

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

BETWEEN:

WORLD BANK GROUP

APPLICANT
(Applicant)

– and –

**KEVIN WALLACE, ZULFIQUAR BHUIYAN, RAMESH SHAH
and MOHAMMAD ISMAIL**

RESPONDENTS
(Accused)

– and –

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

RESPONDENT
(Prosecutor)

**RESPONSE TO APPLICATION FOR LEAVE TO APPEAL and
MOTION TO EXPEDITE
HER MAJESTY THE QUEEN IN RIGHT OF CANADA, RESPONDENT**
(Rules 27 and 47)

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(Applicant)

– and –

**KEVIN WALLACE, ZULFIQUAR BHUIYAN, RAMESH SHAH
and MOHAMMAD ISMAIL**

RESPONDENTS
(Accused)

– and –

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

RESPONDENT
(Prosecutor)

NOTICE OF MOTION TO EXPEDITE
HER MAJESTY THE QUEEN IN RIGHT OF CANADA, RESPONDENT
(Rule 47)

TAKE NOTICE that the respondent, Her Majesty the Queen in Right of Canada, hereby applies to a judge of this Court pursuant to Rule 47 of the *Rules of the Supreme Court of Canada*, for an order to expedite the hearing of this application for leave to appeal and, if leave is granted, the hearing of the appeal, or such further or other order as the said judge may deem appropriate.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of the said motion:

The affidavit of Tanit Loraine GILLIAM;

and such further or other material as counsel may advise and may be permitted.

AND FURTHER TAKE NOTICE that the said motion shall be made on the following grounds:

1. The application for leave to appeal in this file pertains to an interlocutory ruling made by Justice Nordheimer of the Superior Court of Ontario as part of a criminal prosecution that is still at the pre-trial application stage.
2. On 11 April 2012, two of the four respondents accused, Mohammad Ismail and Ramesh Shah, were charged under s. 3(1) of the *Corruption of Foreign Public Officials Act*. They were committed for trial in April 2013, following a two week preliminary hearing.
3. In September 2013, the other two respondents accused, Kevin Wallace and Zulfiquar Bhuiyan, were charged and were joined with the other two through a direct indictment filed on 1 November 2013.
4. On 15 September 2014, the respondents accused filed an *O'Connor* application seeking production of records held by the applicant World Bank Group.
5. On 24 December 2014, Justice Nordheimer released the interlocutory ruling which is subject to this leave application.
6. In anticipation of a *Garofoli* application that would involve cross-examination of the affiant, hearing dates had been set aside in March and May 2015. On 30 January 2015, informed of the leave application to this Court that was then contemplated, Justice Nordheimer vacated the dates of 26-27 March 2015, but retained the 12 days already set aside starting on 18 May 2015 for 12 days. Justice Nordheimer also asked counsel to set aside an additional two weeks in June, should they be needed.
7. This motion to expedite is filed in order to alleviate as much as possible the inevitable delay caused to the ongoing prosecution by the leave application process, and ensuing appeal, if leave is granted in the instant case.

DATED at Toronto, Ontario, this day of March 2015.

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PART I – STATEMENT OF FACTS

i. Overview

1. The World Bank's leave application should be granted. The decision under appeal is wrong, undermines the law of international immunity, and threatens the willingness of international agencies to cooperate with Canadian authorities. The potential consequences of this decision are wide reaching. The risk of international agencies refusing to share information with Canada, or do business with Canadian companies, is serious and of national importance. Moreover, the instant case itself is of particular importance as part of Canada nascent attempts to combat transnational corruption under the *Corruption of Foreign Public Officials Act*. The public interest favours granting leave.
2. This is one of the rare instances in which an interlocutory appeal advances the interests of justice. Much like an attempt to unmask a confidential informant, the impugned Order piercing the World Bank's immunity is likely dispositive of the case. Clarity on the law is both a matter of national importance and of specific importance to the case at hand.

ii. Background to the case

3. 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 The Padma bridge project in Bangladesh was one of those projects.
4. Padma was to be a multi-purpose road-rail bridge that would provide a link between previously difficult to access, and highly impoverished, portions of the country.
5. Unfortunately, the injection of significant development monies into developing nations is a magnet for corruption and bribery. As a fiduciary for its member nations the WBG is obligated to be vigilant for these abuses.³ In this case, discovery of a plan to pay bribes to Bangladeshi government officials, amounting to an alleged 12 per cent of the \$50 million

¹ *Affidavit of Galina Mikhlin-Oliver*, Application Record, Tab 3, at para. 6

² *Ibid.* at Tab 3, at para. 10

³ *Ibid.* at Tab 3, at para. 15

consultancy budget to oversee building of the bridge, resulted in the WBG cancelling the project altogether. The WBG also debarred the accused's employer, SNC-Lavalin, from bidding on WBG projects for a period of 10 years.⁴ This exhausted the WBG's powers to remedy the corruption it unearthed.

6. Beyond its power to end contracts and exclude parties from future projects, the WBG has no ability or mandate to individually prosecute the individuals and companies who abuse its trust and divert its development funds to private pockets. Justice of that kind can only be done by the domestic law enforcement and court processes in the WBG's member nations.

iii. The Case Against the Accused

7. In this case, the WBG received information of irregularities in the bidding process from four tipsters.⁵ That information was shared by the WBG's investigative arm (INT) with Canadian law enforcement – specifically the RCMP. Judicial authorizations were sought and obtained to intercept the private communications of the four accused.
8. The wiretapping resulted in the accused being recorded making allegedly inculpatory statements.⁶ On the strength of the wiretap evidence search warrants were executed that yielded further inculpatory evidence. A cooperating witness is also 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.⁷

iv. Context of the Order Against the World Bank

9. This case likely turns on the admissibility of the recorded inculpatory statements, and the evidence gathered from the search warrants that followed. The accused have indicated they wish to challenge the admissibility of the evidence through a 'sub-facial' assault on the authorizations. To date, the accused have given no indication of intent to challenge

⁴*Ibid.* at Tab 3, at para. 21-22

⁵*Affidavit of Tanit Loraine Gilliam*, appended to this response, at para. 4

⁶*Ibid.* at para. 7

⁷*Ibid.* at para. 9

the facial validity of the authorizations.⁸ In other words, it has not been argued that the information presented to the authorizing judge by the RCMP was deficient on its face.

10. Rather, the accused appear to wish to go behind this information and attack either the practices of the WBG or the information it provided. The materials sought from the WBG are to potentially formulate a *Garofoli* application to challenge the judicial authorizations.⁹ The accused brought an *O'Connor* application for production of records from the WBG in aid of this proposed challenge. No *Garofoli* application has yet been filed.¹⁰

v. State of Disclosure

11. The Crown has disclosed everything that was before the authorizing justices in Canada, and all of the materials in the hands of the RCMP. The accused have also received all material received by the RCMP from the WBG relating to this prosecution, save for anything privileged or clearly irrelevant.

12. This disclosure included, among other items:¹¹

- all emails sent between INT and the RCMP from March 31, 2011 to April 30, 2014;
- 40 Liaison Reports from INT 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 the WBG's investigator, Paul Haynes, and the affiant, Jamie Driscoll;
- all communications between the World Bank and the RCMP from April 4, 2011 to May 15, 2014, that do not contain privileged information; and
- WBG interviews of Muhammad MUSTAFA (the co-operating witness).

⁸ *Ibid.* at para. 14

⁹ *Ibid.* at para. 13-14

¹⁰ *Ibid.* at para. 14

¹¹ *Ibid.* at para. 11

13. 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; à
 - the vetted Part VI affidavits;
 - a forensic audit of the digital evidence seized from SNC-Lavalin's offices; and
 - the audio statements given by Badrul Alam and Abdul Basit and the co-accused who provided statements on arrest.¹²

vi. Scope of the Order Made Against the World Bank

14. Nordheimer J. ordered the WBG to disclose its investigative file into suspected corruption by SNC-Lavalin regarding the Padma Bridge Project, including but not limited to:
- all notes memoranda, correspondence and reports received or sent by INT investigator Paul Haynes;
 - all source documents from the "tipsters" sent to INT whether or not it was shared with the RCMP;
 - all communications between INT and the tipsters;
 - any other investigative materials relevant to the investigation in the possession of other WBG officials.
15. The Order also left it open to the accused to establish the relevance of documentation related to settlements or agreements made between the WBG and third parties as a result

¹² *Ibid.* at para. 12

of the investigation and communications between WBG and representatives of SNC, the Bangladeshi government and the RCMP or Crown that relate to the case.

vii. Importance to Other Prosecutions

16. There is currently another related prosecution underway in Quebec. The Quebec case does not involve cooperation with an international organization but does involve cooperation from a foreign country, Switzerland. The present case is the first to reach pre-trial motions.¹³

* * *

¹³ *Ibid.* at para. 22

PART II – QUESTIONS IN ISSUE AND POSITION OF THE RESPONDENT

17. The Crown respondent would define the core issue in this appeal as follows:

Did the trial judge err in making a third-party disclosure order against an immune international organization?

18. This main question breaks down into four sub-issues, which correspond to what the Crown respondent alleges are the trial judge's errors:

1. Does information sharing between an international organization and the RCMP relating to offences under Canadian law constitute a waiver of immunity?
 - o The Crown's position is that it does not.
2. Do international organizations bear an onus to demonstrate that a proposed incursion into their immunity will negatively impact their operations on a case-by-case basis?
 - o The Crown's position is that immune bodies bear no such burden or onus, unless their immunity is a limited one.
3. Does a burden/benefit analysis apply to waivers of treaty-based immunity?
 - o The Crown's position is that the burden/benefit analysis has no place in the determination of international immunities.
4. Does the right to full answer and defence require an abrogation of immunity in the context of a *Garofoli* challenge to the admissibility of evidence?
 - o The Crown's position is that granting an *O'Connor* Order against an immune international body to further a speculative search for grounds to exclude evidence is not mandated by the right to a full answer and defence or by any other *Charter* right.

PART III – STATEMENT OF ARGUMENT

I. The Ruling Below is Wrong and Raises Issues of National Importance

19. The ruling contains errors in principle which render it wrong in law. Specifically, the trial judge:
- i. conflated the WBG’s cooperation with Canadian law enforcement with a waiver of immunity;
 - ii. reversed the onus on waiver of immunity;
 - iii. applied an inapt “burden/benefit” test; and
 - iv. failed to contextually analyze the contents of the right to full answer and defence.
- i. Cooperation with Domestic Police in not a Waiver of Immunity
20. The core error in this case is treating the WBG’s report to Canadian police of an offence against the laws of Canada in relation to one of its projects as an act of waiver of its own immunity.¹⁴
21. As a matter of law, the fact that the WBG is both obligated by its formational documents to make such a report, and granted broad immunity by the very same instrument,¹⁵ suggests that cooperation and immunity were designed to co-exist rather than cancel one another out.
22. The very reason the WBG must cooperate with domestic law enforcement is that it is immune from domestic legal process, and therefore, lacks any mechanism of legal enforcement.
23. It is improper to turn the very constituent characteristic of the WBG which requires that it act only as a responsible global citizen and report crime to the relevant authorities into a deemed act of waiver of its immunity.

¹⁴ Reasons for Judgment, Application Record, Tab 2B, at para. 35

¹⁵ *Bretton Woods and Related Agreements Act*, R.S.C., 1985, c. B-7, s. 2 and Schedule I, art. IX

24. Also, it is an error to import, as the trial judge did, concepts of waiver attaching to *privileges* to the context of *immunity*. The former protects information, and can therefore be waived by a selective release of information. An immunity, on the other hand, protects an entity from being subject to Court orders and process as explained by Justice Watt in his textbook on evidence:

The right of government to withhold information from disclosure and forensic scrutiny is generally designated “public interest immunity”. It reflects the triumph of public interest in non-disclosure over the contrary interest. It is aptly termed “immunity”, rather than “privilege”. Its successful assertion also bars secondary evidence. It does *not* belong to any private party or witness. Waiver of it, as in the case of a traditional privilege, does *not* occur.¹⁶

25. There is no logical or principled reason, therefore, why the sharing of information (which would potentially waive any privilege attaching to that information), would amount to an agreement to be bound by the court processes of a domestic state.
26. The trial judge erred by drastically diminishing the value and scope of immunities by treating them as functionally akin to privileges. This error has application to every claim of immunity, almost all of which engage Canada’s obligations of international comity. Therefore, a correction by this Court is a matter of national importance.

ii. Reversal of the Onus on Immunity

27. The holder of immunity does not have to justify its invocation.¹⁷ It persists until the party attacking it succeeds in setting it aside. Specifically, the immune party does not have to show how a piercing of that immunity would: “unduly interfere with their operations”.¹⁸ That, however, was the question the trial judge asked himself in reaching his conclusion:

No harm would therefore, appear to be done to the World Bank Group or to their investigations by a finding that the World Bank Group is subject to the requirements of our criminal process in these circumstances.¹⁹

¹⁶ *Watt’s Manual of Criminal Evidence* §15.05.

¹⁷ *Ibid.*

¹⁸ Reasons for Judgment, Record, Tab 2B, para. 39

¹⁹ Reasons for Judgment, Record, Tab 2B, para. 40

28. This reasoning is based on a misapplication of this Court’s decision in *Amaratunga*.²⁰ In that case, this Court was considering the pseudo-immunities of the Northwest Atlantic Fisheries Organization [“NAFO”]. Unlike the absolute immunity provided to the WBG in the *Bretton-Woods Agreement*, NAFO’s enabling documents provided immunity only “to such extent as may be required for the performance of its functions.”²¹
29. The NAFO language expressly required the Canadian courts to perform a functional balancing of the immunity at stake and the impact of enforcement on the organization. This test has no application to the unqualified immunity granted to the WBG. The trial judge’s importation of this inapplicable standard both reversed the onus on waiver of immunity and, more importantly, created a precedent for Canadian domestic courts asking whether piercing the immunity ‘really matters’ when considering making orders against international organizations.
30. This legal error has potential impact on all domestic proceedings involving immune entities, and correcting it is, in and of itself, an issue of sufficient legal importance to warrant leave in this case.

iii. Lack of any Contextual Analysis

31. The right to full answer and defence is context-sensitive.²² In this case, the context is particularly unique: the internal files of the WBG are sought not to prove innocence, not to impugn witnesses at trial, not to undermine the work of the police investigators, but rather to audit the performance and integrity of an international organization that possesses blanket treaty-based immunity.
32. This Court re-iterated the unique nature and importance of international organizations in *Amaratunga*:

[1] International organizations are active and necessary actors on the international stage. Although they are subjects of international law, they have to operate on the territories of sovereign states with political and

²⁰ *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 R.C.S. 866

²¹ *Amaratunga* at para. 34

²² *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 361-62; *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 93; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110 at para. 30; see also *R. v. Ahmed*, [2012] O.J. No. 6643 at para. 29

legal systems of their own. ... In this regard, some form of immunity from legal process in domestic courts is critical, and commonly granted.

....

[29] Such an organization must operate on the territory of a foreign state and through individuals who have nationality and is therefore vulnerable to interference, since it possesses neither territory nor a population of its own. ... 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.

[45] It bears repeating at this point that immunity is essential to the efficient functioning of international organizations. Without immunity, an international organization would be vulnerable to intrusions into its operations and agenda by the host state and that state's courts. [Emphasis added]

33. The trial judge erred in not considering whether this special context should attract a lesser standard of disclosure. Rather, continuing with his reasoning equating the WBG with the prosecution, the trial judge ordered a level of disclosure that would normally only be enforced against the investigating police force in a regular domestic case.
34. Indeed, by way of comparison, in the extradition context, the Court has clearly ruled that the person being extradited is not ordinarily entitled to disclosure of the requesting state's prosecution brief, irrespective of how helpful it may be on the extradition hearing.²³ This is the law notwithstanding that the requesting state is expressly a party to the proceeding.²⁴ Here, *Stinchcome*-level disclosure was ordered against an immune international organization that is not a party to the litigation.
35. The implications of this error are potential widespread and profound. Applying the trial judge's reasoning, one might well seek a similar open-door disclosure order against a foreign intelligence agency that advised Canada of an impending attack on Canadian soil leading to a domestic investigation and prosecution, or against Interpol for tipping Canadian authorities about the presence of a fugitive. This can seriously impair cooperation of foreign with Canadian law enforcement, and potentially disable Canadian

²³ *USA v. Dynar*, [1997] 2 S.C.R. 462 at para. 127ff; *USA v. Kwok*, 2001 SCC 18 [2001] 1 S.C.R. 532

²⁴ *USA v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587 at para. 35

courts from acting upon domestic investigation resulting from international information sharing. While advantageous for transnational criminals, this result could adversely affect public safety and the repute of the administration of justice in Canada.

iv. Misuse of the “Burden/Benefit” Analysis

36. In the context of this case, the application of a “burden/benefit” test for waiver of immunity is inappropriate. The WBG is not even a complainant in this case, much less a party. The trial judge, however, equated it to a prosecuting state agent. This is most obvious in the concluding sentence of his reasons on the benefit/burden issue:

Just as the Crown can withdraw from a prosecution rather than reveal the identity of a confidential informant, there is nothing that prevents the World Bank Group from taking a similar course.²⁵

37. The WBG is not the Crown. The prosecution in this case does not belong to it and was not instigated on its behalf. The *Corruption of Foreign Public Officials Act* is domestic Canadian legislation. It is not enforced for the benefit of the WBG. It is enforced for the benefit of Canada’s place in the international community, and to protect scarce financial resources, destined for developing nations, from the grasp of corrupt officials and their bribing by Canadian corporations or their officers.
38. The trial judge’s approach misconstrues the role of the WBG and undermines the purposes of the *FCPOA*. These errors have a state-level impact that warrant this Court’s intervention.

v. The Proposed Appeal has Real Significance

39. The real victims of the crime in this case are the people in Bangladesh, whose lives and economic prospects the Padma bridge would have materially improved. Those responsible for the collapse of this project through corruption have wrought harm on a significant international scale. Canada’s ability to hold them responsible and participate in the global effort to combat the plague of corruption in international development is very much on the line.

²⁵ Reasons for Judgment, Application Record, Tab 2B, at para. 42

40. Lastly, this case is merely the first in a series of prosecutions against individuals and corporations under the *Corruption of Foreign Public Officials Act*. The issues of access to the private documents of many international organizations will arise in those cases, and resolution of the issues presented in this case will provide needed clarity and efficiency in all of those prosecutions.

vi. Conclusion on the Merits and Importance of the Appeal

41. Beyond the errors and impacts outlined above, the Crown adopts and agrees with the WBG's submissions regarding the public importance of this appeal.

II. An Interlocutory Appeal is Appropriate

42. An interlocutory appeal is appropriate in this case. First, the issues at stake on the proposed appeal are too important to pass without appellate scrutiny. This prosecution may end in unforeseen ways which leave no right of appeal to review this interlocutory ruling. The interests of justice would not be served by that outcome.

43. Second, the issues raised on the proposed appeal may be dispositive of this case. Much like an attempt to unmask a confidential informer, the impugned Order piercing the Word Bank's immunity may effectively end the prosecution if allowed to stand. Conversely, since the facial sufficiency of the affidavits underlying the wiretap authorizations does not appear to be at issue, the accused' hopes for excluding that evidence rests on their finding some as-of-yet unidentified issue in the WBG's papers. If the WBG's immunity is upheld, the accused's attack on the admissibility of this damning evidence loses its force. In the Crown's view, therefore, this case likely turns on the resolution of the issues raised by this leave application. Definitive resolution of the immunity claim will, in fact, move this prosecution to ultimate finality faster.

44. Therefore, it makes practical sense in this case to resolve the immunity issue as quickly and decisively as possible. As noted above, the outcome of this case will have a direct impact on numerous other prosecutions presently at earlier stage. Resolution of these issues will likely save time and resources on all of those trials. For these reasons, an

interlocutory appeal on the discrete issue raised by this case is appropriate and in the interests of justice.

III. Expedited Leave and Hearing

45. This leave application, and an appeal if permitted, will inevitably delay the ongoing trial. Therefore, the Crown requests that this Court consider this leave application on an expedited basis, and set the earliest feasible hearing date if leave is granted. The state of the procedure in the instant prosecution is detailed in the affidavit of Tanit Loraine Gilliam, appended to this memorandum of argument.

* * *

PART IV – COSTS

46. The Crown does not seek costs, and should not have costs awarded against it, as is the ordinary rule in criminal matters. In particular, if this Court does grant leave and order costs against the respondents, as requested by the WBG, it should not do so as against the Crown, as the Crown alone asserted the WBG's immunities in the court below.

PART V – ORDER SOUGHT

47. The Crown respondent requests that the application for leave to appeal be expedited, leave granted, and the appeal heard on an expedited basis, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Toronto, this day of March, 2015.

Nicholas E. Devlin

Andrew Wiese

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

PART VI – TABLE OF AUTHORITIES

AUTHORITY	PARAGRAPH
<i>Amaratunga v. Northwest Atlantic Fisheries Organization</i> , 2013 SCC 66, [2013] 3 R.C.S. 866	28, 32
<i>R. v. Ahmad</i> , 2011 SCC 6, [2011] 1 S.C.R. 110	31
<i>R. v. Ahmed</i> , [2012] O.J. No. 6643	31
<i>R. v. Lyons</i> , [1987] 2 S.C.R. 309	31
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<i>USA v. Cobb</i> , 2001 SCC 19, [2001] 1 S.C.R. 587	34
<i>USA v. Dynar</i> , [1997] 2 S.C.R. 462	34
<i>USA v. Kwok</i> , 2001 SCC 18, [2001] 1 S.C.R. 532	34
Watt, The Honourable Mr. Justice David, <i>Watt’s Manual of Criminal Evidence</i> , 2012 Thomson Reuters Canada Limited	24

PART VII – LEGISLATION

Bretton Woods and Related Agreements Act, R.S.C., 1985, c. B-7, s. 2 and Schedule I, art. IX

<p>2. The Agreements for an International Monetary Fund, an International Bank for Reconstruction and Development, an International Development Association and an International Finance Corporation and the Convention establishing the Multilateral Investment Guarantee Agency, in this Act referred to as “the Agreements”, set out in Schedules I to V, respectively, are hereby approved.</p>	<p>2. Sont approuvés les accords relatifs au Fonds monétaire international, à la Banque internationale pour la reconstruction et le développement, à l’Association internationale de développement, à la Société financière internationale et à la Convention portant création de l’Agence multilatérale de garantie des investissements reproduits aux cinq annexes et ci-après appelés les « accords ».</p>
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Article IX

Status, Immunities, and Privileges

Section 1. Purposes of Article

To enable the Fund to fulfill the functions with which it is entrusted, the status, immunities, and privileges set forth in this Article shall be accorded to the Fund in the territories of each member.

Section 2. Status of the Fund

The Fund shall possess full juridical personality, and in particular, the capacity:

- (i) to contract;
- (ii) to acquire and dispose of immovable and movable property; and
- (iii) to institute legal proceedings.

Section 3. Immunity from judicial process

The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.

Section 4. Immunity from other action

Property and assets of the Fund, 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 Fund shall be inviolable.

Section 6. Freedom of assets from restrictions

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

Section 7. Privilege for communications

The official communications of the Fund shall be accorded by members the same treatment as the official communications of other members.

Section 8. Immunities and privileges of officers and employees

All Governors, Executive Directors, Alternates, members of committees, representatives appointed under Article XII, Section 3(j), advisors of any of the foregoing persons, officers, and employees of the Fund:

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

(ii) not being local nationals, shall be granted the same immunities from immigration restrictions, alien registration requirements, and national service obligations and the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members; and

(iii) shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials, and employees of comparable rank of other members.

Section 9. Immunities from taxation

(a) The fund, its assets, property, income, and its operations and transactions authorized by this Agreement shall be immune from all taxation and from all customs duties. The Fund shall also be immune from liability for the collection or payment of any tax or duty.

(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Fund to Executive Directors, Alternates, officers, or employees of the Fund who are not local citizens, local subjects, or other local nationals.

(c) No taxation of any kind shall be levied on any obligation or security issued by the Fund, including any dividend or interest thereon, by whomsoever held:

(i) which discriminates against such obligation or security solely because of its origin; or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Fund.

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 Fund of the detailed action which it has taken.

Article IX

Statut, immunités et privilèges

Section 1. Objet du présent article

En vue de permettre au Fonds de s'acquitter des fonctions qui lui sont confiées, le statut juridique, les immunités et privilèges définis dans le présent article lui seront accordés sur les territoires de chaque membre.

Section 2. Statut juridique du Fonds

Le Fonds jouira de la pleine personnalité juridique et en particulier de la capacité :

- i) de contracter;
- ii) d'acquérir des biens meubles et immeubles et d'en disposer; et
- iii) d'ester en justice.

Section 3. Immunité de juridiction

Le Fonds, ses biens et ses avoirs, où qu'ils se trouvent et quels qu'en soient les détenteurs, jouiront de l'immunité de juridiction sous tous ses aspects sauf dans la mesure où il y renoncera expressément en vue d'une procédure déterminée ou en vertu d'un contrat.

Section 4. Autres immunités

Les biens et les avoirs du Fonds, où qu'ils se trouvent et quels qu'en soient les détenteurs, ne pourront faire l'objet de perquisitions, réquisitions, confiscations, expropriations, ou de toute autre forme de saisie de la part du pouvoir exécutif ou législatif.

Section 5. Inviolabilité des archives

Les archives du Fonds seront inviolables.

Section 6. Exemption de restrictions

Dans la mesure nécessaire à l'exercice des activités prévues aux présents Statuts, les biens et avoirs du Fonds seront exempts de restrictions, réglementations, contrôles et moratoires de toute nature.

Section 7. Privilège en matière de communications

Les communications officielles du Fonds seront traitées par chaque membre de la même manière que les communications officielles des autres membres.

Section 8. Immunités et privilèges des fonctionnaires et employés

Les gouverneurs, les administrateurs, les suppléants, les membres des comités, les représentants désignés conformément à la section 3, paragraphe j), de l'article XII, les conseillers des personnes précitées, les fonctionnaires et employés du Fonds :

i) ne pourront faire l'objet de poursuites en raison des actes accomplis par eux dans l'exercice officiel de leurs fonctions, sauf au cas où le Fonds renoncerait à cette immunité;

ii) quand ils ne seront pas ressortissants de l'État où ils exercent leurs fonctions, ils bénéficieront des mêmes immunités à l'égard des restrictions relatives à l'immigration, de l'enregistrement des étrangers et des obligations militaires, et, en matière de restrictions de change, des mêmes avantages que ceux accordés par les membres aux représentants, fonctionnaires et employés des autres membres jouissant d'un statut équivalent; et

iii) bénéficieront, en matière de facilités de voyage, du même traitement que celui qui est accordé par les membres aux représentants, fonctionnaires et employés des autres membres jouissant d'un statut équivalent.

Section 9. Immunités fiscales

a) Le Fonds, ses avoirs, biens, revenus, ainsi que ses opérations et transactions autorisées par les présents Statuts, seront exonérés de tous impôts et de tous droits de douane. Le Fonds sera

également exempté de toute obligation relative au recouvrement ou au paiement d'un impôt ou droit quelconque.

b) Aucun impôt ne sera perçu sur les traitements et émoluments versés par le Fonds aux administrateurs, suppléants, fonctionnaires ou employés du Fonds, qui ne sont pas citoyens, sujets ou ressortissants du pays où ils exercent leurs fonctions.

c) Aucun impôt d'une nature quelconque ne sera perçu sur des obligations ou titres émis par le Fonds, ni sur les dividendes et intérêts y afférents, quel que soit le détenteur de ces titres :

i) si cet impôt présente, à l'égard de ces obligations ou titres, un caractère discriminatoire exclusivement fondé sur leur origine; ou

ii) si un tel impôt a pour seul fondement juridique le lieu ou la monnaie d'émission, le lieu ou la monnaie de règlement prévu ou effectif, ou la situation territoriale d'un bureau ou d'une agence du Fonds.

Section 10. Application du présent article

Chaque membre prendra toutes dispositions utiles sur ses propres territoires pour rendre effectifs et incorporer à sa propre législation les principes énoncés dans le présent article, et fournira au Fonds un compte rendu détaillé des mesures qu'il aura prises.

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

BETWEEN:

WORLD BANK GROUP

APPLICANT
(Applicant)

– and –

KEVIN WALLACE, ZULFIQUAR BHUIYAN, RAMESH SHAH
and MOHAMMAD ISMAIL

RESPONDENTS
(Accused)

– and –

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

RESPONDENT
(Prosecutor)

AFFIDAVIT OF TANIT LORAIN GILLIAM
ON THE LEAVE APPLICATION AND THE MOTION TO EXPEDITE
(Rule 47)

I, Tanit Loraine GILLIAM, of the City of Toronto, province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am Senior Counsel employed with the Public Prosecution Service of Canada. I am one of the counsel assigned to the case of *R. v. Kevin Wallace et. al.* (dubbed “Project Ascendant”) and as such have personal knowledge of the matters hereinafter deposed. Where my knowledge is based on information and belief, I have so stated.

i. Background to the Case

2. Project Ascendant was an investigation involving the alleged bribery of Bangladesh government officials by employees of SNC-Lavalin, a Canadian engineering company. The investigation was conducted by the Royal Canadian Mounted Police force's International Anti-Corruption Unit (RCMP). Evidence was gathered through Part VI authorizations, search warrants and witness statements.
3. Four individuals have been charged under s. 3(1) of the *Corruption of Foreign Public Officials Act (CFPOA)*. They are alleged to have arranged to bribe various officials in order to secure the company's bid for a \$50 million consultancy project to oversee the construction of the Padma Bridge Project in Bangladesh. The Padma Project was to be financed by the World Bank Group (WBG).
4. The WBG began an investigation into the Padma Project in 2011 after receiving information about irregularities in the bidding process. The WBG received information from four tipsters. The WBG referred the case to the RCMP and four wiretap authorizations were eventually sought, the first being granted on May 24, 2011. The affiant was Sgt. Jamie Driscoll of the RCMP.
5. The RCMP affidavits were based on information shared by the WBG, through Paul Haynes, an investigator working in the WBG's integrity unit (INT). Paul Haynes resides in Washington, DC, USA.
6. Mohammad Ismail and Ramesh Shah were initially charged on April 11, 2012 and were committed for trial following a two week preliminary hearing in April 2013. Kevin Wallace and Zulfiqar Bhuiyan were charged in September 2013 and were joined with Mohammad Ismail and Ramesh Shah through a direct indictment. A copy of the Indictment is attached as Exhibit "A" to this Affidavit.

ii. Nature of the Case

7. The case relies in large part on the intercepted communications of Badrul Alam, Abdul Basit, Zulfiqar Bhuiyan, Mohammad Ismail, Ramesh Shah, Kevin Wallace, together and with individuals in Bangladesh, which the Crown alleges capture the accused, in both coded and direct language, discussing the bribery associated with the Padma Project.
8. The Crown's case also relies on emails, electronic and hard copies of documents obtained during the execution of search warrants; documents provided by the WBG's integrity unit relating to the bids for the consultancy project to oversee the construction of the bridge; and the statements of a cooperating witness who attended a key meeting where the bribe was allegedly finalized.

9. Muhammad Mustafa, the cooperating witness, testified at the preliminary inquiry of Mohammad Ismail and Ramesh Shah. He is expected to testify at the trial. The Crown anticipates Muhammad Mustafa will identify individuals as foreign public officials and place Kevin Wallace at a key meeting in Bangladesh with government officials who were on the list of bribe recipients. He can also provide voice identification evidence.

iii. The State of Disclosure

10. The Crown has disclosed everything that was before the authorizing justices in Canada, and all of the materials in the hands of the RCMP. The accused have also received all the material received by the RCMP from the WBG relating to this prosecution; subject to editing for privileges (such as to protect the confidential informants) and relevance per *Stinchombe*.
11. The disclosure provided to the accused has included (among other items):
 - all emails sent between INT and the RCMP from March 31, 2011 to April 30, 2014;
 - 40 Liaison Reports from INT 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 the WBG's investigator, Paul Haynes, and the affiant, Jamie Driscoll;
 - all communications between the World Bank and the RCMP from April 4, 2011 to May 15, 2014, that do not contain privileged information; and
 - WBG interviews of Muhammad Mustafa (the co-operating witness).
12. The Crown has also disclosed to the defence 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 Part VI affidavits; a forensic audit of the digital evidence seized from SNC-Lavalin's offices; and the audio statements given by Badrul Alam, Abdul Basit and the co-accused who provided statements on arrest.

iv. The Defence Application to Challenge the Interceptions and Searches

13. Although dates have been set for a *Garofoli* application, the accused have not yet filed a Notice of Application to challenge the wiretaps. In their *O'Connor* Notice of Application, the accused state the WBG records are “likely relevant” to important issues at trial, the competence of witnesses to testify, and to issues relevant to a motion challenging the sub-facial validity to various Part VI wiretap authorizations to intercept private communications and s. 487 search warrants. A copy of the Notice of Application dated September 15, 2014 is attached as Exhibit “B” to this Affidavit.
14. To date, the defence has not raised any potential challenges to the facial validity of the Part VI authorizations or search warrants.
15. If the Part VI evidence were to be excluded, the prospects of conviction would be significantly diminished, bringing the viability of the prosecution into question.

v. Procedural History and Future Dates

16. The case remains in the pre-trial application stage in Superior Court in Toronto.
17. An application regarding the jurisdiction of the court over Abul Hasan Chowdhury was heard April 7, 2014. A multi-faceted disclosure application was heard on August 12-15, 2014 and September 24-25, 2014. Stage 1 of the *O'Connor* application was heard on December 8-9, 2014, in conjunction with the motion regarding the scope of the World Bank’s immunities and privileges. Justice Nordheimer released his ruling on December 24, 2014 ordering the WBG to produce materials to the Court. Stage 2 of the *O'Connor* application, which was scheduled for January 30, 2015, was delayed.
18. As of January 30, 2015, the WBG had not complied with Justice Nordheimer’s order. On this date, Justice Nordheimer ruled that as the Crown intended to rely on the evidence provided by the WBG in the authorizations, and the defence was not prepared to proceed without the WBG records, the dates set aside for the application to seek leave to cross-examine the affiant – March 26-27, 2015 - should be vacated. The parties are returning to Court on March 26, 2015 however to provide Justice Nordheimer with a status update.
19. The *Garofoli* application dates that have been set for May 18, 2015 for 12 days were retained and Justice Nordheimer asked all counsel to set aside an additional two weeks in June, should they be needed.

**SUPERIOR COURT OF JUSTICE
(Toronto Region)**

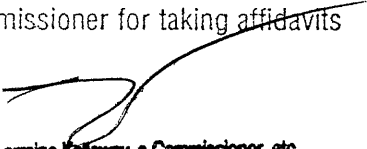
BETWEEN:

This is Exhibit "A" mentioned and referred to in the affidavit of

TANIT GILLIAM

Sworn before me this 18th day of
MARCH A.D. 2015

A Commissioner for taking affidavits



Julianne Lorraine Kelloway, a Commissioner, etc.,
Province of Ontario, for the Government of Canada.
Office of the Director of Public Prosecutions.
Expires August 11, 2016.

HER MAJESTY THE QUEEN

Respondent

and

KEVIN WALLACE

Applicant

**NOTICE OF APPLICATION
RE: THIRD PARTY RECORDS**

TAKE NOTICE that an Application will be brought on behalf of the Applicant, Kevin Wallace, on October 14, 2014 at 10:00 in the forenoon or as soon thereafter as this Application may be heard, at the Superior Court of Justice, 361 University Avenue, Toronto, Ontario, for an Order seeking production of particular materials in the possession and control of the World Bank, as particularized in this Application.

THE GROUNDS FOR THE APPLICATION ARE:

A. Generally:

1. The Applicant seeks the production of records in the possession of the World Bank, pursuant to *R. v. O'Connor*, [1995] 4 S.C.R. 411 and *R. v. McNeil*, 2009 SCC 3;
2. The records sought are "likely relevant" to important issues at trial, the competence of witnesses to testify, and to issues relevant to a motion challenging the sub-facial validity to various

Part VI wiretap applications to intercept private communications and s. 487 search warrants, pursuant to *R. v. Garofoli*, [1990] 2 S.C.R. 1421;

3. Failing to order production of the records would constitute an unreasonable limit on the ability of the Applicant to make full answer and defence.
4. The Applicant does not seek material that is properly the subject of privilege.

B. Specifically:

5. In June 2010, the World Bank began receiving information respecting potential corruption in relation to SNC Lavalin Inc.'s ("SNC") bid to acquire a construction supervision contract related to the planned construction of the Padma Bridge in Bangladesh;
6. The World Bank was a primary lender in relation to the Padma Bridge project;
7. The Applicant, Kevin Wallace ("Wallace" or the "Applicant"), was a Vice-President and General Manager of SNC at all material times;
8. The World Bank Group's Integrity Vice Presidency ("INT") conducted its own investigation into the potential corruption;
9. In March of 2011, the World Bank began voluntarily providing information regarding its investigation, including information that it received from four alleged tipsters¹ to the Royal Canadian Mounted Police ("RCMP");
10. Thereafter, the World Bank cooperated extensively with the RCMP by attending meetings, participating in conference calls, and by providing documents and other information to the RCMP;
11. Following the conclusion of the RCMP investigation and the laying of criminal charges against the defendants Ramesh Shah and Mohammad Ismail in February 2012, the World Bank

¹ The Applicant has concerns that one or more of the four tipsters may be the same person.

cooperated with the Crown regarding relevant court proceedings in Canada, including accepting service of a subpoena to testify in those proceedings; and

12. On September 17, 2014, the Applicant was charged with an offence contrary to s. 3(1)(b) of the *Corruption of Foreign Public Officials Act*. In October 2013, the Applicant was joined to the current proceedings by Direct Indictment.

C. The Records Sought from the World Bank:

13. The Applicant seeks the production of the following records (the "Records"):

1. The Investigative File of the World Bank pertaining to its investigation into suspected corruption by SNC regarding the Padma Bridge Project and its cooperation with the RCMP and Crown regarding the Canadian investigation and legal proceedings pertaining to the same subject matter, including but not limited to:

- a. All notes, memoranda, emails, correspondence and reports received or sent by Mr. Paul Haynes of INT regarding the investigation;
- b. All source documents from all so-called "tipsters" sent to INT, whether or not such information was shared with the RCMP as part of INT's cooperation with the RCMP investigation into the Padma Bridge Project;
- c. All emails and other communications between INT and the tipsters;
- d. Any sanctions or settlements entered into by the World Bank with any third parties as a result of the investigation;
- e. 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; and

- f. All communications between INT, representatives of SNC, representatives of the Bangladeshi government, members the RCMP and/or the Crown regarding the investigation, the related RCMP investigation and/or the charges or proceedings commenced by the Crown before the Courts in Ontario.

IN SUPPORT OF THE APPLICATION THE APPLICANT RELIES UPON THE FOLLOWING:

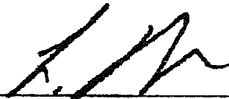
1. The *Indictment*;
2. The Affidavit of Sharon Tagapulot, sworn September 11, 2014;
3. The Applicant's Factum and Authorities; and
4. Such further and other materials as counsel may advise and this Honourable Court may permit.

THE RELIEF SOUGHT IS:

1. An Order granting production to the Applicant of the Records.

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION IN ACCORDANCE WITH RULE 5 THROUGH: Scott K. Fenton, Fenton, Smith Barristers, at 235 King Street East, 2nd Floor, M5A 1J9, Fax: (416) 955-1237 (sfenton@fentonlaw.ca).

DATED at Toronto, Ontario this 15th day of September, 2014.


**Scott K. Fenton
& Lynda E. Morgan**
Fenton, Smith Barristers
235 King Street East, 2nd Floor
Toronto, Ontario
M5A 1J9

Tel: (416) 955-4551
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Counsel for the Applicant Wallace

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Addario Law Group
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Toronto, ON M5T 1X3
- AND TO: Kathryn Wells
559 College Street
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Toronto, Ontario M6G 1A9
- AND TO: Court Clerk
361 University Avenue
Toronto, Ontario M5G 1Y1
- AND TO: Trial Co-ordinator
361 University Avenue
Toronto, Ontario M5G 1Y1

**SUPERIOR COURT OF JUSTICE
(Toronto Region)**

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

KEVIN WALLACE

Applicant

**NOTICE OF APPLICATION
RE: THIRD PARTY RECORDS**

**Scott K. Fenton
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Counsel for the Applicant

1-229917
July

SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

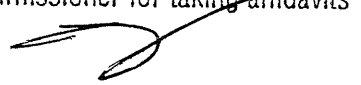
CANADA
PROVINCE OF ONTARIO
PROVINCE DE L'ONTARIO
TORONTO REGION
RÉGION DE TORONTO

This is Exhibit "B" mentioned and referred to in the affidavit of
TAUFI GILLIAM
Sworn before me this 18th day of
MARCH A.D. 2015
A Commissioner for taking affidavits

HER MAJESTY THE QUEEN
SA MAJESTÉ LA REINE

AGAINST
CONTRE

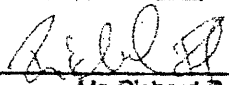
MOHAMMAD ISMAIL, RAMESH SHAH, KEVIN WALLACE, ZULFIQUAR ALI KHAN and ABUL HASAN CHOWDHURY


Julianne Lorraine Kelloway, a Commissioner, etc.,
Province of Ontario, for the Government of Canada,
Office of the Director of Public Prosecutions.
Expires August 11, 2016.

THE ACCUSED STAND(S) CHARGED:
L'ACCUSATION SUIVANTE EST PORTÉE:

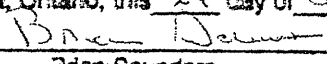
1. That Mohammad ISMAIL , Ramesh SHAH, Kevin WALLACE, Zulfiqar Ali BHUIYAN and Abul Hasan CHOWDHURY between 1st day of December in the year 2009 and the 1st day of September in the year 2011, in Oakville and elsewhere in the Province of Ontario, and in Bangladesh, did, in order to obtain or retain an advantage in the course of business of SNC Lavalin Group Inc, directly or indirectly offer, or agree to give or offer a reward, advantage or benefit of any kind to foreign public officials of the Republic of Bangladesh or to any person for the benefit of foreign public officials of the Republic of Bangladesh to induce the officials to use their position to influence acts or decisions of the Republic of Bangladesh for which the officials perform duties or functions, in particular the awarding of a contract for the supervision and consultancy services, for the construction of the PADMA multipurpose Bridge, and did thereby commit an indictable offence contrary to paragraph 3 (1) b) of the *Corruption of Foreign Officials Act*.

DATED at MONTREAL, Quebec, this 28th day of October, 2013
FAIT à MONTRÉAL, Québec, ce 28^{ième} jour de octobre, 2013



Me Richard Roy
Senior General Counsel, Public Prosecution of Canada
Avocat Général Principal, Service des poursuites pénales du Canada

I hereby consent to the preferment of this indictment pursuant to section 577 of the *Criminal Code*. Dated at Ottawa, Ontario, this 24 day of April, 2013.



Brian Saunders,
Director of Public Prosecutions and Deputy Attorney General of Canada
Directeur des poursuites pénales et Sous-procureur général du Canada