

Expanding the Iniquity Exception to Ensure Corporate Accountability

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Corporations are becoming far savvier in managing corporate information within the organization. The in-house lawyer is often interposed in the middle of all sensitive communications for the purpose of eventually asserting privilege claims should litigation arise. The end result is that the in-house lawyer may sometimes be used by a company for the furtherance of an immoral act or an act that runs counter to public policy and avoiding accountability. The solution to what can only be described as a shell game lies with the iniquity exception to privilege which precludes a party from receiving the benefits of a privilege claim where it is used to perpetrate an immoral act or an act that runs counter to public policy. While the courts have circumscribed the application of the iniquity exception to cases where there is fraud or crime, it must be given broader application if we are to ensure greater corporate accountability.

The iniquity exception to privilege dates back to the case of *R. v Cox and Railton* (1884), 14 QBD 153 and has been applied in most jurisdictions across Canada. While the rule is often described by the case law as the “crime-fraud exception”, it is not restricted to criminal or fraudulent activities and includes all immoral conduct that offends public policy or the interests of justice. Although it is described as an exception, it is not an exception but rather a situation in which privilege does not arise at all. Longmore LJ in *Kuwait Airways Corp v. Iraqi Airways Co* (No 6), [2005] 1 WLR 2734 summarized the exception, saying that where a person consults a solicitor in furtherance of a criminal purpose then, whether or not the solicitor knowingly assists in the furtherance of such purpose, the communications between the client and the solicitor do not attract legal professional privilege. In order to defeat a claim of privilege, the applicant need not prove the alleged fraud, criminality or immoral conduct. The applicant need only show a *prima facie* case of fraud, criminality or other immoral conduct. While there is case law in Canada to suggest that the threshold is that of a strong *prima facie* case, as opposed to simply a *prima facie* case, the lower standard may be considered if the exception is to gain greater usage: *Canbook Distribution Corp. v. Borins*, 1999 CanLII 14842 (ON SC).

For the moment, the case law has limited the application of the exception to cases of fraud or crime and has, for the most part, refused to apply it in other contexts, such as a breach of human rights or regulatory avoidance. There have been recent cases that have attempted to expand its applications beyond crime and fraud, which appear to have been met with some resistance. For instance, in *Holyoake v. Candy*, [2017] EWHC 52 (QB), the court refused to apply the exception to a case involving a breach of fundamental human rights. The court held that it would be a radical extension of the iniquity exception if it were applied to cases beyond

¹ The views expressed by the author are not those of his employer the Department of Justice

crime and fraud. The court was unwilling to encroach on the solicitor-client privilege nor was it prepared to engage in a balancing exercise between the right to professional privilege and the competing human rights. The results of this case are unfortunate insofar as it is a missed opportunity to give the iniquity exception greater application. The case law has yet to fully confirm that the principle is about serious wrongdoing and not just about crime and fraud, which is but one facet of serious wrongdoing.

The iniquity exception to privilege can be very useful in litigation. The courts must provide an avenue for challenging claims of privilege over corporate communications where the in-house lawyer has been strategically placed in the middle of a communication for the purpose of committing a wrongdoing. This may require that the standard of proof be kept at the *prima facie* standard and that the iniquity exception be applied broadly to more than just fraud or criminality. A broader application of the iniquity exception to privilege would increase corporate risk and have a positive effect on corporate accountability.