associated with creativity. Creativity definitionally requires a lack of boundaries. However, innovation requires the implementation of solutions within the confines of relevance and utility.³⁴² Creativity has no boundaries whereas innovation must be conducted within parameters. Moreover, such parameters are sometimes very strict. Fear of boundless creativity and the corresponding risk associated with a lack of parameters are enough to return to tried and true ways of solving problems and implementing solutions. If creativity and innovation are equated, innovation can be dismissed in the same way creativity has been dismissed in legal practice and scholarship. Weiss and Legrand explain that executives are anxious about the risks of unbridled creativity, an anxiety undoubtedly matched by lawyers who are

³⁴⁰ *Ibid.*

³⁴¹ Carrie Menkel-Meadow, “Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?” (2001) *Harvard Negotiation Law Review* 97 [hereinafter *Is Creativity Possible*].

³⁴² see Weiss & Legrand, *supra* note 334 at 6.

similarly adverse to creativity without boundaries.³⁴³ This fear of creativity and the corresponding impact on CL will be discussed in the results of this research. For now, it is merely important to appreciate the distinction between the concepts of creativity and innovation.

History of Innovation

Innovation as a term has been utilized to the point of becoming ubiquitous. The preceding section described the way in which this research defines and conceptualizes innovation. At this juncture, it is useful to examine the history of the study of innovation to provide context for this research. There are two ways of looking at the history of innovation, the history of the study of innovation and the history of the ways innovations take shape. This section will attempt to outline each in succession. Each is important in this context because of its relation to the history of CL. Once again, on both a macro and micro level, CL and innovation are linked.

First, the history of the study of innovation should be considered. Unlike CL, which is a relatively recent phenomenon, innovation has been studied for centuries, although it has garnered significant importance in the 20th century. Pointedly, Nowotny defines our epoch as a fascination and quest for innovation.³⁴⁴ Over the history of innovation, its definition has changed. In that way, the conception of innovation has undergone the same progression as do innovations themselves.

³⁴³ *Ibid.*

³⁴⁴ Helga Nowotny, *Insatiable Curiosity: Innovation in a Fragile Future* (Cambridge, MA: MIT Press, 2008).

At the very beginning of its conception, innovation had nothing to do with creativity and instead was concerned with change, broadly understood.³⁴⁵ The French sociologist Gabriel Tarde offered the first theory of innovation in 1890. Tarde made frequent use of the term innovation as novelty but did not offer an explicit definition.³⁴⁶ Tarde explained that invention is the driving force of society but that society is imitative by nature.³⁴⁷ So, invention gives rise to opposition and then imitation of inventions that survive opposition become innovation. Indeed, this progression may apply to the history of CL and its current state. Fierce opposition to CL at first, has given rise to a broader adoption of the process.

The idea of innovation as a combination of prior ideas and other diverse elements spread in the 1930s when Gilfillan noted, “without the inventor there can be no invention [but] the inventors are not the only individuals responsible for invention”.³⁴⁸ The next major theorist in the area of innovation was E.M. Rogers.³⁴⁹ Rogers offered a broad theory of innovation, which began to link imitation and invention. Previously thought of as contrasting concepts, the study of innovation from this point onward recognizes invention and imitation as a linear sequence.

³⁴⁵ Benoit Godin, *Innovation: The History of a Category, Project on the Intellectual History of Innovation*, (Montreal: NIRS, 2008), online: <http://www.csiic.ca/PDF/IntellectualNo1.pdf>.

³⁴⁶ Gabriel Tarde, *Les Lois de L'Imitation* (1890) (Paris: Edition Kime, 1993).

³⁴⁷ *Ibid.*

³⁴⁸ S. Colum Gilfillan, *The Sociology of Invention* (Cambridge, Mass: MIT Press, 1935) at 81.

³⁴⁹ Everett M. Rogers, *Diffusion of Innovations* (New York: The Free Press, 1962).

Tarde's definition of innovation and the subsequent theories of Gilfillen and Rogers are also congruent with Kuhn's description of paradigmatic change. The shift to CL is frequently described in the literature as being a paradigm shift for lawyers.³⁵⁰ Long before CL, Kuhn explained that a dominant paradigm is replaced when irregularities are described within the dominant paradigm.³⁵¹ The application of Kuhn's theory has been made, in CL on both a macro and micro level. On a macro level, authors such as Cameron, Rose and Tesler explain the paradigm shift from an adversarial to a collaborative paradigm.³⁵² On a micro level, Tesler, Shields and Simmons each describe the paradigm shift required of lawyers to adopt CL.³⁵³ The paradigm shift in either case requires innovation. In the same way that Kuhn's scientific theory spread to non-scientific realms, the theory of innovation spread into technological, business and social spheres.

In addition to understanding the history of innovation as a topic of study, it bears considering the way in which innovations spread, the history of individual innovations. This is particularly the case, since the way in which innovations spread mirrors the history of CL, as outlined in Chapter II. It also has a strong resemblance to the way in which the process of CL transpires on a micro scale.

³⁵⁰ See, for example, Tesler, *Achieving Effective Resolution*, *supra* note 2; Shields, *supra* note 101.

³⁵¹ Thomas S. Kuhn, *The Structure of Scientific Revolutions* (3rd ed.) (Chicago, IL: University of Chicago Press, 1996).

³⁵² Cameron, *Deepening the Dialogue*, *supra* note 231; Tesler, *A New Paradigm*, *supra* note 39 at 991.

³⁵³ Tesler, *Achieving Effective Resolution*, *supra* note 2; Shields, *On becoming a Collaborative Professional*, *supra* note 100; Simmons, *Paradigmatic Conversion*, *supra* note 246.

Tracking innovation can be difficult because of the reality that much of what we take for granted began as radical innovation. It is difficult to anticipate such innovations as they develop. CL may just be one such innovation that is in the process of developing. Return for a moment to Schopenhauer's famous observation, "every truth passes through three stages. First, it is ridiculed. Second, it is violently opposed. Third, it is accepted as self-evident".³⁵⁴ Indeed CL has passed through the first two stages. It was ridiculed at the very start, followed by the vehement opposition, often citing ethical grounds.³⁵⁵ Its current state is not quite self-evident but if its trajectory continues, one may look back 20 years from now and ponder about that initial ridicule and opposition.

Social innovations tend to spread in an "S curve".³⁵⁶ Such a curve begins with an early period of slow growth among committed supporters. In the history of CL, this period is akin to the early days of Stuart Webb, Pauline Tesler and their colleagues. This period of innovation is followed by a phase of rapid growth, and a corresponding slowing down as saturation occurs. These phases, once again, follow the trajectory of the CL movement. At this point in time, CL, as a movement, seems to be in the slowing down phase.

CL's trajectory from a pure two lawyer process to its current conception as a multi-disciplinary, or inter-disciplinary process also follows the process of innovation

³⁵⁴ Arthur Schopenhauer (1818).

³⁵⁵ See *supra* Chapter II for a complete history of CL and Chapter III and IV for a description of the ethical debates.

³⁵⁶ Geoff Mulgan, "The Process of Social Innovation" [2006] *Innovations* 145 [hereinafter *Process of Social Innovation*].

formation. As explained by Mulgan, “Few ideas emerge fully formed. Instead, innovators often try things out, and then quickly adjust them in the light of experience. Tinkering seems to play a vital role in all kinds of innovation, involving trial and error, hunches and experiments that only in retrospect look rational and planned”.³⁵⁷ So is the case with CL.

As will be detailed in the Results section of this study, in Chapter XIII, changes are continuing to take place, which will allow CL to broaden its scope. For instance, the potential to include arbitration and mediation in the CL process are new adaptations on the horizon, a topic which arose in the interviews for this research. The amending of original innovations is not beyond the scope of innovation theory. As explained by Mulgan, “...learning and adaptation turns the ideas into forms that may be very different from the expectations of pioneers. Experience may show unintended consequences, or unexpected applications”.³⁵⁸

Both on a macro and micro scale, the history of innovation as a field of study and the history of individual innovations can be linked to the history of CL. The shared history of both is but one factor, which joins the concepts of CL and innovation. The following Chapter will outline in more detail how these processes overlap.

³⁵⁷ Mulgan, *Social Innovation*, *supra* note 336 at 22.

³⁵⁸ *Ibid.*

Chapter VI – The Innovation and Collaborative Law Processes

In order to explore how the innovation process overlaps with the Collaborative Law (CL) process and to ponder the factors that support and impede innovation in CL, it bears considering what the innovation process entails. This Chapter 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 Chapter will explain that CL is capable of producing innovative outcomes because it addresses complex problems, uses a team approach and progresses through the four-step innovative thinking process.

When is Innovation Required?

Innovation is not always required. Innovation should not be employed loosely as it can be both time consuming and difficult. This section will explain how a determination about when innovation is required should be made. It is suggested that the vast majority of CL cases indeed merit innovation. Just as a decision to innovate must undergo significant analysis of the problem, the decision to utilize CL should likewise entail a detailed analysis of the problem. Over-application of the innovative process is neither practical nor necessary.

Distinguishing between simple, complicated and complex problems

We begin with a premise: Not all problems require innovation. How, then, is one to determine when innovation is to be used? The key to this determination is in

distinguishing between different types of problems, three types of which are offered for consideration: those that are simple and need to be solved quickly; those that are complicated and need to be simplified; and those that are complex and need innovation.³⁵⁹ Distinguishing each of these types of issues illuminates when innovative thinking is required and when traditional analytical thinking is sufficient. What constitutes each type of problem?

Simple issues have direct answers. They need simply to be resolved. A relevant analogy of a simple problem is that of following a recipe. Once the basic skills and terminology are learned, little thought must be employed. Moreover, the chance of success is practically guaranteed if the recipe is followed. This type of problem is not one that can be readily found in the legal realm. Rarely, if ever, is there an effortlessly available certain answer to a legal problem. Human nature and interpretation allow for a variety of solutions in any given legal conflict, particularly those involving family breakdown.

For this reason, family law issues can either be categorized as complicated or complex. Each of these categories should be considered in greater depth. In short, the distinction can be asserted as follows: circumstances in which the same logic that has been used in the past can be applied successfully are complicated, while those in which analytical application is insufficient are complex.³⁶⁰ Many legal problems indeed fit each mold. It is sometimes a challenge to place particular issues into one category or the other but the

³⁵⁹ Weiss & Legrand, *supra* note 334 at 20.

³⁶⁰ *Ibid.*

distinction is critical. 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.³⁶¹

Indeed, one can think of many family law issues that are not adequately resolved and are only treated symptomatically. They were likely complex problems that were miscategorized as complicated and treated as such. Noting their importance, let us examine each type of problem in greater depth to understand the conundrum that indeed occurs when complex legal problems are solved without the use of innovation.

Some legal issues can be categorized as complicated. It is these cases that lawyers are taught to resolve adeptly. Weiss and Legrand describe complicated issues as “multi-faceted repeatable problems that need to be simplified and organized”.³⁶² Ronald Heifetz has also defined such problems as “technical”, where the problem and the solution can be clearly defined.³⁶³ Complicated problems are in and of themselves more difficult to resolve than simple problems and often require specialized expertise. Although the same approach can be used to resolve these problems, specific analytical skills and expertise are required to do so. Hassan explains,

An example of a technical challenge is sending a man to the moon. The problem is clearly defined and the solution is unequivocal. Implementation

³⁶¹ *Ibid.* at 26.

³⁶² *Ibid.* at 21.

³⁶³ Ronald A. Heifetz et al., *The Practice of Adaptive Leadership: Tools and Tactics for Changing your Organization and the World* (Boston: Harvard Business Press, 2009).

may require solving many difficult problems, but the desired outcome is plainly understood and agreed upon. In contrast, multiple perceptions of both the problem and solution are characteristic of complex systems.³⁶⁴

Taking the concept of complicated problems to the legal realm, consider, for example, a simple divorce of two employed individuals with no children. Such cases are often similar to one another and do not generally require innovation. Traditional legal skills and methods, which streamline the issues to those that are legally relevant and resolve the matter by analyzing these issues are an efficient and effective way of resolving such complicated problems. Weiss and Legrand suggest that using knowledge and logic to discover repeatable solutions, combining knowledge to resolve the issues and utilizing best practices and benchmarks are all very useful.³⁶⁵ Traditional processes and settlement mechanisms, including negotiation and mediation, provide the necessary knowledge and benchmarks to resolve complicated problems. Lawyers are trained to examine what parties have done and review legal doctrine and precedent to determine the course of action as well as the client's chances of success. These are the best practices and benchmarks of the legal system and are skills that successful lawyers apply very well. Thus, complicated issues are capably and frequently resolved within the traditional legal paradigm. A process such as CL may not be required in such cases. Certainly, individual clients may opt to embark on a collaborative process to resolve complicated problems, but cost and timing considerations may weigh in the favour of an altered process. More on this topic will be discussed in the Results section of this research.

³⁶⁴ Zaid Hassan, *The Social Labs Revolution: A New Approach to Solving Our Most Complex Challenges* (San Francisco: Berrett-Koehler Publishers Inc., 2014) at 20.

³⁶⁵ *Ibid.* at 22.

The same logic cannot be applied, however, for complex issues. Part of the problem is that most legal practitioners and scholars are not exposed to the distinction between complicated and complex problems. Thus, they likely assume that all legal problems are complicated and employ solutions that are derived from the traditional analytical approach. The methods used to resolve complicated problems are probably the only ones of which they have knowledge and experience. The assumption that all problems are complicated must change in order to resolve the complex problems arising in today's legal world, particularly those challenges that are faced in the family law system. Consider the following description of complex problems: Complex problems are not as predictable as complicated problems; they are unique problems that have many uncertain and ambiguous components that must be understood and not simplified; they may involve aligning multiple stakeholders; and it is imperative to first gain insight into the uniqueness of the issue before discovering the most effective solution.³⁶⁶ Another phrase, coined in the 1970s and used to describe complex problems, is "wicked problems".³⁶⁷ Further, Kahane, labeling complex problems "tough" explains,

Problems are tough because they are complex in three ways. They are dynamically complex, which means that cause and effect are far apart in space and time, and so are hard to grasp from firsthand experience. They are generatively complex, which means they are unfolding in unfamiliar and unpredictable ways. And they are socially complex, which means the people involved see things very differently, and so the problems become polarized and stuck.³⁶⁸

These characterizations epitomize the most difficult issues that family lawyers face.

³⁶⁶ *Ibid.* at 22.

³⁶⁷ Horst W.J. Rittel & Melvin M. Webber, "Dilemmas in a General Theory of Planning" (1973) 4 *Policy Sciences* 155.

³⁶⁸ Adam Kahane, *Solving Tough Problems: An Open Way of Talking, Listening, and Creating New Realities* (San Francisco: Berrett-Koehler Publishers Inc., 2007).

Thus, the need to bring innovative thinking to the discipline through the vehicle of CL. Law is not the only field to experience the problem of distinguishing and managing both complicated and complex problems. Glouberman and Zimmerman studied the Canadian medicare system from the vantage point of complicated versus complex systems.³⁶⁹ They note, “The sophistication of our models, theories and language for complicated problems can be as seductive as the lamplight. They provide better ‘light’ and clarity and yet can lead to investigations that are ill equipped to address complex adaptive systems”.³⁷⁰ This research examines the medial system on both a systemic and individual patient level. Similarly, this research will look at the family law system as a whole but will take a more in depth look at the ways in which CL can utilize innovation to aid individual clients with complex problems. Indeed, the seductiveness of the analytical models used to address complicated family law problems allows people to be ignorant of the need for innovation.

Making an initial determination of whether an issue is complicated or complex allows for an accurate assessment of how the problem should be handled, whether through analysis or innovation. Theorists and practitioners have attempted to implement different resolutions, have created new processes and have offered suggestions to resolve complex issues. CL, as an example of such a process, holds much promise in terms of bringing innovation to complex family law problems. It is not only the issues themselves that are

³⁶⁹ Sholom Glouberman & Brenda Zimmerman, “Complicated and Complex Systems: What would Successful Reform of Medicare Look Like?”, in Pierre Gerlier-Forest, Gregory P. Marchildon & Tom McIntosh (Eds.) *Changing Healthcare in Canada* (Toronto: University of Toronto Press, 2002) at 21.

³⁷⁰ *Ibid.* at 22.

more complex. As will be explained in Chapter IX, many factors in recent history have created the need for innovation. Issues that may have been complicated in the past have now become complex. The following section will explore why CL, as a vehicle for innovation, has the potential to resolve complex problems.

Collaborative Law and complex problems

As explained above, innovation is not required in every case. Correspondingly, CL is certainly not required in every case. Innovation is required for complex problems, defined as unique problems that have many uncertain and ambiguous components that must be understood and not simplified; they may involve aligning multiple stakeholders; and it is imperative first to gain insight into the uniqueness of the issue before discovering the most effective solution.³⁷¹ CL was designed to be utilized in the resolution of family law issues, particularly separation and divorce. These are often complex issues, in the sense articulated in the social innovation literature.

The most difficult family law issues share the following characteristics: they include some unchallenged assumptions, many stakeholders, and significant unpredictable and ambiguous elements. These issues are complex. Indeed, the recognition that some legal problems are more challenging to resolve than others is not new. For example, four decades ago, Fuller described polycentric disputes which he defined as “situation(s) of interacting points of influence [which] involve many affected parties and a somewhat

³⁷¹ *Ibid.*

fluid state of affairs”.³⁷² Indeed, most family law issues are perfect examples of polycentric disputes, with many parties affected by a potential result and long term implications of any decision. Fuller looked at polycentricity in a different context, examining which problems are ill suited for adjudication. In addition to being ill suited for adjudication, this research suggests that polycentric problems are ripe for innovation as they are complex. As Kahane notes,

...problems 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.³⁷³

CL marries the removal of polycentric or complex problems from adjudication (which can be described as piecemeal, backward looking, and authoritarian) with the innovative approach (which is systemic, emergent, and participatory) to resolve them adeptly.

Complex family law problems, both on a macro and micro level, have yet to be solved effectively. The Law Commission of Ontario notes various reforms to the family law system in the province.³⁷⁴ The problem with such reforms when you look at family law from the innovation vantage point, is that the complex family law problems have been addressed as if they were complicated problems. Innovation is still required. The family law lawyer as able problem solver and process designer 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. Innovation is required.

³⁷² Lon L. Fuller, “The Forms and Limits of Adjudication” (1978) 92 *Harvard Law Review* 353 at 395, 397.

³⁷³ Kahane, *supra* note 368 at 32.

³⁷⁴ LCO Report, *supra* note 126 at 38.

The Collaborative Law Process and the Innovative Thinking Process

CL and innovation share many characteristics, some of which have already been outlined. This section will detail the overlap between the innovation process and the CL process. The linear approach that is presented here provides a useful framework for thinking about innovation and CL, but is not always consecutive. Steps are sometimes repeated or missed or circular in nature. Thus, the CL process and innovation process may both look more like multiple spirals than straight lines.³⁷⁵ Different authors have outlined the stages through which innovations pass.³⁷⁶ This section will attempt to merge their ideas to construct a model that shows the related characteristics between CL and innovation. Each loosely flows through a series of four stages, from developing a framework, to redefining the issues, to generating ideas, to planning for implementation.

Developing a framework

Before an innovative thinking process can take place, a framework must be set. It is only once a detailed understanding of the problem is considered that the ideal process and the best techniques required to resolve the problem can be determined. As explained by Mulgan, “The starting point for innovation is an awareness of a need that is not being met and some idea of how it could be met”.³⁷⁷

Similarly, a detailed framework must be developed before a CL process can take place. Even before CL as a process is chosen, sufficient information must be gathered from

³⁷⁵ Mulgan, *Process of Social Innovation*, *supra* note 356 at 155

³⁷⁶ The names of the phases are largely taken from Weiss and Legrand, *supra* note 334, although many related concepts arise from different authors.

³⁷⁷ Mulgan, *Social Innovation*, *supra* note 336 at 21.

clients and given to clients to enable them to select the best model of dispute resolution for their particular problem.³⁷⁸ This decision involves determining if the issue is indeed complex, as explained in the previous section, but also involves other personal criteria that will change with each case. As Tesler explains,

The day is past when a competent lawyer can simply bring to bear on a client's problem the conflict-resolution mode that the lawyer happens to prefer without offering the client a meaningful opportunity to make an informed choice from the growing menu of dispute resolution options now available.³⁷⁹

When complex problems are addressed through innovation, meaningful solutions can be attained. The first step in ensuring a meaningful resolution is in making an appropriate determination of process. Of course, this includes the important screening protocols detailed earlier, in Chapter III.

Very much like the client-centred approach in CL, the approach to innovation must be specific and deliberate. A detailed consideration must be made. As stated by Mulgan, "Some of the most effective methods for cultivating social innovation start from the presumption that people are competent interpreters of their own lives and competent solvers of their own problems".³⁸⁰ Indeed, it is the same supposition with which the CL process begins. Clients are competent interpreters of their own lives and competent solvers of their own problems. They must be given the full spectrum of dispute resolution process options from which to choose. Innovation and CL share a starting point.

³⁷⁸ The challenge of attaining informed consent in CL was detailed in Chapter III and will again be considered in relation to innovation in the Results of this research, in Chapter X.

³⁷⁹ Tesler, *Achieving Effective Resolution*, *supra* note 2 at 55.

³⁸⁰ Mulgan, *Process of Social Innovation*, *supra* note 356 at 150.

If indeed CL is chosen, the CL process, much like the innovative thinking process, begins by identifying the issues and laying out the framework for resolution. CL too recognizes, that the best process and ideal techniques to resolve the issues are not uniform. This is where CL and the traditional legal system diverge. There is no one size fits all approach. If, in fact, the problem is complex, a tailored process is required.

A well thought out framework is critical for the successful implementation of a CL process. It is at this stage that the parties are understood, that the right team is assembled and that a strategy can be built. It is essential that a common collective understanding is held. Without such understanding, the process can continue based on faulty assumptions or differing understanding of the issues or acceptable solutions. Lawyers and clients together lay a foundation in this first stage of a CL file. They communicate a great deal of information to each other and share this information with the other party and his or her counsel. These conversations often begin before the first four-way meeting but also form an integral part of that initial meeting. On the basis of this framework, important process decisions can be made.

One can easily take for granted that each CL case or each opportunity for innovation will look the same. Particularly when a team works on similar types of cases, it is easy to jump in without a thorough framework stage. This is a significant risk in CL cases, which may look similar at the outset. Neglecting to be thorough at the framework stage is to the detriment of the process. Innovation must begin at this stage, so no matter how

perfunctory the development of a framework seems, it should be done thoroughly in every case.

Weiss and Legrand explain that the purpose of this step in the innovation process is for the team to identify: the objective of the work, the type of solution required, the real boundaries and assumptions for a good solution, as well as the most effective approach to achieving the objective.³⁸¹ Before any of this can be achieved, the past and current context of the issue must be fully understood. The multiple purposes of this stage in a CL process are similar.

Tesler explains the first step in a CL file as follows:

At this stage, the lawyer and client forge basic understandings and agreements about how they will work together. The lawyer provides the information needed for the exercise of informed consent, and asks the client to make informed process choices. At this stage the lawyer also puts in place with the client some basic tools...that the lawyer will rely upon throughout the representation for guiding negotiations and working constructively with potential conflict.³⁸²

Once each lawyer has gathered and shared such information with his or her client, the collective knowledge of the group can be shared and mapped. Once this mapping is complete, the definition of the problem will emerge. The problem must be defined unambiguously and the ultimate objective must be outlined, as well as some defined way to measure the success of the process. Laying out the objectives of the work and the approaches with which to reach resolution form an integral part of this phase in both CL

³⁸¹ Weiss & Legrand, *supra* note 334 at 68.

³⁸² Tesler, *Achieving Effective Resolution*, *supra* note 2 at 54.

and innovation. Although the process may seem linear, the social innovation process is iterative rather than linear in nature. Each stage may repeat or evolve as the process unfolds.

A further part of the framework stage in both innovation and CL, is the setting of boundaries to define the formal limits and definitions of acceptable solutions. If certain solutions are unacceptable, it bears ruling them out from the very start. As Hassan explains in the context of social innovation labs, “Our starting point was trying to discern the realities as they existed for the people that the project aimed to help. Even when considering the future, the starting point is to consider what is plausible before getting into what is desirable”.³⁸³ Boundary setting allows the team to focus in the right direction from the beginning and avoids the problem of proceeding down a path that would never be attainable.

Weiss and Legrand discuss three types of boundaries, each of which can be applied in the CL context. A consideration of these boundaries is illuminating as it strengthens the analogy between CL and innovation. The first of these boundaries are “global boundaries” which are outside of the control of the project or team. In the CL context, these boundaries will often surround legislation and the requirements needed to have an agreement ratified by the court. While results need not mirror the legal model, a court must be able to review the agreement and understand the rationale behind decisions made by the clients. Yet other boundaries are “specific boundaries” which are within the

³⁸³ Hassan, *supra* note 364 at 97.

control of the parties and relate directly to the issue. An example of such a boundary is budget. If a couple has a defined amount of money which will not allow for them to keep their current matrimonial home, there is no use in exploring outcomes that involve the retention of the home. The third type of boundary that Weiss and Legrand delineate is “must do boundaries”. It is these boundaries that lay out the elements that must be included in any solution. As can be seen by each type of boundary, different team members in the CL process will be able to contribute to building realistic and workable boundaries. This is the beauty of team practice. For example, the lawyers will have a strong handle on legislation, while the family experts will adeptly articulate the needs for a solution, which meets the best interests of the child. It is recognized that, even with the best intentions, inherent bias of all participants, including mental health professionals, may obscure the best interests of the child. The financial expert will analyze the financial constraints of the process and, most importantly, the parties will have control over those particulars that a solution must contain.

The final consideration at the framework stage is to designate the decision-makers of the process. The CL process, unlike most other innovative thinking processes, provides an unambiguous answer to this question. Clearly, the clients must make all final decisions about any agreement. The deliverable at this stage of the innovation process is a clear framework of the problem the team will seek to resolve. The first stage in a CL file has a distinct end with the signing of the Participation Agreement, setting out the objectives, issues, boundaries, and goals of the parties.

Redefining the issues

The second step in the innovation process delves deeper into the issues by asking the team to gain insight into the complexity of the problem and the underlying root causes of the issue. Weiss and Legrand, explain that redefining the issues "... is essential in order to improve the potential of finding the right solution to the problem".³⁸⁴ 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 root causes of the issue and identifying any obstacles to the implementation of a solution.

In the CL context, this stage is often part of the first or second four-way (or more if an inter-disciplinary approach is taken) meeting. It is here that detailed information is shared and goals and priorities are communicated. As explained in Chapter III, voluntary and ongoing disclosure is integral to the CL process. Information gathering is similarly essential in innovation. In both CL and innovation, a deep understanding of the issue and root causes of a problem must be attained before any resolution or innovation can be considered. Hassan suggests that systems thinking must be used in social innovation labs to resolve complex problems.³⁸⁵ The same is true for issue redefinition in CL. Systems thinking utilizes heuristics, such as the Iceberg Model, which assumes that the most effective intervention considers the whole system, or structure, as opposed to focusing on individual events.³⁸⁶ Looking below the surface is integral.

³⁸⁴ *Ibid.* at 69.

³⁸⁵ Hassan, *supra* note 364 at 99.

³⁸⁶ *Ibid.*

Weiss and Legrand similarly explain that “Issue redefinition is fundamentally concerned with, and driven by, revealing the underlying assumptions to shape and reshape an issue. The innovative thinker always remains open to questioning the continuing appropriateness of all assumptions”.³⁸⁷ This description clearly fits within the open and ongoing disclosure requirement of CL. It also fits within the interest-based negotiation model employed in CL. Looking at underlying assumptions is at the core of an interest-based approach, as it is only in understanding the motivations and interests that an optimal solution can be reached.

The team, whether it be an innovation team or CL team, should emerge from this step with a distinct, clear and manageable agenda. This agenda will undoubtedly include legal questions but should not be limited to questions that can be addressed by the legal realm. Team members other than lawyers can be of assistance in laying these out. As in the innovative thinking process, the CL process must examine issues from both rational and emotional points of view. Different professional team members will be useful in aiding parties to express these points of view.

The stage of issue redefinition is only complete once the issues are clearly understood at both the surface and root levels. It is not only important to understand what clients want but why they want it. Only in understanding the underlying reasons that people want a particular set of circumstances to exist, can a team begin to develop effective solutions. As explained at the start of this section, the four-stage process may not operate linearly

³⁸⁷ Weiss & Legrand, *supra* note 334 at 109.

and some issues may seem completely understood only to realize that further redefinition is required. In such cases, fluidity is required to return to prior stages, rather than to plot along with incomplete information.

Exploring options

In both innovation and CL, it is only once the first two stages are complete that solutions should begin to be devised. Option exploration should not occur haphazardly, but rather should be thoroughly planned and rigorously executed. Weiss and Legrand states, “Effective idea generation ensures that innovative thinkers systematically identify solutions to the real issues within clear boundaries, thereby maximizing the value of the whole innovative thinking process”.³⁸⁸ The same should be applied in option exploration in CL.

Brainstorming as a tool for exploring options is widely utilized in many forums, including CL. Brainstorming was popularized by Osborn, an advertising executive who sought to increase creativity in organizations.³⁸⁹ Osborn was concerned that a main block to organizational creativity was the premature evaluation of ideas.³⁹⁰ Thus, he suggests the deference of judgment during option generation that has become the defining feature of brainstorming. Brainstorming cannot simply be about free association. The parameters

³⁸⁸ *Ibid.* at 124.

³⁸⁹ Paul B. Paulus & Vincent R. Brown, “Enhancing Creativity in Groups: Lessons from research on brainstorming” in P.B Paulus & B.A. Nijstad (Eds) *Group Creativity: Innovation through Collaboration* (Oxford: Oxford University Press, 2003).

³⁹⁰ *Ibid.*

for implementation are indeed important. As Weiss and Legrand describe about searching for “out of the box” business solutions,

What really happens when people engage in “thinking outside the box” in real life, not in creativity books, is that people’s first reaction is to look for rules to break, whether the rules are real or not, whether they are obsolete assumptions or solid business boundaries. By thinking out of the box without trying to understand what the box is made of...leaders and teams are most likely to jump right into another box that will look new and exciting but is still just another box.³⁹¹

It is easy to think that, in escaping the constraints of the legal system, any answer is possible. CL teams must be wary of the risk of “thinking outside the box” without first knowing the nature of that box.

There can be many contributors to option exploration in CL. Some may be at the negotiating table and some may bring their views to the table through others. Any useful input may be important in developing sustainable results. Weiss and Legrand explain that it is critical in the innovation process to define the roles of experts and balance their contributions to option exploration.³⁹² The same is abundantly true for CL. Particularly in inter-disciplinary teams, team members must take responsibility for their areas of expertise and contribute accordingly. Areas of expertise may surpass vocational knowledge, as brainstorming is optimal with different personalities.³⁹³ Such diversity of both occupation and personality is a great benefit of multidisciplinary teams. The benefit can be optimized by defining the roles and responsibilities of each team member. The

³⁹¹ Weiss & Legrand, *supra* note 334 at 91.

³⁹² *Ibid.* at 128.

³⁹³ Michael Kirton, *Adaptors and Innovators: Styles of Creativity* (New York: Routledge, 1989).

deliverable for this stage is a range of implementable ideas that fit within the parameters defined in the first stage.

Planning for implementation

Once a range of employable solutions is determined, plans for the optimal solutions can be fully developed. In this fourth stage of both the innovative thinking process and the CL process, all risks must be examined and all implications explored. The result of this stage is the metamorphosis of the solution from concept to agreement and implementation.

The signing of an agreement and drafting of any court papers certainly takes place at this stage of a CL file. However, these actions are not the only ones to be considered. Just as the innovative process requires risk analysis and effective handoff to the team that focuses on change implementation, the CL process focuses at its end on the continuing lifespan of the agreement. 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.³⁹⁴

It is important to consider the emotional toll of closure for CL clients. Focusing on this implementation phase gives clients such an opportunity. It is this final phase that truly distinguishes creativity from innovation as it is here that ideas are put into action.

³⁹⁴ Tesler, *Achieving Effective Resolution*, *supra* note 2 at 68.

One benefit of CL, described in Chapter IV of this dissertation, is the potential for increased compliance with agreements. As explained by Weiss and Legrand, “Innovation is successful only when a solution is implemented successfully, not when an idea or a solution is identified”.³⁹⁵ Similarly, a CL negotiation is only successful when it can be implemented by the parties successfully. Such success can be evidenced when parties comply with the agreements created in the CL process. It will be important to assess the success of innovation in the CL process by examining the extent to which compliance is achieved. Part of such success will include putting into place mechanisms to assist the parties in the execution of the agreement as well as distinct review periods in which the agreement can be reconsidered for possible amendment over time, if necessary. These are all part of the Planning for Implementation stage of the innovation process.

The Collaborative Law Team Model and Innovation

Chapter II detailed the various team models used in CL. Even in a unidisciplinary team model where lawyers and clients work without the help of mental health or financial professionals, the lawyers and clients work as a team. Thus, no matter what model of CL is utilized, teams are a central component of its practice. The same is true in much of innovation theory. Innovation is supported by the participation of groups.

Much research has been conducted on the ability for innovation to be fostered in teams.³⁹⁶ Some evidence exists in the literature that groups may inhibit intellectual ability

³⁹⁵ Weiss and Legrand, *supra* note 334 at 147.

³⁹⁶ See, for example, Paul B. Paulus & Bernard A. Nijstad, *Group Creativity: Innovation through Collaboration* (New York: Oxford University Press, 2003).

because of pressure to achieve premature consensus,³⁹⁷ lower accountability, or a tendency for groups to focus on a common idea rather than novel ideas³⁹⁸. These and other challenges with working in teams will be discussed later in this section. However, proponents of group innovation have focused on innovative organizations and social innovation labs.³⁹⁹ Moreover, research has shown that diverse groups make better decisions about complex problems.⁴⁰⁰ If, as this study proposes, innovation is required to resolve complex problems, it naturally follows that innovation requires diverse groups and that the diverse teams employed in CL have greater potential for innovation. The two critical components of this proposition are group work and diversity within those groups. These are both aspects that are missing from traditional legal practice but that are embraced in CL.

More today than ever, innovative research, reports, and products are being produced by teams rather than by individuals.⁴⁰¹ Despite the benefits of team-work, lawyers outside the CL process tend to work alone or in hierarchical groups. As stated by Coates et al., “Law firms are typically organized as nested pyramids with little cross-cutting

³⁹⁷ Irving L. Janis, *Groupthink: Psychological studies of policy decisions and fiascoes*, 2nd ed. (Boston: Houghton Mifflin, 1982).

³⁹⁸ Steven J. Karau & Kipling D. Williams, “Social Loafing: A meta-analytic review and theoretical integration” (1993) 65 *Journal of Personality and Social Psychology* 681.

³⁹⁹ See, for example, Hassan, *supra* note 364. Social labs are platforms for addressing complex social challenges that bring together diverse participants in an experimental way to develop systemic change.

⁴⁰⁰ Michele Destefano, “Non-lawyers Influencing Lawyers: Too many Cooks in the Kitchen or Stone Soup” (2012) 80 *Fordham Law Review* 2791.

⁴⁰¹ See Susan Cain, op ed, “The Rise of the New Group Think”, *New York Times*, January 15, 2012 at SR1, stating “[R]ecent studies suggest that influential academic work is increasingly conducted by teams rather than by individuals”.

communications or sharing of tasks”.⁴⁰² Particularly in family law cases, clients often retain a single lawyer who conducts the file on his or her own until agreement or decision is reached. Innovation in such legal processes is difficult because of the unidimensional perspective that such representation offers. CL, by employing teams working together, has greater potential to create innovative outcomes.

The idea that diversity can promote innovation in groups is widely accepted in the literature.⁴⁰³ Dyer et al. state, “Innovative ideas flourish at the intersection of diverse experience...”⁴⁰⁴. And further, “Innovators gain radically different perspective when they devote time and energy to finding and testing ideas through a network of diverse individuals”.⁴⁰⁵ Not only does legal culture tend to operate solitarily rather than in groups, it impedes diversity of such groups, thus stifling the ability for innovative ideas to flourish.

Environments in which connections among people with different experiences and from different disciplines are valued, encourage innovative thinking within such groups. Examples of such groups abound throughout history. Freud brought doctors, philosophers

⁴⁰² John C. Coates et al., “Hiring Teams, Firms and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market” (2011) 36 *Law and Social Inquiry* 999.

⁴⁰³ John R. Austin, “A Cognitive Framework for Understanding Demographic Influences in Groups” (1997) 5 *International Journal of Organizational Analysis* 342; Karen A. Bantel & Susan E. Jackson, “Top Management and Innovation in Banking: Does the composition of the top management team make a difference?” 10 *Strategic Management Journal* 107; Poppy L. McLeod, Sharon A. Lobel & Taylor H. Cox, “Ethnic Diversity and Creativity in Small Groups” 27 *Small Group Research* 248.

⁴⁰⁴ Jeff Dyer, Hal Gregersen & Clayton M. Christensen, *The Innovator’s DNA: Mastering Five Skills of Disruptive Innovators* (Boston: Harvard Business Review Press, 2011) [hereinafter *Skills of Disruptive Innovators*] at 45.

⁴⁰⁵ *Ibid* at 113.

and scientists together in Vienna to discuss psychoanalysis; the 1920s were a time of idea sharing in cafes where scholars, poets, artists and architects would meet, creating the “cultural innovation” of that era.⁴⁰⁶

Frans Johansson coined the term “Medici Effect” to describe the beneficial effect of diverse groups in creating novel ideas.⁴⁰⁷ This term clearly refers to the renaissance period in Florence, but can be generalized to apply to a broader range of temporal and situational groups. A current example of the recognition that diverse groups promote innovation are the popular TED (Technology, Entertainment and Design) conferences. TED conferences are a breeding ground for innovation, bringing together a diverse array of people in order to encourage cross-pollination between disciplines.⁴⁰⁸ Indeed each CL file, unlike most traditional legal files, has the potential to encourage cross-pollination within a common goal. They are like mini social innovation labs, coming together to resolve the complex problems faced by a family.

Diversity in educational and professional background is hard to find in the legal profession. Lawyers tend to work with lawyers or to work alone. A multidisciplinary or interdisciplinary approach is rarely taken. Some suggest that the lack of cross-disciplinary work in the legal field is rooted in the will to maintain a monopoly over the legal

⁴⁰⁶ Steven Johnson, *Where Good Ideas Come From: The Natural History of Innovation* (New York: Riverhead Trade, 2010).

⁴⁰⁷ Frans Johansson, *The Medici Effect: Breakthrough Insights at the Intersection of Ideas, Concepts and Cultures* (Boston: Harvard Business School Press, 2004).

⁴⁰⁸ See, www.ted.com.

marketplace.⁴⁰⁹ Whatever its cause, diversity must be injected into legal culture if innovation is to be achieved. CL is able to embrace such cross-disciplinary work by joining the legal professionals with other professionals such as mental health and financial neutrals. CL joins these individuals from different backgrounds and disciplines to help clients resolve their disputes. It is partially through such diversity that innovative results are possible in CL.

While groups can be of great benefit to innovation, CL lawyers should be wary of some challenges with groups. As Jackson explains, "...many organizations are discovering that teams do not always produce the desired results. Even when teams fulfill their potential, team members and their organizations may experience unanticipated negative side effects".⁴¹⁰ One such challenge is that groups can become stagnant. West suggests that as time goes by, groups can become less innovative unless there are changes in membership.⁴¹¹ Jackson suggests that longer tenure can be associated with greater homogeneity and low levels of innovation.⁴¹² Indeed CL groups tend to evolve in such a way so as to ensure that the same group members are working together continually. This

⁴⁰⁹ Bruce A. Green, "The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivations, Their Development, and Some Implications for the Core Values Debate" (2000) 84 *Minnesota Law Review* 1115 at 1131-1133.

⁴¹⁰ Susan E. Jackson, "The Consequences of Diversity in Multidisciplinary Work Teams", in Michael A. West (Ed) *Handbook of Work Group Psychology* (New York: John Wiley and Sons, 1996).

⁴¹¹ Michael A. West (Ed) *Handbook of Work Group Psychology* (New York: John Wiley and Sons, 1996) at 254.

⁴¹² Jackson, *supra* note 410 at 53-75.

routine can become problematic. Results from the interviews conducted in this study reveal some problems with the insular nature of CL groups.⁴¹³

In addition to these risks with teams, there is skepticism whether the CL process, in employing teams, is indeed less efficient than the traditional system. Efficiency, for example, is a goal of both CL and innovation. In the short term, however, both innovation and CL threaten to take longer than traditional means. As explained by Mulgan, “Any new approach, however well designed, may appear quite inefficient compared to the subtle interdependencies of [a traditional] system”.⁴¹⁴ A misunderstanding of CL may indeed create a sense of inefficiency. As will be explored in greater depth in the results of this study, clients may be turned off of the CL process merely because it seems more cumbersome than the traditional approach. This is often the case for many innovative approaches.

However, Mulgan notes that efficiency eventually turns in favour of innovation when systems inevitably become less optimal and less successful at delivering the product or service intended. He states,

As their problems accumulate the crisis may be felt at many levels: declining profitability for companies; fiscal crisis or legitimacy crisis for the state; the personal stress felt by millions as they see their cherished values or norms less validated by experience. Although people are adept at explaining away uncomfortable results and avoiding ‘cognitive dissonance’, and although elites try to police taboo ideas, at some point performance is bound to decline.⁴¹⁵

⁴¹³ See *infra* Chapter X.

⁴¹⁴ Mulgan, *Social Innovation*, *supra* note 336 at 18.

⁴¹⁵ *Ibid.* at 19.

Indeed, this is the predicament that CL was in, and is still in to some degree, with the legal profession. The cognitive dissonance of a process which eschews court as a last resort is unbearable for many lawyers who have made the court their fall back option for their entire careers. It is for this reason that many lawyers, when asked about CL, will immediately think of the disqualification provision and devalue the CL process, rather than learn all the intricacies of CL. While this ignorance is frustrating, it merely shows that CL is indeed an innovation that fits within the process for innovation followed by so many others.

Chapter VII. Why Now? Reasons to Consider Innovation and Collaborative Law

The preceding Chapters have proposed substantial overlap between Collaborative Law (CL) and innovation theory. It is now useful to go back in time to understand the circumstances under which CL was crafted and under which innovation became necessary. The creation of CL was indeed innovative and CL seeks to offer innovation to clients. The legal, social and economic world has changed dramatically over the last two decades and CL hit the scene optimally at a time where innovation and creative problem solving were required.

The professionalism and alternative dispute resolution (ADR) movements were socio-legal movements occurring at the time of the inception of CL, impacting its creation and subsequent growth. These movements also contributed to the perceived need for innovation in the legal system and thus merit detailed examination in this study. Each movement contributed its own piece to the puzzle that became CL. This Chapter will outline the legal landscape that surrounded these movements and document the contribution each played to the creation of CL up to present day. The Chapter will also examine the trajectory of divorce law around the time of the creation of CL in order to provide a complete picture of the relevant legal backdrop and will consider the economic changes, which have necessitated innovation in much of what lawyers do.

The Professionalism Movement

As articulated in Chapter II, Stuart Webb created CL out of an abhorrence for the family litigation he had practiced for decades. He was burned out. He knew others were burned out as well. This phenomenon of lawyer unhappiness was not unique to Webb.

At the same time as Webb's realization, scholars and professional organizations were busily studying the unhappiness of lawyers. Lawyer burnout had become widespread in the late 1980s and early 1990s and both the academic and legal communities were increasingly interested in professional civility and contentment.⁴¹⁶ A plethora of articles featured the subject of lawyer discontent.⁴¹⁷ Additionally, a steep increase in scholarly works discussing the need for professional revitalization for lawyers was of note. This increased interest and authorship gave rise to the professionalism movement.

Judith Maute explained the issue of lawyer distress in 1992,

Lawyers are worn out, stressed out, burned out, and sometimes drugged out. The legal profession must begin actively creating and implementing solutions so that lawyers in practice can work effectively and live full, rewarding lives. By doing so, they can capably represent their clients for reasonable fees. Living a life that is personally and professionally rewarding should not be an impossible dream. My hope for all humanity, lawyers or not, is that in our old age, we can reflect on our lives with satisfaction, that we lived good and rewarding lives. If the legal profession refuses to address these issues, it cannot rekindle the spirit of

⁴¹⁶ Alice Wooley, "Commentary: Does Civility Matter?" (2008) 46 *Osgoode Hall Law Journal* 175.

⁴¹⁷ See, Gary L. Lefer, "Attorneys are Among Most Severely Stressed Groups" (1986) *New York Law Journal* 23; Christine M. Panyard, "The Lawyer's Health: Coping with Stress" (1984) 56 *New York State Bar Journal* 42; Timothy Harper, "The Best and Brightest, Bored and Burned Out" (May, 1987) *American Bar Association Journal* 28; Christina Maslach & Susan E. Jackson, "Lawyer Burnout: It Can Happen to Anyone" (1978) 5 *Barrister* 8.

professionalism.⁴¹⁸

CL has attempted to answer this plea by offering a more personally and professionally rewarding legal practice.

But what gave rise to such discontent? Some of the factors, contributing to lawyer unhappiness at this time were external, a product of the way lawyers were viewed in society, while others were more personal and internal to the lawyers. Each must be explored as each contributed to the changes in the profession and framed the professionalism movement.

Although rooted in the United States, the professionalism movement has impacted Canada as well. Indeed, the Chief Justice of Ontario Advisory Committee on Professionalism was established in 2001 to define and deal with issues of professionalism.⁴¹⁹ That Committee defined professionalism as, “a personal characteristic [that] is revealed in an attitude and approach to an occupation that is commonly characterized by intelligence, maturity and thoughtfulness”.⁴²⁰ Interestingly, CL began to spread in Canada around the same time that this Committee was initiated. Since the CL process first developed in the United States, the American literature is relevant. Where useful, Canadian literature will also be examined.

⁴¹⁸ Judith Maute, “Balanced lives in a Stressful Profession: An Impossible Dream?” (1992) 21 *Capital Law Review* 797 at 819.

⁴¹⁹ Chief Justice of Ontario Advisory Committee on Professionalism Working Group on the Definition of Professionalism, “Elements of Professionalism” (October 2001, as revised December 2001 and June 2002).

⁴²⁰ *Ibid* at 1.

The professionalism movement was concerned with the erosion of the ideals of the legal profession and sought ways to restore the repute of lawyers. It may be said that lawyers never featured high on the public opinion scale. However, lawyer respect has continued to decline, and the decline was especially steep between the 1980s and early 1990s.⁴²¹ In this time period, the percentage of Americans giving lawyers high ratings in honesty and ethics fell from 27% in 1985 to 17% in 1994.⁴²² Canadian statistics are not much better. Dodek notes the years 2006 and 2007 as *anni horribles* for the Canadian legal profession.⁴²³ He points to several acts committed by Canadian lawyers in those years, as well as headlines such as “Lawyers are Rats” in national magazines to defend the negative impact on the legal profession.⁴²⁴ More recent statistics from the Law Society of Upper Canada’s annual report show that 57% of complaints to the law society in 2008 were about civility issues.⁴²⁵ These tipping points come after those in the United States, but coincide with the growth of CL in Canada, whose exponential growth came after the American movement.

One of the predominant factors in the professionalism movement was the idea that zealous advocacy was being used as an excuse for incivility.⁴²⁶ In creating CL, Webb was

⁴²¹ Leslie McAneny & David W. Moore, “Annual Honesty & Ethics Poll Congress and Media Sink in Public Esteem”, (Oct. 1994) *Gallup Poll Monthly*, at 2.

⁴²² *Ibid.*

⁴²³ Adam M. Dodek, “Canadian Legal Ethics: Ready for the Twenty-First Century At Last” (2008) 46 *Osgoode Hall Law Journal* 1.

⁴²⁴ *Ibid.*

⁴²⁵ Law Society of Upper Canada, *Annual Report* (Toronto: Law Society of Upper Canada, 2011).

⁴²⁶ McAneny & Moore, *supra* note 421.

expressing the concern of the time and addressed the growing unhappiness of lawyers by focusing on ways to improve their professional lives and change the notion of zealous advocacy. In his own words, “Collaborative law is both a simple and a profound concept: simple in its basic structure and profound in its effect and implications... It can and does also transform the quality of a lawyer's practice. I can testify to the fact that it has also transformed the quality of my life!”⁴²⁷ It is very interesting to note the absence of clients in such descriptions. The focus, at the start, was very much on the lawyers. This research will examine the extent to which this remains to be the case today.

The only way, Webb thought, to ensure that lawyers would cooperate and feel safe cooperating, was to mandate withdrawal, which may have, in fact, been the case. Farrow describes the adversarial narrative of professionalism, stating “It is a narrative that largely preferences adversarialism over collaboration, winning over restoring, individual rights over collective interests, power over vulnerability, process over outcomes, and cultural neutrality over pluralism and diversity”.⁴²⁸ Innovation is required to change this narrative for cases in which it is not accurate or useful.

Webb saw no better way to ensure civility than to remove court, the locus of incivility. His innovation was indeed in removing this locus. He thought that, if settlement and collaboration become the goals, rather than competition and winning, lawyers could begin to practice in a more civil, collegial way. The parameters around the innovative

⁴²⁷ Webb, *A Practitioner's Perspective*, *supra* note 57 at 169.

⁴²⁸ Trevor C.W. Farrow, “Residential Schools Litigation and the Legal Profession”(2014) 64(3) *University of Toronto Law Journal* 596.

approach suggested by Webb included the disqualification of lawyers in each and every case. However, just because withdrawal may have been required in the context of the 1990 legal landscape, this does not indicate a perpetual need to maintain disqualification as a central tenet of CL. Such a parameter may no longer be required to promote innovation. The now historical world of the 1990s has been replaced by a new era in which litigious resolution is de-emphasized and early problem-solving resolution is the goal. New processes have been created and changes have occurred. The Alternative Dispute Resolution (ADR) movement was the thrust of this change.

The Alternative Dispute Resolution Movement

While the professionalism movement held a strong focus on lawyers, their contentment and their impact on the justice system, it did not account for all the changes occurring in the legal environment in the 1980s and 1990s. Simultaneously, another movement was focusing on the court system and the impact of the system on clients. These foci were the concern of the ADR movement.

The modern ADR movement is dated in the late 1970s and early 1980s. The world at that time was going through significant societal changes. The early 1970s were marked by various rights movements: civil rights, consumer rights, environmental rights etc. The ADR movement replaced this talk of rights with talk of efficiency and harmony.⁴²⁹ The movement sought to address two distinct issues: first, the courts were becoming crowded,

⁴²⁹ Laura Nader, “Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology” (1993) 9 (1) *Ohio State Journal on Dispute Resolution* 1.

cumbersome and costly, and second, identity and empowerment were becoming important frames of reference. Before looking at each of these respectively, a brief history of the discipline, which has been come to be known as ADR is required.

The range of dispute resolution mechanisms, in and of themselves, are not new. Disputes were created and resolved since the beginning of civilization. However, ADR as a field is, in fact, quite new. As Carrie Menkel-Meadow wrote, “In the late 1970s and early 1980s...there was virtually no field in which to situate this work.”⁴³⁰ Despite the seeming non-existence of a field of study, academics were certainly developing and providing key ideas, concepts and frameworks, which later proved essential in developing the field of ADR. From the time dating back to Plato, manners of resolving disputes to reconcile all was considered paramount.

Which [judge] would be better: the one who destroyed the wicked among them and set the better to ruling themselves, or the one who made the worthy men rule and allowed the worse to live while making them willing to be ruled? But I suppose we should also mention the judge who is third in respect to virtue – if there should ever be such a judge – one capable of taking over a single divided family and destroying no one, but rather reconciling them by laying down laws for them for the rest of time and thus securing their friendship for one another.⁴³¹

What better way is there to describe the goals of ADR in the family law context?

⁴³⁰ Carrie Menkel-Meadow, “What Will we Do When Adjudication Ends? A brief intellectual history of ADR” (1997) 44 *UCLA Law Review* 1613.

⁴³¹ Plato, *The Laws of Plato*, Thomas L. Pangle (ed & translator) (Chicago: University of Chicago Press, 1988) at 6.

Many cite Frank Sander's appearance at the 1976 Pound Conference⁴³² as a turning point in ADR theory. Sander proposed the "multi-door courthouse", a site where disputants would be able to choose from a variety of different dispute processes.⁴³³ Two main goals of ADR, which exist to this day were expressed: a need to expedite dispute resolution and clear courthouses and a possibility for better outcomes than the court was able to provide. Such "better" outcomes indicate outcomes that would empower clients and provide a sense of identity, as noted above. What was sought was a blending of efficiency and effectiveness. A task force resulting from the Pound Conference recommended public funding to pilot mediation and arbitration programs. Also resultant from the conference, the American Bar Association created a Committee on Dispute Resolution to encourage the creation of model "multi-door courthouses".⁴³⁴ The predominant goal of this committee was to achieve greater efficiency.

Warren Burger, Chief Justice of the United States from 1969 to 1986, summed up the issue faced by the civil justice system, "Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people"⁴³⁵. The destructiveness and inefficiency of the legal system was taking a toll on both lawyers and clients. The Chief Justice wanted to divert cases away from courts to create greater efficiency, reduce

⁴³² A. Leo Levin & Russell R Wheeler (Eds.), *The Pound Conference: Perspectives on Justice in the Future* (St. Paul, MN: West Publishing, 1976); Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 29 *American Bar Association Annual Report* 395.

⁴³³ *Ibid.*

⁴³⁴ Russel R. Wheeler & A. Leo Levin, *Judicial Discipline and Removal in the United States* (Washington: Federal Justice Center, 1979).

⁴³⁵ Warren Burger, "The State of Justice" (1984) 70 *American Bar Association Journal* 62 [hereinafter *State of Justice*] at 66.

backlogs, and avoid the increasing expense to process disputes. The focus was narrowly construed as one of cost and delay. A wish to remedy the problems with the legal system spurred the ADR movement. The ADR movement sought to achieve two goals: to reduce the costs of resolving disputes and to improve the quality of final outcomes. The bifurcated goals aimed to help the courts to diminish backlogs and delay and parties by placing a premium role on peacemaking through negotiated settlement rather than adversarial adjudication.

In addition to efficiency, Chief Justice Burger had deeper concerns. He warned that adversarial modes of dispute settlement were tearing the country apart and asked “isn’t there a better way?”⁴³⁶ He spoke publicly about lawyers as healers, and of litigants as patients needing treatment.

The entire legal profession – lawyers, judges, law teachers – has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers – healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?⁴³⁷

The idea of clients as patients translated well to the mental health field, where professionals were quick to support ADR as better than litigation for resolving family disputes. ADR, and specifically mediation, were seen as creating solutions more suited to the needs of parties, reducing the reliance on the court system, encouraging relationships and helping non-parties such as children by speeding up conflict resolution.

⁴³⁶ Warren Burger, “Isn’t there a Better Way?” (1982) 68 *American Bar Association Journal* 274.

⁴³⁷ Burger, *State of Justice*, *supra* note 435 at 66.

The ADR movement was not without its critics. Owen Fiss, whose work was briefly outlined in Chapter II, offered several reasons to oppose ADR.⁴³⁸ First, he said that ADR legitimizes exploiting distributional inequalities between disputing parties.⁴³⁹ Also, he said that ADR aims to settle issues in a single moment of resolution rather than providing for ongoing structural remedies;⁴⁴⁰ Finally, he explains that ADR privatizes public values.⁴⁴¹ ADR scholars at first took offence with Fiss' critique, and proffered many responses.⁴⁴² Amy Cohen has more recently reexamined Fiss' work with a different analytical lens, reading the piece as a political critique rather than an institutional prescription.⁴⁴³ She finds that, through this lens, Fiss' challenge to ADR becomes more irresolvable and enduring.⁴⁴⁴

Other critics of the ADR movement expressed concerns about the impact of private dispute resolution on racial minorities, women, and the poor.⁴⁴⁵ Notably, Richard Delgado et al. examined the informal structure of ADR processes and highlighted biased

⁴³⁸ Fiss, *Against Settlement*, *supra* note 204.

⁴³⁹ *Ibid.* at 1076-1078.

⁴⁴⁰ *Ibid.* at 1082-1085.

⁴⁴¹ *Ibid.* at 1077.

⁴⁴² See, for example, Robert A. Baruch Bush, "Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation" (1990) 3 *Journal of Contemporary Legal Issues* 1; Andrew W. McThenia & Thomas L. Shaffer, "For Reconciliation" (1985) 94 *Yale Law Journal* 1660; Carrie Menkel-Meadow, "Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 *Georgetown Law Journal* 2663.

⁴⁴³ Cohen, *Revisiting Against Settlement*, *supra* note 147.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ See, for example, Grillo, *supra* note 30.

treatment of such minority groups.⁴⁴⁶ They concluded that people were more apt to act on their prejudices in an informal system such as ADR than they would be in an adjudicative forum.⁴⁴⁷ They particularly stated that the greatest danger of prejudice existed where there is direct confrontation between disputants of disparate power, there are few rules governing the interaction, the setting is closed, and the subject matter is highly personal.⁴⁴⁸ Despite these critiques, the ADR movement fueled an increase in non-litigative forms of dispute resolution. In addition, by 1996, Yamamoto wrote that there appeared to be relatively little attention paid to race and gender and other critiques of ADR in prominent legal scholarship.⁴⁴⁹ CL arrived at about the same time, at the heels of the ADR movement.

Changes in Family Law and in the Perception of Divorce

Innovation in family law became particularly important as the professionalism and ADR movements were occurring alongside an increase in divorce, an increased knowledge about the harmful effects of hostile divorce, a growing number of self-represented divorce applicants and a rise in the costs of legal services.⁴⁵⁰ By the 1990s, the time of the creation of CL, family law litigation had been well-documented as unsatisfactory.⁴⁵¹ A departure from this system was craved. Innovation was required.

⁴⁴⁶ Richard Delgado et al. "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" [1985] *Wisconsin Law Review* 1359.

⁴⁴⁷ *Ibid.* at 1388-1399.

⁴⁴⁸ *Ibid.* at 1402.

⁴⁴⁹ Eric K. Yamamoto, "ADR: Where Have the Critics Gone" (1996) 36(4) *Santa Clara Law Review* 1055.

⁴⁵⁰ See Macfarlane, *Emerging Phenomenon of CFL*, *supra* note 5.

⁴⁵¹ For a more comprehensive treatment of the harmful effects of divorce and the adversarial system, see, Peter McCarthy et al., *Longitudinal Study of the Impact of*

In response to the growing dissatisfaction with divorce processes, legal reforms began to take place, beginning in the late 1960s with the introduction of “no-fault divorce”, making marriage breakdown the only ground for divorce. Canada adopted no-fault divorce in 1968 with little opposition.⁴⁵² Unfortunately, the introduction of no-fault divorce did not sufficiently alter the system in positive ways, although this was the goal. Some negative consequences also transpired. Allan Parkman, an economist, describes that even though most cases under the no-fault regime are settled rather than litigated, settling under the no-fault system tends to produce outcomes that leave women with smaller financial settlements than they would receive under a litigated fault system.⁴⁵³ The introduction of no-fault divorce is an example of a complex problem being addressed as if it were a complicated problem: an example of using an analytical approach to resolve a problem that requires innovation.⁴⁵⁴ Such resolutions rarely resolve the problem as an innovative approach is required to resolve complex problems.

Different Dispute Resolution Processes on Post-Divorce Relationships between Parents and Children: Report to the Fund for Research on Dispute Resolution (Newcastle upon Tyne: Family and Community Dispute Research Centre, Newcastle University, 1992); Maccoby & Mnookin, *supra* note 98.

⁴⁵² The Parliamentary debates display the absence of opposition to the introduction of no-fault divorce. For example, after the introduction of the bill, the leader of the opposition stated: “Mr. Chairman, in just a few words I should like to indicate that we on this side of the chamber approve of reforming the divorce law, and look forward to receiving the bill...” (1968, at 5017).

⁴⁵³ Allen M. Parkman, *No-fault Divorce: What Went Wrong* (Boulder, CO: Westview Press, 1992).

⁴⁵⁴ For a detailed discussion of the nature of complex problems and methods of resolution, see Chapter VI.

Legislative changes continued to take place. The most recent drastic change in family law in Canada came in the form of a new *Family Law Act*⁴⁵⁵ in the province of British Columbia. One key theme of this statute recognizes the private settlement of family law disputes as equally important as resolution by the courts. The legislation encourages parties subject to it “to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court”.⁴⁵⁶ The Act grew out of the work of the Justice Review Task Force, and the subsequent Family Justice Reform Working Group, which released a report in 2005, entitled “A New Justice System for Children and Families”.⁴⁵⁷ This report held many recommendations for the way family law matters should be handled in the justice system. One of the most significant and groundbreaking recommendations was the push for out-of-court resolution processes to be the primary option for resolving family law disputes, with the retention of court as a last resort.

Another less drastic but equally salient legislative change came in the province of Nova Scotia on February 19, 2013 with the province’s new *Maintenance and Custody Act*⁴⁵⁸. The changes to that *Act* provided judges with increased clarity when making orders in a child’s best interest. Rather than focusing on case law alone, the amendments allow judges to rely on a new set of considerations placed directly in the *Act*. Another impactful change with this amendment is the mandated consideration of family violence, abuse or

⁴⁵⁵ SBC 2011, c.25.

⁴⁵⁶ *Ibid.* at s.4.

⁴⁵⁷ Family Justice Reform Working Group, “A New Justice System for Children and Families” (2005), online:

http://bcjusticereview.org/working_groups/family_justice/final_05_05.pdf.

⁴⁵⁸ RS, c.160, s.1; 2000, c.29, s.2.

intimidation when making an order. These changes show an increased consideration by the provincial legislature on detrimental emotional and physical risks of divorce, implications also at the forefront in CL negotiations.

In addition to the legislative changes, the public and professional perception of divorce has changed. In the 1960s, social workers viewed divorce as pathological and viewed the role of helping professions as counseling reconciliation.⁴⁵⁹ Shortly thereafter, partly fueled by the advent of no-fault divorce, the goal of helping professions became reconciling individuals to their post-divorce state and accepting the end of the marriage.⁴⁶⁰ Martha Fineman discusses this transition as a “...struggle between two professional ideologies – those of law and social work...[which] have culminated in a substantial redistribution of decision-making authority from judges and lawyers to the helping professions”.⁴⁶¹ CL takes this struggle and reconciles it through a quasi-legal settlement process. Law is certainly important but it is not all that is important. Particularly in cross-disciplinary CL approaches, the consideration of both law and social issues can be addressed.

Changing Nature of the Economy and Law Practice

Over the period leading up to the creation and adoption of CL, the nature of the economy and of law practice have changed. These changes have necessitated innovation. This section will explore the shift from an industrial economy to a knowledge economy, which

⁴⁵⁹ Martha L. Fineman, “Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking” (1988) 101(4) *Harvard Law Review* 727.

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid.* at 731.

has impacted legal practice and the nature and needs of legal clients. This shift has increased the need for innovation in law and has resulted in a need for a clean break from old ways in cases of complex legal issues.

Economic scholars recognize a global shift from an industrial economy, or information age, to a knowledge economy, or conceptual age. This trend is not fleeting but, rather, is a progression likely to continue for some time and thus merits consideration. The two economies are vastly different. For example, in terms of thinking approaches, the industrial economy valued analysis and critical thinking as the solitary focus, whereas the knowledge economy is concept driven. Innovation has become increasingly necessary with the shift to the knowledge economy. Pink asserts that the shift from the industrial economy to the knowledge economy is due, in part, to automation, allowing many analytical tasks to be completed more easily and effectively by computers.⁴⁶² The focus on information and rote knowledge has become virtually obsolete, partially owing to the use of technology, which has simplified and usurped these roles. Thus, economic success in the current market will turn on the necessity of novel thinking, or innovation. Pink explains that the conceptual age requires a new approach, which shies away from pure analytical thought and emphasizes big picture creative thinking and human interaction.⁴⁶³ The increasingly complex world requires discovering those complex issues that can only be resolved in these new ways.

⁴⁶² Daniel H. Pink, *A Whole New Mind: Moving from the Information Age to the Conceptual Age*, (New York: Riverhead Hardcover Publisher, 2005) [hereinafter *A Whole New Mind*] at 28-47.

⁴⁶³ *Ibid.*

The current knowledge economy is ever-changing. In this world, new ways of thinking and acting are required as change occurs so rapidly and so profoundly. The legal world is affected by the changing nature of the economy and the changing social world around it. Despite the changes that have occurred, the justice system and the ways in which lawyers learn, think and practice have been slow to change. We continue to resolve complex problems with standardized processes. Innovation is required.

Innovation has become an important consideration in many fields due to the uncertain nature of the economy and the evolving world around it. Law is no different. Indeed, the Canadian Bar Association, in its study of the future of legal services notes the following macro trends that are making changes in the legal profession so immediate and inevitable: globalization; technology; the liberalization of markets; deregulation, disaggregation, electronic markets, new communication media; demographics; and general economic conditions.⁴⁶⁴ Despite these trends, the profession has maintained its continuous focus on analytical problem solving rather than innovation and has failed to distinguish between complicated and complex issues. This focus must be amenable to change. As articulated by Japanese authors, “Approaches that proved to be successful yesterday may have outlived their usefulness, and what may be needed today is a clean break from the past”.⁴⁶⁵ The legal marketplace has changed along with the global economy.

⁴⁶⁴ Canadian Bar Association Legal Futures Initiative, *The Future of Legal Services in Canada: Trends and Issues* (Ottawa: Canadian Bar Association, 2013).

⁴⁶⁵ Business Consultants Inc., *Innovative Thinking: Unleashing the Creative Power of Your Mind* (North Charleston, SC: CreateSpace, 2012) [hereinafter *Innovative Thinking*].

External market pressures and a changing client-base have begun to force lawyers to reorient legal services.⁴⁶⁶ Lawyers cannot be left behind by limiting solutions to complex problems to analytical means. Lawyers must distinguish between complicated and complex problems and resolve these issues in different ways. Hobbs notes, “Just as small businesses are forming strategic alliances with larger businesses to achieve efficiency in bringing services and products to market, so too will lawyers have to conceive of new ways of doing business...”.⁴⁶⁷ Automation has changed the delivery of legal services dramatically. The internet has allowed for do-it-yourself options and chat-based services where lawyers can give limited legal advice and representation. These changes have resulted in a legal world where the ability to tackle complex problems and provide something that databases and software cannot provide will be the new marker of success.⁴⁶⁸

The Law Society of British Columbia undertook a study of unbundling of legal services in 2008.⁴⁶⁹ Therein is written,

...[P]art of the rise in self-representation reflects a cultural shift that is taking place in the information age. The Internet and related technologies are transforming the way information is collected, disseminated, and used. Legal information is now easily available to those with access to the Internet...Many of these litigants will not see the value in a hiring a lawyer to collect and process information they might easily collect themselves.

⁴⁶⁶ Amanda M. Spratley, “Connecting Law and Creativity: The Role of Lawyers in Supporting Creative and Innovative Economic Development” (2012) 8 *Hastings Business Law Journal* 221 at 222.

⁴⁶⁷ Hobbs, *supra* note 335 at 14.

⁴⁶⁸ Daniel H. Pink, *A Whole New Mind: Why Right Brainers will Rule the Future* (New York: Berkley Publishing, 2005) [hereinafter, *Right Brainers*] at 46.

⁴⁶⁹ Law Society of British Columbia, *Report of the Unbundling of Legal Services Task Force – Limited Retainers: Professionalism and Practice*, April 4, 2008; online: https://www.lawsociety.bc.ca/docs/publications/reports/LimitedRetainers_2008.pdf.

Some will feel they need little or no help from a lawyer when it comes time to advance their case in court. Limited scope legal services provide an opportunity for lawyers to assist this growing demographic in synthesizing information and refining legal arguments. In short, the regulation of limited scope legal services demonstrates the adaptation of the legal profession to an evolving marketplace.⁴⁷⁰

Janet Weinstein also explains the changing legal world, stating, “In an increasingly complex world, lawyers will need to expand their traditional approaches to problem solving if they are to be of real and future service to their clients”.⁴⁷¹ Clients, as well as lawyers, must resort to higher touch services to gain value. CL is one such high touch service. The constant presence and participation of clients in negotiations, along with the problem-solving focus, appeases those clients who yearn for more personal connection. An increase in the use of technological devices has led to a corresponding increase in the will of people to be with other people and seek out relationships.⁴⁷² CL, in involving parties allows for this goal to be achieved.

New methods of approaching the legal profession, such as CL are required in the new economy to service the current needs of clients. Clients today present different challenges than clients in days past. They continue to require expert legal service but of a more dynamic nature than before. As Spratley explains,

Lawyers who develop the ability to articulate and demonstrate their relevance and helpfulness to clients are those who will be able to succeed, while non-productive lawyers may miss valuable business opportunities if

⁴⁷⁰ *Ibid.*

⁴⁷¹ Janet Weinstein, “Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice” (1999) 74 *Washington Law Review* 319 at 319.

⁴⁷² *Ibid.*

existing and potential clients believe there is nothing of value that they can provide.⁴⁷³

Today, because of the changed economy and resultant change in client expectations, lawyers must appreciate the need to distinguish between complicated and complex problems. Their value will be shown by using innovative approaches in appropriate complex cases. Lawyers will have to evolve their thinking to adapt to the conceptual economy and continue to serve the needs of their clients and of society.

In addition to the changed legal landscape, lawyers have also changed. Macfarlane's extensive research on the current state of the legal profession, which culminated in her book, *The New Lawyer*, shows that lawyers currently, in order to be successful, must be practical problem solvers, creative thinkers, excellent communicators, and persuasive negotiators who understand that settlement is the norm.⁴⁷⁴

She states,

The most successful lawyers of the next century will be practical problem solvers, creative and strategic thinkers, excellent communicators, persuasive and skillful negotiators, who are able and willing to work in a new type of professional partnership with their clients. Many lawyers have told me that this modified approach to legal practice resonates with their own changing norms and habits of practice, and fits better with their personal value systems than the old warrior model. These are the new lawyers, who are ... competitive in the new conditions of legal practice, and market forces will ensure their numbers will only increase.⁴⁷⁵

⁴⁷³ Spratley, *supra* note 465 at 232.

⁴⁷⁴ Macfarlane, *The New Lawyer*, *supra* note 124.

⁴⁷⁵ *Ibid.* at 81.

This research will suggest that the new lawyer must also have the capacity to innovate when necessary. The new lawyer has a different relationship with the client. As stated by Macfarlane,

The new lawyer must help her client engage with the conflict, confronting the strategic and practical realities as well as making a game plan for victory. The new lawyer can offer her client skills and tools for conflict analysis, an understanding of how conflict develops and evolves over time, and the experience of working continuously with disputants on (perhaps similar) disputes. Conflict resolution advocacy means working with clients to anticipate, raise, strategize, and negotiate over conflict and, if possible, to implement jointly agreed outcomes. If jointly agreed outcomes are not possible, or if they fall short of client goals, there are other, familiar, rights-based strategies available that can be pursued either simultaneously or alternatively.⁴⁷⁶

The new lawyer has changed the face of the profession and will continue to do so as a result of various societal and economic changes. Today's world is not the world of two decades ago and lawyers are similarly changed.

⁴⁷⁶ Macfarlane, *Evolution of the New Lawyer*, *supra* note 93.

Chapter VIII. Innovation, Lawyers, Disqualification and Collaborative Law

The mandated use of lawyers and of disqualification are integral elements in Collaborative Law (CL). They are perhaps the most integral elements as they distinguish the process from others. No other family law dispute resolution process mandates that every party must be represented by a lawyer or that those lawyers must remove themselves should litigation ensue. This Chapter will be devoted to a consideration of each of these vital components of CL.

Lawyers in Collaborative Law and their Impact on Innovation

In their vital role, lawyers have the potential to create or inhibit innovation through the collaborative process. In the same way that training, propensity, and relationships were explored in Chapter IV, these subjects will be explored in this Chapter in regards to the innovative potential of lawyers. Much like the affective and behavioural requirements that CL training addresses, research has shown that innovation can indeed be trained.⁴⁷⁷ Despite this potential, some explain an innate propensity to innovate. Such a propensity results from specific predispositions, or “intelligences”. Moreover, just as lawyer reputation helps ensure cooperation, it has the potential to encourage innovation as well by creating a culture of innovation. This Chapter will expose the reader to theories that support these assertions. Lawyers indeed have a vital role to play if innovation is to be achieved through CL. Such an innovative role stands apart from a traditional lawyer’s

⁴⁷⁷ Jeffery H Dyer, Hal B. Gregersen, & Clayton M. Christensen, “The Innovators DNA” (2009) 89 *Harvard Business Review* 61 [hereinafter *Innovator’s DNA*].

role. Thus, a specific and concerted effort must be made to innovate and to encourage innovation. A culture of innovation must be built.

How capable are lawyers of achieving this daunting task? If innovation is indeed trainable and supported through CL, is innovation a natural byproduct in every case? If the CL process is not consistently yielding innovative results, it may be because lawyers are not capable of guiding innovation. Perhaps lawyers must develop the human capacity to innovate. While innovation in law seems intuitively and increasingly necessary, lawyers may inadvertently undermine its importance and resist its adoption. The resistance may be triggered by a negative feeling about creativity because innovation challenges some of the basic assumptions that have become ingrained in the way that law is practised.

Lawyers are not alone in resisting innovation. Part of the problem is that lawyers are not usually exposed to the importance of innovation in complex situations, rather they are trained to focus on an analytic precedent-based approach. Glouberman and Zimmerman describe the same problem for health care experts, stating, “Our contention is that many health care experts implicitly describe complex problems as complicated ones and hence employ solutions that are wedded to rational planning approaches”.⁴⁷⁸ Once exposed to the distinction of complicated and complex systems, lawyers are set up to innovate if they are able to do so. The training involved in developing innovative capacity as well as the

⁴⁷⁸ Glouberman & Zimmerman, *supra* note 369 at 2.

innate predisposition to be innovative and the role of practice groups in supporting innovation will be discussed in this Chapter.

Training for Innovation

Lawyers undergo significant formal and informal training. The approximately eighteen years of education before law school, followed by three or more years of legal education and mentoring, followed by any number of additional courses, trainings, seminars and informal mentoring, shape lawyers. Lawyers are certainly trained for the practice of law but are they trained for innovative thinking?

There is some debate in the innovation literature as to the extent to which innovation as a skill can be trained. Reznikoff, Domino, Bridges and Honeyman, for example, in a study of 117 pairs of identical and fraternal twins found that approximately 30% of creativity could be attributed to genetics.⁴⁷⁹ Oppositely, 80-85% of the twins' performance on general intelligence tests was attributable to genetics.⁴⁸⁰ Since creativity and innovation are inextricably linked, these results are relevant and applicable. Other studies also confirm that roughly 25-40% of what we do innovatively stems from genetics.⁴⁸¹ Thus, according to these studies, much of what is required for innovation is learned. The presupposition that everyone is able to access innovative thinking is not entirely accurate. Indeed, lawyers may be at a disadvantage in solving complex problems through

⁴⁷⁹ Marvin Reznikoff, George Domino, Carolyn Bridges, & Merton Honeyman, "Creative Abilities in Identical and Fraternal Twins" (1973) 3(4) *Behavior Genetics* 365.

⁴⁸⁰ *Ibid.*

⁴⁸¹ For a summary of the relevant research in this area, see R. Keith Sawyer, *Explaining Creativity: The Science of Human Innovation, 2nd Ed* (New York: Oxford University Press, 2012).

innovative thinking because of their strong analytical prowess.⁴⁸² Lawyers must work to access their innovative abilities. If indeed, as this study suggests, innovation is critical in CL, requisite CL training must address the development of skills of innovation.

Dyer, Gregersen and Christensen conducted a study of 3,500 executives, which highlighted key skills that innovators must develop. The five essential skills or behaviours that they attribute to innovative thinking are, (a) Questioning, (b) Observing, (c) Networking, (d) Experimenting, and (e) Associational thinking.⁴⁸³ These skills can indeed be trained, taught and encouraged. An examination of these skills begins to illustrate that the ability to think innovatively can be cultivated. The skills become a framework within which to examine the topic of developing innovation and innovative thinking. Each of these skills will be outlined and a description of how they apply in the CL context will be provided. This section will discuss the theory of innovative skill development for CL lawyers, a topic that will also be examined through the interviews and observations outlined in Part C of this dissertation. CL training programs should focus on these skills when training CL lawyers. Indeed, one can note the paradox here that innovative thinking follows a somewhat structured approach and how such a structured approach is created may require innovation, as it meets the definition of a complex problem.

⁴⁸² For a detailed analysis of lawyers personalities, see, for example, Susan S. Daicoff, "Asking Leopards to Change Their Spots: Can Lawyers Change? A Critique of Solutions to Professionalism by Reference to Empirically-Derived Attributes" (1998) 11 *Georgetown Journal of Legal Ethics* 547; Simmons, *Paradigmatic Conversion*, *supra* note 246.

⁴⁸³ Dyer et. al., *Innovator's DNA*, *supra* note 477 at 62.

(a) *Questioning*

Questioning is the first of the five essential skills of innovators. In order to be successful, innovators must challenge assumptions and question the status quo. Lawyers in CL must do the same. What process should be used? Should neutrals be engaged? What options will work for this family? These are among the critical questions CL lawyers must ask. All lawyers are certainly trained to ask questions. The questions that lead to innovation, however, are broad divergent questions rather than narrow convergent questions that lawyers traditionally are taught to ask. Questions are not limited, for example, to whether the option put forward meets the *Child Support Guidelines* or *Spousal Support Advisory Guidelines*. Instead, they ask how best the interests at the table can be met whether or not they exceed or elude the *Guideline* amounts. Questioning in CL takes on additional importance because lawyers must get below the legal issues and understand the true needs and interests of their clients, to the extent that they can. Lawyers certainly CL lawyers must question each other, their clients, the neutrals and themselves each step of the way in order to create truly innovative, client-serving processes and solutions. As lawyers are used to linear problems solving processes, where ideas are presented, debated and judged in a preset sequence, questioning in an innovative CL process can be frustrating.⁴⁸⁴

The first type of questioning that CL lawyers must be trained to ask relate to assessing the type of problems that clients brings through their doors. Although CL lawyers certainly recognize that family law problems are rarely if ever simple, do they have sufficient

⁴⁸⁴ Kahane, *supra* note 368 at 102.

training about assessing and resolving complex problems? Training for such questioning is the first step at achieving an appreciation for complexity.

Once a problem has been deemed complex, Dyer et al. suggest asking questions that both impose and eliminate constraints in order to practise questioning and to see opportunities from a different angle.⁴⁸⁵ In the CL context, the following questions may satisfy this proposition: a lawyer might say to a client, “Assuming you do not get any spousal support, what would your day to day life look like? How would that change if you agreed to the maximum amount of spousal support? What is really important to you?”.

On a broader level, lawyers engaged in CL must examine their role as lawyers in the CL process. CL seeks to change the traditional lawyer role and the corresponding assumptions that accompany it. These assumptions are outlined in Chapter IV. The reconceived lawyer role is in itself innovative. Tesler states, “Collaborative lawyers find themselves becoming members of a healing profession – and in so doing, heal themselves”.⁴⁸⁶ Lawyers in CL are both facilitators of the process and advocates of their clients. Kahane explains what he learned from a mentor about being a facilitator of an innovation,

He taught me that the job of a facilitator is to help participants speak up, listen up, and bring all of their personal resources to the work at hand. Our job is not to direct or control the participants. He also taught me that even though we were remaining neutral with respect to the substance of the participants’ work, our process was not neutral: it embodies values of openness, inclusion and collaboration.⁴⁸⁷

⁴⁸⁵ Dyer et al., *Skills of Disruptive Innovators*, *supra* note 404.

⁴⁸⁶ Tesler, *A New Paradigm*, *supra* note 39 at 991.

⁴⁸⁷ Kahane, *supra* note 368 at 89.

Indeed, these lessons are applicable in the CL context. Questioning must facilitate the values and goals of the CL process.

(b) Observing

In addition to questioning, innovators have keen skills of observation. Dyer et al. explain that innovators “produce uncommon business ideas by scrutinizing common phenomena, particularly the behavior of potential customers. In observing others, they act like anthropologists and social scientists”.⁴⁸⁸ Innovators must watch carefully for signs that might not be apparent at first glance. Kahane explains,

Most conventional approaches to solving problems emphasize talking, especially the authoritarian, boss or expert, way of talking: telling. In a debate, each party prepares their position and speech in advance and then delivers it to a panel, which chooses the most convincing speech. The same process is used in courtrooms and boardrooms, and in parliaments...Experts form ideas and present them, and then authorities adjudicate among these already formed ideas. This approach works for deciding between already created alternatives, but it does not create anything new. The additional element required to create something new, and that is ignored in most conventional approaches, is listening.⁴⁸⁹

Kahane was not speaking of resolving complex legal problems, but the rationale holds true for CL lawyers. They cannot enter a CL process with already formed ideas. They must listen and observe. Observing plays an important role in the continuing screening obligations in CL. Particularly when working in an interdisciplinary team, lawyers must be attuned to all the complex dynamics of working within a team environment. Such dynamics were discussed in Chapter VI.

⁴⁸⁸ Dyer et. al, *Innovator's DNA*, *supra* note 477 at 64.

⁴⁸⁹ Kahane, *supra* note 368 at 68.

Related to such observational skills, CL lawyers must be adept at retaining an awareness of their own behaviour in negotiations because is only in knowing oneself that one can truly elicit the best from others. Reilly explains that in increasing self-awareness, lawyers can better “listen with understanding” and “truly apprehend the reality of the other”.⁴⁹⁰ Simultaneous self-reflection and observation of others will lead to the most productive and innovative negotiations. As explained by Kahane,

To create new realities, we have to listen reflectively. It is not enough to be able to hear clearly the chorus of other voices; we must also hear the contribution of our own voice. It is not enough to be able to see others in the picture of what is going on; we must also see what we ourselves are doing. It is not enough to be observers of the problem situation; we must also recognize ourselves as actors who influence the outcome.⁴⁹¹

This self-reflection is critical in the CL context as well. Since lawyers are trained to utilize negotiation behaviours other than those that are most useful in CL, they must constantly examine and reexamine their behaviour to ensure it meets the innovative and interest-based quality required in CL. Although some propensity to innovate may be innate, as the next section will discuss, CL lawyers can train themselves to adopt styles that are not natural for them. For example, even though someone may possess a certain personality type, which Carl Jung determined to be innate⁴⁹², that person can train him or herself to utilize another type fluidly. Just as right-handed people can learn to utilize their left hands adeptly, narrow individuals can learn to broaden a perspective. Observation of themselves and others are the keys to such growth.

⁴⁹⁰ Peter Reilly, “Mindfulness, Emotions, and Mental Models: Theory that Leads to More Effective Dispute Resolution” (2010) 10 *Nevada Law Journal* 433.

⁴⁹¹ Kahane, *supra* note 368 at 83.

⁴⁹² See Chapter IV for a more fulsome discussion of personality types related to lawyers.

(c) Networking

Innovators take the time to test ideas, to be curious and to explore through a network of diverse individuals. Such networking offers different perspectives on the basis for innovation and hence the foundations for innovation. As explained by Dyer et al., “innovative entrepreneurs go out of their way to meet people with different kinds of ideas and perspectives to extend their own knowledge domains”.⁴⁹³ Further, Kahane notes,

Dynamic complexity requires us to talk not just with experts close to us, but also with people on the periphery...And social complexity requires us to talk not just with people who see things the same way we do, but especially with those who see things differently, even those we don't like. We must stretch way beyond our comfort zone.⁴⁹⁴

CL communities embrace this essential need for networking by continually gathering together different types of individuals. The results section of this study will delve more into the specific networking experienced by CL lawyers, but suffice to say that such opportunities are vast and varied and include the range from conferences to cocktails. The wide range of clients that embark on CL processes also provides differing viewpoints from which CL lawyers can learn through networking. In addition, the team approach espoused in many CL communities ensures a consistent networking between individuals of different backgrounds.

(d) Experimenting

Beyond questioning, observing and networking, innovation requires the skill of experimenting, which requires a certain amount of freedom. Morris Stein wrote of the

⁴⁹³ Dyer et al., *Innovator's DNA*, *supra* note 477 at 65.

⁴⁹⁴ Kahane, *supra* note 368 at 75.

importance of freedom to the innovative capacity of individuals, stating, “To be capable of [innovation], the individual requires freedom – freedom to explore, freedom to be himself, freedom to entertain ideas no matter how wild and to express that which is within him without fear of censure or concern about evaluation”.⁴⁹⁵ Dyer et al. more recently expressed the salience of experimenting for innovators.⁴⁹⁶ Experimenting is not a skill automatically developed through the practice of law. Freedom of the kind Stein discusses is not a luxury often afforded to lawyers; a plethora of rules, regulations, and protocols stand in the way. CL frees lawyers from these strict confines by opening the door to innovation. Whether lawyers accept and take advantage of such freedom will be the subject of Part C of this study, but at least in theory, the freedom is theirs to accept. Clients tend to be less stuck in strict legal mores than their lawyers, which explains the focus here on lawyers. No matter how innovative clients may be, if lawyers are stuck in an analytical paradigm, solutions and processes will not have the opportunity for innovation.

In addition to the freedom offered in CL, experimentation also plays an integral role in CL through hypothetical testing. Hypothetical testing allows for safe experimentation within the confines of the negotiation table. Parties can look at the implications of a variety of different options, with the assistance of the entire team and make the best decision for them based on such projections. Looking at projections and long term plans

⁴⁹⁵ Morris Stein, “Creativity Research at the Crossroads: A 1985 Perspective” In S.G. Isaksen (Ed) *Frontiers of Creativity Research: Beyond the Basics* (Buffalo, NY: Beary Ltd, 1987) at 119.

⁴⁹⁶ *Ibid.*

are fundamental components of CL negotiations but rarely form part of other dispute resolution processes.

Dyer et al. suggest that, in order to increase the skill of experimenting, people must consciously approach work and life with a hypothesis-testing mind-set.⁴⁹⁷ CL lawyers can approach their files in such a way by consciously looking beyond those resolutions that are most obvious in order to dig for a gem that might be buried deep below the surface.

(e) Associational thinking

Associating is the ability to relate seemingly unrelated questions, problems or ideas successfully. Dyer et al. found that innovative entrepreneurs excelled at this skill.⁴⁹⁸ Chapter VIII explained the benefit of a team approach in CL by relating to the benefit of joining different thoughts through diverse groups. In the same way that individuals from different backgrounds can add richness to CL, associational thinking can deepen the meaningfulness of solutions. Associational thinking is a skill that can be developed by lawyers even in the absence of cross-disciplinary teams.

How can the skill of associational thinking be best developed? Diverse experience is key to the ability of combine ideas. Dyer et al. explain that “the more diverse our experience and knowledge, the more connections the brain can make”.⁴⁹⁹ Their study found “The more frequently people ... attempted to understand, categorize, and store new knowledge,

⁴⁹⁷ *Ibid.*

⁴⁹⁸ Dyer et. al., *Skills of Disruptive Innovators*, *supra* note 404 at 3.

⁴⁹⁹ Dyer et al., *Innovator's DNA*, *supra* note 477 at 63.

the more easily their brains could naturally and consistently make, store, and recombine associations”.⁵⁰⁰ Oppositely, the more lawyers are exposed to the same types of cases, their brains will naturally tend towards the same potential solutions. CL lawyers must consciously ensure a breadth of experience to allow them to associate proficiently.

Propensity to Innovate

Although the skills of questioning, observing, networking, experimenting and associational thinking can be developed, Dyer et al. point to 25-40% of innovative potential stemming from genetics.⁵⁰¹ Roger Martin also explains that innovators have a natural innate ability to hold two diametrically opposed ideas in their heads.⁵⁰² Chapter V examined the propensity for lawyers to practise CL. The propensity to innovate is not much different. In addition to the personality variables linked to the propensity to practise CL, as outlined in Chapter V, other innate factors affect lawyers’ propensity to innovate, and hence, to practise CL. In order to resolve complex problems, CL lawyers require various propensities or “intelligences”.

Why utilize the term “intelligence” to describe the capacity to innovate? Several theorists have examined the concept of intelligence.⁵⁰³ The theory of multiple intelligences has been used to articulate the capacities, both innate and learned, that are required for a

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*

⁵⁰² Roger L. Martin, *The Opposable Mind: Winning Through Integrative Thinking* (Boston: Harvard Business School Publishing, 2009).

⁵⁰³ See, for example, Howard Gardner, *Multiple Intelligences* (New York: Basic Books, 1993); Robert Sternberg, “Giftedness According to the Theory of Successful Intelligence”, in N. Colangelo & G. Davis (Eds.), *Handbook of Gifted Education* (Boston: Allyn and Bacon, 2003).

variety of disciplines. Theories of multiple intelligences aid in understanding the ability to innovate. A notable theorist in this area, Howard Gardner, states that intelligences are “proclivities which are realized or not realized depending on the cultural context in which they are found”.⁵⁰⁴ It is important to note the three components of this definition. First, intelligences are proclivities. They are capacities and not particular skills. Second, these capacities may or may not come to fruition. Just because one has a heightened intelligence of one sort or another, does not mean that the intelligence will be utilized. And third, cultural context is important in determining whether a particular intelligence is found. This section will describe the intelligences demanded of CL lawyers and the next section will look at the cultural context of CL practice groups and the role that reputation plays in assisting innovation in the collaborative context.

In addition to Garner, other scholars and researchers have described theories of multiple intelligence. Sternberg, one such researcher, notes three forms of intelligence: analytical, creative and practical.⁵⁰⁵ Analytical intelligence is defined as the ability to think critically, while practical intelligence connotes the ability to solve every day problems and adapt to new solutions. The third intelligence, creative intelligence, is defined as the ability to formulate new ideas.⁵⁰⁶ All three of these intelligences apply to innovation and have been adapted by Weiss and Legrand who assert that leaders in organizations require three specific intelligences: (a) analytical intelligence; (b) emotional intelligence; and (c) innovative intelligence. Indeed, these intelligences are salient in a CL lawyer’s work, and

⁵⁰⁴ Gardner, *ibid.* at 221.

⁵⁰⁵ Sternberg, *supra* note 503.

⁵⁰⁶ *Ibid.*

the interplay between them is illuminating. This study will adopt the theory of multiple intelligence, as articulated by Sternberg and espoused by Weiss and Legrand, to examine the propensity of CL lawyers to innovate. It is only through highly developed analytical, emotional and innovative intelligence that lawyers can participate most beneficially in the CL process. Each of these intelligences will be described and although each can be developed in order to bring individuals to their maximum potential, the capacity of these intelligences has a genetic component, as described below.

(a) Analytical intelligence

Analytical intelligence, that which can be measured by an “Intelligence Quotient”, or IQ test, is what most people think of when faced with the term “intelligence”. In the early 1900s, Alfred Binet popularized the idea that such intelligence could be measured.⁵⁰⁷ While IQ is thought to be innate, as explained in the previous section, and not to change significantly over a lifetime, schools began to focus on those skills attributable to IQ in order to develop IQ to its fullest potential. Thus, analytical intelligence began and continues to be encouraged and assessed through standard school-based academic courses of study.⁵⁰⁸

Analytical intelligence, applying logic to problem solving, is the predominant thinking model utilized in the current legal culture, partly because it is the predominant thinking

⁵⁰⁷ Alfred Binet, “New methods for the diagnosis of the intellectual level of subnormals”, in E. S. Kite (Trans.), *The development of intelligence in children*. (Vineland, NJ: Publications of the Training School at Vineland, 1916). (Originally published 1905 in *12 L'Année Psychologique* 191).

⁵⁰⁸ Robert J. Sternberg, *The Triarchic Mind: A New Theory of Human Intelligence* (Viking Press, 1988).

model encouraged by academic institutions. Analytical intelligence, for most, has been the predominant manner of achieving success in school.⁵⁰⁹ Weiss and Legrand describe how leaders may focus solely on analytical intelligence because of the school system that they experienced.⁵¹⁰ The traditional school system has an almost singular focus on analytical intelligence wherein students are taught to analyze situations based on past information and experience, operate in a linear fashion, focus on answers, avoid ambiguity and uncertainty, emphasize speed and seldom question the question.⁵¹¹

Weiss and Legrand state, “The more successful students are very analytical and logical or are good at memorizing and therefore are able to access the right answers”.⁵¹² Moreover, Kuratko and Hodgetts suggest “Our society and its educational institutions reward individuals who have been successful at developing their logical, analytically and rational left brain skills. Little emphasis, however, has been placed on practicing and using right-brain skills”.⁵¹³ Part of the difference between the operation of analytical intelligence and innovative potential lies in the natural tendency to think either convergently or divergently. Convergent thinking, usually associated with analytical thinking, seeks a single answer to a problem whereas divergent thinking, associated with innovation, seeks multiple potential answers. Although people can train themselves to adopt either approach, one is thought to come more naturally and automatic than the other.⁵¹⁴

⁵⁰⁹ Weiss & Legrand, *supra* note 334.

⁵¹⁰ *Ibid.* at 47

⁵¹¹ *Ibid.*

⁵¹² *Ibid.* at 48.

⁵¹³ Donald F. Kuratko & Rickard M. Hodgetts, *Entrepreneurship: A Contemporary Approach, 5th Ed.* (Toronto: International Thompson Publishing, 2001) at 136.

⁵¹⁴ Sawyer, *supra* note 481 at 45.

CL lawyers, in order to enter the profession, have all attended law school and law school attracts individuals who have strong analytical intelligence partly because of their admission criteria. The commonly used standardized testing mechanism that helps determine law school admission, the LSAT⁵¹⁵, requires strong analytical intelligence. It determines prospective students' abilities to read, analyze and reason under time pressure. These are indeed important skills for lawyers to possess. But they are not the only important skills.⁵¹⁶

Recall, that intelligence, although said to be innate, is just a potential and the corresponding ability only results when one utilizes the intelligence effectively. Those that fulfill their potential for analytical intelligence can apply their memory for solutions effectively to resolve complex problems and can apply logic to situations that are extensions of problems solved in the past.⁵¹⁷ Lawyers, as logic and application are so central to their practice, likely possess a strong analytical intelligence. For a complete discussion of lawyer propensities, see Chapter V which discusses personality type and practice orientation.

⁵¹⁵ Law School Admissions Test. See, Law School Admissions Council, "About the LSAT", online: <http://www.lsac.org/jd/lsat/about-the-lsat/>.

⁵¹⁶ Some authors have suggested that law school admission criteria should be expanded beyond such analytical abilities, see John Lande & Jean R. Sternlight, "The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering" (2010) 25 *Ohio State Journal on Dispute Resolution* 247.

⁵¹⁷ Weiss & Legrand, *supra* note 334 at 35.

(b) Emotional intelligence

In addition to the analytical intelligence required of lawyers, the potential to innovate in CL requires emotional intelligence. The theory of emotional intelligence, developed by Salovey and Mayer,⁵¹⁸ leapt into the public consciousness with the publication of Daniel Goleman's well-known book on the subject in 1995.⁵¹⁹ Emotional intelligence refers to the ability to identify, assess and manage the emotions of oneself and of others.⁵²⁰ It involves a range of interpersonal and intrapersonal skills that allow individuals to understand themselves and others better. Emotional intelligence, or emotional competence as others have called it, is not fixed and can readily be developed.⁵²¹ Although some may have a more astute natural ability for emotional intelligence, education and experience can indeed impart the thinking skills required to use this competency.

Many disciplines have adopted the importance of emotional intelligence. An article in the Harvard Business Review described emotional intelligence as "a groundbreaking paradigm shattering idea".⁵²² The need for lawyers to develop an acute emotional competence has been the subject of academic interest over the last fifteen years. An understanding of the limitations of the purely analytical framework gave way to an

⁵¹⁸ Peter Salovey & John D. Mayer (1990) "Emotional Intelligence", 9(3) *Imagination, Cognition and Personality* 185.

⁵¹⁹ Daniel Goleman *Emotional Intelligence: Why it Can Matter More than IQ* (New York: Bantam Books, 1995).

⁵²⁰ *Ibid.*

⁵²¹ See Marjorie A. Silver, "The Professional Responsibility of Lawyers: Emotional Competence, Multiculturalism and Ethics" (2006) 13 *Journal of Law and Medicine* 431.

⁵²² Daniel Goleman, *Emotional Intelligence: The 10th Anniversary Edition* (New York: Bantam, 2005) at ix.

examination of the impact of emotions and people on the practice of law. Through such discussions, the impact of emotional intelligence of lawyers was propelled into the literature.⁵²³

Some examples of the ways in which the legal world began to embrace the need for heightened emotional intelligence are the focus on a reflective practice model and the practice of therapeutic jurisprudence. Reflective practice is critical in CL and its importance became apparent in the interview phase of this research, as will be explored in the results section of this dissertation. The ability to manage the potentially high emotions on a CL file is not easy and requires developed emotional intelligence.

Innovation literature has similarly featured emotional intelligence as a core concept. As stated by Mulgan, “Some of the best innovators spot needs which are not being adequately met by the market or the state. They are often good at talking and listening, digging below the surface to understand peoples’ needs and dislocations, dissatisfactions and ‘blockages’...Empathy is the starting point...”.⁵²⁴ Similarly, CL lawyers must spot the needs of their clients as well as of the other client. They must talk and listen, dig below the surface to understand the interests. They must have empathy.

⁵²³ See Mark Neal Aaronson, “Problem Solving in Clinical Education: Thinking Like a Fox: Four Overlapping Domains of Good Lawyering” (2002) 9 *Clinical Law Review* 1; Angela Burton, “Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Intelligences Paradigm into the Clinical Setting” (2004) 11 *Clinical Law Review* 15; Kirsten A. Dauphinais, “Valuing and Nurturing Multiple Intelligences in Legal Education: A Paradigm Shift” (2005) 11 *Washington & Lee Race and Ethnic Ancestry Law Journal* 1; Ian Weinstein, “Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam” (2001) 8 *Clinical Law Review* 247.

⁵²⁴ Mulgan, *Social Innovation*, *supra* note 336 at 21.

CL lawyers must consciously increase their use of emotional intelligence in order to utilize this intelligence most advantageously. Dealing with complex family and emotional conflict certainly requires such competence. Despite its necessity, emotional intelligence is not often encouraged in law school. As stated by Savoy, in law school, “(p)ersonal values and feelings are brought into rational discourse rather than acknowledged”.⁵²⁵ Feelings are important “but the law school experience teaches students to ignore and obscure the feeling side of life, to divorce emotion from logic, as if they were incapable of peaceful coexistence”.⁵²⁶ Rationality must sometimes give way to emotionality. Co-existence must replace binary consideration of these concepts. CL lawyers must reflect on themselves and others and exercise emotional intelligence, while at the same time, applying analytical intelligence to analyze problems..

Interestingly, studies of CL lawyers tend to suggest that they possess high emotional intelligence. For example, as explained in Chapter V, Simmons conducted a personality study of traditional family law lawyers (those who do not practise CL) and CL lawyers, using the Myers Briggs Type Indicator (MBTI).⁵²⁷ One bipolar dimension of the MBTI is the Thinking/Feeling scale. The Feeling scale has been found to be closely linked to emotional intelligence, while the Thinking scale is closely linked to analytical thinking. The MBTI shows a preference for one type over another. This does not mean that the two

⁵²⁵ Paul N. Savoy, “Toward a New Politics of Legal Education” (1970) 79 *Yale Law Journal* 444 at 461.

⁵²⁶ David Culp, “Law School: A Mortuary for Poets and Moral Reason” (1994) 16 *Campbell Law Review* 61 at 79.

⁵²⁷ Simmons, *Paradigmatic Conversion*, *supra* note 246.

abilities cannot coexist but that one is more easily accessed than the other. In that study, the majority of CL respondents, 64.7%, reported a preference for Feeling as compared to 37.5% who preferred Thinking. This result stands in stark contrast to a personality study conducted by Richard in which 77% of lawyers were found to be Thinkers.⁵²⁸ These studies, considered together, suggest a more natural propensity for CL lawyers to have astute emotional intelligence.

The CL process itself is complex and involves multiple participants and issues. A pulse on the level of tension experienced by participants and the ongoing determination of whether discussions are productive and relevant to successful resolution must be maintained.⁵²⁹ Thus, collaborative practitioners must appreciate their emotional intelligence to maintain an effective process.

(c) Innovative intelligence

In addition to requiring a developed analytical and emotional intelligence, CL lawyers must possess innovative capacity. Weiss and Legrand define innovative intelligence as “the human cognitive ability to look at problems or opportunities in new ways and to discover new implementable solutions”.⁵³⁰ Innovative intelligence is demonstrated through innovative thinking, defined as “the process of solving problems by discovering,

⁵²⁸ Lawrence R. Richard, “Psychological Type and Job Satisfaction among Practicing Lawyers in the United States” (2001) 29 *Capital University Law Review* 979 at 1016.

⁵²⁹ See Trinnie Houghton & Scott Seagren, “Relationship Systems Intelligence: The Critical Ingredient to Collaborative Leadership” (2013) 13(1) *Collaborative Review* 7.

⁵³⁰ Weiss & Legrand, *supra* note 334 at 33.

combining, and arranging insights, ideas, and methods in new ways”⁵³¹. In short, innovators must think differently to generate new ideas. The two predominant components of innovative intelligence are problem insight and solution discovery.⁵³² Once again, just as in the definition of innovation itself, the combination of creativity and implementation is central. Both of these are essential in CL.

Edward de Bono discusses lateral thinking, a concept largely synonymous with innovative thinking.⁵³³ De Bono notes that lateral thinking, which involves solving problems through an indirect and creative approach, does not result from step-by-step logical analysis.⁵³⁴ Traditional education is not based on lateral thinking, but instead is focused on vertical thinking, which is selective rather than generative.⁵³⁵ Innovative thinking requires generation of ideas and broadening of thought. This is a different process than is typically employed in law, where narrowing the legal issues is a selective process.

Innovative intelligence and analytical intelligence are not completely disparate conceptions. Prior to the 1960s, IQ and creativity were thought to be so strongly correlated that analytical intelligence alone was studied. Indeed, Barron and Harrington

⁵³¹ *Ibid.* at 7.

⁵³² *Ibid.*

⁵³³ Edward de Bono, *Lateral Thinking: Be More Creative and Productive* (London: Penguin Books, 1990).

⁵³⁴ *Ibid.*

⁵³⁵ *Ibid.*

found that highly creative individuals indeed score high on IQ tests.⁵³⁶ A study of high school students established that creativity requires a threshold level of IQ, around 120, but that above that level of creativity does not increase with intelligence.⁵³⁷ Despite the overlap of these two intelligences, in order to develop innovative intelligence, CL lawyers must be capable of lessening the potency of their analytical thinking. Analytical intelligence certainly has a role in resolving legal problems, on both a macro and micro level, but access to innovative intelligence is restricted by an over-eager analytical intelligence.

Innovative thinking does not come naturally to many and, in fact, some of the best analytical thinkers have difficulty accessing their innovative intelligence.⁵³⁸ Weiss and Legrand refer to this as the “analytical intelligence paradox” which states “the more that individuals have a dominant and successful analytical intelligence, the less likely they will have easy access to their innovative intelligence”.⁵³⁹ Herein lies the problem for lawyers. Lawyers have effectively applied their analytical intelligence through law school, and years of practice. Each successful experience heightens the ability to apply analytical intelligence. However, this analytical intelligence becomes so ingrained that lawyers may be impeded from using their innovative intelligence. Neuroscience explains this propensity through the theory of neuroplasticity. Norman Doige describes the “neuroplasticity paradox” which states that “the same neuroplastic properties that allow

⁵³⁶ Frank Barron and David M. Harrington “Creativity, Intelligence and Personality” (1981) 32 *Annual Review of Psychology* 439 at 445.

⁵³⁷ *Ibid.*

⁵³⁸ Weiss & Legrand, *supra* note 334 at 51.

⁵³⁹ *Ibid.*

us to change our brains and produce more flexible behaviours can allow us to produce more rigid ones”.⁵⁴⁰ The more one practises in the same way, the more rigid one’s abilities become and the less the ability to change is available. The following scenario is offered to describe this phenomenon:

Neuroplasticity is like pliable snow on a hill. When we go down the hill on a sled, we can be flexible because we have the option of taking different paths through the snow each time. But should we choose the same path a second or third time, tracks will start to develop, and soon we tend to get stuck in a rut – our route will now be quite rigid, as neural circuits, once established, tend to become self-sustaining. Because our neuroplasticity can give rise to both mental flexibility and mental rigidity, we tend to become self-sustaining. Because our neuroplasticity can give rise to both mental flexibility and mental rigidity, we tend to underestimate our own potential for flexibility, which most of us only experience in flashes.⁵⁴¹

Thus the longer that lawyers have practiced in the traditional analytical paradigm, the more “stuck” they may be and the less likely they may be to access their innovative intelligence.

The law is not the only profession to experience this potential hampering. Experts in most fields tend to find themselves stuck within perceived limits.⁵⁴² Laypeople do not find themselves stuck in the same way. A non-expert in any field, has a greater ability to be open-minded about the subject-matter to which they are not fully trained. The problem, however, is that, in order to resolve complex problems, the expertise is required simultaneously with the open-mindedness.

⁵⁴⁰ Norman Doige, *The Brain that Changes Itself* (New York: Viking Press, 2007) at 242-243.

⁵⁴¹ Weiss & Legrand, *supra* note 334 at 52.

⁵⁴² *Innovative Thinking*, *supra* note 465 at x.

There is a fear of creativity in the legal world.⁵⁴³ Despite this fear or hesitation, dispute resolution theorists have long called out for lawyers to be more creative. What they yearned for, and what continues to be needed, is indeed innovation and not mere creativity. Carrie Menkel-Meadow describes the creativity required of the legal problem-solver, a theme she explores in much of her writing on dispute resolution.⁵⁴⁴ For her, the legal problem-solver is one who knows how to “think outside the box”.⁵⁴⁵ Weiss and Legrand explain, “A fundamental error in innovative thinking over the past 40 years has been the attempt to promote creative processes that require totally different thinking approaches from the dominant analytical thinking process”.⁵⁴⁶ Innovative thinking need not be described as vastly different. Just as thinking of CL as a completely different approach to traditional family law created fear and resistance, so too does thinking of innovative thinking as vastly different from analytical thinking. Beyond thinking outside the box, the innovative lawyer must understand the box within which the dispute is situated to be able to decide when and how to go beyond that box. Since decisions require adept analytical, emotional and innovative intelligences.

In the case of CL, law remains an ever-present backdrop that cannot be ignored. However, the legal backdrop need not limit the innovation that can take place. To help clients find appropriate solutions, CL lawyers must have the capacity to be innovative through innovative intelligence. Once again, Shields’ research is informative here. If CL

⁵⁴³ Menkel-Meadow, *Is Creativity Possible?*, *supra* note 341.

⁵⁴⁴ See, for example, Menkel-Meadow, *Lawyer as Problem Solver*, *supra* note 234.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ Weiss & Legrand, *supra* note 334 at 66.

lawyers already practise under a philosophical map consistent with CL before training as Shields' research suggests, the same may be true for their innovative capacity. Perhaps CL lawyers possess a more developed innovative intelligence.

Innovative intelligence allows individuals to gain insight into existing or potential problems, fully understanding them before discovering a range of solutions and suggesting the most optimal solution to complex problems within given parameters. This propensity is immensely helpful for CL lawyers to possess. The capacity of clients to possess innovative intelligence is also a tremendous asset, but client innovations risk resistance from lawyers who retain a purely analytical mindset. Thus, this research focuses on the lawyers in CL and their role in innovation.

Reputation and Practice Groups

Chapter IV offered an outline of the importance of communities of practice in CL. Through such communities, cooperation is encouraged and a collaborative work environment is retained. Similarly, Weiss and Legrand state, "an organizational culture either enables or prevents innovation".⁵⁴⁷ They explain, "Some of the main cultural drivers of innovation are trust, response to risk taking, communication, and openness".⁵⁴⁸ Through social gatherings, conferences and meetings, CL communities attempt to build such trust, communication and openness.

⁵⁴⁷ Weiss and Legrand, *supra* note 334 at 171.

⁵⁴⁸ *Ibid.*

Organizational culture is relevant in CL because of the extent of collaboration required. Edgar Schein explains that a group's culture is comparable to an individual's personality.⁵⁴⁹ Indeed, it can be said that CL groups have their own culture. As Schein explains,

If there is a strong socialization during the education and training period and if the beliefs and values learned during this time remain stable as taken-for-granted assumptions even though the person may not be in a group of occupational peers, then clearly those occupations have cultures.⁵⁵⁰

What better way to describe the goals of the progression from training to practice in CL? The CL training is meant to be a kind of socialization and the intention is for the espoused values to continue through to practice.

West explains that, "Organizations create an ethos or atmosphere within which creativity is either nurtured and blooms in innovation or is starved of support".⁵⁵¹ CL has the potential to nurture creativity and innovation through its very foundations in communication, conciliation and collaboration. By supporting these foundations, the CL practice groups promote a culture of innovation. Continuing education should focus on increasing the innovative potential of CL group members and supporting innovations as they develop.

⁵⁴⁹ Edgar Schein, *Organizational Culture and Leadership* (San Francisco: Jossey-Bass, 2010).

⁵⁵⁰ *Ibid* at 21.

⁵⁵¹ Michael A. West, "Innovation Implementation in Work Teams", in Paulus and Nijstad (Eds), *Group Creativity*, *supra* note 395 at 256.

Disqualification and its Impact on Innovation

The Disqualification Agreement (DA), which limits representation to settlement and bars lawyers from litigation, is a central feature of CL. The DA certainly has an impact on theorizing about innovation. The question remains, however, whether that impact is positive or negative. Previous research has yet to suggest a definite answer. As explained in Chapter VI, both the innovation process and CL process begin with a stage of setting the framework. Part of this stage is the setting of boundaries around which innovation can take place. Located within the CL participation agreement, the DA is indeed one such boundary. Since boundary setting is applicable and important in innovation, the presence of the DA does not in and of itself preclude innovation. After all, it is a boundary.

Although boundaries in and of themselves do not inhibit innovation, the effects of the operation of the DA, may strain the potential for innovation. Weiss and Legrand depict three scenarios, which have the effect of eclipsing innovative intelligence.⁵⁵² They explain these by analogizing a lunar eclipse in which the moon still exists but is obscured to the situation where another intelligence obscures innovative intelligence. In these cases, innovation remains accessible, at least theoretically, but becomes more difficult to utilize. This Chapter will examine how and when the DA may, in such a way, reveal or obscure innovation.

⁵⁵² Weiss and Legrand, *supra* note 334 at 47; The three scenarios are: “The School System Made Me Do It”, “The Analytical Intelligence Paradox”, and “Impact of High Stress Environments”. Each of these have been and will continue to be discussed throughout the remainder of this study.

Disqualification's Potential to Support Innovation

(a) Remaining outside the litigation realm

If innovation is to occur in CL, parties and lawyers cannot be stuck on the analytical legal model. As discussed in Chapter VI, one goal of the DA is to escape the forceful constraints of the legal model. In so doing, CL attempts to escape an analytical framework, allowing for innovation. If the default process is litigation, the default frame is analytical. The DA ensures that default no longer exists, or at least is impracticable.

Moreover, the CL process has followed the advice of Weiss and Legrand by repeatedly “anchoring” the alternative system. Several features of the collaborative process serve to anchor a culture of innovation. The DA is indeed one such anchor. The DA, in creating a system completely apart from litigation forces lawyers to reorient themselves to an innovative approach. Indeed, as seen in Chapter VI, this is one defence for the use of the DA.

(b) Helping lawyers embrace an innovative approach

In addition to helping to remain outside the litigation realm, the DA helps lawyers to accept a more innovative approach. Fear of creativity has been one challenge that law has encountered which has kept lawyers in an analytical framework. The reality, as explained in the previous Chapter, is that lawyers are, often by propensity and training, analytical by nature. An effective way to encourage analytical individuals to be innovative is to provide them with a framework in which to innovate. CL is such a framework. The DA allows that framework to take shape by providing an analytical method to employ the

innovative process with the DA as a control mechanism. Kahane explains that, “In order to solve tough problems, we need more than shared new ideas. We also need shared commitment. We need a sense of the whole and what it demands of us”.⁵⁵³ The DA has the potential to impute both the shared commitment and sense of what the process demands of participants (settlement). Lawyers need not fear stepping into the world of creativity and innovation because the parameters of disqualification protect them and their clients through such a shared commitment. Thus, in keeping CL outside of the litigation system and in constraining lawyers within the innovative model, the DA has the potential to encourage innovation.

Disqualification’s Potential to Hinder Innovation

While the above aspects of the DA support innovation, others have the potential to make innovation more difficult. Specifically, innovation may be inhibited by the following factors: the heightened stress imposed on the CL process because of the DA, the fact that the DA is an obsolete assumption, and the unnecessary rigidity imposed by the DA. Each of these issues will now be addressed in sequence.

(a) The imposition of added stress

Stress, and negative stress in particular, is a common problem faced by lawyers, today. Indeed, stress is so prevalent in lawyers that Amiram Elwork wrote a book on the subject, describing why lawyers suffer from negative stress at a disproportionate rate compared to

⁵⁵³ Kahane, *supra* note 368 at 103.

the general population and offers strategies for managing stress.⁵⁵⁴ Elwork suggests that excessive time pressure, long hours, lack of family time and economics all contribute to this disproportionality.⁵⁵⁵ In addition to causing significant personal trauma, this stress obscures access to innovative intelligence.⁵⁵⁶ Excess stress indeed shuts down the mind.⁵⁵⁷ Under stress, people resort to their dominant thinking process, for lawyers, analytical thought.

Resorting to analytical intelligence occurs because of the perceived lack of time to be innovative. Clients demand swift responses and innovation is rarely a swift process. Innovation has the potential to give the optimal results but time must be taken to go through the innovative thinking process outlined in Chapter VI. The rush to achieve resolution may explain why, even when departing from the traditional paradigm, results crafted under ADR mechanisms look a lot like those results gleaned through adjudication. A swift manageable result is sought rather than an innovative long-term result. The limbic system of the brain which triggers the “fight or flight” response is triggered by stress and a resort to what is deemed the “safe route” is taken. Part of the reason for this rush is the expense of paying lawyers hourly. As the bills add up, clients put pressure on their lawyers to settle the matter quickly. The billable hour thus impedes innovation by imputing added stress to settle matters quickly.

⁵⁵⁴ Amiram Elwork, *Stress Management for Lawyers, 3rd Edition* (North Wales, PA: Vorkell Group, 2007).

⁵⁵⁵ *Ibid* at 19-24.

⁵⁵⁶ Weiss & Legrand, *supra* note 334 at 54.

⁵⁵⁷ Jennifer James, *Thinking in the Future Tense: A Workout for the Mind* (New York: Touchstone, 1996) at 176.

Even in environments of negative stress, innovation is possible. As Weiss and Legrand explain, “To access their innovative intelligence at any time, even while under negative stress, leaders must imprint the innovative thinking process at the limbic level of the brain. Otherwise, they might understand the logic of a situation but be unable to manage it innovatively”.⁵⁵⁸ Indeed, the same applies in CL. The setting of CL, aimed to reduce client stress, does have a calming effect on lawyers. As explained in Chapter IV, and as will be described from the interviews in this research, lawyers often adopt a CL practice to improve their professional lives. However, stress inevitably exists. CL files are often highly charged with emotion. The client service required in CL is correspondingly stressful and emotional. If lawyers are to be innovative in CL, they must be able to access their innovative intelligence while in this stressful environment.

The DA, however, imputes added stress on the CL environment. The need to settle or lose a file has a significant impact on both the lawyers and the other professionals at the table. The clients potentially feel such stress as well. In a stressful environment, innovation is more difficult and effort must be made to decrease the stress sufficiently to enable innovation. Removal of the DA as a necessary constraint may help to decrease stress in this way.

(b) Disqualification is an obsolete assumption

In addition to adding potential stress to the CL environment, disqualification can be characterized as an obsolete assumption. Weiss and Legrand poignantly define the

⁵⁵⁸ Weiss & Legrand, *supra* note 334 at 58.

parameters between an acceptable boundary and an obsolete assumption in the context of innovation,

The issue with boundaries is that there is no obvious visible difference between a good boundary that really defines your “sandbox” and an old, obsolete paradigm or assumption. At times, bad assumptions are so strongly held that they become automatic and unwritten boundaries for a team.⁵⁵⁹

The DA may indeed be such an obsolete assumption. Although required at the start of CL to contain lawyers, it may no longer be required in every case. Barker explains the problem of “paradigm paralysis”,

Paradigm paralysis has profound implications for innovation within an organization. Why is it that internal innovation is so difficult to stimulate? Because the paradigm is already in place. So, until we can change that attitude and stimulate people to be more flexible and break out of their paradigms to search for alternatives, we will continue to find the great new ideas, on the whole, being discovered outside the prevailing institutions.⁵⁶⁰

Indeed, as discussed previously in this dissertation, CL in its infancy was a paradigm shift for lawyers. Disqualification was one feature that defined this new paradigm. The notion that disqualification is the only feature of importance in CL trivializes the process. CL is an innovative process. CL has the potential to create innovative results. The empirical portion of this study will examine, in part, whether lawyers are capable of innovation without tying their hands through the operation of the DA. These two poles of the DA as helpful to innovation and the DA as harmful to innovation will be further explored in Part C of this research.

⁵⁵⁹ Weiss and Legrand, *supra* note 334 at 90.

⁵⁶⁰ Joel A. Barker, *Future Edge: Discovering the New Paradigms of Success*, (New York: William Morrow and Co., 1992) at 156.

Recall that disqualification does not prevent the clients from going to court. It merely prevents the lawyers from attending court on the clients' behalf. Clients can leave the CL process and embark on a court process either self-represented or with other counsel. The reality remains, though, that most cases settle. Some need a single determination to be made in court. The constraint on the CL process for a determination on a point of law or fact is unnecessary. While the litigious frame is to be avoided for all the reasons outlined in Chapter II, there is no reason why a dispute over a discreet fact could not be settled through a case conference, arbitration or evaluative mediation. An entire bar of these options has the potential to quash innovative outcomes that could have been devised but for a small factual determination that is in dispute. These issues were discussed with the participants in the research and their viewpoints will be shared in the results section of this dissertation.

(c) The imposition of unnecessary rigidity

Perhaps because the DA is an obsolete assumption, it imposes an unnecessary rigidity on the process of CL. Morris Stein explained, "A society fosters creativity to the extent that it encourages openness to internal and external experiences...Societies that are full of 'don'ts' and 'shouldn'ts' and 'mustn'ts' restrict freedom of inquiry and autonomy".⁵⁶¹ Indeed a blanket requirement for lawyer disqualification imposes such rigidity.

⁵⁶¹ Stein, *supra* note 495 at 130.

Through such rigidity, CL has separated itself from the legal system in which it continues to reside. It creates an “us versus them” mentality in lawyers and mediators who do and do not practise CL. Such divisiveness does not aid in implementing innovation more broadly where required.

In addition, while the DA helps lawyers embrace an innovative approach, the thought that lawyers could not innovate while the option of court still looms is simplistic. Can it really be said that such an external measure is required to create internal change in lawyers? As explained in the previous section of this Chapter, lawyers likely possess some propensity to innovate and can be trained to optimize this proclivity. Other boundaries may be able to be set which serve the same purpose as the DA but soften the rigidity of a complete bar from litigation. Other options will be explored through the interviews and analysis in the remainder of this dissertation.

PART C – INNOVATION AND COLLABORATIVE LAW – RESEARCH AND RESULTS

“The Collaborative movement is worth studying as a professional movement with a life cycle including formation, experimentation, consolidation, maturation, and institutionalization. It has a founding story, heroes, villains, internal controversies and a political life.”

- John Lande, “An Empirical Analysis of Collaborative Practice” (2011) 49 *Family Court Review* 257 at 279.

Chapter IX. Research Methodology

This study has thus far rooted itself in the literature of both Collaborative Law (CL) and innovation. It has begun the discussion of how CL acts as a fitting case study of innovation in legal process. Part A provided a detailed account of the CL process, explaining its history, characteristics, benefits and drawbacks. Part B then examined innovation and the application of innovation principles to CL. It explained that not all legal problems require innovation, but that family law problems often have the components that define them as complex. It is such complex problems that indeed merit and require innovation. The process of innovation is indeed applied in CL, although this synergy has not yet been made in the literature. This research suggests that indeed CL is an innovative process, which applies innovation in resolving complex disputes. The previous Part concluded by querying whether two integral elements of CL, lawyers and disqualification, help or hinder innovation. This Part, Part C, will move ahead with the empirical portion of the study, capturing data from lawyers that bears on innovation in CL. This Chapter will provide an accounting of the methodology of the study. The subsequent Chapters will provide the results and analysis of the research and will suggest implications and directions for future research.

The purpose of this Chapter is to outline the philosophical and practical reasons for which the researcher chose to conduct the study in the way it was conducted. A detailed description of the method will be provided, followed by an examination of the particular mechanics of the current study, including participant selection, interviews, observations

and data generation and analysis. This Chapter will also reflect on some of the challenges with this form of inquiry and will suggest strategies used to mitigate such constraints.

The theoretical frame of a research study, in addition to the particular research questions, will imply the appropriate methodology to be used. Bogden and Biklen suggest that qualitative methodology is appropriate where the researcher inquires about how things work or what people think.⁵⁶² As they explain, “if you want to understand the way people think about their world and how those definitions are formed, you need to get close to them, to hear them talk and to observe them in their day-to-day lives”.⁵⁶³ Because this research is exploratory in nature and an in-depth knowledge about the subjective area of lawyer experience of CL was sought, a qualitative methodology, using various methods common to ethnography, the study of a culture, was deemed appropriate. The reason this methodology was chosen is that this study explores a culture, the culture of CL.

CL can be defined as a culture by virtue of its close-knit community, widely held ethic and set norms. The researcher became immersed in the culture in order to understand and describe the process of CL. As a trained lawyer and mediator and teacher of legal negotiation and mediation, the researcher stood in proximity to those being researched. She was therefore not a complete outsider, a fact that will be explored further in this Chapter. Because this study is so embedded in the culture of CL, ethnography as a qualitative methodology was determined as appropriate. Ethnography, the charting of

⁵⁶² Robert C. Bogden & Sari K. Biklen, *Qualitative Research for Education: An Introduction to Theories and Methods (4th Ed.)* (New York: Pearson Education Group, 2003).

⁵⁶³ *Ibid* at 31.

human behaviour, aims to learn and understand cultural phenomena, which reflect the knowledge that guides the actions of a cultural group.⁵⁶⁴ Ayers explains that, “there is not a single definition of ethnographic research that is wholly illuminating or fully satisfactory...there is, however, an ethnographic sensibility, or body of work, and a respectable tradition upon which to draw and with which to interact”.⁵⁶⁵ This dissertation seeks such an inquiry. CL is about people. It is about the clients, the lawyers and the additional professionals. It is about the way all of these people interact with and amongst each other. Because of the importance of communication and collaboration in CL, the only methodology that can be used to adequately study the practice is ethnography.

The methods utilized in this research are hence characteristic of ethnographic research. Berreman suggests that research methods of ethnography, primarily participant observation and ethnographic interviewing, enlighten the researcher about the “behaviour and the beliefs, understandings, attitudes, and values they imply, of a group of interacting people. Thus, an ethnography is a description of the way of life, or culture, of a society”.⁵⁶⁶ In order to gather the appropriate data from a group in its natural context, the ethnographer observes, participates and interviews. This study indeed adopts participant observation and interviews as research methods to describe the way of life that is CL.

⁵⁶⁴ Julian M. Murchison, *Ethnography Essentials: Designing, Conducting, and Presenting your Research* (San Francisco: Jossey-Bass, 2010).

⁵⁶⁵ William Ayers, *The Good Preschool Teacher* (New York: Teacher’s College Press, 1989) at 11

⁵⁶⁶ Gerrald E. Berreman “Ethnography: Method and Product”. In V.K. Svivastava (Ed.) *Methodology and Fieldwork* (Oxford University Press: Oxford, 1968) at 157.

Why use both interview and observation? Triangulation is frequently used to strengthen research through combining multiple methods, measures, researchers, theories and perspectives. Denzin identified four types of triangulation: (1) data triangulation; (2) investigator triangulation; (3) theory triangulation; and (4) methodological triangulation.⁵⁶⁷ This study utilized methodological triangulation, using multiple research methods to test the phenomenon of interest. Although the researcher contemplated the use of data triangulation, through the use of multiple perspectives on the research problem, the perspectives of participants other than lawyers in the CL process was determined not to be of sufficient utility to expand to such an extent the scope of the research.

The two methodologies chosen for this study, key informant interviews and participant observation, are characteristic of ethnographic research and combine to give a more complete picture of the cultural phenomenon being explored. Kritzer explains that participant observation elicits more nuanced data than the edited text of an interview, which tends to deliver a relatively unambiguous picture.⁵⁶⁸ Interviews, however, have the irreplaceable benefit of determining thoughts, feelings and beliefs; characteristics that, by nature, are not observable. The combination of these methods was deemed most appropriate.

⁵⁶⁷ Norman K. Denzin, *The Research Act: A Theoretical Introduction to Sociological Methods* (New York, NY: McGraw Hill, 1978).

⁵⁶⁸ Herbert M. Kritzer, "Stories from the field: Collecting data outside over there". In J. Starr & M. Goodale (Eds.), *Practicing Ethnography in Law: New dialogues, enduring methods*. (New York: Palgrave MacMillan, 2002) at 153.

Methodology

In this section, each method of study will be explained, including its corresponding benefits and challenges.

Participant observation

Observation was selected as an integral component of this research because the process generates more detailed data than does interviews alone. The use of and factors affecting innovation in CL, yielded different types of results by combining observation and interviews than would have been available from interviews alone. As stated by Kritzer, “...for understanding the nature of a social or political or legal process, ultimately, nothing is going to replace actually seeing the process in operation”.⁵⁶⁹ The researcher was interested in what lawyers had to say about their experiences in CL and the dynamics between lawyers but also on the observed behaviours of lawyers working within the CL process. For reasons of confidentiality, the researcher was not able to gain access to actual CL negotiations, but was able to observe collaborative lawyers in other settings, such as conferences, practice group meetings, training sessions and social gatherings. Another benefit of such observational settings was the potential to observe non-lawyers who also attended the gatherings. It is only through such observation that their viewpoints are shared in this research.

The type of observation in this study is necessarily participatory. As noted, the mere presence of the researcher has the potential to impact the data. As Spradley explains,

⁵⁶⁹ *Ibid.* at 152.

“The participant observer comes to a social situation with two purposes: (1) to engage in activities appropriate to the situation and (2) to observe the activities, people, and physical aspects of the situation”.⁵⁷⁰ Through the researcher’s attendance at various CL conferences, training sessions, practice group meetings and social gatherings, it was possible to become immersed in the culture that is CL: a culture that stands in sharp contrast to traditional legal mores.

A peripheral membership role in the International Academy of Collaborative Professionals (IACP) was required in order to gain access to the variety of trainings, conferences and meetings essential to this research. This membership was peripheral because the researcher never held herself out to be a CL lawyer who conducts her own cases. Rather, she was always described as a researcher. Adler and Adler describe that peripheral membership still implies an insider’s perspective because of the direct and first-hand experience achieved, but maintaining a certain level of detachment.⁵⁷¹ Some degree of detachment was inevitable, despite the researcher’s participation, since a collaborative practice was never maintained. Despite being a practicing lawyer, trained in CL, the researcher had never participated as a lawyer in a CL file. Detachment is necessary as Hammersling and Atkinson explain, “there must always remain some part held back, some social and intellectual ‘distance’. For it is in the ‘space’ created by the

⁵⁷⁰ James P. Spradley, *Participant Observation* (Toronto: Nelson Thomson Learning Inc., 1980) at 54.

⁵⁷¹ Peter A. Adler & Patricia Adler, “Membership Roles in Field Research”. In *Qualitative Methods, Volume 6* (Beverly Hills: Sage Publications, 1987).

distance that the analytic work of the ethnographer gets done”⁵⁷² and thus, membership in the IACP was not deemed to affect the required intellectual distance. The potential concern, however, was not ignored or underestimated.

In order to impact the objectivity of the research situation as little as possible, it was necessary to remain a passive participant, being present but not participating or interacting with others to any great extent.⁵⁷³ Attendance was limited to required presentation with no input into discussions where participation was as an observer only. It is acknowledged and accepted, thus, that the author, as a participant observer, was inevitably impacting the phenomena being observed. An outsider entering an “in-group” would have that impact whether actively engaging with the group or not. Since the researcher was indeed trained in CL and known quite well by some members of the CL communities, this impact was likely diminished.

While the presence of the researcher likely had little influence on the results of the present research, the researcher recognizes the potential impact of the Hawthorne Effect⁵⁷⁴ on study results. Since CL lawyers are likely enthusiastic proponents of CL, the information supplied may be swayed by that information which the participants wanted

⁵⁷² Martyn Hammersly & Paul Atkinson, *Ethnography: Principles in Practice* (London: Routledge, 1983) at 102.

⁵⁷³ See Spradley, *supra* note 570 at 59.

⁵⁷⁴ The Hawthorne Effect is a research phenomenon in which research subjects change their behaviour, simply because they are being studied. See, for example, Rob McCarney, James Warner, Steve Iliffe, Robb van Haselen, Mark Griffin & Peter Fisher, “The Hawthorne Effect: a randomized, controlled trial” (2007) 7 *BMC Medical Research Methodology* 30.

the researcher to report of that which the participants thought the researcher wanted to hear.

Observation as a tool for data generation comes with inherent limitations beyond those associated with researcher participation. Specifically, observation necessarily takes a long time and forums for observation are difficult to procure. Particularly in cases of sensitive and personal information, such as families undergoing divorce as in this study, practical roadblocks may prevent such research. Sarat and Felstiner, as they planned their research on divorce lawyers and their clients, were not at all sure that they would be able to gain access that the research required.⁵⁷⁵ As will be explained in the subsequent section devoted to the specific method of the observational research, the researcher hoped to observe CL negotiations as they transpired. However, this was deemed to be impracticable because of lawyer concerns of confidentiality and authenticity of the process. Additionally, as noted by Kritzer, the data sample is necessarily limited owing to the amount of time required to conduct fulsome observational studies.⁵⁷⁶ In this study, five opportunities for observation were utilized. While more such opportunities may have yielded more results, the researcher determined that, once saturation was achieved, more results would not be different results. The researcher's attendance at several multi-day trainings and conferences meant that a solid and satisfactorily robust amount of time was spent observing the CL culture. This was assessed once novel themes no longer emerged through observation.

⁵⁷⁵ David L. Chambers, "25 Divorce Attorneys and 40 Clients in Two Not So Big but Not So Small Cities in Massachusetts and California: An Appreciation" (1997) 22 *Law & Social Inquiry* 209 at 214-219

⁵⁷⁶ Kritzer, *supra* note 568 at 144.

Qualitative interview

The second phase of this research entailed interviewing key informants in the CL process. The methodology of key informant interviews utilizes information available from individuals who possess special knowledge and who are willing to share this knowledge with the researcher.⁵⁷⁷ Qualitative interviews have been described as conversations with a purpose.⁵⁷⁸ It is through interviewing that the researcher can determine the participants' view of the phenomenon under investigation. Atkinson and Silverman explain that interviews serve to "broaden and deepen the concept of knowledge and its sources, incorporating the subjects' experiential truths into the process of the creation of knowledge".⁵⁷⁹ Kvale suggests that the interview is an "inter-view", an exchange of views between people on a common subject and that these people travel together on a conversational journey.⁵⁸⁰ Further, Gubrium and Holstein suggest that interviews are "the procedural scaffolding of a broad, culturally productive enterprise...The interview's ubiquity serves to communicatively ramify the very culture it ostensibly only inquires about".⁵⁸¹ This research seeks to gather information from lawyers immersed in the world of CL. In order to learn from them, the only way is to ask.

⁵⁷⁷ Judith P. Goetz & Margaret D. LeCompte, *Ethnography and Qualitative Design in Educational Research* (Orlando, FL: Academic Press, 1984).

⁵⁷⁸ Robert L. Kahn & Charles F. Cannell, *The Dynamics of Interviewing: Theory, Technique and Cases* (Michigan: Wiley, 1957).

⁵⁷⁹ Paul Atkinson & David Silverman, "Kundera's immortality: The interview society and the invention of self" (1997) 3 *Qualitative Inquiry* 304.

⁵⁸⁰ Steinar Kvale, *Interviews: An introduction to qualitative research interviewing* (Thousand Oaks, CA: Sage Publications, 1996).

⁵⁸¹ Jaber F. Gubrium & James A. Holstein (Eds.) *Handbook of Interview Research: Context and method* (Thousand Oaks, CA: Sage Publications, 2002) at 30.

Interviews cannot be seen as passive interactions with subjects. Meaning-making occurs through interviews that involve both the researcher and the respondent. As stated by Holstein and Gubrium,

Both parties to the interview are necessarily and unavoidably active. Each is involved in meaning-making work. Meaning is not merely elicited by apt questioning nor simply transported through respondent replies; it is actively and communicatively assembled in the interview encounter. Respondents are not so much repositories of knowledge-treasuries of information awaiting excavation- as they are constructors of knowledge in collaboration with interviewers.⁵⁸²

In depth interview techniques described by John Johnson were utilized in the present study.⁵⁸³ The researcher was also informed by the techniques recommended by Rubin and Rubin in *Qualitative Interviewing: The Art of Hearing Data*.⁵⁸⁴ Semi-structured interviews were utilized to gather primarily qualitative information from lawyers regarding their perceptions of both the practice of collaborative and conventional family law in an attempt to generate data on innovative outcomes and the innovative process in CL. The semi-structured interviews were organized as interactive conversations and utilized a standardized format from which extrapolations were made based on the individual interview. Open-ended questions were utilized to enable the participants to expand on answers and to facilitate follow-up questions.

⁵⁸² James A. Holstein & Jaber F. Gubrium, *The Active Interview* (Thousand Oaks, CA: Sage Publications, 1995) at 4.

⁵⁸³ John M. Johnson, "In-Depth Interviewing" in J.F.Gubrium & J.A. Holstein (Eds.) *Handbook of Interviewing* (Thousand Oaks, CA: Sage Publication, 2001).

⁵⁸⁴ Herbert J. Rubin & Irene S. Rubin, *Qualitative Interviewing: The Art of Hearing Data*, 3rd Ed. (Sage Publishing: Los Angeles, CA, 2005).

Interview methodology is not without limitation.⁵⁸⁵ Studies of CL possess inherent methodological challenges characteristic of research of any dispute resolution mechanism. First, there may exist a sample selection bias. It is near impossible to randomly select participants for the research. Since specific research sites were selected, there was a small pool from which to pull potential participants. This pool was then decreased by the practical considerations of convenience and interest in participating within the time frame in which the researcher was available.

Additional limitations surround the various potential biases inherent in interview research. For example, there is the potential that CL lawyers may want to provide responses that create a positive view of the CL process. This research has attempted to curb this “social desirability bias” by combining interviews with participant observation methodology. In entering and engaging in the CL observational settings, lawyers are less likely to create a non-genuine atmosphere. Furthermore, interviews are inherently biased because of the meaning-making injected by the interviewer. As stated by Holstein and Gubrium,

...the active approach to interviewing might seem to invite unacceptable forms of bias...Bias is a meaningful concept only if the subject is seen to possess a preformed, pure informational commodity that the interview process might somehow contaminate. But if interview responses are seen as products of interpretive practice, they are neither preformed, nor ever pure.⁵⁸⁶

⁵⁸⁵ Charles L. Briggs, *Learning How to Ask: A Sociolinguistic Appraisal of the Role of the Interview in Social Science Research* (New York: Cambridge University Press, 1986); Jean M. Converse & Howard Schuman, *Conversations at Random: Survey Research as Interviewers See It* (New York: John Wiley and Sons, 1974).

⁵⁸⁶ Holstein & Gubrium, *supra* note 582 at 18.

As interviews were conducted on a one-on-one basis, some challenges of interviews were abated while others created. On one hand, participants in individual interviews are less likely to withhold or alter information as they might if another participant were present.⁵⁸⁷ On the other hand, Fielding notes that information may be embellished in an individual interview if the participant believes that it improved his or her self-image or if they wish to impress the interviewer.⁵⁸⁸ As will be seen in the Results section, there were a broad range of responses provided. A range of results was found on the variety of topics discussed in interviews. This variety suggests that a common bias was not shared by all participants. The potential for research biases cannot, however, be ignored.

Observation Phase: Method

Research settings

At various points during the 21-month span of the data collection portion of this research, from September 2012 to June 2014, the researcher attended gatherings of collaborative practitioners throughout Canada and in the United States. Through these gatherings, which were predominantly in the nature of practice group meetings and conferences, the researcher was able to ascertain information of the culture of the practitioners and practice groups and the general views of CL that the individuals and groups possessed.

⁵⁸⁷ Ben K. Beitin, "Interview and Sampling: How Many and Whom" in J.F. Gubrium, J.A. Holstein, A.B. Marvasti & K.D. McKinney (Eds) *The Sage Handbook of Interview Research: The Complexity of the Craft, 2nd edition* (Thousand Oaks, CA: Sage Publications Inc., 2012) at 244.

⁵⁸⁸ Nigel Fielding, "Varieties of research interviews" (1994) 1 *Nurse Researcher* 4.

It was in these types of meetings, social gatherings and conferences that the researcher initially inquired as to whether an observation phase would be practicable. The original research plan entailed being present during collaborative negotiations to determine the ways in which the innovative process was helped or hindered by the presence of lawyers and the disqualification provision. Through these discussions, the researcher's suspicions were confirmed. Gaining access to these negotiations for the purpose of research observation would likely be impossible given the important guarantees of confidentiality that are so central to the process. Additionally, lawyers expressed concerns with their ability to represent their clients adequately while being observed in such a way. Thus, the observation phase of the research was limited to observation of collaborative lawyers and collaborative communities at gatherings such as conferences, practice group meetings and social events. These forums provided useful insight into the inner workings of collaborative groups and communities. They also aided in gaining an understanding of the concerns of different groups and individuals. Through these interactions, the researcher was also able to observe and interact with non-lawyer CL experts such as financial and mental health professionals. As these professionals were not interviewed as part of this research, their perspectives could only be gleaned via observation.

Figure 5: Research Observation Sites

Research Site	Date	Nature of Observational Setting
IACP Institute Phoenix, Arizona	March 1-4, 2012	International gathering of CL professionals for the purpose of continuing education and training.
Practice Group Meeting, Simcoe County, Ontario	April, 2012	Gathering of CL professionals from Simcoe County, Ontario.
OCLF Conference	September 27-29, 2012	Attended and presented at province-wide CL conference.
IACP Conference, Chicago, Illinois	October 18-21, 2012	International conference of CL professionals featuring social and educational sessions.
Practice Group Meeting, Halifax, Nova Scotia	October, 2013	Gathering of CL professionals from Halifax, Nova Scotia.

Data analysis

The researcher took detailed field notes at each research setting. Such field notes included important statements made by those being observed as well as general observations about morale and rapport among professionals.

At conferences, where a choice of sessions was available, the researcher selected those sessions, which held the most bearing on the research topic. For example, at the IACP Institute in Phoenix, Arizona, the researcher attended a two day session conducted by Canadian scholar and researcher, Julie Macfarlane and Vancouver-based practitioner Nancy Cameron, QC. This session was entitled “Effective Advocacy in Collaborative Practice”. It provided the researcher ample opportunity to observe the lawyer-participants in both simulated activities as well as in topical discussions. The opportunity to communicate with participants at breaks provided additional time to question any findings that were noted during the sessions.

At social gatherings, the researcher observed as many attendees as possible. She explained her role as researcher if directly asked but attempted to stay on the sidelines and observe interaction where appropriate. Often the best way to observe was to be engaged in a group conversation with several participants, and where this was the case, the researcher attempted to have as little active involvement as was necessary to be included in that group.

At the end of each observational experience, or at the end of each day in the case of multi-day conferences, the researcher reviewed her field notes and made any amendments, additions or notations that were necessary. Emergent themes were noted in the margins so that they could be more easily accessed upon completion of the interview stage or when required. The researcher also noted any questions that arose that would be beneficial to ask participants in the interview phase of the research. In this way, the observational phase had the added benefit of helping to frame the interview phase without the need for a pilot set of interviews. Interactions at the research sites were not considered interviews for the purpose of the research, but were instead information gathering sessions conducted in advance of the research.

Interview Phase: Participants

Participants

The lawyers interviewed in this study were all residing and practising law in Canada. In order to get a cross-country examination, the researcher interviewed a total of 31 lawyers

in Nova Scotia, Ontario, and British Columbia. Specifically, interviews were conducted with lawyers who practise in the Greater Halifax/Dartmouth area (n=8; 4 female, 1 male), the Greater Toronto Area (n=14; 13 female, 1 male), Simcoe County (n=3; 0 female, 3 male) and the Greater Vancouver Area (n=9; 5 female, 4 male). Each of these represents approximately 13% of the respective CL communities, as evidenced by lawyers listed on the community websites. Of the lawyers in the sample, 22 were female and 9 male. This gender gap is indicative of fact that many more female lawyers practise CL. They had practised law for an average of 18.9 years and had been trained in CL between the years of 2000 and 2013.

The research sites for the study were selected in an attempt to give a representative sample of the country. They represent three large centres, one on the east coast, one on the west coast and one more centrally located as well as one small town. They also represent CL groups of different ages and stages. The characteristics of each group are detailed below.

Although effort was made to reflect representative participation, it is recognized that in selecting these specific research sites, there are many others whose viewpoints will not be present. Future research could examine the implications examined in this research throughout the country in various other sites. It is not anticipated that vastly different results will be found.

Practice groups

CL did not spread across Canadian provinces at an equivalent rate. Each practice area has a slightly different history. While a detailed accounting of each is not necessary, it is important to note the time at which CL began to spread in the specific research sites, as the age of the practice group has proven to be relevant to this research. Each practice group has its own distinct characteristics, which are important to note in order to understand the data comprehensively. This section will describe the distinct features of the Halifax, Toronto, Simcoe County and Vancouver practice groups in sequence.

Nova Scotia has a relatively young practice, beginning in 2006 with an initial training session for those seasoned practitioners who were interested in learning about CL. A number of participants in this study were among these early adopters. Multidisciplinary practice only recently came to the area, in May of 2013 when the practice group had expanded and sought training. The website of Collaborative Law Nova Scotia lists 37 lawyer members.⁵⁸⁹

In 2000, Chip Rose trained the first group of collaborative lawyers in Ontario.⁵⁹⁰ Collaborative Practice Toronto was established shortly thereafter. Their website lists 89 lawyer members.⁵⁹¹ The training required in Toronto is two days of Level I and three days of Level II collaborative training. The practice group in Toronto predominantly uses an interdisciplinary model, frequently incorporating whole teams in meetings.

⁵⁸⁹ www.collaborativefamilylawyers.ca

⁵⁹⁰ Shields, *On becoming a Collaborative Professional*, *supra* note 100.

⁵⁹¹ www.collaborativepracticetoronto.ca

The Toronto Group and the Simcoe County group are both members of the Ontario Collaborative Law Federation (OCLF), which was established in 2002. The OCLF is charged with producing CL documents and information for publicity and to organize conferences and continuing education programs. The connection is important because Simcoe County has adopted many of the features and training requirements of its closest neighbour, the Toronto group. Collaborative Practice Simcoe County's website lists 25 lawyer members.⁵⁹² The first CL training in Simcoe County took place in 2001 and the practice group was formed thereafter. The interdisciplinary model was adopted in 2005 and the practice group now includes Family Coaches (mental health professionals) and Financial Specialists. The Simcoe County group utilizes a variety of CL models, including the lawyer only model, as well as an interdisciplinary model.

Vancouver, British Columbia was the first CL group to be established in Canada, having been formed in 1999 by a small group of local lawyers and psychologists. Indeed, in the summer of 1999, the founder of CL, Stuart Webb, led the first North American CL training in Vancouver.⁵⁹³ Collaborative Divorce Vancouver was incorporated on August 28, 2002. Their website lists 74 lawyer members.⁵⁹⁴ Training currently required in Vancouver is a two or three-day mediation training in addition to a specified three-day CL training. The CL model utilized in Vancouver is predominantly a multidisciplinary, two coach model where clients meet with their own individual coaches on their own and

⁵⁹² www.collaborativepracticesimcoecounty.com

⁵⁹³ www.collaborativedivorcebc.com

⁵⁹⁴ *Ibid.*

then conduct negotiations in four-way meetings with their lawyers. Although a few financial specialists are part of the Vancouver practice group, “Vancouver Collaborative Divorce fosters a particularly strong collaborations between lawyers and family therapists”.⁵⁹⁵

Interview Phase: Method

Participant selection

The lawyers sampled in the study were identified from the websites of the various CL groups.⁵⁹⁶ Every lawyer listed on the websites of these groups was contacted by email and invited to participate. Informal discussions with several of these groups allowed the researcher to describe the research and answer any questions. A letter of introduction was sent by email to lawyers in the four research sites, namely, Halifax, Toronto, Simcoe County, and Vancouver. The invitation included a brief description of the research as well as an introduction to the researcher as a doctoral candidate. An example of the email solicitation can be found in Appendix C. In total, 225 lawyers were invited to participate in the study. Of these, 31 agreed to participate. Each participant committed to speaking with the researcher in a 45 minute confidential, audio-recorded interview. Although 45 minutes was the estimated length of interviews, actual interviews lasted between 14:13 and 56:34 minutes in length.

The researcher recognizes the issues that may arise due to the inability to use a random sample. Since participants who were interviewed self-selected to be part of this research,

⁵⁹⁵ *Ibid.*

⁵⁹⁶ *Supra* note 589, 591, 592, and 593.

they could have been a subset of particular promoters of the process. Upon consideration of this potential challenge, the researcher examined both the list of participants, as well as their interview data and determined that there was no single view expressed by all participants. As can be seen from the demographic data, the sample is quite widespread in terms of the amount of experience possessed by participants. Nevertheless, considerable effort is made throughout this study to avoid generalizing results to the entire population of collaborative lawyers.

Determining the ideal number of interviews to conduct was a challenge faced by the researcher. There remains little consensus on sample size and composition in qualitative interviews. As noted by Beitin, early qualitative research followed quantitative research in attempting to delineate numerical requirements for the selection of participants.⁵⁹⁷ While various studies have recommended ranges from two to 25 participants, theoretical saturation is now becoming the most common approach to sample size.⁵⁹⁸ As stated by Guest, Bunce and Johnson, “Saturation has, in fact, become the gold standard by which purposive sample sizes are determined”.⁵⁹⁹ It is noted, however, that saturation is itself a contested concept.⁶⁰⁰

⁵⁹⁷ Beitin, *supra* note 587 at 243.

⁵⁹⁸ *Ibid* at 244.

⁵⁹⁹ Greg Guest, Arwen Bunce, & Laura Johnson, “How many interviews are enough? An experiment with data saturation” (2006) 18 *Field Methods* 58 at 60.

⁶⁰⁰ See, for example, Kathy Charmaz, “Grounded Theory as an Emergent Method”. In S.N. Hesse-Biber & P. Leavy (Eds) *Handbook of Emergent Methods* (New York: The Guilford Press, 2008).

Figure 6: Demographic Data of Participants

Part. #	Site	Gender	Interview Length	Years in practice in Ontario	Year trained in CL
1	Simcoe County	M	50:38	11	2006
2	Simcoe County	M	23:59	22	2003
3	Simcoe County	M	23:14	5	2011
4	Halifax	F	14:13	13	2013
5	Halifax	F	39:16	11	2010
6	Halifax	F	19:08	13	2010
7	Halifax	F	47:08	5	2011
8	Halifax	M	38:27	29	2006
9	Toronto	F	52:58	20	2004
10	Toronto	F	31:27	11	2004
11	Toronto	F	25:05	15	2008
12	Toronto	F	39:46	35	2002
13	Toronto	F	56:29	22	2004
14	Toronto	F	47:53	33	2004
15	Toronto	M	31:35	20	2007
16	Toronto	F	46:20	24	2003
17	Toronto	F	29:35	31	2003
18	Toronto	F	55:38	31	2000
19	Toronto	F	49:08	26	2000
20	Toronto	F	49:29	22	2000
21	Toronto	F	56:34	25	2001
22	Toronto	F	43:00	24	2000
23	Vancouver	F	37:57	22	2002
24	Vancouver	M	16:58	34	2010
25	Vancouver	M	43:04	15	2010
26	Vancouver	M	24:12	1	2012
27	Vancouver	F	24:10	6	2010
28	Vancouver	F	21:19	13	2012
29	Vancouver	F	19:34	19	2004
30	Vancouver	F	42:43	14	2003
31	Vancouver	M	24:47	16	2008

Interview location

Studies involving interviews often only make reference to the setting in which the interview takes place as a footnote or parenthetical comment. Rarely is time spent

explaining why the location was chosen or what impact this choice has on the research findings.⁶⁰¹ Herzog argues that the location of an interview is not just a logistical tool but rather constitutes an integral part of the interview.⁶⁰² She states, "...interview location plays a role in constructing reality, serving simultaneously as both cultural product and producer...It should be examined within the social context of the study being conducted and analyzed as an integral part of the interpretation of the findings."⁶⁰³ In the case of this research, much time was spent debating the location in which to hold interviews. This section attempts to explain this choice and the impact this choice likely had on the research.

In this respect, the following guidelines offered by Seidman were useful,

The place of the interview should be convenient to the participant, private, yet if at all possible, familiar to him or her. It should be one in which the participant feels comfortable and secure. A public space such as a cafeteria or coffee shop may seem convenient, but the noise, lack of privacy, and the likelihood of the interviews becoming an event for others to comment upon undermine the effectiveness of such a place for interviews.⁶⁰⁴

Gillham similarly notes that people talk more freely "on their own ground" but cautions about distractions and constraints of daily surroundings.⁶⁰⁵ Adler and Adler suggest that

⁶⁰¹ Hanna Herzog, "Interview Location and its Social Meaning" in J.F. Gubrium, J.A. Holstein, A.B. Marvasti & K.D. McKinney (Eds) *The Sage Handbook of Interview Research: The Complexity of the Craft, 2nd edition* (Thousand Oaks, CA: Sage Publications Inc., 2012) at 209.

⁶⁰² *Ibid.*

⁶⁰³ *Ibid.* at 207.

⁶⁰⁴ Irving E. Seidman, *Interviewing as Qualitative Research* (New York, NY: Teachers College Press, 1991).

⁶⁰⁵ Bill Gillham, *The Research Interview* (London: Continuum, 2000).

the subject of the interview should be the determining factor in terms of location⁶⁰⁶ which is why the subject of this research and purpose of its interviews, namely the work that collaborative lawyers engage in, was ideally suited in the lawyers' offices. Such a location provided convenience and confidence for the participants, along with a private setting in which to gather the most reliable data available. Often because interviews took place at the lawyers' offices, participants found themselves remembering particular situations in which they were engaged in collaborative meetings or client interviews, which shed light on the practice in which they engage. Some participants even took the opportunity to refresh their memories by checking their desktop computers for files.

In two instances, interviews had to be held in nearby cafes. The reason for this change in location was based on particular situations with the offices of the lawyers. In one case, the lawyer's office was occupied and in the other, the lawyer worked from home. Reflection on the change in location did not seem to yield differing results as in both cases the privacy was offered and little interference was experienced.

Interview process

Each session began with brief introductions and some casual conversation to set the participant at ease. After this, participants signed the consent form as required by York University's research protocol.⁶⁰⁷ The only concern that was noted by 3 participants was the way in which their confidentiality would be protected. To those concerned

⁶⁰⁶ Patricia A. Adler & Peter Adler, "The Reluctant Respondent" in Jaber F. Gubrium & James A. Holstein (Eds.) *Handbook of Interview Research: Context and method* (Thousand Oaks, CA: Sage Publications, 2002) at 528.

⁶⁰⁷ A copy of the consent form can be found in Appendix D.

participants, the researcher explained that their name would not be included in any material and that they would be assigned a numeric participant identification that would be untraceable to them. Many participants also inquired as to the availability of the written report following the research and were assured that they could access the material.

Once the consent form was signed, the researcher began taping the interviews using an application on her mobile telephone. The use of this device made it unnecessary to write down verbatim notes and therefore the researcher was able to retain eye contact with the participants and use active listening techniques to ensure that their answers were developed in the way that they wanted. Maintaining such a connection with the participants was intended to help them feel at ease and to encourage fulsome sharing of information. It also allowed the researcher to elaborate on questions or ask relevant follow-up questions to dig deeper into the contributions.

The initial questions posed in the interviews were intended to illicit demographic data from the subjects, the results of which are summarized above, in Figure 7. Of particular interest was the gender of the participants, the year they were called to the Bar of their provinces, the year they were trained in CL and some general information about the type of practice they hold. These basic questions held the additional benefit of easing participants into the questions. Through the interview, the researcher proceeded through the broad question list, which can be found in Appendix E. A strict adherence to the question list was not maintained and the questions were revised for each particular

interview. The researcher sought an open-ended approach to the data collection, consistent with the research of ethnographic participant observation, and so the way in which the questions were asked reflected the participants themselves. Once all questions had been asked, the researcher ended with an offer to discuss anything that participants wanted to share but that had not been asked. Twenty-one participants indeed ended with either an expansion of something they had already discussed or some final words on their thoughts of collaborative practice. Such final statements were often very useful in the research.

Data analysis

The analysis of the data gleaned from interviews was highly cyclical to generate themes. Data was continually reviewed throughout the time period in which interviews were collected. The analysis of the interview data was first considered in isolation and then a more holistic analysis combined the data from observational settings. These steps were not followed in a strictly linear fashion. Rather, a cyclical approach was used to review and check the data for emergent themes.

An initial analytical consideration of interviews was conducted immediately after each interview. At the end of each interview, verbatim typewritten notes of the audio taped interview were created. The interviews resulted in 357 pages of typewritten transcripts.⁶⁰⁸

Within these transcripts, participants were assigned a number code to ensure anonymity.

Where quotations are utilized in the report of findings, reference is given to the interview

⁶⁰⁸ Transcripts securely stored with the author.

number, the time in the interview at which the quotation occurred and the page of the transcript on which the quotation can be found. Through the process of transcribing the audio taped interviews, the researcher was able to gather an overview of each particular interview and develop a conceptual framework. Review of each individual interview provided a snapshot of the topic discussed in that interview. The review of interviews, conducted before each subsequent interview, was helpful to shape the conceptual map as it began to emerge.

Once all interviews were completed and transcribed, a review of the transcripts from each interview was undertaken to develop a global understanding for the themes that emerged from the interview phase of the research. As each interview was reviewed, the researcher coded the transcript and thus generated themes. Transcripts were coded and re-coded for emerging themes. A master list of codes was created.

Data Categorization and Refinement

Once observational data and interview data was reviewed and coded in isolation, the researcher sought to combine the sources of data to categorize and refine the emergent themes. As previously noted, the analysis of the data was highly iterative in nature. Through a cyclical process of continual review of the data gleaned from both research sources, a number of common categories were thus generated.

While review of individual interview and observational data yielded important and valuable information, larger themes only began to emerge once a more global

examination of the data was conducted. In this stage of analysis, the researcher matched and grouped together coded themes from the previous stage of analysis to elicit larger themes.

Initially, coding was conducted using a standard word-processing program. Direct quotations were placed into files of general coded categories. The quotations were identified solely by interview number, location on the audiotape, and page of the transcript in which it could be found. Subsequently, the researcher used NVIVO for Mac, a computerized data management system, to refine and confirm coding.

In coding convergent data, the researcher was careful to consider whether convergence demonstrated a shared social reality or social pressure to “present a façade of conformity”, a concern articulated by Beitin.⁶⁰⁹ Since CL practice groups are indeed dependent on positive feedback, the concern that participants would only reveal what they viewed as positive information was real. As will be shown in the results, however, a varied response set was found and participants seemed candid in their positive and negative responses.

The final stage of data review saw the researcher refining categories developed in the previous phase. Dissonant data was categorized among convergent data and methods for

⁶⁰⁹ Beitin, *supra* note 587 at 251.

dealing with dissonant data were considered, as suggested by McCarthy, Holland and Gilles.⁶¹⁰

The data that was generated reflected the participants and the culture of CL. It also epitomized the features of CL that support innovation. Ethnographic research was the only way to do justice to the CL approach and to the participants. Participants were able to be heard and were able to express their thoughts and feelings in an uninterrupted manner. Just as the goals of the collaborative approach are to allow for expression and communication to achieve the best resolution, so too were these the goals of the study in order to achieve the most comprehensive results. Not every research project is appropriate for the ethnographic approach, just as not every legal problem is appropriate for the CL approach.

⁶¹⁰ Jane R. McCarthy, Janet Holland, & Val Gillies, “Multiple Perspectives on the ‘Family’ Lives of Young People: Methodological and theoretical issues in case study research” (2003) 6 *International Journal of Social research Methodology: Theory and Practice* 1.

Chapter X – Results and Analysis

This Chapter will explore the generated themes through direct quotes from interviews as well as through interpretation made by the researcher in both interviews and observational settings. Part B of this dissertation explained the overlap between innovation theory and Collaborative Law (CL). Chapter VI proposed that the CL process and its benefits and challenges can be paralleled to the innovation process. Chapter VIII, in particular, explained the reasons that the presence of lawyers and the Disqualification Agreement (DA) may encourage or inhibit innovation in CL. Data gleaned from interviews and observations in the research sites help shed light on each of these areas.

Results of this ethnographic study will be shared from the perspective of those lawyers immersed in CL. Indeed, while not aware of the specifics of the overlap between innovation theory and CL, participant comments and researcher observations confirm the theoretical convergence. As described in the methodology for the research, interview transcripts were coded and re-coded for emergent themes. As the codes were sorted, many themes consistent with innovation surfaced. This Chapter will share data on when and why innovation is required in CL, will detail the overlap between the innovation process and CL and will explain the impact of the use of teams, lawyers and the DA on innovation in the process.

Summary of Results and Themes

The themes thus generated are:

- (1) Choosing CL as a dispute resolution mechanism
- (2) Screening
- (3) Technology
- (4) Protocols
- (5) Relationships
- (6) Team models
- (7) Accessibility
- (8) Benefits of training
- (9) Personal comfort with the CL model
- (10) Disqualification

The researcher superimposed innovation theory upon these themes to generate the analysis of these results. The combined results and analysis of this research demonstrate that with a thorough assessment of complexity, and a methodical approach to the innovation process, CL lawyers and teams have the potential to bring innovation to their clients. Moreover, the DA has, in most cases, become an obsolete assumption despite its potential to encourage innovative approaches to resolving impasse.

When and Why Innovation is Required in Collaborative Law

Not all problems require innovation. Recall the context within which innovation should take place. Before any innovation can occur, the problem must be assessed as being simple, complicated or complex. This research has proposed that family law issues are either complicated or complex. Those that are complex share the following characteristics indicative of complexity: they are unpredictable; they have uncertain and ambiguous components; and, they involve aligning multiple stakeholders. The distinction between complicated and complex problems was shared in Chapter VI. In that Chapter, it was asserted that CL, as an innovative approach has the potential to resolve complex problems. Recall, that CL is described in this research as an innovative approach because of its structure, the orientations of the participants, and the skills required.

This section will report on the extent to which assessments of complexity are taking place in CL. Despite the importance of the distinction between complicated and complex problems, the researcher found that such an assessment was not always being conducted. Part of the reason for this lack of assessment was that lawyers were not trained to distinguish between complicated and complex problems. Since innovation theory has yet to permeate into the CL community, this distinction is still novel. Nonetheless, some lawyers conducted screening of clients that paralleled a complexity evaluation. In other cases, however, the researcher found an underuse or overuse of CL because of a lack of thorough assessment. The will to conduct more CL cases, the unconscious resort to more familiar processes and the increasingly educated client population proved to stand in the way of such an assessment process.

While an assessment of complexity was not part of the vernacular of interviewees, some CL lawyers discussed the screening they conduct to determine if CL is indeed the right process to undertake. Screening was a theme that was generated consistently from the interview data. The participants largely recognized that, with the right screening at the start of the file, agreements were easier to reach. Those participants that demonstrated a thorough complexity assessment showed an understanding that CL is not required in all cases, just as the traditional approach is not appropriate in every case. One participant expressed this appreciation stating,

... you know there are some cases in which it would be overdoing it to suggest a collaborative process. If parties are very near an agreement or really there is very little, you can pretty much predict how the thing is going to work...if we're going to be inside the law anyway, and um I'm reluctant to draw people into...collaborative family law when really we just want to get this done.⁶¹¹

And another stated,

...most of my files have settled. I think a lot of that is the trick of the self-selection process at the outset. Just trying to do a good job of figuring out whether it would be a good model and we learn a lot.⁶¹²

Such an initial assessment of complexity was not always demonstrated by interviewees. Many participants admitted that they did not take time distinguishing between different types of problems in suggesting whether CL was the appropriate process choice to their clients. The omission of a detailed complexity evaluation resulted from one of two problems: an automatic resort to traditional processes or a desire to conduct more cases collaboratively. The results of these problems were either the insufficient use of CL or

⁶¹¹ Interview 008 at 04:59, page 78 of transcript.

⁶¹² Interview 013 at 31:36, page 136 of transcript.

the overuse of the collaborative process respectively. One participant who had conducted very few CL cases stated,

The message that I've gotten from people, and I agree with as well, is that, you know, we just get so busy and we kind of do things in a mechanical way and we think that its just going to resolve anyway really easily with a few calls back and forth with the other lawyer and then all of a sudden with this...you end up with a matter that's resolved in the traditional way and uh you can't go back.⁶¹³

Participants explained that a resort to a traditional approach was often the result of a missed opportunity for thorough case assessment. The feeling that lawyers had that they automatically resorted to non-innovative processes shows the prevailing assumption that cases are complicated and can be resolved by simplification and analysis. If indeed a thorough evaluation of the case is made and a conscious decision about complexity is done, files would not be conducted in a mechanical way. The decision of process and protocol would be deliberate and reasoned.

The reverse problem is the overuse of the collaborative approach. Lawyers interviewed and observed in this study largely expressed a will to conduct more CL files. As with many movements, lawyers who are interested in practising CL are eager to get cases. This enthusiasm was noted by several interview participants. One participant referred to a survey that was conducted in the Halifax CL community, stating, "...almost universally people said they wanted to be doing more collaborative".⁶¹⁴ Because lawyers want to be doing more CL files, the process can easily be oversold or overused. Such overselling is

⁶¹³ Interview 005 at 02:30, page 45 of transcript.

⁶¹⁴ Interview 004 at 1:42, page 44 of transcript.

not in a client's best interest. In addition, and more importantly, it impedes an assessment of complexity.

In some cases, lawyers seemed to be pushing for their clients to utilize CL because of personal reasons or bias for them, as lawyers. Often participants at both interview and observational settings spoke of "selling" collaborative. One participant explained,

I have a bias towards the collaborative. Its more fun, its easier. Its um more rewarding ... it's a wonderful way to spend your day, collaborative. Its dynamic, its exciting, its happening. ...That team work feeling is quite enjoyable in a collaborative. You get to look at the other lawyer, you get to, you know, roll your eyes or whatever. So, um its more fun.⁶¹⁵

CL should not be used or not used for reasons other than that it is the appropriate process for the particular case. Moreover, it should not be "sold" to clients in inappropriate cases. The innovation process, utilized at the unsuitable time, will only lead to increased time and cost. A thorough assessment of complexity must be made. Certainly the assessment of complexity should not replace a thorough screening for power dynamics, abuse and other factors described in Chapter III, which are all critical in deciding whether CL is an appropriate process.

The observational settings proved very informative to gather data on this theme. Rather than holding conference sessions or meetings that would help CL lawyers determine the appropriate cases in which to utilize CL, sessions and meetings discussed increasing the number of cases lawyers receive as CL files and encouraged the "selling" of CL. Marketing sessions existed at each of the conferences that researcher attended. Hypnotic

⁶¹⁵ Interview 016 at 32:12, page 172 of transcript.

titles of such sessions included: “You Had me at Hello: Increasing your Collaborative Practice”; “Growing your Collaborative Practice”; “30-Second Elevator Speech”; and, “Anatomy of the Elevator Speech”. While the intention of such promotion is stated as helping clients, clients do not benefit from the inappropriate use of CL.

Opposing those that wanted to conduct more CL files, a few participants were wary about CL, despite the fact that they had conducted some cases collaboratively. They resisted the CL model unless clients were focused on following it. For instance, one participant stated,

Well, I’m not as big a proponent as other people are of collaborative. I know that some people will take every file that walks in the door and make it into a collaborative case. I’m probably the polar opposite of that. Uh, I take cases usually more along the lines of when the other side is pushing for collaborative I will consider doing it. I won’t usually initiate collaborative unless I really really think its a good idea for that particular case. Uh and I look at it and try to say that from the client’s perspective do I ultimately think I can get them a better deal or not a better deal? So, as an example, if I’m acting for the stereotypical payor and it’s going to be in the Newmarket court, the guy probably isn’t going to do terribly well there so if they want to do collaborative, I’d be thrilled and I’d suggest it to him. That may sound really pessimistic, but that’s the reality. If I’m acting for the woman in that case, who is the recipient, again as a stereotype, and I know I’m going to be in the Newmarket court, I’m going to be more likely to say I want to go to court or to med/arb because at least then, I know that I’m going to get to a decision that would be a lot quicker in terms of getting to a result.⁶¹⁶

Once again, this participant is not opting in or out of CL after a complexity assessment but rather is focusing on the result long before a thorough analysis has been conducted.

This participant is also showing a particular view about what matters most to clients and

⁶¹⁶ Interview 015 at 05:08, page 155 of transcript.

what “success” might mean to them. Overuse or underuse of CL has the potential to hurt clients while also harming the reputation of the CL process.

Many critics of CL are swift to note that CL can be time consuming and expensive. While some disputes are worthy of such time and cost, others simply are not. The determination of complexity is also crucial to a decision of whether to use CL because the overuse of the process, just like the overuse of innovation, can be costly and time consuming. The reverse of this problem is that, when used appropriately, CL can be efficient. One participant stated,

Collaborative can be very inexpensive and efficient...cost efficient and time efficient if it turns out to not run very long. It can, it is actually....I would never really go as far as saying it's less expensive per se . It depends how you quantify the expense.⁶¹⁷

The cases that turn out to be more expensive and time consuming than the average experience of participants, likely were not in the right process, the process was not adequately designed, or they were especially complex such that they required the extra time and expense. The standard CL model can be further designed to reflect the dispute and the parties, an intricacy that is sometimes, according to participants, not being done. Despite an accurate assessment of complexity, some clients are unable to afford the process even in complex cases. Real innovation is required where complex cases are limited by strict financial constraints. CL lawyers have not yet begun to consider the way in which online resources could be used to increase access to CL or to decrease the cost of CL. More will be discussed about cost and accessibility in the next Chapter but

⁶¹⁷ Interview 001 at 14:25, page 9 of transcript.

innovative lawyers may find technology and all the internet has to offer to be helpful in providing the most innovative services to their clients.

Assessing complexity has become increasingly pivotal because of the augmented presence of the internet and the implications that this entails for clients. As with many areas of law and social life, the internet has impacted collaborative practice in various ways. This impact was demonstrated in interviews in each of the research sites. Participants frequently discussed the influence of the internet in terms of the way their practices are advertised and the information with which clients come into their offices. For better or for worse, because of the internet, clients are more informed.

The information that clients now possess requires a more diligent screening for complexity because clients may not fully understand the process they are requesting. For instance, one lawyer, when asked if clients are coming to her specifically for CL stated,

I think for me it's a combination of my website clearly indicates that I'm a settlement lawyer so I'm...there's actually websites out there for family lawyers that say, "you need a shark, I'm your lawyer". They actually use words like "shark" or "pitbull" on their website as a promotional tool. So my website is the other end of the spectrum. It says I'm child-focused. It says I'm settlement – I mean my slogan is "focused on settlement every step of the way". So, I tend not to get a lot of calls from people who are not wanting to settle out of court.⁶¹⁸

A client may come in wanting a child-focused settlement process, many parents presumably would, but CL may not be the best way to resolve the issue because it may be inefficient if the problem is not complex. A complexity assessment is required before

⁶¹⁸ Interview 009 at 06:05, page 90 of transcript.

making that determination. Another lawyer explained the benefit of the internet on her practice for promotion and research purposes stating,

I think the internet is changing that a lot. I think people are doing a lot of research...I built a practice on relying on people to go to the website and search for divorce. I didn't think it would happen, could happen but it did. So I think that's changing a lot of this. I'm not sure if it's changing it at the level of somebody that's in the corporate world and has a corporate lawyer and goes to the them and says "who in your firm does family law?", I think that's perhaps different. But for the more average family, there's a lot more hands on research that's been done.⁶¹⁹

Because of the internet, clients may feel they are further along in the legal process when they begin with a lawyer and in reality may have to back track. The internet is impacting the extent to which people think they need lawyers and the increased amount of information with which clients attend their first meeting. One participant explained,

A lot more people are without lawyers. It's not necessarily because they can't afford lawyers. Its because they have read about law online and they are sure that they know as much as any lawyer and they can handle their case. Because generally I am seeing people handing me law. Would you hand your doctor a treatise on medicine?...Well they come in with caselaw. "See, my child should be forced to see me and the other side should be forced to hand them over". And I say "yes, but the case was a six month old baby and you have a 14 year old. What do we do? Put them in swaddling cloth and hand them over?" But they tell me that's the law. A little knowledge is a dangerous thing.⁶²⁰

An increased screening standard applies to these clients because they must be made aware of all their options. Certainly each participant in the interview phase of this research explained an initial intake with the client where all processes were explained. Often this was described as a continuum from litigation through to arbitration, mediation and CL. Many participants showed how they depict this continuum graphically to help

⁶¹⁹ Interview 019 at 23:46, page 204 of transcript.

⁶²⁰ Interview 012 at 27:43, page 124 of transcript.

clients understand the variety of processes. A bias for CL, was nonetheless admitted. Despite the fulfillment of their professional duty, lawyers must be wary to conduct a comprehensive complexity assessment. Lawyers must re-educate clients who attend their first meeting with considerable information gleaned from the internet and other sources.

Collaborative Law and the Innovation Process

The data generated by this research demonstrates that indeed the innovative thinking process is being employed in CL, although admittedly inadvertently and not always to its full potential. Although CL lawyers were unaware of the steps in the innovative thinking process, they were utilizing these steps in their files, often very successfully and adeptly. This section will detail each of the four steps of the innovation process and relate them to the CL files that the participants described.

Developing a framework

Recall that the first stage of the innovation process entails the setting of a framework within which to innovate. Similarly, participants described the importance of ground rules and a framework to the start of their CL process. Specifically, participants explained the behavioural protocols expected of lawyers and participants such as respectful communication, open and timely disclosure, a focus on interests and an obligation to prepare for meetings. CL sets out these and other protocols in a participation agreement, formalizing them to a degree not seen in other processes. Framework setting is critically important in CL and complex problems benefit from these measures. Two particular features of framework setting proved crucial to innovation in this study. First is the

expectation that all those involved in the file adhere to behavioural protocol formalized in a written agreement. And second is the continuous planning and organization conducted by CL teams. This section will describe these aspects of framework setting in CL.

The key in developing a framework in CL is in injecting sufficient rigor, in the form of a framework, to the practice so that innovation can be supported. Such rigor is memorialized in the signing of the participation agreement. The solemnity of signing a written agreement seemed to resonate with participants in this research. As explained by one subject,

...to sign a document as a representation of what your approach to this negotiation is going to be, I think that has power, in part to the clients as to what you are going to be doing with them...The formalities in the contract that we are going to work in this way together is a huge benefit, I believe...⁶²¹

The importance of setting protocols through the participation agreement was also described as follows,

But what I think the best part of the participation agreement frankly is that it sets some ground rules for the communication. Right? So we set some rules about disclosure, we talk about respectful communication, we talk about what's confidential and what's not and a lot of that we don't talk about otherwise. Right? ... So talking about the participation agreement, the communication; ... the communication ground rules that I usually go through with people and just handing them to people. [Lawyers] can learn from that too and we have to model that for the clients. Not only does it hold our clients to a certain standard on things, it reminds us as lawyers what we're doing in that process too. ... I think it just sets the tone for the process.⁶²²

⁶²¹ Interview 001 at 36:14, page 13 of transcript.

⁶²² Interview 018 at 31:52, page 193 of transcript.

The written protocols in CL ensure that everyone at the negotiation table understands the roles they are expected to play and the behaviours they are expected to display.

Such a framework indeed sets a tone for both resolution and innovation. Setting a clear framework continues with other unwritten expectations of planning and preparation. As described by one participant,

...my collaborative files are like a well-oiled machine in terms of the process. We have agendas. We have progress notes. We have homework. We have the next meeting planned. My other files sit on my desk and nothing happens.⁶²³

The higher standard in terms of planning that CL requires was explained by another participant stating,

If you embark on collaborative law, my assistant has a set of procedures that she follows. We set up a meeting with the client, we set up a telephone call with the lawyer, we set up a four-way meeting, we set up time to do the minutes afterwards. Like there's a whole chronology and choreography to how it goes...⁶²⁴

The difference was also described as follows,

...the process is different in a collaborative file. Um I really think one of the most important things is preparation for meetings. And I find in traditional negotiations, sometimes there's no prep on the other side. I mean, I tend to spill over my collaborative prep into my traditional and even into my courtroom stuff. The skills are very transferable. So I'm amazed when people show up at four-way meetings and your clients are totally unprepared, have no idea what the agenda is, there is no agenda as far as they're concerned, its like a free for all and they haven't done the work. Right? There's no NFP or they haven't really considered what's going on. Its like, "we're here, lets start now". So it's a lot of wasted time.⁶²⁵

⁶²³ Interview 013 at 11:21, page 131 of transcript.

⁶²⁴ Interview 020 at 10:39, page 212 of transcript.

⁶²⁵ Interview 021 at 05:17, page 224 of transcript.

The common understanding about process, protocols, and expectations from all involved sets CL apart from other types of dispute resolution. These factors provide the framework within which innovation can happen. The adherence to the elevated standard also begins to set the tone for trust and respect. It models, for clients, what lawyers expect of them in the CL process.

One particular protocol that encourages both trust and respect and which was frequently raised by participants is the common practice of avoiding writing letters in favour of speaking in person or by telephone in a CL process. Many lawyers expressed the benefits of the expectation of verbal communication to achieving greater understanding. In particular, they noted that letter-writing used outside of CL is inflammatory and ineffective. The detrimental effects of letter writing were described by one participant in the following terms,

...[letter writing] escalates the conflict and...and then you pick up the phone and you talk to them and they say something and you're like "oh, that's what you mean 'cause I thought you meant this"...and it could have been solved seven letters ago. So I find that's probably the biggest difference [between CL and traditional cases].⁶²⁶

And another stated,

You know in the lawyer to lawyer [traditional negotiations], one of the biggest downfalls of that I think is the letters back and forth between counsel and um one of the biggest benefits of collaborative is that the lawyers pick up the phone and call each other. And so talk about, you know, no matter how well-intentioned the lawyer's letter may be, in my experience in doing that for 15 year is that its always offensive to the person, the client, receiving it.⁶²⁷

⁶²⁶ Interview 007 at 3:21, page 63 of transcript.

⁶²⁷ Interview 009 at 08:23, page 90 of transcript.

Another participant described the time consuming and costly process of letter writing and the resistance of lawyers outside CL to communicate in person as follows,

I mean I've had so many people scream at me when I ask for an in person meeting or telephone call to discuss things. You wouldn't believe. Its crazy. They just have a different way of doing it. And sending letters with your proposals? That's such an expensive way of doing it. And there's always misunderstandings and then you respond to it and then the letters get to be really really long because you respond to paragraph 7 and then the separation agreement changes and then 7 is now 6 and its now 3 and then when you redo the separation agreement at the end of these 5 or 6 letters, it takes as long as drafting the agreement.⁶²⁸

Innovation is difficult to attain with such lack of connection. The telephone or in person communication in CL allows ideas to be shared and communication to be better understood, paving the way for deep understanding of the problem and its resolution.

Although the administrative process in CL is quite stringent, the high expectations placed on all participants, expert and lay, do not impute a strict orthodoxy on the process. They set behavioural boundaries but allow for fluidity in terms of process development and option generation. These aspects form part of the next two phases of the innovation process.

Redefining the issues

Once an innovation process is chosen based on an assessment of complexity, the ground rules are set, and the protocols are understood, it is time to delve into the complexity of the problem and the root causes of the issue. Through the adoption of an interest-based process, CL seeks to redefine issues and clarify assumptions. The data generated from the

⁶²⁸ Interview 020 at 15:56, page 213 of transcript.

interviews in this research revealed the importance of relationships to the redefinition of issues. The importance of relationships with clients, among professionals, and between clients was evident in the data and was deemed essential for interest-based negotiation.

Participants articulated that relationships between clients and lawyers proved to be very different in CL than in general litigation or traditional settlement. Lawyers explained that this reconceived relationship allows them to delve deeper into the issues. As expressed by one participant,

I spend a lot of time finding out who that client is; what their hopes and dreams are; what their goals are; what their fears are; what keeps them awake at night; what could happen. Then I identify their strengths, their spouse's strengths...[a]nd so its easy to transition into the principles of the collaborative process because we've already talked about the way in which I can help a client take some control over the end of a marriage or a relationship.⁶²⁹

Lawyers, in getting to know the needs and wants of the clients, can clarify assumptions with them as they are active participants in the negotiations. As stated by one participant,

...the professionals all are very, um, cognizant of the importance of looking at what are the underlying interests and...they struggle with the fact that the law is only part of the equation but most of the lawyers are able to look at the underlying interests and that's what generated creative solutions. So I think that's important...⁶³⁰

Underlying interests and assumptions can be brought forward more easily through the CL process both because of the framework that has been set and because of the nature of the relationships with clients. Also aiding the extent of sharing in the CL process is the relationships between the lawyers.

⁶²⁹ Interview 014 at 05:12, page 144 of transcript.

⁶³⁰ Interview 002 at 7:06, page 23 of transcript.

The data revealed a strong sense of professional camaraderie with other collaborative lawyers. They often compared experiences with traditional negotiation files and CL files and explained what a difference they felt in the lawyer-to-lawyer relationship. For instance, one participant stated,

...some of the people do a lot of this work and do it really well. Really well. Like if you are on a file with some of these people, I literally think to myself sometimes: what a gift to this family. What a privilege to work with these people who work behind the scenes, do debriefs, not charging the client, all kinds of stuff. We sincerely care about these outcomes and care about the children and our clients have allowed us to care because they've said that's their priority right.⁶³¹

As explained by this participant, the relationship between lawyers allows the professionals to discuss the issues on a deeper level and discuss issues that lawyers in a traditional process would not necessarily discuss. Although a greater camaraderie may be seen in small communities of practice regardless of process, particular features of CL increase the camaraderie between professionals. For instance, many participants explained the way they debrief after meetings to talk about the client's emotions and the way the team was working together. Such meetings were conducted at no charge to the clients and impacted the negotiations in a beneficial way.

In addition to the differing relationship between clients and lawyers and amongst professionals in the CL process participants described the different kind of relationship required between the two clients. In CL, the clients are nearly always at the table hearing each other throughout negotiations. The intensity of spending that critical time together can build a new relationship between them that is meant to last into the future. Building a

⁶³¹ Interview 013 at 27:48, page 135 of transcript.

restructured relationship between clients begins when issues are redefined and clients are asked to take the perspective of the other side. Participants in this study discussed how coaching from lawyers and other professionals is invaluable at achieving mutual understanding.

To follow through with the innovation process, issues must be understood at all levels, surface, mid, root, and must be examined from both a rational and emotional point of view. This understanding was encapsulated by one participant stating,

When people feel heard and respected and understood, they learn to start seeing the perspective of the other person and what makes that person tick. And we help remind them of why they fell in love with that person and what their strengths were, notwithstanding what life threw at them and they couldn't cope and they got derailed and they get to a different place of understanding and communication and that assists [the negotiation].⁶³²

In the CL process, the clients are assisted by their lawyers and by the neutrals in sharing the information required and in remaining productive despite a potential for high emotional charge.

The sharing of information is a critical feature of this stage of issue redefinition. Participants in this study did not feel there was any difficulty attaining relevant information from the other side in negotiations. Part of the reason they felt information was freely shared was the relationship built between professionals and between clients. Observational settings were also helpful to explore this issue of information sharing and relationships. Through observations, the researcher was privy to a debate between CL lawyers who disagreed on the extent to which information should be shared. The

⁶³² Interview 014 at 10:31, page 145 of transcript.

particular topic of debate surrounded the infidelity of a spouse. Must such indiscretion be shared in CL? Of the seven lawyers engaged in this conversation, only one felt that this information was not relevant to the negotiation. The rest of the conversants felt that, if the information is going to come out at some point in the future, it should be raised in the negotiation. Failure to do so would jeopardize the trust built through the process.

Trust is critical for innovation. Only in a trusted environment can innovators explore complex issues. As stated by Weiss and Legrand, “When [team members] trust each other, they are more open to each other’s ideas, communication and openness increase, and the engagement of all participants is maximized. Trusting relationships contribute to opportunities to leverage conversations and to achieve meaningful outcomes for complex issues”.⁶³³ Indeed the trusted relationships built between lawyers and other professionals in the CL process was evident throughout both phases of this research. The framework is set for trust through the protocols that are put in place but then supported by the myriad practice group gatherings and debrief expectations that will be explored later in this Chapter.

Trust was so critical to many participants. As explained by one participant,

...the safety and the level of communication that we create through the process [is essential]. We call it the “magic in the room”, and its just amazing to see the level of communication that these partners manage to achieve. It sounds very woo woo but you just see it happening in the room. And it’s not always the case. Certainly there are times you just can’t do anything about reestablishing the trust but for some reason we can use techniques to create at least sufficient trust or sufficient respect to be able to transition them out of their relationship and move on. It doesn’t mean

⁶³³ Weiss & Legrand, *supra* note 334 at 186.

they have to be the best of friends, but ideally if they could, that would be the best. A lot of it is keeping the folks forward focused and not, you know, looking backwards and drudging up the past. It's acknowledging that they are who they are because of the relationship that they had and we're not dismissing the importance of that relationship nor are we placing any judgment on the fact that there was a decision not to continue in that relationship.⁶³⁴

The level of information required to understand the issues to a full extent requires such openness and trust. Only once all information is shared and understood can solutions begin to be generated.

Exploring options

Once the issues are fully understood through the relationships that are built and trust that is established, CL teams can begin to generate solutions. This phase is where innovative potential is demonstrated. Most participants in this research noted that there was something different about the way agreements were reached in the collaborative process and detailed the thorough effort put into exploring options. As a result of the process of option exploration, agreements looked different. Contrary to Macfarlane's finding that the substantive outcomes were generally the same in CL as other processes⁶³⁵, participants in this research described substantially different agreements. Many pointed to the creativity of agreements as a departure from the legal model, and others noted the detail that collaborative agreements include that other agreements do not. For example, one participant stated, "[My collaborative cases] have definitely been more detailed in terms of the content because during the meetings with parties a lot more issues come out.

⁶³⁴ Interview 023 at 07:16, page 260 of transcript.

⁶³⁵ Mafarlane, *Emerging Phenomenon of CFL*, *supra* note 5.

[I]t may not be a legal issue but something that's important to them"⁶³⁶. This statement was echoed by many and relates back to the importance of the clear understanding of the issues and having the parties present. As explained by one participant,

...there can be some things that are more creative and certainly more personalized. More individual outcomes and solutions. Like real time and attention paid to these [clients], their roles, how we can make these things work. So I've worked on files now where I've literally thought to myself at the end, "wow, how would this have even worked in my other world? How would we have ever gotten here? It's complicated but it's personalized to them, the other lawyer is helping me at the end to check for mistakes and any issues. It seems so efficient, so productive. How would that file have unfolded in my former world? I don't even know how." So I think it's great. I think you get customized outcomes.⁶³⁷

Another participant similarly explained,

... you're able to put more detail into [agreements] because people are actually in the room. Um even with people staying in the home and how long that's going to happen, transitioning child support, just doing different arrangements. It's easier when you've got the people in the room so you're not writing "can we do this" or "can we do that". You're also not in a negotiation where everyone's cards are close to their chest and you have to sort of get the best result for yourself. ... It's more like working towards a common goal. It's interest-exploration [because] when you get in there you realize that...what you think would be a good option for them is not really what they want.⁶³⁸

As noted by another participant when asked to explain a solution in a particular file,

I'm not gonna use the word creative so much as outside the norm. The parties were able to reach agreements on division of property and child support, which would not even have been achieved in a settlement conference...But the parties have figured it out and it feels right to them and...and both parties recognize the particular emotional currents and unusual features that required or called for a different solution.⁶³⁹

⁶³⁶ Interview 005 at 17:23, page 49 of transcript.

⁶³⁷ Interview 013 at 15:46, page 132 of transcript.

⁶³⁸ Interview 007 at 22:39, page 69 of transcript.

⁶³⁹ Interview 008 at 17:48, page 82 of transcript.

Another described the increased availability of personal and creative options in CL, stating,

I would say there is more chance that the collaborative agreement will truly reflect what this family really needs. Very creative stuff. Creative ways of possessing the matrimonial home, doing the repairs, putting it up for sale, valuating options and shares. If you have options, they can be valued at a lot of money and yet it's future cash so how do you deal with the distribution of it? Is it an 'if and when'? Is it in the income and if it's in the income do you subtract it when it comes to spousal support and child support? All of these pieces are things to think about which we do because we have time and we're not threatened in collaborative law but in traditional negotiation like everything you're pulling teeth and everything is an effort to get something that's reasonable although you might get an agreement that will be fine.⁶⁴⁰

The reasons cited for these differences were often linked to the participation of clients in the process as well as the active participation of neutrals in drafting agreements. Clients bring their own expertise, both professional and personal, to the negotiation table. As one participant explained,

Um the customized settlements are wonderful. And sometimes I didn't think of it, and the other lawyer didn't think of it and their client thought of it. Not because I'm a genius and I should have thought of it but because this is their thing that they wake up in the morning thinking about and go to bed thinking about and they craft this wonderful settlement like "ok, it's my family's cottage and I want to keep the cottage but you really love going up there for the fall so why don't you take the two weeks in the fall, Labour Day weekend and another week in the fall and you can be up there for...that long walk you like and you'll bring some of your friends and your girlfriend and your family and won't that be nice because the kids will get that with you". So, that generous offer is there, the court couldn't offer that. It's either exempt or not exempt, it's either shareable or not shareable, there's an equalization, but what about the generous offer to use? That's that little thing that's going to make the parenting relationship so much better and that's the collaborative file.⁶⁴¹

⁶⁴⁰ Interview 020 at 20:34, page 214 of transcript.

⁶⁴¹ Interview 012 at 24:46, page 123 of transcript.

Option exploration was unequivocally described as different in CL because of the presence of clients.

In addition to client participation, the stage is set for innovative outcomes in CL because of the ability to escape the confines of the legal model. A departure from the legal regime in exploring options was a common point of discussion. It is the freedom from the strict confines of what courts can order that opens the door for innovation. For example, one participant noted,

The options are hugely expanded [in CL]. Um a court process options are pretty legal model. The legal model is always the backdrop, the default we call it, to any collaborative resolution but it is certainly a default. So if people cannot resolve things differently, then we go to the legal model. And if they can't come up with their own creative solutions then that is all they have left. But for the most part, people really enjoy having the creativity and options available to them that are not part of the legal model. So many things we do are not something that a judge has jurisdiction to order. You know, they want to keep the kids in the house so they're going to put a second mortgage on and he'll get paid in five years when the kids are finished high school. Or they're going to sell the house in five years when the kids are finished high school...we would look more at what are your goals and interests? And if the interests were making sure the kids were in a stable environment and it was important to stay in that neighbourhood for whatever reason, and it was doable financially for the other spouse to not have his equity or sometimes we'll do a reduction in child support or spousal support 'cause they're using the equity. There's so many things you can do, these tradeoffs to achieve stability for the kids. So that's a common outcome. It's just the ability to do things that are not prescribed by law.⁶⁴²

Although the latitude exists, in CL, to depart from the legal model, it prominently remains in the background as a default. At one time, some CL lawyers attempted to pretend this was not the case because they feared it would impede the latitude of

⁶⁴² Interview 021 at 28:35, page 230 of transcript.

agreements. One participant described the change in the approach to legal models as follows,

Well, I would say that long gone are the days where you would pussy foot around about...legal models. I think there was a time when we would withhold the bottom line on a net family property statement, you know because once you deliver that information people sometimes get stuck to it so there's not as much room. I have come to believe, we might as well put it out there. They've got to know it. It's part of our responsibility and it's part of the criticism of the process...⁶⁴³

Accepting an innovative outcome may indeed entail giving up rights. Although results need not mirror the legal model and rights may be given up, clients must be made aware of their legal rights and entitlements. As explained by one participant,

...in terms of the outcomes, I think that its an interesting question whether you give up rights in this process. And I really think you may very well give up rights. Absolutely. And I don't have a problem with that. You're going to give up rights and hopefully because you are trading a want for a need and your legal right may just be a want for you but this other issue that isn't a legal right is a need.⁶⁴⁴

Option exploration necessarily involves a balancing of rights and needs to achieve a result that is most meaningful and long lasting for clients: an innovative result.

The method of exploring options most often employed in CL is brainstorming. Although this method was frequently deemed successful by participants in this research, the risks associated with brainstorming described in Chapter VIII were not lost on the participants.

One lawyer explained,

We don't overwhelm them with options, we have long since understood that putting 100 options on the board is not helpful to decision-making but we do really just one step at a time ask a lot of questions. So I think that

⁶⁴³ Interview 013 at 14:23, page 132 of transcript.

⁶⁴⁴ Interview 009 at 47:22, page 100 of transcript.

creates an atmosphere of that thoughtfulness and desire to customize and openness to being outside the box.⁶⁴⁵

This comment shows the appreciation of the difference between creativity and innovation. Constraints must be placed on innovation for the sake of productivity. Throwing out hundreds of options for the sake of creativity is neither productive nor efficient. Moreover, it does not demonstrate a clear understanding of the needs and desires of the family.

Planning for implementation

Merely identifying a solution is not sufficient for innovation. Implementation is critical. The final stage of a CL process looks beyond the agreement to determine, as best as possible, what the future will look like for the clients. In the implementation planning phase, risks and implications of the agreement must be explored. Helping the clients to be able to communicate on an ongoing basis was the focus of many participants. For instance, one interviewee stated,

... the separating couple is at the table together at each stage of [CL files] with other people and they're having to have difficult conversations and they're having to listen to each other and each other's point of view and their interests and they're having to state theirs in a way that's um you know non-judgmental and non-threatening and that sort of stuff and that is really good practice 'cause they're going to have more of those in the years ahead. So next time something happens, somebody loses their job or someone has to, you know an issue comes up with the kid, the things that happen over time, they have some practice instead of the first thing they're going to do is run to court. Um so they're going to have practice of sitting down together and addressing difficult issues and talking about money which is never easy. So that's a big thing, really just in a time where it can

⁶⁴⁵ Interview 009 at 32:03, page 97 of transcript.

be very very challenging to do so they are having to sit down and own the issues and work through them with help. So I think that's huge.⁶⁴⁶

The focus on implementation and a continuing relationship rather than simply agreement begins to bring together the innovative solutions with the compliance of the agreement. As explained by one participant when asked about the difference between CL and traditional settlements,

I find most of my clients just very sad at the end of the day. They're not angry with each other, they don't hate each other, they're just sad that this has happened. And a lot of the time, its like "if we had just communicated like this throughout the marriage, maybe we wouldn't have been where we are". Because they really are communicating with each other and they are trying to generate options. I find the resolution in collaborative law um is adhered to more.⁶⁴⁷

CL seeks to develop in clients a skill set that will take them beyond the process. As explained by one participant,

So I think they develop a skill-set that they never had and in a couple of my files, people actually reconciled during the process because they realized that the grass was not greener and they really had a history and that they could build the future together because they had learned that you don't have to hurt each other.⁶⁴⁸

While reconciliation is rare, and not a goal of the process, skill development will help communication into the future. Skill development was also explained in terms of growth through the CL process,

I think we can bring out the best in both spouses in this process, more than they can even understand. I really think people don't know what they don't know and it takes a team of experienced professionals from different disciplines to show them what they don't know and need to know. It's a growth opportunity this process.⁶⁴⁹

⁶⁴⁶ Interview 010 at 09:48, page 104-105 of transcript.

⁶⁴⁷ Interview 011 at 09:06, page 112 of transcript.

⁶⁴⁸ Interview 014 at 12:31, page 146 of transcript.

⁶⁴⁹ Interview 014 at 25:23, page 149 of transcript.

Developing skills enables innovative goals to be implemented successfully. The goal of both the innovation process and the CL process is to discover an implementable solution. After all, the innovation process is an integral part of the CL process. The participants in this research shared the goal of achieving lasting implementable agreements.

The Collaborative Law Team Model and Innovation

As discussed in Chapter VIII, teams in CL are particularly important because they offer diversity to allow for increased innovative potential. Through different applications of the team model, practice groups can either increase or decrease their innovative potential. This section will report on the findings of this study as they relate to the team approaches employed.

The research sites in this study operate under different team models. Halifax still operates under a unidisciplinary model, although the practice group has recently received interdisciplinary training. Vancouver utilizes either a unidisciplinary or multidisciplinary approach, often using a two-coach model where clients meet with their coaches but the coaches do not attend meetings. Coaches are mental health professionals who do not act as neutrals but instead work with both parties to assist them in attending the negotiations in a meaningful way. They help them with language and framing techniques to assist them to be heard by the other party. Toronto and Simcoe County utilize unidisciplinary,

multidisciplinary and interdisciplinary approaches but, where neutrals are involved in the process, they often attend at least some of the meetings.⁶⁵⁰

The team model, whatever its nature, is optimal to achieve innovative outcomes. While CL exceeds other dispute resolution models in terms of the sophistication with which teams are used, more work can be done to increase the interdisciplinary potential of CL to support innovation. Often, the approach is not based on the particular needs of the clients, but on the norms of the practice group. A truly innovative process would develop and team and determine the mechanics of how that team will work on a case by case basis.

The researcher noted for example, that the CL group in Vancouver did not regularly use financial neutrals. The reason for this norm was not clear to most. As explained by one participant,

In this city we do the two coach model most of the time...we have a sub-committee working right now on trying to figure out why the financial neutrals are not used to the extent that we could see them used.⁶⁵¹

Other participants noted that the avoidance of financial neutrals was due to a particular clash of personalities when the multidisciplinary approach first came to the area. Still others noted the importance of financial neutrals and the cost savings that they bring to the process. These varied experiences demonstrate the seemingly haphazard reasons for which a CL community may practise in a certain way. In some cases, much thought is put

⁶⁵⁰ For a description about the different team models, see Chapter III.

⁶⁵¹ Interview 023 at 10:26, page 251 of transcript.

into the model to be utilized and in others, it is purely normative. Moreover, in many cases, it is subsets of practice groups that create the norms.

One particular subset that became apparent in this research is the multidisciplinary collaborative office. Five participants in the Toronto group and three participants in the Vancouver group work in shared offices with other lawyers and neutrals. Each professional is independent but there is a shared understanding of referral, along with shared expenses. While this practice can add to the comfort with which a team approach is employed, it suggests a set model rather than a client-based team composition. In addition, such groups are more likely to fall into the drawbacks of innovation in teams, discussed in Chapter VI. However, such a model achieves much in terms of efficiency and cost saving, thus a considered balancing of the impact on innovation should be made.

While some participants often utilized a static team composition and approach, others described a fluid and ever-changing use of neutrals depending on the needs of the particular case. For example, one Toronto participant noted,

We use [neutrals] both offline where the parties meet and resolve issues that are best left to someone like a parenting coordinator. We also use someone like a parenting coordinator as a neutral at the meetings to keep [clients] focused. We use financial advocates offline to collect data and make projections, help with budgets but we often also use that same neutral at the meeting where the financial pieces are being discussed to describe what's in that net family property statement and what do the ranges of spousal support really mean and what are the tax effects of rolling over the RRSP instead of getting the cash, making the EP payment and what are your lives going to look like in 15-20 years into retirement and so we use them both as neutrals in the meetings and offline to do the kind of work between meetings that either the lawyers shouldn't be doing, because its

not their expertise, or the clients shouldn't have to pay for the lawyers doing that because they are sharing the cost of the neutrals.⁶⁵²

Although there was some fluidity in these types of arrangement, the options remain limited. Neutrals utilized in all practice areas researched were limited to family and financial professionals. Some limited diversity is existent within these categories; for instance, a family professional may be a child specialist, psychologist or social worker while a financial expert may be a chartered business valuator, an investment specialist, or an accountant. In either case, the options are relatively limited. A family may need more or different experts. Innovation may indeed benefit from a more diverse range of neutral experts. This proposition will be discussed further in the following Chapter, the analysis of these results.

Consistent with innovation theory, diversity proved important in bringing innovation to CL. Diversity need not only refer to breadth of current professional vocation. Even in unidisciplinary practice groups, it was common to find that participants had held different careers before practicing law, often in areas that neutrals would hold as an expertise. Of the participants in this study, seven lawyers had held prior careers in mental health or financial services. These perspectives, even in a unidisciplinary CL file would colour the way that the file is approached. Return to Dyer et al.'s statement, "Innovative ideas flourish at the intersection of diverse experience".⁶⁵³ This past experience allows lawyers to approach CL from a broader lens than a pure legal framework. Without adding any

⁶⁵² Interview 014 at 31:40, page 150 of transcript.

⁶⁵³ Dyer et al., *Skills of Disruptive Innovators*, *supra* note 404 at 45.

additional neutrals to the table, these particular lawyers can bring the viewpoints from their prior careers.

Not all CL lawyers, however, share such diverse vocational histories. Particularly where lawyers do not bring a diverse background, participants expressed how the use of a team approach provides benefits that the process cannot offer with lawyers alone. Participants described how ideas can be brought forward and tested by the entire team throughout the CL process. A participant explained,

...an interdisciplinary approach helps because the family coach and the financial specialist are not as married to the law as lawyers are so they can sometimes bring a more of the interests to light and help us find more creative solutions too.⁶⁵⁴

And another stated,

It really moves it along. The neutrals are so important. Whether it's the mental health professional or the financial advisor who they trust or the tax person who's going to make sure that nobody gets screwed tax wise with hidden tax implications. It keeps everyone in the process.⁶⁵⁵

The two components of group work and diversity are satisfied through the CL team process. Two lawyers work together rather than against each other and use of a cross-disciplinary team. Both of these features increase innovative potential as competition is replaced by a shared common goal. Also explaining the increased benefit of teams to the quality and longevity of agreements, one participant explained,

...the collaborative separation agreements that I've entered into I feel with the experienced collaborative counsel that I now deal with and also with the experienced collaborative teams that I now deal with including parenting coaches, who give input into the wording on the way in which

⁶⁵⁴ Interview 002 at 7:46, page 23 of transcript.

⁶⁵⁵ Interview 012 at 34:32, page 125 of transcript.

parenting should be structured etcetera...and financial people recommending, you know, wording structures which we do in our...meetings...[W]e have used all of the professionals to input on the creativity and the structure of the actual agreement in a very efficient way, in my opinion, so that I would say when I look back on the agreements that I find are the most thorough and the most specific to a family and the most functional for that family and the most likely to be long-lasting for a family and ... the less likely to come back for amendments, ... the collaborative agreements are much better. [They are] more detailed just because of the way the four-way meetings occur, and we tend to write up things in the four-way meetings or pretty soon after them and get the feedback from the professionals while it's very fresh and so therefore the types of clauses that I've seen written around parenting or written around a complex financial issue ... I think are much better than any one person could put in. ... I just feel that the two collaborative lawyers in my files have tended to write much more um thorough, interesting, um, nuanced agreements that fit this family like a glove and are very successful at what the family's feedback is that its exactly what they wanted, it's given them an overview of the process that they never thought they would even have, you know the struggles they went through to get this. Some of that's written into the collaborative type separation agreement which we usually leave out of other types of separation agreements...⁶⁵⁶

Comments such as this occurred repeatedly over the research period. They allude to the innovative potential of teams and the way in which teams so fluidly assist to innovate together, whether those teams are unidisciplinary, multidisciplinary or interdisciplinary. The data from this study suggests that teams should be utilized as a default in complex cases. The composition of the team and the manner in which the team works should be assessed on a case-by-case basis.

A major consideration that must be assessed with the team approach is the cost that it potentially adds. Concern about the cost of CL and its accessibility to the larger public was noted by many in all research sites. For instance, one Halifax lawyer stated,

⁶⁵⁶ Interview 001 at 25:41, page 10 of transcript.

Oh ya, the cost. People are terrified of the cost. Because when you start talking about, “I’m gonna bring in a mental health professional and maybe a financial professional and they’re hourly rates start at...” and you can start to see the panic escalating and they’re like “that sounds really expensive”. In fact, I don’t think it’s expensive at all, compared to what...and I tell them, you know, “I don’t know if you understand this is what a trial would cost you”. You know? But they don’t know because they’ve never...usually they’ve never been to a lawyer except maybe a will and a house...so they have no idea what lawyers cost.⁶⁵⁷

Another participant said,

I think those of us who are supportive of teams sort of had a slogan for a while: we’re not adding dollars, we’re adding people and we’re just redistributing the work, which was naïve because while that was with the best of intentions, when you add people you do add dollars because even though the work is being distributed there is more team communication. At the same time, those files, are complicated and would have been probably getting impasse or getting stuck without the neutrals.⁶⁵⁸

Collaborative Practice Toronto as well as Vancouver’s BC Collaborative Roster Society are making efforts to increase access through pro-bono pilot projects. As one Toronto lawyer explained,

[Cost is] a huge problem and it’s not just in Toronto. It’s like across the board as a problem and um one of the things we’ve just established a committee on is you know low cost, no cost [CL]. So how do we make [CL] more accessible, particularly because so many of the people doing [CL] have been doing family law for 20 years, have these multiple hundred dollar hourly rates um so we’re hoping this initiative will...make it more accessible and um you know senior people matching the rate of the junior people for one file a year. Like asking every CPT member to one file a year is no cost or low cost and that’s part of your commitment to being a member. Now we won’t start with it being mandatory but we’re starting to try to create the culture that that’s um an expectation. And that every year you do one low cost, no cost.⁶⁵⁹

She continued,

⁶⁵⁷ Interview 007 at 14:06, page 66 of transcript.

⁶⁵⁸ Interview 009 at 35:37, page 98 of transcript.

⁶⁵⁹ Interview 009 at 41:41, page 99 of transcript.

I think part of the challenge we face with collaborative is the costs, it's perceived to be a very costly process. I'm not sure that it is over all, it's as compared to what. As compared to mediation? Potentially. But I think the files that we can deal with in collaborative can be the more challenging files. Unless you are co-mediating with a mental health professionals there are limits to the kinds of files you can take on. So I think that this approach is something that all the reports are talking about but they're not recognizing it as something that we're doing. So we as collaborative lawyers have the challenge of making it cost effective. Maybe we need to be more efficient or to streamline some of these things without maybe the luxury of the time we put in which is problematic because time is very important in terms of when people are ready to have those discussions but I think that's the opportunities that we need to be looking at now to become more mainstream. I think that if we are going to get that credibility ...I think we have to be able to show we can offer this to middle to low middle income people that don't fit into the legal aid categories but that really need a cost effective solution and I think that's the challenge that we haven't quite grappled.⁶⁶⁰

The issue of accessibility and cost of CL is a concern shared by many in this research. Innovative thinking must be used to find a solution to the accessibility issues associated with the cost, both perceived and actual, of CL. Some additional suggestions to increase accessibility will be offered in the next Chapter.

Lawyers, Innovation and Collaborative Law

The lawyers interviewed in this research provided great insight into the impact of training, propensity and practice groups on their innovative capacity. Indeed the data generated from interviews confirmed that innovative thinking can be trained and the skills articulated by Dyer et al., and described in Chapter X, were found to be relevant in the work of CL lawyers. Despite the skills that are trainable, there are predispositions that either help or hinder innovative potential. CL lawyers in this study shared a great deal of innovative potential and described their natural tendencies to adopt CL before receiving

⁶⁶⁰ Interview 018 at 54:34, page 197 of transcript.

training. Both skills and propensity proved, in this study, to be supported by practice groups. Results on each of these areas will be shared in this section.

Training

The decision to practise CL is not one that is made haphazardly. Participants described relatively rigorous initial training requirements, along with the need to change the structure of their practices and the need for continuous training. Participants were clear: they made a conscious choice to adopt CL. Some did so as part of their practice and others decided to forgo traditional family law practice entirely to focus on a CL career. Of the 31 participants in this study, 19 lawyers no longer attend court on any file. While some of these lawyers may still take on files that are not in the CL process, they consider themselves “settlement only” lawyers whether inside or outside of the CL process, and they transfer cases to litigation counsel if litigation becomes necessary.

None of this study’s participants hesitated to take the training or regretted doing so. Even those participants who conduct very few CL files felt they benefitted from the training. The benefit indeed matches with the innovative skill development. The impact of the skills developed through training was profound for participants. One participant explained,

I think it’s a good idea for all lawyers to train in collaborative because, from a negotiation standpoint...because if you understand what somebody’s goals and objectives are, that may be the only way you will be able to find and structure a deal that keeps everybody’s interests working. That’s a positive thing. Whether you can achieve it or not, that piece of negotiation is a simple smart piece of negotiation. So should people take the training? Yes. Have most of my lawyers taken the training here?

Yes... I think it's good training to have whether you are going to do collaborative or not.⁶⁶¹

Another lawyer similarly described the benefits of training even in the absence of a CL practice,

Well, I can tell you, two very senior collaborative practitioners who are now judges say they use their collaborative training every single day as a judge... they say the way they do settlement conferences and all kinds of things are very informed by their collaborative training.⁶⁶²

These responses suggest that there is something “trainable” about CL lawyering and further, that the trainable skills are available even outside the distinct CL process.

Many described that, although there are benefits of the initial CL training for lawyers, continuous training occurs through practice. The open communication between all CL professionals allows for constant mentoring and feedback on the skills initially developed through training. As explained by one participant,

The challenge with collaborative training is that the 3 day basic training gets your foot in the door and gets you the basics but its one of those things that if you don't practice, you won't develop the skills.⁶⁶³

The push for training supports the conception that innovation skills are indeed important and trainable in CL. Although the lawyers interviewed in this study did not know of the five skills of innovation from the study of Dyer et al., the researcher was able to extrapolate these skills from the lawyers' responses. Recall that these skills are: questioning, observing, networking, experimenting, and associational thinking.

⁶⁶¹ Interview 015 at 07:21, page 156 of transcript.

⁶⁶² Interview 022 at 34:48, page 245 of transcript.

⁶⁶³ Interview 023 at 23:09, page 253 of transcript.

The skill of questioning is developed through training and embedded in the abandonment of the legal framework as an assumption. It is fostered in the focus on the family. As explained by one participant,

...we're working collectively as a team for the benefit of the family. Be they a couple or with children doesn't matter, they're a family. It really is not win/lose. It's about how do we literally transition this family out of a marriage or relationship into two different households and, you know, disentangle their finances somehow. And so it's really um people working from the same starting point toward the same goals. And the goals aren't necessarily the same for the couple, obviously, if they got along beautifully and shared the same life vision, then they probably would not be separating but the idea is that there still can be common ground for these folks and it doesn't require that somebody leave something on the table or there would be huge compromises in someone's life. So it's really got to be the fact that its interest-based negotiation where we're trying to meet everyone's goals number one.⁶⁶⁴

Interest based negotiation entails a significant amount of training that participants linked with the ability to ask deeper and different questions than they had asked in traditional files. They began to ask questions that aimed at the root of the issues and enable innovation.

Training for observing, as a critical innovation skill, begins at the initial training where participants are asked to participate in simulated negotiations while others watch and comment on them. Subsequent training and conferences require the same sort of critique. Observing is further supported by the open relationships developed between professionals. Lawyers explained the importance of reflecting and debriefing with each other, commenting on the behaviours they demonstrate in negotiations. One participant explained a particular situation, related to the skill of observing,

⁶⁶⁴ Interview 023 at 06:19, page 250 of transcript.

Sometimes [lawyers will] say “that wasn’t very collaborative” and I say “I’m sorry, I’m not perfect”. And its not like every collaborative lawyer gets along with everyone. We have clashes, but what we do then is we go for lunch and we try and work it through. I mean, I have a lawyer who I like and respect and I had a file with her before and I called her and said “you might think that I’m thick as a brick but you have to stop rolling your eyes in front of the client. You came back in and were very impatient with me. You disappeared for 20 minutes with your client and that never happens in the process”. Well, of course she laughed and told me what she had been doing out there. That her client was about to fire her. But the point is, we try to fix it ‘cause we know we have to work as a team and we do...that’s it.⁶⁶⁵

Many participants explained the importance of observing others at the negotiating table and reflecting on their own behaviour. They explained that they learned a significant amount by such observation and changed their approaches based on the experience observing and working with others. The researcher’s interpretation of such data was that observation enabled participants to improve their innovative capacity in subsequent files. In addition to observation during the CL process, communities of practice have developed videos to assist with observation of files outside of a professional’s own client base.

Further, the innovation skill of networking was demonstrated in the impressive breadth of training possessed by the interview participants. As previously mentioned, they came from varied backgrounds. Many interviewees had not started their careers in law or had taken a break from the practice of law before embarking on a CL career. One participant explained,

I had practiced litigation and then I had left practice for 9 years. So when I was litigating I felt it was very destructive to people’s future relationships

⁶⁶⁵ Interview 022 at 33:17, page 245 of transcript.

cause you were driving a wedge between these two people who you had to, you know, it's a truth finding exercise in court so you had to show that one person was lying and one person was truthful and it seemed very contrary to my personality so I left practice and then discovered there was collaborative law and immediately I studied it and went back into practice.⁶⁶⁶

While some lawyers came from financial backgrounds, others were mental health professionals before entering law school and still others had lived in other jurisdictions before moving to their current location of practice. CL appealed to them as it bridged their professional areas of interest as well as life style and practice choice. The breadth of experience that they brought to their craft was astonishing. Through their varied experience, the participants possessed a strong network of resources from whom to draw out innovative potential.

In addition to past experiences, the participants sought out new knowledge and different experiences. This is consistent with the theory of increasing associational thinking, as explained in Chapter VIII. One participant spoke of her interest in neuroscience, while another spoke of her frequent travel. These kinds of extra-legal experiences undoubtedly assist the innovative capacity of these lawyers and should be encouraged. It also further supports the value of CL for complex problems as a broader experience is possessed from which to help individuals resolve their disputes.

The promotion of associational thinking was also noted in the observational phase of this research, where the researcher saw an impressive breadth of experience being shared. Conferences included sessions focused on exercise, neurology, and music. Drama

⁶⁶⁶ Interview 016 at 01:20, page 164 of transcript.

activities were often conducted within sessions and, in one case, an improvisation evening was scheduled as a supplementary program. Improvisation is a very helpful way of increasing associational capacity. The innovation theory was not lost on these CL lawyers.

Experimenting was also part of the training and practice of CL lawyers interviewed. By virtue of the deep conversations that can be held in CL, lawyers can practice the skill of experimenting. One participant explained,

You get to have those conversations about [their] parenting philosophy. So it's almost preemptive. It's like a cohabitation agreement a couple might do. You try and think in advance to what it might be the challenges that this family might face based on the choices that they make. So it's almost like they come out of it with an agreement that has a longer shelf-life.⁶⁶⁷

The skill of experimenting can be seen by the examination of potential challenges that is so integral to crafting meaningful and lasting agreements.

Although the data reveals the importance of training in imparting the skills required for innovation in CL, participants explained that training is insufficient for some lawyers. As one participant explained,

Unfortunately, there are some lawyers who are collaboratively trained who I will not have a collaborative file with 'cause I feel like I have my hands tied behind my back and they're fighting, punching me in the face. 'Cause they're not doing it collaboratively. I have a case now with a guy who does a lot of litigation and some collaborative. Nice guy, we get along great, it's not about that. It's collaborative lite is what I tell him. This is collaborative lite. He thinks collaborative law is when you get along with the other lawyer and you're not sending nasty letters. OK, that's a good start but he

⁶⁶⁷ Interview 023 at 17:23, page 252 of transcript.

doesn't understand the process of, you know, preparing your client, having these prep talks before.⁶⁶⁸

The fact that training is insufficient for some lawyers supports the proposition made in this and other research that there is something innate about the ability or willingness to practise CL. The next section will discuss such a propensity.

Propensity

Most participants shared the same reasons for taking the CL training, describing a practice orientation that always adopted collaborative principles including an inclination for innovation. CL training gave them a process to follow and specific rules to support them. Generally, lawyers interviewed in this study talked at length about how wonderful CL was for them. For example, one participant stated, "So, am I collaborative? I look forward to collaborative, I feel so good when I have a collaborative file. So that's my choice".⁶⁶⁹ It was quite common for participants to focus on personal characteristics that made CL suit their lives, their persona, their ego. This result suggests that these lawyers had a propensity to adopt CL principles and felt fulfilled by following through with them.

Consistent with the foundations of CL where Webb conceived of the process with his own life goals in mind, this research found that CL lawyers today are making the same choice for the same reasons. As stated by one participant when asked why she embarked on a collaborative practice,

⁶⁶⁸ Interview 021 at 19:23, page 227-228 of transcript.

⁶⁶⁹ Interview 012 at 24:36, page 122 of transcript.

... for me it's just feeling far more comfortable in the collaborative, interest-based sort of process, its just natural for me so that's what motivated me. It fit my personality so well. Uh but I think there could be other motivators, you know, that someone might just find the stress of litigation too difficult and they want to....a lot of senior practitioners become collaborative lawyers because they don't want to continue to be part of making things worse for families and they have this epiphany that they realize, "I'm part of the problem and I don't want to do that anymore, I don't need to do that anymore and I don't need to feed my ego by going into court and making a big uh, you know, making a big event". So they're motivated by that circumstance in their life...⁶⁷⁰

Another participant noted,

I have always approached my cases, before I knew anything about collaborative law, I was approaching my cases in a collaborative fashion, that's just who I am. That's how I work, that's always been how I worked.⁶⁷¹

Lawyers interviewed showed a balance between analytical, emotional and innovative intelligence. This section of the study results will focus on these three critical intelligences required for innovation.

The lawyers interviewed for this study were a highly reflective group. Such reflectiveness demonstrates a propensity for heightened emotional intelligence. The words "I think" or "I feel" appeared 176 times in interviews. Lawyers showed a real interest in the way in which they practise on a day-to-day basis. They also spoke of the emotional nature of divorce and not wanting to add to the turmoil. As explained by one participant,

Well, I think what has attracted many of us to collaborative is that, in our experience, the legal system can do harm to families. Economic harm, emotional harm, I think it hurts families. Some families do not have the ability to not do that but many families if they were educated and

⁶⁷⁰ Interview 002 at 21:23, page 27 of transcript.

⁶⁷¹ Interview 006 at 7:48, page 58 of transcript.

understood the process and knew it was a viable option would choose it. And um collaborative lawyers, almost like the hypocratic oath, we don't want to do any harm. And we try very hard not to. And not to let the system...we can adapt the system. But sometimes it's very tricky.⁶⁷²

CL lawyers expressed real concern for the well-being of their clients and their families.

Lawyers expressed a desire to show compassion to their clients. As explained by one participant when asked about the benefits of CL,

... the dedication of each counsel to be open to being compassionate from the perspective of the other. ... To get my client what she wants in a settlement where there's no resentment, that's one of her goals, she and I have to understand what husband wants and we need to care about it 'cause knowing about it and not caring about it is not going to get her what she wants.⁶⁷³

In addition to displaying emotional intelligence, the participants displayed the potential for innovative intelligence. Lawyers interviewed noticed a difference between those lawyers capable of innovation and those that remained stuck in an analytical paradigm. Participants described other lawyers with whom they had worked to support this proposition. They showed an understanding for the difference between innovation and mere problem solving. For example, one participant explained,

I can think of a traditional negotiation file I have now with a non-collaborative lawyer who is very big picture and settlement oriented and we can have frank discussions and we respect each other and trust each other and I've worked with him for many many years. Um, and that file looks similar to collaborative just because of who he is and how he practices. But it's not the same. The interest negotiation part is not there much. He's big picture but he's not, "what does your client need to make this happen?". Right? What's the win win? Its more like "this is my client's position and that's your clients position and how do we shave it up the

⁶⁷² Interview 022 at 37:58, page 246 of transcript.

⁶⁷³ Interview 009 at 30:39, page 96-97 of transcript.

middle?”. Right? So it’s not as creative in that respect and it’s not as family focused and there’s no effort to connect to the other side at all.⁶⁷⁴

The ability to note the lack of innovative potential in another lawyer shows some predisposition to seek out innovation. Another example of innovation at work in CL describes “bolder” lawyers with the ability to craft richer agreements, stating,

... we’re much more bold as lawyers. I see traditional separation agreements all the time because they come to me in mediation because there’s no review clauses or if there is a review clause there has been a big fight about it. Whereas in a collaborative agreement, we probably will set out 20 things that may happen that will trigger a review among these things... and we’re bold. We’ll go there. We’ll push the idea of spousal support way into the golden years and start figuring out what will you do if this happens or this happens or this happens? You’re going to come back. And if you are going to come back, it is going to be for these reasons and do it this way. So I think there’s a boldness about the agreements that we’re not scaredy cats about the dirty discussions about spousal support or whatever. And I also think that they’re much richer. They recognize that all families are different so we’re not so bound by language we pull out of templates. Also, the value of the kind of information that, particularly the financial neutral brings to the case is to look to the future and allow for that discussion. So if we think in a traditional case that the finish line is a separation agreement, you know, support is going to be X for X number of years. Those are just numbers. We look beyond that and say what’s going to happen afterwards. ...So its bringing the practical reality which I don’t think always happens in traditional cases. I know it doesn’t happen.⁶⁷⁵

Innovation indeed requires boldness, a characteristic displayed by the way in which CL lawyers look at problems and the ways implementable solutions are devised. It became clear to the researcher that participants viewed innovation as a propensity that could be employed outside of CL. For instance, one lawyer whose practice includes both litigation and CL said,

... because I always practiced with the view to creating an agreement of some description, and I say to clients “look, you can agree to anything....you can say that our children will only even wear purple socks

⁶⁷⁴ Interview 021 at 03:26, page 224 of transcript.

⁶⁷⁵ Interview 019 at 40:24, page 207 of transcript.

and if its in an agreement and you agree, nobody's going to argue with that. So, bare that in mind". So that's kind of how I approach it.⁶⁷⁶

Propensity for innovative thinking was also expressed by participants in discussions about who they choose to work with on files. For example on lawyer stated,

I think there's a lot more homogeneity within the collaborative group. I could almost throw a dart and whoever I pick in that group it'll be fine. There are a couple that its not fine at all. And there are, but very few. And there are some that's its heaven if you get that person. Its just heaven as opposed to fine or really not fine. But the biggest piece of it is fine and that's ok. So that's fine. The group, the people who belong to the group by and large do the work, do it well and are open to hearing what it would take to get an interest-based settlement.⁶⁷⁷

Although a test of emotional and innovative capacity was not performed in this research, the above data, generated from interviews, suggests a propensity for both heightened emotional intelligence and innovative intelligence. This was a consistent finding across interviews.

As explained by Weiss and Legrand, however, these proclivities are insufficient.⁶⁷⁸

Innovation in CL requires that analytical intelligence is developed and utilized appropriately. Many participants described their concern that analytical skills were waning in the CL process, usually because lawyers do not have sufficient experience or are not keeping up their legal skills. As one lawyer explained,

I think one of the problems with the collaborative process is that there are a lot of young lawyers who have virtually no experience being lawyers who go right into the collaborative thing because it is very manageable...You don't have to go home and stare at something for five hours. The collaborative participation agreement requires that the lawyers are always paid so that deals with a particular problem for a lot of people. You can

⁶⁷⁶ Interview 006 at 10:18, page 59 of transcript.

⁶⁷⁷ Interview 016 at 14:08, page 167 of transcript.

⁶⁷⁸ Weiss & Legrand, *supra* note 334.

work between 9 and 5 only. So there are a lot of attractive things to collaborative law. You are not being served with motions and then having to deal with things in an untimely way. But the problem with that is, and I think from the public's perspective, if you hire a lawyer that's been out three years, to do the collaborative process, one, collaborative law is not easy, if you practice it well it's very difficult, two, the lawyer has no experience as a lawyer so the overlay of the collaborative thing becomes, I think, lost because there's a lot of sitting around without guidance.⁶⁷⁹

This lawyer inadvertently describes the requisite analytical knowledge required before an innovative process can take place. Another similar concern raised by participants was that CL lawyers have the potential to get lazy with their knowledge of law and current developments in the law if they are not involved in court processes. For instance, one participant stated,

I just think that the downside to collaborative law is, because you don't go to court, it does lead the way to becoming a lazy lawyer because you don't have to keep on top of everything. So there's always that danger. So you have to go to as many things as you can that are not collaborative based so you can keep on top of litigation and other aspects. So that's the downside.⁶⁸⁰

Another lawyer explained the need to maintain analytical skills explaining,

I think over time, I think the collaborative lawyers have to do awesome work. We have to present an image of highly sophisticated lawyers. Um they have to keep up their skills, they have to keep up their skills of these complex financial issues and we need to be the "go to" of people that have complex financial issues. I don't think we are that currently.⁶⁸¹

The perception of CL lawyers as somehow lesser lawyers was a concern shared by many participants. One participant explained,

⁶⁷⁹ Interview 017 at 06:42, page 178 of transcript.

⁶⁸⁰ Interview 011 at 24:28, page 116 of transcript.

⁶⁸¹ Interview 020 at 42:34, page 220 of transcript.

I would talk to good litigators who I would love to get into collaborative and I work with them and negotiate things with them and we're fine. And I ask them why they don't want to get trained. Their perception is that the lawyers that are involved in it are doing it cause they can't do litigation. And it's not entirely not true. There are some that are like that. Or they're afraid to do litigation. Um or they just don't feel like the caliber of lawyers doing the work is good. And there is a problem with that but there is no question that that is the perception.⁶⁸²

Another recounted,

I had a girlfriend and she was separating and she came to me with the names of lawyers who had been recommended to her. I wasn't going to be her lawyer 'cause I'm her friend. So she wanted to run her names by me ...They were all really aggressive lawyers and I looked at her and said "no!". So out there there's a sense that these lawyers are good and these [CL] lawyers are tree hugging. I have a very rich client that works with me...she said to me one day, ... "[the agreement we have is] good for now but if he changes his mind I'm going to get myself a real lawyer". And then she caught herself and said "I mean, I think you're a real lawyer too but..." So she has the perception that I'm not a real lawyer.⁶⁸³

These comments describe the importance of analytical intelligence but also point to the reputation of CL, which will be discussed further in the subsequent section. Analytical intelligence must not only be held and maintained but must be demonstrated in order for others to value the practice. Participants indeed expressed a deep concern with maintaining analytical skills.

Reputation and practice groups

Practice groups are essential to support the innovative capacity of lawyers that exist, to some extent, by predisposition and achieves its potential through initial and continuing training. This section will describe the essential role of practice groups, as evidenced by

⁶⁸² Interview 021 at 47:16, page 234 of transcript.

⁶⁸³ Interview 020 at 40:29, page 220 of transcript.

the research data. Before such data can be shared, an important concern raised by lawyers, which bears on these results, must be noted.

Despite the potential exhibited by CL lawyers in terms of both training and propensity, participants expressed dismay about lawyers who have misconception about the nature of CL. As explained by one participant,

So a lot of the litigators, although they think they are doing their clients a favour by pulling them into mediation, don't know about what the collaborative process is, don't want to get trained because they think we're all holding hands and singing koombaya and really we do our best work when we are triaging couples who are bleeding and helping them patch up and make their own best decisions because we don't work, we can't work any harder than our clients do.⁶⁸⁴

The word “koombaya” appeared twelve times in the interviews of this research. The term was used to explain misconceptions about the process and a negative view of CL from lawyers who do not practice CL. Much of these concerns circled around the same negativity as does creativity in innovation. Viewing CL as a “softer” approach to family law, lawyers naïve to the practice are apt to undervalue it. Many participants expressed this concern.

A similar concern was expressed when it came to what many referred to as “dabblers”. Participants used the term “dabblers” to refer to those who are trained in CL but do very few cases within the process. One participant stated,

Um, the people who dabble in [CL] really depends on the nature of the rest of their practice. If they're dabbling in [CL] but they do lots of other negotiation, that usually works ok. If they're dabbling in [CL] but they do

⁶⁸⁴ Interview 014 at 29:44, at page 149-150 of transcript.

lots of litigation, it's very difficult. It's difficult for scheduling, it's difficult for mindset, you know, I've got them sitting in a room that is an out of court settlement and they're like "just a second I just gotta check my blackberry, I was in court yesterday and I'm just waiting for the judge's ruling" and it's right in the room and it just brings that heavy weight court "I'm a litigation lawyer who happens to be sitting in this room"...so it's really difficult.⁶⁸⁵

The discussion of so-called "dabblers" was quite common and points to the insular nature of CL communities in some cases. CL lawyers explained that they prefer to work with people with whom they have worked before. The referral model that leads to many CL files continues this repeated exposure to the same set of lawyers. As explained by one participant,

I think that really there are certain collaborative lawyers who go to all of the meetings and send the work to each other. From my perspective, it's a very very closed group. And they will refer to each other because they want to be referred by each other. They just want to keep it going. So if somebody like me shows up once in a while, maybe once a year or twice a year, I'm not part of the group and I don't say that collaborative law is the only way to practice law. In fact, it shouldn't be and it's not. I think it needs to be one alternative and most of the persons who do it only do collaborative law. That's it.⁶⁸⁶

The unit through which CL lawyers and neutrals unite is the practice group. Practice groups are an essential resource for CL lawyers. As such a resource, innovation must be supported through practice groups. Gatherings of CL lawyers perform a social, informational, referral and mentoring function that forms the heart of a CL group. Previous research conducted by both Macfarlane⁶⁸⁷ and Degoldi⁶⁸⁸ note the importance of practice groups. This research has noted a broader range of supports that practice groups can offer.

⁶⁸⁵ Interview 009 at 12:28, page 92 of transcript.

⁶⁸⁶ Interview 017 at 16:44, page 181 of transcript.

⁶⁸⁷ Macfarlane, *Emerging Phenomenon of CFL*, *supra* note 5.

⁶⁸⁸ Degoldi, *supra* note 37.

The observational phase of this research entailed attendance at many practice group events at research sites and beyond. A similar social atmosphere was noted in each case. The camaraderie observed between and amongst practice group members was evident. These were not individual lawyers working in isolation but friends and colleagues working as a team. Lawyers and neutrals joined together to discuss issues and ideas. At various points it was impossible for the researcher to denote which individuals held which professional roles. Such gatherings brought to mind what sociologists and anthropologist Ray Oldenberg termed “third places”.⁶⁸⁹ Third places are environments that enable connections among people from different disciplines and, in this way, are ideal for incubating innovation. The sharing of experiences and best practices amongst all in attendance was contagious and uplifting. Innovation was seen at work.

Beyond the researcher’s observations of practice groups at work, the interviews detailed the importance of practice groups. The combination of perspectives in practice groups was shown to impact cases in a positive way, even when people were not directly involved in such practice groups. For example, one participant explained,

And I have a small practice group that I meet with once a month and we bring cases and say “this is what’s going on and the other lawyer is doing this or the client is doing this or my client...and we strategize. Its really really helpful. I’ve been able to save cases by just taking advice from other people on what techniques to use and manage.”⁶⁹⁰

⁶⁸⁹ Ray Oldenberg, *The Great Good Place: Cafes, Coffee Shops, Community Centres, Beauty Parlors, General Stores, Bars, Hangouts and How they Get You Through the Day* (New York: Paragon House,1991).

⁶⁹⁰ Interview 021 at 45:13, page 234 of transcript.

Retaining a reputation for innovation and having such a reputation encouraged by the rest of the practice groups is essential to supporting innovation in CL.

Disqualification and Innovation

The topic of disqualification was covered in all interviews, as the researcher suspected that it would have an effect on innovation. Whether positive or negative, some impact was expected; however, little effect was noted. Despite its essential nature in CL, many lawyers in this research simply did not consider it relevant to their work in CL. As explained by one participant,

... I've never considered disqualification relevant at all to the way in which I put effort into a file. The outcome of the file, the outcome of the level of detail in the clauses, the outcome of the structure or the creativity of the agreement. My personal experience has totally depended on my interaction with the other professionals. Nothing to do with feeling any pressure from withdrawing, I just think it's the furthest thing from my mind, I never think of withdrawing.⁶⁹¹

This particular lawyer uses a DA in some cases and not in others. This was an unexpected finding. Participants described that the impact of the DA was minimal for one of three reasons: (1) because most cases resolve in the CL process, and even when they do not, the transition to a litigation lawyer is very smooth; (2) because many lawyers in two of the research sites no longer conduct any litigation; and (3) because the other components of CL are so much more important. Each of these rationales will be discussed in this section. The only ways in which participants viewed the DA as innovative supporting was in encouraging lawyers to seek alternative modes of overcoming impasse within the CL process and in encouraging open communication

⁶⁹¹ Interview 001 at 30:43, page 11 of transcript.

Settlement rates are exceptionally high in CL, as they are in most files outside the CL process. The frequency of successful settlement makes disqualification an exceedingly rare occurrence. Even where disqualification is necessary, participants noted that methods of transitioning files have been developed to ease the movement of the file to another litigation lawyer. One participant noted,

I've found that [the impact of the DA] has played out in two ways that I don't think I expected. One was that the vast majority of my cases settle so I would say, ... 95-96% of my files settle within collaborative process so that's one thing, that it doesn't happen very often that it leaves process. Those few that have left process, um have left process with all the financial disclosure exchanged and organized, with partial settlements, with narrowed issues and the transition to their new counsel I always offer, as many of us do, you know, a free hour to go with them and meet their new lawyer and the three of us kind of transition the file together over a one hour meeting where they may be paying the new lawyer but at least they're not paying me as well. And because it [has] never been all issues,... they don't need to reinvent the wheel on all aspects of the case so it's gone very smoothly... [S]o it seems like its been smooth transitions, not hugely costly to duplicate work and rarely happens.⁶⁹²

Another lawyer stated,

At the beginning, we had, a lot of people came [to trainings] because they were curious and as soon as they heard that [lawyers were disqualified] they walked out of the meeting. But what they failed to realize is how many times their litigation files walk out of their office and go to another lawyer before it settles. And what they fail to realize is, yes, they're going to lose the file but they'll get a good referral. So few of them, like less than 3% don't finish... There's been a couple that I have referred to litigation counsel and I pick the lawyer for them and take them there free of charge and I explain to the litigation counsel what the essence of the case is. And you can distil that into like a five minute discussion. And where the stumbling blocks are. And then, I leave. So maybe I'm there with them for half an hour. And so its not, and then we've got all the financials probably gathered by that point. Its not like they throw out the work they've already done. You have to maybe swear a financial statement but you've got all the

⁶⁹² Interview 009 at01:54, page 88-89 of transcript.

backup. So, you know, it's in a bound volume. You've collected everything. You've got a lot of information.⁶⁹³

Any sworn documents can be easily passed on to litigation counsel and survive the CL process. None of the participants in this study had had more than five cases leave the process. This supported the sense that the DA was increasingly unimportant. Additionally, these participants did not feel that the DA kept them in the process where they otherwise would have litigated.

Many participants viewed the DA as so insignificant that they conducted “small-c”, “quasi-collaborative” or “collaborative light” files which look the same as CL files but without the DA. These participants discussed the possibility of, and their participation in, cases that, while not formally part of the collaborative process followed many of the same principles of collaborative practice. This was occurring in all the research sites. As one participant observed,

So [the DA] doesn't actually affect my practice other than with the constraint that if you sign on that dotted line and say you are now in a collaborative model, I have to pull out. So there are cases that the other lawyer and I, if the other lawyer is similarly minded, then we both have concerns that one or the other has a client who may push it past the collaborative side, we will just move it through the collaborative path but not sign that agreement.⁶⁹⁴

The use of “collaborative light” or “quasi-collaborative” was often described as beneficial. When asked why this process worked, even in the absence of a DA, one participant explained,

⁶⁹³ Interview 022 at 12:55, page 240 of transcript.

⁶⁹⁴ Interview 006 at 7:51, page 58 of transcript.

Because we put it on the table and say the only reason we're not a collaborative file is because they don't want to lose the lawyers. So everybody says ok, we're not going to lose the lawyers but we're not going to go to court are we? We're going to sit here and settle it come hell or high water and we sort of almost like the signing ceremony but we do it around their concerns and how we can resolve it and we talk the talk that you would talk when you sign the collaborative agreement but we do it in a non-collaborative signing context.⁶⁹⁵

Another participant noticed a shift through the years in the importance of the DA, stating

Well, you know, and it's very interesting because I have to be reminded all the time that that provision is in the agreement because it is never an issue. Never. I mean, we just don't see it as an issue. It never comes up in training the disqualification. Like in the early early days when we were training, ... 60 lawyers would come to training because they didn't want anyone in town to know anything that they didn't know. And there'd be these huge discussions about the disqualification...And then all of a sudden, as the fold got smaller and lawyers started to come to the training because they really believed in it, the issue of the disqualification provision has sort of become a non-issue.⁶⁹⁶

Many lawyers stressed the importance of the other aspects of CL, which greatly outweigh the importance of the DA. For instance, one participant stated,

... to my mind, the [DA] and the formality of the process isn't as important as what the lawyers bring to the table and get their clients to bring to the table. So I'm not, and maybe people would criticize me for saying this, but to me, if we're bringing this thing and credentials to the table, ...I would still say that there has to be full financial disclosure, there has to be respectful communication, all those things I would apply whether I signed a participation agreement or not as long as the other lawyer agreed that that's the process that they were going to be recommending to their clients and keeping their clients on the same level. So, in fact, the results might be very similar [in a collaborative or non-collaborative case] depending on the conflict level of the clients, the willingness of the lawyers to coach their clients and help them through that so that they can continue to have, especially as parents, an ongoing relationship.⁶⁹⁷

⁶⁹⁵ Interview 012 at 25:39, page 123 of transcript.

⁶⁹⁶ Interview 019 at 18:59, page 202 of transcript.

⁶⁹⁷ Interview 018 at 06:46, page 187 of transcript.

The discussion of holding CL cases without a DA is still taboo such that conversations in this regard were not held in public in the observational sites. Although almost all participants in the interview phase could imagine a scenario where all elements of CL were retained but for the DA, this was never admitted in larger groups of CL lawyers.

Indeed the DA has taken on a surprisingly minute role in two of the research sites. Many CL lawyers in Toronto and Vancouver have limited their practices to non-adversarial family law. In this way, and for those lawyers, disqualification has become an obsolete assumption. As Chapter XI suggests, bad assumptions sometimes become so strongly held that they are automatic boundaries that may not be useful. Why retain a mandatory boundary that has no utility? If lawyers never go to court in any case, they need not sign a DA. Such a document is redundant. One participant explained,

Because I am no longer doing any litigation and I make that very clear to a prospective client from the outset, that I hung up my robes several years ago, they are now art on my wall...⁶⁹⁸

Another stated,

For me, I don't do litigation so a disqualification clause of collaborative becomes irrelevant. I have a limited retainer with my clients anyway. So I think that does make a difference from the lawyers' comfort level in deciding "do I think this will be successful in collaborative or not?". Um and from the client's perspective, probably as well...with me, they wouldn't get me as [a litigator] anyway.⁶⁹⁹

The view most commonly held by participants was that of the DA as a routinely signed document that was not frequently considered or thought of. Some arguments against the DA proved in this research to have become obsolete. One example is the thought that if a

⁶⁹⁸ Interview 014 at 04:11, page 144 of transcript.

⁶⁹⁹ Interview 009 at 13:59, page 92 of transcript.

CL case ends, all information must be destroyed. Participants were shocked to hear about this misconception.

Oh, its not destroyed. So I guess [the fact that people think that is] scary. It never occurred to me that the work had to be destroyed. We do have, in the participation agreement, ...that anything that's a sworn document lives past the process because it's a sworn document. Business records are still business records. Your tax bill, your tax return, those are not now destroyed, right? Um drafts? Draft net family property statements, statements that were used for the purpose of looking at options, those can't survive outside the process. So, um and draft 13.1s would not survive the process. But if anything I find there's a tendency to get more 13.1s sworn than there ever was because we're always hearing what the complaints are and would love to hear all the complaints because we can't do anything about our image until we know what people are saying.⁷⁰⁰

As CL has developed, lawyers have addressed such concerns as “starting all over again” and have turned to various methods of overcoming impasse. This has meant fewer and fewer cases leaving the CL process. It also has increased the innovative potential of lawyers who sought to find creative means of overcoming impasse. In this limited way, the DA indeed has supported innovation in CL. One participant, when asked how many of her cases leave the process explained the change that has occurred for her over the years,

Very few. More common when I started. Um and that was because, I think I was more inexperienced. I gave up too early. I was afraid to explore other options like bring a mediator in. I had not thought of that. I thought that was not part of the process.⁷⁰¹

Particularly in more developed collaborative communities, a focus has turned to using external aids in overcoming impasse in a case, rather than requiring withdrawal from the

⁷⁰⁰ Interview 016 at 10:01, page 166 of transcript.

⁷⁰¹ Interview 021 at 32:09, page 231 of transcript.

lawyers. Such mechanisms have included second opinions, settlement conferences, mediations and arbitrations.

Many participants stated that, before they let a file go, they would send it for another opinion. For example, one participant noted,

Another thing that I have offered in a case is to have some kind of mechanism if we reach an impasse. Like having a senior lawyer come in, or even a non-binding arbitration or something like that. So I talked to [s]omebody about that and they thought that as long as both parties agreed that it would be acceptable.⁷⁰²

Another participant stated,

Sometimes, not often, if it looks like its going off the rails, I will suggest to my client that he or she go and get a second opinion from a litigator to get some sense of their own exposure and potential successes if it comes out of process and often they come back into process or they don't leave process to begin with.⁷⁰³

Settlement conferences were also noted as a possible step to add that would not detract from the CL goals. Particularly in Halifax where disputants can select their settlement conference judge, participants described such conferences as more of an evaluative mediation than a true step in the litigation process. Lawyers showed their innovative capacity by explaining the kinds of options that could be used in case of impasse. In this way, the DA aids innovation by forcing lawyers to look at other options. When asked what could be added to CL to improve the process and help surpass impasse, one lawyer noted,

...you know maybe adding the option that if it appears that parties really could and should settle this but they aren't doing this within the

⁷⁰² Interview 005 at 36:10, page 55 of transcript.

⁷⁰³ Interview 014 at 08:37, page 145 of transcript.

collaborative process but they could go to a court settlement conference, no further but a court settlement conference, that might spur it on because I think that people would then be able to say to clients “look we have this process and I can take you all the way up to here. I won't litigate for you but I can do all this up to here. And when we look at the stats here, 98% of cases settle, I don't know what they're like in Ontario but here they're 98% so um I don't know what the stats are for the collaborative model here, I can't speak to that at all but it seems to me that why would we by taking people into the collaborative process restrict ourselves from a 98% settlement but for this one little court settlement conference?⁷⁰⁴

Using mediation, and particularly an evaluative style of mediation, was raised by several participants. For instance, one Toronto lawyer stated,

I totally do I see a total role for an evaluative mediator on files. I think that there are a certain group that have a skill-set and knowledge and experience and I think people do value what they have to say...I would be absolutely someone who would say that could be very helpful to people.⁷⁰⁵

Varying opinions were offered when the idea of arbitration within the CL process was raised. Many participants explained that arbitration would be helpful but that a joint statement of facts made by both sides would be the only permissible way to utilize arbitration while retaining the spirit of CL. These are issues that are clearly being discussed among CL professionals and it was the researcher's sense that more of this is going to be occurring. Again, the fact that these discussions occur shows a reflective and adaptive quality in CL lawyers. One participant explained some potential options,

...we were discussing recently in my small working group uh what would be the role of the collaborative lawyer in the arbitration. Uh it would be weird if the collaborative lawyer became the counsel in arbitration because then you really take on an advocacy role, which is contra to the sense of collaborative law. So uh one lawyer actually suggested that you would only do it if you had an agreed statement of facts and the arbitrator would make a decision based on the agreed statement of facts and no submissions. That

⁷⁰⁴ Interview 006 at 15:38, page 60 of transcript.

⁷⁰⁵ Interview 013 at 28:50, page 136 of transcript.

would be one way. If it's a parenting issue, I believe the clients can go on their own and make their own pitch and have someone make a determination. I'm not really sure that I would favour for arbitration as we know if where you have witnesses and cross examinations and all of that. I think I wouldn't be comfortable I mean, I don't do arbitration in court myself so I would have to retain counsel to do that anyways to do that advocacy. Um, would they temporarily suspend collaborative law, get other lawyers to determine an issue and then continue in collaborative law? Maybe, that's a good way of doing it.⁷⁰⁶

Other innovative ideas came from another participant,

So, yes, I definitely use evaluative mediators, litigation opinions, I have very strong views about arbitration. I've never used it but I believe you can use it on the following basis, and that is: if it's a decision that needs to be made by a neutral third party based only on a joint statement of facts from both lawyers. Because I don't believe um that you can change hats and become a different kind of advocate with the same family you have a relationship with your own client, that's a special kind of advocacy and you've also been working in good faith with the other spouse and to suddenly do a mini trial in front of an arbitrator, I don't think there's any place for that in collaborative practice. They can go, but with different counsel.⁷⁰⁷

Would any of these ideas be thought of if CL never had a DA? Likely not. The removal of disputes from the litigation realm forces a series of thoughtful discussions about what can be done if impasse occurs.

Not all lawyers felt that the process could survive without the DA. Eight of the participants in this research expressed that the DA is absolutely essential. The following statement shows that there is still a feeling that some lawyers will not share information or cooperate without the DA:

Um, I think that it is important because when things get difficult the tool that us lawyers are trained to go to is to think "ok well then, you know, we'll march off to court". So it just helps soften that because everyone is

⁷⁰⁶ Interview 020 at 36:54, page 219 of transcript.

⁷⁰⁷ Interview 022 at 26:35, page 244 of transcript.

on board trying to get this sorted out without that... If we're not committed to collaborative at the beginning, we just have to know because we're not going to talk the same way. We're not going to disclose in the same way with counsel. You can't do that if you're going to potentially have them going off to court because the kind of conversation I can have with a collaborative lawyer in a collaborative agreement um, I can pick up the phone and acknowledge that my client is having these issues and how we can help them while this is going on. I'm not going to do that in another case. So I think its really important. I think sometimes it can feel like an afterthought and there's those files that are never going to go to court and it is an afterthought for those files.⁷⁰⁸

Since sharing information is critical to innovation, such sentiments suggest that there may be a role for a DA in some instances. A reasoned decision should be made, however, in deciding whether disqualification is necessary in a particular case. A blanket inclusion or exclusion of a DA is neither necessary nor beneficial to innovation.

⁷⁰⁸ Interview 010 at 17:02, page 106 of transcript.

Chapter XI. Implications and Directions for Future Research

This research has examined the practice of Collaborative Law (CL) through the lens of innovation theory. CL, as a dispute resolution mechanism, demonstrates innovation on both a macro and micro level. CL itself is an example of social innovation and individual innovations are possible in executing the CL process, where appropriate. This Chapter will expand upon the results and analysis documented in the previous Chapter, suggesting implications of the research for CL, for dispute resolution, for legal practice and for legal education. Herein, suggestions will also be made for future research.

The specific results from the observations and interviews conducted in this study suggest a model for innovation in the provision of legal services. The data generated through this research supports the importance of analyzing the problem by assessing complexity at the outset. Only in complex cases should the innovation process of CL be undertaken. Interviews in this research suggested that, when the CL process was utilized in complicated cases, clients felt that the process was lengthy, cumbersome, and expensive. Once a complexity assessment is conducted, CL benefits from following through the four-step innovation process articulated in Chapter VI to resolve the complex problem through innovation. Cross-disciplinary team members should be included as a default in CL, because of the marked facilitation of innovation when diverse groups work together. Such professionals can be employed in a variety of fashions depending on the needs and budgets of the particular clients. Lawyers are a vital component in CL, and hence, in innovation and individual lawyers as well as CL practice groups must value and train for innovation. Finally, the Disqualification Agreement (DA) should be reconsidered as a

default but should be included where necessary to encourage the innovative potential of the team.

What Does this Research Mean for Collaborative Law?

The results of this study, combined with the knowledge imputed from innovation theory indeed suggest a slightly modified model of CL. This modified model has implications for CL training, practice and process. Each of these implications will be explored in this section, along with corresponding suggestions for future research.

Implications for Collaborative Law training

Training programs should be studied for their capacity to foster, teach and ensure the application of the skills of innovation.

Three particular findings from this research bear on CL training. First, this research has discussed and demonstrated the importance of a complexity screening. Second, data generated from this research has shown that specific skills of innovators can be taught through CL training. And third, continuing training should be deliberate and frequent. Standards must be set in each of these areas to ensure that lawyers are prepared to be innovative in appropriate cases.

Innovation, as the road to resolving complex disputes, requires specific, deliberate and continuous training. Such training can be applied in CL. This research has found that CL lawyers value the skills they learn through training, and that they were prone to collaborate and innovate before undertaking the training. The specific skills of innovation including questioning, observing, networking, experimenting, and associational thinking

should be focused upon in the initial training as well as subsequent continuing CL education.

Because it is so easy to slip into routines and avoid innovation, training should be ongoing. By reinforcing the access to innovative thinking, this method of thought can become dominant and, even in stress, can become the source from which the individual practises law. As stated by Weiss and Legrand, “To access their innovative intelligence at any time, even while under negative stress, leaders must imprint the innovative thinking process at the limbic level of the brain”.⁷⁰⁹ Training lawyers to use innovative thinking under high stress avoids the fight or flight response that sees lawyers resorting to analytic means of resolving disputes.

Repetition of training allows behaviours to be accessed at any time and such automaticity depends on the repeated practice of innovative thinking for a minimum of four to six months of continuous effort.⁷¹⁰ Training programs and continuing CL education tends to occur as a one off, stand alone initial training course. This type of training does not allow for the kind of repetition and encouragement that will enable lawyers to access their innovative intelligence on a regular basis. Instead of such isolated courses, CL practice groups should focus on continuous programs, which will reinforce the ability for lawyers to use innovative intelligence. Research should assess the impact of CL training programs on the discreet skills of innovation. Moreover follow-up studies should assess the longevity of such training.

⁷⁰⁹ Weiss and Legrand, *supra* note 333 at 58.

⁷¹⁰ *Ibid.* at 59.

Implications for Collaborative Law practice

Comparative studies should examine the impact of the removal of the disqualification provision as well as the inclusion of a team model on CL negotiations.

CL has a strong framework, as noted in this study, but work must be done to ensure that this framework remains vibrant. Innovation cannot stop. Various amendments to the CL process are suggested by this research. The specific areas of change revolve around lawyer disqualification and team models. The impact of these changes should be the subject of future research.

This research suggests the removal of the DA as a mandatory requirement. An innovative approach to resolving complex legal matters cannot retain such a blanket constraint. Moreover, participants largely considered it inconsequential in many circumstances. While disqualification was found to help encourage the search for innovative means of overcoming impasse, it was not found to be necessary in all cases and may accordingly inhibit innovation. Boundaries were recognized to be entirely appropriate and constructive in innovation; however, the existence and nature of such boundaries must be made explicit. If a DA will aid innovation in a particular case, this study would support retention. Factors such as trust between the parties and between counsel and the nature of the law practice of the individual lawyers should be considered. If, for example, the lawyers only practise settlement lawyering, the DA likely has little impact. If, by contrast, one lawyer continues a litigation practice and the other a settlement-only practice, the DA may be a necessary protection for clients. But the entire model of the innovation process is threatened by the imposition of such a constraint without reasoned

grounds for it. Continued research should be conducted which examines the precise impact on generating innovative outcomes in the absence of lawyer disqualification.

In addition to removing the mandate for lawyer disqualification in all cases, this current research would support that CL should eliminate blanket routines, which see CL employing a narrow definition of neutrals. The focus on family and financial specialists, while both offering important expertise, is too narrow for true innovation. As stated by participants, some families may require a different expertise and each case should be evaluated on its own and an appropriate team should be built. An important finding is that many more neutrals than have been used in CL to date may provide great benefit to the process. Appendix F offers an extensive list of neutral experts that may impact a case beneficially. This list is certainly not exhaustive but it is intended as an enriched foundation. Indeed, lawyers should utilize the same innovative thinking that this dissertation promotes in expanding the list to fit the needs of each family. A concern about the training of these experts may be raised. In the circumscribed roles that neutrals will assume, it is not vital that specific CL training be provided. In addition, participants in this research explained that they are beginning to conduct CL cases with lawyers who are not trained in CL. The necessity and impact of training on lawyers and neutrals should be examined in a future study.

Implications for Collaborative Law process

Accessibility to CL should be studied and innovation should be employed to resolve the problem of access to CL. Future research should assess technologies that could be employed to increase accessibility.

Participants in this research raised the concern that CL can be expensive. The extent of the expense and the comparison to other modes of dispute resolution varies depending on the model used, but at its very basic level, CL requires two lawyers. This causes at least two accessibility issues: CL is not accessible to clients whose spouses either do not have counsel or do not have collaboratively trained counsel and, CL is not accessible to clients who cannot afford the representation. This does not even address the added cost of neutrals. In an age where a preponderance of family matters are handled by self-represented litigants, the two lawyer model may be out of reach. Accessibility to CL is an important issue because if, as this study suggests, innovation is required to resolve all complex problems, and CL indeed provides such innovation, the benefit of resolution cannot be limited to a privileged few.

Accessibility to CL is a complex issue. As such, it cannot be resolved by any means other than innovation. Accessibility to CL has either not been addressed or has been addressed by the same analytical approach as has access to justice generally. Pilot projects are underway in both Toronto and Vancouver, which will attempt to provide pro-bono CL legal representation. CL practice groups have applied to be able to participate in legal aid programs. While these efforts are genuine and respectable, the issue of access to CL will not be resolved if the focus is purely on such traditional ideas. This study highlights

therefore that accessibility must be increased by whatever means practicable. Innovative thinking must be utilized.

Innovative technologies should be studied for their applicability in CL. Online mechanisms such as chat rooms or the use of avatars could permeate into the CL realm to address this need. Regardless of the team model employed, CL requires many individuals, both professional and lay, to meet together to negotiate. The burden of having to be present at all meetings and the cost of retaining lawyers and neutrals can have a reverse effect on a process that is aimed to be more democratic and more accessible.

Accessibility will be affected by the reputation of CL as a process. Future research should examine the innovative potential of lawyers more broadly to adopt the CL approach.

The future of CL as a dispute resolution mechanism is also threatened by its reputational challenges. As described in the context of innovation and creativity, in Chapter VII, lawyers tend to be skeptical of creativity in law. In the same way that creativity is undervalued in the legal community, so too is CL. They are each viewed as soft skills not necessary for “real lawyers”. Several participants in this research described their dismay with the disrespect afforded to CL practice generally and to them personally. They felt that the legal community did not respect the CL process. Indeed the process can grow beyond its current confines as a fringe dispute resolution process. Because the CL approach indeed adopts both an innovative philosophy and process, it should be

employed to resolve a broader range of complex problems. One participant in this research explained,

I guess I am still, after doing this for over 10 years I would say that I think the process has been maturing and I think the approach that we're taking, it would be my hope that that approach isn't something that is limited to collaborative files. That a lot of this holistic approach is something that as family lawyers we will be more open to and there will be more of that in the mainstream. I think that is still the problem with collaborative that it hasn't become as mainstream as we anticipated it would. I say we're not at the grownup's table yet, we're still at the children's table which is a shame because I think we have a lot to offer.⁷¹¹

This research found that CL lawyers feel undervalued in the legal community. A recommendation for future research is the examination of the innovative potential of CL lawyers, and lawyers generally, to determine whether this propensity exists. While a completely controlled study may be impracticable, it would be interesting to note any differences that may exist in innovative potential. Future research could also dig deeper into the culture of CL to ascertain whether indeed the lawyers are undervalued by legal community and what impact such undervaluing may have on the practice of CL.

What does this Research Mean for the Dispute Resolution Field?

Implications of innovation in CL reach far beyond the narrow practice area of CL itself. This study focused on CL both to limit its breadth and because CL is our best current example of a process which can offer innovation to clients. The fact that this research focused on CL does not mean that other processes cannot offer the same benefits of innovation. The results from this study, expanded further, suggest a different way to approach complex legal problems on a broader level.

⁷¹¹ Interview 018 at 53:21, page 197 of transcript.

Not every case is amenable to CL. Not every lawyer has the propensity to practise CL. In the same vein, not every problem is suitable for innovation and not every person is capable of innovating. But lessons can be learned from both CL and innovation that benefit the practice of law at large. These lessons exist on both a micro level and a macro level. Just as this study has described for CL itself, innovations are possible on a case-by-case basis but also for the system as a whole.

Micro implications for dispute resolution

Research should be conducted into the ways in which aspects of the CL process could permeate into other dispute resolution processes. The particular features to be examined include: (1) complexity assessment and process selection; (2) framework setting; (3) collaboration and a team model

Although the potential exists, innovation theory has not spread to other areas of dispute resolution. The entire field of dispute resolution, from legal negotiation to litigation and everything in between, is hampered by rigidity that retains an analytical, rather than innovative, paradigm. Attributes that allow CL to offer innovation to its clients need not be limited to CL. As explored in Chapter II of this research, a client-centred focus and the use of interest-based negotiation are encouraged in lawyering outside the CL context. The importance of both of these factors was critical to the innovative potential of CL in this study. Future research should examine that impact of different aspects of CL that are utilized outside the CL process.

Nothing in the structure of processes outside of CL precludes the availability of innovation. Just as with CL, once the process passes the original screening protocols outlined in Chapter III, the starting point is in distinguishing the type of problem to be addressed. Is it complicated and able to be resolved by the traditional analytical method or is it complex and in need of innovation? Even before an analysis of the legal position of the parties is conducted, an examination of complexity will suggest the procedural route to be taken. Lawyers must be able to, at least, describe with accuracy each process option but, even better, to offer all services to satisfy their clients with complex problems.

Clients must have the freedom to select from the array of appropriate process options but this freedom requires that lawyers know enough about the processes that should be offered in certain cases. It is all too easy to narrow the scope of one's expertise and offer only this narrowness to clients. Being versed in the breadth of options is less simple and requires systemic changes in the way lawyers are taught, trained and monitored. In this way, non-CL lawyers can learn from CL.

Even after a process is chosen, if the case is indeed complex, the specific procedures that were so important to participants in this research and which aligned with the vital framework setting of innovation, should be considered. Setting the parameters and defining the issue with enough breadth to leave room for innovation but with enough circumscription to ensure boundaries is essential. Setting protocols in writing before any dispute resolution process sets a framework for innovation. This research showed significant differences in the way in which the framework is set in CL and traditional

files. Participants all talked about the immense difference in this stage. CL provides an illustration of how a framework is set for innovation. The participation agreement in CL lays out procedural and behavioural guidelines that will be followed throughout the dispute resolution process. Additional parameters that can be laid out include the amount of time and money that parties are willing to expend on finding a resolution and the type of solution that is desired. These factors are often not discussed in great depth at the outset of a problem. Innovation in CL is assisted by adhering to strict behavioural protocols, solidified through the participation agreement, such as the reduction of letter writing, keeping progress notes, attending meetings prepared and respecting disclosure and communication expectations. None of these frameworks need be exclusive to CL.

As this, and other, research suggests, collaboration is key to innovation. Collaboration must become part of the norm. Lawyers are wise to address collaboration, with their clients, and with other professionals in resolving complex problems. Collaboration also is considered a humanistic approach to dispute resolution. Could any aspect of the following statement not be expanded outside the CL context?

For collaborative practitioners like me..., divorce is about a family that just happens to have a legal component to it. As opposed to divorce being a law-suit which happens to have a family element to it. And so when your focus is humanistic and not legalistic, and is based on the needs and interests of every member of the family including the in-laws and everybody that has a voice and is going to be around in the future, the outcomes can be as innovative as the clients themselves want it to be.⁷¹²

CL practice provides a model for the use of team-work. As this research has shown, many members of collaborative practice groups meet on a regular basis to share thoughts

⁷¹² Interview 014 at 09:19, page 145 of transcript.

on a particular issue or just to get to know each other better. Trust and information sharing can be built and facilitated by a genuine camaraderie amongst professionals. Willingness to share information must also increase if information is going to permeate into dispute resolution. As explained by Weiss and Legrand,

In a work environment dominated by complex problems, knowledge no longer can be a source of power; rather, knowledge needs to be a shared resource. Leaders need to be actively committed to sharing knowledge and business developments with their teams so that all can work with the same information. This transparency of knowledge will maximize the trust on the team and, at the same time, will allow the team to collaborate in order to generate the most effective insights into complex issues and to discover the most effective solutions to the complexities.⁷¹³

Such consideration is beginning to take place in other areas of law. For example, Hoffman stated,

...as [CL] has become more ubiquitous it has affected other forms of the dispute resolution practice...The following are some of the common Collaborative practices that I have seen replicated in non-[CL] cases: (a) heavy reliance on four-way meetings as preferable to lawyer-only meetings; (b) alternating meeting places (i.e., first at one lawyer's office, and the next meeting at the other lawyer's office); (c) serving food to make the meetings more hospitable; (d) using agendas to organize four-way meetings and meeting notes to track progress; and (e) counsel engaging in de-briefing to discuss lessons learned from handling the case. Some of the norms of Collaborative Practice (and of mediation) are also affecting the norms and expectations in other types of practice, such as (a) respectful, non-adversarial communications, (b) focusing on interests instead of positions, (c) freely sharing information and, (d) direct involvement of clients in the process. All of these practices and norms are relatively new to the practice of law, at least in my experience, but have become part of the culture of Collaborative Practice.⁷¹⁴

Each of these additions has the potential to increase the probability of innovation in complex cases. Lande also describes that the CL movement has been an instigator of

⁷¹³ Weiss & Legrand, *supra* note 334 at 190.

⁷¹⁴ David A. Hoffman, "Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR" [2008] *Journal of Dispute Resolution* 11 at 26.

change to the legal system and the way lawyers conduct themselves, stating that CL has led to,

...greater efforts to (1) be informal, respectful, cooperative, and trusting; (2) have candid conversations; (3) elicit client input; (4) voluntarily exchange information; (5) use four-way meetings and productive negotiation techniques; (6) use coaches and shared experts; (7) use mental health providers more creatively to help address the needs of the children; and (8) use mediation.⁷¹⁵

Although these authors are optimistic about the influence of CL on traditional practice, it has not occurred nearly enough. Using the framework of innovation may be the answer to expanding the breadth of this influence. Future research should examine traditional practices and determine the extent to which some of these characteristics of CL are spilling into other forms of dispute resolution.

Research should examine the impact of settlement-only lawyering on both innovation and ethical lawyering practices.

Settlement-only lawyering arose as a topic in this study because of the unexpectedly high number of CL lawyers who no longer go to court regardless of the process in which they engaged. While this was not a topic that was specifically addressed in this research, its implications cannot be ignored and should be studied further. Various problems have the potential to arise with such arrangements. While a reciprocal DA ensures that both lawyers must leave the process if settlement is not achieved, a settlement lawyer outside of CL has no such reciprocity. The burden, if settlement is not achieved, is borne

⁷¹⁵ John Lande, "Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin" [2008] *Journal of Dispute Resolution* 203 at 247-249.

unevenly by one side who must retain a new lawyer. The ethical challenge is more intense in such cases than in pure CL cases with a DA.

Macro implications for the legal system

Research into innovation and legal culture must be conducted for impact to occur at a macro level.

This research has implications that stretch beyond the micro analysis provided above. Encouraging increased innovation in lawyers also necessitates encouraging innovation in those who study, research and implement changes in the law. The system itself has a lot to gain from innovation theory.

The legal landscape shaped the creation of CL and, in return, CL has had an impact on the legal landscape. Times have changed and lawyers have changed. Today, more than ever, lawyers are required to innovate and be capable of doing so. The exact nexus of change is unknown but various theorists credit CL with having some impact.

Innovation is another way in which CL can impact the legal system. Innovation is needed throughout the legal system and legal culture.

In order to accept the necessity of an innovative model, the legal culture must adapt. Law is generally a culture that shuns, or at best avoids, innovation. Lawyers are going to have to accept innovation and embrace innovative thinking if they are going to be capable of helping their clients resolve their problems innovatively. Inevitably, if the practice of law is going to adapt to accommodate innovative thinking, methods that enable innovative thinking within the analytical framework of law must be developed. Building a culture of

innovation requires trust, communication and openness⁷¹⁶, features that are not promoted in the legal field. Rather, skepticism, limited communication and withholding of information are often encouraged in an effort to provide diligent representation of clients. Such is the culture of legal practice.

Organizational cultures, such as the legal culture, are generally resistant to change. Culture provides stability and consistency within a profession or organization. In order to protect that stability, defenses must be created and attempts at change must be resisted.⁷¹⁷ Legal culture was developed in a different time, a different economy and with different assumptions than exist today. This study suggests that this culture is amenable to change and has already, to some degree, changed. CL and its lawyers are the example.

Attempts to resolve some of the legal system's complex problems have not been entirely successful. Access to justice is but one example. 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".⁷¹⁸ 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 indeed possesses unchallenged

⁷¹⁶ Weiss & Legrand, *supra* note 334 at 171.

⁷¹⁷ *Ibid.* at 203.

⁷¹⁸ Renee Newman Knake, "Why Law Students Should be Thinking About Entrepreneurship and Innovation in Legal Services" (2012), online: <http://about.bloomberglaw.com/2012/11/28/innovation/>.

assumptions, multiple stakeholders, and unpredictable and ambiguous elements. Access to justice is a complex problem. Innovation is required to create systemic change. Systemic change has to take place if the problem of access to justice is going to be resolved. While specific suggestions on how to resolve this complex problem are beyond the scope of this dissertation, this research suggests that the key is in the innovation model. The study of CL can be the start but continual study of innovation in legal systems must be the follow-up.

What Does this Research Mean for Legal Education?

Future research in legal education should examine the extent to which innovative intelligence is fostered and supported in law school.

If the legal system is to embrace innovation, innovation must be brought to legal education. In 1970, Robin Yeamans wrote a compelling piece describing the need for creativity in legal education.⁷¹⁹ The arguments resonate today. Another poignant statement is the following:

The good student really wants contradictory things from his legal education. He wants the thrill of exploring a wilderness and he wants to know where he stands every step of the way. He wants a subject matter sufficiently malleable so that he can feel that he himself may help to shape it, so that he can have a sense of creative participation in defining and formulating it. At the same time he wants that subject so staked off and nailed down that he will feel no uneasiness in its presence and experience no fear that it may suddenly assume unfamiliar forms before his eyes.⁷²⁰

As was explained in Chapter VIII, students usually enter law school with a well-developed analytical intelligence. The thinking process they have been successful in

⁷¹⁹ Robin Yeamans, "Creativity and Legal Education" (1971) 23 *Journal of Legal Education* 381.

⁷²⁰ Lon L. Fuller, "On Teaching Law" (1950) 3 *Stanford Law Review* 35 at 42-43.

applying prior to law school is so deeply ingrained that they apply that thinking approach to all problems.⁷²¹ Law school strengthens this proclivity for an analytical thinking approach. This approach works very well for complicated problems.

The focus of law schools must expand, however, if students are to graduate with the ability to use alternate thinking methods and resolve complex problems through innovation. Articles have discussed the failure of law schools to graduate lawyers with sufficient practice skills, business acumen or substantive knowledge.⁷²² The results of this study suggest that law school to help future lawyers think effectively for their impending legal careers. The rest of the skills and knowledge remain important but pure analytical thinking is insufficient for complex problems. Law schools have historically touted their ability to teach students to “think like a lawyer”. Thinking like a lawyer no longer implies analytical thinking alone, as times have changed.⁷²³ Thus, law schools must aim to teach law students to expand thinking when approaching complex problems.

Law schools would benefit more students by promoting a system that encourages and validates the law student’s access to analytical, emotional and innovative intelligences.⁷²⁴

Law schools are not currently focused on this goal. As stated by Weinstein and Morton, “Law professors tend to cling to the analogical reasoning we were taught and with which

⁷²¹ See, Weiss & Legrand, *supra* note 334 at 49.

⁷²² For a detailed history of legal education see, John O. Sonsteng, “Legal Education Renaissance: A Practical Approach to the Twenty-First Century” (2007) 34(1) *William Mitchell Law Review* 303.

⁷²³ See Chapter VII for a detailed examination of the changed legal, economic and social world.

⁷²⁴ Martha E. Simmons “Innovative Thinking and Clinical Education: The Experience of the Osgoode Mediation Intensive Program” (2013) 37 *Manitoba Law Journal* 365.

we feel most comfortable, ignoring important alternative thinking processes”.⁷²⁵ Some distinct areas in which law schools can accomplish this endeavour is in promoting group work, changing the nature of assessment, deemphasizing purely critical thought and encouraging frequent reflection. Indeed, changing legal education is in itself a complex problem, which has been addressed as a complicated problem since identified over forty-five years ago. Innovation must be employed to create these programs. If the objective is to impart innovative intelligence in law students, certainly innovation in curriculum design must be used to meet this goal.⁷²⁶

Legal practice is changing and legal education should lead the way. As stated by Macfarlane, “...legal education remains in thrall to the traditional models of lawyering that are beginning to lose their place in the delivery of legal services...Change within the core of legal education has been glacial in pace”.⁷²⁷ Articles written four decades ago called for change that has yet to be implemented.⁷²⁸ What is needed is a renaissance.⁷²⁹

This research suggests that the renaissance should be a consideration and adoption of innovation theory and the development of skills of innovation in the legal curriculum.

⁷²⁵ Janet Weinstein & Linda Morton, “Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education” (2002) 9 *Clinical Law Review* 835 at 836.

⁷²⁶ Some examples of a focus on innovation in legal education currently exist. Harvard Law School, for example, offers a course in innovative thinking and Michigan State University has launched ReInvent Law, a law laboratory devoted to innovation in legal services – others should and likely will follow suit.

⁷²⁷ Macfarlane, *The New Lawyer*, *supra* note 123 at 225; see also, Gary A. Munneke, “Legal Skills for a Transforming Profession” (2001) 22 *Pace Law Review* 105, stating “while society and the practice of law have undergone radical changes, legal education has changed little in the past 100 years” at 123.

⁷²⁸ See, for example, Duncan Kennedy, “How the Law School Fails: A Polemic” (1970) 1 *Yale Review of Law and Social Action* 71; Savoy, *supra* note 525.

⁷²⁹ Sonsteng, *supra* note 722.

Chapter XII – Conclusion

This dissertation has investigated the way in which innovation theory can be applied in a legal context. Using ethnographic methods of key informant interviews and participant observation, the researcher examined the particularly innovative dispute resolution mechanism of Collaborative Law (CL).

This study found that, typical of any innovation, CL has evolved over its 20 year lifespan. Features that seemed essential in the start, such as lawyer disqualification, have become obsolete and aspects that were not thought of, such as the integration of neutrals, have since become fundamental. This finding is consistent with the innovation model. Mulgan suggests that,

...all processes of innovation can be understood as types of learning, rather than as 'eureka' moments of lone geniuses. Instead, ideas start off as possibilities that are only incompletely understood by their inventors. They evolve by becoming more explicit and more formalized, as best practice is worked out, and as organizations develop experience about how to make them work.⁷³⁰

Indeed, much has been learned through the evolution and innovation of CL. Most significantly, the conception of Stuart Webb, CL's lone genius, has changed from a purely two-lawyer model to embracing a team model approach. The lawyer's role has been confirmed as not one of neutrality but as a true advocacy role. Mediation and arbitration have begun to be examined as options for managing impasse. Lawyers are beginning to act as settlement counsel outside of the CL process as well. Changes are happening. These changes are integral to the development of CL and change the ethical

⁷³⁰ Mulgan, *Social Innovation*, *supra* note 336 at 25.

and practical discourse considerably. The most enlightening part of this change is that it demonstrates CL as innovative on a macro level, which allows an increasing amount of innovation to take place on a micro level. In younger CL communities, these changes have not yet taken root. Their time will come and the process will grow as changes are adopted.

These results have implications for CL practice, for the practice of law and for legal education that have been shared in the previous Chapter, Chapter XI of this dissertation. CL, through innovation, has transformed and will continue to transform traditional law practice if innovation is embraced. As Lande explains,

CL leaders and practitioners deserve great credit for promoting protocols of early commitment to negotiation, interest-based joint problem-solving, collaboration with professionals in other disciplines, and internal development of a new legal culture through activities of local practice groups. If CL practice becomes firmly institutionalized, it could influence traditional legal practice, which might be its most significant impact.⁷³¹

As Lande also suggests, CL need not keep innovative potential all to itself. Hoffman agrees, stating,

To say that our garden should grow only one variety – even if it is a strikingly attractive bloom – will simply force those who want to cultivate a wider variety to create other gardens.⁷³²

Encouraging the use of, and indeed teaching the skill and value of, innovative thinking by lawyers outside of CL will go a long way at solving today's complex legal problems.

⁷³¹ Lande, *Possibilities for CL*, *supra* note 67 at 1328, citations omitted.

⁷³² David Hoffman, "An Open Letter to the Collaborative Practice Community and IACP" (2006), online: http://www.bostonlawcollaborative.com/documents/Letter_to_CP_Community_and_IA_CP.doc.

Both at the macro level, in terms of dealing with difficulties in the justice system such as self-represented litigants and impediments to access to justice, as well as at the micro level of individual disputes, lawyers need the ability to use innovative thinking. In so doing, value can truly be delivered to clients and to the system that has been lacking in some cases for a long time.

Changes must take place in legal education and throughout the profession. Innovation must be fostered in and of itself and must pervade all areas of legal education and practice. The push for innovation will be increasingly important as we head into an era of entrepreneurial lawyering. As noted by Hobbs, "...the entrepreneurial lawyer will need skill sets that include strategic planning, leadership, and creative problem solving. At the heart of these skills will be a need to foster imagination and innovation in the manner in which we advise [clients]".⁷³³ The time for silo practice areas has gone. Fluidity must be encouraged and cases must be assessed on an individual basis. Complex cases must be handled differently than complicated ones.

We remain at a stage where there is no other process that can be compared on an even plane with CL when it comes to innovation. The hope is that this will soon change. Innovation can and should take place more broadly. As stated by one participant in this research,

Right now, what happens in a [CL] file is completely different from what happens in negotiation files. You come back in a few years and show me a negotiation file that has agendas, progress notes after, it has lawyers preparing and talking with each other and preparing their clients so there's

⁷³³ Hobbs, *supra* note 335 at 14.

no surprises at the meetings. It has all these things in it. Then we're going to have the discussion of whether the disqualification clause is needed or not and the relevance it bears or other aspects. But until that's happening over here, we have nothing to compare.⁷³⁴

Innovation must bleed into traditional legal practice so that such a comparison can take place. An evolution is required.

This dissertation is intended to begin the conversation of why and how this evolution must take place. CL has been utilized as an example of a practice area that has embraced innovation. The conversation is intended to continue. The legal profession is in the thralls of a new coming of age, which will be marked by innovation and collaboration. CL is just the start.

⁷³⁴ Interview 009 at 48:53, page 101 of transcript.

APPENDIX A

GLOSSARY OF TERMS AND SHORT FORMS

Abbreviation	Full Term	Operational Definition
ADR	Alternative Dispute Resolution	Dispute resolution options that help parties in disagreement to reach agreement outside of court.
BATNA	Best Alternative to a Negotiated Agreement	The attractiveness of the best available alternative to a potential settlement.
CL	Collaborative Law	A voluntary dispute resolution process, which utilizes interest-based negotiation and in which parties settle with the assistance of lawyers but without resort to litigation.
DA	Disqualification Agreement	The agreement, made between counsel and client, that if a collaborative case does not result in settlement, the lawyers may not represent the parties in subsequent litigation.
IACP	International Academy of Collaborative Professionals	Umbrella organization which provides training, networking, standards and guidelines to collaborative practice groups around the globe.
OCLF	Ontario Collaborative Law Federation	A self-governed group of collaborative professionals located in Ontario, Canada
POD	Practice Group	Self-governed groups of collaborative professionals.

APPENDIX B

SAMPLE COLLABORATIVE PARTICIPATION AGREEMENT

The wife, _____, and her attorney, _____, and the husband, _____, and his attorney, _____ have chosen to use the principles of collaborative law to settle the issues arising from the dissolution of marriage. The primary goal of this collaborative law process will be to settle in a non-adversarial manner the issues of the parties' separation, dissolution of their marriage or other family law related matter.

The wife and husband are aware and acknowledge that the success of the collaborative law approach requires a sincere commitment by the participants to engage in mutual respect and full financial disclosure of both wife and husband to make informed decisions, and, even then, there are no assurances that a mutual settlement or agreement will be reached in their particular case to resolve their differences. In furtherance of their commitment, the wife and husband agree to the following:

COMMUNICATION:

The parties shall effectively communicate with each other to efficiently and economically settle the dissolution of their marriage and arrive at a parenting plan that is in the best interests of their child or children. All written and verbal communication will be respectful and constructive and will not make accusations or claims against the other party that are not based on fact and that are not relevant to their collaborative sessions with the attorneys and other professionals. Communications during collaborative meetings will be focused on the economic and parenting issues in their dissolution of marriage and the constructive resolution of these issues. The parties and their lawyers understand that the costs of settlement meetings are substantial and require everyone's cooperation to make the best possible use of available resources and to build trust in believing that litigation with the courts is not necessary. To achieve this goal, the parties agree not to engage in unnecessary discussions of past events which will hinder the parties in their commitment to sincere communication, to moving forward and which are meant to harass or pass unnecessary blame on the other party. To maintain an objective and constructive settlement process, the parties agree to discuss the settlement of their family law issues only in the settlement conference setting, unless otherwise agreed upon by the parties and their attorneys. Discussions of settlement issues will not be initiated at unannounced or inappropriate times by telephone calls or appearance at the other party's residence. If there are minor children the parties acknowledge that communication directly with them or in their presence about the family law issues can be harmful to them. Communication with children regarding these issues will occur only if it is appropriate and done by mutual agreement or with the advice of a child specialist. The parties specifically agree that their child or children will not be included in any discussion regarding the dissolution (or other family law matter) except as described in this Agreement or otherwise mutually agreed upon, preferably in writing, by the parties and their attorneys.

EXPERTS

When appropriate and needed, the parties will use neutral experts for purposes of custody and visitation issues, employment evaluation, valuation of property, cash flow and standard of living analysis, and any other issue which calls for expert advice and/or recommendations. The parties will agree in advance as to how the costs of any expert will be paid.

INFORMATION

The parties and their lawyers agree to deal with each other in good faith to promptly provide all necessary and reasonable information requested. No formal discovery will be used unless specifically agreed to in advance by the parties. However, the parties and their attorneys acknowledge that the issuance of subpoenas may be required to obtain certain documents outside of their possession, custody or control from outside entities such as banks and stock brokerage companies. The parties acknowledge that by using informal discovery, they are giving up certain investigative procedures and methods that would be available to them in the litigation process. They give up these measures with the specific understanding that each of them will make full and fair disclosure of all assets, income, debts, and other information necessary for a fair settlement. Participation in the collaborative law process, and any settlements reached, is based upon the assumption that both parties have acted in good faith and have provided complete and accurate information to the best of their ability. The parties may be required to sign a sworn statement making full and fair disclosure of their income, assets and debts.

ENFORCEABILITY OF AGREEMENTS

This Agreement shall be subject to disclosure to a court of competent jurisdiction. In the event that either party requests a temporary agreement for any purposes, the issue will be discussed and upon consensus, put into writing and signed by the parties and their lawyers. If either party withdraws from the collaborative process, any written agreements may be presented to the court as a basis for an order, which the court may make retroactive to the date of the written agreement. Similarly, once a final agreement is signed, the final agreement may be presented to the court to be incorporated into a Final Judgment of Dissolution of Marriage or other final order, and may be presented in any subsequent action.

LEGAL PROCESS

Court Proceedings: Unless otherwise agreed or filed by either party prior to entering into this Agreement, no Summons and Petition (or Supplemental Petition) will be served or filed, nor will any other motion or document be prepared or filed with the court which would initiate court intervention. As part of a final agreement, a procedure for obtaining a legal dissolution of marriage or final disposition of other types of family law matters will be discussed and agreed upon. Neither party nor their lawyers will use the court during the collaborative law process unless set forth in this Agreement or subsequently agreed upon to facilitate this collaborative process.

Valuation Date: In recognition of the fact that the parties are by agreement delaying the date of filing of a Petition for Dissolution of Marriage (or Supplement Petition in modification matters), the parties acknowledge and agree with the intent to bind themselves and their attorneys now and in the future, that _____, 20____, shall be used by them, their attorneys, and the courts in lieu of the actual date of filing of the Petition for determination of retroactive support, marital assets and liabilities, or any other purpose set forth in Florida Statutes Chapter 61, other relevant statutes and the case law interpreting same.

Withdrawing from Collaborative Law Process: Should either party decide to withdraw from the collaborative law process, or should the collaborative law process fail for any reason, prompt written notice will be given to the other party through his or her attorney and: (1) Neither party nor any members for this or her attorney's firm can continue to represent either of the parties, and the attorneys for the parties thereupon shall withdraw except for providing transitional assistance (including a summary of the case) as may be required by the parties to obtain another attorney. It is further agreed there will be a thirty (30) day waiting period (unless there is an emergency) before any court hearing, to permit each party to retain an attorney and to make an orderly transition. All temporary agreements will remain in full force and effect during this period. The intent of this provision is to avoid surprise and prejudice to the rights of either party. It is therefore mutually agreed that either party may bring this provision to the attention of the court in requesting a postponement of a hearing. (2) Except as specifically noted herein all oral, computer-based, and written communications between each party and his or her attorney, shall be privileged and confidential and not subject to disclosure in any subsequent litigation except for purposes of the determination and award of fees and costs at the conclusion of any subsequent litigation.

RIGHTS AND OBLIGATIONS PENDING SETTLEMENT

Although the parties have agreed to work outside the judicial system, and consistent with Florida law, the parties agree that: (1) Neither party will dispose of any assets or obligate the other to any additional debt except (i) for the necessities of life or for the necessary generation of income or preservation of assets, (ii) by an agreement in writing, or (iii) to retain counsel or experts to carry on or to contest this proceeding; (2) Neither party will harass the other party; (3) Neither party shall move the primary residence of the minor child or children without prior knowledge and written consent of the other party; (4) All currently available insurance coverage must be maintained and continued without change in coverage or beneficiary; (5) Violation of any of these provisions or failure to proceed in good faith in accordance with the terms of this Agreement may result in sanctions by the court to include an award of attorney's fees and costs.

ACKNOWLEDGEMENT

Both parties and their lawyers acknowledge that they have read this Agreement, understand its terms and conditions, and agree to abide by them. The parties understand that by agreeing to this alternative method of resolving their family law issues, they are giving up certain rights, including the right to formal discovery, formal court hearings, and other procedures and options provided in an adversarial proceeding by the legal

system. The parties have chosen the collaborative law process to reduce emotional and financial costs and to generate a final agreement that addresses their concerns. They agree to work in good faith to achieve these goals. Dated this _____ day of _____, 20__.

[Signatures of husband, wife, husband's lawyer, and wife's lawyer]

APPENDIX C

SAMPLE LETTER OF INVITATION TO PARTICIPATE

Dear Collaborative Colleagues,

I write to request your participation in a research study I am conducting for the completion of my PhD degree at Osgoode Hall Law School. I am conducting research that will shed light on the practice of collaborative law as well as on the potential for collaborative law to generate innovative outcomes. I am hoping that I could meet with you to conduct an interview for this research.

The interview should take no more than 45 minutes of your time and will be arranged at your convenience in a location of your convenience. I would greatly appreciate your participation.

If you are willing to participate, please respond to this email.

Thank you in advance,



Martha Simmons, BA (Hons), JD, LLM(ADR), PhD (candidate)
Adjunct Faculty and Director, Mediation Intensive Program and Clinic
Osgoode Hall Law School

APPENDIX D

CONSENT TO PARTICIPATE

Study Name: Study of Collaborative Law

Researcher: *Martha E. Simmons*
PhD Candidate, Osgoode Hall Law School
marthaesimmons@gmail.com

Purpose of the Research: To investigate the importance of innovation in Collaborative Law as it pertains to process and result generation.

What You Will Be Asked to Do in the Research: In order to help with this research, you will be asked to participate in a one-on-one interview with the researcher. This interview should take no more than 45 minutes.

Risks and Discomforts: I do not foresee any risks or discomfort from your participation in the research.

Benefits of the Research and Benefits to You: The research has the potential to affirm and/or change the way Collaborative Law is practiced.

Voluntary Participation: Your participation in the study is completely voluntary and you may choose to stop participating at any time. Your decision not to volunteer will not influence the nature of your relationship with York University either now, or in the future.

Withdrawal from the Study: You can stop participating in the study at any time, for any reason, if you so decide. Your decision to stop participating, or to refuse to answer particular questions, will not affect your relationship with the researcher, York University, or any other group associated with this project. In the event you withdraw from the study, all associated data collected will be immediately destroyed wherever possible.

Confidentiality: All information you supply during the research will be held in confidence and unless you specifically indicate your consent, your name will not appear in any report or publication of the research. If individual information is used, it will not be identifiable in any way. The data will be comprised of transcripts of the audio recorded interviews and handwritten notes taken following or during interviews. While these will have identifying information for the convenience of the study, such identifying information will be kept strictly confidential. Your data will be safely stored in a locked facility and/or on a password-protected computer device and only research staff will have access to this information. Data will be stored for two years at which time it will be destroyed. Confidentiality will be provided to the fullest extent possible by law.

Questions About the Research? If you have questions about the research in general or about your role in the study, please feel free to contact me or my Graduate Supervisor – Professor Paul Emond by e-mail (pemond@osgoode.yorku.ca). This research has been reviewed and approved by the Human Participants Review Sub-Committee, York University’s Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, please contact the Sr. Manager & Policy Advisor for the Office of Research Ethics, 5th Floor, York Research Tower, York University (telephone 416-736-5914 or e-mail ore@yorku.ca).

Legal Rights and Signatures:

I _____, consent to participate in *A Study of Collaborative Law* conducted by *Martha Simmons*. I have understood the nature of this project and wish to participate. I am not waiving any of my legal rights by signing this form. My signature below indicates my consent.

Signature _____
Participant

Date _____

Signature _____
Martha E. Simmons
Principal Investigator

Date _____

APPENDIX E

BROAD INTERVIEW QUESTION LIST

To be approached in a conversational, semi-structured format

Personal/General questions

- Years in practice
- Year trained in Collaborative Law
- Percentage of cases Collaborative
- Number of Collaborative cases in the last year

Informed consent

- How do you go about recommending collaborative law to a particular client?
 - o Do you recommend CL to all our clients or only some?
 - o How do you describe the disqualification provision?
- How do clients generally react when you explain the disqualification agreement to them?

Resolution

- What do you find is different about the results and remedies that come out of a collaborative case?
 - o Can you give an example of a creative solution that would not have been legally available that parties agreed to?
 - o Do you think such creative solutions would be available without disqualification?
- What are your success rates in CL? Settlement rates in traditional cases?
 - o Have you had to disqualify yourself from a collaborative case? Why?

Disqualification agreement

- Describe the effect of the disqualification agreement
 - o To rapport between parties
 - o To rapport between counsel
 - o To the negotiation environment
- Do you use the threat of disqualification as a bargaining tool in negotiation?

Innovation

- What role does creativity play in the collaborative process?

APPENDIX F

EXTENDED LIST OF POTENTIAL NEUTRALS

Category	Professional
Medical	General Practitioner
	Psychologist
	Psychiatrist
	Naturopath
	Occupational Therapist
	Geneticist
	Fertility Specialist
	Ethicist
	Medical Specialist
Clergy	Priest
	Minister
	Rabbi
	Sangha
	Mullah
Financial	Accountant
	Business Valuator
	Financial Advisor
	Forensic Accountant
	Wills and Estates Specialist
	Business Advisor
Academic	Teacher
	Principal
	Educational Consultant
	Extracurricular (i.e. Coach)
	Educational Psychologist
	Child Development Specialist
Employment	Head hunter
	Employment counselor
Other	Family Members
	Travel Expert

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