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Privilege Under Pressure: Navigating Privilege Pitfalls & Disclosure Risks on the Commercial List

Privilege issues are a frequent flashpoint on the Commercial List, where fast-paced, highly managed proceedings demand that counsel anticipate, address, and resolve privilege disputes efficiently. In this post, we explore a few key privilege challenges on the Commercial List, including asserting joint and common interest privilege, best practices for privilege logs, and the critical importance of handling inadvertent disclosure with care.

Navigating Joint & Common Interest Privilege

Commercial List cases frequently involve a web of parties: corporations, directors, officers, shareholders, lenders, insurers, and regulators, often with complex and shifting alliances. In these matters, it is common for parties to share legal advice or strategy with others who are not their direct clients but who have a legal or commercial interest in the outcome. This is where joint interest and common interest privilege come into play and can become critical tools for protecting a client's position.

Joint interest privilege arises when parties share the same legal interest in the subject matter of a dispute or transaction and communicate with or through counsel regarding that joint interest. For example, co-defendants in litigation, joint venturers, or parties aligned under a court order or receivership may exchange privileged communications without waiving privilege as against outsiders. Joint interest privilege often arises where aligned parties retain joint counsel — in M&A transactions, syndicated lending, and partnership or shareholder disputes.

Common interest privilege allows parties on the same side of a transaction or litigation to share otherwise privileged advice to advance a common legal interest, provided the interest is genuinely legal (not merely commercial) and the parties preserve confidentiality. This is especially prevalent on the Commercial List, where parties to a transaction, such as buyers and sellers or co-investors, may need to share legal opinions, due diligence, or tax advice to complete a deal. Similarly, co-

defendants may coordinate defense strategy or share expert reports, and parties negotiating a restructuring or settlement may need to exchange legal advice to reach a common solution.

Ontario courts, including the Commercial List, have recognized and expanded common interest privilege in both litigation and transactional contexts. However, the boundaries are not always clear. What constitutes a “sufficiently common” interest? Does privilege survive if parties later become adverse? How does privilege apply to communications with non-lawyer advisors, such as accountants or consultants, who are part of a deal team? And what is the effect of written common interest agreements? Are they required, and do they provide certainty?

The answers to these questions are often fact-specific. In *Magnotta Winery Corporation v Ontario (Alcohol and Gaming Commission)*, the Court clarified that parties do not trigger common interest privilege merely by sharing similar legal or regulatory concerns. In that case, each winery pursued its own interests in separate proceedings, without evidence of a coordinated legal strategy. By sharing legal opinions and advice with other wineries that lacked a sufficiently aligned legal interest, the parties waived privilege. The decision underscores that parallel positions or objectives are not enough; there must be a genuine joint legal effort to preserve privilege.

To avoid uncertainties, parties involved in commercial disputes or transactions should take proactive steps to clarify and safeguard the scope of common interest or joint interest privilege.

- **Written agreements** should articulate the purpose, scope, confidentiality, non-waiver provisions, and permitted recipients of shared information. While not always determinative, such agreements provide a strong foundation for preserving privilege.
- **Limit circulation of privileged materials** to those who truly need access, label documents appropriately, and use secure communication channels.
- **Distinguish business from legal advice.** Include non-lawyer advisors in the privilege framework only where their role is tied to the provision of legal advice or litigation strategy.
- **Articulate the shared legal interest early** in insolvency or receivership contexts. Court-appointed stakeholders, lenders’ syndicates, and ad hoc creditor groups should

define their common legal interest at the outset to avoid waiver fights mid-process.

- **Address the possibility of future adversity.** Common interest or joint defense agreements should clarify that privilege over shared information survives even if parties later become opponents.

Privilege Logs: Clarity, Not Overkill

Once parties assert privilege, the next challenge is demonstrating its proper application. Privilege logs are a critical tool in commercial litigation before the Commercial List. Given the complexity, scale, and high stakes of these disputes, courts require parties to be transparent and precise when withholding documents on the basis of privilege. An effective privilege log should identify privileged documents with enough detail (typically including the date, author, recipients, type, general subject, and basis for privilege) to allow the opposing party and the Court to assess the claim without revealing the substance of the communication.

Proportionality and cooperation are essential when preparing privilege logs. Counsel should work together to focus logging efforts on what truly matters. For example, it may be appropriate to use categorical logs for large groups of similar documents, such as routine counsel/client emails on the same subject. By agreement, parties can also exclude obvious, non-controversial categories from the log altogether.

To ensure your log is effective, avoid these common mistakes:

- Using vague labels such as “legal advice” without explanation
- Failing to identify recipients or their roles
- Combining privileged and non-privileged attachments in a single entry

Inadvertent Disclosure: Contain First, Argue Later

Inadvertent disclosure is a significant risk in complex commercial litigation, where the high volume of documents, tight timelines, and involvement of multiple parties and advisors increase the likelihood of mistakes. The response of the party receiving privileged information is critical and governed not only by case law but by the ethical and procedural framework set out in Ontario’s *Rules of Civil Procedure* and the *Rules of Professional Conduc*t.

In *2177546 Ontario Inc v 2177545 Ontario Inc*, the Court considered the consequences of inadvertent disclosure and improper use of privileged information in a commercial dispute

between business partners. Privileged emails had been inadvertently made available to the opposing party, who then reviewed and relied on them. The Court emphasized that inadvertent disclosure of privileged material, if exploited by the receiving party, poses a serious risk to the integrity of the administration of justice. The Court struck the offending party's evidence and ordered that the application proceed as an undefended matter, subject to leave, to protect the fairness of the proceedings.

Rule 30.1.01 of the *Rules* requires parties and their counsel to act in good faith and to facilitate the fair, efficient, and cost-effective resolution of discovery issues. When a party receives a document that appears to have been disclosed inadvertently and may be privileged, counsel is ethically obliged to refrain from reviewing, copying, or using the document any further than necessary to identify its nature. The Law Society of Ontario's Rules of Professional Conduct reinforce this, requiring lawyers to act with integrity, avoid sharp practice, and uphold the administration of justice. Specifically, Rule 7.2-10 provides that a lawyer who receives a document and knows or reasonably ought to know that it was inadvertently sent must promptly notify the sender. The ethical obligation to notify and not exploit the mistake is paramount, regardless of the legal effect of inadvertent disclosure.

Upon discovering an inadvertent disclosure, the producing party should notify promptly, identify the documents and context, and request sequestration. The recipient should cease review, segregate the materials, and await direction. Courts will assess whether steps taken on both sides were timely and reasonable, whether review or use occurred, and the prejudice from either clawing back or permitting use. The focus is always on fairness and maintaining the integrity of the process. Pre-agreeing in discovery plans or case conference endorsements on a clawback regime, using technology defensively (such as privilege screens and QC sampling), and seeking the Court's direction if disagreement persists are all effective protocols. Proactive, disciplined privilege management is essential to avoiding costly disputes and ensuring the integrity of Commercial List proceedings.