File Number: 36315

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE SUPERIOR COURT OF ONTARIO)

BETWEEN:

WORLD BANK GROUP

APPELLANT
(Applicant)

– and –

KEVIN WALLACE, ZULFIQUAR BHUIYAN, RAMESH SHAH and MOHAMMAD ISMAIL

RESPONDENTS
(Accused)

– and –

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

RESPONDENT
(Prosecutor)

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, RESPONDENT FACTUM
(Rule 42)

REDACTED VERSION

Public Prosecution Service of Canada
Ontario Regional Office
130 King Street West, Suite 3400, Box 36
Toronto, Ontario, M5X 1K6

Per: Nicholas E. Devlin
François Lacasse
Tel: 416-952-6213
Fax: 416-973-8253
E-mail: nick.devlin@ppsc-sppc.gc.ca

Counsel for the respondent
Her Majesty the Queen in Right of Canada

Brian Saunders, Q.C.
Director of Public Prosecutions
160 Elgin Street, 12th floor
Ottawa, Ontario, K1A 0H8

Per: François Lacasse

Tel: 613-957-4770
Fax: 613-941-7865
E-Mail: flacasse@ppsc-sppc.gc.ca

Ottawa agent for the respondent

Lenczner Slaght Royce Smith Griffin LLP
Barristers
130 Adelaide Street West
Toronto, Ontario, M5H 3P5

Per: Alan J. Lenczner, Q.C.
Scott Rollwagon

Tel: 416.865-3090
Fax: 416-865-9010
Email: alenczner@litigate.ca

Lawyers for the applicant
World Bank Group

Borden Ladner Gervais
Barristers and Solicitors
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, Ontario, K1P 1J9

Per: Nadia Effendi

Tel: 613-230-5160
Fax: 613-230-8842
Email: neffendi@blg.com

Ottawa agent for the applicant

Fenton Smith
2nd Floor, 235 King Street East
Toronto, Ontario, M5A 1J9

Per: Scott Fenton

Tel: 416-955-4551
Fax: 416-955-1237

Counsel for the respondent Kevin Wallace

Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario, K1P 1C3

Per: Jeffrey W. Beedell

Tel: 613-786-0171
Fax: 613-788-3587

Ottawa agent for the respondent

Addario Law Group
101 – 171 John Street
Toronto, Ontario, M5T 1X3

Per: Frank R. Addario
Megan Savard

Tel: 416-649-5055
Fax: 416-714-1196

Counsel for the respondent Zulfiquar Bhuiyan

Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, ON K1P 1C3

Per: Matthew Estabrooks

Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agent for the respondent

David B. Cousins
203 – 425 University Avenue
Toronto, Ontario, M5G 1T6

Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario, K1P 1C3

Per: David B. Cousins

Tel: 416-977-8871
Fax: 416-.599-8075

Counsel for the respondent Ramesh Shah

Per: Jeffrey W. Beedell

Tel: 613-786-0171
Fax: 613-788-3587

Ottawa agent for the respondent

Wells Criminal Law
202 – 559 College Street
Toronto, Ontario, M6G 1A9

Per: Kathryn A. Wells

Tel: 41-.944-1485
Fax: 416-944-2529

Counsel for the respondent Mohammed Ismail

Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario, K1P 1C3

Per: Jeffrey W. Beedell

Tel: 613-786-0171
Fax: 613-788-3587

Ottawa agent for the respondent

Heinein Hutchison LLP
235 King Street East, third floor
Toronto, ON, M5A 1J9

Per: Scott C. Hutchison
Samuel Walker

Tel: 416-368-5000
Fax: 416-368-6644

Counsel for the intervener
Criminal Lawyer's Association

Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario, K1P 1C3

Per: Jeffrey W. Beedell

Tel: 613-786-0171
Fax: 613-788-3587

Ottawa agent for the intervener

Osler, Hoskin & Harcourt LLP
P.O. Box 50
1 First Canadian Place
Toronto, ON, M5Z 1B8

Per: Mark A. Gelowitz
Geoffrey Grove

Tel: 416-862-4743
Fax: 416-862-4743

Osler, Hoskin & Harcourt LLP
340 Albert Street, Suite 1900
Ottawa, ON, K1R 7Y6

Per: Patricial J. Wilson

Tel: 613-787-1009
Fax: 613-235-2867

Counsel for the intervener
Transparency International Canada Inc. and Transparency International e.V.
Stockwoods LLP
77 King Street West, Suite 4130
Toronto-Dominion Centre
Toronto, ON, M5K 1H1

Per: Nader R. Hasan
Gerald Chan
Tiffany O'Hearn Davies

Tel: 416-593-7200
Fax: 416-593-9345

Ottawa agent for the intervener

Power Law
130 Albert Street
Suite 1103
Ottawa, ON, K1P 5G4

Per: David Taylor

Tel: 613-702-5563
Fax: 613-702-5563

Counsel for the intervener
British Columbia Civil Liberties Association

Borden Ladner Gervais LLP
World Exchange Plaza
1300 – 100 Queen Street
Ottawa, ON, K1P 1J9

Per: Guy J. Pratte
Duncan Ault

Tel: 416-367-6728
Fax: 416-361-2721

Ottawa agent for the intervener

Borden Ladner Gervais LLP
World Exchange Plaza
1300 – 100 Queen Street
Ottawa, ON, K1P, 1J9

Per: Nadia Effendi

Tel: 613-237-5160
Fax: 613-230-8842

Counsel for the intervener
European Bank for Reconstruction and Development, Organisation for Economic Co-Operation and Development, African Development Bank Group, Asian Development Bank, Inter-American Development Bank, and Nordic Investment Bank

Ottawa agent for the intervener

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. During a pre-trial motion, the judge in this case ordered *Stinchcombe*-level disclosure against an immune international organization, on an issue unrelated to the guilt or innocence of the accused, in aid of an application to sub-facially attack the admissibility of real evidence gathered with the prior authorizations of a Superior Court judge. He did so despite that organization having voluntarily provided every written communication it had had with Canadian authorities, and absent any showing that the information sought could realistically undo the validity of the authorizations.

2. The Crown supports the World Bank's appeal, which should succeed both on a proper application of domestic disclosure principles, and in respect of the Bank's immunities. On the first front, there is a growing judicial consensus that third-party disclosure sought in aid of *Garofoli* applications should be required to meet the same relevance threshold this Court has imposed for leave to cross-examine affiants. To do otherwise fails to properly balance the need to avoid prolix fishing expeditions with the genuine requirements of full answer and defence. The trial judge in this case applied the wrong test, erroneously treated the World Bank virtually as a party to the prosecution, and made factual errors that led to the unjustified, open-ended production order. The order should be set aside on these bases alone.

3. In respect of the World Bank's immunities, the trial judge erred by importing the burden/benefit exception from the law of Crown immunity, when it has no application in the context of international treaties. In so doing, the simple act of reporting crimes to police and cooperating with law enforcement were wrongly styled as obtaining a 'benefit'. This approach has no support in principle and must be rejected as damaging to Canada's international partnerships.

4. Moreover, the World Bank has complete treaty-based immunity against orders to produce its documents, absent waiver. No waiver ever occurred in this case. To the contrary, the Bank asserted its immunities at every turn. This renders moot, for the purpose of this appeal, whether waiver by the Bank must be express or implied. Lastly, the critique levelled at the World Bank for not appearing to assert its immunities before the trial judge is misguided and reflects a failure to understand and implement Canada's obligations in international law.

B. CONTEXT

1. The World Bank and the Padma Bridge Project

5. Following the Second World War, a global system for international economic development rose from the efforts of reconstruction.[1] One of the institutions created in that effort was the World Bank, which was charged with providing loans to developing nations with the aim of funding projects that would help alleviate poverty.[2]

6. The Padma Bridge Project in Bangladesh was one of those projects. Padma was to be a multi-purpose road-rail bridge, costing over $2 billon, which would provide a link between previously difficult to access, and highly impoverished, portions of the country.[3]

7. Unfortunately, the injection of significant development monies into developing nations could be a magnet for corruption and bribery. As a fiduciary for its member nations, the World Bank is obligated to be vigilant for these abuses.[4] In this case, discovery of a plan to pay bribes to Bangladeshi government officials, [redacted] resulted in the World Bank ultimately cancelling their financing for the project altogether.[5] The World Bank also debarred the accused's employer, SNC-Lavalin, from bidding on World Bank projects for a period of 10 years.[6]

2. Domestic investigation and proceedings against the accused

8. The bribery of foreign officials by Canadians is a criminal offence under the *Corruption of Foreign Public Officials Act* ["*CFPOA*"].[7] Canada is also a member of the World Bank, and as such is bound by the treaty creating it. In March of 2011, Paul Haynes ["Haynes"], an investigator at the World Bank's Integrity Vice-Presidency [also designated as "INT"] – the unit responsible for preventing and investigating acts of corruption – told Staff Sgt. Martin Bedard of the RCMP

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[1] *Affidavit of Galina Mikhlin-Oliver*, Appellant's Record, Vol. 1, Tab 5 at para. 6 ["*Affidavit of Galina Mikhlin-Oliver*"]*; Bretton Woods and Related Agreements Act*, R.S.C., 1985, c. B-7.
[2] *Affidavit of Galina Mikhlin-Oliver*, at para 10.
[3] *Affidavit of Galina Mikhlin-Oliver*, at para. 22; see also the prior related pre-trial ruling in these proceedings by Nordheimer J. in *Kevin Wallace v. H.M.Q.*, 2014 ONSC 5931 at para. 6 ["First Pre-Trial Motions Ruling"]; and *Authorization #1*, Respondents' Joint Record, Vol. V., Tab 91(B), para. 21 ["Authorization #1"].
[4] *Affidavit of Galina Mikhlin-Oliver*, at para. 15.
[5] *Affidavit of Galina Mikhlin-Oliver*, at para. 22.
[6] *Affidavit of Galina Mikhlin-Oliver*, at paras. 21 and 22.
[7] *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34.

that he had received information about corruption by Canadian SNC-Lavalin staff in relation to bidding on parts of the Padma project. Bedard told Haynes that the RCMP was interested in investigating this potential criminal offence. [8]

9. The World Bank agreed to cooperate. Over the following months, it shared the information it had received from four tipsters, as well as all of its own investigative reports. Sgt. Jamie Driscoll was tasked to prepare an application for judicial authorization to intercept private communications of the accused to gain direct evidence of their participation in the corruption.[9] The Ontario Superior Court granted the judicial authorization. Ultimately, a total of four successive wiretap authorizations were granted and executed. On a previous, related motion for disclosure, Nordheimer J. reviewed the process and contents of the affidavits in this case and made the following finding:[10]

> Most of what Sgt. Driscoll relied upon for his ITOs was the investigative work product of other officers, all of which has been disclosed.

10. The authorizations resulted in the accused being recorded making allegedly inculpatory statements.[11] On the strength of this evidence, search warrants were executed that yielded further inculpatory evidence.[12] The RCMP also went on to recruit a co-conspirator (Muhammad Mustafa) to testify against the accused.[13] He is expected to testify and provide voice identification evidence, identify individuals as foreign public officials and place Mr. Wallace at a key meeting in Bangladesh where the proposed bribes were discussed.[14]

11. The accused are now on trial before the Ontario Superior Court, charged with offering bribes to officials of the Bangladeshi government, contrary to s. 3(1)(*b*) of the *CFPOA*.[15]

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[8] First Pre-Trial Motions Ruling at para. 7.
[9] *Affidavit and Information for Authorization #3*, prepared by Sgt. Jamie Driscoll, 23 June 2011, Respondents' Joint Record, Vol. VI., B3 at paras. 23, 39 ["Authorization #3"].
[10] First Pre-Trial Motions Ruling at para. 52.
[11] *Affidavit of Tanit Loraine Gilliam* at para. 7 ["*Gilliam affidavit*"].
[12] *Ibid* at para. 8.
[13] *Ibid* at para. 8.
[14] *Ibid* at para. 9.
[15] *Indictment*, Exhibit to *Gilliam affidavit*, Appellant's Record, Vol. 1, Tab 7(b).

3. Complete disclosure to the accused

12. Complete and comprehensive disclosure has been made in this case.[16] Every piece of paper the RCMP received from the World Bank has been disclosed to the accused. The Crown has disclosed everything that was before the authorizing justices in Canada, and all of the materials in the hands of the RCMP at the time of those authorizations. In short, everything Sgt. Driscoll or the authorizing judge had in their possession has been disclosed.[17]

13. This disclosure included (among other items):[18]

- All emails sent between the World Bank and the RCMP from March 2011 to April 2014;
- 40 liaison reports from the World Bank from March 31, 2011 to January 27, 2012, including 33 that contained source information sent between March 31, 2011 and January 27, 2012;
- Emails sent between Haynes, the World Bank's investigator, and Driscoll, the affiant;
- All communications between the World Bank with the RCMP from April 4, 2011 to May 15, 2014, that do not contain sensitive information; and
- World Bank interviews of Muhammad Mustafa (the co-operating witness).

14. The Crown has also disclosed: a detailed summary of the evidence obtained by the RCMP; transcripts of the relevant intercepted communications, as well as the original audio; the notes of all of the main RCMP investigators involved in the investigation; copies of the relevant materials seized during the execution of the search warrants; copies of all the authorizations, including the reports to justice; the vetted wiretap and search warrant affidavits; a forensic audit of the digital evidence seized from SNC-Lavalin's offices; and the audio and video statements given by two individuals (Alam and Basit), and the co-accused who provided statements on arrest.[19]

15. In an earlier ruling on disclosure, editing and informer privilege, Nordheimer J. described the state of disclosure in these terms: "Most of what Sgt. Driscoll relied for his ITOs was the

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[16] For instance, the search warrants in this case generated more than 1 million discrete items, the entirety of which was disclosed, with 2,332 documents identified as potentially relevant. First Pre-Trial Motions Ruling at para. 36.
[17] *Gilliam affidavit* at paras. 10-11.
[18] *Ibid* at para. 11; excerpts of disclosure take up much of the 19 volumes of the Respondents' Joint Record.
[19] *Ibid* at para. 12.

investigative work product of other officers, all of which has been disclosed."[20] The notes of the lead investigator, Staff Sgt. Bedard, run to 520 pages and have, of course, been disclosed.[21]

16. Everything received from the World Bank was disclosed subject only to editing required to protect informer privilege. The status of the tipsters is settled, with Nordheimer J. having ruled on a previous motion that two of the four enjoy protection as confidential informers.[22]

4. The World Bank's cooperation with the disclosure process

17. In a December 2014 letter to Crown counsel, the World Bank voluntarily provided virtually every remaining document of potential relevance that had not already been given to the RCMP. The World Bank did so on a cooperative basis, but while continuing to assert its immunities. The *only* materials not produced voluntarily by the Bank were:[23]

- Internal World Bank deliberative records;
- Communications between the World Bank and the Government of Bangladesh;
- Communications with SNC-Lavalin Group Inc. and its legal counsel;
- Communications with legal counsel for Mohammed Ismail; and
- Communications with Engineering Planning Consultants Ltd., and its legal counsel.

18. The World Bank's Integrity Vice-Presidency has a policy on disclosure of information designed to further its mandate of transparency.[24] The World Bank's cooperation with the investigation followed the guidelines of this policy, maximizing disclosure.[25] The *only* materials withheld by the Bank are those falling within the limited categories of confidentiality enumerated in the disclosure policy as essential to the Bank's performance of its core functions.[26]

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[20] First Pre-Trial Motions Ruling at para. 52 [our underlining].
[21] Respondent's Joint Record, Vols. XIV, XV, and XVI, Tab 4.1.
[22] First Pre-Trial Motions Ruling at paras. 12-34.
[23] Letter from World Bank Director of Operations, Integrity Vice-Presidency to Crown Counsel, 26 November 2014, Appellant's Record, Volume 1 at pp. 103-104.
[24] World Bank Integrity Vice Presidency, *Policy on Disclosure of Information 2011*, Exhibit G to the Affidavit of Christopher Kim, Respondents' Joint Record, Volume 10, Tab G34 at pp. 1795-1799.
[25] *Ibid* at pp. 1800-1806.
[26] *Ibid* at pp. 1806-1810.

5. The World Bank voluntarily provision of all communication to-and-from the RCMP

19. The World Bank went so far as to provide its copies of the entire email correspondence between its investigator and Sgt. Driscoll when the latter's computer records were inadvertently destroyed. These were then all disclosed to the accused.[27] The World Bank's records show that most of these emails had initially also gone to Staff Sgt. Bedard and would thus have been disclosed to the accused from his files as well.[28]

6. Context of the order against the World Bank

20. The accused have indicated they wish to challenge the admissibility of the evidence through a 'sub-facial' challenge to the authorization. The material from the World Bank is sought to formulate this attack.[29] No deficiency or shortcoming on the face of the affidavits put before the authorization judges has been identified,[30] and the accused have rejected repeated invitations by the Crown to litigate the sufficiency of the wiretaps on the materials before the issuing judge during the delay caused by this appeal.

7. Scope of the order against the World Bank

21. Nordheimer J. ordered the World Bank to produce to him effectively every document in its possession concerning corruption by SNC-Lavalin related to the Padma Bridge Project:

> i. all notes, memoranda, emails, correspondence and reports received or sent by Mr. Paul Haynes of INT regarding the investigation into suspected corruption by SNC-Lavalin Group Inc., regarding the Padma Bridge Project;
> ii. all source documents from so-called "tipsters" sent to the INT, <u>whether or not such information was shared with the RCMP</u> as part of the INT's cooperation with the RCMP investigation into the Padma Bridge Project;
> iii. all emails and other communications between the INT and the tipsters; and
> iv. any other investigative materials relevant to the Investigation in the possession of other World Bank officials, including Christina Ashton-Lewis (Senior Institutional Intelligence Officer), Kunal Gupta (World Bank's Case Intake Unit), Laura Valli (Senior investigator) and Christopher Kim.[31] [Our underlining]

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[27] Email from Crown Counsel to counsel for the accused; Respondents' Joint Record, Vol. XVIII, Tab 6.1.a, p.58.
[28] As summarized in the *World Bank Group Transmission Log*, Appellant's Record, Vol. VI, Tab 9; Appellant's Record, Vol. VI, Tab 9; see First Pre-Trial Motions Ruling, at para. 50.
[29] *Gilliam affidavit*, *supra* at paras. 13-14**.**
[30] *Ibid* at para. 15.
[31] Order of Nordheimer J., Appellant's Record ("AR"), Vol. 1, Tab 1 at pp. 2-4.

22. Significantly, no evidence was offered to show that Haynes had any notes of conversations with the RCMP, beyond the information already disclosed.

8. The World Bank's assertion of its immunities throughout

23. While the World Bank cooperatively shared its information with the RCMP, and even assisted in filling a gap caused by the RCMP's loss of emails, it expressly asserted its immunities with every communication. A *caveat* was appended to all documents shared by the Bank, which reserved and asserted its immunities, expressed in these terms:

> This Report is provided without prejudice to privileges and immunities conferred on the Bank and its officer and employees by its Articles of Agreement and other applicable sources of law. The Bank reserves the right to invoke its privileges and immunities, including at any time during the course of an investigation or a subsequent judicial other proceeding pursued in connection with this matter.[32]

24. The World Bank agreed early in the process to modify their caveat to the extent necessary to allow the RCMP to meet its disclosure obligations.[33]

9. The World Bank's good faith

25. In the course of his reasons for granting the order, Nordheimer J. found that the World Bank was acting for proper purposes and in good faith:[34]

> In this instance, the World Bank Group, through the INT, chose to involve Canadian law enforcement, i.e. the RCMP, to pursue the allegations against Canadian citizens, who were allegedly involved in the corruption.
>
> There is no evidence that the World Bank Group chose this route for any reason other than its desire to promote its own goal of ensuring the integrity of projects in which it is involved. [Our underlining]

[32] Respondents' Joint Record, Vol. I, Tab A3, p. 92 (p. 71 of original document).
[33] Respondents' Joint Record, Vol. I, Tab A7 at pp. 92 and 94.
[34] Reasons of Nordheimer J., AR, Vol. 1, tab 2, p. 21 at paras. 31-32.

PART II – QUESTIONS IN ISSUE

26. The World Bank raises a number of issues[35] that essentially reduce to a single question: was the trial judge wrong to abrogate its treaty-based immunity and order disclosure of virtually its entire file in this case? The Crown agrees with the Bank's position that there was no waiver of immunities, and that Canada's treaty obligations precluded the Order made by the trial judge.

27. Should the Order have issued under domestic disclosure principles? The Crown's position is that it should *not*. A correct application of third party production principles in the context of a *Garofoli* review hearing dictates that the demand for disclosure should have been dismissed.

PART III – STATEMENT OF ARGUMENT

28. The Crown's argument is divided into three parts. First, we argue that the production order could not be issued under domestic disclosure law (heading A); second, we deal with the erroneous reliance by the trial judge on the benefit/burden exception to Crown immunity (heading B); finally, we address the World Bank's immunities (heading C).

A. PRODUCTION ORDER IMPROPERLY ISSUED UNDER CANADIAN DISCLOSURE LAW

29. On the correct application of disclosure principles, the production order should not have been made, irrespective of the World Bank's immunities.

30. The right to disclosure is contextual. It will vary depending on the circumstances in which it is sought, the issues to which it is relevant, and the circumstances of its source.[36] In this case, these important contextual factors were not taken into account, and the wrong test was applied, resulting in an improperly issued order.

31. The relevant contextual factors in this case are that the materials sought: (i) were never in the hands of the police or Crown; (ii) form no part of the case against the accused; (iii) had no bearing on their guilt or innocence; (iv) were sought only in aid of a sub-facial attack on presumptively valid judicial authorizations; (v) had not been shown to have a reasonable likelihood

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[35] Appellant's factum at paras. 45-50.

[36] *R. v. Pires; R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343 at para. 3; *R. v. Crevier*, 2015 ONCA 619, [2015] O.J. No. 5109 at para. 62.

of assisting in undermining the validity of those authorizations; and (vi) were held by a reputable international organization, acting in good faith, which had already made voluntary disclosure of all relevant materials to the Canadian authorities with the understanding that those materials would be disclosed to the accused.

32. These factors all weigh against issuing a production order for materials of no demonstrated relevance to a challenge of the judicial authorizations.

1. Disclosure rights vary as per context, source and proposed use of the materials

33. Disclosure is a powerful tool for truth-seeking and is essential to fair criminal trials. Since this Court's landmark decision in *Stinchcombe*, fruits of the investigation in the hands of the police or prosecution that are potentially relevant to the case must be disclosed, subject to privileges.[37] Full *Stinchcombe* disclosure has been given in this case. The voluntary cooperation of the World Bank, providing everything in their possession beyond the limited materials withheld in accordance with their access to information policy, have taken the level of disclosure in this case well *beyond* that mandated by *Stinchcombe*.

34. In *O'Connor*, this Court crafted a further mechanism for obtaining production and disclosure of material likely relevant to a triable issue on the guilt or innocence of the accused.[38] The accused seek to transpose this process into the context of a pre-trial motion on the admissibility of evidence, as is, and without any nuance or regard for that context.

35. The right to disclosure and production, however, is neither absolute nor unlimited.[39] The *Charter* does not provide an unrestricted right to every conceivable item of information and evidence.[40] To paraphrase McLachlin J. (as she then was) in *O'Connor*, practical and reasonable limits on disclosure are both fair and necessary.[41]

36. The further the material sought lies from core issues of guilt or innocence, the more courts insist on an enhanced showing of relevance before ordering disclosure. In particular, a factually

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[37] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.
[38] *R. v. O'Connor*, [1995] 4 S.C.R. 411.
[39] *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389 at para. 1.
[40] *R. v. Grimes*, 1998 ABCA 9 at para. 13.
[41] *R. v. O'Connor*, *supra* at para. 194.

ungrounded claim that materials are generically relevant to potential *Charter* arguments is simply not enough. As the Saskatchewan Court of Appeal explained, in terms apposite to this case:[42]

> The right to make full answer and defence does not entitle [the accused] after tens of thousands of pages of disclosure already given, to make general requests for every last piece of paper involved in the investigation based on speculation that it is relevant or that somewhere in the great morass of investigatory documents yet to come lies the pearl of inappropriate police behaviour which may form the basis of a constitutional argument. [Our underlining]

37. While accused individuals should be able to seek third-party production in aid of *Charter* applications in appropriate cases, it is fair and principled to place reasonable limits on this process. This protects the integrity of the administration of justice and avoids opening the door "to wide ranging, time consuming, and resource draining fishing expeditions."[43]

2. Test for third-party production in aid of *Garofoli* attacks on wiretap authorizations

a. Narrow scope of review of judicial authorizations under *Garofoli* hearings

38. The scope for review of judicial authorizations is narrow and well established.[44] This narrow scope in turn defines what material will be relevant.[45] For this reason, since this Court's judgment in *Garofoli*, a leave requirement has been imposed before the affiant of a wiretap affidavit can be cross-examined, to prevent what Sopinka J. described as the "procedural quagmire" arising in this type of ligation.[46]

39. This requirement was strongly reaffirmed by this Court in *Pires*. In that case, Charron J. articulated the key connection between the standard for review of judicial authorizations and the scope of inquiry allowed to the defence:

> It is in this narrower context that the right to cross-examine, as an adjunct to the right to make full answer and defence, must be considered. There is no point in permitting cross-examination if there is no reasonable likelihood that it will impact on the question of the admissibility of the evidence. [47] [Our underlining]

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[42] *R. v. Anderson*, 2013 SKCA 92 at para. 75, cited with approval in *R. v. Cater*, 2014 NSCA 74 at para. 131.
[43] *R. v. Ahmed*, 2012 ONSC 4893, [2012] O.J. No. 6643 at para. 32.
[44] *R. v. Pires; R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343 at para. 30; *R. v. Sadikov*, 2014 ONCA 72 at para. 84.
[45] *R. v. Pires* at paras. 24 and 30.
[46] *R. v. Garofoli*, [1990] 2 R.C.S. 1421 at p. 1445.
[47] *R. v. Pires, supra* at para. 31.

40. The principle is simple: the accused must show that what they are asking for has, in the words of this Court, a *reasonable likelihood* of impacting the outcome of the challenge to the reasonable grounds, or other preconditions, for the authorization.[48]

b. Test for third party production: reasonable likelihood of assistance

41. The same standard must apply equally to applications made by the defence for third party materials that were neither before the judge who granted the judicial authorization, nor in the hands of the police officers who applied for that authorization.[49] Simply put, the principles of *Garofoli* review define the scope of relevant disclosure sought for a *Garofoli* application. This has been the law since the British Columbia Court of Appeal's decision in *Barzal*.[50]

42. Consistent with the approach to cross-examination of wiretap affiants affirmed in *Pires*, the test governing production of third party records should be framed as follows: the accused must establish some *factual basis* for believing that there is a *reasonable likelihood* that the production sought will be of assistance *on the application*. This test finds overwhelming support in the recent jurisprudence addressing this issue.[51]

43. The Lesage and Code *Report of the Review of Large and Complex Criminal Case Procedures* also supports applying a stronger threshold relevance test to third party disclosure sought for pre-trial motion purposes.[52] The Report found that one of the problematic areas of complex cases were requests for materials outside the investigative file, which "test" the outer margins of even the "low" *Stinchcombe* relevance standard. As illustrated by this case, such requests often raise third party confidentiality issues, and can cause lengthy delays. Consequently,

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[48] *R. v. Pires*, *supra* at para. 69.
[49] *R. v. Croft*, 2013 ABQB 705 at paras. 21-35; see also *R. v. Ahmed*, *supra* at paras. 28-34; *R. v. Ali*, 2013 ONSC 2629 at para. 8; *R. v. Alizadeh*, 2013 ONSC 5417 at para. 36.
[50] *R. v. Barzal*, [1993] B.C.J. No. 1812, 84 C.C.C. (3d) 289 (C.A.) at paras. 42-44.
[51] *R. v. Ahmed*, *supra* at para. 31; *R. v. Hazelwood*, [2000] O.J. No. 459 (S.C.J.) at paras. 12-13; *R. v. Terezakis*, 2005 BCSC 850 at paras. 24-32; *R. v. Basi*, 2010 BCSC 26 at paras. 24-36; *R. v. Arviko*, [2013] O.J. No. 6293 (S.C.J.) at paras. 5-6, 17; *R. v. Ali*, *supra* at paras. 4-9; *R. v. Daponte*, 2013 ONSC 4720 at paras. 23-26, 32; *R. v. Grant*, 2013 ONSC 7323 at paras. 10-16; *R. v. Jaser*, 2014 ONSC 6052 at paras. 20-23; *R. v. Way*, 2014 NSSC 180; *R. v. Blake*, 2015 ONSC 6008 at paras. 14-27**;** *R. v. Sangollo*, [2014] O.J. No. 4133 at paras. 14-22; *R. v. Burgher*, 2014 ONSC 3239 at paras. 71-73, 86-87.
[52] The Honourable Justice Patrick Lesage and Professor Michael Code, *Report of the Review of Large and Complex Criminal Procedures* (Toronto: Ontario Ministry of the Attorney General, December 2008) at pp. 45-57.

a more robust conception of relevance must be applied for applications involving reviews of judicial authorizations.

44. That narrower scope of 'likely relevance' for disclosure in aid of an attack on a judicial authorization is defined by the following core principles:

a. Judicial authorizations are presumptively valid until the accused proves otherwise;[53]

b. The critical question in assessing the sufficiency of a warrant application is whether there was reliable evidence that might reasonably be believed on the basis of which the warrant *could* – not *would* – have issued;[54]

c. As explained by MacDonnell J. in *Ahmed*: "A *Garofoli* review is not intended to be a trial of every piece of information that the affiant gathered for the purposes of a wiretap application. […] In the absence of a reason for believing that discrepancies might be unearthed by looking at the notes, or for suspecting that the authors of the reports misstated the facts contained in the reports, there is no basis to order that the notes be produced."[55] [Our underlining]

d. Evidence "[…] that can do no more than show that some of the information relied upon by the affiant is false is not likely to be useful unless it can also support the inference that the affiant knew or ought to have known that it was false. We must not lose sight of the fact that the wiretap authorization is an investigatory tool. At that stage, a reasonable belief in the existence of the requisite statutory grounds will suffice for the granting of an authorization. Upon further investigation, the grounds relied upon in support of the authorization may prove to be false. That fact does not retroactively invalidate what was an otherwise valid authorization."[56] [Our underlining]

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[53] *R. v. Campbell*, 2010 ONCA 588 at para. 45, aff'd 2011 SCC 32, [2011] 2 S.C.R. 549.
[54] *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 at para. 40.
[55] *R. v. Ahmed, supra* at para. 48.
[56] *R. v. Pires, supra* at para. 41.

e. Inaccuracies or material non-disclosures in the affidavit, on their own, are not a sufficient basis on which to ground a finding of bad faith or an intent to mislead, much less to provide a basis on which to set aside a judicial authorization.[57]

45. In other words, the allegation that information 'relates to' the substance of the judicial authorization in some way is *insufficient* to warrant production. The accused must offer some modest showing that the third-party materials could truly matter in a way that could meaningfully undercut the authorization. This showing must be backed by specific facts, and not vague generalities or suspicions. "General assertions" that the material might help are simply insufficient.[58] Adopting the unanimous Ontario jurisprudence on this point, the Alberta Court of Queen's Bench recently summarized the standard in these terms:

> […] the need to keep the inquiry focused and on track is as great in the context of disclosure as it is in the context of cross-examination. A requirement that the accused show a basis for concluding that disclosure of materials beyond what the affiant consulted and what was put before the authorizing judge would advance the inquiry is appropriate. [59]

46. The crucial point is that, on a *Garofoli* application, the affidavit is judged based on what the affiant "knew or ought to have known", not whether the information is true.[60] 'Fact-checking' the affidavit against outside information that was not in the possession of the affiant or the police force does not bring the accused any closer to invalidating the authorization.[61] That is especially true here where, as detailed below, the entity that provided the underlying information to the affiant was asked to double-check the draft affidavit for accuracy, before it was submitted to the authorizing judge.

47. Applying these principles, the production order should not have been issued.

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[57] *R. v. Araujo*, 2000 SCC 65, [2000] 2 SCR 992 at para. 54; *R. v. Pires*, *supra* at para. 30.
[58] *R. v. Blake*, *supra* at para. 20.
[59] *R. v. Croft*, *supra* at para. 31.
[60] *R. v. Pires*, *supra* at paras. 41-42.
[61] *R. v. Ahmed*, *supra* at para. 45; see also *R. v. Blake*, *supra* at paras. 26-27; *R. v. Jaser*, *supra* at para. 21.

3. Application of the test to this case

48. The judge below applied the bare "likely relevance" threshold in its broadest form without the proper contextual modification discussed above.[62] If the correct, contextually sensitive test had been applied, the application would have been dismissed.

49. Before applying the proper analytical framework, however, two factual shortcomings of the reasons must be addressed.

a. Two significant factual errors regarding the 'notes' sought

50. First, the trial judge's reasons fail to mention or consider that Sgt. Driscoll sent his draft affidavit to the World Bank to check the accuracy of his recounting of the tipster information before submitting it to the issuing judge.[63] Driscoll testified before the judge below as follows:[64]

> For the first wiretap I also created a draft that I provided to Mr. Paul Haynes of the World Bank, again for essentially the same purpose, to ensure I had things accurately but additionally too because Mr. Haynes had intimate knowledge of four tipsters that I had relied upon in the affidavit. I also wanted Mr. Haynes to ensure that I had not inadvertently identified one of those tipsters. [Our underlining]

51. This fact renders the entire 'lack of notes' argument nugatory. It is difficult to fathom how Haynes' personal notes (if any exist) can possibly assist in undermining Driscoll's reasonable belief in the accuracy of the tipster information, when Driscoll had Haynes verify his draft affidavit.

52. Moreover, this fact makes this case the exact analogue of *R. v. Ahmed*, where the affiant sent detailed questionnaires to the original source-handlers in order to confirm the accuracy of the information he planned to rely upon from the sources. In that case, the Court rejected a demand for underlying materials solely in the possession of those source-handlers that had never been conveyed to the affiant.[65] The same result should follow in this case. In *Ahmed*, MacDonnell J. disposed of the argument succinctly:[66]

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[62] Reasons of Nordheimer J., AR, Vol. 1, tab 2, p. 21 at paras. 56-57, 59.
[63] Affidavit of Sgt. Jamie Driscoll, Respondents Joint Record, Vol. XIII, Tab H6, p. 2377 at para. 15.
[64] Evidence of Sgt. Jamie Driscoll, Respondents Joint Record, Vol. XVII, Tab 4.3 at p. 92, lines 16-24.
[65] *R. v. Ahmed*, *supra* at paras, 3, 8-9, 44-45, 47.
[66] *R. v. Ahmed*, *supra* at para. 47.

> In order to succeed, the applicants must at some point take the position that it was not reasonable for the affiant to rely on reports from other officers, that she had to conduct an investigation into the accuracy of those reports, and that she had to trace them back to the notes or other materials on which they were based. That position is not consistent with s. 185(1) of the *Criminal Code*, which provides that a wiretap affidavit "may be sworn on information and belief". In any event, in the absence of circumstances signaling a need for further inquiry - something suggesting that the reports might not be an accurate, fair or complete account of the underlying events - the affiant was not required to do that.

53. Second, Sgt. Driscoll testified that, where material information came from Haynes in telephone conversations, he directly entered these into his draft affidavit, and *specifically noted* in the affidavit where information had been conveyed orally to him.[67] While he could not exclude the possibility that some minor details had missed being recorded, there is simply no air of reality to the suggestion of any material omissions. As recently stated by this Court, a possibility does not amount to evidence.[68]

54. The notion that the accused have been denied any meaningful source of evidence is baseless.

b. Application of the correct test

55. The following facts should have determined the production issue against the accused:

a. The accused have full *Stinchcombe* disclosure of every document possessed by the police and Crown, subject to editing for informer privilege;

b. The accused had already received *every document* sent by the World Bank to the RCMP – this record is voluminous and comprehensive;

c. The accused have all of the emails between the World Bank and the RCMP voluntarily provided by the World Bank after an RCMP's loss due to a computer problem;

d. The accused have copies of everything that was placed before the authorizing judge;

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[67] Will say of Sgt. Jamie Driscoll, Respondents' Joint Record, Vol. XIII, Tab H4, p. 2370, para. 11; Evidence of Sgt. Jamie Driscoll, Respondents' Joint Record, Vol. XVII, Tab 5, p. 98, lines 15-22.
[68] *R. v. Simpson*, 2015 SCC 40 at paras. 36-37.

e. Exceptionally, the accused even have a pre-authorization draft of an affidavit;[69]

f. The World Bank checked the draft for accuracy of the information they provided;

g. The World Bank was found by the trial judge to be acting properly and in good faith;

h. The World Bank is a respected international organization;

i. The disclosure is sought to conduct a *sub-facial* attack on a wiretap authorization; and

j. The accused have identified no insufficiency on the face of the authorizations.

56. Simply put, the accused are not entitled to this material ordered produce because: (i) there is no factual reason to believe any materials exist that would assist them beyond the information already disclosed; and (ii) the question on review is not whether it was true, but whether Sgt. Driscoll had reasonable grounds to believe that the preconditions to issuance of the authorizations had been met.[70]

57. Even assuming anything touching on the tipsters' reliability remains undisclosed, double-checking the World Bank's transmission of the tipster information forms no part of the *Garofoli* analysis. This is particularly so, since the accused have offered no basis to suggest that Sgt. Driscoll ought to have had doubts about the accuracy of information relayed by the World Bank.

58. Indeed, the World Bank is a reputable international organization, committed to ensuring the integrity of its projects. Given the high level of cooperation and transparency demonstrated by the World Bank in this case, the only available inference was that their communication of information, and verification of that information in the affidavit was accurate, complete, and done in good faith. Far from supporting the accused's case for disclosure, the circumstances of this case point overwhelmingly towards there being no helpful material hidden in the Bank's archives. The trial judge completely ignored this contextual factor.

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[69] First Pre-Trial Motions Ruling at para. 67.
[70] *R. v. Pires*, *supra* at para. 41.

59. The comprehensiveness of *Stinchcombe* disclosure already given, coupled with the good faith of the World Bank and its fact-checking of the information provided, leave no reasonable likelihood that anything exists in the World Bank's archives that would undermine the grounds for issuance of the authorizations. This third party production application stands to do nothing but complicate and lengthen the proceedings without adding any meaningful substance.

60. Finally, even assuming that the accused could mine-out a handful of minor discrepancies from the material they seek, this will have no impact on validity of the wiretap authorizations. This Court could not have been clearer that the *Garofoli* review of authorizations is not a matter of nibbling at the margins: where there is "reliable evidence that might reasonably be believed on the basis of which the authorization could have issued", the test is met and the authorization stands.[71]

B. INAPPLICABILITY OF THE BENEFIT/BURDEN EXCEPTION TO WORLD BANK'S IMMUNITIES

61. One error links the domestic law analysis with the international immunities issue, and that is the trial judge's misapplication of the 'benefit/burden exception to Crown immunity' to the World Bank's cooperation with Canadian law enforcement. This error manifests in this passage:

> [T]his is not the usual situation of a third party records application where the Crown or an accused person is attempting to involve the World Bank Group in a matter to which the World Bank Group has otherwise been a mere bystander. I must conclude that the World Bank Group sees a benefit to their organizational goals and objectives from pursuing such matters in the courts of a host country.
>
> Consequently, if the analysis from *Sparling* is applied to this situation, the conclusion would follow that, if the World Bank Group wishes to take the benefits of causing a criminal prosecution to be instituted in a host country, it must accept the burdens of so doing.[72] [Our underlining]

62. This approach – essentially treating the World Bank as a party to the prosecution – appears to be what led the trial judge to apply a less rigorous relevance standard, more akin to that appropriate for first-party *Stinchcombe* disclosure, as well as the improper abrogation of the

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[71] *R. v. Araujo*, *supra* at para. 54; see also *R. v. Pires*, *supra* at para. 40; *R. v. Morelli*, *supra* at para. 40.
[72] Reasons of Nordheimer J., AR, Vol. 1, tab 2, p. 15-16 at paras. 35-36.

Bank's international immunities. On closer examination, the benefit/burden exception has no application to the circumstances of this case.

1. Definition and scope of benefit/burden exception

63. The burden/benefit exception is not a legal principle of general application. Rather, it is a common law concept tied to the presumptive immunity of the Crown from statute. The general rule is that the Crown is not bound by statute except by express words or necessary implication.[73] An exception to this immunity exists where the Crown chooses to accept a statutory benefit that has a sufficient nexus with an attendant burden.[74] In other words, the Crown will find itself subject to legislation where it seeks to exercise a right (i.e., gain a benefit) available under that legislation.[75] The doctrine thus relates to the Crown exercising rights that do not exist at large but rather come as part of a package of rights and obligations *under statute*.

64. For example, in *Sparling v. Québec*, this Court held that the Caisse de dépôt was bound by insider-trading rules after purchasing a significant ownership stake in a publicly traded company. The relevant shares were issued under the same statute containing the insider-trading rules. The case stands for the common sense proposition that, where a Crown agency buys securities in a regulated market created by statute, it must abide by the regulatory scheme governing that market.[76] The trial judge's reasons in this case offer no rationale for importing this narrow exception to Crown immunity into the context of the present case.

2. Rationale for inapplicability of burden/benefit exception

65. The burden/benefit exception has no application here for four reasons: (a) the factual premises underlying the application of the doctrine to the World Bank are incorrect; (b) general enforcement of the criminal law is not a 'benefit' in the relevant sense; (c) this novel invocation of the doctrine has potentially severe negative implications for Canada's international

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[73] *Interpretation Act*, s. 17.
[74] *Sparling v. Québec (Caisse de dépôt & de placement)*, [1988] 2 S.C.R. 1015 at pp. 1021-1024; *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225 at pp. 284-291.
[75] *Alberta Government Telephones*, *supra* at p. 285.
[76] *Sparling*, *supra* at p. 1023-1024.

partnerships; and (d) the benefit-burden has no application to the interpretation of international treaties.

a. No factual basis for putting the World Bank in the shoes of the Crown

66. The trial judge appears to have justified the use of the burden/benefit exception, at least implicitly, by equating the World Bank with the police and the Crown. The reasons speak repeatedly of the World Bank "pursuing", "causing" and having "instigated" the criminal prosecution.[77] Strangely, the reasons even state that the World Bank could "withdraw from a prosecution".[78] These statements are factually unsupported. There is no evidence that the World Bank pressured or inveigled the RCMP to lay charges in this case, or directed the conduct of the Crown in any way. Indeed, nothing of the sort was even alleged.

67. It was the RCMP's decision to open an investigation and gather evidence.[79] It was the RCMP's decision, jointly with a designated Crown wiretap agent, to seek authorizations to intercept private communications.[80] It was the decision of a Canadian Superior Court judge to grant the wiretap authorizations. It was the RCMP's decision to lay charges. It was the RCMP and Crown's decision to identify and recruit a cooperating witness, and it was the Crown's decision that a reasonable prospect of conviction existed and that the prosecution was in the public interest.

68. The suggestion that the RCMP did not really do its own investigation[81] is wrong and belied by the realities of the case. The hearsay information provided by the World Bank will form no part of the case at trial. Rather, the criminal case is shaped and driven by the Canadian investigation, and has an entirely different content and complexion than the World Bank's internal enforcement measures. The accused will be prosecuted on their own words,[82] and those of their former co-conspirator, who has agreed to testify against them – all evidence gathered in Canada, by Canadian authorities.[83]

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[77] Reasons of Nordheimer J., AR, Vol. 1, Tab 2, p. 21 at paras. 33, 35-36.
[78] *Idem*, at para. 42.
[79] See Notes of Staff Sgt. Martin Bedard, Respondents' Joint Record, Vol. XIV, Tab 4.1 at pp.35*ff*.
[80] *Ibid.*
[81] Reasons of Nordheimer J., AR, Vol. 1, Tab 2, p. 21 at para. 33.
[82] See for instance: *Authorization #3*, Respondents' Joint Record, Vol. VI, Tab B3 at paras.127, 173, 215.
[83] *Gilliam Affidavit* at para. 9.

69. The World Bank reported a crime and cooperated with the ensuing police investigation.[84] This Canadian criminal prosecution was begun, pursued, and continues as an exercise of the RCMP and Federal Crown's authority to enforce the laws of Canada for the public interest. Thus, the burden/benefit exception stands on a flawed factual footing.

b. Enforcement of the criminal law is not a 'benefit' in the relevant sense

70. Reporting a crime and cooperating with the police investigation do not constitute 'taking a benefit' in the sense contemplated by the burden/benefit exception. Simply put, the enforcement of the criminal law by the police and Crown is not a 'benefit'. Rather, it is part of a functioning society governed by the rule of law. Every member of the community expects and is entitled to the investigation and prosecution of criminal acts.

71. While part of the World Bank's mandate is to act as a lookout for corruption, the protection of resources allocated for critical development projects is the concern of all. At a global level, the international community has adopted the *United Nations Convention against Corruption*.[85] In the foreword to the *Convention*, then Secretary-General Kofi Annan described the impact of corruption on the international community in the following words:

> This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.[86]

72. The *Corruption of Foreign Public Officials Act* is part of Canada's effort to combat this phenomenon. During second reading of Bill S-21 which led to the adoption of the *Act*, Senator Céline Hervieux-Payette explained that corruption prejudices international trade and competition as well as global economic development:

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[84] Many investigations into secretive, consensual crimes begin with a tip from an informant or witness with inside information; *see R. v. Kirzner*, [1978] 2 S.C.R. 487 at p. 493.
[85] Can T.S. 2007 No. 7; the Convention entered into force 14 December 2005, Canada ratified it on 2 October 2007 and it came into force in Canada on 1 November 2007.
[86] United Nations Office on Drugs and Crime, *United Nations Convention against Corruption*, New York, 2004, available online at: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

> Corruption is a threat to the rule of law, democracy and human rights. It undermines the principle of good governance, threatens the stability of democratic institutions and undermines the moral foundations of society. Corruption is prejudicial to international trade and free competition, and hampers economic development, particularly in developing countries. Through its OECD partners, Canada is working actively to encourage global systems for ensuring security and the improvement of the human condition and to strengthen trading ties, in order to help nations develop and prosper. We are increasingly aware that the best way to defend our national interests is to defend them within international institutions and tribunals and to put in place rules and institutions that will allow Canadians to obtain the kind of protection they need.[87]

73. The *Corruption of Foreign Public Officials Act* is not enforced for the World Bank's benefit, but to advance the global public interest. Combatting and deterring corruption of the sort found in this case does not benefit the World Bank, but the international community as a whole.

74. The unworkability of the trial judge's reasoning becomes obvious when analogized to more common crimes. For instance, sexual assault victims can scarcely be described as gaining a 'benefit' from reporting the crime and testifying against the perpetrator. Similarly, residents of a neighbourhood are not availing themselves of a statutory benefit when their information to police leads to the capture and prosecution of a drug dealer operating on their streets. Reporting crimes, and assisting the police, in the hopes that justice will be done, neither confers a benefit, nor makes anyone a party to any resulting prosecution.[88] The use of the burden/benefit exception vis-à-vis enforcement of the criminal law is entirely inapt.

75. Conversely, the requirements of criminal procedure are not a 'burden' in the relevant sense either. Third parties are not expected to cooperate with *O'Connor* orders because they have 'taken the benefit' of the criminal law being enforced in their community. They are bound because the administration of justice is a core element of society. Unlike the cases to which the burden/benefit

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[87] Debates of the Senate, 1st Session, 36th Parliament, Volume 137, Issue 100, Thursday, December 3, 1998, Second Reading Debate on Bill S-21 *An Act Respecting the Corruption of Foreign Public Officials and the Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to Make Related Amendments to Other Acts*. In addition to implementing Canada's obligations under the *Organization for Economic Co-operation and Development* (OECD) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, the *Corruption of Foreign Public Officials Act* also forms the basis of Canada's implementation of the *United Nations Convention against Corruption* as it relates to foreign bribery.
[88] *Khadr v. Canada (Attorney General),* 2008 FC 549.

exception has been applied by this Court, there is no *quid pro quo* and no *choice* involved in the operation of the criminal justice system.

76. Put another way, there is no "close and direct" *nexus* between one's right to have the criminal law enforced properly, and the obligation to participate in the court process if compelled by the courts.[89] Both are independent and freestanding rights and obligations.

c. Potentially negative implications for Canada's international partnerships

77. The erroneous importation of the burden/benefit exception into the general operation of criminal justice has widespread and profound implications beyond this case. Applying this faulty analysis, one might, for instance, seek a similar open-door disclosure order against a foreign intelligence agency that advised Canada of an impending attack on Canadian soil. It is difficult to see how such agencies would 'take the benefit' of a domestic prosecution flowing from their tip any less than the World Bank did in this case.

78. Such an outcome would threaten Canada's security by damaging our relationship with international partners. If organizations such as Interpol and foreign intelligence services are viewed as 'taking the benefit' of domestic Canadian criminal proceedings resulting from their tips, and subjected to *Stinchcombe*-level disclosure, they may simply stop cooperating with Canada. As Canada is by far a net-importer of criminal and security intelligence, this would be a most unfortunate development.[90]

79. For this reason, and mindful of the practical territorial limits on their jurisdiction, Canadian courts have been cautious to extend disclosure orders against truly foreign entities.[91] Indeed, by way of example, in the extradition context this Court has clearly ruled that the person being extradited is *not* ordinarily entitled to disclosure of the requesting state's prosecution brief,

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[89] *College d'arts appliqués et de technologie Cite collégiale v. Ottawa (City)*, 1998 CarswellOnt 687, [1998] O.J. No. 512 (C.A.) at para. 20.
[90] *Khadr v. Canada (Attorney General)*, 2008 FC 549 at para. 92.
[91] *USA v. Khadr*, 2007 CarswellOnt 8734 [2007] O.J. No. 3140 (S.C.J.) at paras. 42, 51; *Germany v. Schreiber*, [2000] O.J. No. 2618 (S.C.J.) per Watt J. at para. 86-89; *R. v. A.L.T. Navigation Ltd.*, [2002] N.J. No. 166 (S.C.T.D.) at paras. 29, 42, 56-57.

irrespective of how helpful it may be on the extradition hearing.[92] This is the law notwithstanding that the requesting state is *expressly a party to the proceeding*.[93]

80. For these reasons, this Court should clearly state that information sharing and cooperation with law enforcement, by individuals and organizations who have information about crimes committed by Canadians, does *not* make them parties to proceedings which come about as a result of their information under the burden/benefit exception.

d. Non-application of the burden/benefit exception to international treaties

81. The benefit/burden exception, as explained above, applies in a very specific context, namely when trying to determine whether a specific law states a rule that displaces the Crown's presumptive immunity from statute. The World Bank is not the Crown. Its immunities have a different genesis, flowing from a Canadian enactment implementing an international agreement, both of which engage principles of interpretation unrelated to Crown immunity. Therefore, the question of whether the World Bank waived its immunities in this case depends on the principles of interpretation governing the immunities of an international organization drawn from international law, not from Crown immunity law.

C. WORLD BANK'S IMMUNITIES

82. Beyond, and in addition to, the incorrect application of domestic disclosure principles, the production order made by the judge below is also barred by the immunities enjoyed by the World Bank and its staff, as provided for under Article VII of the *Articles of Agreement* that created it.

83. In that regard, the Crown adopts the position found in the World Bank's factum, but wishes to add certain precisions to the Bank's arguments on three points: (1) the interpretation of section 5 of Article VII of the World Bank's *Articles of Agreement*, which confers immunity upon the Bank's archives; (2) the alleged waiver made by the Bank of its immunities; and, (3) the non-appearance by the Bank before Nordheimer J.

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[92] *USA v. Dynar*, [1997] 2 S.C.R. 462 at para. 127-131; *USA v. Kwok*, 2001 SCC 18, [2001] 1 R.C.S. 532 at para. 45.
[93] *USA v. Cobb*, 2001 SCC 19, [2001] 1 R.C.S. 587 at para. 35.

84. Before addressing these points, it should be noted that the World Bank's immunities were implemented into Canadian law on 27 January 1945 by virtue of Order in Council P.C. 7421[94] taken under the authority of s. 2(2) of the then *Bretton Woods Agreements Act, 1945*,[95] and not directly pursuant to the *Act* itself or its current version.

1. Interpretation of inviolability of archives (Section 5 of Article VII)

85. The judge below came to the conclusion that the principle of inviolability of archives entrenched in Section 5 of Article VII does not preclude compelled production by the World Bank in the instant case. The Crown disagrees. Properly interpreted, Section 5 does prohibit compelled production, short of waiver.

a. Principles of interpretation in international law: the *Vienna Convention*

86. This Court has stated that the interpretation of a provision of an international treaty incorporated into Canadian law is governed by Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"),[96] the fundamental principle of which is very similar to the Canadian modern rule of interpretation.[97] That principle is set out in Article 31(1):

Article 31. *General rule of interpretation*	Article 31. *Règle générale d'interprétation*
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.	1. Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but.

87. We shall therefore examine the meaning of the terms of Section 5, then place them in their proper context underscored by the object and purpose of the grant of immunities to this international organization.

b. Meaning of the terms of Section 5

88. Section 5 provides that:

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[94] Now entitled the *International Monetary Fund and International Bank for Reconstruction and Development Order*, P.C. 1945-7421, SI/45-7421.
[95] *Bretton Woods Agreements Act, 1945*, S.C. 1945, c. 11; now the *Bretton Woods and Related Agreements Act*, R.S.C. 1985, c. B-7, s. 3.
[96] *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37.
[97] *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431 at paras. 11-12; see also *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 at para. 35.

Section 5. *Immunity of archives* The archives of the Bank shall be inviolable.	Section 5. *Inviolabilité des archives* Les archives de la Banque seront inviolables.

89. First, Section 5 uses the expression "shall" which is to be construed as imperative. The French version is to the same effect as it is conjugated in the indicative future tense which expresses an obligation.[98]

90. Second, the provision is devoid of any qualifying language susceptible of limiting the scope of the immunity afforded to the World Bank's archives.

91. Third, the two key words of that Section are "archives" and "inviolable". Properly interpreted, the term "archive" is not restricted to historical documents as suggested by Nordheimer J.,[99] but comprises all internal documents produced by the World Bank. Similarly, the term "inviolable" is not confined to protecting documentation only to the extent of "being attached or confiscated" as concluded by the court below.[100] It encompasses protection against any kind of access by third parties, including inspection pursuant to a judicial order, as is the case here. This immunity, however, is obviously subject to waiver, which will be addressed later.

92. A proper interpretation of the provision requires a determination of the meaning of the words "archives" and "inviolable". In the absence of a specific definition in the *Articles of Agreement*, which is the case here, ordinary and specialized dictionaries are a useful tool in interpreting a word or expression.[101]

i. Definition of "archives"

93. The most relevant definition for our purposes is found in the *Dictionnaire de droit international public* which offers a definition of "archives" that is specific to international organizations. According to that definition, "international organizations' archives" are basically

[98] *Interpretation Act*, s. 11; see also *Febles*, *supra* at para. 18, where the Chief Justice interprets the word "shall" used in the *Convention Relating to the Status of Refugees* as mandatory.
[99] Reasons of Nordheimer J., AR, Vol. 1, Tab 2, p. 21 at para. 54.
[100] Reasons of Nordheimer J., AR, Vol. 1, Tab 2, p. 21 at para. 55.
[101] See the jurisprudential analysis in P.A. Côté, *the Interpretation of Legislation in Canada,* Fourth Edition (Toronto: Carswell, 2011), p. 278 *et seq*.

the records kept by that organization for the conduct of its functions; it does not restrict it, or even refer, to historical documents. It reads:

> **Archives d'une organisation internationale** – Pièces et documents se rattachant au fonctionnement d'une organisation internationale et dont le statut est déterminé par les textes conventionnels applicables à celle-ci. [102]

94. The general English and French dictionaries diverge. While some clearly support this broad definition, others appear to restrict "archives" to historical documents.

95. The definition of the *Oxford English Dictionary* quoted by Nordheimer J. incorporate an historical notion to "archives" which would support his restrictive interpretation. It reads: "a collection of historical documents or records providing information about a place, institution or group of people".[103] [Our underlining] The current online *Oxford English Dictionary* offers a differently worded definition but which is to the same effect: "**1.** A place in which public records or other important historic documents are kept. Now only in *pl.* **2.** A historical record or document so preserved. Now chiefly in *pl.* […]" [Our underlining] To the extent that the adjective "historical" qualifies both "documents" and "records", it can be concluded that the term "archives" applies to historical documents.

96. Other English dictionaries, however, propose definitions that are devoid of any restrictive historical notion:

- Interestingly, the *Canadian Oxford* Dictionary's definition that does not refer to any historical notion: "**1.** a collection of public, corporate or institutional documents or records. **2.** the place where these are stored […]".
- The online *Merriam-Webster English Dictionary* offers a definition that clearly encompasses two different categories: "1: a place in which public records or historical documents are preserved; *also***:** the material preserved —often used in plural; 2**:** a repository or collection especially of information […]". [Our underlining]
- The *Collins English Dictionary* provides an even more generic definition that does not refer to historical notions: "1. a collection of records of or about an institution, family, etc.

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[102] Jean Salmon, *Dictionnaire de droit international public* (Bruxelles : Bruylant, 2001) at p. 80.
[103] Reasons of Nordheimer J., AR, Vol. 1, Tab 2, p. 21 at para. 54.

2. a place where such records are kept […] **HISTORY:** from Late Latin *archivum*, from Greek *arkheion* repository of official records, from *arkhè* government".

97. While the general French dictionaries from France – le *Nouveau Petit Robert* et le *Petit Larousse* – emphasize the historical nature of the documentation, the Québec general dictionary of French – le *Multidictionnaire de la langue française* – proposes two definitions, a first one that is generic, and a second one that focuses on the historical aspect of the documentation:

- The *Nouveau Petit Robert* defines "archives" as follows: « **1.** Ensemble de documents anciens, rassemblés et classés à des fins historiques. […] »
- The *Petit Larousse* proposes a similar definition: « **1.** Ensemble des documents relatifs à l'histoire d'une ville, d'une famille, etc., propres à une entreprise, à une administration, etc. […] »
- The *Multidictionnaire de la langue française*, 5ème édition, however, suggests two distinct meanings: « **1.** Ensemble des documents, quelle que soit leur date ou leur nature, produits ou reçus par une personne ou un organisme pour ses besoins ou l'exercice de ses activités et conservés pour leur valeur d'information générale. *Loi sur les archives*. **2.** Ensemble de titres, de documents anciens. *Les Archives du ministère de la Culture*. […] »

98. This brief overview demonstrates that some of the ordinary English and French dictionaries do not restrict the meaning of "archives" to historical documentation, but extend it to contemporary records kept by an organization. The same is true for legal dictionaries:

- *Black's Law Dictionary*, Tenth Edition, proposes the following: "**1.** A place where public, historical, or institutional records are systematically preserved. **2.** Collected and public, historical, or institutional papers and records. **3.** Any systematic compilation of materials, esp. writings, in physical or electronic form".
- The French legal dictionary *Vocabulaire juridique* also adopts a generic definition devoid of any historical element: « **1.** (sens générique) Ensemble de documents quels que soient leur date, leur forme et leur support matériel, produits ou reçus par toute personne

physique ou morale et par tout service ou organisme public ou privé dans l'exercice de leur activité. […] **2.** Services chargés de la conservations des archives ».[104]

99. In the absence of a specific definition in a particular treaty, it is appropriate to consider definitions of the same word or expression found in other treaties.[105] The *Vienna Convention on Consular Relations* contains a definition of "consular archives" that does not restrict its scope to historical documents, but that encompasses contemporaneous records: [106]

1(*k*) "consular archives**"** includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safe keeping.	1(*k*) L'expression «archives consulaires» comprend tous les papiers, documents, correspondance, livres, films, rubans magnétiques et registres du poste consulaire, ainsi que le matériel du chiffre, les fichiers et les meubles destinés à les protéger et à les conserver.

ii. Definition of "inviolable"

100. The meaning of "inviolable" is straightforward. All dictionaries, whether English or French, ordinary or specialized, define it as something that cannot be broken or transgressed:

- Online *Oxford English Dictionary*: " **1.** Not to be violated; not liable or allowed to suffer violence; to be kept sacredly free from profanation, infraction, or assault: **a.** Of laws, treaties, institutions, customs, principles, sacred or cherished feelings, etc. **b.** Of persons, places, and things material […]"
- *Canadian Oxford Dictionary* of 2004: "not to be violated, dishonoured, or profaned *(inviolable rights)*".
- Online *Merriam-Webster English Dictionary*: "1: secure from violation or profanation <an inviolable law> […]".
- *Collins English Dictionary*: "that must not or cannot be transgressed, dishonoured or broken; to be kept sacred: *an inviolable oath*".

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[104] Gérard Cornu, *Vocabulaire juridique* (Paris: PUF, 1998) at p. 65.
[105] The *Interpretation Act* at s. 15(2)(*b*) provides that when an enactment contains an interpretation provision, it applies to all other enactments relating to the same subject-matter unless a contrary intention appears.
[106] Article 1(k) of the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, incorporated into Canadian law as Schedule II of the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41, by virtue of s. 3(1) of that *Act*.

- *Nouveau Petit Robert*: « **1.** Qu'il n'est pas permis de violer, ou d'enfreindre. […] »
- *Petit Larousse*: « **1.** Qu'on ne doit jamais violer, enfreindre. *Serment, droit inviolable*. **2.** Qui est comme sacré, à qui on ne peut porter atteinte. […] »
- Le *Multidictionnaire de la langue française*, 5ème édition: « Qui ne doit pas être violé. *Un secret inviolable*. »
- *Black's Law Dictionary*, Tenth Edition: "Safe from violation; incapable of being violated".
- *Dictionary of International and Comparative Law*: "complete protection from investigation or interference of any kind, the protection afforded diplomats and their communications".[107]
- *Dictionnaire du droit québécois et canadien* : « Qu'il est impossible ou interdit de violer, d'enfreindre ».[108]

101. This review shows that no limitation to the scope of the World Bank's archival immunity can be inferred from the term "inviolable"; that word connotes an absolute prohibition to compelled access to the Bank's records, short of waiver. These definitions also support the World Bank's submission that "inviolable" was specifically chosen "to express the broadest shield, one that cannot be pierced".[109]

iii. Amaratunga: a precedent supportive of a broad interpretation

102. This Court's judgment in *Amaratunga* supports a broad interpretation of Section 5. In that case, the Court interpreted the scope of the immunity afforded to the North Atlantic Fisheries Organization (NAFO) by applying the functional test set out in the *NAFO Treaty*. The headquarters of NAFO, unlike the World Bank, is located in Canada. At issue, was an employment dispute that occurred in Nova Scotia. Subsection 3(1) of the *NAFO Immunity Order* states that it "shall have in Canada the legal capacities of a body corporate and shall, to such extent as may be required for the performance of its functions, have the privileges and immunities set forth in Articles II and III

[107] James R. Fox, *Dictionary of International and Comparative Law* (New York: Oceana Publications) at p. 173.
[108] Hubert Reid, *Dictionnaire du droit Québécois et Canadien* (version en ligne disponible sur le Centre d'accès à l'information juridique (CAIJ)).
[109] Appellant's factum at para. 90.

of the *Convention for the United Nations*."[110] The Court interpreted the qualifying phrase "to such extent as may be required for the performance of its functions" in accordance with two factors.

103. First, the qualifying phrase interpreted in context could not be read narrowly, as this would preclude the application to NAFO officials of arguably common immunities enjoyed by employees of international organizations.[111]

104. Second, the limiting factor in interpreting the qualifying phrase should be NAFO's functions. This Court observed that the *NAFO Immunity Order* could not have granted NAFO the absolute immunity conferred on the United Nations in the *Convention on the Privileges and Immunities of the United Nations* because the words of the order were consistently and explicitly limited to the extent required for NAFO to perform its "functions."[112] The scope of NAFO's immunity had to be limited to acts necessary to conduct its business, including Mr. Amaratunga's legal action for breach of contract.[113]

105. Returning to Section 5, its unqualified language contrasts with that of the *NAFO Immunity Order* limited by the phrase "to such extent as may be required for the performance of its functions." Despite this limitation, this Court in *Amaratunga* emphasized the importance of immunities and privileges for international organizations. That importance can only be enhanced and the immunities applied with greater force in the case of a provision, such as Section 5, that is couched in absolute terms and that contains no such qualifying language.[114]

106. This does not bring the analysis to an end because, as mandated by the *Vienna Convention*, Section 5 must be interpreted in its context and in light of its purpose.

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[110] *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866 at para. 34.
[111] *Amaratunga*, *supra* at paras. 40-41.
[112] *Idem* at paras. 47-49.
[113] *Idem* at para. 2.
[114] *Idem* at paras. 24, 29, 45.

c. Context of Section 5

i. Immediate context

107. The immediate, and most relevant, context of Section 5 is the whole of Article VII.[115] That article provides for the Bank's legal status as well as all of its various immunities and privileges.

108. Section 2 of Article VII says that the Bank possesses full juridical personality, including the capacity to institute legal proceedings. Section 3, however, specifies a number of conditions required to validly bring an action against the Bank and provides to it an immunity against pre-judgement civil seizures.

109. Section 4 protects the Bank's property and assets by making them "immune from search, requisition, confiscation, expropriation or any form of seizure by executive or legislative action." The protection granted by this provision could hardly be expressed in broader terms. It would be paradoxical to conclude that the Bank's archives benefit from a lesser protection than that conferred upon its property and assets, when one considers that both are essential for the Bank to efficiently discharge its functions.

110. Section 6 further renders the Bank's property and assets free from restrictions, control or regulations "of any nature", to the extent necessary to carry out the Bank's operations and subject to the provisions of the Agreement. The immunity contained in this section is limited to what is necessary for the Bank's operations, similar to the qualifying phrase analysed in *Amaratunga* and discussed above. Section 6 can be contrasted with Section 5 which contains no such restriction. Section 6 also illustrates the fact that the original member states that concluded the Agreement expressly provided limits to immunities when they considered them to be appropriate.

111. The judge below noted that Section 5 falls between Section 4 (which deals with the immunity of assets from seizure) and Section 6 (which provides for the freedom of assets from restrictions). According to him, the positioning of Section 5 suggests that it is intended to deal with the protection of documents from being attached or confiscated only, and not from being produced for inspection.[116] With deference, the judge reads too much into the relative positioning

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[115] See *Febles*, *supra* at para. 18, where the Chief Justice, for the majority, resorts to the immediate context to interpret Article 1F(*b*) of the *Convention relating to the Status of Refugees*.
[116] Reasons of Nordheimer J., AR, Vol. 1, Tab 2, p. 21 at para. 55.

of Section 5 between two other provisions that deal with property and assets, as opposed to archives. If any inference can be drawn from the relative positioning of Section 5, it is that it follows Section 4 which is drafted in limpid and absolute terms concerning property and assets, as Section 5 is for archives.

112. Finally, Section 10 imposes on all member states that they implement the immunities and privileges into their domestic law and that they inform the Bank of the "detailed actions" taken in that regard. These obligations, particularly the requirement to account for the implementation steps adopted, demonstrate the importance given by member states to the Bank's immunities.

ii. Comparison with other international organizations

113. The doctrine of archival immunity is not exclusive to the World Bank. Other international organizations benefit from the same immunity. The interpretation adopted of the Bank's immunities in the context of this appeal may spill on other international organizations, hence the usefulness of examining the provisions conferring archival immunity to other international organizations.

114. The agreements that govern the other four agencies that constitute the World Bank Group all contain inviolability of archives provisions which mirror that of Section 5. [117] The same is true for the Inter-American Development Bank the relevant provision of which states that: "The archives of the Bank shall be inviolable".[118]

115. Other international banking organizations, however, have provisions which state that the principle of inviolability applies to their archives, but add that it applies to all documents belonging to them. The *Articles of Agreement of the European Bank for Reconstruction and Development* offer such an example: "The archives of the Bank, and in general all documents belonging to it or

[117] *Article of Agreements for the International Monetary Fund* at Article IX, Section 5; *Articles of Agreement of the International Development Association* at Article VIII, Section 5; *Articles of Agreement of the International Finance Corporation* at Article VIII, Section 5; *Convention establishing the Multilateral Investment Guarantee* at Article 46(a); all are annexed to the *Bretton Woods and Related Agreements Act*; see also: *International Development Association International Finance, Corporation and Multilateral Investment Guarantee Agency Privileges and Immunities Order*, SOR\2014-137.

[118] *Agreement Establishing The Inter-American Development Bank* at Article XI, Section 5; available online at: http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=781584.

held by it, shall be inviolable."[119] [Our underlining] The relevant provisions for the African Development Bank,[120] the Asian Development Bank[121] and the Nordic Investment Bank[122] are to the same effect. The treaties conferring privileges and immunities on other international organizations also adopt similar formulations; for example, in the case of the United Nations and its specialized agencies,[123] the International Criminal Court,[124] and the International Atomic Energy Agency,[125] to name a few.

116. This brief comparative review reveals that while some provisions speak only of "archives", others add the expression "and in general all documents". This latter approach has arguably been adopted out of an abundance of caution to ensure that all documents, whether past, present or future be inviolable. In the end, both formulations must have the same meaning. Otherwise, international banking organizations, which all conduct the same business of supporting economic development in various parts of the world, would benefit from more or less immunity depending on the use of the expression "all documents" in their archival immunity provisions. This distinction, just like the restrictive "historical" interpretation of "archives" adopted by the judge below, leads to an absurd result that must be avoided.

iii. World Bank's policy on access to information

117. Article 31(3)(*b*) of the *Vienna Convention* provides that subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation shall be taken into account, together with the context. In that regard, the World Bank has a policy

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[119] *Agreement establishing the European Bank for Reconstruction and Development*, (1990) Can. T.S. 1991 No. 16 at Chapter VIII, Article 48; available online at: http://www.ebrd.com/home.
[120] *Agreement Establishing the African Development Bank* at Article 53, Section 2; available online at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Legal-Documents/Agreement%20Establishing%20the%20ADB%20final%202011.pdf.
[121] *Agreement Establishing the Asian Development Bank* at Article 52; available online at: http://www.adb.org/sites/default/files/institutional-document/32120/charter.pdf.
[122] *Agreement between Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, Norway and Sweden concerning the Nordic Investment Bank* at Article 7; available online at: http://www.nib.int/filebank/2032-Constituent_Documents.pdf.
[123] *Convention on the Privileges and Immunities of the United Nations*, (1946) Can. T.S. 1948 No. 2 at Section 4; *Convention on the Privileges and Immunities of the Specialized Agencies*, (1947) U.N. T. S., vol. 33 at p. 261, Section 6.
[124] *Agreement on the Privileges and Immunities of the International Criminal Court*, (2002) U.N.T.S. vol. 2271 at p. 3, Article 7.
[125] *Agreement on the Privileges and Immunities of the International Atomic Energy Agency*, (1959) Can. T.S. 1966 No. 31 at Section 5.

that governs access to its information.[126] That policy, launched in 2010, is based on the principle that "any information" in the Bank's possession is made publicly accessible, unless that information falls within one of the ten exceptions enumerated in the policy.[127] This policy is relevant here for three reasons.

118. First, it applies to all information in the Bank's possession, regardless of its age.[128] This supports the view that the term "archives" should be understood as all encompassing, and not restricted to historical documentation.

119. Second, it shows that despite the doctrine of archival inviolability, the Bank has adopted a policy based on transparency only limited by considerations necessary to prevent "harm to specific parties or interests".[129] In that regard, the information ordered produced by Nordheimer J. falls within the exceptions identified in the Bank's policy, to wit information that is gathered, received or generated by the Integrity Vice Presidency and related to one of its inquiries or investigations,[130] and which is specifically governed by a distinct and specific disclosure policy.[131]

120. Third, the existence of the World Bank's disclosure policy is not intended and cannot be construed as a complete waiver of the Bank's archival immunity if only because the Bank has expressly excluded certain categories of information.

121. The World Bank's policy specifically provides that its provisions can be waived at the discretion of the Bank.[132] This is obviously what occurred in the instant case when the Bank's Integrity Vice Presidency chose to share information with the RCMP, the Crown and the accused.

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[126] World Bank, *Bank Policy: Access to Information*, 2015; available online: http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/7/393051435850102801/World-Bank-Policy-on-Access-to-Information.pdf.
[127] World Bank, *Bank Policy: Access to Information*, 2015 at Section III.B.1.
[128] World Bank Website: Frequently Asked Questions (FAQs) available online at: http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/6/258591434479489790/AI-FAQs.pdf.
[129] World Bank, *Bank Policy: Access to Information*, 2015 at Section III.B.2.
[130] *Ibid* at Section III.B.2(*f*).
[131] World Bank Integrity Vice Presidency, *Policy on Disclosure of Information 2011*, Exhibit G to the Affidavit of Christopher Kim, Respondents' Joint Record, Volume 10, Tab G34 at pp. 1795*ff*.
[132] World Bank, *Bank Policy: Access to Information*, 2015 at Section V.1.

iv. Improper comparison with International Monetary Fund immunities

122. The judge below justified his conclusion that Section 5 does not shield all documents from production by comparing it to Section 3 of Article IX of the *Articles of Agreement for the International Monetary Fund*.[133] That section, however, provides immunity from judicial process for the Fund's property and assets, not its archives, and thus provides little assistance. If any analogy is to be drawn from the provisions of the agreement governing the Fund, it should be with Section 5 of Article IX of the *Articles of Agreement for the International Monetary Fund*, which is the section that provides for the protection of the Fund's archives and, as stated above, uses the same language as Section 5 applicable to the World Bank.

d. Objects and purpose of Section 5

123. As recognised by this Court in *Amaratunga*, the purpose of the immunities and privileges afforded to international organizations is to protect them from unwarranted interference by member states.[134] The World Bank's immunities, and its archival immunity in particular, serve this very purpose.

124. The World Bank, as other international organizations, owes its existence to a treaty that provides it with legal status and various powers and duties. It conducts its business through individuals, who have their own nationality, on the territories of its member states, as it does not have its own territory and population. In order to fulfill its mandate efficiently, it must be able to operate free of direct implication by its member states, including judicial orders made by domestic courts. *Bowett's Law of International Institutions* conveniently summarizes the rationale for the inviolability of international organizations' archives to domestic judicial production orders:

> The inviolability of archives and other official documents, for its part, is similarly affirmed in all agreements, and also constitutes an important element in ensuring the good functioning of international organisations. Without it the confidential character of communication between states and the organisation, or between officials within the organisation, would be less secure. As a consequence of this principle, international organisations are under no duty to produce any official document or

[133] Reasons of Nordheimer J., AR, Vol. 1, Tab 2, p. 21 at para. 54.
[134] *Amaratunga, supra* at para. 29 and 45.

> part of their archives in the context of litigation before national courts.[135] [Citations omitted] [Our underlining]

125. In the instant case, the documents ordered to be produced were created as part of the World Bank's core function to maintain the integrity of its contracting process. Corruption investigations are essential to the proper and effective functioning of the World Bank. A narrow reading of the Bank's immunities and privileges, or a finding that it waived its immunities and privileges, would potentially reduce the member states' trust in the confidentiality of the Bank's records and deter information sharing respecting corruption on Bank funded projects. A narrow reading also opens the Bank to potentially onerous and divergent judgments, tethering the organization to the whims of its member states.

126. Rendering the World Bank a *de facto* party in the instant prosecution would constitute, to paraphrase this Court's reasons in *Amaratunga* (at para. 45), a clear intrusion into the operations of the institution by one of its member states through its courts.

127. To conclude on archival immunity, it should be noted that compelling production of inviolable archives potentially puts Canada in breach of its international obligations and commitments to its treaty partners under the *Articles of Agreement*. A correct reading of the underlying treaty supports the conclusion that the World Bank is immune to orders to produce documents, absent waiver.

2. No waiver by the World Bank

128. The judge below found that the World Bank waived its archival immunity by providing information and evidence to the Canadian authorities, as well as by having implicitly accepted the burden of complying with a judicial production order as a corollary to the benefits accrued to it flowing from the prosecution of this case.[136]

129. The World Bank argues that waiver of its privileges and immunities must be express.[137] In the alternative, if the Court opens the door to implied waiver, the Bank submits that it should be

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[135] P. Sands & P. Klein, *Bowett's Law of International Institutions*, Sixth Edition (London: Sweet and Maxwell, 2009) at pp. 501-502.
[136] Reasons of Nordheimer J., AR, Vol. 1, Tab 2, p. 21 at paras. 32-42.
[137] Appellant's factum at para. 69.

an unequivocal communication of an actual intention to waive made by a representative empowered to do so.[138]

130. The Crown agrees with that last proposition: a waiver of immunities and privileges must be grounded on an unequivocal intent to do so made by a competent representative.

131. However, the Crown submits that, in order to resolve this appeal, this Court does not need to decide whether the *Articles of Agreement* require an express waiver. In this case, as a matter of fact, the Bank did not waive. On the contrary, the Bank expressly and repeatedly asserted its privileges and immunities in its correspondence with both Canadian authorities and counsel for the respondents, as illustrated in the following paragraphs.

132. As early as when it first informed the Canadian authorities of the fruits of its inquiry regarding the Padma Bridge Project, the Bank expressly maintained its immunities and privileges. Its report contained the following *caveat*:

> This Report is provided without prejudice to the immunities and privileges conferred on the Bank and its officers and employees by the Articles of Agreement and any other applicable sources of law. The Bank reserves its right to invoke its privileges and immunities, including at any time during the course of its investigation or a subsequent judicial or other proceeding pursued in connection with this matter.[139]

133. The Bank also asserted its immunities and privileges in its correspondence with defence counsel. The following epistolary exchange illustrates the clear intent expressed by the Bank in that regard. On 9 May 2014, Mr. Frank Addario, counsel for respondent Zulfiquar Bhuiyan, wrote to Mr. Normand Boxall, counsel for the World Bank, in relation to the third party records application that the respondents were then contemplating. In his letter, Mr. Addario asked whether Mr. Boxall would accept service of the respondent's application on behalf of the World Bank, as well as the general basis for the immunity claim made by the Bank.[140] On 16 May 2014, Mr. Boxall replied that he would "accept service of material on behalf of the World Bank; however, it should be clearly understood it is without prejudice or waiver of the World Bank's immunity and privileges. I will be endorsing any materials as follows: "Accepted without prejudice to the

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[138] Appellant's factum at para. 79.
[139] See Statement of Use and Limitations of the Liaison Report prepared by World Bank Integrity Vice Presidency sent to the RCMP on 4 April 2011: Respondents' Joint Record, Vol. I, Tab 3 at p. 92, 132, 169.
[140] Respondents' Joint Record, Vol. XVII, Tab 5.1.c at p. 198.

privileges and immunities of the World Bank which are expressly reserved." Mr. Boxall then explained the legalities of the implementation of the Bank's immunities in Canadian law.[141]

3. Non-appearance of the World Bank in the court below

134. The judge below suggested that the World Bank showed some "disrespect" by not having counsel on its behalf appear before him to ascertain its immunities.[142] This conclusion misunderstands the use and nature of international immunities. As the World Bank correctly states, there was nothing disrespectful in choosing to not appear before the Superior Court in this case as it had no legal or moral obligation to do so.[143]

135. There is no general rule in international law that requires foreign states and international organizations to appear in domestic courts of member states to assert their immunities and privileges. As a matter of principle, domestic courts have an independent obligation to enforce immunities without the need for the protected entity to appear. For example, the *State Immunity Act* provides that a court shall give effect to the immunity conferred on a foreign state, notwithstanding that the state fails to take any step in the proceedings.[144]

136. Immunity is notably designed to allow such organizations to focus on the fulfilling of the functions for which they were created, without being burdened with responding to various litigation in multiple jurisdictions, which negatively impact the organizations' resources.

137. Canada's international obligations do not end with the enactment of enabling legislation; they include the requirement to ensure that such immunities are given effect. As stated above, Section 10 of Article VII provides that members of the Bretton Woods Agreements shall take the necessary actions for making effective in terms of their domestic law the immunities and privileges set forth in that Article.

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[141] Respondents' Joint Record, Vol. XVII, Tab 5.1.d, at p. 199; see also p. 132, 169; see also:
- Letter of 22 April 2014 of Normand Boxall, Respondents' Joint Record, Vol. XVII, Tab 5.1.b, at p. 196;
- Letter of 8 September 2014 of Normand Boxall, Respondents' Joint Record, Vol. XVIII, Tab 5.1.i, at p. 10;
- Email of 11 September 2014 of Normand Boxall, Respondents' Joint Record, Vol. XVIII, Tab 5.1 k, at p. 13;
- Letter of 22 September 2014 of David Rivero (Chief Counsel, World Bank), Respondents' Joint Record, Vol. XVIII, Tab 5.1.s, at p. 39.

[142] Reasons of Nordheimer J., AR, Vol. 1, Tab 2, p. 21 at para. 26.

[143] Appellant's factum at paras. 95-97.

[144] *State Immunity Act*, R.S.C., 1985, c. S-18, s. 3(2).

138. In international law, Canada's responsibility may be engaged on the international scene in the event that the Canadian judiciary fails to apply immunities to which an international organization is entitled. It is a well-established principle of international law that the actions of state organs, including the judiciary, engage the state's responsibility.[145]

139. One mechanism to ensure that immunities are properly considered by domestic courts is for Crown counsel to appear in court on behalf of the international organization concerned. There are Canadian precedents to that effect, many of which implicate the International Civil Aviation Organization (ICAO) which has its headquarters in Montreal. For example, in the recent case of *Ferrada v. International Civil Aviation Organisation*, the Québec Superior Court stated that Canada, as member state and host country for the ICAO, has the obligation to defend the latter's immunities. The Court added that it is in Canada's interest to do so in order to remain an attractive home base for such international organizations:

> [33] Le Canada, en tant que pays hôte de l'OACI et État partie à la Convention, a l'obligation d'assurer, à la demande de l'ONU et l'OACI, le respect intégral des immunités et privilèges qu'il leur a reconnus en droit international et qu'il a mis en œuvre en droit interne canadien. […]
>
> [35] Le Canada a intérêt à faire respecter les immunités qu'il a octroyées à l'ONU et l'OACI, notamment afin de se conformer à ses obligations internationales et afin de demeurer un endroit attrayant pour l'établissement du siège ou des bureaux d'organisations internationales. [146]

140. For these reasons, the trial judge erroneously criticized the World Bank for not appearing to assert its immunity. This was an irrelevant factor in his determination of the scope of immunities in this case. This failure to apply the proper workings of treaty-based immunity further demonstrates the need for intervention by this Court.

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[145] This principle of international law is now codified in Article 4 of the *Articles on Responsibility of States for International Wrongful Acts* adopted by the International Law Commission in 2001.

[146] *Ferrada v. International Civil Aviation Organisation*, 2015 QCCS 3121; see also: *Trempe v. Canada*, 2005 QCCA 1031 at para. 1 and *Canada (Procureur general) v. Lavigne*, [1997] J.Q. no 192 (C.A.) at para. 11 where the Attorney General of Canada appeared on behalf of ICAO; and *Cairns v. Secrétariat du Fonds multilatéral aux fins d'application du Protocole de Montréal*, [2003] J.Q. no 19371 (C.Q.) at para. 2 where the Attorney General for Québec appeared on behalf of the Fonds multilateral.

PART IV – COSTS

141. The Crown makes no submission regarding costs except to state that it does not seek any and submits that none should be awarded against her.

PART V – ORDER SOUGHT

142. That the appeal be allowed, the production order made by Nordheimer J. be vacated and the case returned to the Ontario Superior Court of Justice, without costs against the Crown.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, this day of October, 2015.

Nicholas E. Devlin
Counsel for the respondent
Her Majesty the Queen in Right of Canada

François Lacasse
Counsel for the respondent
Her Majesty the Queen in Right of Canada

PART VI – TABLE OF AUTHORITIES

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PART VII – LEGISLATION

State Immunity Act, R.S.C., 1985, c. S-18

State immunity 3(1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada. *Court to give effect to immunity* (2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.	*Immunité de juridiction* 3(1) Sauf exceptions prévues dans la présente loi, l'État étranger bénéficie de l'immunité de juridiction devant tout tribunal au Canada. *Immunité reconnue d'office* (2) Le tribunal reconnaît d'office l'immunité visée au paragraphe (1) même si l'État étranger s'est abstenu d'agir dans l'instance.

Corruption of Foreign Public Officials Act, S.C. 1998, c. 34

Bribing a foreign public official 3(1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions. *Punishment* (2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable	*Corruption d'agents publics étrangers* 3(1) Commet une infraction quiconque, directement ou indirectement, dans le but d'obtenir ou de conserver un avantage dans le cours de ses affaires, donne, offre ou convient de donner ou d'offrir à un agent public étranger ou à toute personne au profit d'un agent public étranger un prêt, une récompense ou un avantage de quelque nature que ce soit : a) en contrepartie d'un acte ou d'une omission dans le cadre de l'exécution des fonctions officielles de cet agent; b) pour convaincre ce dernier d'utiliser sa position pour influencer les actes ou les décisions de l'État étranger ou de l'organisation internationale publique pour lequel il exerce ses fonctions officielles. *Peine* (2) Quiconque commet une infraction prévue au paragraphe (1) est coupable d'un acte

to imprisonment for a term of not more than 14 years.	criminel passible d'un emprisonnement maximal de quatorze ans.
Saving provision	*Défense*
(3) No person is guilty of an offence under subsection (1) if the loan, reward, advantage or benefit (a) is permitted or required under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions; or	(3) Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (1) si le prêt, la récompense ou l'avantage : a) est permis ou exigé par le droit de l'État étranger ou de l'organisation internationale publique pour lequel l'agent public étranger exerce ses fonctions officielles; b) vise à compenser des frais réels et raisonnables faits par un agent public étranger, ou pour son compte, et liés directement à la promotion, la démonstration ou l'explication des produits et services de la personne, ou à l'exécution d'un contrat entre la personne et l'État étranger pour lequel il exerce ses fonctions officielles.
(b) was made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official that are directly related to (i) the promotion, demonstration or explanation of the person's products and services, or (ii) the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions.	
Facilitation payments	*Exception*
(4) For the purpose of subsection (1), a payment is not a loan, reward, advantage or benefit to obtain or retain an advantage in the course of business, if it is made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions, including (a) the issuance of a permit, licence or other document to qualify a person to do business; (b) the processing of official documents, such as visas and work permits; (c) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and (d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo,	(4) Ne constitue pas un prêt, une récompense ou un avantage visé au paragraphe (1) le paiement visant à hâter ou à garantir l'exécution par un agent public étranger d'un acte de nature courante qui est partie de ses fonctions officielles, notamment : a) la délivrance d'un permis, d'une licence ou d'un autre document qui habilite la personne à exercer une activité commerciale; b) la délivrance ou l'obtention d'un document officiel tel un visa ou un permis de travail; c) la fourniture de services publics tels que la collecte et la livraison du courrier, les services de télécommunication, la fourniture d'électricité et les services d'aqueduc; d) la fourniture de services occasionnels tels que la protection policière, le débardage, la protection des produits périssables contre la détérioration ou les inspections relatives à l'exécution de contrats ou au transit de marchandises.

the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods. *Greater certainty* (5) For greater certainty, an "act of a routine nature" does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision.	*Précision* (5) Il est entendu que l'expression « acte de nature courante » ne vise ni une décision d'octroyer de nouvelles affaires ou de reconduire des affaires avec la même partie — notamment ses conditions — ni le fait d'encourager une autre personne à prendre une telle décision.

Interpretation Act, L.R.C. 1985, ch. I-21

11. The expression "shall" is to be construed as imperative and the expression "may" as permissive.	11. L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.
17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.	17. Sauf indication contraire y figurant, nul texte ne lie Sa Majesté ni n'a d'effet sur ses droits et prérogatives.

Vienna Convention on Consular Relations, incorporated in Schedule II of the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41

1 (k) "consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safe keeping.	1 (k) L'expression «archives consulaires» comprend tous les papiers, documents, correspondance, livres, films, rubans magnétiques et registres du poste consulaire, ainsi que le matériel du chiffre, les fichiers et les meubles destinés à les protéger et à les conserver.

Responsibility of States for Internationally Wrongful Acts, 2001,

Conduct of organs of a State	*Comportement des organes de l'État*
1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.	1. Le comportement de tout organe de l'Etat est considéré comme un fait de l'Etat d'après le droit international, que cet organe exerce des fonctions législative, exécutive, judiciaire ou autres, quelle que soit la position qu'il occupe dans l'organisation de l'Etat, et quelle que soit sa nature en tant qu'organe du gouvernement central ou d'une collectivité territoriale de l'Etat. 2. Un organe comprend toute personne ou entité qui a ce statut d'après le droit interne de l'Etat.

Bretton Woods and Related Agreements Act

Section 1. *Purposes of Article*	Section 1. *Objet du présent article*
To enable the Bank to fulfill the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Bank in the territories of each member.	Pour mettre la Banque en mesure de remplir les fonctions qui lui sont confiées, le statut, les immunités et privilèges définis dans le présent article seront accordés à la Banque dans les territoires de chaque État membre.
Section 10. *Application of Article*	Section 10. *Application du présent article*
Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Bank of the detailed action which it has taken.	Chaque État membre prendra, dans ses propres territoires, toutes les mesures nécessaires en vue d'appliquer, dans sa propre législation, les principes énoncés dans le présent article et il informera la Banque du détail des mesures qu'il aura prises.

Vienna Convention on the Law of Treaties

Article 31. *General rule of interpretation*	Article 31. *Règle générale d'interprétation*
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.	1. Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; *(b)* Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; *(b)* Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.	2. Aux fins de l'interprétation d'un traité, le contexte comprend, outre le texte, préambule et annexes inclus : *a)* Tout accord ayant rapport au traité et qui est intervenu entre toutes les parties à l'occasion de la conclusion du traité; b) Tout instrument établi par une ou plusieurs parties à l'occasion de la conclusion du traité et accepté par les autres parties en tant qu'instrument ayant rapport au traité. 3. Il sera tenu compte, en même temps que du contexte : a) De tout accord ultérieur intervenu entre les parties au sujet de l'interprétation du traité ou de l'application de ses dispositions; *b)* De toute pratique ultérieurement suivie dans l'application du traité par laquelle est établi l'accord des parties à l'égard de l'interprétation du traité; *c)* De toute règle pertinente de droit international applicable dans les relations entre les parties. 4. Un terme sera entendu dans un sens particulier s'il est établi que telle était l'intention des parties.
Article 32. *Supplementary means of interpretation* Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 : (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.	Article 32. *Moyens complémentaires d'interprétation* II peut être fait appel à des moyens complémentaires d'interprétation, et notamment aux travaux préparatoires et aux circonstances dans lesquelles le traité a été conclu, en vue, soit de confirmer le sens résultant de l'application de l'article 31, soit de déterminer le sens lorsque l'interprétation donnée conformément à l'article 31 : a) laisse le sens ambigu ou obscur; ou b) conduit à un résultat qui est manifestement absurde ou déraisonnable.