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Limitations On The Protection Afforded To Joint Defendants

In Canadian Litigation:

Factors to Consider in Joint Defence Arrangements

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JOINT DEFENCE AGREEMENTS IN CANADA

As with most other international jurisdictions, criminal enforcement against international cartel activity continues to be a high priority for Canada's competition authorities. This heightened scrutiny has been accompanied by a surge in civil actions, especially class actions which, relative to the United States, remain in their infancy of common law development.

From the very beginning of a criminal investigation into an alleged conspiracy, counsel retained to represent one party must conduct a risk benefit analysis as to whether and to what extent it would be in his client's interest to cooperate with other defendants, prospective defendants and their counsel. While most of the factors to be considered in this analysis are similar to those in the United States or other jurisdictions, there are some differences in Canadian law that may have an important impact on the decision to cooperate, the extent of that cooperation and the procedures employed to protect the information.

Common interest privilege and litigation privilege generally may be less protective in Canada than in other jurisdictions, notably the United States. In addition, new limitations of actions legislation in Canada's most litigious province limits the flexibility of defendants to agree to avoid putting themselves in unnecessary adversity for as long as possible.

COMMON INTEREST PRIVILEGE

In Canada, as in the United States, litigation privilege protects documents from disclosure during litigation, provided the dominant purpose for the creation of the documents is to submit them to a lawyer for advice and use in current or anticipated litigation. Common interest privilege extends the litigation privilege to documents or information shared with a third party who has a common interest with the client in anticipated or current litigation arising from the same transaction or series of transactions. The determination of when parties are considered to share a common interest sufficient to bring communications within the protection of the privilege is not well settled in Canadian law. There have been conflicting cases during the last ten years, with no definitive statement from Canada's highest court.

Some decisions, including one in the realm of competition litigation, have defined common interest privilege so narrowly as to preclude the use of the privilege where there is any *potential* adversity between the parties sharing information at the time that information is shared. This would preclude protection for any parties who may have an eventual claim against each other for contribution or indemnity. More recent case law has embraced a broader scope of common interest protection.

The roots of recognition of common interest privilege in Canada stem from a 1980 British case called *Buttes Gas and Oil Co. v. Hammer and others*¹ in which Lord Denning articulated the privilege as follows:

There is privilege which may be called a "common interest" privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels' opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation because it affects each as much as it does all the others.

In all such cases I think the courts should, for the purpose of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged."

In the 1995 case *Canadian Pacific Ltd. v. Canada (Director of Investigation and Research)*², the Court took a narrow view of the protection that common interest privilege affords. In the context of an inquiry under Canada's *Competition Act*, two parties asserted common interest privilege over documents that would otherwise be relevant and producible in the inquiry. The Court declined to afford protection, holding that the privilege protection only extends to those with a "selfsame interest" who were the necessary agents in obtaining legal advice. In doing so, it adopted a strict test for determining what parties share a common interest, limiting it to where it would be "reasonably possible for the same counsel to represent both" without a conflict of interest.

¹ [1980] 2 All E.R. 475 (C.A.)

² [1995] O.J. No. 4148

The Court held that once it had been established that two parties shared a common interest, it did not necessarily follow that all employees of the parties with the common interest communicating with or receiving communications from legal counsel were protected: "It is not enough to be a member of the client's team; rather it would be on the basis of "need to know". Thus (the party) would have to justify others being copied with material in order to preserve the privilege." In *Canadian Pacific*, this meant that sending a copy of a legal opinion to a party's public relations advisor acted as a waiver of the privilege.

Three years later in *Supercom of California Ltd. v. Sovereign General Insurance Co.*³, the defendant insurers attempted to shield a investigative report from disclosure to the plaintiff. The report had been prepared by the insurer and submitted to the Insurance Crime Prevention Bureau ("ICPB"), a non-profit organization to which only insurers were members. In holding that there was no common interest amongst all of the insurers fighting against insurance fraud sufficient to shield the report from being disclosed, the Court made the following statement:

In this case, there are four or five different insurers representing the various defendants and third parties. They provide a united front to attempt to deny the plaintiff's claim. However, if the insurance policy is in force, they are battling each other to see which insurer is responsible for the plaintiff's loss. Not far beneath the surface veneer in this case are a series of insurers adverse in interest to each other. I conclude that the requisite dynamic of a shared, common front, or interest fundamental to a finding of common interest privilege is not present in the facts of this case

The *Canadian Pacific* and *Supercom* cases would thus appear to exclude common interest privilege in any situation in which contingent cross claims could potentially be made amongst the defendants. An analogous cartel situation to the *Supercom* case could occur where information has been provided to an industry association, whose membership is limited to the alleged conspirators.

This line of cases could make it very difficult to shield communications with a co-accused or co-defendant in subsequent civil litigation. Consider the lawyer who may start out representing a corporation during a criminal investigation, providing a wealth of information to, and receiving confidential communications from senior employees of the corporation. There is always a potential conflict should those same employees become defendants in their own right, with

³ (1998) 37 O.R. (3d) 597 (Ont. Gen. Div.)

different, and conflicting defences. At the time the information is shared with the senior employees there may not be information disclosed to the lawyer to allow him to anticipate a divergence of interests between the corporation and the individual employees. Applying *Canadian Pacific* strictly, there would not appear to be privilege for communications made to or from the lawyer that have been disclosed to the employees, because the employee and corporation could be viewed as always having had an adversity of interests.

The narrow view of common interest privilege espoused in *Canadian Pacific*, supra. and *Supercom*, supra. has not been readily accepted in subsequent cases (although it has not been definitively overruled either). Courts are starting to recognize the important systemic benefits of common interest in litigation, especially litigation involving numerous parties. In a recent class action decision, common interest privilege was identified as a necessary ingredient to a fair and efficacious resolution: "Complex litigation ..requires that the parties and their counsel be able to share information and show their position to some but not all of the participants. This facilitates the refining and reduction of issues, achieves economy in research and expenses, is supportive of possible settlements or compromises and enables the litigation to progress with fairness and timeliness. Parties should be free of any asserted archaic strict rules of waiver."⁴

More recently, Canadian case law has moved towards adopting the U.S. view of common interest privilege. *General Accident Assurance Co. v. Chrusz*⁵, the leading appellate court decision in Canada at the present time, adopted the principles set forth by the U.S. Court of Appeals in *United States of America v. American Telephone and Telegraph Company*⁶:

...The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But "common interests" should not be construed as narrowly limited to co-parties. So long as the transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary. When the transfer to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger.

⁴ *CC&L Dedicated Enterprise Fund (Trustee of) v. Feldman* [2001] O.J. No. 637 (Ont. Sup. Ct.)

⁵ (1999) 45 O.R. (3d) 321 (Ont. C.A.)

⁶ 642 F. 2d 1285 (1980) at 1299-1300 (S.C.C.A.).

The view that common interest privilege is waived by disclosure to a party that might at some future point in time become adverse in interest has also been relaxed in more recent case law. In the 1999 case *Almecon Industries Ltd. v. Anchortek Ltd. (T.D.)*⁷ a defendant in a lawsuit sent two opinion letters to a distributor (not then a party to the lawsuit). The opinions had been sent under cover of a letter marked "confidential" which referenced the defendant's understanding that it and the distributor would both work together to resist the plaintiff. After the opinions had been delivered, the plaintiff commenced a second law suit against the distributor, in which the distributor produced the opinions to the plaintiff. In examinations for discovery in a consolidated action, the plaintiff sought to question the defendant in the first law suit on the contents of the opinions. The defendant resisted responding to those questions, asserting common interest privilege. The court held that common interest privilege applies on a broader basis than where the defendants *might* become adverse in interest. Provided they are not adversaries, and it is anticipated that they may both become parties to litigation with the plaintiff, then there exists a common interest sufficient to protect their communications.

In summary, the law in Canada appears to be moving away from the strict and narrow interpretations of common interest privilege in recognition of the following principles:

1. Cooperation amongst parties, particularly in complex litigation, ought to be encouraged in order to ensure resolutions that are timely and fair.⁸
2. Parties may have a common interest even if they do not have identical interests;
3. Common interest is not restricted to co-parties⁹;
4. The possibility that parties might at some future point in time become adverse in interest in insufficient to deny the existence of a common interest privilege at present¹⁰;
5. There must be a demonstrated clear intention to waive the privilege.

It is important to note however that until there is a more definitive determination on what the bounds of common interest privilege are, and ought to be, in Canada, defendants will need to consider including precautions in joint defence agreements to ensure, to the greatest extent

⁷ [1999] 1 F.C. 507 (F.C.T.D.)

⁸ *CC&L Dedicated Enterprise Fun (Trustee of) v. Feldman*, supra.

⁹ *General Accident Assurance Co. v. Chrusz*, supra.

¹⁰ *Almecon Industries Ltd. v. Anchortek Ltd. (T.D.)*, supra.

possible, privilege is not going to be waived if a party becomes adverse in interest. Suggestions could include a stipulation that a party to the joint defence agreement provide notice of contact with the investigating authorities regarding cooperation or the possibility of a plea, and the requirement that a party immediately withdraw from the agreement as soon as plea negotiations begin.

PRIVILEGE DOES NOT PROTECT THE FACTS

Common interest privilege, where it is found to exist, will protect the legal advice or analysis provided and the actual document which is deemed to be a privileged communication. However, the facts contained or relayed in such communications do not enjoy the same protection in Canada as in the U.S..

In *Forest Protection Limited v. Bayer AG et al.*,¹¹ a New Brunswick Court examined the production obligations in a civil suit commenced after two defendants had entered guilty pleas for implementing a foreign conspiracy in Canada. The court ordered the defendants to produce a statement of facts compiled during the criminal investigation, regardless of whether such facts were communicated to counsel:

Information given by way of a statement of facts by Chemagro or employees of Chemagro as to knowledge they had concerning relevant facts material to this action should be disclosed, whether they were provided to counsel or not. To the extent that they relate to this action the fact that these material facts were communicated to their solicitor subsequent to the investigation by the Director and upon counsel coming into the picture to advise the defendant as a result, in my view, does not cloak the facts stated within the knowledge of the defendants with solicitor/client privilege to allow the defendant to deny disclosure. The actual statements taken by solicitors or notes taken by them may well involve disclosures that relate to legal advice sought or given and need not be disclosed. However, the witness must inform himself of these statements and answer questions as to what information material to this action was available to the defendant, Chemagro, at the time the statements were made.

Similar statements were also made in *Canadian Pacific*, supra.:

Merely because facts are recited in a privileged communication does not render the facts as privileged and therefore immune from being revealed in an examination. However, discovery is a two part process; it involves not only examination but production as well. The question here is whether the Director must be content with eliciting facts on an examination but not having these facts presented in a written form with the balance of documents to be produced if these facts are set forth in documents which are otherwise privileged. As a practical matter it would seem that if such facts were to be so produced, there would have to be an expurgated or a reconstructed-

¹¹ January 29, 1998 (unreported) (N.B.Q.B.)

sanitized document. If expurgated, then I would assume that the document would have been removed from any element of the request for legal advice (and the legal advice itself). If reconstructed-sanitized, then I would assume that there would be a writing produced, which writing would recite the facts which were contained in the privileged documents but the facts would be recited in such a way so as to minimize the risk of inadvertent disclosure of the nature of the legal advice sought.

Most provincial rules of civil procedure and the Federal Court of Canada rules require that the representative of a corporation being examined for discovery must provide the *corporation's* knowledge, information and belief of any facts relating to any matter at issue in the action. The corporate representative is thereby under an obligation to disclose all of the facts in the possession, control or power of the corporation, including those facts uncovered by counsel in their investigation of the matters at issue. In the cartel context, this means that all the material facts that counsel, and therefore the client, learns during his investigation relating to potential criminal charges, including those facts elicited in interviews with employees, former employees or other third parties, would be required to be disclosed to a plaintiff in a subsequent civil action. This is notwithstanding the fact that counsel's interview notes or a chronology constructed from thousands of documents were conducted or prepared for the dominant purpose of defending the criminal proceeding and are *prima facie* protected by litigation privilege. As counsel for a party providing information under a joint defence arrangement, this also means that facts from your client which have been disclosed to another party (or his counsel) will be subject to production and discovery.

This is a factor which counsel should consider when conducting an investigation which may include interviewing or reviewing documents from employees, former employees or other third parties. Defence counsel should be cognizant that they may end up conducting an investigation for the ultimate benefit of a plaintiff in future proceedings and advise their clients of this factor before embarking on a widespread search for the facts from employees, former employees or other third parties during the criminal investigation. In certain cases, it may be appropriate to have separate and independent counsel engaged to act on behalf of employees, former employees or other third parties whom the company under investigation is considering interviewing. These individuals could then be interviewed in depth by their own counsel and the information in turn provided to the company's counsel can be controlled. With this procedure, the interview will be protected by solicitor-client privilege and the company under

investigation would only be required to disclose the facts relayed by the employees, former employees or other third party's counsel, if any.

A NEW LIMITATIONS ACT IN ONTARIO

In addition to considering the potential disclosure of information shared pursuant to a joint defence agreement, counsel will also want to be cognizant of how such an agreement may affect the timing of a client's decision to protect its individual interests vis a vis the plaintiff and other defendants.

In Canada, contingent claims in relation to an alleged international cartel could arise where all or most of the parent corporations of the named defendants may have participated in a larger international conspiracy where they fixed the price of products and allocated markets, but only one or two of the defendants may have actually sold the product in Canada. In such cases, it is common for the defendants to provide in their joint defence agreement that they each will not make any claims for contribution or indemnity until such time as the plaintiff is successful at trial (or in settlement). In essence, the agreement contracted out of any applicable limitation period, which was permissible under prior case law. This avoided the requirement to make cross-claims at an earlier time. Given the ramifications of being adverse in interest on common interest privilege discussed above, this is obviously a prudent course of action in order to ensure that defendants are able to share information and work product with each other while under the protection of that privilege.

Civil claims commenced following a guilty plea or conviction for criminal cartel activity in Canada are most commonly commenced in the province of Ontario. As of January 1, 2004, a new *Limitations Act* came into force in Ontario which dramatically changes both the substantive limitations period and procedures that have been adopted by the bar to address prior jurisprudence.

Under the prior law of limitations, it was well settled that parties could agree not to enforce a limitation period, provided their agreement satisfied the usual formal requirements of a

contract. Under the new Ontario *Limitations Act*, parties can no longer contract out of a limitation period¹². This provision clearly prohibits contractual limitation periods which do not accord with statutory limitation provisions.

In a cartel case (as with all other criminal cases), Section 36 of the Canadian *Competition Act* imposes a two year limitation period on plaintiffs commencing a civil suit which commences to run from the time that criminal proceedings are finally disposed of, or the day on which the conduct was engaged in, whichever is later. In addition, the new Act provides that, for a claim by one alleged wrongdoer against another for contribution or indemnity, the new (almost universal) two year limitation period starts to run on the day that the first wrongdoer is served with the claim in respect of which contribution and indemnity is sought.¹³

Civil conspiracy claims, especially contentious class actions with many procedural disputes, may take much longer than two years to be resolved. Defendants cooperating under a joint defence agreement may find themselves in a difficult position as the two years draw to a close. There may come a time when defendants will have to choose between the benefits of cooperating and the potential for recovery or loss minimization in the event of a positive finding for the plaintiff.

CONCLUSION

The benefits of cooperating with other parties in cartel litigation in Canada, whether criminal or civil, do not come without risk or limitations. In order to protect the individual interests of a client, counsel will have to consider the dynamic nature of the interrelationship amongst the co-defendants and other third parties who share a common interest against the plaintiff. Each time before information is shared with another party, counsel must ensure that there is no information that may indicate a divergence of interests, and must ensure that he understands that the facts within those communications are not protected from disclosure to the plaintiff in a subsequent civil action. Finally, if a plaintiff commences an action in Ontario, counsel must

¹² *Limitations Act, 2002*, S.O. 2002, c. C-24, section 22(1). It is important to note however that all agreements entered into prior to January 1, 2004 have been grandfathered.

¹³ *Limitations Act, 2002*, S.O. 2002, c. C-24, section 18.

ensure that he analyzes his clients' rights against co-defendants (or any prospective parties from whom contribution and indemnity may be sought) before the two year limitation period expires.