CITATION: Ottawa Credit Exchange Limited v. David Wu and Opus Fitness Investments Inc. 2026, ONSC 2697
COURT FILE NO.: CV-14-00062684-0000
DATE: 2026-05-04

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ottawa Credit Exchange Limited

AND:

David Wu and Opus Fitness Investments Inc.

BEFORE: Associate Justice Perron

COUNSEL: Nadia Authier for the plaintiff

Jason Squire for the defendants

HEARD: January 6 and March 3, 2026

ENDORSEMENT

[1] This is a motion by the plaintiff seeking:

a. Production by the defendants of redacted Schedule A and Schedule B documents, over which common interest privilege is claimed;

b. Production by the defendants of a joint tolling agreement; and,

c. Compelling the defendants to answer undertakings, advisements and refusals.

[2] The primary issue on the motion is whether the requested documents are subject to common interest privilege. I heard submissions from the parties on January 6, 2026 and reserved my decision.

[3] With respect to the refusals, OCEF sought to compel answers from the defendants on approximately 15 undertakings/advisements/refusals. On January 6th, I adjourned this part of the motion to provide the defendants with additional time to consider their responses. The parties re-attended before me at a case conference on March 3, 2026 and reported that only 1 advisement by Mr. Wu remained in dispute: advisement #39. I heard submissions from each party and told them that my disposition on this advisement would be included in my reserve decision.

[4] For reasons set out below, my disposition on each of these issues is as follows:

a. The defendants have not made out the requisite elements to establish common interest privilege on the redacted Schedule A and Schedule B documents. The defendants shall therefore produce those documents.

b. The defendants shall also produce the joint tolling agreement, subject only to appropriate redactions to any monetary quantum paid to the parties as part of the agreement; and,

c. Mr. Wu shall answer advisement #39.

Summary of the Action and Relevant Context for the Motion

[5] The action was commenced in November 2014 by OCEF Corp. and seeks damages of $18,000,000. In November 2022, OCEF assigned the action to OCEL.

[6] In the action, OCEF seeks to rescind a Purchase and Sale Agreement dated July 8, 2014 (the PSA) between OCEF and the defendants, Mr. Wu and Opus, along with associated agreements.

[7] Pursuant to the PSA, Opus repurchased stock options that were previously granted to OCEF under an Option Agreement that was entered into between the parties in March 2014 as part of a loan by OCEF to Opus. Opus' primary investment at the time was in a chain of fitness clubs operating as TAC which has since reorganized into Movati Athletic Group Inc.

[8] OCEF alleges that the defendants deprived OCEF of its rights pursuant to the Option Agreement to purchase an ownership stake in Movati Athletic. Particularly, OCEF alleges that contrary to the terms of the Option Agreement, the defendants failed to disclose a potential sale of TAC to a third party (NEP). OCEF alleges that if it had been made aware of the contemplated transaction, OCEF would have exercised its option to participate in the transaction and it would not have entered into the PSA.

[9] For purposes of this motion, the period from May 2014 to August 1, 2014 is material because these are the dates of the redacted Schedule A and Schedule B documents over which the defendants claim common interest privilege. In addition, OCEF alleges that it was during this period that the defendants sought to terminate the Option Agreement and intentionally misrepresented to OCEF that there was no contemplated transaction or deal being negotiated.

[10] The full chronology of events is not in dispute therefore I need not reproduce it here. That said, I have considered the full context and chronology in making my findings on this motion.

[11] With respect to the materials that were before me on this motion, the plaintiff produced a motion record, compendium and factum. The record included some of the transactional documents, including the Option Agreement and PSA, as well as the pleadings, undertakings/refusals chart and list of documents over which privilege was claimed. The record also included the transcripts of the examination of Mr. Wu on May 20, 2021 and June 2, 2025 as

well as the examination of Dan Pompilii on November 16, 2023 and of Charles Kelly on November 17, 2023.

[12] The defendants produced a factum but did not produce a responding motion record.

[13] Neither party produced an affidavit in support of the motion.

[14] At the outset of the motion, I reminded the parties of the current practice directions which require that counsel must succinctly make their entire argument during the oral hearing and must bring all material facts and authorities upon which they rely to the attention of the Court. I indicated that I would not review the full transcripts, and I requested that they bring me specifically to the evidence that supported their position.

[15] I noted that this would be particularly important for the defendants because several paragraphs of the "fact" section of their factum did not include references. At the outset of his submissions, the defendants' counsel stated that the statements in the factum that did not include references were conclusionary statements supported by the evidence. I reminded counsel to bring me to that evidence during his submissions.

[16] The defendants also took the position that I did not need to review the unredacted versions of the documents to make a determination on the claim of common interest privilege because the defendants' submissions were determinative of the issues on the record that was before me.

[17] The plaintiff's position was that if I had any doubts on whether the defendants had not met their required onus on the motion – in other words, if I rejected the plaintiff's submissions - I needed to inspect the documents before making a determination on whether the documents were privileged.[1]

The Defendants have Not Met the Test for Common Interest Privilege

[18] The documents at issue which the plaintiff requests be produced – without redactions – are those over which common interest privilege is claimed as set out in the chart attached at Tab 11 of the plaintiff's motion record which reproduces the applicable documents listed in Mr. Wu's supplementary affidavit of documents sworn on October 6, 2021[2].

[19] In their factum, the defendants summarize that the documents are email communications between Mr. Wu (the principal of Opus) and Mr. Wu's lawyer, John Groenewegen, on which other persons are included. The primary individuals included on the email exchanges are Dan Pompilii (the then CFO of TAC) and Michael Stevenson (counsel to shareholders of TAC) but other individuals were occasionally copied including Ken Rosenstein (counsel for CIBC), Bernie

[1] *Quadrangle* v *AG Canada*, 2023 ONSC 7125 at paras 43-44.
[2] The plaintiff does not take issue with Schedule B documents which are only between Mr. Wu and Mr. Groenewegen and over which only solicitor-client privilege is being claimed.

Olanski (counsel for TAC) and Chuck Kelly (the CEO of TAC). The plaintiff correctly points out that some of the emails do not include Mr. Wu. For example, some emails are only between Mr. Pompilii and Mr. Groenewegen, or between Mr. Pompilii, Mr. Groenewegen and others.

[20] I reviewed the chart at Tab 11 and the parties brought me to some examples of the redacted documents during their submissions, but an item-by-item review was not possible given the volume of documents at issue. The outcome of the motion will be determinative for all the documents at issue.

[21] Except for one nuance which will be discussed below, the parties do not dispute the applicable legal principles that are required to establish common interest privilege. Those principles were summarized by the Court in *Wintercorn* v *Global Learning Group Inc.*[3]:

(i) Common interest privilege is established where a lawyer's communication or advice is shared, on a confidential basis, with a non-client or other "with a sufficient common interest in the same transactions": *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2018 FCA 51, 420 D.L.R. (4th) 477, at para. 41;

(ii) The concept of common interest privilege originated in the broad context of "parties sharing a goal or seeking a common outcome": *Pritchard*, at para. 24;

(iii) "Because the existence of this privilege is so fact-dependent, there can be no hard and fast rules as to when it will or will not arise": *Trillium Motor World*, at para. 130;

(iv) Common interest privilege applies when there is an "ongoing interest in completing the transaction which the disclosure was designed to facilitate". Such an interest may exist through contractual arrangements, including when there is an "ongoing economic relationship", or when the parties have a "direct pecuniary interest in the transaction": *Maximum Ventures Inc v. De Graaf*, 2007 BCCA 510, at paras. 11 and 16; *Iggillis Holdings*, at paras. 32-34;

(v) Common interest privilege is not a "stand-alone privilege": *Power v. RGMP*, 2021 ABQB 877, at para. 20. Communications that are otherwise non-privileged cannot be cloaked in privilege simply because they are exchanged between parties sharing a common interest;

(vi) The underlying solicitor-client privilege attaching to each communication at issue must be established by the party attempting to rely on common interest privilege: *Power*, at paras. 30-31; and,

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[3] *Wintercorn*, 2022 ONSC 4576 (CanLII) at para 160.

(vii) The party asserting common interest privilege bears the onus of establishing both the predicate privilege and the common interest intention to maintain confidentiality over the communications: *Power*, at para. 32.

[emphasis added]

[22] In the specific context of a commercial transaction, the principles were summarized by the Court in *Trillium Motor World* v. *General Motors et al*[4] as follows:

- The court refers to this concept interchangeably as an exception to waiver of privilege and as common interest or common litigation privilege, though the term "common interest privilege" seems to be the most prevalent. They all involve similar scenarios, so no distinction is merited;
- Common interest privilege in the context of commercial transactions has been clearly recognized by the court;
- This privilege, or exemption from waiver of privilege, has been found to exist because it advances the economic and social value in encouraging commercial transactions. Sharing of information of a legal nature can enhance negotiations as it supports open and informed discussions by putting parties on a common footing;
- It applies where parties share a legal opinion that is in aid of the completion of a transaction; where there is an expectation that that opinion will be kept in confidence; and where completion of a transaction is of benefit to all parties;
- Being of benefit to all means the parties are seeking a shared goal or a common outcome, such as the completion of a transaction. The privilege is not defeated because each party wants this outcome for a different reason;
- Therefore, for this privilege to apply, the common interests need not be identical interests;
- While common interests need not be identical, there must be sufficient common interest and a mutual interest in the commercial transaction;

[4] *Trillium*, 2014 ONSC 1338 (CanLII) at para 130.

- The privilege will apply even where parties who share the documents may become adverse in interest in the future or if they are already adverse in respect of another related action;
- There needn't be litigation in existence or even contemplated at the time the information is shared for this privilege to arise; and
- Because the existence of this privilege is so fact-dependant, there can be no hard and fast rules as to when it will or will not arise;
- The mere existence of a commercial transaction will not suffice to create it.

[23] Pursuant to the principles outlined above, it is not disputed that the defendants bear the onus of first establishing that the documents at issue are protected by solicitor-client privileged. Litigation was not contemplated at the applicable time, therefore the only privilege that could underly the common interest privilege in the present case is solicitor-client privilege.

[24] The plaintiff's position is straightforward. They submit that the defendants have not provided any evidence to support that the documents are protected by solicitor-client privilege and that this is fatal to the defendants' position on the motion and that the documents must be disclosed. The plaintiff also submits that the defendants' most recent characterization of the common interest and the date of the documents, suggest that the documents would reveal that the defendants were concealing the NEP purchase from the plaintiff to induce the termination of the Option Agreement.

[25] The defendants submit that, because it is not disputed that the communications between Mr. Wu and Mr. Groenewegen were solicitor-client privileged, I should infer, based on the overall context, that privilege over the communications was maintained when those communications were shared with Mr. Pompilii because he was an advisor to Mr. Wu and was helping Mr. Wu complete the transaction and obtain legal advice. The defendants request that I draw the same inference to the sharing of the communications with other individuals because they formed part of the team.

[26] As stated above, the defendants did not file an affidavit on the motion. I have summarized below the evidence that the defendants ask me to consider to make the above inferences.

[27] The defendants brought me to various paragraphs of the PSA to illustrate that this was a complicated transaction. They submit that on its face, the agreement shows that other parties had an interest in the transaction and that it ought to have been obvious to the plaintiff that secondary parties, such as lenders and financial advisors, were working on the transaction and ancillary steps. In particular, they say it is obvious that Mr. Pompilii would be involved due to the various financial components of the transaction and that this was all "CFO kind of stuff".

[28] In their submissions and factum, the defendants also reference various excerpts from the transcripts of Mr. Pompilii's and Mr. Kelly's examinations.

[29] Mr. Pompilii's evidence was that he was involved in multiple projects for TAC and he was the liaison for "all the financial pieces" including: the buyout of Mr. Quesnel (which he said was the number one focus), trying to raise capital, arranging for new/additional financing, completing the opening of the new club, looking to future expansion. A sale of the company was also possible.

[30] Mr. Pompilii stated that, as of March 2014, he had seen early drafts of the option agreement and said what needed to be adjusted but then he never heard further. He "had other things, that's not my – I wasn't doing it personally, doing anything else so it wasn't my piece to take further.[5]" Mr. Pompilii said that he gave instructions to all parties, including Mr. Wu, that Opus' shares were not to be encumbered. Mr. Pompilii also reviewed the loan agreement. He said that Mr. Wu liked to ask a lot of questions and had lots of different lawyers. When Mr. Pompilii eventually saw that the final Option Agreement encumbered the shares, he knew this was a major problem, including for CIBC and for NEP. As the defendant's counsel put it during submissions, Mr. Pompilii was caught in the middle of all of this.

[31] Mr. Kelly's evidence was that many people were involved in the management buyout piece and that the TAC shareholders would have leaned on counsel and their financial advisors for advice. He also emphasized that the option provided to OCEF was very problematic. It jeopardized NEP's investment. It put the credit agreement at risk. Mr. Kelly had a heated discussion with Mr. Wu about the terms of the agreement.

[32] Therefore, according to the defendants, the overall context illustrates that many parties were interested in seeing Mr. Wu and Opus complete the PSA because they were affected (TAC, Mr. Pompilii, CIBC etc) and they had a mutual interest to correct the mistake made by Mr. Wu of having included the option in the original agreement.

[33] OCEF doesn't dispute that it was aware that TAC was trying to raise funds to buyout Mr. Quesnel. OCEF was also aware of the plan to open new clubs. OCEF was also aware that CIBC was going to fund the buyout. However, OCEF says it was never made aware of the NEP piece.

[34] Before considering whether the individuals copied on the communications shared a common interest in the transaction, I circle back to the defendants' obligation to first establish that the shared communications were protected by solicitor-client privilege.

[35] There are several passages from Justice Grosse's decision in *Power* v *RGMP*[6] that are helpful in the circumstances.

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[5] Mr. Pompilii transcript, pages 17-18, Q. 54 (A1534-A1535).
[6] *Power* v *RGMP*, ABQB 877 (CanLII)

[36] Justice Grosse summarizes the test and confirms that communications will be protected by solicitor-client privilege if they: a) are made between a lawyer and a client; b) entail seeking or providing legal advice; and, c) are intended to be confidential[7].

[37] Her Honour then goes on to explain that not all communications involving counsel are privileged but "the Court does not engage in a line by line review to identify "advice". A "continuum of communications" between lawyer and client is necessary in order for the lawyer to understand the client's circumstances and advise accordingly."[8] Whether a communication falls within the continuum and is privileged is a contextual exercise that depends on the evidence before the Court. The Court may be able to infer that some elements of the test are met without specific evidence. "For example, if a communication is clearly between a lawyer and client for the purpose of giving or receiving legal advice, and there is no evidence that it was shared with any third party, an inference is readily available that the communication was intended to be confidential."[9]

[38] The following passages are particularly relevant to the present case:

> [32] I noted above that where communications are clearly between a lawyer and their client, the court often is able to infer that all elements of solicitor-client privilege are present without direct evidence, assuming no evidence to the contrary. Those same inferences are not necessarily available when the communication is, on its face, directed to another party. Parties claiming privilege in these circumstances should expect more scrutiny as to whether the communication meets all of the elements of solicitor-client privilege in the first place, and if so, whether common interest privilege applies. On the latter point, I am aware that the onus to prove waiver is generally on the party claiming waiver. However, I have not seen any authority equating this to an obligation on the party challenging a claim of privilege to dis-prove a common interest privilege. In the face of intentional sharing between independent parties, particularly where they are represented by counsel, it seems there is at least an evidentiary burden on the party claiming the benefit of a common interest privilege to establish the requisite circumstances.
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> [33] In many of the commonly-cited authorities on transactional common interest privilege, it appears the application record included affidavits from parties or counsel involved in the transaction to support the claim of privilege. There are no such affidavits before me in this case. The Power Plaintiffs filed two Affidavits of a legal assistant in

[7] *Power* at para 16 citing *Solosky* v *The Queen*, 1979 CanLII 9 (SCC) and *R.* v *McClure*, 2001 SCC 14.
[8] *Power*, at para 17.
[9] *Power*, at para 18.

> support of the Applications; the Defendants did not file any evidence in response. I am not critical. There are many reasons for which a party might choose not to proffer evidence. I simply make my decisions on privilege on the application record as it stands, being the face of the disputed records themselves and the apparent context.[10]

[39] In the present matter, the communications in issue are not communications only between Mr. Wu (the client) and Mr. Groenewegen (the lawyer). On their face, the communications were shared with others. In some cases, the client – Mr. Wu – is not included. I agree with Justice Grosse's analysis in *Power* that as a result, I cannot simply make an inference that the communications entail seeking or providing legal advice. For the same reasons, I cannot simply draw an inference that the communications were intended to be confidential.

[40] While the terms of the agreement and the transcript excerpts referenced above may be helpful context to assist me in considering whether the parties shared a common interest in the transaction, this evidence is not helpful to decide whether the communications are solicitor-client privileged or whether they were intended to be confidential.

[41] None of the excerpts from Mr. Pompilii's evidence that were brought to my attention during this motion discuss his involvement with Mr. Groenewegen, or confirm that he was involved in providing Mr. Wu or Opus with legal advice. To the contrary, Mr. Pompilii's evidence suggests that he was not involved in providing legal advice to Mr. Wu and that Mr. Wu had lawyers for this purpose. In addition, none of the excerpts from Mr. Pompilii's evidence speak to an intention to maintain confidentiality over the communications he was having with all of the various individuals. In the same vein, the excerpts brought to my attention regarding Mr. Kelly's evidence are not helpful to draw the necessary conclusions.

[42] The defendants' factum included several assertions to support their position that the communications were protected by solicitor-client privilege. For example, at paragraph 30 of their factum the defendants state:

> The communications at issue fall within the solicitor-client continuum because they either seek legal advice from Mr. Groenewegen, convey his legal advice, or share the factual and legal inputs necessary for that advice in real time. They are not status updates, scheduling or tasking traffic, or bare factual exchanges of the type cautioned in *Power*. Nor are they positions or demands conveyed across the table. Where third parties appear, they were aligned participants receiving or facilitating legal advice on a confidential basis.

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[10] *Power*, at paras 32 and 33.

[43] These paragraphs, like many others with similar assertions, did not include any references. I do not agree with the defendants that these conclusionary statements are supported by the evidence before me on this motion or that it would be appropriate to draw inferences on each of these points based on the apparent context. There is no evidence to support that the communications shared legal advice, let alone any evidence to refute that the communications were "status updates, scheduling or tasking traffic, or bare factual exchanges". These statements can only be described as bald assertions.

[44] In asserting his claim of common interest privilege, Mr. Wu stated the following in his undertakings' chart:

> The redacted words were communications confidentiality made for the purpose of providing legal advice relating to the common interest of David Wu, Opus, TAC (and related corporations) and the direct and indirect shareholders (other than Al Quesnel) in the Option Agreement and the PSA. [emphasis added]

[45] Mr. Wu did not file an affidavit to support this statement. The defendants did not draw my attention to any excerpts from Mr. Wu's examination that would be helpful to determine the issue of solicitor-client privilege. I am not prepared to conclude that the communications are protected based on a position baldly articulated in an undertakings' chart.

[46] Mr. Kelly stated that a written common interest privilege agreement existed but the defendants refused to provide it. As will appear below, there was some confusion as to whether the common interest privilege was the same as a joint defence tolling agreement entered into between some of the parties (former defendants). In any event, the defendants submit that any common interest privilege agreement is not producible because it is privileged or irrelevant and that Mr. Kelly's disclosure of its existence is a fact that I should consider.

[47] In the circumstances, I am not simply prepared to take Mr. Kelly's word for it. The plaintiff made it clear that this issue – whether the documents were protected by common interest privilege- was in dispute. It is odd that in the face of this opposition, the defendants double-down and say the agreement that would seemingly prove the privilege is not producible.

[48] In any event, because the determination of common interest privilege involves the determination of factual and legal issues, a person simply asserting the existence of the privilege would not be determinative.

[49] Unlike several of the cases relied upon by the defendants, such as *Wintercorn*, there is no evidence before the Court that the individuals copied on the communications worked "hand-in-hand" and were "intimately connected" with counsel in order for counsel to provide legal advice[11].

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[11] *Wintercorn* at paras 154-158.

Nor was this a situation such as in *Maximum Ventures*[12] or *Pitney Bowes*[13] where it was clear - and admitted - that the documents at issue were legal opinions.

[50] In the face of the competing inferences that the parties are asking me to draw, the defendants ought to have expected more scrutiny from the Court. Because the communications were shared with others, I cannot make the inferences that the defendants ask me to make.

[51] There is no evidence to support that the communications were for the purpose of giving or receiving legal advice. There is no evidence to support that the communications were made with the intention of confidentiality. The defendants have not met their burden to prove that the communications at issue are protected by solicitor-client privilege.

<u>There are Additional Problems with the Defendants' Assertion of Common Interest Privilege</u>

[52] Although the defendants' failure to establish that the communications are protected by solicitor-client privilege is dispositive of this motion, I would also have declined to make a finding that the documents were protected by common interest privilege due to a lack of evidence on other necessary elements of the test.

[53] I mentioned above that the parties were generally agreeable on the applicable legal test. Where the parties appeared to disagree was whether common interest privilege requires that the communications only be shared as between the parties to the transaction. In other words, the plaintiff's position appeared to be that to be protected, the communications must include OCEF because the privilege seeks to assist parties to a transaction to negotiate in an informed and open manner towards a common goal, such as completing a transaction.

[54] On this point, I agree with the defendants that common interest privilege does not exclusively protect legal opinions communicated between the parties directly involved in a transaction. Solicitor-client privilege can be extended to members of an advisory team necessary as part of the conduit of legal advice and common interest privilege has been found to apply to communications shared with such teams if the other requisite elements are met.[14]

[55] However, because I have found that the defendants failed to establish that the communications are protected by solicitor-client privilege, this is a moot point in the circumstances and I need not consider the issue any further.

[56] That said, there were also other evidentiary gaps or difficulties with the defendants' position on a number of other elements necessary to underpin common interest privilege.

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[12] 2007 BCCA 510 (CanLII)
[13] 2003 FCT 214 (CanLII)
[14] For example, see *Wintercorn* at paras 5(vii), 149-150, 154-158 and 161-162; see also *Trillium Motor World* v *General Motors et al*, 2014 ONSC 1338 and *Maximum Ventures*.

[57] For example, the defendants provided inconsistent and/or contradictory descriptions of the underlying "transaction":

a. When Mr. Wu was examined in 2021, his counsel described the privilege as follows: "This was a common interest in respect of the deal that both Mr. Wu and the shareholders other than Mr. Quesnel were negotiating, along with TAC itself, vis-à-vis NEP."

b. In his undertakings chart, Mr. Wu described it as follows: "The redacted words were communications confidentiality made for the purpose of providing legal advice relating to the common interest of David Wu, Opus, TAC (and related corporations) and the direct and indirect shareholders (other than Al Quesnel) in the Option Agreement and the PSA".

c. In their factum, the defendants state "for clarity" that the "transaction" is the negotiation and completion of the PSA on July 8, 2014 together with the contemporaneous reorganization steps affecting the parties' shareholdings.

[58] The defendants' morphing description of the transaction is contradictory and certainly not a reliable assertion that I can accept on its own to support this element of the test.

[59] Even if I accept Mr. Pompilii's evidence and Mr. Kelly's evidence (which includes hearsay) that many parties were affected by the option agreement, there is simply no evidence from the defendants, and/or any evidence from counsel or those with whom the documents were shared, that the individuals copied were working together to close the PSA or that they shared a common interest in same.

[60] In addition, the fact that a number of other "transactions" took place between the individuals copied on the communications immediately after the PSA was concluded (i.e. NEP's financing of the management buyout, TAC's amalgamation with 241 to form Movati, NEP's option agreement, NEP's loan to 242 etc) also cast doubt that the individuals had a common interest in closing the PSA. Although the common interests need not be identical interests, there must be sufficient common interest and a mutual interest in the commercial transaction at issue.

[61] In the backdrop of everything that was going between all of these persons and entities, and in the absence of any evidence on point, I am not prepared to infer from the context that the "transaction" was the closing of the PSA or that there was a sufficient and mutual interest in that transaction. Furthermore, the mere existence of the commercial transaction will not suffice to create the common interest privilege nor is "merely desiring a commercial transaction to close".[15]

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[15] *Trillium* at para 130. See also *Hui 789 Development Ltd* v. *Fraserway RV Limited Partnership*, 2023 BCSC 2479 at para 40.

[62] On the record before me, I would not have concluded that the defendants had established that the communications were protected by common interest privilege.

The Joint Defence Tolling Agreement is Producible

[63] The JDTA was entered into on April 25, 2016 which is the same date that Mr. Pompilii, Mr. Kelly and 242 (the corporate entity that owned Movati after TAC's amalgamation) were let out of the action by the plaintiff as a result of the settlement of motions. The existence of the JDTA was disclosed in Mr. Wu's answers to undertakings delivered on November 20, 2025.

[64] OCEF and the defendants also entered into a tolling agreement in 2016 as part of the settlement of the motions. There was some confusion in the materials as to whether the JDTA was a separate, second agreement from the tolling agreement with OCEF and/or the common interest privilege agreement to which the defendants are a party. During their submissions, the defendants confirmed that the JDTA is indeed a separate agreement.

[65] In response to the advisement, Mr. Wu states the following in his chart: "Beyond disclosing its existence, the JDTA is privileged, irrelevant, and not required to be produced." The advisement chart does not specify what privilege is being asserted over the JDTA.

[66] In their factum, the defendants assert that there was a clear expectation of confidentiality on Mr. Pompilii in the eventual JDTA which also bound the original defendants in this action. The defendants further assert that the parties to the agreement would retain confidentiality against all others with respect to their participation in the PSA.

[67] The plaintiff's position is that the defendants' description of the JDTA strongly suggests that the agreement deals with an arrangement that will affect the quality of the evidence at trial, and that if the agreement had been disclosed contemporaneously in 2016, it would have impacted the conduct of the plaintiff in this action. They submit the JDTA ought to have been immediately disclosed because it altered the litigation landscape[16].

[68] In their submissions, the defendants stated that they would try and work this issue out with the plaintiff and produce a redacted version of the document.

[69] The caselaw relied upon by the plaintiff, including *CHU* confirms that the disclosure obligation extends to any agreement "that has the effect of changing the adversarial position of the parties into a co-operative one" and that "confidentiality clauses in the agreements in no way derogate from the requirement of immediate disclosure".[17]

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[16] *CHU de Quebec-Universite Laval* v *Tree of Knowledge International Corp*, 2022 ONCA 467 at para 55 citing *Handley Estate* v *DTE Industries Limited*, 2018 OnCA 324 at para 45.
[17] *CHU* at para 55(b) and (e).

[70] The *Bilfinger* also confirms that cooperation agreements that may be subject to common interest privilege also require disclosure in certain circumstances to ensure a fair trial including where the agreement may inform the quality of the evidence, or motivation of a witness, where it could be relevant to the conduct of trial and/or where the Court or opposing party could be misled about the positions of the parties.[18]

[71] The Court in *Bilfinger* goes on to specify that:

> the common interest privilege between litigants who have a cooperation agreement must give way to some extent in the following circumstances:
>
> a) Where there are evidentiary arrangements in the agreement;
>
> b) Where the agreement contains a release, covenant not to sue, or reservation of rights; and, or
>
> c) Where the agreement makes the parties' true adversarial positions in the lawsuit different than what might otherwise be expected from the pleadings.[19]

[72] The defendants assert that the agreement doesn't impact the litigation landscape and only impacts discovery rights and the passing of the limitation. Once again, there is no evidence to support the defendants' assertions. It is not even clear which persons or entities are parties to the JDTA.

[73] In addition, based on the fact that the JDTA was entered into at the same time as the settlement of the motions with the plaintiff which saw certain parties let out of the action, I find that the agreement did alter the litigation landscape.

[74] I also agree with the plaintiff that the defendants' description of the JDTA strongly suggests that the agreement is of the nature requiring disclosure pursuant to the caselaw above. The defendants stated that the JDTA impacts discovery rights and the limitation; it therefore deals with evidentiary arrangements and, implicitly, with reservation of rights. I have already found that the defendants have not established the necessary requirements for common interest privilege but even if such a privilege exists, the JDTA would be producible based on the principles set out in *Bilfinger*.

[75] The defendants were also prepared to produce a redacted version. This also suggests that at least parts of the agreement are relevant and ought to be disclosed. This contradicts the bald assertions by the defendants that the JDTA is not the kind of agreement requiring disclosure.

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[18] *Bilfinger Berger (Canada) Inc.* v *Greater Vancouver Water District*, 2014 BCSC 1560 (CanLII) at para 152.
[19] *Bilfinger* at para 153.

[76] I agree with the plaintiff that permitting the defendants to produce a redacted version would only prolong the dispute over productions. Moreover, the defendants had an opportunity to try and resolve this with the plaintiff prior to the hearing of the motion and they did not do so.

[77] The defendants shall produce the JDTA to the plaintiff, subject only to redactions for any monetary compensation specified as part of the agreement.

The Defendants Must Answer Advisement #39

[78] As indicated above, this advisement is the only remaining refusal in dispute. The advisement deals with the following answer provided by Mr. Wu: *Mr. Wu was advised at that time only that the mezzanine lenders required the OCEF options to be terminated. Now based upon a review of the productions in this litigation it appears it was NEP that required that option to be terminated.*

[79] The advisement requests that Mr. Wu identify within the productions what documents he reviewed to come to the alternate conclusion, and that he produce any such documents if they have not already been disclosed. In his answer, Mr. Wu stated that he didn't rely on any particular document and that he "reviewed the documents in the record that appear to demonstrate NEP's dissatisfaction with the Option Agreement […]".

[80] The plaintiff's position is that it is clear from the above answer that Mr. Wu looked at specific documents and that because the cancellation of the Option Agreement is a key issue in the litigation, the plaintiff is entitled to know what documents Mr. Wu is relying upon within the extensive productions during this period (May to July 2014) to have come to this conclusion. In addition, if Mr. Wu is relying on privileged documents to come to this conclusion, they are not accessible by the plaintiff.

[81] The defendants' position is that Mr. Wu cannot testify for NEP and that this was only Mr. Wu's conclusion. The defendants submit that the plaintiff has access to the productions and it can review the documents itself to locate any documents suggesting NEP's dissatisfaction. The defendants' counsel stated that he was not sure what Mr. Wu had looked at, including whether privilege was claimed over the documents.

[82] In his answer, Mr. Wu makes explicit reference that certain documents informed this conclusion. By his own answer, he has put in issue the relevancy of any such documents. A search of the database will not permit the plaintiff to confirm which documents Mr. Wu is talking about. It is not reasonable for Mr. Wu to now say look for the documents yourself.

[83] Mr. Wu shall answer this advisement and identify within the productions which documents informed his conclusion. To the extent he relies on documents that have not already been produced, he shall also produce those documents.

Conclusion

[84] The plaintiff's motion is granted. Within 30 days, the defendants shall produce: a) unredacted versions of the documents over which common interest privilege was asserted (as per the list at Tab 11 of the plaintiff's motion record); b) a copy of the JDTA subject only to redactions for any monetary compensation paid as part of the agreement; and, c) Mr. Wu shall answer advisement #39 and produce any further documents as applicable.

[85] If the parties cannot agree on costs of this motion the plaintiff shall deliver a costs outline and written costs submission of not more than three pages double-spaced by May 22, 2026. The defendants shall deliver any costs outline and responding costs submissions of not more than three pages double-spaced by June 5, 2026. The plaintiff may deliver a short reply of no more than one page double-spaced by June 12, 2026.

Associate Justice Perron

Date: May 4, 2026