Court File No.: 36315

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

BETWEEN:

WORLD BANK GROUP

Appellant

- AND -

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

Respondents

- AND -

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), TRANSPARENCY INTERNATIONAL CANADA INC. AND TRANSPARENCY INTERNATIONAL E.V., BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, AFRICAN DEVELOPMENT BANK GROUP, ASIAN DEVELOPMENT BANK, INTER-AMERICAN DEVELOPMENT BANK AND NORDIC INVESTMENT BANK

Interveners

FACTUM OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW

1. The British Columbia Civil Liberties Association (the "BCCLA") confines its submissions to the issue of implied waiver of immunity. The question is whether an international organization such as the World Bank Group (the "Bank") — having conducted an investigation that resulted in domestic criminal charges and offered to assist in the domestic criminal prosecution[1] — can place its files beyond the reach of the defence merely by expressly asserting immunity.[2] The BCCLA respectfully submits that the answer is "no". The right to make full answer and defence, protected under both Canadian domestic law and international law, necessitates the recognition of an implied waiver of immunity in certain circumstances.

2. In the court below, the motion judge proceeded on the basis that the investigative arm of the Bank — the Vice Presidency for Integrity (the "INT") — derives its immunity from Article VII of Schedule II to the *Bretton Woods and Related Agreements Act* (the "*Bretton Woods Act*").[3] Schedule II incorporates the Articles of Agreement that govern the International Bank for Reconstruction and Development, which is the entity of the Bank to which the INT apparently belongs.[4] After examining the text of Article VII and the relevant case law, the motion judge concluded that it allows for the Bank's immunity to be waived expressly and impliedly.

3. In support of the motion judge's conclusion, the BCCLA argues that Article VII should be interpreted in its proper international law context, which includes the other international

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[1] *Wallace v. Canada*, 2014 ONSC 7449, at paras. 33-34, 64 (S.C.J.) [Book of Authorities ("BA"), Tab 21]. The World Bank initiated the investigation that led to criminal charges against the accused Respondents under the *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34. The Bank supplied the RCMP with the fruits of its investigation, which represented "virtually all" of the information used to obtain a Part VI authorization to intercept the Respondents' private communications. This evidence led to the criminal charges. The Bank was then prepared to make its investigator, Paul Haynes, available to give evidence at the preliminary hearing; and sought to take the benefit of the results of the RCMP investigation, for its own purposes, by seeking to obtain materials seized pursuant to the search warrants, along with information obtained from the intercepted private communications.

[2] *Ibid.*, at paras. 40, 64-65. The motion judge found that four categories of files were "likely relevant" to the defence's s. 8 *Charter* challenge, particularly because the RCMP affiant had not taken notes of his conversations with World Bank investigators. These files did not include any information that would tend to reveal the identity of two of the World Bank's tipsters, who the court accepted were confidential informants.

[3] R.S.C. 1985, c. B-7.

[4] The Bank is made up of five entities, four of which are governed by Articles of Agreement attached as schedules to the *Bretton Woods Act.* In the court below, there was some uncertainty about whether the Bank's investigative arm — the INT — belongs to any of these four entities. If not, then it is not entitled to any of the immunity provisions set out in the schedules to the *Bretton Woods Act.* The motion judge, however, proceeded on the basis that the INT belongs to the International Bank for Reconstruction and Development, which is governed by Schedule II: *Wallace, supra* at paras. 24-25 (S.C.J.) [BA, Tab 21]. The BCCLA makes its submissions on the same basis.

obligations to which Canada has committed itself. Canada is a party to the *Organization for Economic and Cooperative Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the "OECD Convention")[5] and the *International Covenant on Civil and Political Rights* (the "ICCPR").[6] The OECD Convention is especially relevant because the Bank will most often interact with criminal justice systems in states that are parties to the OECD Convention. Indeed, the Bank is expressly mentioned in the preamble to the OECD Convention as an entity that has "advance[d] international understanding and co-operation in combating bribery of public officials".[7]

4. Collectively, the OECD Convention and the ICCPR recognize that while Canada is required to investigate and prosecute foreign bribery, it must do so in a manner that respects the right of the accused to a fair trial. This encompasses the related rights to disclosure and to make full answer and defence. Under the doctrine of implied waiver, there will come a point at which the Bank becomes so enmeshed in the domestic criminal justice system that it will be treated as having waived its immunity from judicial orders made in the criminal proceedings. This is a fact-sensitive, contextual inquiry driven by an overriding concern for fairness. This type of analysis is necessary to ensure the rights of the accused do not get lost in the drive to prosecute foreign corruption. The two concerns are complementary, not conflicting. Canada cannot investigate and prosecute foreign corruption with any legitimacy unless it also affords the accused a fair trial.

5. The BCCLA accepts the facts as set out in the motion judge's decision and takes no position on disputed facts.

6. In addition, the BCCLA adopts the submissions of the Criminal Lawyers' Association (Ontario) on the availability of remedies under s. 24(1) of the *Charter* in the event that the defence cannot obtain disclosure — either because a production order is not made, or because it is not complied with and cannot be enforced.

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[5] *Organization for Economic and Cooperative Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, S. Treaty Doc. No. 105-43 (1998), 37 I.L.M. 1 (entered into force 15 February 1999) [OECD Convention] [BA, Tab 27].

[6] *International Covenant on Civil and Political Rights*,16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976) [ICCPR] [BA, Tab 25].

[7] OECD Convention, *supra* preamble [BA, Tab 27].

PART II: THE BCCLA'S POSITION ON THE QUESTION IN ISSUE

7. The motion judge correctly concluded the Bank can waive its immunity under Article VII of Schedule II to the *Bretton Woods Act* both expressly and impliedly.

PART III: STATEMENT OF ARGUMENT

8. The Bank is recognized in Canada through the *Bretton Woods Act*. The investigative arm of the Bank, the INT, is apparently governed by Schedule II.[8] Thus, the relevant immunity-conferring provisions are found in Article VII of Schedule II, which includes the following:

> 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 5. Immunity of archives
>
> The archives of the Bank shall be inviolable.
>
> 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;

9. In the court below, the motion judge relied on a number of compelling textual arguments to conclude that Article VII allows for the Bank to waive its immunity impliedly through its conduct. For example, he noted that s. 8 does not limit the concept of waiver to "express" waiver, unlike the immunity-conferring provisions of other international organizations.[9] He also

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[8] See footnote 4, *supra.*

[9] *Wallace, supra* at paras. 45-46 (S.C.J.) [BA, Tab 21]. The treaty provision conferring immunity on the International Monetary Fund states that "[t]he 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" (emphasis added): *Bretton Woods Act,* Schedule 1, Article IX, s. 3. Similarly, the provision regarding the United Nations in *United States v. Chalmers,* 410 F. Supp. 2d 278 stated that the U.N. "shall enjoy immunity from every form of legal process except insofar as it has expressly waived its immunity" (emphasis added): *Wallace, supra* at para. 45 [BA, Tab 21].

held that, to the extent s. 5 provides an independent basis for the Bank's immunity, the approach to waiver of that immunity must be consistent with the approach to waiver in s. 8.[10]

10. The text of the *Bretton Woods Act*, however, is not the only relevant consideration. Because Article VII is a part of an international treaty that has been incorporated into Canadian law through statute, it must be interpreted in accordance with international law principles of interpretation.[11] Article 31 of the *Vienna Convention on the Law of Treaties* sets out a number of interpretative rules that require consideration of matters beyond the text.[12] The most relevant for the BCCLA's position is Article 31(3)(c), which requires the consideration of "any relevant rules of international law applicable in the relations between the parties."[13] In other words, international conventions cannot be interpreted in a vacuum. To the extent possible, they should be interpreted in harmony with other rules of international law.[14]

11. In this case, two international instruments are especially relevant: (a) the OECD Convention; and (b) the ICCPR. Canada is a party to both.

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[10] *Wallace, supra* at para. 53 (S.C.J.) [BA, Tab 21].

[11] Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis, 2008), at 550 ["Sullivan"] [BA, Tab 23].

[12] *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 [BA, Tab 30]. See also, Sullivan, *supra* at 552-553 [BA, Tab 23] and *Febles v. Canada (Citizenship and Immigration)*, [2014] 3 S.C.R. 431, at paras. 11-12 [BA, Tab 5]. As Prof. Sullivan explains, the rules of interpretation in the *Vienna Convention on the Law of Treaties* do not differ dramatically from rules of interpretation in domestic law. The overriding principle of statutory interpretation in domestic law is the modern principle, which requires that a provision be read in its entire context, in its grammatical and ordinary sense, harmoniously with the scheme and object of the statute: *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013] 3 S.C.R. 866, at paras. 36-37 [BA, Tab 2]. This is analogous to Article 31(1) of the *Vienna Convention on the Law of Treaties*.

[13] There has been some dispute over the meaning of "applicable in the relations between the parties" in Article 31(3)(c). The International Law Commission has taken the view that another international treaty can be considered under Article 31(3)(c) when the "parties to the dispute" are parties to that other treaty: see International Law Commission, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (2006), at pp. 237-239, paras. 470-472 ["ILC Report"] [BA, Tab 26]. In this case, this would include the OECD Convention and the ICCPR. Moreover, the right to a fair trial in Article 14 of the ICCPR is arguably a rule of customary international law: see International Committee of the Red Cross, *Customary International Humanitarian Law, Volume 1: Rules*, (Cambridge: Cambridge University Press, 2005), pp. 352-354, 358-360 [BA, Tab 24]. Rules of customary international law fall within the scope of what might be considered under Article 31(3)(c): see ILC Report, *supra* pp. 233-237, paras. 462-469 [BA, Tab 26].

[14] *Al-Adsani v. the United Kingdom*, [2001] ECHR 761, at paras 53-55, cited in *Kazemi (Estate of) v. Islamic Republic of Iran*, [2011] Q.J. No. 412, at para 50 (S.C.), varied [2012] Q.J. No. 7754 (C.A.), aff'd [2014] 3 S.C.R. 176 [BA Tabs 1, 8]. See also *Hagerman v. United States of America*, [1990] B.C.J. No. 2058, at pp. 7-8 (C.A.) [BA, Tab 6]. This approach does not differ significantly from that which is taken in the case of purely domestic legislation, in which one presumes that the legislature intended to "act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community." See *R. v. Hape*, [2007] 2 S.C.R. 292, at para. 53 [BA, Tab 13]; *Amaratunga, supra* at para. 38 (S.C.C.) [BA, Tab 2].

A. The OECD Convention Supports the Recognition of Implied Waiver

12. The OECD Convention obliges Canada to combat bribery in international business transactions. Pursuit of this important goal can include criminal prosecutions of individuals alleged to have participated in foreign corruption schemes under the *Corruption of Foreign Public Officials Act*.[15] Where the criminal justice system is engaged, however, nothing in the OECD Convention requires Canada to abandon the procedural protections it has traditionally conferred on accused persons. To the contrary, Article 5 of the OECD Convention provides:

> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.[16]

13. In other words, while the OECD Convention requires Canada to fight foreign corruption through criminal investigations and prosecutions, it recognizes that Canada must do so subject to the principles of its own criminal justice system. Chief among these is the right of the accused to make full answer and defence under s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). This principle underlies the Crown's obligation to disclose all relevant information in its possession to the defence,[17] as well as the right of the accused to obtain production of "likely relevant" records in the possession of third parties under the *O'Connor* regime.[18]

14. The Bank's position, if accepted, would give it the right to unilaterally foreclose access to these disclosure regimes. First, it argues that is entitled to absolute immunity (in contrast to the functional immunity conferred on the Northwest Atlantic Fisheries Organization in *Amaratunga*);[19] and therefore, it does not have to demonstrate on case-by-case basis that the immunity is necessary for the performance of its functions.[20] Second, it argues this immunity can only be waived when it chooses to do so expressly — regardless of how deeply it involves itself in a domestic criminal proceeding. The combined effect of these arguments is to deprive

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[15] S.C. 1998, c. 34.
[16] OECD Convention, *supra* [BA, Tab 27].
[17] *R. v. McNeil*, [2009] 1 S.C.R. 66, at para. 14 [BA, Tab 14].
[18] *Ibid.*, at paras. 29, 35, 37.
[19] *Amaratunga*, *supra* at para. 49 (S.C.C.) [BA, Tab 2].
[20] In *Amaratunga*, this Court held that because the Northwest Atlantic Fisheries Organization was only granted functional immunity, "What is necessary for the performance of NAFO's functions, or what constitutes undue interference, must be determined on a case-by-case basis" (para. 53) [BA, Tab 2].

the court of the ability to conduct an objective, fact-sensitive analysis in determining the applicability of the immunity. The sole and determinative factor would be the Bank's intentions.

15. This approach severely undermines the right to make full answer and defence. While the case on appeal involves a request for disclosure to further a *Charter* challenge to the admissibility of wiretap evidence, the Bank's position would apply just the same to a request for disclosure that bears directly on guilt or innocence. Consider the following hypothetical: the Bank interviews a key witness on three occasions, but discloses only the final interview to the RCMP. In this scenario, if the Bank's position is accepted, the defence would have no way of obtaining the previous two interviews so long as the Bank expressly maintains its immunity. This would be the case even if the third interview was a complete recantation of the first two — and even if the first two interviews were wholly exculpatory. The Bank's position does not allow for any contextual analysis, nor does it allow for any consideration of fairness.

16. By contrast, the motion judge's approach allows for a fact-sensitive determination of when the Bank has, through its conduct and participation in a domestic legal proceeding, impliedly waived its immunity. This is consistent with the approach the courts have long taken towards waiver of privilege. As Wigmore explained:

> … 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.[21]

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[21] Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. (Toronto: LexisNexis Canada, 2014) at §14.144 [BA, Tab 22]. See also *R. v. Youvarajah*, 2011 ONCA 654, at paras. 147-148 (Ont. C.A.), rev'd on other grounds, [2013] 2 S.C.R. 720 [BA, Tab 18]. In para. 86 of its factum, the Appellant notes that Sopinka, Lederman & Bryant also say that "(w)here a party makes privileged documents available to the police for a limited purpose, namely, to assist in the conduct of a criminal investigation and then a criminal trial, such disclosure cannot be construed as a waiver of its privilege to which the party was entitled in the civil action for which the documents had been created." This does not conflict with the BCCLA's position. We do not submit that partial disclosure always results in a general waiver for all purposes and all proceedings; but rather that partial disclosure can result in an implied waiver of immunity to the extent required by fairness (which may mean that the waiver will only apply within the same proceedings — in this case, the criminal prosecution).

17. Privilege and immunity are closely related concepts. Indeed, in *Amaratunga,* this Court analogized the immunity of international organizations to Parliamentary privilege.[22] Thus, if privilege can be waived impliedly, then so too can immunity.[23]

18. To the extent there is a distinction between privilege and immunity, it is one that favours a broader approach to waiver in the context of immunity. Privilege is, by definition, narrowly targeted at a specific category of information. By contrast, immunity clothes an entity against any and all orders of disclosure, no matter how critical the information may be to the defence. Thus, immunity has the potential to be more destructive of the right to full answer and defence. This demands a broader and more flexible approach to waiver, not a rigid and narrow one. In *R. v. Barros,* Binnie J. explained the following regarding the scope of informer privilege: "precisely because informer privilege can place a significant limitation on the activities of the defence, it is important not to extend its scope beyond what is necessary to achieve its purpose".[24] The same rationale applies to the concept of immunity. Because immunity can so seriously impair the right to full answer and defence, it is important not to take an overly narrow approach to waiver. There must be some allowance made for waiver by implication where required by fairness.

19. Of course, one must also consider the extent to which an implied waiver would undermine the Bank's ability to "fulfill the functions with which it is entrusted". The waiver provision in s. 8 of Article VII should be read in light of the purpose of the immunity as set out in s. 1. Under this approach, implied waiver of immunity from civil suit (at issue in *Amaratunga*) would not result from the same set of circumstances as would implied waiver of immunity from a production order (at issue in this case). The courts can make this type of distinction in the contextual analysis permitted by the doctrine of implied waiver; but they cannot do so if the Bank's position (*i.e.,* absolute immunity subject only to express waiver) is accepted.

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[22] *Amaratunga, supra* at paras. 50-52 (S.C.C.) [BA, Tab 2].
[23] Parliamentary privilege can also be waived impliedly: see *Riddell v. The Right Point,* [2007] O.J. No. 3943, at paras. 55, 62 (S.C.J.) [BA, Tab 10] (the Court declined to make a finding of implied waiver in that case on the basis of insufficient evidence).
[24] *R. v. Barros,* [2011] 3 S.C.R. 368, at para. 28 [BA, Tab 11].

B. The ICCPR Supports the Recognition of Implied Waiver

20. The motion judge's conclusion on implied waiver is also supported by the fact that Canada is a party to the ICCPR.[25] Article 14(1) of the ICCPR provides that "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." More specifically, Article 14(3) provides that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: …(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" (emphasis added). General Comment No. 32 of the Human Rights Committee elaborates on this requirement as follows:

> "Adequate facilities" must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary).[26]

21. Thus, the right to "adequate facilities" includes robust rights to disclosure and to make full answer and defence.

22. The rationale for Article 14(3) is to ensure an "equality of arms".[27] In ordinary criminal cases, equality of arms is protected by the *Stinchcombe* requirement that the Crown, with access

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[25] Indeed, the framers of the *Charter* drew extensively from the ICCPR: *B. (R.) v. Children's Aid Society*, [1995] 1 S.C.R. 315, at para. 38 (per Lamer C.J.) [BA, Tab 3]. And this Court has repeatedly cited the ICCPR in the development of *Charter* rights, including those enshrined in s. 7: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 66 [BA, Tab 19]; *United States of America v. Burns*, [2001] 1 S.C.R. 283, at paras. 87, 93 [BA, Tab 20]; *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 120-121 [BA, Tab 15]; *R. v. Brydges*, [1990] 1 S.C.R. 190, at pp. 214-215 [BA, Tab 12]; *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 25 [BA, Tab 4].

[26] UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, at para. 33 [BA, Tab 29]. This has led the Human Rights Committee to criticize member States to the ICCPR for failure to provide adequate disclosure mechanisms in criminal proceedings. For example, the requirement of "adequate facilities" was applied in a "concluding observation" to criticize the Canadian disclosure regime under s. 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5*:* UN Human Rights Committee (HRC), Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Canada, 20 April 2006, CCPR/C/CAN/CO/5, at para. 13 [BA, Tab 28].

[27] *Ragg v. Magistrates Court of Victoria and Corcoris*, [2008] VSC 1 (24 January 2008), at paras. 50, 56, citing *Jespers v. Belgium*, (1983) 5 EHRR CD305 [BA, Tab 9].

to the full investigative brief, disclose any information in its possession or control to the defence that is not clearly irrelevant, privileged or otherwise governed by law — regardless of whether it is helpful to the prosecution or the defence.[28] In this case, where the investigation is largely conducted by an international organization that withholds information from the prosecuting Crown, equality of arms requires meaningful access to the third party records regime under *O'Connor*.

23. The Bank's position, however, would close the door on *O'Connor*. By arguing that it has an absolute immunity that can only be waived expressly, the Bank reserves for itself the unilateral right to prevent the defence from obtaining production of its files — no matter how relevant they are and no matter how deep the Bank's involvement in the domestic prosecution.

24. This creates an inequality of arms that undermines Article 14(3). As an investigative body, the Bank is necessarily invested in its investigation.[29] Thus, it is predisposed to disclose only that which is favourable to the prosecution. That is why, in purely domestic matters, the police do not make the ultimate decisions on disclosure; rather, that discretion is vested in Crown counsel, who are ministers of justice with an undivided loyalty to the proper administration of justice.[30] As a majority of this Court said in *R. v. Regan*, "the separation of Crown from police functions are elements of the judicial process which must be safeguarded".[31] The Bank's position undermines this separation and allows it, as the investigative body, to unilaterally decide what it will and will not disclose. This tilts the balance in favour of the prosecution and undermines trial fairness.

25. Accordingly, Article 14 of the ICCPR militates against the Bank's position and in favour of implied waiver of immunity.

26. Notably, in *Amaratunga*, this Court referred to the interpretive role of the ICCPR in defining the scope of immunity for international organizations. In that case, the appellant sought to bring a claim against the Northwest Atlantic Fisheries Organization for wrongful dismissal,

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[28] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at pp. 339-341 (S.C.C.) [BA, Tab 17]; *McNeil, supra* at paras. 18, 23-24 (S.C.C.) [BA, Tab 14].
[29] As Jackson J. put it in *Johnson v. United States*, 333 U.S. 10, at 14 (1948), they are "engaged in the often competitive enterprise of ferreting out crime." [BA, Tab 7]
[30] *McNeil, supra* at para. 49 (S.C.C.) [BA, Tab 14].
[31] *R. v. Regan*, [2002] 1 S.C.R. 297, at para. 70 [BA, Tab 16].

and argued against a finding of immunity by citing Article 14. The Court rejected that argument on the basis that Article 14 merely creates "a procedural right" to have a fair hearing and not "a substantive right" to make a claim.[32]

27. The BCCLA's proposed use of Article 14 in this case is much more modest. The Bank does not dispute that its immunity can be waived. The only question is whether it can be waived impliedly as well as expressly. In answering this question, Article 14 of the ICCPR supports an interpretation that protects the procedural right to a fair hearing. The accused are not seeking the substantive right to make any claims. They are only seeking the procedural right to access the Bank's files so that they can answer the claims made by the Crown.

28. In summary, Canada's international obligations under both the OECD Convention and the ICCPR support the motion judge's conclusion. While Canada is required to investigate and prosecute instances of bribery of foreign officials, Canada is also required to reach a proper verdict through the holding of fair trials. The two obligations are equally important. And they can only be achieved together if this Court interprets the Bank's immunity-conferring provisions to allow for both implied and express waiver of immunity.

PART IV: SUBMISSIONS ON COSTS

29. The BCCLA does not seek costs and asks that none be awarded against it.

PART V: NATURE OF THE ORDER REQUESTED

30. The BCCLA respectfully requests leave to present oral argument for no more than 10 minutes at the hearing of this appeal.

All of which is respectfully submitted this 22nd day of October, 2015.

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[32] *Amaratunga, supra* at paras. 59-62 (S.C.C.) [BA, Tab 2].

PART VI: TABLE OF AUTHORITIES

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PART VII: LEGISLATION CITED

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 5. *Immunity of archives*

The archives of the Bank shall be inviolable.

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 5. *Inviolabilité des archives*

Les archives de la Banque seront inviolables.

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.

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11**

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.