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

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MEMORANDUM OF LAW OF THE RESPONDENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

1. This is the Memorandum of Law of the Respondent Kevin Wallace ("Wallace"). The other Respondents Zulfiquar Bhuiyan, Ramesh Shah and Mohammad Ismail adopt the Respondent Wallace's position. Wallace also adopts the submissions contained in the Memorandum of Law filed by the Respondent Bhuiyan.

2. The World Bank Group ("WBG") seeks leave to appeal the third party records Order made by Nordheimer J. of the Superior Court of Ontario pursuant to *R. v. O'Connor,* [1995] 4 S.C.R. 411 and *R. v. McNeil* 2009 SCC 3 (the "Order").

3. The Order was made on full notice to the WBG and the Crown in the course of a pre-trial motion during the Respondents' ongoing trial. That trial is scheduled to continue, subject to the WBG complying with the Order, on May 19, 2015.

4. Having strategically decided not to attend before the Superior Court of Justice to contest the Order or file any evidence in support of its position, the WBG now seeks to disrupt the rest of the trial by seeking to appeal the Order.

5. Due to the WBG's conduct in bringing this leave application, as fully endorsed by the Crown, the continuing trial dates will undoubtedly need to be adjourned for a substantial period of time. If leave to appeal is granted, the delay in the resumption of the trial could exceed one year. All the while, the Respondents' rights under section 11(b) of the *Charter of Rights and Freedoms* are substantially in issue.

6. The Respondent Wallace submits that there are no issues of public importance raised in the WBG's application for leave. Contrary to the WBG's exaggerated claim that "*the crux of the issue is whether Canadian courts may take jurisdiction over WBG and make compulsion orders [...] to produce internal documents and to testify*"[1], the Order was a fact-specific determination made against the WBG based on a voluminous evidentiary record filed with the Court.

7. Contrary to the WBG's equally overstated claim that "*the decision is of immense importance not only to the entities that comprise the [WBG], but to all international organizations around the world of which Canada is a member*"[2], the decision by Nordheimer J. was a carefully considered, discretionary application of the well-established principles from *Amaratuga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, in which this Court held that any allegation of "undue interference" in the functions of an international organization "must be determined on a case-by-case basis".

> *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013] S.C.J. No. 66, at para. 53, Response, Tab A

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[1] *Applicant's Memorandum of Argument*, para 5.
[2] *Applicant's Memorandum of Argument*, para 9.

8. Further, if the decision of Nordheimer J. was of such "*immense importance*" to the WBG and "*to all international organizations around the world of which Canada is a member*", query why the WBG elected not to show up?[3]

9. As stated by Nordheimer J. at paragraph 26:

> My decision to proceed in this fashion [allowing the Crown to argue the WBG's immunities], 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**. I note that in *Amaratunga* the international organization did appear to assert its claim of immunity. ... **Putting aside the measure of disrespect that the World Bank Group demonstrates to this court by absenting themselves from this application**, it remains the fact that it becomes more difficult to fully understand and assess the claim for immunity, in these circumstances, given the dearth of evidence from the World Bank Group on the various issues that would be helpful to the analysis.
>
> *Reasons for Decision* of Nordheimer J. dated December 23, 2014, para. 26 [emphasis added], Application for Leave to Appeal, Tab 2B, p. 17

10. Undaunted by the "disrespect" shown to the Court below, the WBG fails to describe *any* of the evidence from the extensive record filed before Nordheimer J. and, instead, relies on "fresh evidence" in the form of an untested affidavit offered by the WBG on this application. The Respondent respectfully submits that this Court should not rely upon the affidavit filed by the WBG.

11. Undaunted by the delay and disruption caused to the Respondents' trial, the Crown wraps its arms around the WBG's position, fails to even comment on the "disrespect" the WBG showed to the Respondents and the Court below, and argues that leave should be granted.

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[3] Similarly, at para. 12 of its *Memorandum of Argument*, the WBG submits, "*The importance of the issues raised affect the fundamental core of the business of the [WBG]*". If so, why did they not attend before Nordheimer J. and file evidence to substantiate this claim? If it was not important then, why is it important now?

12. In its Memorandum of Law, the Crown also fails to recite any of the relevant evidence that was before the Court below, and instead, relies on an untested affidavit of one of the prosecutors involved in the prosecution of the Respondents. The Respondent submits that this Court should not rely upon the affidavit filed by the Crown.

13. Further, the Crown exaggerates the importance of the *Ruling* of Nordheimer J. (fact-specific as it was) by inaccurately stating, at paragraph 2 of its Memorandum of Law, *"[m]uch like an attempt to unmask a confidential informant, the impugned Order piercing the [WBG's] immunity is likely dispositive of the case"*. In fact, to the Crown's knowledge, Nordheimer J. has made it clear that no information in the possession of the WBG that is *properly* protected by informant privilege will ever be produced to the Respondents, an issue that will be canvassed with the full input of the Crown at the second stage of the *O'Connor* process (assuming the WBG complies with the Order).

R. v. Wallace, 2014 ONSC 531, Response, Tab B

14. Put starkly, the WBG's position as supported by the Crown, is that this Court should:

a. overlook that the WBG's officers were served with *subpoenas* but failed without lawful excuse to attend the hearing below;
b. overlook that the WBG intentionally declined to participate in the third party records motion seeking orders against it despite being served with the entire motion record;
c. reward the WBG for its conduct by granting it leave to appeal mid-way through the Respondents' trial; and
d. finally, accept that if leave to appeal is not granted (or any appeal that is permitted is ultimately dismissed) and the Order is upheld, the WBG will continue to refuse to comply.

15. In any event of the foregoing deficiencies, the WBG and the Crown have failed to identify any aspect of the decision by Nordheimer J. that either "unduly interferes" with the WBG's proper functions or limits the capacity of the WBG or any other international organization, in any future case, from asserting their immunities pursuant to *Amaratunga*.

16. Finally, neither the WBG nor the Crown has established any basis to argue that the decision of Nordheimer J. was wrong.

A. The Trial Proceedings

17. The Respondent Wallace and his co-accused are charged on an *Indictment* filed in the Superior Court of Ontario with one count of bribing a foreign public official contrary to s. 3(1) of the *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34. The Respondents Shah and Ismail were charged in February 2012. The Respondents Wallace and Bhuiyan were directly indicted on September 17, 2013.

18. On August 12, 2014, the Respondents' trial commenced before Nordheimer J. sitting as a Case Management Judge pursuant to s. 551.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. Subject to the WBG complying with the Order from which this leave application is taken, the trial is scheduled to resume on May 19, 2015 with a further pre-trial motion pursuant to ss. 8 and 24(2) of the *Charter* related to the admissibility of intercepted private communications.

B. Disclosure Motion

19. On August 12, 2014, the Respondent Wallace brought a motion seeking further disclosure from the Crown pursuant to *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. The other Respondents joined. On October 10, 2014, Nordheimer J. released his decision ordering the Crown to provide additional disclosure.

R. v. Wallace, 2014 ONSC 531, Response, Tab B

20. In his *Reasons* on the disclosure motion, Nordheimer J. noted the following unusual features of the RCMP's investigation based on the evidence filed before him:

a. In the spring of 2011, the WBG gathered information in its investigative file from four tipsters,[4] two of whom were anonymous, who alleged wrongdoing

[4] It is a contested issue in the proceedings whether Tipsters 1, 2 and/or 3 may in fact be the same person.

by SNC Lavalin Inc. ("SNC") in bidding for a consulting services contract regarding a bridge construction project in Bangladesh;[5]

b. the WBG voluntarily produced *some* but *not all* of the tipster information in its investigative file to the RCMP, upon which the RCMP relied exclusively in seeking, as a first resort, a Part VI Order for the interception of private communications;[6]

c. prior to seeking the wiretap order, the RCMP only sought to speak to *one* of the WBG's four tipsters (Tipster #2), whose identity the WBG refused to disclose to the RCMP;[7]

d. the RCMP never sought to contact any of the other three tipsters to try to corroborate the reliability of their information;

e. all of the information from the four tipsters was indirect information (hearsay) based on unknown sources, none of whom the RCMP sought to contact to confirm whether the information was reliable;

f. contrary to this Court's comments in *Woods v. Schaeffer*, 2013 SCC 71, and in violation of the RCMP's own operational policy manual, the RCMP's lead investigator and affiant of the Part VI Orders kept *no notes or any other record of his dealings* with investigators at the WBG or his telephone dealings with Tipster #2 in obtaining the information used to support the grounds for Part VI Orders;

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[5] In paragraph 31 of the Affidavit of Galina Mikhlin-Oliver, filed by the WBG, 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 the WBG had *any prior history* of providing information to the WBG or the RCMP. None had any reputation or track record for past truthfulness, credibility or reliability. Tipster #2 admitted previous involvement in bribery to the RCMP (but never previously reported it).

[6] In paragraph 27 of the Affidavit of Galina Mikhlin-Oliver, it is stated that the WBG "*will not reveal the identities of individuals or entities that cooperate with [the WBG]*". This is also not true. The WBG disclosed the identity of Tipster #4 to the RCMP.

[7] In paragraph 27 of the Affidavit of Galina Mikhlin-Oliver, it is stated that the 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. There was no information or evidence for the WBG or RCMP to believe that such was the case for Tipsters #1, #3 or #4. In fact, not only was Tipster #4's identity known and disclosed to the RCMP, Tipster #4 was explicitly told that he was given no assurance of confidentiality by either the WBG or the RCMP because of concerns relating to his credibility.

g. the RCMP's lead investigator and affiant of the Part VI Orders also "*lost all of his emails*" made during the investigation as a result of a "computer malfunction"; and

h. in his sworn affidavit filed in support of the first Part VI Order the RCMP's lead investigator and Part VI affiant improperly characterized two of the four tipsters as confidential informants when in fact they did not qualify as confidential informants.

R. v. Wallace, 2014 ONSC 531, Response, Tab B

21. Notably, included in the materials filed by the Crown on the disclosure motion was the sworn affidavit of a WBG investigator named Christopher Kim ("Kim"). As Kim was unavailable for cross-examination during the August dates set for the disclosure motion, the cross-examination of Kim was adjourned at the Crown's request to September 24, 2014.

C. Third Party Records Motion

22. On September 15, 2014, the Respondent Wallace filed in the Superior Court of Justice a third party records motion as against the WBG pursuant to *O'Connor* and *McNeil*. The Respondent Wallace filed a multi-volume evidentiary record supporting his position. The other Respondents joined.

23. The Respondents sought an order requiring the WBG to produce its "investigative file" regarding: (a) the WBG's investigation of alleged corruption by SNC and other parties in relation to the Padma bridge project, and (b) the WBG's cooperation with the RCMP and Crown in Canada regarding the RCMP's investigation and prosecution of the same subject matter.[8] Notably, this was the *very same* WBG "investigative file" from which *all* of the tipster-related information came that was provided to the RCMP and, in turn, used to obtain the Part VI orders for the interception of private communications.

[8] A list of the specific documents that the Respondents sought from the WBG's investigative file (from which all of the WBG's prior disclosures to the RCMP originated), is attached as Appendix "A" to the *Reasons for Decision* of Nordheimer J. dated December 23, 2014, Application for Leave, Tab 2B, p. 29.

24. The Respondents submitted that the contents of the WBG's investigative file were "likely relevant" to the proceedings on the *Indictment*, including a challenge pursuant to *R. v. Debot*, [1989] 2 S.C.R. 1140, *R. v. Garofoli*, [1990] 2 S.C.R. 421 and *R. v. Pires; R. v. Lising*, 2005 SCC 66 to the facial and sub-facial validity of the affidavits submitted by the RCMP in support of the Part VI wiretap orders.[9]

25. Among the factors relied upon by the Respondents were the points summarized in paragraph 20 above, including particularly: (a) the fact that the first Part VI Order obtained by the RCMP was based *exclusively* on the uncorroborated hearsay provided by the tipsters to the WBG, and (b) the fact that the lead investigator and affiant of the Part VI Orders kept *no notes or other written record* of his interactions with the WBG or Tipster #2, and "lost" all his investigative emails. In *Reasons* delivered on December 23, 2014, Nordheimer J. agreed with the Respondents' position.

> *Reasons for Decision* of Nordheimer J. dated December 23, 2014, Application for Leave to Appeal, Tab 2B

26. Notably, all of the Respondents' motion materials, in both paper and electronic form (at the WBG's specific request), were served upon counsel for the WBG prior to the hearing of the motion, all without prejudice to the WBG attending before Nordheimer J. to assert its immunities and privileges.

> Letters to Counsel dated September 15, 2014, Response Tab 1; October 8, 2014, Response, Tab 2; and November 28, 2014, Response, Tab 3

D. Subpoenas Served on WBG re Third Party Records Motion

27. On September 2, 2014, the Respondent Wallace's counsel wrote to counsel for the WBG, as a courtesy, to advise that the Respondent intended to serve Kim with a *subpoena duces tecum* in respect of the third party records motion when Kim attended in Toronto to testify for the Crown at the continuation of disclosure motion.

> Letter from Fenton to Boxall dated September 2, 2014, Response, Tab 4

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[9] The Crown has misconstrued that the Respondents will only challenge the sub-facial validity of the Part VI Orders.

28. Counsel for the WBG responded by letter dated September 8, 2014, stating that he had "received instructions to accept the *subpoena* on Mr. Kim's behalf subject to the understanding that it is accepted without prejudice to the World Bank's privileges and immunities". The Respondents agreed.

Letter from Boxall to Fenton dated September 8, 2014, Response, Tab 5

29. On Wednesday, September 24, 2014, Kim attended at the Superior Court of Justice in Toronto and was cross-examined by the Respondent Wallace's counsel. At no time did Kim or counsel for the WBG notify any of the Respondents or the Court that, having accepted service of the *subpoena* for Kim respecting the forthcoming third party records motion, the WBG intended to ignore the *subpoena*.

Transcript of Cross-Examination of Kim, September 24, 2014, Response, Tab 6

30. Then, on Friday, September 26, 2014, two days *after* Kim's cross-examination, the WBG sent a letter to the Respondent's counsel dated Monday, September 22, 2014, (*i.e.*: written two days *before* Kim's appearance in Toronto) repudiating the *subpoena* for which the WBG's counsel had accepted service on Kim's behalf, stating that the WBG "could not be compelled by any *subpoena*".

Letter dated September 22, 2014 sent by WBG to Fenton on September 26, 2014, Response, Tab 7

31. On Monday, September 29, 2014, the Respondent's counsel objected to the WBG's repudiation of the *subpoena* it had previously accepted for Kim, writing, in part:

> The World Bank could have opted to refuse to accept service, but instead, it agreed to admit service. **The appropriate venue for the World Bank to make any legal argument respecting the World Bank's purported immunities is in the Superior Court of Justice before [*sic*: the] Honourable Justice Nordheimer.**

Letter dated September 29, 2014 from Fenton to Boxall [emphasis added], Response, Tab 8

32. On October 1, 2014, counsel for the WBG wrote to the Respondent's counsel seeking to justify the conduct of the WBG, stating, in part:

> **Immunity would not be immunity if persons granted immunity had to attend and argue their status.**

> **Therefore my clients will not be filing materials nor attending on October 14** [the date then set for third party records motion].
>
> Email dated October 1, 2014 from Boxall to Fenton [emphasis added], Response, Tab 9

E. Proceedings on the Third Party Records Motion

33. The third party records motion was heard in the Superior Court of Justice on December 8 and 9, 2014. The Crown opposed the relief sought by the Respondents and was permitted to argue in support the WBG's purported immunities.

34. No one from the WBG bothered to attend.

PART II – QUESTIONS IN ISSUE

35. The Respondent disagrees that the leave application raises any of the issues cited by the WBG at paragraphs 53-60 of its *Memorandum of Law*.

PART III - ARGUMENT

36. The third party records Order made by Nordheimer J. was a fact-based determination based on the principles established in *Amaratunga* as applied to the evidentiary record before the Court, in circumstances where the WBG was duly served with all of the motion materials and strategically declined to participate. Having been placed on full notice prior to the third party records motion as to the specific relief sought by the Respondents, the complete evidentiary record established by the Respondents for seeking that relief, and copies of the detailed *Facta* and Authorities relied upon as the legal basis for the Respondents' requests, the WBG took a calculated risk that, in deciding not to appear, the Order would not go against it. Clearly, they miscalculated.

37. Further, having accepted service of a *subpoena duces tecum* respecting its investigator Kim, the WBG then disrespected the Respondents and the Courts of Ontario by ignoring the *subpoena* and failing to appear.

38. As a sophisticated organization with substantial financial and institutional resources, the WBG cannot credibly state that it did not understand what was at stake in the motion before Nordheimer J. If the matter was not deemed sufficiently important to warrant the WBG's participation in the Superior Court of Justice, it rings hollow for the WBG to claim, *only after losing*, that the issues are of such "public importance" as to warrant an appeal to this Court. The position of the WBG is contradicted by its own prior behavior.

39. In any event, the WBG has failed to identify any aspect of the decision by Nordheimer J. that either "unduly interferes" with its proper functions or would limit the capacity of the WBG, or any other international organization, in *any* future case, from asserting their immunities pursuant to the principles set out in *Amaratunga.* In those future cases, however, it would generally be expected that, just like the international organization in *Amaratunga*, it would respect the processes of the administration of justice by entering an appearance before the Court to file evidence and/or make submissions in support of those purported immunities.

40. Finally, the WBG has not established any basis to argue that the decision of Nordheimer J. was wrong.

A. Decision by Nordheimer J. Raises No Issues of Public Importance

41. The legal framework for Nordheimer J.'s analysis rested in four legal precepts, none of which are credibly put in issue in the WBG's leave application.

i. Onus is on the Party Asserting Case-by-Case Privilege

42. Pursuant to *R. v. Gruenke*, [1991] 3 S.C.R. 263 and *Canada (House of Commons) v. Vaid*, 2005 SCC 30, where there is an assertion of a "case-by-case" privilege or immunity, the onus to establish that the privilege or immunity applies rests on the party asserting it. The position taken in correspondence by counsel to the WBG that, "*Immunity would not be immunity if persons granted immunity had to attend and argue their status*" is, with great respect, erroneous.

Email dated October 1, 2014 from Boxall to Fenton, Response, Tab 9
R. v. Gruenke, [1991] 3 S.C.R. 263 at para. 43, Response, Tab C
Canada (House of Commons) v. Vaid, 2005 SCC 30 at para. 29, Response, Tab D

ii. International Organization Immunity is Case-by-Case

43. In *Amaratunga* this Court confirmed that, for international organizations, unlike sovereign states, the prevailing view is that "no rule of customary international law confers immunity on them" (para 29). Since international organizations "vary greatly in size, sphere of activities and powers" and their immunities depend on the specific treaties and laws that establish them, the determination of what is necessary to the performance of their essential functions "must be determined on a case-by-case basis".

Amaratunga, at para. 53

44. *Amaratunga* also confirmed that international organizations do not enjoy absolute immunity from legal process in Canada. Rather, immunity is dependent on the language of the applicable legislation affording particular immunities and/or privileges. In *Amaratunga*, the relevant legislation afforded the international organization privileges and immunities "to such extent as may be required for the performance of its functions". In determining the scope of immunity, this Court held that the statutory language required an examination as to whether the proposed immunity was necessary to prevent undue interference with the performance of the organization's function, and that, "[w]hat is necessary for the performance of [the international organization's] functions, or what constitutes undue interference, must be determined on a case-by-case basis."

Amaratunga, at para. 53

45. Analogous language respecting *functional immunity* was imported into Schedule II, Article VII of the *Bretton Woods Act,* upon which the WBG relies in support of its purported immunities, which sets out the purpose of the statutory immunities and privileges as follows at s. 1:

> **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. [Emphasis added.]

Bretton Woods and Related Agreements Act, R.S.C., 1985, c. B-7, Schedule II, Article VII, Section 1, Response, Tab K

46. The determination of whether a particular form of legal action against any international organization is barred by its immunities on the basis that the legal action would cause "undue interference" in the functions of the organization must be assessed on a "case-by-case" basis *and* be determined based on the evidence before the court. As found by Nordheimer J. based on the evidentiary record filed before him, which the WBG intentionally chose not to contest, there was no evidence that an Order of production under *O'Connor* of the "likely relevant" documents from the WBG's investigative file would constitute any undue interference with its operations.

Reasons for Decision of Nordheimer J. dated December 23, 2014, paras. 38-39, Application for Leave to Appeal, Tab 2B, p. 20

iii. Privilege Can Be Waived

47. In circumstances where a privilege or immunity might otherwise apply, a party can waive reliance upon the privilege or immunity expressly or by conduct. For example, waiver of privilege may be established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. Waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus, waiver of privilege as to part of a communication will be held to be waiver as to the entire communication.

S & K Processors Ltd. v. Cambpell Ave. Herring Producers Ltd., [1983] 4 W.W.R. 762, at para. 6, Response, Tab E; *927966 Ontario Ltd. v. Cogenix Develoment Corp.*, [1999] B.C.J. No. 2779 at para. 14, Response, Tab F

48. As stated by Wigmore:

> Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. **He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He**

> **may elect to withhold or to disclose, but after a certain point his election must remain final.**
>
> 8 Wigmore (McNaughton rev., 1961), as quoted in Sopinka, J. *et al, The Law of Evidence in Canada*, 2nd ed (Butterworths: Toronto, 1999) at p. 758 [emphasis added], Response, Tab G; *Reasons for Decision* of Nordheimer J. dated December 23, 2014, para. 29, Application for Leave to Appeal, Tab 2B, p. 18

49. While there is no set rule that waiver of part is *necessarily* waiver of all, in determining whether waiver has taken place, the court should look at all of the circumstances and ask whether the conduct in disclosing part of a privileged communication is likely to mislead the other party or the court, so as to require privilege to be lifted with respect to the whole of the communication. The determination of whether waiver by conduct has occurred is a question of fact.

> *Chapelstone Developments Inc. v. Canada* (2004), 191 C.C.C. (3d) 152; leave to appeal to SCC refused 195 C.C.C. (3d) vi., Response, Tab H

iv. Immunity Can Be Waived

50. Statutory immunity is also subject to waiver by implication. In *Sparling v. Québec (Caisee de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, the Caisee de Dépôt, an agent of the Crown in right of Quebec, sought to rely on section 16 of the *Interpretation Act*[10] to avoid the application of a particular section of the *Canada Business Corporations Act*. This Court confirmed that Crown immunity is not absolute and set out the doctrine of implicit waiver: the Crown cannot accept the benefit of the law without also incurring its burdens.

> *Sparling v. Québec,* paras. 12, 16-18, Response, Tab I; *Reasons for Decision* of Nordheimer J. dated December 23, 2014, para. 30, Application for Leave to Appeal, Tab 2B, p. 18

51. In the application before Nordheimer J., the Court found as a fact that the WBG had chosen to disclose substantial portions of its "investigative file" to the RCMP for the joint benefit of itself and the Crown. Nordheimer J. found that the WBG sought to reap the benefits of the RCMP's investigation as evidenced by, among other things, the WBG's efforts to obtain the fruits of the RCMP's searches through a section 490(15)

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[10] Now section 17.

application and the WBG's efforts to obtain copies of the intercepted communications filed by the Crown at the preliminary inquiry of the Respondents Shah and Ismail. In summary, Nordheimer J. concluded, based on the evidence before him, that the WBG cooperated with the RCMP by disclosing a variety of records from its investigative file as part of the WBG's objective to further its own interests.

> *Reasons for Decision* of Nordheimer J. dated December 23, 2014, paras. 31-32, Application for Leave to Appeal, Tab 2B, pp. 18-19

52. Nordheimer J. also held that the conduct of the WBG was not consistent with an assertion that the contents of its investigative file were "inviolable" or immune from a third party records order. The WBG was hardly a "bystander" to the litigation between the Crown and the Respondents. The evidentiary record before the Superior Court of Justice demonstrated that the WBG had self-selected and disclosed to the RCMP hundreds of documents from its investigative file, which conduct was wholly inconsistent with asserting a claim of immunity over other relevant documents from the very same file.

> *Reasons for Decision* of Nordheimer J. dated December 23, 2014, paras. 34-35, Application for Leave to Appeal, Tab 2B, pp. 19-20

53. Further, a WBG investigator named Paul Haynes ("Haynes"), who also refused to appear at the third party records motion although duly served with a *subpoena duces tecum*, had previously agreed to give evidence *for the Crown* at the preliminary inquiry of the Respondents Shah and Ismail. In that instance, the WBG deputized the RCMP to accept service of Haynes' *subpoena.*[11] Moreover, it was Haynes who leaked substantial parts of the WBG's investigative file to the RCMP, mostly through interactions with the RCMP's lead investigator and affiant (who, as noted, quite unusually maintained *no notes or other independent record of those dealings*).

> *Reasons for Decision* of Nordheimer J. dated December 23, 2014, para. 35, Application for Leave to Appeal, Tab 2B, p. 20

[11] Ultimately, Haynes' evidence became unnecessary and he did not testify.

54. Having addressed all of the correct legal principles, having assessed the conduct of the WBG in assisting the Crown by disgorging select documents from its investigative file to the RCMP and offering its investigators to testify *for the benefit of the Crown* (as Kim did at the disclosure motion), and having concluded that the WBG engaged in cooperative disclosures to the RCMP to secure its own benefits, Nordheimer J. found that the WBG had waived whatever immunities might have otherwise applied to the undisclosed documents sought by the Respondents from the WBG's investigative file.

55. As Justice Nordheimer concluded:

> Consequently, if the analysis from *Sparling* is applied to this situation, the conclusion would follow that, **if the World Bank Group wishes to take the benefits of causing a criminal prosecution to be instituted in a host country, it must accept the burdens of doing so, that is, it must accept that it will be required to comply with the procedural rules, and the attendant obligations, of such a prosecution, including the possible result that third party records will be ordered disclosed.** The conclusion would also be consistent with the general principle that a privilege holder cannot selectively waive the privilege. **I see no reason, in the circumstances of this case, to draw a distinction, in this regard, between a claim of privilege and a claim of immunity. In other words, the World Bank Group cannot choose to provide some of its documents for use in this criminal investigation but then refuse to provide other relevant documents.**
>
> *Reasons for Decision* of Nordheimer J. dated December 23, 2014, para. 36, Application for Leave to Appeal, Tab 2B, p. 20 [emphasis added]

56. Finally, there was no evidence before Nordheimer J. that an Order requiring production of the undisclosed parts of the WBG's investigative file would interfere, let alone "unduly interfere", with the WBG's ability to carry out its functions. Interestingly, even in the affidavit filed by the WBG on this leave application, the WBG provides no evidence, however untested, that the Order unduly interferes with the functions of the WBG. That, of course, is the *very opposite* of what the international organization did in *Amaratunga*.

57. In the Respondent's submission, the Order in this case would no more interfere with the WBG's ability to conduct investigations in the future than post-investigation

disclosure orders under *Stinchcombe* or production orders under *O'Connor* interfere with the proper functioning of police forces. This is especially true of an *O'Connor* application, where the Court has broad powers to supervise and regulate what is ordered produced and to protect third party privacy interests and privileges.

R. v. McNeil, 2009 SCC 3, at paras. 41, 46, Response, Tab J

v. Conclusion

58. In addition to the factors cited above, serious consideration should be given to the balance of harms that are at stake in this leave application. On the one hand, the WBG has shown considerable "disrespect" to the Respondents and the Courts of Ontario. In a word, it does not come to this Honourable Court "with clean hands". It accepted service of a *subpoena*, then repudiated that acceptance, and then its investigators failed to appear in the Superior Court of Justice. It intentionally held back a letter to the Respondents repudiating the *subpoena* for Kim until *after* Kim had cleared the jurisdiction, thereby preventing the Respondents from raising the issue before Nordheimer J. when Kim was before the Court. The Crown, as reflected in its Memorandum of Law, fully endorses this behavior by its principal information source for the Part VI affidavits.

59. Finally, the WBG accepted service of a voluminous motion record prepared at great expense to the Respondent and then failed to appear to argue or file evidence in support of its alleged immunities. Even now, there is no assurance that if this leave application is dismissed (or any appeal that is permitted is ultimately dismissed), the WBG would comply with the Order of the Superior Court. In fact, in the evidence that was before Nordheimer J. on the third party records application, there was a letter written by counsel for the WBG stating that the WBG would not respect any orders made by the Superior Court of Justice:

> I can advise you that my client will not respond to a subpoena or an order to produce documents were such an Order made…

Letter dated April 22, 2014 from Boxall to Wells, Response, Tab 10

60. Importantly, the Crown seems to know that, no matter what happens with this leave application, the WBG will continue to refuse to comply with the Order (*i.e.*: even if this Court were to specifically uphold it). This is because the Crown submits that the Order "*is likely dispositive of the case*" (Memorandum of Law, para 2.). As such the WBG and the Crown ask this Court to grant leave to appeal on the following conditional basis: ***the WBG will only comply with an Order of the Supreme Court of Canada if the WBG wins***.

61. On the other hand, the Respondents are at trial. It is a serious matter and their liberty is at stake. The Respondents filed an extensive motion record, *facta* and authorities in accordance with the rules of practice and procedures mandated under *O'Connor,* including giving full, fair and timely notice to the WBG. In the result, after careful consideration of all of the evidence, the Superior Court of Justice determined that the WBG has documents in its investigative file that are "likely relevant" to issues in the Respondents' trial.

62. The next step in the *O'Connor* process is for the WBG to comply with the Order and turn over the records to Nordheimer J. so that the Court can consider those records after taking into account further submissions of the parties, and determine which of those records, if any, should be produced to the Respondents so that they can make full answer and defence. No harm can come to the WBG's interests in this process and the execution of the Order will in no way interfere, let alone unduly interfere, with the inner workings or functioning of the WBG.

63. At the end of the day, the WBG, a powerful and sophisticated international organization, rolled the dice. It made an informed and voluntary assessment of the risks of attending in the Superior Court of Justice to assert and defend the WBG's purported immunities, but ultimately decided to accept the risk of an adverse result if they failed to attend. Clearly, they made the wrong call.

64. In the Respondent's submission, leave to appeal to this Honourable Court should not be available to rectify an applicant's intentionally poor decision-making. This should be particularly so in circumstances where the effect of granting leave to appeal will to very substantially delay the continuation of an *ongoing* criminal trial in continuous derogation of the Respondents' rights to be tried within a reasonable time.

PART IV – SUBMISSIONS CONCERNING COSTS

65. The Respondent Wallace seeks an Order that the WBG pay his costs.

PART V – ORDER REQUESTED

66. The Respondents request that leave to appeal be denied.

Dated: March 24, 2015.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Scott K. Fenton and Lynda E. Morgan
for Respondent Kevin Wallace

David Cousins
for Respondent Ramesh Shah, adopts and agrees with the Respondent Wallace's position

Kathryn Wells
for Respondent Mohammad Ismail, adopts and agrees with the Respondent Wallace's position

PART VI – AUTHORITIES

1. *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013] S.C.J. No. 66

2. *Regina v. Wallace*, 2014 ONSC 531

3. *Regina v. Gruenke*, [1991] 3 S.C.R. 263

4. *Canada (House of Commons) v. Vaid*, 2005 SCC 30

5. *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] 4 W.W.R. 762

6. *927966 Ontario Ltd. v. Cogenix Develoment Corp.*, [1999] B.C.J. No. 2779

7. 8 Wigmore (McNaughton rev., 1961), as quoted in Sopinka, J. *et al, The Law of Evidence in Canada*, 2nd ed (Butterworths: Toronto, 1999)

8. *Chapelstone Developments Inc. v. Canada* (2004), 191 C.C.C. (3d) 152; leave to appeal to SCC refused 195 C.C.C. (3d) vi

9. *Sparling v. Québec (Caisee de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015

10. *Regina v. McNeil*, 2009 SCC 3

PART VII – STATUTORY PROVISIONS

Bretton Woods and Related Agreements Act, R.S.C., 1985, c. B-7, Schedule II, Article VII, Section 1:

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.