PRIVILEGE

The Case for Common Interest Privilege Agreements in Canadian Litigation

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Common interest agreements allow separate parties to share otherwise privileged information, related to their common legal interest.[1] Neither the U.S. nor Canadian courts have thus far required a written agreement formalizing the common interest, but both jurisdictions emphasize that "[t]hose invoking the privilege must have a 'manifested common interest in the litigation."[2] U.S. courts have noted that the most effective means of proving the existence of the common interest is a common interest agreement.[3]

Though cross-border transactions and litigation are a routine aspect of many Canadian counsel's practice, common interest agreements are not regularly executed by Canadian practitioners, despite their prevalence among their U.S. counterparts.[4] Canadian counsel may reasonably be reluctant to execute a common interest agreement when neither the Supreme Court of Canada nor any provincial appellate court has analyzed these agreements, and many outstanding issues concerning the doctrine of common interest privilege remain.[5] However, a well-written common interest agreement not only furthers the goals of common interest privilege and the solicitor-client privilege which underlies it, but better safeguards the privilege against unintentional waiver.

The law of common interest privilege in Canada originated with the British case of *Buttes Gas and Oil Co. v. Hammer (No. 3)*.[6] Canadian law initially excluded common interest privilege in situations where there was the potential for the parties to have an adversity of interests. However, the Ontario Court of Appeal in *General Accident Assurance Co. v. Chrusz*,[7] adopted the broader principles of the U.S. Court of Appeals in *United States of America v. American Telephone and Telegraph Company*.[8] Now, if parties are or anticipate they may both become parties to litigation against a common adversary or share an interest in the successful completion of a commercial transaction, there exists a common interest sufficient to protect their communications.[9]

There are more similarities than differences between Canadian and U.S. approaches as cross-border common interest agreements become more prevalent. Both provide that different clients with similar legal interests may share privileged communications, without constituting a waiver of the privilege. The doctrines of both jurisdictions require that the

[1] In Canada, where there is pending litigation, a common interest agreement is typically incorporated into a joint defense agreement. It may also be utilized as a stand-alone agreement where litigation is merely anticipated, or in the course of a commercial transaction, as discussed in this article.

[2] *Trading Techs. Int'l, Inc.*, 2007 WL 1302765, at 1 quoting *Ludwig v. Pilkington N. Am., Inc.*, No. 03 C 1086, 2004 WL 1898238, at 3 (N.D. Ill. August 13, 2004). See, in the Canadian context, the recent Ontario case of *Barclays Bank PLC v. Devonshire Trust (Trustee of)*, 2010 ONSC 5519 at paragraphs 29-30, citing letters and express statements of common interest as the requisite proof of the common interest.

[3] *Minebea Co. Ltd. v. Papst*, 228 F.R.D. 13 (D.C. 2007) at 161.

[4] In the U.S., common interest privilege's significance has perhaps even eclipsed that of joint defense privilege for information sharing among clients with different attorneys, as per the Delaware Bankruptcy Court. See *Leslie Controls, Inc.*, Case No. 10-12199 (Bankr. D. Del. 9/21/10).

[5] Some key issues concerning common interest privilege which have yet to be analyzed at length include how to consistently define what a "common interest is," the breadth of scenarios outside of pending litigation to which it could apply, and who holds the power to waive the common interest doctrine?

[6] [1980] 3 All E.R. 475 at 483, [1981] Q.B. 223 (C.A.).

[7] (1999), 45 O.R. (3d) 321 at paragraph 46 ["*Chrusz*"].

[8] 642 F.2d 1285 (1980) at 1299-1300 (S.C.C.A.) ["*American Telephone and Telegraph Company*"].

[9] See, for example, *Almecon Industries Ltd. v. Anchortek Ltd.*, [1999] 1 F.C. 507 (T.D.) at paragraph 9, stating that the fact "that the parties might at some point become adverse in interest [is not] sufficient to deny the existence of a common interest privilege at present."

underlying privilege in the communication must be established; the communication be made by separate parties in the course of a matter of common interest; the communication be designed to further the effort; and the privilege has not otherwise been waived.[10] Canadian law, however, offers broader common interest protection, in that it may be claimed not only in relation to litigation matters, but also to some commercial transactions.[11] One of the remaining differences is that, in the U.S., the protection applies only to litigation matters, such that disclosures made during commercial transactions are not protected by privilege.[12] This approach is consistent with Rule 502(b)(3) of the U.S. *Uniform Rules of Evidence Act*, which requires that there be a pending action before a party may utilize the common interest defense against the waiver of privilege.[13]

The purpose of the common interest doctrine, like that of the underlying solicitor-client privilege, is to encourage the full and honest flow of information, thereby enhancing the quality of legal advice and promoting the broader public interest in the promotion of justice.[14] Enabling parties to access information concerning cases substantially similar to their own aids their separate counsel's ability to become more informed about their respective cases, and thereby provide better legal advice.[15] However, benefits attach to the common interest doctrine, over and above those encompassed by solicitor-client privilege, including the potential for faster, more efficient litigation, as parties share resources, strategies and pool information.[16]

In order to take full advantage of the doctrine while remaining vigilant about potential waiver or other pitfalls, counsel should execute a detailed common interest agreement.[17] A written agreement can be the best evidence of the manifestation of the parties' common interest (which is one of the requirements to establish common interest privilege), demonstrating that parties shared an interest and exchanged communications for the purpose of seeking legal advice with the reasonable expectation that the communications would remain confidential and privilege would not be waived. Also, by delineating the boundaries of the common interest, courts may be more likely to respect the related communications that are covered by the underlying privilege.[18] Furthermore, unwritten terms may discourage parties from sharing

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[10] Michael Temin, "The Common Interest Privilege," online: Recent Developments in Bankruptcy Law, http://delawarebankruptcy.foxrothschild.com/2010/10/articles/recent-developments-in-bankruptcy.

[11] See *Fraser Milner Cagrain LLP v. Canada (Minister of National Revenue – MRN)*, 2002 BCSC 1344 at paragraph 14.

[12] See *Aetna Casualty and Surety Co. v. Certain Underwriters at Lloyd's London*, 176 Misc. 2d 605 at 612-613 (Sup. Ct. N.Y. 1998), *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 190 (D. Del. 2004) at 190.

[13] Canadian Bar Association, Ethics and Professional Responsibility Committee, "Frequently Asked Questions about Solicitor-Client Privilege and Confidentiality," *The Canadian Bar Association* (November 2010), online: The Canadian Bar Association at http://www.cba.org/CBA/activities/PDF/Privilege%20FAQ%20Eng%20-%20final.pdf.

[14] See, in the U.S. context, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), stating: "[i]ts purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's [sic] being fully informed by the client." For a similar statement under Canadian law, see *Anderson v. John Zivanovic Holdings Ltd.*, [2000] O.J. No. 4868 (S.C.J.) at paragraph 16, finding the public policy underlying common interest privilege is "free and open communications" between the respective parties.

[15] Katharine Traylor Schaffzin, "An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It," 15 *B.U. PUB. INT. L.J.* 49, 51 (2005).

[16] Katharine Traylor Schaffzin, "Eyes Wide Shut: How Ignorance of Common Interest Doctrine can Compromise Informed Consent," 42 *U. Mich. J.L. Reform* 71, 2-3 (2008).

[17] As noted at the outset, common interest privilege can exist at common law even in the absence of a written agreement. Thus, even if an agreement is not put in place at the start of the contemplated litigation, if it appears to be an increasingly prevalent issue in the handling of the case, it may still be useful to retroactively memorialize the common interest privilege in writing as the case progresses.

[18] See, for example, the Court of Appeal's statement in *Chrusz*, following *American Telephone & Telegraph Co.*, that where parties transfer information "under a guarantee of confidentiality, the case against waiver is even stronger." What better guarantee of confidentiality than a written provision?

information for fear of waiving privilege, thereby obstructing the flow of information and limiting their counsel's ability to provide the best available advice. A written document provides a basis for parties to accurately assess whether a potential communication is in furtherance of the common legal goal, and thus covered by the privilege, and instill confidence that privilege will not be unknowingly waived.

Additionally, a written agreement helps avoid potentially negative repercussions of the common interest doctrine. For example, informal aggregation may create a pseudo-solicitor-client relationship, the boundaries of which are not clearly defined but which could have negative consequences.[19] A written agreement expressly denying the creation of a direct solicitor-client relationship where there is no retainer will function to prevent counsel from assuming obligations to separate parties that could later result in a conflict of interest in future, unconnected litigation.[20] A written agreement also shows that counsel obtained their client's informed consent before allowing confidential information to be shared, thereby evincing no breach of counsel's ethical duties of confidentiality, loyalty and diligence.

Essential elements of the joint defense or common interest agreement include:

- confidentiality provisions, including survival beyond the termination of the agreement;
- non-waiver of privilege provisions;
- a provision requiring prior written consent of all parties for waiver of privilege;
- provisions providing that the communications at issue were designed to facilitate a common legal interest;
- provisions evidencing a "coordinated legal strategy" between parties;[21]
- a provision that each party retains all rights of ownership and control of its own materials pursuant to the agreement;
- a provision restricting the use of the shared materials to the defense or common legal interest and for no other purpose;
- a provision that materials shared pursuant to the agreement should be so marked;
- provisions providing for the process for terminating or withdrawing from the agreement; and
- if other jurisdictions are party to the agreement, a choice of law provision.

It is also advisable for parties to clearly specify and claim the privilege at the time that a potential advisor prepares a document.

The advantages and full promise of the common interest doctrine remains to be tapped by Canadian counsel. A well-crafted agreement that documents both the existence of the common interest and delineates its parameters will result in a fuller flow of information, more efficient and strategic legal advice, ethical protection for counsel and ultimately, better legal services to the client.

[19] Supra note 15 at 2.
[20] Ibid. at 18.

[21] See *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007), *Minebea Co.*, 228 F.R.D. at 16 (citing *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995).