DOCUMENT PRODUCTION AND FILE INFORMATION IN COLLABORATIVE FAMILY LAW: LEGAL ISSUES ARISING WHEN LITIGATION FOLLOWS THE COLLABORATIVE PROCESS

This paper was prepared by Roja Safartabar of Daykin, Walker, Kaderly, Wahid LLP for the BC Collaborative Roster Society, October 2025. Many thanks to Nancy Cameron KC for her contributions and insights throughout.

Table of Contents

Introduction

The collaborative family law process is designed to promote voluntary disclosure, cooperation, and principled negotiation. One of its foundational features is confidentiality. Participants enter into participation agreements that disqualify collaborative counsel from continuing in litigation and commit to settlement-focused discussions that often extend beyond what would be compellable in court.

However, when the collaborative process comes to an end—whether with or without a resulting settlement agreement—and litigation ensues, difficult questions arise concerning what information and documentation may properly leave the collaborative process and enter the litigation arena.

This paper addresses those questions with a focus on the disclosure obligations and evidentiary protections surrounding collaborative family law, particularly when litigation follows either a failed process or a challenge to a concluded agreement. It also examines the relevant principles from both collaborative-specific jurisprudence and general family law, with regard for the law on settlement privilege and the sanctity of negotiations.

Collaborative Family Law

Collaborative family law ("**CFL**") has become an increasingly popular method for resolving family disputes in Canada. The case law describes CFL as offering a non-adversarial framework that emphasizes cooperation, client engagement, and dialogue over litigation. CFL involves both parties and their lawyers working together in structured four-way meetings to negotiate a settlement. Lawyers in this process act as facilitators and legal advisors, not as litigators, and both clients and counsel must sign a participation agreement requiring full disclosure and committing to withdraw from the case if litigation is pursued.

In the United States, some jurisdictions have enacted legislation regulating collaborative law, including statutory protection for confidential communications and formal endorsement of the disqualification rule. In Canada, however, no province has enacted similar legislation. The regulatory framework for CFL remains piecemeal and largely reliant on the terms of the participation agreement. While some Canadian law societies are beginning to explore how to integrate CFL into professional codes and family law statutes, no uniform approach has emerged.

Until statutory reforms arise, the rights and duties in CFL in British Columbia are governed by the participation agreements, in addition to the general professional and ethical obligations under the BC Code of Professional Conduct, and of course, the common law.

How the common law develops on important issues such as disclosure from the CFL process is particularly important at this juncture, as the development of the case law on this subject is still in its infancy.

As collaborative law becomes more widely adopted—driven by a combination of our relatively new statutory preference for out of court resolutions and client demand for non-adversarial options—shepherding it into formal regulation could ensure that it operates fairly, especially for those in unequal bargaining relationships.

Confidentiality and Privilege

What is the nature of privilege that arises in CFL? Is it limited to what the participation agreement says about confidentiality? Is there a class privilege that applies to CFL? Does it vary by province?

This question was reviewed in the New Brunswick case of *DA v. LA*, 2013 NBQB 258, where the court explored whether or not CFL entails a class privilege or a case-by-case privilege in respect of disclosure surrounding settlement negotiations. At the lower level, the court considered the combination of solicitor-client privilege and settlement privilege and concluded that the communications and settlement discussions arising through the CFL process are prima facie privileged and inadmissible, holding that the public interest in encouraging settlements outweighs the interest of disclosure. However, as will be reviewed further below, this finding was overturned on appeal.

This paper will establish that courts generally uphold the robust confidentiality provisions of the participation agreements, thus preserving the integrity of the CFL process. In a review of the case law that follows, courts have emphasized the societal value in protecting settlement-related communications, including those from the CFL process. These cases affirm that courts will not lightly pierce the veil of confidentiality surrounding collaborative negotiations. However, if and when that veil is pierced, this paper will attempt to outline the disclosure that is required from the CFL process.

The Participation Agreement

The confidentiality provisions of the BC Collaborative Roster Society's (the "**Roster**") current form of participation agreement are robust. For ease of reference, the provisions are as follows:

I. Except as set out in subparagraphs (II) and (III) below, all communications exchanged or documents generated during the Collaborative Process will be confidential and without prejudice. If subsequent litigation, arbitration or other process for dispute resolution occurs ("**Any Proceeding**"), the Parties agree that:

    a. neither Party will introduce as evidence in Any Proceeding, information disclosed during the Collaborative Process for the purpose of reaching a settlement;

    b. neither Party will introduce as evidence in Any Proceeding the verbal agreements, concessions or statements of any kind whatsoever which may have been made during the Collaborative Process;

c. neither Party will introduce as evidence in Any Proceeding information disclosed during the Collaborative Process with respect to either Party's behavior or legal position with respect to settlement;

d. neither Party will ask or subpoena either lawyer or any of the Collaborative Professionals to Any Proceeding to testify in Any Proceeding, nor bring on an application to discover either lawyer or any of the Collaborative Professionals, with regard to matters disclosed during the Collaborative Process or anything relating to the Collaborative Process.

e. neither Party will require the production at Any Proceeding of any notes, records, or documents in the lawyer's possession or in the possession of one of the Collaborative Professionals;

f. the Collaborative Lawyers may provide copies of the documents listed in subparagraph (II) to the Party's new lawyer, but must not provide the new lawyer with copies of any other communications or documents generated within the Collaborative Process (commencing with the signing of the Lawyer's Collaborative Participation Agreement or the signing of the Coaching Collaborative Participation Agreement, whichever is signed first);

II. The following documents and information are <u>not</u> confidential, even though they may be generated or exchanged within the Collaborative Process. In the event of Any Proceeding, these documents may be provided to a Party's new lawyer for use in such proceeding:

a. Institutional or third party documents that either Party would be required to disclose to the other Party in litigation pursuant to any applicable legislation or court rules such as bank statements, income tax returns etc.;

b. Sworn financial statements made by the Parties during the Collaborative Process;

c. Interim or final agreements signed by the Parties and witnessed in the Collaborative Process, unless the agreement specifically provides that it shall remain confidential; and

d. The Collaborative Practice Participation Agreement;

III. In the event that a Party or Collaborative Professional is obligated by law to report to the Ministry of Children and Family Development information arising out of the Collaborative Process which gives the Party or Collaborative Professional reasonable grounds to believe that a child is or may be in need of protection, the Party or Collaborative Professional must report the information which they are legally bound to report in relation to the child protection concern, but the confidentiality provisions above shall continue to apply to all other information or communications generated in or arising out of the Collaborative Process (such as settlement positions etc.).

These provisions, or a sample of them, have been reviewed by the courts in the cases that follow.

Settlement Privilege

Settlement privilege is a common law principle that protects communications made with a view to settlement from being disclosed in court.

Foundational case law on settlement privilege provides the backdrop for all such discussions. In *Dos Santos v. Sun Life*, 2005 BCCA 4, the British Columbia Court of Appeal reaffirmed that settlement communications are presumptively privileged and inadmissible unless a recognized exception applies. Similarly, in *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, the Supreme Court of Canada confirmed the general rule of settlement privilege and its exception where disclosure is necessary to prove the existence or scope of a settlement agreement. These cases emphasize that when litigation follows negotiations, disclosure of negotiation content must be treated with caution.

The party trying to override settlement privilege has the burden of showing that the need to disclose certain documents outweighs the strong public interest in keeping settlement talks confidential. Courts emphasize that settlement privilege plays a key role in encouraging negotiated resolutions over litigation, so any exception must meet a high threshold. Disclosure will only be allowed if the documents are both relevant and necessary to the case: *Dos Santos v. Sun Life*, 2005 BCCA 4 at paras 19–22.

In *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37, the Supreme Court of Canada dealt with the class privilege that attaches to settlement negotiations and described the necessary exceptions to disclosure that can arise within a class privilege category:

> [12] Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a prima facie presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), at p. 740).
>
> . . .
>
> [19] There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos Estate v. Sun Life Assurance Co. of Canada,* 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co*., [2001] 1 All E.R. 783 (C.A.), *Underwood v. Cox* (1912), 26 O.L.R. 303), and preventing a plaintiff from being overcompensated (Dos Santos).

More recently in *Association de médiation familiale du Québec v. Bouvier*, 2021 SCC 54, the Association (which is the main organization in Quebec dedicated to promoting and developing family mediation) obtained leave from the SCC to be substituted as an appellant in a case about the existence and terms of settlement at a concluded mediation with no signed agreement, but with a “summary of mediated agreements”. The Association argued that the discussions during family mediation and the summary of mediated agreements prepared by a mediator are protected by a rule of absolute confidentiality that is necessary for such a process to function fairly and effectively. The SCC disagreed:

> 8 Given the significance of the procedural safeguards inherent in family mediation, it is, in my respectful view, an error to insist on the absolute nature of confidentiality. A rule of absolute confidentiality might not only deflect family mediation from its participatory and consensual foundations, but also undermine the parties' adherence to this process for resolving their dispute, or even to the settlement itself. To reject the settlement exception recognized by this Court in *Union Carbide* in favour of absolute confidentiality would interfere with the primary objective of family mediation, which is to reach an agreement resolving an existing or anticipated dispute. Moreover, the interpretation of the standard mediation contract widely used in Quebec, and of the contract signed by the spouses in this case, supports the conclusion that parties to such a process do not exclude from the outset the settlement exception from *Union Carbide*. Therefore, where spouses enter into a settlement at the end of a mediation process governed by the standard contract, the settlement exception can apply and allow them to file in evidence the communications that are necessary to establish the existence or terms of their agreement.

The question that naturally arises after a review of the confidentiality terms of the participation agreement and the law of settlement privilege (including the exceptions that apply) is what happens in circumstances where the exceptions to settlement privilege require disclosure from the CFL process, but the contractual terms of the participation agreement do not allow it. While these exact circumstances have not come before the courts in any of the cases reviewed below, this question will be explored in this paper.

Litigation Following a Failed Collaborative Process

When the CFL process breaks down without a settlement agreement, litigation may commence under traditional family law proceedings, but what, if anything, from the collaborative file can or must be disclosed?

In *Banerjee v. Bisset*, 2009 BCSC 1808, the British Columbia Supreme Court addressed whether evidence referencing matters discussed during a CFL process could be disclosed or relied upon in subsequent litigation after the process had failed. The parties had entered into two separate participation agreements governing their collaborative separation process (one with lawyers and one with coaches). These agreements expressly provided that any communications, draft agreements, and materials exchanged during the collaborative process would remain confidential and would not be admissible in later proceedings unless reduced to a signed written agreement.

The plaintiff sought to rely on affidavit evidence that recounted the parties' negotiation positions and communications during the collaborative process. The defendant objected, invoking the confidentiality provisions in the participation agreements. The Court upheld the defendant's position and held that the plaintiff could not rely on that evidence:

> [19] In choosing to participate in the collaborative law process, and signing the [participation agreements], the parties agreed to have a confidential process; they agreed to forego access to court unless either or both of them withdrew from the collaborative law process; and they agreed that no agreements would be enforceable unless they were agreements in writing. They also, necessarily, agreed to forego disclosing negotiations which stopped short of a written agreement for the purpose of trying to prove that an oral agreement

> was made and should be enforced. In other words, they agreed to a different set of rules than apply to normal litigation.

Justice Beames emphasized that the parties had clearly contracted to exclude from future litigation any information or admissions made during the collaborative negotiations unless embodied in a signed agreement. As such, no part of the collaborative record—whether draft agreements, lawyer notes, or negotiation communications—could be admitted into evidence in the litigation.

However, as at 2009, the ruling left open the possibility that independently existing financial documents could still be subject to disclosure, provided they are not themselves covered by the collaborative process protections. It was in or around this time that that the Roster revised the standard participation agreement to include the provisions outlined above which state which documents and information are not confidential, even though they may have been generated or exchanged within the CFL process. Specifically, documents such as tax returns and bank records, which exist independently of the collaborative process and would be discoverable in ordinary litigation, must be disclosed and can be admitted as evidence even if they were initially shared during the CFL process.

A few years later, the Saskatchewan's Court of Queen's Bench in *Hogan v. Hogan*, 2011 SKQB 479, considered the issue of what documents may be disclosed and relied upon in litigation following the breakdown of a CFL process. The case arose when the petitioner sought interim distribution of family property and disclosure of bank account information after collaborative negotiations failed. During the CFL process, the parties exchanged a number of financial documents, including a draft property statement, a draft financial statement, a corporate bank statement, and a 2009 tax return.

Following the collapse of the CFL process, the respondent sought to exclude these documents from litigation, arguing that they were protected by the confidentiality provisions of the parties' participation agreement. The Court examined the participation agreement and emphasized that the collaborative process is based on principles of confidentiality and candour. The participation agreement explicitly provided that documents created or shared during collaborative meetings would not be admissible or relied upon in subsequent litigation unless both parties consented in writing.

However, Justice McIntyre distinguished between documents created for the purpose of the collaborative process and documents that pre-existed independently of it. He ruled that the draft property and financial statements prepared specifically for use in the CFL process were inadmissible in litigation, as they fell squarely within the confidentiality terms of the agreement. However, documents like the respondent's 2009 tax return and the bank statement for a jointly held company, although exchanged during the collaborative process, were found to be independently generated and not created solely for the purposes of negotiation. These documents were therefore not subject to the collaborative privilege and could be relied upon in litigation.

The decision underscored the need to distinguish between privileged collaborative materials and financial records that carry ongoing disclosure obligations in family litigation.

The above cases suggest that unless the participation agreement expressly permits it—or the documents would have been produced in litigation independently—materials from the CFL process and working documents are generally inadmissible. Exceptions arise when information is not prepared *for* the CFL process but merely shared within it, as well as other circumstances, as will be reviewed next.

Litigation Challenging a Concluded Agreement

Even when the collaborative process concludes with a signed agreement, parties have challenged those agreements for a variety of reasons, bringing them within the court's purview. Obviously, the CFL process does not immunize an agreement from judicial scrutiny. Courts have repeatedly affirmed that an agreement reached through the CFL process is treated the same as an agreement entered into without the CFL process.

The following is a series of cases in respect to collaborative settlement agreements which have been challenged.[1] Where the Court has provided guidance in respect to disclosure requirements and commented on the participation agreement, that has been referenced. Unfortunately, as the summaries will reveal, there is no substantial concrete guidance from the courts on this point.

Firstly, in *Ward v. Ward*, 2010 ONSC 1007, the Ontario Superior Court found that a handwritten Memorandum of Agreement signed during the CFL process was not a binding settlement. The trial judge concluded that the agreement lacked sufficient formality, was not accompanied by sworn financial disclosure, and had been negotiated under conditions that raised fairness concerns. The wife had alleged that she was not in a position to give informed consent due to a history of depression and that material financial information—particularly concerning the husband's offshore assets and 2005 income—had not been properly disclosed. The trial judge expressed concern about the role of the parties' mutual financial advisor, who was the husband's business partner, and whose involvement may have compromised the independence of the disclosure process.

The lower court decision indicates that the net family property statements that were prepared during the CFL process, as well as executed "progress reports", and an affidavit from the husband's collaborative lawyer were before the court. There is no indication of a dispute between the parties in terms of what documents should or should not have been before the court.

---

[1] This paper will not delve into the circumstances behind whether an agreement was upheld or not (i.e. via a *Miglin* or *Hartshorne* analysis), as that is beyond the scope of this paper. For a comprehensive and recent recap on this issue, see "Agreements: Where We Are, and Drafting for (un)Certainty" prepared by Todd R. Bell for CLE, July 2025.

On appeal (*Ward v. Ward*, 2011 ONCA 178), the Ontario Court of Appeal reversed the lower court's finding and held that the Memorandum of Agreement was valid and enforceable. The appellate court emphasized that agreements reached through the collaborative process are not invalid merely because they do not mirror the formalities of court-based litigation. Both parties had legal counsel throughout, participated actively in the collaborative sessions, and voluntarily signed the memorandum, which addressed key terms of property division, support, and parenting. While no sworn financial statements were exchanged, the Court found that the financial disclosure provided—including net family property statements and summary information from the joint financial advisor—was sufficient under the circumstances. The wife had accepted and acted on the disclosed information at the time, and the parties had already implemented significant aspects of the agreement, including the transfer of funds. Ultimately, the wife failed to demonstrate that she had been misled or materially deprived of information necessary to make an informed decision.

In *Arsenault v. Arsenault*, 2017 NBBR 64, the parties were experiencing difficulties in their marriage and arrived at a marriage contract through the CFL process for financial stability in the event of separation. The parties ultimately separated and put into effect the terms of the marriage contract. The husband then filed for divorce, but the wife sought the marriage contract be set aside on the basis of non-disclosure and unconscionability. As a result of the claims made by the parties in the court proceeding, both parties sought disclosure of their files from their collaborative lawyers.[2]

Central to the wife's claim was the assertion that she did not understand the implications of the agreement and was pressured into signing it without full disclosure of the husband's financial circumstances. The court, however, found that the husband did not withhold financial information or mislead the wife as to the value of their assets, and the wife received independent legal advice during the negotiation and signing of the marriage contract:

> 65 As a result of the parties' agreement to negotiate their marriage contract through collaborative law, they agreed to provide complete disclosure of all information required. The disclosure of information in the conduct of a collaborative file is quite different then what typically transpires in family law matters. The parties are framing the issues themselves along with identifying the appropriate information required to resolve the issues. This approach is quite different than the more formulaic process followed in mainstream litigation files where the parameters of the negotiations are defined by legislation and the *Rules of Court.*
>
> 66 In the collaborative law process the "ground rules", so to speak, are as set out in the collaborative law contract. Given this procedural reality, there can be no nefarious motive attached to anyone's failure to provide specific documents such as a sworn financial statement. Likewise, there can be no blameworthy

[2] The collaborative lawyers resisted production, and the cases between the parties and their collaborative lawyers are summarized below.

> conduct attributed to the lawyers for their failure to insist or request specific documents or information.
>
> 67 Unfortunately, at the present time, we are in the middle of a protracted and complex litigation where the rules of the game are governed by the *Rules of Court.* By necessity, the tools and procedures provided by our litigation system must now be used to assess the collaborative law process which entire existence is designed to help people avoid the minefield that is family division litigation. I pause to make this comment solely to highlight the fact that while under today's microscope the actions of the lawyers or even the parties may seem suspect, it is important to remember the tenor and nature of these negotiations at the time they occurred. Today, we have the benefit of hindsight and in hindsight flaws frequently jump from the page which at the time the contract was negotiated may have honestly seemed inconsequential.
>
> 68 In this particular matter, there were several documents reviewed by the parties and various information considered, all of this emanating from the husband or his accountant. The wife has not identified any key piece of information or document that was requested and not provided during the course of the negotiations. While, in hindsight, the wife suggests that there ought to have been appraisals of all the properties, there ought to have been disclosure of all of the actual tax returns, there ought to have been full disclosure of all the bank accounts, etc., there is no suggestion that any of these various things were requested. I cannot point to any document or information that was requested and not provided by the husband throughout the course of the negotiations.

The court ultimately found that the marriage contract was valid and enforceable, except with respect to spousal support (on the basis that the support was not substantially compliant with the objectives of the *Divorce Act*).

While the decision does not specify which specific documents from the CFL process were disclosed and reviewed by the court during the litigation, it is evident from the judgment that the court relied upon the final agreement, supporting documentation, and the procedural history of the collaborative negotiations in assessing whether to uphold the agreement. With that said, however, comments from the Court of Appeal in a parallel judgment suggest that the entire CFL file may have been before the court.[3]

In *B.A.C. v. K.C.*, 2018 BCSC 2111, the British Columbia Supreme Court examined the enforceability of a separation agreement that was negotiated through the CFL process. The parties, after ending a 12-year relationship, entered into collaborative negotiations with the assistance of their counsel and professional advisors, including a business valuator and a parenting coach. The collaborative process culminated in a comprehensive separation agreement signed in February 2015.

---

[3] See: *A. (D.) v. A. (L.),* 2014 NBCA 39

Following the agreement, the respondent challenged its validity, initially on grounds of duress, coercion, and inadequate disclosure. These allegations were later withdrawn, and the legal issue narrowed to whether the agreement should be set aside, in part, for insufficient financial disclosure, specifically relating to the claimant's income. The Court found that while the respondent may have harbored doubts about the completeness of the financial disclosure, she explicitly acknowledged in the agreement that she had received sufficient information, was aware of her entitlement to further disclosure through legal means and nonetheless chose to proceed with the settlement. She had reviewed the draft agreement in detail, suggested changes that were incorporated, and confirmed through a signed certificate that she had been fully advised of her rights and signed the agreement voluntarily.

In respect to the record that was before the Court in this case, the Court stated as follows:

> 26 Privilege was waived in this litigation. Ms. C's communications to her lawyer reveal that she read the draft agreement closely and provided comments which led to corrections and changes in the concluded Separation Agreement. Apart from these matters of detail, on February 2, 2015 she advised that she was generally content with the agreement.

The court also referred to the parties' engagement of Ron Tidball during the CFL process in respect to the "financial issues" (at para. 25). It is not clear whether Mr. Tidball's report was before the court or not. There is no discussion of the provisions of the participation agreement in the case, nor any claims made in respect to confidentiality. If one can surmise from paragraph 26 of the decision, it is conceivable that the entire CFL file had been adduced. In fact, if the parties both consented and agreed to waive privilege, the CFL lawyers may have simply agreed to produce their files.

In *B.A.C. v. K.C*, the Court upheld the integrity of the separation agreement and declined to set aside its support provisions, finding that the respondent's claim amounted to post-agreement regret rather than a legal basis for variation.

In *M.G.H. v. K.L.D.H.*, 2020 NBCA 46, the New Brunswick Court of Appeal contemplated the Court's role in circumstances where a separation agreement achieved through the collaborative process had been challenged.

The parties had participated in a comprehensive collaborative process and signed a separation agreement in 2015 that resolved all issues, including custody, child support, and division of property. Both parties were represented by CFL counsel, and accountants were involved in evaluating financial matters. The parties mutually agreed to impute income of $130,000 to each parent for child support purposes.

Approximately fifteen months later, the mother brought a court application seeking a substantial variation in child support. She argued that the father's actual income was significantly higher than what had been agreed, and she sought to have his corporate income, capital cost allowances, business deductions, and personal benefits added back to his Line 150 income. The application

judge agreed, imputing significantly higher incomes to the father, and ordered retroactive support and arrears. However, the application judge did not find the terms of the settlement to be unconscionable, inequitable, obtained without proper legal advice, based on incomplete or erroneous financial disclosure, or obtained by fraud, misrepresentation or as a result of undue influence.

The Court of Appeal overturned the lower court's decision. It acknowledged that the collaborative process resulted in an agreement that included provisions for annual income disclosure. However, it emphasized that the application judge had improperly re-evaluated the parties' incomes absent any material change in circumstance or change in the father's accounting practices since the agreement was signed. The Court held that there was no evidence of incomplete or misleading disclosure at the time the agreement was formed and that the trial judge failed to give proper weight to the parties' mutual understanding and acceptance of the income figures used in the collaborative process. Unfortunately, there is no discussion of the materials from the CFL process that may or may not have been before the court.

Finally, *Joyce v. Urbauer*, 2024 BCSC 2082, is the most recent and relevant case in respect to this paper's inquiry. In that case, the parties participated in two CFL processes and signed a Separation Agreement in 2015. Their participation agreement included confidentiality clauses prohibiting the use of communications, documents, and expert reports from the CFL process in future litigation (in accordance with the current standard form participation agreement used in BC CFL cases). After the second CFL process broke down, the claimant sought to vary child and spousal support based on decreased income, and pursued repayment of alleged overpayments.

The respondent filed affidavit evidence referencing an expert report (the "**Hooge Report**") and communications from the CFL process. The claimant objected, relying on both the participation agreement and the law of settlement privilege. Justice Armstrong confirmed that the participation agreement's confidentiality provisions—and settlement privilege more broadly—prevented the parties from relying on negotiations, communications, concessions, or expert opinions generated for the collaborative process, unless an exception is met in accordance with burden of proof, citing *Dos Santos*.

Ultimately, the Court ruled that the Hooge Report produced during the CFL process was inadmissible in the litigation and could not be referenced by either party. The Court also rejected the respondent's argument that the documents were necessary to defend an alleged fraud, finding no compelling basis for disclosure on the facts:

> [51] Although there is strong public policy supporting the disclosure of privileged material obtained during settlement negotiations to confront frauds, perjury or unambiguous impropriety, this is not a case where permitting disclosure in breach of the parties' written agreement and/or generally is supported on the facts.
>
> …

> [56] The respondent has not demonstrated there is any public interest warranting the disclosure of the impugned information in the respondent's affidavit. This is not a case where settlement privilege is advocated to prevent perjury or some other impropriety…

The Court ordered the impugned affidavit passages redacted. By contrast, the Court confirmed that the independently existing financial or business documents shared during the CFL process become subject to the usual disclosure obligations in litigation, which of course is in accordance with the terms of the standard form participation agreement.

Collaborative Law Privilege?

As introduced above, the case of *D.A. v. L.A.*, 2013 NBQB 258 inquired directly into the issue of collaborative family law privilege. This case involved a dispute between two former clients (Denis and Lise Arsenault) and their collaborative family lawyers (Brenda Noble and Mary-Eileen O'Brien). As described above, the Arsenaults used the CFL process to draft a marriage contract in advance of their separation. When their marriage ended, Mrs. Arsenault challenged the validity of the contract, claiming non-disclosure and misrepresentation. Both parties waived any solicitor-client privilege in respect of their collaborative lawyers and requested disclosure of their files to support their respective positions. Unlike in *B.A.C. v. K.C.*, 2018 BCSC 2111, the lawyers in this case refused, claiming the existence of a "collaborative law privilege" and citing the confidentiality clauses of the participation agreement. The cases referenced below are between the parties and their collaborative lawyers.

At the lower level, on the issue of the nature of the privilege that attaches to the CFL process, the court provided an analysis of whether or not the process entails a class privilege or a case by case privilege, concluding as follows:

> 35 I therefore find that the class privilege (blanket privilege) applies to the Collaborative Family law process. The process engages a combination of solicitor-client privilege and settlement privilege, resolution of legal issues being the objective. Accordingly, the communications and settlement discussions arising through the Collaborative Law process are prima facie privileged and inadmissible as the public interest in encouraging settlements outweighs the interest of disclosure.

However, the Court distinguished between protected communications and documents that must be disclosed in litigation. Justice Robichaud confirmed that documents and communications created specifically for the collaborative process—such as negotiation notes, draft settlement proposals, and communications between counsel—are protected by both solicitor-client privilege and settlement privilege, and cannot be compelled in litigation. In line with the current form participation agreement, the Court also held that raw financial disclosure—such as income tax returns, financial statements, and bank records—do not enjoy the same protection and must be produced if relevant. The Court held that even though these records were first disclosed in a collaborative setting, they remained subject to production obligations under ordinary rules of family litigation:

> 48 I fail to see how disclosure of financial documents compellable at law can be found to be injurious to either a settlement privilege and/or a solicitor-client privilege where the issue to be litigated relates to the adequacy and sufficiency of financial disclosure and its impact on the validity of a marriage contract.
>
> 49 I therefore conclude that Mr. and Mrs. A. have established to my satisfaction that the financial disclosure they request constitutes a valid exception to the settlement privilege and that the public interest of financial disclosure in this case is more compellable than the public interest of privilege.

The collaborative lawyers who were attempting to establish a class collaborative law privilege then appealed the lower-level decision, and it came before the New Brunswick Court of Appeal in *A. (D.) v. A. (L.),* 2014 NBCA 39.

The Court of Appeal affirmed that communications, draft settlement materials, and lawyer notes created within the collaborative process remained protected from production in subsequent litigation due to both solicitor-client privilege and settlement privilege embedded in the participation agreements. The court emphasized that this protection is necessary to preserve the candid and without-prejudice nature of collaborative negotiation. The Court also confirmed that independently generated financial documents that were disclosed during the collaborative process are not subject to that protection. Because these documents existed independently of the collaborative context, they remained discoverable and admissible under standard litigation rules.

In effect, the New Brunswick Court of Appeal in *A. (D.) v. A. (L.)* upheld the distinction drawn by our participation agreements: while protected communications from the collaborative file must remain confidential, raw financial documents disclosed in the collaborative process are required to be produced in subsequent litigation if relevant.

On the issue of a class or blanket privilege that applies to all CFL files, the Appeal Court found objectionable the claim that privilege asserted in the proceedings was one that would allow collaborative lawyers to disregard instructions from their clients and deny them disclosure of relevant information and production of relevant documents from their files, to the benefit of the lawyers. The Court stated:

> [46] With respect, I do not agree with the motion judge's statement that "all communications, discussions, proposals whether written or oral, and documents created during the collaborative law process remain privileged, in the context of this current motion, except for the signed marriage contract itself". In my view, in this province there is no class privilege in the Collaborative Law Process for the benefit of the participating lawyers. In that regard, I will underscore the obvious: (1) this province does not have a long-standing history with collaborative law; (2) there is no provincial statute on point; (3) there is no Rule of Court directly on topic; (4) no provision in the Code of Professional Conduct for lawyers is specifically directed at collaborative law; and (5) no standard contract has been adopted. Before the existence of a privilege inuring to the lawyers could be judicially considered, a clear provision to that effect would have to be included in the Collaborative Law Contract. Here, the issue of confidentiality is addressed in Clause 10.4 of the Collaborative Law Contract, which is reproduced in paragraph 40 above. That clause, by its very terms,

> accords rights and obligations to the clients, not their lawyers. It is a clause that was inserted in the Collaborative Law Contract for the benefit of the clients, and no one else. If confidentiality rights had been accorded to the lawyers by the Collaborative Law Contract and the lawyers had asserted those rights over the objections of their clients, the Court would have had to consider whether the pertinent clause should be struck on public policy grounds.
>
> 47 At the hearing on appeal, counsel for Mr. and Mrs. A. confirmed each of their clients had waived any and all privileges (solicitor/client privilege, settlement privilege, etc.) that could conceivably be argued. The respondents/ clients simply want disclosure of the information and production of the documents that are relevant to their dispute over the validity of the marriage contract. Much was said about privilege in the court below and in our Court, but one must not overlook what exactly was being requested of the collaborative law lawyers: in essence, to produce the documents their clients brought to the table — documents that are the property of the clients and which, pursuant to the Law Society of New Brunswick's Code of Professional Conduct, must be returned to the clients when requested.
>
> 48 While I disagreed with some features of the motion judge's reasons for decision relating to the issue of privilege, like my colleagues, I was satisfied the actual order she granted, which is carefully and narrowly drawn, was beyond reproach. In sum, that is why I joined in dismissing the appeal from the Bench. I would complete the proceedings by ordering each appellant pay costs of $5,000 to each respondent.
>
> 49 That said, and having regard to the terms of the Collaborative Law Contract between the parties, the state of collaborative law in this province, the respondents' unqualified waiver of any privilege, whether valid or not, and the solicitor- client relationships in effect at the material times, I am of the view that no privilege stands in the way of the respondents' discovery of communications, discussions, proposals, whether written or oral, and documents created during the collaborative law process.

The Court of Appeal's conclusion confirms that clients own their files, and the information and documents in the CFL file belongs to the clients.[4] The decision suggests that all collaborative lawyers must provide their file documents to their clients if requested, especially when privilege has been explicitly waived.

Out of all the cases reviewed, this case was the only instance where the CFL lawyers became directly involved in the litigation. If the parties themselves had the documents they both wished to adduce in the proceeding, there likely would not have been an objection from the Court in this case.

---

[4] Although this is presumably subject to the direction from the Law Society in respect to the portions of a lawyer's file that must be released to the client upon request (see the Law Society of BC's Practice Resource: Ownership of Documents in a Client's File, July 2017).

In most of the other cases reviewed, it is one of the parties who is attempting to uphold the participation agreement and the settlement privilege which attaches to the CFL process. If both parties waive their rights under the participation agreement, and the CFL lawyers do not get involved in the litigation, will the court allow the entirety of the CFL file to come before it? That seems to be exactly what occurred in both *B.A.C. v. K.C.*, 2018 BCSC 2111 and *Arsenault v. Arsenault*, 2017 NBBR 64.

What steps, then, should collaborative lawyers be taking when their former collaborative clients ask for their complete file? Should they uphold the confidentiality provisions of the participation agreement given that the lawyers are also parties to the contract? Or should they simply produce their files if both parties consent in an effort to minimize the issues to be litigated?

Document Production Obligations of Collaborative Counsel – Different in Different Circumstances?

The cases reviewed do not explicitly determine whether the provisions of the participation agreement in respect to the disclosure permitted once litigation is commenced will be upheld by the court in different circumstances. For example, in respect to the grounds for challenging an agreement, it is not clear whether alleging a failure to disclose material information would require further production from the CFL file than alleging vulnerability, duress or unconscionability.

B.A.C. v. K.C., 2018 BCSC 2111 and *Arsenault v. Arsenault*, 2017 NBBR 64 were predominantly in respect to the sufficiency of financial disclosure. However, neither of those cases identify the specific documents that were before the court during the mounted challenges (although it is the writer's assumption that the whole files were available).

Joyce v. Urbauer, 2024 BCSC 2082 suggests that the courts will uphold the participation agreements strictly unless exceptions apply. Therefore, there may very well be cases where the veil will be broken in favour of full disclosure of the CFL file, in breach of the participation agreement. In *Joyce,* despite an allegation of fraud, the participation agreement was upheld, and an exception to settlement privilege was not established. *Joyce* suggests that settlement privilege will only be pierced where the party seeking disclosure proves that the CFL documents they are seeking are both relevant and necessary, and that the public interest favours disclosure.

An allegation of negligence is one such case where disclosure of the CFL file will likely be required. See *Webb v. Birkett*, 2009 ABQB 239, for example. The case touches on a lawyer's professional obligation to obtain sufficient financial disclosure before advising a client to settle — and what the consequences are if that is not done. In that case, the plaintiff sued her former lawyer for negligence arising from a settlement reached during a CFL process. The settlement was finalized before full financial disclosure had been obtained. The plaintiff alleged she had not been adequately advised about her entitlements under the *Divorce Act* and *Matrimonial Property Act* and that her lawyer failed to ensure sufficient disclosure prior to settlement.

The Alberta Court of Queen's Bench dismissed the claim, finding the lawyer's conduct met the applicable standard of care. The trial judge held that, although full disclosure was not obtained, the client was informed of the risks and chose to proceed. The claim also failed on causation, in that there was no evidence that a better financial outcome would have resulted had disclosure been complete.

The decision refers to the claimant's own notes that she kept during the CFL process, as well as certain financial documents[5], and the parties' neutral financial expert during the CFL process also testified (at para. 50).

On appeal in *Webb v. Birkett*, 2011 ABCA 13, the Court of Appeal upheld the dismissal. The Court however clarified that collaborative family lawyers are held to the same professional standard as litigators and that clients cannot contract out of a lawyer's duty to ensure adequate disclosure and provide competent legal advice. While the trial judge may have applied a somewhat lower standard due to the CFL context, the error was not material in the result.

It is the Court of Appeal's discussion in respect to the limitation period which reveals that the entire file may have been before the trial judge. The lawyer acting for the claimant at the start of the litigation (Mr. Tumbach) testified that while he reviewed the collaborative lawyer's file (which he received all of except for the notations and internal memoranda) he became "concerned about the quality of Ms. Birkett's representation" (para. 28). Presumably, as a result of the nature of the allegations, in order to both advance the claim and defend the advice that was provided to the client, privilege would have to have been waived and the CFL file would have to have been produced.

Where Do We Go from Here?

As stated so eloquently by Justice Turnbull in *Duits v. Duits* 27 RFL (6th) 407 (back in 2006 and in reference to Ontario):

> [48] …In our court system in Ontario, there has been major systemic change to over the past ten to fifteen years to encourage mediation, collaborative family law mediation, case conferences, settlement conferences, pre-trial management conferences, pre-trial conferences, and mid trial settlement conferences. These processes are aimed at allowing the parties to work out their differences themselves. The costs, stress, emotional damage and waste of time of much litigation can thereby be avoided. **It is this court's view that the sanctity of such social and judicial processes should be recognized in most cases. There may be the exceptional case where the common law recognition of the paramountcy of confidentiality must be abrogated but such cases must be exceptional and I suggest relatively rare.** Otherwise, the social and court processes which have been created to facilitate discussion, settlements and offers to settle will be compromised…

---

[5] See para 25 for example: "It appears on the record that Mr. Todd accurately disclosed the financial interest of the parties prior to the last four-way meeting."

[emphasis added]

The need for such protection has only increased since then, so what steps can the Roster take now to protect the CFL process to the maximum extent possible?

Where a party alleges that a settlement agreement was tainted by lack of disclosure or advice, and the issue goes to enforceability, courts may permit certain disclosure of the CFL materials necessary to determine the claim. Perhaps this is consistent with the settlement privilege exception recognized in *Union Carbide*, where disclosure is necessary to prove the existence or scope of a settlement. However, what is not clear is what happens if that exception affronts the explicit terms of the participation agreement. Although there are no reported decisions available on this point, it is entirely conceivable that the veil of confidentiality will be pierced in these circumstances.

We know for sure that we are permitted to contract out of the common law if doing so is not an affront to justice. For example, the common law and the participation agreement are in conflict in respect to oral agreements and settlements reached. At common law, two parties can reach an enforceable oral agreement, however, the participation agreement specifically states that any agreements reached in CFL are not enforceable unless they have been reduced to writing, witnessed and executed. Our courts have upheld this provision.

Why then don't courts uphold the confidentiality provisions of the participation agreement without exception? Perhaps it is because the current form of participation agreement does not allow for disclosure from the CFL process when "justice so requires". If the participation agreement provided for circumstances when disclosure would be required (for example in circumstances of fraud, misrepresentation, or duress) and the participation agreement specified the exact disclosure required in each of these circumstances, the confidentiality provisions of the participation agreement would be impenetrable.

The only way to ensure that the common law develops in a way that will uphold the confidentiality of the CFL process is to ensure that the participation agreement itself provides for the exceptions available at law. *Joyce v. Urbauer*, 2024 BCSC 2082 made clear that there may be circumstances where the public interest will warrant disclosure of information which is considered confidential under the participation agreement in order to "prevent an injustice". Perhaps the Roster can take steps now to revise the participation agreement to ensure that the next time an inquiry like that of *Joyce* takes place, the court can simply look at the terms of the participation agreement in order to cure the injustice.

The process could be akin to agreements with mandatory arbitration clauses, where even in circumstances one is attempting to set aside the agreement (with the arbitration clause) the parties are required to address the issue in arbitration.[6] Perhaps the participation agreement could

[6] See: *Pimstone v. Adam,* 2024 BCSC 322

include a dispute-resolution mechanism in circumstances where parties disagree as to the contents of the file that can leave the CFL process after its conclusion. So long as the process created protects the public interest and the founded exceptions to settlement privilege, it should be endorsed by the courts.

It is also worthwhile for the Roster to clarify the "file information" that belongs to CFL lawyers and not clients, which could replicate the Law Society's direction on this issue. This could also be spelled out explicitly in the Participation Agreement, so that in the event of a future disagreement, the clients are aware of which part of the file can be subject to disclosure in specific delineated circumstances, and which part of the file can never be disclosed.

Conclusion

Collaborative law offers a constructive alternative to adversarial litigation, fostering resolution through cooperation rather than conflict. Yet, when the process collapses or when a resulting agreement is later challenged, lawyers face difficult questions regarding disclosure, confidentiality, and privilege. Courts have generally upheld the confidentiality provisions embedded in participation agreements, recognizing them as fundamental to the integrity of the process—though always subject to established exceptions grounded in law and fairness.

The transition from the collaborative process to litigation introduces distinct and often delicate challenges. A principled and measured approach—anchored in the text of the participation agreement and informed by broader doctrines of privilege, fairness, and public policy—is essential when addressing document production and evidentiary issues in this developing area of family law.

Although participation agreements are executed by four signatories, the case law suggests that the clients' interests ultimately prevail over those of the collaborative professionals. Where the parties to subsequent litigation both consent to the disclosure of the collaborative file and explicitly waive privilege, their lawyers should likely cooperate in facilitating that disclosure.

What emerges clearly from the jurisprudence is the judiciary's recognition of the social and institutional value of consensual dispute resolution processes such as CFL. Confidentiality is the cornerstone of this process; it promotes candour, encourages settlement, and protects the integrity of the dialogue. Courts have repeatedly cautioned that weakening this privilege would deter participation and erode the effectiveness of the process itself.

That said, confidentiality is not absolute. Courts will not hesitate to pierce the veil of confidentiality where the interests of justice demand it—particularly where a party advances credible allegations of fraud, misrepresentation, duress, or other conduct that may warrant setting aside an agreement.