



What Civil Litigators Need to Know About Privilege

Common Interest Privilege

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April 18, 2015



LSUC CPD Program

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April 28, 2015

What is it?

- “Common Interest Privilege” permits parties who share a common litigation interest or strategy to extend existing solicitor-client privilege or litigation privilege amongst each other
- Common interest privilege is not a unique privilege unto itself in the same sense as solicitor-client privilege, litigation privilege or settlement privilege, but rather facilitates the sharing of documents or information which enjoy one of these privileges
- Common interest privilege provides an exception to the general rule that privilege may be waived through the voluntary disclosure of privileged communications or documents to third parties
- In circumstances where there are multiple parties with a shared interest in the outcome of the litigation, common interest privilege allows parties to consult and coordinate strategy without waiving litigation or solicitor-client privilege¹
- The courts have noted that both “*litigation privilege and common interest privilege are founded on the principles of promoting a fair and balanced adversarial system.*”²
- Because common interest privilege agreements are typically formed between parties defending a claim, they are also often referred to as “Joint Defence Agreements”

Requirements for Common Interest Privilege

- There are four necessary requirements to establish common interest privilege:

¹ *Supercom of California Ltd v Sovereign General Insurance Co* (1998), 37 OR (3d) 597 at para 39 (Ont Ct J (Gen Div)) [*Supercom*].

² *Almecon Industries Ltd v Anchortek Ltd*, [1999] 1 FC 507 (TD) at para 12 [*Almecon*].

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1. The parties share a legal or strategic common interest in existing or anticipated litigation
 2. The protected communications related to a common issue
 3. The communications are made with an expectation of confidentiality
 4. The existing privilege has not otherwise been waived³
- Once these requirements have been met, common interest privilege is established, and parties are able to exchange privileged information without risk of an opposing party demanding the production of that information
 - Common interest privilege allows parties to pool their resources, exchange research and information, and reduce the possibility of each party taking a position that is inconsistent with the other
 - It also has the potential of reducing the costs for each party, and ensuring a more efficient litigation process.

Legal Foundation for Common Interest Privilege

- The general principle was first enunciated by Lord Denning M.R. in *Buttes Gas & Oil v Hammer (No 3)*. Lord Denning noted that common interest privilege “...is a privilege in aid of anticipated litigation in which several persons have a common interest.”⁴ He went on to say that parties with “the selfsame interest” should be able to unify in order to present one side of the litigation, whether they are the plaintiffs or the defendants⁵
- The Ontario Court of Appeal in *General Accident Assurance Co v Chrusz* found that “it may not be inconsistent with litigation privilege vis-à-vis the adversary to communicate with an outsider, without creating a waiver...if there is a common interest in litigation or its prospect.”⁶
- Canadian courts have held that while there must be “...a shared, common front, or interest...” between the parties, the interests need not be identical in order for common interest privilege to apply⁷
- Moreover, Canadian courts have begun to expand the common interest exception, recognizing that parties need not be co-parties in the litigation in order for the privilege to exist. The court in *Chrusz* adopted the view of the US Court of Appeal, as set out in *United States of America v American Telephone and Telegraph Company*:

“[C]ommon interests” should not be construed as narrowly limited to co-parties.
So long as transferor and transferee anticipate litigation against a common

³ *Supercom*, *supra* note 5 at paras 13-14.

⁴ *Buttes Gas and Oil Co v Hammer (No 3)* [1980] 3 All ER 475 at 483-484 (Eng CA).

⁵ *Ibid*.

⁶ *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321 at para 43 (Ont CA) [*Chrusz*].

⁷ *Supercom*, *supra* note 5.

adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts.⁸

- The courts have also found that common interest privilege may apply where the parties are adverse in some respects, or may become adverse in interest at some point in the future⁹
- While courts have recognized that when two or more parties with a common interest jointly consult a solicitor, their communications are privileged, the Federal Court of Canada in *Almecon Industries Ltd v Anchorteck* held that parties seeking to establish common interest privilege need not be represented by the same counsel¹⁰
- Canadian courts appear to be slowly expanding the common interest privilege, as long as the parties share a common goal or strategy between them throughout the time the privilege is claimed

Scope of Common Interest Privilege

- The recognition of common interest privilege does not create a separate category of privilege¹¹
- Rather, it depends on the existence of an underlying privilege being made out, either litigation or solicitor-client, and extends that existing privilege over documents or information so that they can be shared with third parties without constituting a waiver of privilege¹²
- The courts have been clear that if the requisite common interest is not established, sharing documents with third parties will constitute a waiver of the privilege, and those documents will then be producible to the opposing party¹³
- The Federal Court of Appeal in *Slansky v Canada (Attorney-General)* confirmed that, “if a client receives a letter in confidence from the solicitor and forwards it to third parties, privilege is lost, absent “joint” or “common” interest between clients and third parties”¹⁴
- Once common interest privilege has been established, the privilege becomes that of all the parties to the arrangement¹⁵
- The privilege extends to communications between the parties and their lawyers in the context of the actual or upcoming litigation
- However, the courts have recognized that common interest privilege may also apply to “...reports of experts, as well as lawyers’ opinions written for the purpose of corporate transactions and other contentious matters, even before the thought of litigation arises”¹⁶
- The particular circumstances surrounding the actual or contemplated litigation will be considered when determining which documents and information is protected by the common interest privilege

⁸ Chrusz, *supra* note 8 at para 45.

⁹ *Barclays Bank PLC v Metcalfe and Masnfield*, 2010 ONSC 5519 at para 12; *Amelcon Industries Ltd v Anchorteck*, [1999] 1 FC 507 (TD) at para 9.

¹⁰ *Amelcon Industries Ltd*, *supra* note 6 at para 9.

¹¹ *Trillium Motor World Ltd v General Motors of Canada Ltd*, 2014 ONSC 4894 at para 14.

¹² *Barclays*, *supra* note 13 at para 11.

¹³ *Ibid.*

¹⁴ *Slansky v Canada (Attorney-General)*, 2013 FCA 199 at para 256.

¹⁵ *Supercom*, *supra* note 5 at para 36.

¹⁶ *Hospitality Corp of Manitoba Inc v American Home Assurance Co*, 2002 MBQB 294 at para 8; *CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman* (2001), 6 CPC (5th) 281 at para 39 (Ont Sup Ct J) aff’d (2001), 55 OR (3d) 794 (Ont CA).

Waiver of Common Interest Privilege

- All privileges can be waived by the party who holds the privilege. For example:
 - a client may choose to waive solicitor-client privilege by disclosing the legal advice provided by their lawyer
 - similarly, litigation privilege may be waived when documents prepared in anticipation of litigation are disclosed to a third party or the opposing party
- Common interest privilege may also be waived by the parties to the privilege. However, one party to the common interest privilege cannot unilaterally waive the privilege attached to particular communications or documents¹⁷
- Rather, all parties must “expressly consent” to the waiver of the privilege before the information covered by privilege may be disclosed¹⁸
- If the parties become adverse in interest, then the privilege no longer exists. At that point, any party that has agreed to common interest privilege may waive its own solicitor-client or litigation privilege, without the consent of the other parties¹⁹

Advantages of Common Interest Privilege

- It increases in the flow of information between the parties who share the privilege²⁰
- It allows parties to access information that may otherwise be undiscoverable²¹
- It increases the resources, as well as the strategies and legal arguments, available to the parties
- It allows parties who have similar interests to present a uniform position, one which best serves all of their individual interests
- It allows for a potential cost-sharing arrangement, so that the parties to the privilege are able to divide labour and disbursements amongst themselves²²
- Overall, common interest privilege may contribute to more efficient, and potentially less costly, litigation²³

Disadvantages of Common Interest Privilege

- One of the biggest risks associated with a common interest arrangement is the potential for one party to use confidential information disclosed in the context of common interest privilege to advance a position that may conflict with one of the other defendants

¹⁷ *Almecon*, *supra* note 6 at paras 10-11.

¹⁸ *Ibid*.

¹⁹ *Maritime Steel & Foundries Ltd v Whitman Benn & Associates Ltd* (1994), 24 CPC (3d) 120 at para 46 (NSSC).

²⁰ Wendy Berman and Kelly Henriques, “Common Interest/Joint Defence Privilege: What it is and When and How Can You Claim It?” *The Twelve-Minute Civil Litigator Continuing Professional Development*, Law Society of Upper Canada, 2011 at 10-6.

²¹ Katharine Traylor Schaffzin, “Eyes Wide Shut: How Ignorance of Common Interest Doctrine can Compromise Informed Consent” 42 U Mich JL Reform 71 at 72.

²² *Ibid*.

²³ *Ibid* at 77.

- Such a risk may increase in the case of withdrawal or termination of the common interest arrangement²⁴
- There is the potential for conflicts of interest between counsel and current or potential clients. For example, a lawyer may be disqualified from representing a client against one of the parties to the common interest agreement in the future, because they have had exposure to that party's confidential information
- Some of the courts in the United States have found that lawyers who are part of these common interest arrangements owe a fiduciary duty to their "pseudo-clients," that is the other members of the common interest arrangement²⁵
- One of the biggest risks associated with a common interest privilege is that even though a party to the agreement may have a common interest in the outcome of the pending or actual litigation, the agreement still involves the sharing of previously confidential information
- This could become particularly problematic if one of the parties withdraws from the agreement or the agreement is terminated

Practical Tips: Common Interest Agreements

- When deciding whether to enter a common interest agreement, lawyers should consider the following:
 - Whether there is a sufficient level of trust between counsel for the parties to the agreement
 - Whether it would be wise to allow other parties to potentially influence the individual client's litigation strategy
 - Whether irreparable harm might be done to the client with the disclosure of their privileged information, particularly if the agreement is terminated or a party withdraws
 - Whether it is in the client's best interest to enter into a common interest agreement (for example, it may not be worthwhile if the client is a minor party in the action)²⁶
- Lawyers must recognize the ethical and professional obligations to both their own clients and the other parties to the agreement when deciding to invoke common interest privilege
- Lawyers should explain the advantages and disadvantages of the privilege to their individual client before agreeing to participate in a common interest arrangement
- Informed consent from the client prior to entering into such an arrangement may help lawyers avoid some of the risks associated with the privilege²⁷
- Canadian courts do not require a formalized common interest agreement in order for parties to rely on the privilege. As such, arrangements between multiple parties to adopt common interest privilege may be either oral or written
- However, there are advantages to creating a written common interest agreement. A written agreement will clearly identify:

²⁴ Berman & Henriques, *supra* note 26 at 10-7

²⁵ Schaffzin, *supra* note 27 at 78.

²⁶ *Ibid* at 10-9.

²⁷ *Ibid* at 91.

- the parties who share the privilege
- the communications and documents protected by the privilege
- the scope of the agreement
- the duties of each party
- terms for sharing expenses
- terms for withdrawal and/or termination
- If a written agreement is entered into, Ontario courts have held that the common interest privilege applies to the agreements themselves, and they not are subject to discovery²⁸

Typical Agreement Provisions

If you decide to have a written Common Interest Agreement, the following are elements that are typically included in this type of agreement:

- It should clearly identify the parties to the common interest agreement
- A provision defining the common legal interest, and that the parties to the agreement are seeking to advance that common interest without waiving the protection of solicitor-client or litigation privilege
- Provisions outlining and defining the scope of the coordinated legal strategy between the parties and setting out the responsibilities and duties of each party
- Provisions for cost-sharing between the parties to the agreement
- It should clearly define the scope of the agreement including:
 - which communications, information and/or documents are to be protected by the privilege
 - which communications, information and/or documents are to be specifically excluded from the agreement
 - that such an agreement does not mean that all information protected by a particular solicitor-client or litigation privilege will be disclosed to the parties to the agreement
- The agreement should explicitly state that communications covered by the privilege are to remain confidential in regard to outside parties, and that there is an expectation that information that is shared will be kept confidential by the party or parties who receive it
- A protocol for protecting the confidentiality of the documents and information subject to the privilege to ensure that nothing is disclosed without the consent of all parties to the agreement
- A limiting provision that the information shared amongst the parties is only to be used for the purpose of a common legal strategy and position
- A provision prohibiting parties from using shared information in any manner adverse to any of the other parties to the agreement

²⁸ *GMAC Commercial Credit Corp. v. Lucas*, 2005 CarswellOnt 160 & *Aviaco International Leasing Inc. v Boeing Canada Inc.*, [2000] OJ No 2420

- A provision stating that documents that are subject to the common interest privilege should be marked as such
- To help protect lawyers against potential conflicts of interest and phantom clients and ensure compliance with the *Rules of Professional Conduct*:
 - Each party can acknowledge that they are only represented by their own counsel and not by the other counsel who form part of the common interest agreement
 - Alternatively, the agreement can provide there is no solicitor-client relationship where no retainer has been signed
- The agreement should contain the express consent by the parties to the sharing of their confidential information, whether protected by solicitor-client or litigation privilege. This also helps ensure compliance with the *Rules of Professional Conduct*
- A withdrawal provision that contains provisions in regard to what information will remain confidential, what information that was shared under the agreement can be disclosed and the return of any privileged communications or documents to the rightful owner
- A provision relating to the termination of the agreement, including the circumstances that will give rise to the termination (for example, if a party becomes adverse in interest), the obligations of the parties following the agreement (for example, the survival of confidentiality beyond the termination of the agreement) and the return of any privileged communications or documents to the rightful owner
- Mechanisms for dealing with parties to the agreement who are uncooperative with the other parties, including a process for removing parties from the agreement in appropriate circumstances
- An explicit provision that solicitor-client and litigation privilege will persist following the termination of the agreement between the parties and their individual counsel
- A choice of law provision if there are parties to the agreement from other legal jurisdictions