File No. 36315

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, ZULIFQUAR BHUIYAN, RAMESH SHAH, MOHAMMAD ISMAIL and HER MAJESTY THE QUEEN RIGHT OF CANADA

Respondents

RESPONSE OF THE RESPONDENT ZULIFQUAR BHUIYAN

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MEMORANDUM OF LAW OF THE RESPONDENT ZULFIQUAR BHUIYAN

PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Respondent Bhuiyan adopts the facts as set out in the Respondent Wallace's *Memorandum of Law*.

PART II – QUESTIONS IN ISSUE

2. The Respondent Bhuiyan disagrees that the leave application raises any of the issues cited by the World Bank Group (WBG) at paragraphs 53-60 of its *Memorandum of Law*. This case is about an unhappy litigant seeking another kick at the can, after opting out of the hearing below. Regardless of whether leave is granted, WBG is likely to do whatever it wants. It will only comply with a court order that suits it.

PART III - ARGUMENT

3. The Respondent Bhuiyan adopts the arguments set out in the Respondent Wallace's *Memorandum of Law* and makes the following additional arguments.

A. WBG's Past Conduct Suggests It Will Continue to Disregard Court Orders

4. WBG's conduct shows it believes it controls the nature and extent of its participation in Canadian court proceedings. WBG has stated Canadian courts have no authority over it.[1] As noted by Justice Nordheimer, WBG has shown considerable disrespect to Canada's judiciary throughout this case.[2]

5. WBG selectively disclosed hundreds of documents from its investigative file to the RCMP and offered its investigators to testify under *subpoena* for the Crown.[3] Christopher Kim testified for the Crown at the disclosure motion and Paul Haynes agreed with the RCMP to give evidence for the Crown at the preliminary inquiry of the Respondents Shah and Ismail.[4] The Respondents subsequently sought to call these WBG investigators as witnesses. WBG initially accepted service of a *subpoena duces tecum* for Kim.[5] It then waited until Kim left the jurisdiction before purporting to retroactively repudiate service.[6] When the Respondent Wallace served Haynes with a *subpoena duces tecum*, he refused to appear in court. *At WBG's request*, counsel for the Respondents served the application materials on WBG, in both paper and electronic form, all without prejudice to WBG attending and asserting its immunities. After receiving the record,

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[1] Email dated October 1, 2014 from Boxall to Fenton, Tab 9 of Respondent Wallace's materials; Letter from Boxall to Wells dated April 22, 2014, Tab 10 of Respondent Wallace's materials.
[2] *Reasons for Decision* of Nordheimer J. dated December 23, 2014, para. 26, Application for Leave to Appeal, Tab 2B, p. 17.
[3] *Reasons for Decision* of Nordheimer J. dated December 23, 2014, paras. 34-35, Application for Leave to Appeal, Tab 2B, pp. 19-20.
[4] *Reasons for Decision* of Nordheimer J. dated December 23, 2014, para. 35, Application for Leave to Appeal, Tab 2B, p. 20.
[5] Letter from Boxall to Fenton dated September 8, 2014, Tab 5 of Respondent Wallace's materials.
[6] Letter from Boxall to Fenton dated September 8, 2014, Tab 5 of Respondent Wallace's materials; Letter dated September 22, 2014 sent by WBG to Fenton on September 26, 2014, Tab 7 of Respondent Wallace's materials.

counsel for WBG informed the Respondents that no one from WBG would be showing up to the application, because "[i]mmunity would not be immunity if persons granted immunity had to attend and argue their status."[7] Counsel for WBG has stated as clearly as possible that WBG and its investigative staff will not comply with Canadian court orders:[8]

> [M]y client will not respond to a subpoena or an order to produce documents were such an Order made. Furthermore, Mr. Haynes will not attend for cross-examination and/or to produce documents pursuant to a court order if such a court order were made.

6. After refusing to show up to the hearing, WBG now seeks a remedy from the judicial system, despite its belief that the system has no power to compel it to do anything. It asks this Court to disregard Justice Nordheimer's ruling on the basis of a single untested affidavit filed as part of its leave application. It makes no promise to honour an adverse ruling. It is a "cafeteria litigant", picking and choosing the items it likes from the remedy buffet. This Court should not endorse WBG's litigation tactics. There is no indication WBG would show the Supreme Court any more respect than it showed the Ontario Superior Court. If this Court were to grant leave, rule in WBG's favour on the merits, and send the matter back to Justice Nordheimer for a rehearing, there is no guarantee WBG would show up to the rehearing. If this Court were to rule against WBG and uphold Justice Nordheimer's ruling, there is likewise no guarantee WBG would produce the records sought. This Court should not entertain appeals from parties who flout orders from lower courts; to do so endorses the prior disrespect and gives that party an opportunity to show further disrespect to the Supreme Court.

7. This case additionally raises the unusual spectre of the Crown prosecution service supporting a third party litigant that has treated Canadian court orders with disdain. Instead of

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[7] Email dated October 1, 2014 from Boxall to Fenton, Tab 9 of Respondent Wallace's materials.
[8] Letter from Boxall to Wells dated April 22, 2014, Tab 10 of Respondent Wallace's materials.

distancing itself from WBG and its tactics, the Crown associated itself with WBG's argument in the trial court and now asks this Court to permit the latter to continue its "pick and choose" approach to Canadian court processes. This Court should not reward either WBG or the Crown prosecution service for such conduct.

B. Granting Leave Would Create a Dangerous Precedent

8. If this Court grants leave, it risks creating a dangerous precedent. Any litigant who asserts an immunity or privilege will unsurprisingly prefer to do what WBG did here: refuse to participate at the hearing, but still reserve the right to appeal adverse decisions. Permitting such a litigation tactic adds an unnecessary step to proceedings, wasting valuable court resources. Worse, it encourages disrespect for Canada's trial courts by telegraphing that their rulings and orders are not binding.

9. WBG's circular understanding of immunity is legally wrong. WBG suggests that organizations with immunity do not have to show up to argue for their immunity (query: does WBG suggest that only organizations *without* immunity have to show up to argue immunity?). Contrary to WBG's suggestion, other international organizations *do* show up to argue their immunity. In *Amaratunga v. Northwest Atlantic Fisheries Organization*, the trial judge stated:[9]

> It should first be recognized that the burden falls upon the defendant NAFO to establish that it is entitled to immunity from legal process in this case. NAFO is not entitled to any presumption in favour of immunity, which is common ground between both parties and their respective experts. (Emphasis added.)

[9] *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2010 NSSC 346 at para. 42.

Even Sovereign states, which enjoy broader immunity than WBG, show up to argue their immunity.[10] There is no precedent for WBG's litigation strategy in this case, and this Court should not allow WBG to create such a precedent.

C. WBG Asks this Court to Make a Fact-Specific Decision on the Basis of a Shifting Factual Record

1. The Proposed Issues on this Appeal are Primarily Factual

10. The existence and extent of WBG's Integrity Vice President's (INT's) immunity is a question of fact. This case has little precedential value. The immunities of some of WBG's entities are set out in the schedules to the *Bretton Woods and Related Agreements Act* (the *BWRAA*).[11] INT, an independent body that reports directly to the head of WBG, is not referenced in any of the schedules to the *BWRAA*. Therefore, consideration of potential INT immunities requires a factual finding that INT is part of one of the legal entities referred to in the *BWRAA*. Although WBG refused to provide any evidence on which such a factual finding could be made, Justice Nordheimer, *to WBG's benefit*, proceeded on the basis that INT is part of the International Bank for Reconstruction and Development (IBRD), stating:[12]

> [T]here is some evidence before me, albeit very indirect, that the World Bank Group considers the INT part of the International Bank for Reconstruction and Development.
>
> My decision to proceed in this fashion, however, is not to be taken as countenancing this situation where a court is placed in the position of attempting to evaluate the applicability of a claim of immunity by a party, who chooses not to attend before the court and provide assistance, in terms of evidence and/or submissions, in support of that claim. (Emphasis added.)

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[10] See e.g. *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269.
[11] *Bretton Woods and Related Agreements Act*, R.S.C., 1985, c. B-7.
[12] *Reasons for Decision* of Nordheimer J. dated December 23, 2014, paras. 25-26, Application for Leave to Appeal, Tab 2B, p. 17.

Schedule II to the BWRAA governs IBRD's immunities:

> **Section 1. Purpose 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 3. Position of the Bank with regard to judicial process**
>
> Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.
>
> ...
>
> **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.)

11. As is apparent, IBRD does not enjoy blanket immunity from judicial process. To determine whether immunity applies in a given case, a court must consider *inter alia* whether a particular grant of immunity is necessary to "enable the Bank to fulfill the functions with which it is entrusted", whether "final judgment" has been delivered against the Bank, whether an employee is acting in his or her official capacity, and whether IBRD has waived any immunity it would otherwise have. The *BWRAA* requires that some waivers of immunity be explicit (those made by the International Monetary Fund),[13] but does not require that waivers of immunity by IBRD be explicit.

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[13] *Bretton Woods and Related Agreements Act, supra*, Schedule I, Article IX.

12. The issues on the proposed appeal would therefore be primarily factual. Is INT a part of IBRD? Would IBRD be unable to fulfill its functions if INT were not granted immunity in this case or similar cases? Has INT waived, by its conduct, any immunity it would otherwise enjoy? These questions are all either purely factual or are applications of the settled principles of law articulated by this Court in *Amaratunga*[14] and in *R. v. Gruenke*[15] to the facts. This case has little precedential value as a result.

2. WBG Asks this Court to Make Factual Inquiries on the Basis of a Shifting Record

13. WBG asks this Court to make factual inquiries on the basis of a shifting, untestable, and therefore unreliable, record. After refusing to give evidence in front of Justice Nordheimer, WBG now says his Honour got the facts wrong. WBG files a single affidavit sworn by Galina Mikhlin-Oliver, makes no reference to any of the facts before Justice Nordheimer, and invites this Court to grant leave on the basis of this new evidence. Such an approach should be rejected.

14. Mikhlin-Oliver's affidavit contains both incorrect and inadmissible material. As noted by the Respondent Wallace, various statements in Mikhlin-Oliver's affidavit are false.[16] She has also appended several documents to her affidavit, which should properly be the subjects of separate

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[14] *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66.

[15] *R. v. Gruenke* [1991], 3 S.C.R. 263 establishes the principle that the party seeking to establish case-by-case immunity bears the burden of establishing it.

[16] For example, in para. 31 of the Affidavit of Galina Mikhlin-Oliver, it is suggested that the tipsters had a "*prior history of providing accurate information*". This is not true. None of the four tipsters who provided information to WBG had any prior history of providing information to WBG or the RCMP. In para. 27, it is stated that WBG "*will not reveal the identities of individuals or entities that cooperate with [WBG]*". This is not true. WBG disclosed the identity of tipster #4 to the RCMP. In para. 27, it is stated that WBG "*believes that the informants [tipsters] might face serious economic and perhaps physical retribution if their identities were to be discovered*". This is also not true. Only Tipster #2 claimed to fear retribution if it became known that he cooperated with the authorities. In fact not only was Tipster #4's identity known and disclosed to the RCMP, Tipster #4 was given no assurance of confidentiality by either WBG or the RCMP because of concerns relating to his credibility.

affidavits sworn by different deponents who have knowledge of the matters therein.[17] Finally, Mikhlin-Oliver opines in her affidavit on Canadian law and on the ultimate issue to be decided.[18]

15. It would be useless and difficult to test the new evidence. The Respondent Bhuiyan has not sought leave to cross-examine or strike Mikhlin-Oliver's affidavit only because to do so would further delay his trial. With respect to an application for leave to cross-examine, there is no guarantee WBG would now permit its witnesses to attend, given that its counsel previously stated that WBG will not comply with any court order to attend for cross-examination.[19] Further, it is not clear that Mikhlin-Oliver is likely to have knowledge of the relevant facts of this case. Given this, the Court should decline to rely on the new information in WBGs affidavit.

D. The Proposed Appeal Would Waste Court Dates and Would Further Delay the Respondents' Trial

16. The Respondents' criminal prosecution is ongoing. Justice Nordheimer scheduled a *Pires* wiretap application to cross-examine wiretap affiants and sub-affiants for March 27, 2015. This date has now been lost. Two weeks of Court time from May 18 to June 2, 2015 are set aside for a *Garofoli* hearing. If leave is granted, these dates, which were booked over ten months in advance, will also be lost. Granting leave in this case will substantially delay the Respondents' trial, jeopardizing their speedy trial rights. These delays were wholly avoidable. WBG was served with the Respondents' application record without prejudice to its right to assert its immunities. It could have come to the third party records application and made all the arguments it now makes. This

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[17] Mikhlin-Oliver attaches various documents which she appears to have had no role in authoring, containing various factual and legal assertions, such as, for example, a letter from Stephen Zimermann, Director of Operations at INT, to Richard Roy, General Counsel for the Public Prosecution Service of Canada, dated November 26, 2014 at Tab G.
[18] For example, in para. 17 of her Affidavit, Mikhlin-Oliver states that the *Corruption of Foreign Public Officials Act* was enacted to satisfy Canada's treaty obligations. She then goes on to explain the manner in which a corruption offence is defined in the Act. In para. 28 she states that any disclosure requirements would prevent INT from fulfilling its investigative mandate, the very question the Court must answer under the test set out in *Amaratunga, supra.*
[19] Letter from Boxall to Wells dated April 22, 2014, Tab 10 of Respondent Wallace's materials.

Court should not give away blocks of court time, which were set aside for the Respondents' trial. This would reward a litigant that has participated selectively in the process, has shown disrespect to the Court, and has given no indication that it would comply with future orders made against it.

17. Moreover, because of the factual nature of the inquiry and the shifting record, it's unlikely that this Court would be able to decide the substantive issues in this case. The only remedy available to WBG at this stage would be a full rehearing of the third party records application before Justice Nordheimer. A second third party records application could take months – and WBG might again decline to show up.

PART IV – SUBMISSIONS CONCERNING COSTS

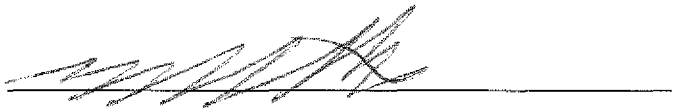
18. The Respondent Bhuiyan seeks an Order that WBG pay his costs.

PART V – ORDER REQUESTED

19. The Respondent Bhuiyan requests that leave to appeal be denied.

Dated: March 24, 2015

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:



Frank Addario and Megan Savard
for the Respondent Zulfiquar Bhuiyan

PART VI – AUTHORITIES

PART VII – STATUTORY PROVISIONS

Bretton Woods and Related Agreements Act, R.S.C., 1985, c. B-7, Schedule II, Article VII

Section 1. ***Purposes of 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 3. ***Position of the Bank with regard to judicial process***
Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

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;
(ii) not being local nationals, shall be accorded 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;
(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 1. ***Objet du présent article***
Pour mettre la Banque en mesure de remplir les fonctions qui lui sont confiées, le statut, les immunités et privilèges définis dans le présent article seront accordés à la Banque dans les territoires de chaque État membre.

Section 3. ***Situation de la Banque en ce qui concerne les actions en justice***
Il ne pourra être intenté d'action en justice contre la Banque que devant un tribunal dont la compétence s'étend aux territoires d'un État membre dans lesquels elle possède un bureau ou dans lesquels elle a nommé un agent aux fins de recevoir les assignations ou significations d'ordre judiciaire ou dans lesquels elle a émis ou garanti des valeurs. Toutefois, aucune action en justice ne pourra être intentée par des États membres ou par des personnes agissant pour le compte desdits États ou faisant valoir des droits qu'ils tiennent de ceux-ci. Les biens et avoirs de la Banque, en quelque lieu qu'ils se trouvent et quels qu'en soient les détenteurs, bénéficieront d'une immunité en ce qui concerne toute forme de saisie-exécution, saisie-arrêt ou mesure d'exécution tant qu'une décision non susceptible de recours n'aura pas été rendue contre la Banque.

Section 8. ***Immunités et privilèges des fonctionnaires et employés***
Tous les gouverneurs, administrateurs, suppléants, fonctionnaires et employés de la Banque :
i) ne pourront faire l'objet de poursuites à raison des actes accomplis par eux dans l'exercice de leurs fonctions, sauf lorsque la Banque aura levé cette immunité;
ii) jouiront, s'ils ne sont pas des ressortissants de l'État où ils exercent leurs fonctions, des mêmes immunités, en matière de mesures restrictives relatives à l'immigration, de formalités d'enregistrement des étrangers et d'obligations de service national, ainsi que des mêmes facilités, en ce qui concerne les restrictions de change, que celles que les États membres accordent aux représentants, fonctionnaires et employés de rang comparable des autres États membres;
iii) jouiront, pour leurs déplacements, des mêmes facilités que celles que les États membres accordent aux représentants, fonctionnaires et employés de rang comparable d'autres États membres.