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In Defence of Transactional Common Interest Privilege

Author: Maureen Littlejohn

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On Oct. 31, 2019, *The Lawyer's Daily* published "Transactional common interest privilege: Not over till it's over," by Alexander Gay. Commenting on the Federal Court of Appeal's decision in *Iggillis Holdings Inc. v Canada (MNR)*, 2018 FCA 51, Gay calls out Bay Street for its misplaced confidence that the threat to transactional common interest privilege created by the lower court's *Iggillis* decision (2016 FC 1352) has been neutralized by the Federal Court of Appeal's reversal of that decision. He suggests that transactional common interest privilege "undermines the administration of justice," and that it is only a matter of time before this "orphan privilege" is once again challenged in Canadian courts.

With the greatest of respect, the concerns expressed by Gay – and by the motions judge's decision in *Iggillis* – appear to be rooted not in the Canadian experience with the doctrine of transactional common interest privilege (or, as it might more usefully be called, the common interest waiver exception), but in concerns about the creation of some new privilege that would allow parties to shield from view the ordinary communications that occur in the course of a commercial transaction.

Properly understood, common interest privilege is not, itself, a privilege – it is a doctrine that allows parties who share a sufficiently common interest to share already privileged documents without losing the protection of that privilege. A common interest can exist by virtue of existing or contemplated litigation or, as was the case in *Iggillis*, a commercial transaction that both parties share an interest in consummating. Importantly, both transactional common interest privilege and litigation common interest privilege can involve the sharing of either litigation-privileged or solicitor-client privileged documents. However, it was only the transactional context of this sharing, rather than the litigation context, that was under attack in *Iggillis*. Notably, the motions judge's decision in *Iggillis* is an outlier in the Canadian legal landscape as being the only decision disclaiming the validity of the doctrine of transactional common interest privilege.

When we consider the policy rationale for transactional common interest privilege, it is important to recall that documents being shared under the rubric of common interest privilege must already be privileged in order to be protected. Far from undermining the administration of justice, protection of solicitor-client privilege is consistent with decades' worth of Canadian jurisprudence finding that solicitor-client privilege is not only substantive rather than a mere rule of evidence, but is itself so fundamental to the administration of justice as to have attained quasi-constitutional status (for a very brief overview, see *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at paras. 38-45). Similarly, the Supreme Court of Canada has held that litigation privilege is "a fundamental principle of the administration of justice that is central to the justice system" (see *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 at para. 4).

The courts in Canada have chosen to confine the ambit of solicitor-client privilege narrowly, limiting the circumstances in which communications involving third parties will be subject to protection. However, once privilege is found to have attached, it is carefully protected, and waiver of privilege is typically limited to what is strictly necessary to do justice in the circumstances of the case. U.S. treatment of the doctrine of common interest privilege has little relevance to the Canadian experience, since the bounds of solicitor-client privilege itself are drawn differently south of the border.

The concerns expressed by Gay (and by the motions judge in *Iggillis*) appear to be founded on the belief that transactional common interest privilege would allow parties to a transaction to "shelter the very information that motivated their decisions from the court when the transaction itself is litigated." However, it is of course not every communication made during the course of a transaction that will be

subject to a proper claim of privilege, and the mere existence of a common interest between parties does not create privilege over communications between them.

Ordinary discussions between transactional counterparties will not be privileged and will not be protected from disclosure. Moreover, the suggestion that common interest privilege hides commercial transactions from judicial view and thus deprives courts of the ability to "assess the nature of the transaction and the very documents that gave rise to its inception" is not borne out even on the facts of *Iggillis*: the motions judge's recitation of the facts clearly showed that he had sufficient information to understand the parameters of the transaction that was under scrutiny, and only a single, solicitor-client privileged memorandum was subject to a dispute on the basis of common interest privilege.

There can be no doubt that transactional common interest privilege will be subject to continued discussion and analysis by Canadian courts in the years to come. However, the central thesis of the motions judge in *Iggillis* and of Gay – namely, that the doctrine undermines the administration of justice in favour of commercial expediency – is simply not borne out by a review of the relevant Canadian case law.

Solicitor-client privilege and litigation privilege are fundamental to the administration of justice in Canada, and efforts to afford them continued protection through anti-waiver doctrines like common interest privilege promote those interests rather than hinder them.

Key Contact: Maureen Littlejohn