

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SUPERIOR COURT OF JUSTICE OF ONTARIO)

B E T W E E N:

WORLD BANK GROUP

Applicant

and

KEVIN WALLACE, ZULFIQUAR BHUIYAN,
RAMESH SHAH, MOHAMMAD ISMAIL and
HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondents

APPLICATION FOR LEAVE TO APPEAL

(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26)

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MEMORANDUM OF ARGUMENT

PART I - OVERVIEW AND STATEMENT OF FACTS

1. World Bank Group, a non-party, applies for leave to appeal the Order of the Superior Court of Justice of Ontario whereby it was ordered to produce its deliberative and internal documents. World Bank Group does not attorn to the jurisdiction of the Canadian courts except with respect to a resolution of its assertion of immunity.

This reality makes immunity essential to the efficient and independent functioning of international organizations.

Reference: *Amaratunga v. Northwest Atlantic Fisheries*, [2013] 3 S.C.R. 866 (“*Amaratunga*”), at para. 29;
Affidavit of Galina Mikhlin-Oliver sworn February 18, 2015 (“MO Affidavit”), Application for Leave to Appeal, Tab 3, pp. 31-41

2. This Application for Leave to Appeal lies from the final Order of Nordheimer J. to this Court pursuant to the Court’s ruling in *CBC. v. Dagenais*.

Reference: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835;
Section 40, *Supreme Court Act*, R.S.C., 1985, c. s-26

3. The four individual respondents brought an Application to the Superior Court of Justice of Ontario seeking production of documents from World Bank Group. Justice Nordheimer ordered production.
4. The four individual respondents have each been charged with an offence under the *Corruption of Foreign Public Officials Act*: namely that, as three former employees of SNC Lavalin, they offered to bribe senior Bangladeshi officials through their representative, the respondent, Zulfiqar Bhuiyan.
5. At the crux of this issue is whether Canadian courts may take jurisdiction over WBG and make compulsion orders affecting its officers and employees to produce internal documents and to testify. What hangs in the balance is cooperation by international organizations with Canadian authorities for the benefit of Canada.
6. In *Amaratunga*, the Court recognized that international organizations enjoy immunity as essential to its efficient functioning and because, without immunity, “an international organization would be vulnerable to intrusions into its operations and agenda by the host state and that state’s courts”.

Reference: *Amaratunga, supra*, at para. 45

7. The Padma Multipurpose Bridge Project (PMBP) was undertaken to plan, construct, and operate a road and railway bridge over the Padma River. Situated not far from the confluence of two of the longest rivers in the world, the Brahmaputra and the Ganges, which, together with the Meghna River, form the world’s largest delta, the bridge was to be built along the floodplains of the Padma River. WBG undertook to advance a \$1.2 billion loan to the project, but upon learning of the alleged corrupt practices involving SNC Lavalin and officials of the Government of Bangladesh, cancelled the loan.
8. This Application raises the fundamental, overarching question whether the Superior Court of Justice of Ontario is right to compel production of documents from an international organization, which possesses immunities and which is not resident, nor domiciled, in Canada and whose documents are archived in Washington, D.C. WBG objects to producing its deliberative and internal records.

9. The decision is of immense importance not only to the entities that comprise the World Bank Group, but to all international organizations around the world of which Canada is a member and which will be impacted by the decision at issue. This decision is also of fundamental importance to all foreign governmental organizations (e.g. the FBI, Interpol, intelligence agencies, etc.) that may share information with the RCMP and other Canadian authorities charged with the enforcement of Canadian law. In this case, the Canadian law is the *Corruption of Foreign Officials Act*.

10. Although the World Bank Group did not appear before Justice Nordheimer, arguments regarding the lack of jurisdiction of the Superior Court of Justice were advanced by the Crown and addressed by Justice Nordheimer. The facts relevant to the organization and functions of the WBG were also before Nordheimer J. and reviewed by him. However, to provide supplementary facts that might be helpful to the Court, the WBG has, in addition, provided the Affidavit of Galina Mikhlin-Oliver for a full appreciation of the importance of the issues in this case.

11. This Application involves important legal issues of public importance:

- (a) Whether there is any principled basis on which a Superior Court should assert jurisdiction to compel production of confidential records of international organizations neither resident in Canada nor attorning to Canadian jurisdiction;
- (b) The scope and effect of statutory immunity for international organizations, conferred by Canadian law, in the context of criminal proceedings to which such international organizations are not a party;
- (c) Whether the benefits/burden doctrine has any application to the statutory immunity conferred on international organizations by Canadian law;
- (d) Whether the immunity, when expressly reserved, can be waived implicitly by conduct rather than expressly; and
- (e) Whether the immunity is capable of being waived by WBG officials, at what level and by what procedure.

12. The importance of the issues raised affect the fundamental core of the business of the World Bank Group, an international organization created to lend monies to member countries for the purpose of alleviating poverty. Moreover, the mandate of the World Bank Group includes an obligation to ensure that any monies it lends, itself or with other international development banks, are used for approved projects rather than for the bribing of foreign officials. That mandate is fulfilled and the corruption of foreign officials avoided by World Bank Group's ability to obtain records through its internal processes and by the receipt of confidential information from informants to whom promises of absolute confidentiality are given, in order to protect them from retaliation by state or corporate officials.

13. To respond to the exigencies of Canadian law, so as not to prejudice either the individual respondents or the Crown, WBG respectfully requests the Court to expedite its decision in this matter.

FACTS

World Bank Group

14. World Bank Group ("WBG") is comprised of five separate institutions being the International Bank for Reconstruction and Development ("IBRD"), the International Development Agency ("IDA"), the International Finance Corporation ("IFC"), the Multilateral Investment Guarantee Agency ("MIGA") and the International Centre for the Settlement of Investment Disputes ("ICSID"). Each of the five institutions has its own set of governing documents: IBRD, IDA, and IFC are governed by Articles of Agreement, while MIGA and ICSID are governed by Conventions.

Reference: Reasons for Decision of Nordheimer J. dated December 23, 2014 ("Nordheimer Decision"), paras. 2-7, Application for Leave to Appeal, Tab 2B, pp. 11-12;
MO Affidavit, para. 4, Application for Leave to Appeal, Tab 3, p. 32

15. 188 member countries have incorporated these constituent documents into their national laws.

Reference: Nordheimer Decision, paras. 16-19, Application for Leave to Appeal, Tab 2B, pp. 14-15

16. WBG was created in 1944 at the Bretton Woods International Treaty in accordance with its Articles of Agreement. Canada was one of the founding members. Initially, Canada implemented the Articles of Agreement through a Privy Council Order from December 21, 1945. Under the Order, sections 2 to 9 inclusive of Article vii or the Articles of Agreement will have the force of law in Canada. Subsequently, WBG was recognized in Canada by an Act of Parliament entitled *The Bretton Woods and Related Agreements Act*, R.S.C. 1985 c.B-7.

Reference: MO Affidavit, para. 6, and Exhibit "B" thereto, Application for Leave to Appeal, Tab 3, p. 32, 3A, pp. 44-46

17. WBG is headquartered in Washington, DC. It has more than 10,000 employees in more than 100 offices worldwide.

18. The Board of Governors of WBG consists of a member from each of 188 recognizing countries. The Minister of Finance of Canada is Canada's Governor on the Board of WBG.

19. Integral to WBG's lending program is a robust system of accountability to ensure that funds are used for the designated purpose, and not lost to corruption. This proposed appeal involves the WBG's fight against corruption in a critical development project it was seeking to finance involving a Canadian company and a Canadian prosecution based, in part, on information provided, as part of the RCMP's regular enforcement procedures. It also raises important issues affecting the struggle of the international community against corruption that undermines multi-lateral assistance to developing countries.

The WBG's Lending Objectives

20. The purpose of the WBG is to extend loans, grants and credits to developing and transitioning countries to assist in the reconstruction and development of various projects. Amongst the purposes are the following:

(i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.

(ii) To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors;

and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.

Reference: Articles of Agreement of IBRD, Article I, Exhibit "C" to the MO Affidavit, Application for Leave to Appeal, Tab 3C, p. 50

21. To be eligible for World Bank loans, countries have to become Bank members. This requires first joining the International Monetary Fund (IMF), then joining IBRD and subsequently IDA. Member countries help to fund the Bank through share capital contributions, which along with voting rights, are based on member country GDP (50 percent), openness (30 percent), economic variability (15 percent), and international reserves (5 percent).

WBG's Requirements to Combat Fraud

22. The Articles of Agreement of IBRD and IDA require the institutions to make arrangements to ensure that financings provided by them are used for their intended purposes and with due attention to economy and efficiency. This fundamental requirement is often referred to as the "fiduciary duty", which forms the legal and policy basis for much of the World Bank's fiduciary framework for its operations, including its project-level anti-corruption efforts.

23. To this end, the World Bank has established a set of tools to help prevent and deter fraud and corruption in projects and programs financed by WBG. Collectively known as the "integrity regime", these are both operational and administrative in character.

Reference: MO Affidavit, paras. 13-15, Application for Leave to Appeal, Tab 3, p. 34

24. On the operational side, the World Bank has developed anti-corruption provisions in its legal agreements with borrowers and other recipients of World Bank funds, as well as practices and procedures aimed at reducing the risk of, or detecting and addressing, potential fraud and corruption in World Bank-financed operations. World Bank Procurement Guidelines, Consultant Guidelines and Guidelines on Preventing and Combating Fraud and Corruption in Projects ("The Anti-Corruption Guidelines") are incorporated by reference into the World Bank's legal agreements with borrowers. These documents, among other things, set out the definitions of sanctionable practices, and grant the World Bank access to bid and contract documentations through a third party audit clause. For example, paragraph 9(d)(ii) of the Anti-Corruption

Guidelines obligates borrowers to include provisions in its agreements with each recipient of loan proceeds "requiring such recipient to permit the Bank to inspect all of their accounts and records and other documents relating to the project required to be maintained pursuant to the Loan Agreement and to have them audited by, or on behalf of, The Bank".

25. On the administrative side, the WBG has a formal process for investigating and subsequently sanctioning firms and individuals which have been found to have engaged in fraud and corruption in WBG financed projects, primarily by declaring them ineligible to be awarded WBG-financed contracts, a step known as "debarment". Sanctions are intended to advance the fiduciary duty by excluding corrupt actors from access to World Bank financing, while serving as a deterrent both for the sanctioned firm and for others. The administrative sanctioning process was utilized with respect to the SNC Lavalin Group's participation in the Padma Bridge Project and resulted in a negotiated resolution whereby SNC Lavalin Group voluntarily agreed to be debarred from participating for 10 years in projects funded by WBG.

26. In the present case, an international consortium, led by the World Bank, and which included the Asian Development Bank, the Japan International Cooperation Agency, and the Islamic Development Bank, had agreed to lend Bangladesh up to \$2.9 billion for a 6-km (4-mile) multi-purpose bridge over the river Padma (the "Padma Bridge Project"). The World Bank Group itself, (through IDA) was to lend Bangladesh \$1.2 billion.

27. After the submission of technical and financial proposals from companies bidding on the contract, the Government of Bangladesh ("GoB") recommended that the contract be awarded to SNC Lavalin Group.

Integrity Vice Presidency ("INT") and the Origins of the Present Dispute

28. INT, an independent unit within the WBG reporting to the President, is charged with, among other things, identifying and investigating allegations and other indications that sanctionable practices may have occurred in connection with WBG-financed projects and commencing sanctions proceedings when it deems it appropriate. The INT is part of the World Bank Group and has jurisdiction over the whole group.

Reference: MO Affidavit, paras. 19-22, Application for Leave to Appeal,
Tab 3, pp. 35-37

29. INT's investigations are carried out in an atmosphere free of improper influence, or even the perception of improper influence. Therefore, to ensure the independence of its activities, the Vice President of INT reports directly to the President of the Bank Group.

30. INT maintains effective lines of communication to permit Bank Group staff and the public to submit to INT any allegations of staff misconduct or allegations of fraud or corruption in Bank Group projects. Given the context of some of the countries in which the Bank works, INT receives allegations and information from a number of sources, including some who choose to remain anonymous, and who are fearful of retaliation were they discovered to be the source of the allegation. To prevent the possibility of retaliation or interference with an investigation, and to encourage the reporting of fraud and corruption, the identities of sources of allegations are kept confidential.

31. It would be destructive of INT's credibility and ability to fulfill its mandate going forward were it to ever breach any undertakings or promise of confidentiality it has made.

Reference: Nordheimer Decision, para. 41, Application for Leave to Appeal, Tab 2B, p. 21;
MO Affidavit, para. 23, Application for Leave to Appeal, Tab 3, p. 37

32. As part of its investigative procedures, INT recognizes a need to keep certain information it collects confidential. This is usually for the following reasons: (a) to preserve the integrity of an investigation and prevent interference with the investigation or destruction of evidence; (b) to protect those who assist INT in its investigations who might otherwise face retaliation; and, (c) to reassure potential witnesses, complainants and whistleblowers that they can come forward confident in the knowledge that their identities will be kept confidential.

Reference: Nordheimer Decision, paras. 40-41, Application for Leave to Appeal, Tab 2B, p. 21

33. Given that INT has jurisdiction over World Bank-financed projects globally, INT is not in a position to provide protection to witnesses other than through the strict maintenance of confidentiality of their identity and cooperation. INT will not reveal the identities of individuals or other entities that cooperate with INT or disclose information that may enable their identification to be determined. To this end, INT redacts all its reports, including Referral reports

to national authorities, to omit any information that may identify a confidential witness. INT's promise of confidentiality is always subject to the full cooperation and truthfulness of those cooperating with INT.

34. In March 2011, INT received credible allegations from a number of sources, some of whom were anonymous and others who were known to INT about corruption in the procurement process and the offer of bribes to a number of senior Bangladeshi officials, including government officials. The credibility of the information was verified based on internal consistencies, matching of details with other available records and sources, prior history of providing accurate information, and the sources' ability to anticipate certain events. INT believes the informants might face serious economic or perhaps physical retribution if their identities or roles were to be discovered. These allegations, received by INT, were that SNC Lavalin officials had agreed to pay a percentage of the contract amount to GoB officials in exchange for favorable treatment.

35. In April 2011, INT provided to the Royal Canadian Mounted Police ("RCMP"), explicitly subject to its immunities, for its consideration, the verified information that WBG had gathered from its confidential and other sources while WBG continued with its investigations which led to the debarment of SNC Lavalin for 10 years and the non-funding of the loan.

36. In the Padma Bridge case, INT advised the RCMP at the outset that it had made undertakings to particular individuals not to reveal their identities or disclose information that would enable their identification, and that INT would abide by its commitments for the reasons discussed above. The RCMP agreed to proceed with its investigation in the knowledge that INT would not reveal the identities of certain individuals, and that INT would redact any information that may disclose these individuals' identities from all materials provided by INT to the RCMP before those materials were further disclosed.

Reference: MO Affidavit, para. 27, Application for Leave to Appeal, Tab 3, p. 38

37. The INT has provided to the RCMP its investigative documents, with each transmission indicating that it expressly maintains its immunities, including its immunity from legal process in Canada. The INT has not produced, and objects to producing other records including its deliberative records, its internal communications with a member of the Government of

Bangladesh and its negotiations with SNC Lavalin which led to the settlement of the administrative process whereby SNC Lavalin was debarred from participating for 10 years in projects funded by WBG. The settlement has been made public and is on WBG's website.

Reference: Letter of November 26, 2014, Exhibit "G" to the MO Affidavit, Application for Leave to Appeal, Tab 3G, pp. 100-103

38. Whether or not the RCMP concludes that it has accumulated, through authorized wiretaps, WBG materials and its own investigations sufficient evidence to establish a reasonable prospect of conviction is for the RCMP and a Canadian Crown Attorney to decide. WBG's cooperation with the RCMP is merely a by-product of its own institutional work.

Status, Immunities and Privileges

39. The WBG and its staff are entitled to the protection of certain privileges and immunities. These privileges and immunities protect the WBG as an entity from most claims of liability. The WBG is also protected from the compulsory disclosure of information and evidence through subpoenas, warrants, or court orders. Similarly, WBG staff are entitled to certain privileges and immunities that protect staff from liability for any duties performed in their official capacity.

40. The immunities are contained in the various Articles of Agreement and are substantially similar in each:

ARTICLE VII

Status, Immunities and Privileges

SECTION 1. Purposes of the 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.

...

SECTION 4. Immunity of Assets from Seizure

Property and assets of the Bank, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action.

SECTION 5. Immunity of Archives

The archives of the Bank shall be inviolable.

SECTION 6. *Freedom of Assets from Restrictions*

To the extent necessary to carry out the operations provided for in this Agreement and subject to the provisions of this Agreement, all property and assets of the Bank shall be free from restrictions, regulations, controls and moratoria of any nature.

SECTION 7. *Privilege for Communications*

The official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of other members.

SECTION 8. *Immunities and Privileges of Officers and Employees*

All governors, executive directors, alternates, officers and employees of the Bank

(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity; (emphasis added)

...

SECTION 10. *Application of 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. (emphasis added)

PROCEEDINGS BEFORE JUSTICE NORDHEIMER

41. The respondents, Wallace, Bhuiyan, Shah and Ismail are all charged with an offence under the *Corruption of Foreign Public Officials Act*, SC 1998, c.34. The respondents brought an Application before the Superior Court of Justice of Ontario to compel WBG to produce various documents, additional to those received from WBG through the Crown Prosecutor.

42. The WBG did not appear. Nevertheless, the Crown did advance jurisdictional and immunity claims which Nordheimer J. addressed.

Decision of Justice Nordheimer

43. Nordheimer J. stated that the actions of WBG through its investigators was covered by immunity “except when the Bank waives this immunity” and identified the issue to be determined as one of waiver.

Reference: Nordheimer Decision, paras. 28 and 29, Application for Leave to Appeal, Tab 2B, p. 18

44. Nordheimer J. recognized that WBG “supplied the RCMP with essentially all information necessary” to pursue the charges and that “INT produced all of its documents with a clear reiteration of the immunity of the World Bank Group”.

Reference: Nordheimer Decision, paras. 33 and 43, Application for Leave to Appeal, Tab 2B, pp. 19 and 22

45. But then Justice Nordheimer confused the issue of waiver by wondering “whether there was a ‘benefit burden exception’” to the statutory immunity, conferred on international organizations such as WBG, analogous to the domestic concept of waiver of Crown immunity considered by the Court in *Sparling v. Quebec (Caisse de depot et de placement)*.

Reference: Nordheimer Decision, para. 30, Application for Leave to Appeal, Tab 2B, p. 18

46. The *Sparling* case dealt with the purchase of the “benefit” of shares in a federally incorporated company by a Quebec Crown agent, which then sought to avoid the burden of the associated insider filing obligations.

47. He concluded that WBG obtained a benefit to its organizational goals and objectives by causing a criminal prosecution to be instituted in Canada and must therefore accept the burdens of so doing by adhering to the procedural rules governing that prosecution.

Reference: Nordheimer Decision, paras. 35 and 36, Application for Leave to Appeal, Tab 2B, pp. 19-20

48. Nordheimer J. also determined that the “benefits/burden exception” was consistent with the private law principle that a privilege holder cannot selectively waive the privilege. He saw no reason to draw a distinction between a claim of private law privilege and a claim of public international immunity.

Reference: Nordheimer Decision, para. 36, Application for Leave to Appeal, Tab 2B, p. 20

49. Although he recognized that immunity is essential to the efficient functioning of international organizations, Nordheimer J. found that the principle was not absolute and that

absent evidence by WBG of undue interference with its functions, the principle of immunity should not apply in this situation.

Reference: Nordheimer Decision, paras. 38 and 39, Application for Leave to Appeal, Tab 2B, pp. 20-21

50. On waiver, Nordheimer J. asserted that although the Articles of Agreement indicated in Section 8 that all officers and employees of the Bank “shall be immune from legal process with respect to acts performed by them in the official capacity except when the Bank waives this immunity” (emphasis added), the absence of the words “expressly waives” precluded a conclusion “that the World Bank Group can only be found to have waived its immunity if it has done so expressly”. He placed WBG in the same category as a person who enjoys a private privilege. “Privileges may be expressly or impliedly waived and, I conclude on the plain wording of s. 8 of Article VII so can the immunity enjoyed by World Bank Group.”

Reference: Nordheimer Decision, paras. 46 and 47, Application for Leave to Appeal, Tab 2B, p. 23

51. Addressing the assertion that the Court could not order WBG to produce documents, as it was located in Washington D.C., Nordheimer J. accepted the Quebec Court of Appeal Decision in *R. v. Lore*, but concluded that WBG, being an international organization, had no territory or population of its own. Therefore the question whether WBG would comply with a production order was not one of jurisdiction to be dealt with initially, but a question of enforceability if and when that issue materialized.

Reference: Nordheimer Decision, paras. 49-51, Application for Leave to Appeal, Tab 2B, pp. 23-24

52. As for the provision that: “The archives of the Bank shall be inviolable”, Nordheimer J. determined that “archives” had a historical connotation and this was not an independent source of immunity. WBG had only one immunity, not several, and by waiving it through selective disclosure, “it had done so for all purposes”.

Reference: Nordheimer Decision, paras. 52-53, Application for Leave to Appeal, Tab 2B, p. 24

PART II - QUESTIONS IN ISSUE

53. What are Canada's obligations to WBG and other international organizations on whom Canada relies, with regard to the immunities conferred by Canadian law? Is there any justification for setting aside this immunity on the facts of this case? Was there any sound legal principle that justified setting aside the immunity on the facts of this case?

54. If there is jurisdiction to entertain the application, should the Ontario Superior Court of Justice refuse it on the basis of the immunity enjoyed by the WBG resulting from the application of its Articles of Agreement expressly adopted in Canada by *The Bretton Woods and Related Agreements Act*, RSC 1985, c. B-7. Did the Superior Court have any basis in law for setting aside the statutory immunity conferred on WBG?

55. Is there an exception to international immunity known as the "benefits/burden exception" when the benefit of the prosecution against Canadian residents is under the *FCPOA* for the benefit of the Canadian public?

56. Does the onus of establishing "undue interference" fall on WBG in such instances in order to maintain its immunity?

57. Because the Articles of Agreement provide immunity "except when the Bank waives this immunity" and not the words "except when the Bank expressly waives this immunity", does this mean that by making available to the RCMP documents and information relevant to a potential prosecution under the *FCPOA*, with the express reservation of immunity, but not its deliberative and internal communications, it has impliedly waived immunity over all its documents?

58. Is it legally appropriate to equate the waiver of a private law privilege with circumstances giving rise to the loss of a public law immunity conferred by statute?

59. Is it a proper interpretation as a matter of law to determine that the enumerated immunities in Article VII are but one immunity?

60. Because the charged respondents wish to bring a Garofoli Application to challenge the Information to Obtain, does that make the internal WBG deliberative documents producible?

PART III - STATEMENT OF ARGUMENT

61. This Application for Leave to Appeal raises crucial questions regarding international cooperation in the enforcement of Canada's criminal laws, and the extent to which international organizations can rely on immunities conferred by Canadian law to provide comfort for such cooperation. It is submitted that the Decision of Nordheimer J did not strike the proper balance between Canada's public interest and the demands of the accused. The learned judge's formulation of the law of waiver of statutory immunity (or, more generally, "public interest immunity") will operate as a warning not only to WBG but to other international organizations such as the United Nations and other development banks of which Canada is a member. These international organizations will see that cooperation with Canada may not be protected by their immunities, putting their operations at risk, including their ability to maintain the confidentiality of information and the inviolability of their archives, thus creating a disincentive to provide information to which Canadian authorities otherwise lack access.

62. WBG and its employees have the right to immunity "from legal process" by Article VII, s. 8, a right incorporated into Canada's law by *The Bretton Woods and Related Agreements Act*, R.S.C. 1985. Nordheimer J. recognized this right to immunity.

No Benefit/Burden Exception

63. In entering upon the benefits/burden discussion, Nordheimer J. impermissibly borrowed a doctrine of statutory interpretation used in the determination of whether a statute of Parliament or of a province may apply to the other level of government even though not expressly so stated. Even if the legal doctrine applies, which in the Applicant's submission it does not, it is wrong to treat a Canadian prosecution of accused persons in this country as a "benefit" conferred on WBG. There is no relevant benefits/burden exception to a statutory public interest immunity. *Sparling v. Quebec (Caisse de depot)* was a federalism case dealing with whether insider filing provisions of the *Canada Business Corporations Act* applied to a provincial Crown agent in its capacity as a purchaser of shares in a *CBCA* company. The RCMP regularly receives information about potential violations of the criminal law. The receipt is not seen as conferring a "private benefit" on the source. If there is anything that can be said to resemble a "benefit" in this case, it is a benefit to the Canadian public in the enforcement of criminal law.

64. WBG derives no benefit from a prosecution under the *FCPOA*. WBG has already achieved its own objectives by using its internal, administrative procedures to debar SNC Lavalin for 10 years from participating in WBG projects. It has also achieved its objectives, internally, by not advancing the loan to the Government of Bangladesh to build the Padma Bridge.

65. The benefit/burden exception to Crown immunity expressed by the Court in *Sparling v. Quebec (Caisse de depot)* does not apply to the Articles of Agreement and, further, to this fact situation. In *Sparling*, the Caisse, as an agent of Quebec, purchased more than 10 percent (22.7%) of the shares of Domtar, a publicly traded company. As a result, it became an insider of the corporation by virtue of ss. 121 and 122 of the *Canada Business Corporations Act*. Nevertheless, it refused to file an insider report claiming immunity from the *CBCA* under s. 16 of the *Interpretation Act*:

No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to ...

66. The Court stated:

Here, the interrelationship between the rights and obligations acquired by a purchaser of a share is so close, both conceptually and historically, that there can be no question of the application of the benefit/burden exception. Indeed, as earlier mentioned, a share is an integral whole. Thus the Crown, when it purchases a share of the company to which the Act applies is bound by the entirety of the *Canada Business Corporations Act* so far as it defines and regulates the rights and obligations of shareholders.

The language, intent and objective of s. 16 of the *Interpretation Act* differs significantly from the immunities mandated under the Articles of Agreement. In no way has WBG brought itself within the *FCPOA* as a direct party.

No Reversal of Onus

67. In *Amaratunga*, the Court, with one exception, granted immunity to the Northwest Atlantic Fisheries' Organization, an international organization responsible for the management of the fishery resources in the Northwest Atlantic, from claims for severance payments from one

of its former employees. The Court recognized the vital importance of immunity for international organizations. The exception to immunity was with regard to the claim for a separation indemnity and was granted on two bases, both of which respect immunity:

- (a) The claim related solely to rule 10.4 of the NAFO Staff Rules, which provided that a separation indemnity must be paid to any departing employee, regardless of the reasons for the termination of the employment relationship. “The enforcement of rule 10.4 would not amount to submitting NAFO’s managerial operations to the oversight of Canadian courts”; and
- (b) NAFO recognized that a separation indemnity is owed to the appellant and conceded that the “Immunity Order does not immunize NAFO from a lawsuit that only seeks payment of entitlements under the NAFO Staff Rules”.

Reference: *Amaratunga, supra*, at paras. 65-66

68. This Court’s decision in *Amaratunga* does not reverse the onus and does not require the international organization to prove undue interference with its functioning in order to claim immunity. Further, one cannot equate the language in s. 3(1) of the NAFO Immunity Order:

The Organization 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 of the Convention for the United Nations

with the absence of any similar language and particularly the words, “to such extent as may be required” in the Articles of Agreement.

69. *Amaratunga* involved the interpretation of a different statute with different provisions to the one at bar. In any event, the evidence before Nordheimer J., which he recited, was sufficient to establish the principle of “to such extent as may be required”, even though that phrase is not in the Articles of Agreement:

It would be extremely harmful to INT’s credibility and ability to fulfil its investigative mandate going forward were it to ever renege of any undertakings or, promise of confidentiality it made.

Reference: Nordheimer Decision, para. 41, Application for Leave to Appeal, Tab 2B, p. 21

United States v. Chalmers

70. In *U.S. v. Chalmers*, the applicant, charged in a scheme to defraud the United Nations Oil-for-Food Program, sought an order compelling the US government to produce documents. The US District Court held that the US government need not produce non-binding statements of employees not alleged to have been personally involved in the acts underlying the charged offences.

71. Nordheimer improperly distinguished *United States v. Chalmers* on the bases that:

- (a) the international organization in *Chalmers* was the United Nations;
- (b) the United Nations responded to requests from the U.S. Government and the accused's counsel rather than, as in the case at bar, initiating the provision of the investigative record; and
- (c) the UN provision had the words "shall enjoy immunity from every form of legal process, except insofar as it has expressly waived its immunity" (emphasis added) whereas the Articles of Agreement do not use the word "expressly", but rather "shall be immune from legal process with respect to acts performed by them in their official capacity except when the bank waives this immunity". (emphasis added)

Reference: *United States v. Chalmers*, 410 F. Supp. 2d, 278;
 Nordheimer Decision, paras. 44-47, Application for Leave to
 Appeal, Tab 2B, pp. 22-23

72. The immunity accorded to international organizations such as WBG is not so fragile that it hinges on who makes the request and whether the word "expressly" is used.

Waiver of Privilege and Waiver of Immunity

73. It is legally incorrect to equate private law principles of solicitor-client waiver and the consequences of selective waiver with public law principles applicable to immunity for international organizations. The equating of the two disparate types of principles is inconsistent with the importance of maintaining immunity of an international organization as stressed by the Court in *Amarantunga*:

This reality makes immunity essential to the efficient and independent functioning of international organizations. It also shapes the immunities and privileges that are granted to international organizations. Such immunities and privileges are created through a complex interplay of international agreements and the national law of host states.

Reference: *Amarantunga, supra*, at para. 29

74. Section 8(1) includes the right of WBG to waive its immunities. In every instance when WBG provided its investigative records, it expressed that it was maintaining all its immunities. It never waived any immunity. Any provision of information to a national police force or any discussion of a WBG investigator with a national policeman cannot constitute a complete waiver over all WBG documents including the deliberative and internal documents which it objected to produce. The immunities of 187 member states cannot be compromised in this manner.

Jurisdiction not Enforceability

75. The dictum of Fish J.A., as he then was, in *R. v. Lore* that:

... Surely the Court has no jurisdiction to order anyone in the United States to disclose anything at all to the RCMP, to the Crown or to the appellant directly.

goes to the very root of initial jurisdiction, rather than to enforceability to be considered at a later stage. Nordheimer J. recognized the dictum as an important precedent, but then determined that the concept of extraterritoriality was irrelevant because the WBG, as an international organization, is everywhere and yet nowhere. The documents ordered to be produced are in the United States and the dictum of Fish J.A., as he then was, should apply.

76. WBG did produce to the RCMP its investigative records. It refused to produce internal deliberative records, communications with a member government, the Government of Bangladesh, communications with SNC Lavalin leading to the resolution of a 10 year debar, and communications with legal counsel for a charged respondent. It must be correct that WBG has the right to make the determination which documents accomplish its mandate to combat corruption and bribery and which records are internal and deliberative, the production of which will undermine and destroy its ability to fulfil its mandate without putting immunities at risk. At the crux of this issue is the jurisdiction of Canadian courts to take jurisdiction over WBG and make compulsion orders affecting its officers and employees to produce and to testify. What

hangs in the balance is cooperation by international organizations with Canadian authorities for the benefit of Canada.

77. The law in Canada is settled. An applicant seeking third party production for the purposes of a Garofoli hearing to challenge the authorization of wiretaps is entitled, as of right, only to disclosure of the information before the authorizing judge. The documents that WBG objects to producing were never provided to the RCMP by WBG and are internal communications, communications with a member and deliberative considerations. To order production of these documents, indeed potentially of all documents within the files and archives of WBG whenever it provides investigative information to a national police force, is not within the prescription of Garofoli and undermines the immunities conferred on international organizations including the WBG, conferred by Canadian law. The consequences of such an Order are enormous in that it will prejudice the flow of relevant information to Canadian authorities.

PART IV - SUBMISSIONS CONCERNING COSTS

78. The Applicant asks for its costs.

PART V - ORDER REQUESTED

79. Respectfully, that leave to appeal be granted.

Date: February 19, 2015

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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PART VI - TABLE OF AUTHORITIES**AUTHORITY (JURISPRUDENCE)**

	Paragraph Reference
<i>Amaratunga v. Northwest Atlantic Fisheries</i> , [2013] 3 S.C.R. 866	1,6,67, 68, 69, 73
<i>Dagenais v. Canadian Broadcasting Corp.</i> , [1994] 3 SCR 835	2
<i>R. v. Lore</i> (1997), 116 C.C.C. (3d) 255 (Que. C.A.)	75
<i>Sparling v. Québec (Le Caisse de depot et placement du Québec)</i> , [1988] 2 S.C.R. 1015	45, 46, 63, 65
<i>United States v. Chalmers</i> , 410 F. Supp. 2d, 278	70, 71

PART VII - STATUTORY PROVISIONS

N/A