

# Supreme Court of Canada affirms robust World Bank immunities in global anti-corruption case

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### Introduction

In a recent and unanimous decision, the Supreme Court of Canada affirmed the broad immunities and privileges granted to the archives and personnel of the World Bank Group, and clarified Canada's domestic requirements for third-party production orders in the context of wiretaps used to intercept private communications. In *World Bank Group v Wallace*, **(1)** the Supreme Court overturned an order to compel senior investigators of the World Bank Group to appear before a Canadian court and produce documents related to their investigation of corruption allegations against former SNC-Lavalin employees with respect to the construction of the Padma Bridge in Bangladesh. The Supreme Court's decision was based on a detailed analysis of the scope and purpose of treaty-based immunities and Canadian criminal law jurisprudence on search warrants. The case provides useful insight into Canadian principles governing the interpretation of international documents and the concept of international immunity more generally, and signals Canada's judicial endorsement of international anti-corruption efforts.

### Facts

The World Bank Group's Integrity Vice Presidency (INT) – an independent investigative unit within the World Bank Group – investigated allegations against representatives of SNC-Lavalin in the context of an international procurement process. The World Bank Group shared some of this information with the Royal Canadian Mounted Police, which used this information to obtain wiretap authorisations that led to charges against four accused under the Corruption of Foreign Public Officials Act. **(2)** The accused challenged the wiretap authorisations relying on *R v Garofoli*, **(3)** and applied for a third-party production order pursuant to *R v O'Connor* **(4)** to compel senior investigators of the World Bank Group to appear before a Canadian court and produce documents. This order was granted by the trial judge.

The World Bank Group challenged the order on two grounds:

- First, the World Bank Group asserted that the documents were immune from production on the basis of the Canadian Bretton Woods and Related Agreements Act, **(5)** which grants immunity to the archives and personnel of certain constituent organisations of the World Bank Group, including the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). Pursuant to Schedules II and III of the Bretton Woods Act, the archives of the IBRD and the IDA "shall be inviolable" ('archival immunity') and "[a]ll governors, executive directors, alternates, officers and employees... (i) shall be immune from legal process with respect to acts performed by them in their official capacity except where the [IBRD or IDA] waives this immunity" ('personnel immunity'). **(6)**
- Second, following Canadian jurisprudence, the World Bank Group argued that the documents ordered to be produced by the trial judge did not meet the test required for production

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The trial judge held that:

- the IBRD's personnel immunity applied to the INT investigators, (7) but the investigators had implicitly waived their immunity; (8) and
- the archival immunity did not apply, as 'archival' means 'historical records' and 'inviolable' entails only production from a search and seizure order, not an order for compelled production. (9)

On the second issue, the trial judge held that the documents should be produced because they were "likely relevant" to the issues that would arise on a *Garofoli* application. (10)

## Decision

At the outset, the Supreme Court noted that the World Bank Group does not benefit from any immunities conferred by international treaty and no immunities arising from customary international law were pleaded. (11) Instead, the World Bank Group's immunities are set out in its governing documents – the articles of agreement of the IBRD and the IDA – and are in force in Canada though orders in council and approved by Parliament in the Bretton Woods Act. (12)

Although it was unclear on the evidence how the INT fits within the structure of the World Bank Group, the court held that, on a "common sense" view, the INT benefits from either the IBRD or the IDA's immunities. (13) The articles of agreement of the IBRD and IDA require the organisations to make arrangements to ensure that funds are used for their intended purposes and the INT carries out this function. (14)

The key issue for the court was the scope of the immunities granted to the World Bank Group. The court held that the immunities should be interpreted in a "purposive" manner. (15) The 'purpose' of immunities is to protect international organisations from intrusions into their operations and agenda by either a member state or a member state's courts. (16) On this purposive view, archival immunity properly extends to the entire collection of stored documents of the IBRD and IDA, and protects these documents from both search and seizure and compelled production. (17) The court found this consistent with:

- the everyday definition of 'archive' and its use in international law;
- the historical use of 'inviolable' at international law;
- international legal scholarship; and
- decisions of foreign courts.

Similarly, personnel immunity must be interpreted purposively; it therefore shields employees of the IBRD and IDA at all times when they are acting in their official capacities. (18)

The court held that archival and personnel immunities can be waived only explicitly. There is no concept of 'constructive' or 'implied waiver' of the IBRD or IDA's immunity. (19) Constructive or implied waiver would allow states control over the IBRD and IDA, which would be inconsistent with the purpose of immunities. In addition, archival immunity cannot be waived by selective disclosure of some documents. Instead, in instances of disclosure, the immunity simply does not apply. (20)

On the domestic criminal law issue of third-party production of documents, the court held that the documents were not relevant to the issues on a *Garofoli* wiretap challenge, which involves the question of whether the affiant who swore the affidavit in support of the wiretap knew or ought to have known that the affidavit contained errors or omissions at the time the affidavit was sworn. (21) The court held that the documents were not reasonably likely to be of probative value to what the affiant knew or ought to have known, since he did not consult them in preparing the warrant. (22)

## Comment

*Wallace* will be of particular interest to lawyers litigating disputes where an international organisation seeks the protection of similar treaty-based immunities. The decision is the latest in a

series of Supreme Court of Canada cases which have grappled with various forms of immunities at international law. **(23)**

In the 2013 case *Amaratunga v Northwest Atlantic Fisheries Organization*, immunity was granted to the defendant "to such extent as may be required for the performance of its functions". **(24)** The court held that this was a "functional" immunity and subject to a case-by-case determination of functional necessity. It is interesting to contrast that with *Wallace*, where Section 1 of the articles of agreement similarly stated that the immunities shall be provided "[t]o enable the [IBRD or IDA] to fulfil the functions with which [they are] entrusted". In *Wallace*, the court distinguished *Amaratunga* and held that Section 1 was a purposive clause to explain why the immunities were granted, rather than an express condition of functional necessity. This distinction will be a live issue in future cases dealing with immunities at international law.

The sources of information that the court looked to in interpreting the words of the articles of agreement also serve as a practical reminder to lawyers seeking to have the court interpret international documents. The sources that the court considered included:

- the principles of treaty interpretation set out in the Vienna Convention on the Law of Treaties **(25)** and Canadian case law adopting same;
- the Charter of the United Nations **(26)** and other international instruments;
- decisions of foreign courts; and
- scholarly articles.

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## Endnotes

(1) 2016 SCC 15.

(2) SC 1998, c 34.

(3) [1990] 2 SCR 1421.

(4) [1995] 4 SCR 411.

(5) RSC 1985 c B-7 .

(6) Sch II, art VII, ss 5 and 8; sch III, art VIII, ss 5 and 8.

(7) International Monetary Fund and International Bank for Reconstruction and Development Order, PC 1945-7421.

(8) *Supra* note 1 at para 24.

(9) *Ibid* at para 66.

(10) *Ibid* at para 30.

(11) *Ibid* at para 43.

(12) *Ibid* at para 46.

(13) *Ibid* at para 53.

(14) *Ibid* at para 51.

(15) *Ibid* at para 64.

(16) *Ibid* at para 71.

(17) *Ibid* at para 67.

(18) *Ibid* at para 85.

(19) *Ibid* at para 90.

(20) *Ibid* at para 83.

(21) *Ibid* at para 121.

(22) *Ibid* at para 138.

(23) See *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 and *Amaratunga v Northwest Atlantic Fisheries Organization*, 2013 SCC 66.

(24) NAFO Immunity Order, SOR/80-64, s 3 s 3(1).

(25) Can TS 180 No 37.

(26) Can TS 1945 No 7.

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