



SUPREME COURT OF CANADA

CITATION: World Bank Group v. Wallace, 2016
SCC 15

APPEAL HEARD: November 6, 2015
JUDGMENT RENDERED: April 29, 2016
DOCKET: 36315

BETWEEN:

World Bank Group
Appellant

and

**Kevin Wallace, Zulfiqar Bhuiyan,
Ramesh Shah, Mohammad Ismail and
Her Majesty the Queen in Right of Canada**
Respondents

- and -

**Criminal Lawyers' Association (Ontario), Transparency International Canada
Inc., 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**
Intervenors

CORAM: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner,
Gascon, Côté and Brown JJ.

JOINT REASONS FOR JUDGMENT: Moldaver and Côté JJ. (McLachlin C.J. and Abella,
(paras. 1 to 149) Cromwell, Karakatsanis, Wagner, Gascon and Brown JJ.
concurring)

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WORLD BANK GROUP v. WALLACE

World Bank Group

Appellant

v.

**Kevin Wallace,
Zulfiqar Bhuiyan,
Ramesh Shah,
Mohammad Ismail and
Her Majesty The Queen in Right of Canada**

Respondents

and

**Criminal Lawyers' Association (Ontario),
Transparency International Canada Inc.,
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

Indexed as: World Bank Group v. Wallace

2016 SCC 15

File No.: 36315.

2015: November 6; 2016: April 29.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE ONTARIO SUPERIOR COURT OF JUSTICE

Public international law — Jurisdictional immunity — International organizations — Financial institutions — Accused in Canadian criminal proceedings applying for third party production order to compel senior investigators of international financial organization to appear before court and produce documents — International financial organization claiming archival and personnel immunities under its Articles of Agreement — Whether claimed immunities apply to international financial organization — Bretton Woods and Related Agreements Act, R.S.C. 1985, c. B-7, sch. II, arts. I, III, s. 5(b), art. VII, ss. 1, 3, 5, 6, 8, sch. III, arts. I, V, s. 1(g), (h), art. VIII, ss. 1, 3, 5, 6, 8.

Criminal law — Evidence — Disclosure — Interception of communications — Accused charged with bribing foreign public officials — Accused challenging wiretap authorizations on Garofoli application — Accused seeking production of documents held by third party international financial organization and validation of subpoenas to organization's personnel in support of application — Whether documents sought by accused are relevant to Garofoli application — Proper threshold for third party production on a Garofoli application.

The World Bank Group is an international organization headquartered in Washington, D.C. composed of five separate organizations, including the International Bank for Reconstruction and Development (“IBRD”) and the International Development Association (“IDA”). Each constituent organization has its own set of governing documents which set out the immunities and privileges the organization is to enjoy in the territory of each member state.

The World Bank Group provides loans, guarantees, credits and grants for development projects and programs in developing countries. The World Bank Group was originally one of the primary lenders for the project at the heart of this case, the Padma Multipurpose Bridge in Bangladesh. SNC-Lavalin Inc. was one of several companies bidding for a contract to supervise the construction of the bridge. The four individual respondents — three former employees of SNC-Lavalin and one representative of a Bangladeshi official — allegedly conspired to bribe Bangladeshi officials to award the contract to SNC-Lavalin. They are all charged with an offence under the Canadian *Corruption of Foreign Public Officials Act*.

The Integrity Vice Presidency (“INT”) is an independent unit within the World Bank Group responsible for investigating allegations of fraud, corruption and collusion in relation to projects financed by the World Bank Group. It was the INT that had initially received a series of emails from tipsters suggesting there was corruption in the process for awarding the supervision contract, involving SNC-Lavalin employees. The INT later shared the tipsters’ emails, its own

investigative reports and other documents with the Royal Canadian Mounted Police (“RCMP”).

The RCMP then sought and obtained authorizations to intercept private communications in order to obtain direct evidence of the accused’s participation in corruption, as well as a search warrant. Sgt. D was assigned to prepare affidavits for the application. He largely relied on information the INT shared based on its communications with the tipsters, as well as knowledge of the bidding process of a senior investigator with INT. Sgt. D also spoke directly to one of the tipsters. Sgt. D did not make any handwritten notes of his work as affiant. All of his emails for the period of the investigation were lost because of a computer problem, though many were recovered through other sources.

The Crown charged the four accused under the *Corruption of Foreign Public Officials Act* and joined their proceedings by direct indictment. The Crown intends to present intercepted communications at trial. For their part, the accused seek to challenge the wiretap authorizations pursuant to *R. v. Garofoli*, [1990] 2 S.C.R. 1421. In support of their application, the accused sought an order requiring production of certain INT records, as well as the validation of two subpoenas issued to the investigators of the INT.

However, the Articles of Agreement of the IBRD and the IDA provide that their archives shall be inviolable. In addition, the Articles of Agreement provide that all officers and employees shall be immune from legal process with respect to

acts performed by them in their official capacity, except when the IBRD or the IDA waives this immunity. These immunities have been implemented in Canadian law by two Orders in Council, and the Articles of Agreement of the IBRD and the IDA have been approved by Parliament in their entirety through the *Bretton Woods and Related Agreements Act*.

Two issues were raised on the application: (1) whether the World Bank Group could be subject to a production order issued by a Canadian court given the immunities accorded to the IBRD and the IDA, and (2) if so, whether in the context of a challenge to the wiretap authorizations pursuant to *R. v. Garofoli*, the documents sought met the test for relevance.

With respect to the first issue, the trial judge found that the immunities and privileges claimed were *prima facie* applicable to the archives and personnel of the INT. However, he determined that the World Bank Group had waived these immunities by participating in the RCMP investigation. In any event, he was not persuaded that the documents at issue were “archives”. Moreover, in his view, the term “inviolable” in the Articles of Agreement connoted protection from search and seizure or confiscation, but not from production for inspection. On the second issue, the trial judge concluded that the documents were likely relevant to issues that would arise on a *Garofoli* application. Accordingly, he ordered that the documents be produced for review by the court.

Held: The appeal should be allowed and the production order set aside.

Notwithstanding its operational independence, the INT's documents form part of either the IBRD's or the IDA's archives, and the INT's personnel benefit from legal process immunity for acts performed in an official capacity. Because the Articles of Agreement of the IBRD and the IDA provide the legal foundation for the World Bank Group's integrity regime, and by extension the INT, the immunities outlined in those Articles of Agreement shield the documents and personnel of the INT.

Section 3 of Articles VII and VIII of the IBRD's and the IDA's Articles of Agreement, respectively, which confirms that the IBRD and the IDA can be the subject of a lawsuit in a court of competent jurisdiction, is not engaged in the present appeal. The present appeal involves a request for document production directed at personnel of the INT in the context of criminal charges. It is not the kind of action contemplated by s. 3.

Nor are the immunities outlined in ss. 5 and 8 of Articles VII and VIII, respectively, "functional" in the sense that the immunities only apply where it has been demonstrated that their application is necessary for the organization to carry out its operations and responsibilities. The signatory states of the Articles of Agreement set out, in advance, the specific immunities that enable the IBRD and the IDA to fulfill their responsibilities. The very wording of s. 1 of Articles VII and VIII suggests that this was an explicit choice. To import an added condition of functional necessity

would undermine what appears to be a conscious choice to enumerate specific immunities rather than to rely on a broad, functional grant of immunity.

As regards the inviolability of the organization's archives, the trial judge erred in construing so narrowly an immunity that is integral to the independent functioning of international organizations. The immunity outlined in s. 5 shields the entire collection of stored documents of the IBRD and the IDA from both search and seizure and from compelled production. This broader interpretation is consistent with the plain and ordinary meaning of the terms of s. 5 and is in harmony with its object and purpose. Partial voluntary disclosure of some documents by the World Bank Group does not amount to a waiver of this immunity. Indeed, the archival immunity is not subject to waiver.

The personnel immunity also applies since the challenged subpoenas required Mr. Haynes and Mr. Kim to give evidence. It is uncontested that the INT personnel were performing acts in their official capacity when they obtained the information that the accused now seek. It is also undisputed that the scope of the legal process immunity in s. 8 of Articles VII and VIII shields employees acting in an official capacity from not only civil suit and prosecution, but from legal processes such as subpoenas. While this personnel immunity can be waived, the object and purpose of the treaty favour an express waiver requirement. Given the absence of such express waiver, the trial judge erred in his finding that the World Bank Group waived this immunity.

Even if the World Bank Group did not possess any of the immunities identified in the Articles of Agreement, the production order should not have been issued under the framework for third party production set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411. A *Garofoli* application is more limited in scope than a typical *O'Connor* application, relating as it does to the admissibility of evidence, namely intercepted communications. An *O'Connor* application made in the context of a *Garofoli* application must be confined to the narrow issues that a *Garofoli* application is meant to address. The *Garofoli* framework assesses the reasonableness of a search when wiretaps are used to intercept private communications. A search will be reasonable if the statutory preconditions for a wiretap authorization have been met. A *Garofoli* application does not determine whether the allegations underlying the wiretap application are ultimately true — a matter to be decided at trial — but rather whether the affiant had a reasonable belief in the existence of the requisite statutory grounds. What matters is what the affiant knew or ought to have known at the time the affidavit in support of the wiretap authorization was sworn.

While the *O'Connor* process may be used to obtain records for purposes of a *Garofoli* application, the relevance threshold applicable to such an application is narrower than that on a typical *O'Connor* application. To obtain third party records in a *Garofoli* application an accused must show a reasonable likelihood that the records will be of probative value to the narrow issues in play on such an application. This test for third party production is also consistent with another form of discovery on a *Garofoli* application: cross-examination of the affiant. Both forms of discovery serve

similar purposes and engage similar policy concerns. The justifications that warrant limiting cross-examination of the affiant apply with equal force to third party production applications. The “reasonable likelihood” threshold is appropriate to the *Garofoli* context and fair to the accused.

The trial judge erred in assessing the accused’s arguments. Although he correctly placed the burden on the accused, he did not properly assess the relevance of the documents being sought. In particular, he blurred the distinction in a *Garofoli* application between the affiant’s knowledge and the knowledge of others involved in the investigation. In this case, that distinction is crucial. While the documents sought may be relevant to the ultimate truth of the allegations in the affidavits, they are not reasonably likely to be of probative value to what Sgt. D knew or ought to have known since he did not consult them. The accused have not shown that it was unreasonable for him to rely on the information he received from the INT and other officers. Furthermore, accepting the argument that the INT’s records should be presumed relevant because first party documents were lost or not created, would require a significant change to the *O’Connor* framework. Such a change is not necessary. Any loss of information must be addressed through the remedial framework set forth in *R. v. La*, [1997] 2 S.C.R. 680, which may well be the appropriate framework for addressing any prejudice resulting from the World Bank Group’s assertion of its immunities. The accused did not argue these issues on this appeal, and they are best left to the trial judge.

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223; *R. v. Sipes*, 2009 BCSC 612; *R. v. McKinnon*, 2013 BCSC 2212; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Ebanks*, 2009 ONCA 851, 97 O.R. (3d) 721; *R. v. Ahmed*, 2012 ONSC 4893, [2012] O.J. No. 6643 (QL); *R. v. Leipert*, [1997] 1 S.C.R. 281; *R. v. Croft*, 2013 ABQB 705, 576 A.R. 333; *R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. Ali*, 2013 ONSC 2629; *R. v. Alizadeh*, 2013 ONSC 5417; *R. v. Way*, 2014 NSSC 180, 345 N.S.R. (2d) 258; *R. v. Bernath*, 2015 BCSC 632; *R. v. Edwardsen*, 2015 BCSC 705, 338 C.R.R. (2d) 191; *R. v. Lemke*, 2015 ABQB 444; *R. v. La*, [1997] 2 S.C.R. 680.

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Northwest Atlantic Fisheries Organization Privileges and Immunities Order, SOR/80-64, s. 3(1).

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APPEAL from a decision of the Ontario Superior Court of Justice (Nordheimer J.), 2014 ONSC 7449, [2014] O.J. No. 6534 (QL), granting in part an application by the accused seeking an order for the validation of subpoenas and compelling the production of documents. Appeal allowed.

Alan J. Lenczner, Q.C., Scott Rollwagen and Chris Kinnear-Hunter, for the appellant.

Scott K. Fenton and Lynda E. Morgan, for the respondent Kevin Wallace.

Frank Addario and Megan Savard, for the respondent Zulfiqar Bhuiyan.

David Cousins, for the respondent Ramesh Shah.

Kathryn Wells, for the respondent Mohammad Ismail.

Nicholas E. Devlin and François Lacasse, for the respondent Her Majesty the Queen in Right of Canada.

Scott C. Hutchison and Samuel Walker, for the intervener the Criminal Lawyers' Association (Ontario).

Mark A. Gelowitz and Geoffrey Grove, for the interveners Transparency International Canada Inc. and Transparency International e.V.

Gerald Chan and Nader R. Hasan, for the intervener the British Columbia Civil Liberties Association.

Guy J. Pratte and Nadia Effendi, for the interveners the European Bank for Reconstruction and Development, the Organisation for Economic Co-operation and Development, the African Development Bank Group, the Asian Development Bank, the Inter-American Development Bank and the Nordic Investment Bank.

The judgment of the Court was delivered by

MOLDAVER AND CÔTÉ JJ. —

[1] Corruption is a significant obstacle to international development. It undermines confidence in public institutions, diverts funds from those who are in great need of financial support, and violates business integrity. Corruption often transcends borders. In order to tackle this global problem, worldwide cooperation is needed. When international financial organizations, such as the appellant World Bank Group, share information gathered from informants across the world with the law enforcement agencies of member states, they help achieve what neither could do on their own. As this Court recently affirmed, “[i]nternational organizations are active and necessary actors on the international stage”: *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866, at para. 1.

[2] However, without any sovereign territory of their own, international organizations are vulnerable to state interference. In light of this, member states often agree to grant international organizations various immunities and privileges to

preserve their orderly, independent operation. Commonly, an organization's archives are shielded from interference, and its personnel are made immune from legal process.

[3] In the present appeal, the World Bank Group's Integrity Vice Presidency ("INT") investigated allegations that representatives of SNC-Lavalin Inc. ("SNC-Lavalin") were planning to bribe officials of the Government of Bangladesh to obtain a contract related to the construction of the Padma Multipurpose Bridge (the "Padma Bridge"), a project valued at US\$2.9 billion. The World Bank Group shared some of the information from its investigation with the Royal Canadian Mounted Police ("RCMP"). On the basis of this information and other information gathered by the RCMP, the RCMP obtained wiretap authorizations. Subsequently, the individual accused (the "respondents") were jointly charged with one count of bribing foreign public officials under the *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34.

[4] The respondents challenged the wiretap authorizations pursuant to *R. v. Garofoli*, [1990] 2 S.C.R. 1421. In support of their *Garofoli* application, they applied for a third party production order pursuant to *R. v. O'Connor*, [1995] 4 S.C.R. 411, to compel senior investigators of the World Bank Group, Paul Haynes and Christopher Kim, to appear before a Canadian court and produce documents.

[5] The trial judge granted the applications. The World Bank Group, supported by the Crown respondent and several interveners, appeals from that order and seeks to have it overturned for two reasons.

[6] First, the World Bank Group submits that the schedules of the *Bretton Woods and Related Agreements Act*, R.S.C. 1985, c. B-7 (“*Bretton Woods Act*”), grant immunity to the archives and personnel of certain constituent organizations of the World Bank Group, including the International Bank for Reconstruction and Development (“IBRD”) and the International Development Association (“IDA”). Under Schedules II and III of the *Bretton Woods Act*, the IBRD’s and the IDA’s “archives . . . 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 when the [IBRD or IDA] waives this immunity” (“personnel immunity”): sch. II, art. VII, ss. 5 and 8; sch. III, art. VIII, ss. 5 and 8.

[7] Accordingly, the World Bank Group submits that the documents ordered produced by the trial judge are immune from production.

[8] Second, the World Bank Group and the Crown challenge the relevance of the documents sought in the context of the *Garofoli* application. They submit that the documents ordered produced by the trial judge are not relevant on the *Garofoli* application. Therefore, in their view, the trial judge’s order must be set aside on that basis as well.

[9] For reasons that follow, we agree with the appellant on both issues. Accordingly, we would allow the appeal and set aside the trial judge's order.

I. Facts

[10] The World Bank Group is an international organization headquartered in Washington, D.C. It is composed of five separate organizations, the IBRD, the IDA, the International Finance Corporation, the Multilateral Investment Guarantee Agency and the International Centre for Settlement of Investment Disputes. Canada has ratified the Articles of Agreement and conventions establishing these organizations, along with 187 other member states.

[11] Among the World Bank Group's most important responsibilities, it provides loans, guarantees, credits and grants for development projects and programs in developing countries. The World Bank Group was originally one of the primary lenders for the project at the heart of this case. The Padma Bridge project was to construct a six-kilometre long road and railway bridge over the Padma River in Bangladesh. The bridge was intended to link the capital, Dhaka, to the isolated southwest region. Through the IDA, the World Bank Group was to lend the Government of Bangladesh US\$1.2 billion of the total US\$2.9 billion cost of the bridge. The rest was to be financed by an international consortium of development banks and agencies.

[12] SNC-Lavalin was one of several companies bidding for a contract to supervise the construction of the bridge (the “Supervision Contract”). A committee of Bangladeshi officials evaluated the bids. The respondents allegedly conspired to bribe the committee to award the contract to SNC-Lavalin. Three of the respondents are former employees of SNC-Lavalin: Kevin Wallace, Ramesh Shah and Mohammad Ismail. The fourth, Zulfiquar Bhuiyan, was allegedly a representative of Abul Chowdhury, a Bangladeshi official alleged to be involved in this matter. They are all charged with an offence under the *Corruption of Foreign Public Officials Act*.

[13] The INT is responsible for investigating allegations of fraud, corruption and collusion in relation to projects financed by the World Bank Group. The INT is an independent unit within the World Bank Group, reporting directly to its President. Mr. Haynes and Mr. Kim were senior investigators with the INT. Mr. Haynes was the primary investigator in this matter.

[14] In 2010, the INT received the first of a series of emails suggesting there was corruption in the process for awarding the Supervision Contract. The tipsters alleged SNC-Lavalin employees were negotiating to pay a portion of the contract amount to Bangladeshi officials in exchange for favourable treatment. Ultimately, the INT received emails from four tipsters. All but one remains anonymous even to the RCMP. A second tipster has shared his or her identity with Mr. Haynes, but has refused to share it with the RCMP. The other two never revealed their identities to any investigator in this matter.

[15] In an earlier ruling which is not challenged in this Court, two of the four tipsters were found to be confidential informants under Canadian law, while the other two were not. Therefore, the identities of two informants are protected by informer privilege. As of the hearing of this appeal, the Crown had no intention to call any of the tipsters as witnesses at trial.

[16] The INT contacted the RCMP in March 2011 and shared the tipsters' emails, investigative reports and other documents with the RCMP. The RCMP then sought a wiretap authorization to intercept private communications pursuant to Part VI of the *Criminal Code*, R.S.C. 1985, c. C-46, in order to obtain direct evidence of the respondents' participation in corruption. The authorization was granted, along with two further authorizations.

[17] The process of applying for these authorizations is at the heart of this matter. Sgt. Jamie Driscoll was assigned to prepare an affidavit for the initial application (also known as an information to obtain). In preparing that affidavit and two subsequent affidavits, Sgt. Driscoll largely relied on information the INT shared based on its communications with the tipsters, as well as Mr. Haynes's knowledge of the bidding process. Sgt. Driscoll also spoke directly to one of the tipsters but not to the others.

[18] Sgt. Driscoll did not make any handwritten notes of his work as affiant. All of his emails for the period of the investigation were lost because of a computer problem, though many were recovered through other sources. The respondents rely

on these deficiencies in support of their production applications. More will be said about these deficiencies in our discussion of the *Garofoli* application.

[19] The RCMP applied for and was granted its first wiretap authorization on May 24, 2011. Further authorizations were granted on June 24, 2011 and August 8, 2011. A search warrant was granted in September 2011.

[20] Mr. Ismail and Mr. Shah were charged first, in early 2012. Both were committed for trial after a preliminary hearing in April 2013 and indicted in May 2013. On September 17, 2013, the Crown charged Mr. Wallace and Mr. Bhuiyan and, the following month, joined their proceedings to Mr. Ismail's and Mr. Shah's by direct indictment.

[21] The Crown intends to present intercepted communications at trial. In addition, an alleged co-conspirator, Muhammad Mustafa, has agreed to testify as a Crown witness against the respondents.

[22] As a result of the investigation, the World Bank Group cancelled its financing for the Padma Bridge and debarred SNC-Lavalin from participating in World Bank Group-funded projects for 10 years.

II. Decision Below

[23] The decision under review arises from an application brought in the Ontario Superior Court of Justice, in which the respondents sought the validation of two subpoenas issued to Mr. Haynes and Mr. Kim, as well as an order requiring production of the following documents (the “INT’s records”):

- a. All notes, memoranda, emails, correspondence and reports received or sent by Mr. Paul Haynes of INT regarding the Investigation;
- b. All source documents from all so-called “tipsters” sent to INT, whether or not such information was shared with the RCMP as part of INT’s cooperation with the RCMP investigation into the Padma Bridge Project;
- c. All emails and other communications between INT and the tipsters;
- d. Any sanctions or settlements entered into by the World Bank with any third parties as a result of the Investigation;
- e. Any other investigative materials relevant to the Investigation in the possession of other World Bank officials, including Christina Ashton-Lewis (Senior Institutional Intelligence Officer), Kunal Gupta (World Bank’s Case Intake Unit), Laura Valli (Senior investigator) and Christopher Kim; and
- f. All communications between INT, representatives of SNC, representatives of the Bangladeshi government, members [of] the RCMP and/or the Crown regarding the Investigation, the related RCMP investigation and/or the charges or proceedings commenced by the Crown before the Courts in Ontario.

(2014 ONSC 7449, [2014] O.J. No. 6534 (QL), at Appendix A)

Two issues were raised on the application: (1) whether the World Bank Group could be subject to a production order issued by a Canadian court, and (2) if so, whether in the context of a *Garofoli* application, the documents sought met the test for relevance.

[24] Nordheimer J., the trial judge, found that the INT's archives and personnel formed part of the IBRD, whose immunities are set out in Article VII of the IBRD Articles of Agreement and implemented in Canadian law by an Order in Council, the *International Monetary Fund and International Bank for Reconstruction and Development Order*, P.C. 1945-7421. The immunities and privileges set out in Article VII were therefore *prima facie* applicable to the archives and personnel of the INT. The trial judge further found that both Mr. Haynes and Mr. Kim were acting in an official capacity and were therefore shielded by the personnel immunity provided in Article VII, s. 8. However, he determined that the World Bank Group had waived this personnel immunity.

[25] In so concluding, the trial judge rejected the Crown's submission that the World Bank Group's personnel immunity could only be waived expressly, determining instead that it could be waived either implicitly or expressly. He provided three reasons for this.

[26] First, the trial judge noted that the relevant provisions of the Articles of Agreement do not explicitly require an *express* waiver, as do the provisions providing legal process immunity to the United Nations and to the International Monetary Fund.

[27] Second, the trial judge reasoned by analogy that just as a privilege holder cannot choose to selectively reveal some privileged communications but not others, the World Bank Group similarly could not choose to provide some of its documents for use in the criminal prosecution but refuse to provide other relevant documents.

[28] Finally, the trial judge relied on the “benefit/burden exception” to Crown immunity discussed by La Forest J. in *Sparling v. Quebec (Caisse de dépôt et placement)*, [1988] 2 S.C.R. 1015. He found that the World Bank Group had chosen to benefit from Canadian criminal proceedings; for example, it had sought to obtain materials seized pursuant to the search warrants and information obtained from the intercepted communications. Consequently, the World Bank Group was obliged to accept the attendant burdens of doing so, which includes compliance with procedural rules.

[29] The trial judge then turned to the archival immunity provided in Article VII, s. 5. He found that the different sections within Article VII of the IBRD Articles of Agreement do not set out discrete free-standing immunities; in other words, archival immunity was not separate from personnel immunity. Accordingly, he concluded that if the World Bank Group had waived its immunity, it had done so for all purposes. In any event, he was not persuaded that the documents at issue should be considered part of the “archives”, which he limited to historical records. Moreover, in his view, the term “inviolable” connoted protection from search and seizure or confiscation, but not from production for inspection.

[30] On the second issue, the trial judge concluded that the documents sought by the respondents were likely relevant to issues that would arise on a *Garofoli* application. Virtually all of the information relied on by the affiant in the affidavits filed in support of the wiretap authorizations came from the INT and its investigative

file. The affiant did not keep handwritten notes of his work preparing the affidavits. Accordingly, the trial judge ordered that the documents listed under headings a., b., c. and e., in para. 23 above, be produced for review by the court, the second step in an *O'Connor* application.

[31] The World Bank Group appealed the decision to this Court, with leave, on the authority of *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, which allows a third party affected by an order of a superior court judge to challenge that order before this Court.

III. Parties' Submissions

[32] The World Bank Group submits that the INT is a division of the IBRD, and enjoys, as a result, the immunities conferred on that organization. Its personnel are therefore immune from legal processes and its documents are immune from any legal process of compulsion, including production of information and evidence through subpoenas, warrants, or court orders. In their view, the immunities and privileges granted by the Articles of Agreement should be interpreted in a generous and liberal manner, as the immunities are necessary to avoid undue interference in the operations of an international organization.

[33] The World Bank Group argues that the term “waiver” as it applies to its personnel immunity under s. 8 must be interpreted as meaning “express waiver” only, which they define as an expressly stated, positive and intentional act by the President

of the World Bank Group or its Executive Board. Regarding the inviolability of the archives under s. 5, the World Bank Group argues that “archives” includes contemporaneous documents, and that archival immunity can never be waived.

[34] The Crown argues that the production order was erroneously issued under Canadian law, and should not have been made regardless of the World Bank Group’s immunities. The application for production was brought within the context of a *Garofoli* application to attack the wiretap authorizations. The respondents must therefore show that the evidence sought has a reasonable likelihood of assisting in the *Garofoli* application. On a *Garofoli* application, the affidavit before the authorizing judge is assessed based on what the affiant “knew or ought to have known”, not whether the information is true (*R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 41). Thus, the documents sought will only be relevant if they can demonstrate that the affiant knew or ought to have known that the information he relied on was false.

[35] The respondent Mr. Wallace argues that the materials sought are likely relevant for the purposes of both a third party records application under the *O’Connor* framework, and the *Garofoli* application. He argues that the RCMP investigative file is incomplete as the affiant did not make adequate notes, and submits that the affiant acknowledged in cross-examination that he had misrepresented facts in his affidavits.

[36] On the issue of immunity, Mr. Wallace argues that there is no evidence explaining how the INT fits within the World Bank Group, or which immunities, if any, apply to the INT.

[37] Mr. Wallace further argues that the INT's personnel are only immune from legal process insofar as is necessary for the INT to perform its functions without undue interference. Mr. Wallace submits that production of the documents sought would not unduly interfere with the IBRD's operations and that, in any event, the INT's investigative file is simply not a part of the IBRD's archives. Finally, Mr. Wallace argues that the immunities of the World Bank Group's constituent organizations are subject to implicit waiver, and that the World Bank Group waived any immunity by its conduct when it actively participated in the domestic criminal investigation and prosecution of the respondents.

[38] On the issue of immunity, the respondent Mr. Bhuiyan also submits that s. 3 of Article VII — stating that “[a]ctions may be brought against the [IBRD]” by private parties in jurisdictions in which the IBRD has a legal presence — demonstrates that Parliament did not intend for the World Bank Group to be immune from Canadian judicial process.

[39] A number of interveners also presented submissions before this Court. Transparency International Canada Inc. and Transparency International e.V. stress the importance of protecting whistleblowers, and submit that failure to uphold an international organization's immunities in a context such as this may result in a

chilling effect on these organizations' cooperation with domestic criminal prosecutions. The European Bank for Reconstruction and Development, the Organisation for Economic Co-operation and Development, the African Development Bank Group, the Asian Development Bank, the Inter-American Development Bank and the Nordic Investment Bank submit that the waiver of archival and personnel immunities must always be express, and can never be implied. In their view, only a requirement of express waiver can provide the needed protection and ensure uniformity across international organizations' member states.

[40] The British Columbia Civil Liberties Association, for its part, submits that the right to make full answer and defence, recognized in both domestic and international law, compels the recognition of an implied waiver of immunity in certain circumstances. In a similar vein, the Criminal Lawyers' Association (Ontario) argues that, when deciding whether to compel an international organization to produce its records in the context of a criminal proceeding, the public interest in upholding the immunity must be balanced against the accused's constitutional right to make full answer and defence.

IV. Analysis

A. *Admission of Fresh Evidence*

[41] As a preliminary matter, the respondents ask that portions of the World Bank Group's record and factum be struck out on the ground that they constitute fresh

evidence that was not before the trial judge. They primarily take issue with two affidavits. The Mikhlin-Oliver affidavit provides information about the organization and operations of the World Bank Group, and some background on the investigation in the present case. The Gilliam affidavit sets out the chronology of the prosecution, and describes the state of disclosure. Much of the evidence contained in the affidavits was presented in some form before the trial judge.

[42] As the present matter is an appeal of a pre-trial motion, we do not have the benefit of a full trial record. In addition, the World Bank Group did not appear in front of the trial judge to assert its immunity. It relied instead on the Crown to do so, which it was entitled to do. Although the affidavits are not admissible as fresh evidence, we find that they assist in completing the record before this Court (see *Law Society of British Columbia v. Mangat*, S.C.C., No. 27108, August 31, 2000, order by Arbour J. (*Bulletin of Proceedings*, September 29, 2000, at p. 1542); *Taypotat v. Taypotat*, S.C.C., No. 35518, August 7, 2014, order by Moldaver J. (*Bulletin of Proceedings*, August 29, 2014, at p. 1292)). Consequently, we admit the affidavits for the limited purpose of providing procedural context to this appeal, which includes the extent of the information which the Crown has disclosed to the respondents.

B. *The Archival and Personnel Immunities Conferred by the Articles of Agreement*

(1) Background

[43] The World Bank Group does not itself benefit from any immunities conferred by international treaty, and the parties to the present dispute have not pleaded any immunity flowing from customary international law. Rather, certain immunities have been conferred on the World Bank Group's five constituent organizations by their 188 member states. As outlined above, these constituent organizations are the IBRD, the IDA, the International Finance Corporation, the Multilateral Investment Guarantee Agency and the International Centre for Settlement of Investment Disputes. Each of these five institutions has its own set of governing documents, which set out the immunities and privileges the organization is to enjoy in the territory of each member state. The Articles of Agreement of the IBRD and the IDA are most relevant for the purposes of the present appeal.

[44] The IBRD was created alongside the International Monetary Fund at the Bretton Woods Conference in 1944. Its principal purpose was to promote the reconstruction and development of its member states by providing financing on more favourable terms: Articles of Agreement of the IBRD, Article I. Article VII of the IBRD's Articles of Agreement sets out the immunities and privileges to be accorded to the IBRD in the territories of each member state.

[45] The IDA was created in 1960. Its purpose is to further the IBRD's overall objective of promoting economic development by providing financing on more favourable terms to less-developed countries in particular: Articles of Agreement of the IDA, Article I. It was through the IDA that the World Bank Group sought to loan

the Government of Bangladesh US\$1.2 billion for the construction of the Padma Bridge. The IDA's immunities are set out in Article VIII of its Articles of Agreement and are, for the purposes of the present appeal, identical to those accorded to the IBRD.

[46] The immunities accorded in the Articles of Agreement of the IBRD and the IDA have been implemented in Canadian law by two Orders in Council, the *International Monetary Fund and International Bank for Reconstruction and Development Order*, and the *International Development Association, International Finance Corporation and Multilateral Investment Guarantee Agency Privileges and Immunities Order*, SOR/2014-137 (collectively the "Orders in Council"). The Articles of Agreement of the IBRD and the IDA have been "approved" by Parliament in their entirety through the *Bretton Woods Act*. There is no dispute between the parties that the relevant immunities have the force of law in Canada.

[47] As is the case with implementing legislation, the Articles of Agreement of the IBRD and the IDA must be interpreted in accordance with the general rules of interpretation set out in the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 ("Vienna Convention"): *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, at paras. 11-12; *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, at para. 35; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 51-52; *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at pp. 577-78. These general rules, set out in Articles

31 and 32 of the *Vienna Convention*, are similar to the modern approach to statutory interpretation affirmed by this Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. It is worth reproducing them at length:

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Thus, pursuant to the *Vienna Convention*, the scope of the immunities at issue must be interpreted in accordance with the ordinary meaning of the treaty terms and in light of their purpose and object.

[48] Sections 5 and 8 of the IBRD's and the IDA's Articles of Agreement provide as follows:

IBRD Articles of Agreement, Article VII

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;

IDA Articles of Agreement, Article VIII

Section 5 *Immunity of Archives*

The archives of the Association shall be inviolable.

...

Section 8 *Immunities and Privileges of Officers and Employees*

All Governors, Executive Directors, Alternates, officers and employees of the Association

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

[49] There remains a certain ambiguity regarding where the INT fits within the World Bank Group's overall structure, and whether it benefits in Canada from the immunities conferred on the World Bank Group's constituent entities. This ambiguity remains in large part because of a dearth of evidence in the record. From this, the trial judge limited himself to noting that the INT is "an independent unit within the World Bank Group reporting directly to the President", and that it was unclear "whether the INT is structurally part of one of the five entities making up the World Bank Group, in terms of its governance, or whether it is separate and apart from them" (para. 24).

[50] Notwithstanding this operational independence, we are of the view that the INT's documents form part of either the IBRD's or the IDA's archives, and that the INT's personnel benefit from either the IBRD's or the IDA's legal process immunity for acts performed in an official capacity. Because these immunities are identical, we need not determine conclusively whether it is Article VII of the IBRD's Articles of Agreement or Article VIII of the IDA's Articles of Agreement that applies.

[51] The INT forms part of the World Bank Group's integrity regime. It is charged with identifying and investigating allegations and other indications that sanctionable practices may have occurred in connection with projects financed by the World Bank Group, and in commencing internal sanctions proceedings when appropriate. The legal foundation for this integrity regime is laid out by the Articles of Agreement of the IBRD and the IDA, which require these organizations to make arrangements to ensure that funds are used for their intended purpose and with due attention to economy and efficiency. Article III, s. 5(b) of the IBRD Articles of Agreement provides:

(b) The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.

[52] In the same spirit, Article V, ss. 1(g) and 1(h) of the IDA Articles of Agreement provide:

(g) The Association shall make arrangements to ensure that the proceeds of any financing are used only for the purposes for which the financing was provided, with due attention to considerations of economy, efficiency and competitive international trade and without regard to political or other non-economic influences or considerations.

(h) Funds to be provided under any financing operation shall be made available to the recipient only to meet expenses in connection with the project as they are actually incurred.

[53] Because the Articles of Agreement of the IBRD and the IDA provide the legal foundation for the World Bank Group's integrity regime, and by extension the INT, common sense demands that the immunities outlined in those Articles of Agreement shield the documents and personnel of the INT. After all, the immunities outlined in the respective Articles of Agreement are accorded to enable the IBRD and the IDA to fulfill the functions with which they are entrusted: s. 1, Article VII of the IBRD Articles of Agreement; s. 1, Article VIII of the IDA Articles of Agreement. In support of this conclusion, the trial judge observed that the letterhead used by the Director, Operations for the INT bears the name of the IBRD, which provides some evidence that the World Bank Group considers the INT to be part of the IBRD. We turn now to consider the immunities set out in ss. 5 and 8, namely, when they apply, their scope, and under what conditions they may be waived.

(2) Is Section 3 Engaged?

[54] Mr. Bhuiyan argues that Article VII, s. 3 of the IBRD's Articles of Agreement (or Article VIII, s. 3 of the IDA's Articles of Agreement) expressly permits the respondents' document production order, notwithstanding the IBRD's or the IDA's other immunities. Section 3 reads as follows:

Actions may be brought against the [IBRD or IDA] only in a court of competent jurisdiction in the territories of a member in which the [IBRD or IDA] 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 [IBRD or IDA].

[55] In our view, s. 3 is not engaged in the present appeal. Section 3 confirms that the IBRD and the IDA, unlike many other international organizations, can be the subject of a lawsuit in a court of competent jurisdiction. This can be explained on the grounds that the IBRD and the IDA, in addition to other international development banks, engage in borrowing and lending operations and, in order to attract lender confidence, the IBRD's and the IDA's creditors must have access to courts to recover their claims: A. Reinisch and J. Wurm, "International Financial Institutions before National Courts", in D. D. Bradlow and D. B. Hunter, eds., *International Financial Institutions and International Law* (2010), 103, at pp. 123-24; P. Sands and P. Klein, *Bowett's Law of International Institutions* (6th ed. 2009), at p. 496. The present appeal involves a request for document production directed at personnel of the INT in the context of criminal charges. It is simply not the kind of action contemplated by s. 3.

(3) Are the Immunities Outlined in the Articles of Agreement "Functional"?

[56] The respondents argue that the immunities outlined in ss. 5 and 8 are "functional". On the respondents' understanding, a functional immunity is one that only applies where it has been specifically demonstrated that the immunity is necessary for the organization to carry out its operations and responsibilities. This was indeed the case for the immunity considered by this Court in *Amaratunga*. By

contrast, an immunity said to be “absolute” is not subject to this case-by-case determination of functional necessity.

[57] To support their theory, the respondents draw this Court’s attention to s. 1, which states as follows: “To enable the [IBRD or IDA] to fulfill the functions with which [they are] entrusted, the status, immunities and privileges [set forth or provided] in this Article shall be accorded to the [IBRD or IDA] in the territories of each member.”

[58] A plain reading suggests that this is merely a descriptive, purposive clause. It states the reason for according the IBRD and the IDA the immunities set out in Article VII and Article VIII of their respective Articles of Agreement. As the Court of First Instance of Brussels concluded with regards to similar immunities outlined in the governing agreement of the African Development Bank, this kind of purposive clause explains why the enumerated immunities were granted. It is not meant to require international organizations to justify the application of the asserted immunity: *Scimet v. African Development Bank* (1997), 128 I.L.R. 582, at p. 584. Our conclusion that the provision is only an interpretive aid is further supported by the fact that, unlike ss. 3, 5 and 8, s. 1 is not implemented in Canadian law through the Orders in Council.

[59] In addition, the ss. 5 and 8 immunities are not subject to any express condition of functional necessity. This distinguishes ss. 5 and 8 from the functional immunity provision this Court considered in *Amaratunga*, which stated that the

Northwest Atlantic Fisheries Organization “shall have in Canada the legal capacities of a body corporate and shall, to such extent as may be required for the performance of its functions, have the privileges and immunities set forth in Articles II and III of the Convention for the United Nations” (*Northwest Atlantic Fisheries Organization Privileges and Immunities Order*, SOR/80-64, s. 3(1)).

[60] It is noteworthy that this express condition is stipulated in s. 6 of Article VII and Article VIII. By virtue of s. 6, “all property and assets” of the IBRD and the IDA shall be free from “restrictions, regulations, controls and moratoria of any nature”, but *only* “[t]o the extent necessary to carry out the operations provided for in [the Articles of Agreement]”. These words would be meaningless if the privileges and immunities outlined in Articles VII and VIII were already subject to this condition by virtue of s. 1.

[61] Fundamentally, the respondents misinterpret the role and significance of s. 1. Functional forms of immunity appear to be inspired from the broad and flexible immunity outlined in the *Charter of the United Nations*, Can. T.S. 1945 No. 7. (“U.N. Charter”): A. Reinisch, “Transnational Judicial Conversations on the Personality, Privileges, and Immunities of International Organizations — An Introduction”, in A. Reinisch, ed., *The Privileges and Immunities of International Organizations in Domestic Courts* (2013), 1, at p. 5. Rather than enumerate specific immunities, Article 105(1) of the U.N. Charter simply provides that “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are

necessary for the fulfilment of its purposes". Article 105(2) of the U.N. Charter extends this protection to representatives and officials of the U.N., subject to the same condition. As Anthony J. Miller has stated:

This approach of formulating privileges and immunities in general terms, rather than as a series of detailed rules, enabled the drafters of the Charter to closely connect privileges and immunities "to the realization of the purposes of the Organization, to the free functioning of its organs and to the independent exercise of the functions and duties of officials", rather than trying to formulate concrete provisions dealing with particular privileges and immunities. [Footnote omitted.]

("The Privileges and Immunities of the United Nations" (2009), 6 *I.O.L.R.* 7, at p. 16)

[62] However, flexibility is bought at the price of uncertainty, as what is "functional" is essentially a matter of perspective: J. Klabbers, *An Introduction to International Organizations Law* (3rd ed. 2015), at p. 132; C. W. Jenks, *International Immunities* (1961), at p. 26; A. Reinisch, *International Organizations Before National Courts* (2000), at p. 206.

[63] Instead of committing the IBRD and the IDA to this uncertainty, the signatory states of the Articles of Agreement set out, in advance, the specific immunities that would enable these organizations to fulfill their responsibilities. The very wording of s. 1 suggests that this was an explicit choice; the immunities are accorded "[t]o enable the [IBRD or IDA] to fulfill the functions with which [they are] entrusted". To import an added condition of functional necessity would undermine

what appears to be a conscious choice to enumerate the specific immunities rather than to rely on one broad, functional grant of immunity.

[64] For these reasons, we are of the view that s. 1 does not impose a condition of functional necessity that must be satisfied whenever any immunity is asserted. However, as stated previously, the scope of these immunities should nevertheless be interpreted purposively, taking into consideration their object outlined in s. 1.

[65] Having concluded that the immunities outlined in ss. 5 and 8 apply without the need for further justification, we turn now to interpret the scope of these immunities.

(4) Scope of the IBRD's and the IDA's Archival Immunity

[66] By virtue of s. 5, the “archives of the [IBRD and the IDA] shall be inviolable”. The trial judge concluded that this immunity does not shield the IBRD from the respondents’ document production order, since, on the basis of a definition provided in a dictionary, “archives” refers exclusively to a “collection of historical documents or records” (para. 54). In addition, the trial judge was of the view that the word “inviolable” only entails protection from a search and seizure order, but not protection from an order for compelled production.

[67] In our respectful view, the trial judge erred in construing so narrowly an immunity that is integral to the independent functioning of international organizations. On our reading, the immunity outlined in s. 5 shields the entire collection of stored documents of the IBRD and the IDA from both search and seizure and from compelled production. This broader interpretation is consistent with the plain and ordinary meaning of the terms of s. 5 and is in harmony with its object and purpose.

[68] First, the word “archive” is frequently defined as a collection of records and documents held by an organization. For example, the *Canadian Oxford Dictionary* (2nd ed. 2004) defines “archive” as: “1 a collection of public, corporate or institutional documents or records. 2 the place where these are stored” (p. 67). The definition in the *Merriam-Webster’s Collegiate Dictionary* (11th ed. 2003) is similarly broad: “1: a place in which public records or historical documents are preserved; *also*: the material preserved — often used in pl.; 2: a repository or collection esp. of information” (p. 65) as is the *Black’s Law Dictionary* (10th ed. 2014) definition: “1. A place where public, historical, or institutional records are systematically preserved. 2. Collected and preserved public, historical, or institutional papers and records. 3. Any systematic compilation of materials, esp. writings, in physical or electronic form” (pp. 127-28 (emphasis added)).

[69] For their part, the *Collins Canadian Dictionary* (2010), at p. 42, defines “archives” as “a collection of records or documents”, while the *Multidictionnaire de*

la langue française (2009) defines the French word “*archives*” firstly as a [TRANSLATION] “[c]ollection of documents, regardless of their dates or their nature, produced or received by a person or an organization for his or its needs or for the performance of his or its activities, and retained for their general information value” (p. 123 (emphasis added)). Finally, *Le Lexis: dictionnaire érudit de la langue française* (2009) describes “*archives*”, at p. 103, as a [TRANSLATION] “[c]ollection of documents (handwritten papers, printed material, etc.) that come from an organization, a family or an individual”.

[70] This broader meaning of “archive”, which does not differentiate between current versus historical documents, reflects its known usage in international law. The *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, defines “consular archives” as including “all the papers, documents, correspondence books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping” (art. 1(1)(k)). This definition has also been applied to the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29, where the term “archives” is undefined: J. P. Grant and J. C. Barker, eds., *Parry and Grant Encyclopaedic Dictionary of International Law* (2nd ed. 2004), at p. 35 (“archives, diplomatic and consular”); see also J. R. Fox, *Dictionary of International and Comparative Law* (3rd ed. 2003), at p. 86 (“diplomatic archives”). The *Dictionnaire de droit international public* (2001) defines “*archives d’une organisation internationale*” (archives of an international organization) in a similarly broad fashion: [TRANSLATION] “Papers and documents

related to the functioning of an international organization and whose status is determined by the treaties applicable to that organization” (J. Salmon, ed., at p. 80).

[71] Interpreting “archives” in the narrow manner proposed by the trial judge would not only deviate from the manner in which this term is commonly used in international law, it would also undermine the purpose of s. 5. As this Court held in *Amaratunga*, immunities are extended to international organizations to protect them from intrusions into their operations and agenda by a member state or a member state’s courts: paras. 29, 30 and 45. Shielding an organization’s entire collection of stored documents, including official records and correspondences, is integral to ensuring their proper, independent functioning. Without it, the “confidential character of communications between states and the organisation, or between officials within the organisation, would be less secure”: Sands and Klein, at p. 502; see also Jenks, *International Immunities*, at p. 54; and K. Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (1964), at p. 81.

[72] This explains why archival immunity is affirmed in the constituent agreements of many international organizations in such broad, uncompromising terms: Sands and Klein, at pp. 501-2. Jenks has described the importance of international organizations’ archival immunity as follows:

The inviolability of international archives does not appear to have raised any special problem; it is designed partly to secure the safe-keeping of original documents and partly to preserve the confidential

character of official records; it appears to be generally accepted as self-evident that to recognise that the legislative, executive or judicial agencies of any one country may call for the production of documents from international archives would be to undermine the freedom and independence with which international staffs are expected to advise the international organisations towards which they have been vested by treaty with an exclusive responsibility and to destroy the whole basis of reciprocal respect for the confidential character of such archives without which governments would be unwilling to communicate confidential information to international organisations. [Emphasis added; footnotes omitted.]

(International Immunities, at p. 54)

[73] Limiting the protection of s. 5 to historical documents would leave exposed current and more sensitive documents, whose confidentiality is likely more important to the IBRD's independent functioning. For all of these reasons, we are of the view that the term "archives" is better construed as the entire collection of stored documents of the IBRD and the IDA, including their official records and correspondences. We note, in passing, that the House of Lords endorsed a similarly broad definition of "archives" in the context of interpreting the International Tin Council's immunities: *Shearson Lehman Bros Inc. v. Maclaine Watson & Co. (No. 2)*, [1988] 1 All E.R. 116, at p. 122.

[74] For its part, the term "inviolable" connotes a sweeping protection against any form of involuntary production. Maintaining a distinction, as the trial judge suggests, between document production orders as opposed to searches and seizures is neither suggested by the plain meaning of this provision, nor is it consonant with the purpose for extending immunity. As we have said, shielding the IBRD's and the IDA's archives is integral to ensuring their proper, independent functioning.

However, what is truly important is not the documents themselves but the information they contain. From this vantage point, it is irrelevant whether this information is revealed in the context of a search and seizure or in the context of a compelled production order. The purpose underlying the immunity is thwarted in either case.

[75] Admittedly, the use of the word “inviolable” may seem out of place when referring to the archives of an organization. However strange it may seem to speak of violence towards a collection of stored records, documents and correspondence, the term “inviolable” has a history in international law that sheds some light on its meaning in the IBRD and the IDA Articles of Agreement.

[76] Originating in the law of diplomacy, and later becoming common in treaties establishing certain international organizations, the term “inviolable” implies freedom from unilateral interference. Originally, the person of an ambassador was said to be inviolable. This entailed freedom from arrest or any kind of restraint: C. Morton, *Les privilèges et immunités diplomatiques* (1927), at p. 49; J. Secretan, *Les immunités diplomatiques des représentants des états membres et des agents de la Société des nations* (1928), at p. 67. Inviolability was later extended to the premises of diplomatic missions. In that context, “inviolable” connoted an immunity from the enforcement of local law within the premises by local authorities: E. Denza, *Diplomatic Law* (3rd ed. 2008), at p. 136.

[77] Prior to the First World War, many international organizations were accorded the same privileges and immunities known to the law of diplomacy: E. H.

Fedder, “The Functional Basis of International Privileges and Immunities: A New Concept in International law and Organization” (1960), 9 *Am. U.L. Rev.* 60, at p. 60. The personnel of many of the first international organizations were thus inviolable: L. Preuss, “Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest” (1931), 25 *A.J.I.L.* 694, at pp. 696-99; J. L. Kunz, “Privileges and Immunities of International Organizations” (1947), 41 *A.J.I.L.* 828, at pp. 828-32. Later, the 1920 *Covenant of the League of Nations* provided that the “buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable”: art. 7, (1920), 1 *League of Nations O.J.* 3, at p. 5. A subsequent agreement concluded in 1926 between the League and Switzerland provided that “inviolable” meant “no agent of the public authority may enter” without the consent of the League: “Communications from the Swiss Federal Council Concerning the Diplomatic Immunities to be Accorded to the Staff of the League of Nations and of the International Labour Office” (1926), 7 *League of Nations O.J.* 1422, at p. 1423. The agreement also added for the first time that the “archives of the League of Nations are inviolable”: *ibid.*

[78] This formulation was reprised in the Articles of Agreement of the IBRD. It has since become standard in the constituent agreements of many international organizations: see e.g. *Convention on the Privileges and Immunities of the United Nations*, Can T.S. 1948 No. 2, Article II, s. 4; *Vienna Convention on Diplomatic Relations*, art. 24. Though the word has been applied in various contexts — to persons, premises, and archives — this history makes clear that the term “inviolable”

generally entails freedom from any form of unilateral interference on the part of a state.

[79] This broad interpretation also finds support in international law scholarship. The inviolability of archives is said to afford a complete shield from investigation, confiscation or interference of any kind with the documents belonging to the archives of a state or international organization: A. S. Muller, *International Organizations and their Host States: Aspects of their Legal Relationship* (1995), at p. 205; Fox, at p. 173 (“inviolability”); Morton, at pp. 56-57. Philippe Sands and Pierre Klein write that, as a consequence of the principle that archives are inviolable, “international organisations are under no duty to produce any official document or part of their archives in the context of litigations before national courts”: p. 502, citing C. W. Jenks, *The Proper Law of International Organisations* (1962), at p. 234. This appears to reflect the consensus view of international law scholarship: see e.g. Jenks, *International Immunities*, at p. 54; B. Sen, *A Diplomat’s Handbook of International Law and Practice* (3rd ed. 1980), at pp. 117-118; J. Wouters, S. Duquet and K. Meuwissen, “The Vienna Conventions on Diplomatic and Consular Relations”, in A. F. Cooper, J. Heine and R. Thakur, eds., *The Oxford Handbook of Modern Diplomacy* (2013), 510, at p. 523. The United Nations Special Rapporteur was also of the view that the absolute secrecy of an organization’s archives protects it from all forms of document production orders: Díaz Gonzáles, “Fifth report on relations between states and international organizations (second part of topic)”, U.N.

Doc. A/CN.4/438, in *Yearbook of the International Law Commission 1991* (1994), vol. II, Part One 91, at pp. 95-99.

[80] Finally, it is worth noting that our interpretation is also favoured in the decisions of foreign courts. The Court of Appeal for England and Wales has written recently that “the universal definition of ‘inviolability’ is freedom from any act of interference on the part of the receiving state”: *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 3)*, [2014] EWCA Civ 708, [2014] 1 W.L.R. 2921, at para. 61 (emphasis added). What is more, several foreign courts appear to have specifically taken it for granted that the inviolability of archives shields international organizations from document production orders: *Taiwan v. United States District Court for the Northern District of California*, 128 F.3d 712 (9th Circ. 1997); *Iraq v. Vinci Constructions* (2002), 127 I.L.R. 101 (Brussels C.A.); *Owens, Re Application for Judicial Review*, [2015] NIQB 29, at paras. 63 and 69 (BAILII).

[81] For these reasons, we are of the view that the protection afforded by s. 5 extends to all documents stored by the INT from search, seizure and compelled production.

[82] Further, we are of the view that partial voluntary disclosure of some documents by the World Bank Group does not amount to a waiver of this immunity. Indeed, on our reading, the archival immunity is not subject to waiver.

[83] We have already concluded that archival inviolability connotes protection from all forms of unilateral interference with the INT's archives. As a result, where the World Bank Group has expressly permitted the consultation of documents in its archives, the sanctity of those archives is respected. In other words, where there is express permission to consult, s. 5 simply does not apply. This likely explains why, unlike the personnel immunity outlined in s. 8, s. 5 does not contemplate the possibility of waiver. Moreover, where a document has been copied and transmitted to an external party, that transmitted copy no longer forms part of the "archives", as we have defined them. As a result, s. 5 no longer applies to shield that transmitted copy. The House of Lords arrived at a similar conclusion in *Shearson Lehman Bros Inc.*

[84] Since a qualified representative of the IBRD or the IDA never agreed to allow Canadian officials to consult the documents sought in the document production order, s. 5 applies.

(5) The IBRD's and the IDA's Legal Process Immunity for Personnel

[85] While this appeal primarily concerns a document production order, the challenged subpoenas also required Mr. Haynes and Mr. Kim to give evidence, in addition to producing the requested documents. Therefore, we will address the immunity that protects officers and employees from legal process.

[86] Section 8 provides that “[a]ll [g]overnors, [e]xecutive [d]irectors, [a]lternates, officers and employees of the [IBRD or IDA] (i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the [IBRD or IDA] waives this immunity”.

[87] It is uncontested that Mr. Haynes and Mr. Kim were performing acts in their official capacity when they obtained the information that the respondents now seek. It is also undisputed that the scope of the legal process immunity in s. 8 shields employees acting in an official capacity from not only civil suit and prosecution, but from legal processes such as subpoenas. After all, an employee who fails to respect a production order would be found in contempt of court. In addition, for the reasons we have outlined above, the application of this immunity is not made conditional on a case-by-case determination of functional necessity. Therefore, the s. 8 immunity applies, subject to waiver.

(6) Were the Immunities Waived?

[88] The respondents submit that the archival and personnel immunities were waived by the World Bank Group, given the substantial amount of information it shared with the RCMP and its interest in the fruits of the RCMP investigation. As we have already discussed, the archival immunity is not subject to waiver, be it express, implied or constructive. Regarding the organization’s personnel immunity, we disagree with the respondents, for the reasons that follow.

[89] The only reference to “waiver” in Article VII or in Article VIII is in the text of s. 8, which confers immunity from legal process to the personnel of the IBRD or the IDA “except when the [IBRD or IDA] waives this immunity”. The term “waiver” is not qualified, leaving open the question of whether waiver means “express” waiver, or whether implied waiver or constructive forms of waiver are recognized.

[90] In our view, the object and purpose of the treaty favour an express waiver requirement. The application of the IBRD’s and the IDA’s immunity provisions are not subject to a case-by-case determination. To read “waiver” as including forms of implied or constructive waiver would subject immunities to case-by-case determination. Representatives of the World Bank Group would be required to appear in national courts to argue whether their conduct amounted to waiver, or whether for other reasons they should be deemed to have waived their immunity. Such a conclusion would be inconsistent with our view that the IBRD’s and the IDA’s immunities apply without further justification.

[91] Further, the purpose for according immunity to international organizations and their personnel is to shield these organizations from interference by member states: *Amaratunga*, at para. 29. Personnel immunity is foundational to international organizations. As one scholar opines, personnel immunity is necessary “to avoid harassment of international officials by way of court proceedings, civil or criminal” (Ahluwalia, at p. 106). Put another way, “[i]f the official acts of world

authorities are open to question in national courts in proceedings against the officials of those authorities, every attempt to establish an effective world organization is liable to be completely nullified by the interference of national agencies” (C. W. Jenks, “Some Problems of an International Civil Service” (1943), 3 *P.A.R.* 93, at p. 103). Jenks further observes that the function of international immunities is to “protect international officials against the consequences of the nonexistence of anything in the nature of a federal government to which they can appeal for protection and support against any attempt to prevent the effective discharge of their official duties” (*ibid.*).

[92] In this context, limiting the IBRD’s or the IDA’s waiver to strictly its own express terms is consistent with the purpose of protecting them from state interference (Muller, at p. 162). If “waiver” is limited to express waiver, then the IBRD and the IDA will be firmly in control of when their personnel may be subjected to domestic legal processes. This is essential for a large international organization which, in this case, comprises 188 member states. If s. 8 were to include forms of implied and constructive waiver — concepts that are liable to vary significantly across the globe — then inconsistencies from jurisdiction to jurisdiction could cause considerable confusion and interfere with the IBRD’s and the IDA’s orderly operations.

[93] It must be remembered that when a state agrees to become a member of the World Bank Group, it makes a deliberate decision to accept the terms and

conditions of the organization, which include archival and personnel immunities. It is part of the original agreement that in exchange for admission to the international organization, every member state agrees to accept the concept of collective governance. As a result, no single member can attempt to control the institution, which may occur if domestic courts apply local and variegated conceptions of implied and constructive waiver. Requiring express waiver avoids these problems.

[94] Further, exposing the World Bank Group to forms of implied or constructive waiver could have a chilling effect on collaboration with domestic law enforcement. Such an effect would be harmful, since multilateral banks including the World Bank Group are particularly well placed to investigate corruption and to serve at the frontlines of international anti-corruption efforts.

[95] Turning to the case at bar, the IBRD's and the IDA's personnel immunity was never expressly waived. On every occasion when the INT provided information, it reiterated that it did so without prejudice to its immunity.

[96] In our view, the trial judge erred in his finding that the World Bank Group waived its immunity, a finding which appears to be rooted in a fairness-based constructive waiver. He found that the INT could not selectively share some of the information, documents or correspondences in its possession with Canadian law enforcement officials. However, the doctrine of selective waiver, developed at common law, should not inform the interpretation of an international treaty.

[97] The trial judge further found that the World Bank Group could not assist in and “benefit” from a Canadian prosecution without sharing other information that might be valuable to the respondents. In support of this theory, the trial judge relied on the “benefit/burden exception” to Crown statutory immunity applied in *Sparling*. The “benefit/burden” principle is a common law exception to the Crown’s presumed immunity from statute, which applies when the Crown accepts a statutory benefit that has a sufficient nexus with an attendant burden. The exception is intended to prevent the Crown from simultaneously taking advantage of rights conferred by legislation while invoking its own immunity to shield itself from related liabilities or restrictions.

[98] The “benefit/burden exception” applied in *Sparling* does not apply to the immunities at issue in the present case. First, the World Bank Group has in no relevant sense “benefitted” from the Crown’s prosecution of the respondents. Prosecutions are, by their very nature, in the interest of the public and not the complainant or any other private party. Second, the rationale underlying the “benefit/burden exception” has no bearing in the context of international organization immunity. The doctrine is premised on the fact that if the Crown was permitted to take advantage of rights provided by legislation but not be subject to the attendant liabilities or restrictions, it would benefit from more than what the statute intended to provide: P. W. Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (1971), at p. 183, cited by La Forest J. in *Sparling*, at p. 1023. This rationale simply has no relevance in this context.

[99] For these reasons, the personnel immunity in s. 8 applies to shield Mr. Haynes and Mr. Kim from being compelled by a Canadian court, and the immunity has not been waived. Given our finding, it is not necessary to determine whether the subpoenas were validly served on Mr. Haynes and Mr. Kim.

C. *The Domestic Law of Third Party Production in Criminal Cases*

[100] Even if the World Bank Group did not possess any of the immunities identified in the Articles of Agreement, the production order should not have issued under Canadian law. To obtain third party records in a *Garofoli* application — a proceeding brought to challenge a wiretap authorization — an accused must show a reasonable likelihood that the records will be of probative value to the narrow issues in play on such an application. The respondents have failed to do so.

[101] Before engaging in the *Garofoli* issue, we note that in the material filed before the trial judge, the respondents claimed that the records sought were “‘likely relevant’ to important issues at trial, the competence of witnesses to testify, and to issues relevant to a motion . . . pursuant to *R. v. Garofoli*”. However, only the *Garofoli* issue was particularized and ultimately addressed by the trial judge. Accordingly, we propose to restrict our comments to it.

(1) The Disclosure Already Made in This Case

[102] As noted, the intercepted communications form a significant part of the Crown's case against the respondents. The RCMP obtained the authorizations to intercept largely on the basis of information supplied by the INT.

[103] Shortly after the investigation commenced, the RCMP team commander, Staff Sgt. Martin Bédard, assigned Sgt. Driscoll to prepare an affidavit for the wiretap application. Sgt. Driscoll had extensive experience obtaining wiretap authorizations.

[104] Sgt. Driscoll made no handwritten notes of his work as affiant. He did, however, make a few pages of electronic notes at his initial meetings with World Bank Group officials in Washington, D.C. According to Sgt. Driscoll, those notes were to form the basis of the wiretap affidavits, and they have been disclosed to the respondents.

[105] Sgt. Driscoll testified that in his role as an affiant he did not usually make notes of his work since he was not actively investigating but relying instead on the work of others. When he participated in what he considered to be an "investigative step", such as taking part in the execution of a search warrant at SNC-Lavalin on September 1, 2011, and an interview with one of the respondents, he made handwritten notes. Both events occurred after all of the wiretap authorizations had been issued.

[106] When preparing the affidavits, Sgt. Driscoll primarily relied on documents shared by the INT, and the work product of other officers. He entered the

information directly into the draft affidavits, usually citing the source in a footnote. Every INT report that Sgt. Driscoll consulted has been disclosed.

[107] Sgt. Driscoll also spoke to Mr. Haynes on a regular basis and received information from him. While he attributed this information to Mr. Haynes in the affidavits, he kept no independent notes of their conversations. If information was not entered in the affidavits, it was not documented.

[108] Sgt. Driscoll checked the content of the first of his three affidavits with Mr. Haynes, both for accuracy and to prevent the inadvertent identification of the tipsters. He kept an electronic copy of that draft, which has been disclosed to the respondents.

[109] Sgt. Driscoll also spoke directly to one of the tipsters on at least two occasions. He made no notes of these conversations, but Staff Sgt. Bédard and other officers sat in on those conversations and made notes. Staff Sgt. Bédard's handwritten notes of the investigation, which run to over five hundred pages, have been disclosed to the respondents.

[110] All of Sgt. Driscoll's emails from the period of the investigation were lost when problems occurred during the re-imaging of his office computer in July 2013. Sgt. Driscoll testified that he had no reason to expect that his emails would be lost. Sgt. Erik Martin, the primary investigator in the case, also lost some emails as a result of a computer crash in February 2012.

[111] When the INT learned about the lost emails, it voluntarily provided copies of its entire email correspondence between Mr. Haynes and Sgt. Driscoll to the Canadian authorities. These emails have been disclosed to the respondents. The Crown has also disclosed all emails sent between the INT and the RCMP from March 31, 2011 to April 30, 2014. Furthermore, most of the emails sent from the INT to Sgt. Driscoll were copied to Staff Sgt. Bédard, as well as to Sgt. Driscoll's personal email account, or to other RCMP officers. These emails have been recovered and disclosed.

(2) *O'Connor and Stinchcombe*

[112] The respondents seek the INT's records, listed above at para. 23, under the *O'Connor* framework for third party production. The *O'Connor* framework addresses the right of an accused to obtain documents that are in the hands of third parties. In view of the privacy interests at stake, an accused bears the burden of demonstrating that the documents sought are “logically probative to an issue at trial or the competence of a witness to testify” (*O'Connor*, at para. 22 (emphasis in original)).

[113] An *O'Connor* application is a two-step process. At the first step, an accused must demonstrate that the records sought are *likely relevant* to an issue at trial, such as the credibility or reliability of a witness. If an accused meets the likely relevance threshold, the documents will be produced to the trial judge, who must then weigh the “salutary and deleterious effects of a production order and determine

whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence” (*O’Connor*, at para. 30).

[114] This process is distinct from the *Stinchcombe* framework which applies when documents are in the hands of the Crown or the police. Under that framework, the Crown must disclose all documents in its “possession or control” which are relevant to an accused’s case (*R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 22; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326). To withhold disclosure, the Crown must demonstrate that the documents sought are “clearly irrelevant, privileged, or [that their] disclosure is otherwise governed by law” (*McNeil*, at para. 18; see also *Stinchcombe*, at p. 336).

[115] *Stinchcombe* places the burden on the Crown to justify non-disclosure. In contrast, *O’Connor* requires the accused to justify production. These two regimes share a fundamental purpose: protecting an accused person’s right to make full answer and defence, while at the same time recognizing the need to place limits on disclosure when required.

(3) The Proper Threshold for Third Party Production on a *Garofoli* Application

[116] The respondents seek the INT’s records in a *Garofoli* application designed to challenge the wiretap authorizations. A typical *O’Connor* application is designed to deal with production of documents that relate to material issues at trial

bearing directly on the guilt or innocence of the accused. A *Garofoli* application is more limited in scope, relating as it does to the admissibility of evidence, namely intercepted communications (*Pires*, at paras. 29-30). This is an important distinction — and one which requires clarification. An *O'Connor* application made in the context of a *Garofoli* application must be confined to the narrow issues that a *Garofoli* application is meant to address. Policy considerations in this context dictate a similar narrow approach.

[117] The *Garofoli* framework assesses the reasonableness of a search when wiretaps are used to intercept private communications. A search will be reasonable if the statutory preconditions for a wiretap authorization have been met (*Garofoli*, at p. 1452; *R. v. Duarte*, [1990] 1 S.C.R. 30, at pp. 44-46).

[118] In this case, the authorization was sought under ss. 185 and 186 of the *Criminal Code*. The statutory preconditions are straightforward. Granting an authorization must be in the best interests of the administration of justice (*Criminal Code*, s. 186(1)(a)). This means that there must be reasonable grounds to believe an offence has been committed and that information concerning the offence will be obtained (*Duarte*, at p. 45). Other investigative procedures must also “have been tried and have failed”, be “unlikely to succeed”, or the matter must be urgent “such that it would be impractical to carry out the investigation of the offence using only other investigative procedures” (*Criminal Code*, s. 186(1)(b)).

[119] A *Garofoli* application does not determine whether the allegations underlying the wiretap application are ultimately true — a matter to be decided at trial — but rather whether the affiant had “a reasonable belief in the existence of the requisite statutory grounds” (*Pires*, at para. 41). What matters is what the affiant knew or ought to have known at the time the affidavit in support of the wiretap authorization was sworn. As this Court stated in *Pires*, albeit in the context of an application to cross-examine the affiant:

. . . cross-examination that can do no more than show that some of the information relied upon by the affiant is false is not likely to be useful unless it can also support the inference that the affiant knew or ought to have known that it was false. We must not lose sight of the fact that the wiretap authorization is an investigatory tool. [para. 41]

When an accused seeks evidence in support of a *Garofoli* application by way of cross-examination, this narrow test must be kept in mind. As we will explain, the same test applies when production of third party records is sought.

[120] As a general rule, there are two ways to challenge a wiretap authorization: first, that the record before the authorizing judge was insufficient to make out the statutory preconditions; second, that the record did not accurately reflect what the affiant knew or ought to have known, and that if it had, the authorization could not have issued (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at paras. 50-54; *Pires*, at para. 41; see also *R. v. Grant*, [1993] 3 S.C.R. 223, on the exclusion of unconstitutionally obtained information from warrant applications). The challenge here is brought on the second basis, sometimes referred to as a subfacial challenge.

[121] In view of the fact that a subfacial challenge hinges on what the affiant knew or ought to have known at the time the affidavit was sworn, the accuracy of the affidavit is tested against the affiant's reasonable belief at that time. In discussing a subfacial challenge to an information to obtain a search warrant, Smart J. of the British Columbia Supreme Court put the matter succinctly as follows:

During this review, if the applicant establishes that the affiant knew or should have known that evidence was false, inaccurate or misleading, that evidence should be excised from the [information to obtain] when determining whether the warrant was lawfully issued. Similarly, if the defence establishes that there was additional evidence the affiant knew or should have known and included in the [information to obtain] in order to make full, fair and frank disclosure, that evidence may be added when determining whether the warrant was lawfully issued.

(*R. v. Sipes*, 2009 BCSC 612, at para. 41 (CanLII))

[122] Smart J.'s comments apply equally to a *Garofoli* application (see *R. v. McKinnon*, 2013 BCSC 2212, at para. 12 (CanLII); see also *Grant*, at p. 251; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 40-42). They accord with this Court's observation in *Pires* that an error or omission is not relevant on a *Garofoli* application if the affiant could not reasonably have known of it (para. 41). Testing the affidavit against the ultimate truth rather than the affiant's reasonable belief would turn a *Garofoli* hearing into a trial of every allegation in the affidavit, something this Court has long sought to prevent (*Pires*, at para. 30; see also *R. v. Ebanks*, 2009 ONCA 851, 97 O.R. (3d) 721, at para. 21).

[123] When assessing a subfacial challenge, it is important to note that affiants may not ignore signs that other officers may be misleading them or omitting material information. However, if there is no indication that anything is amiss, they do not need to conduct their own investigation (*R. v. Ahmed*, 2012 ONSC 4893, [2012] O.J. No. 6643 (QL), at para. 47; see also *Pires*, at para. 41).

[124] With these principles in mind, while we do not foreclose the possibility that the *O'Connor* process may be used to obtain records for purposes of a *Garofoli* application, the relevance threshold applicable to such an application is narrower than that on a typical *O'Connor* application. Specifically, where an accused asserts that third party documents are relevant to a *Garofoli* application, he or she must show a reasonable likelihood that the records sought will be of probative value to the issues on the application. The fact that the documents may show errors or omissions in the affidavit will not be sufficient to undermine the authorization. They must also support an inference that the affiant knew or ought to have known of the errors or omissions. If the documents sought for production are incapable of supporting such an inference, they will be irrelevant on a *Garofoli* application (*Pires*, at para. 41).

[125] This test for third party production is also consistent with another form of discovery on a *Garofoli* application: cross-examination of the affiant — and so it should be. Both forms of discovery serve similar purposes and engage similar policy concerns. They should be treated alike.

[126] On a *Garofoli* application, an accused may only cross-examine the affiant with leave of the trial judge. Leave will only be granted if the accused shows “a reasonable likelihood that cross-examination of the affiant will elicit testimony of probative value to the issue for consideration by the reviewing judge” (*Pires*, at para. 3; see also *Garofoli*, at p. 1465). Simply put, the accused must show that the cross-examination is reasonably likely to be *useful* on the application.

[127] In *Pires*, this Court upheld the constitutionality of the requirement that leave be sought to cross-examine the affiant, as well as the applicable threshold. The Court did so for three reasons. First, only a limited range of questioning will be relevant to the test on a *Garofoli* application (*Pires*, at paras. 40-41). The threshold primarily ensures that the cross-examination will be relevant (paras. 3 and 31). Second, cross-examination creates a risk of inadvertently identifying confidential informants (para. 36). Third, cross-examination can create waste and unnecessary delays. The threshold is “nothing more than a means of ensuring that . . . the proceedings remain focussed and on track” (para. 31).

[128] The three justifications that warrant limiting cross-examination of the affiant apply with equal force to third party production applications. First, the issues on a *Garofoli* application remain narrow. The relevance of the information sought will be judged in relation to these narrow issues. A finding that some information in Sgt. Driscoll’s affidavits is false will only be relevant if it tends to support the inference that he knew or ought to have known that it was false.

[129] Second, production of documents the affiant did not consult risks identifying confidential informants. Although it is easier to vet documents than to vet an affiant's testimony, this Court has recognized that it is "virtually impossible for the court to know what details may reveal the identity of an anonymous informer" (*R. v. Leipert*, [1997] 1 S.C.R. 281, at para. 28). Lower courts have also recognized that it is difficult and time-consuming for the police to adequately vet original informer notes, which in complex cases can involve many officers and hundreds of reports (*Ahmed*, at para. 46; *R. v. Croft*, 2013 ABQB 705, 576 A.R. 333, at para. 32).

[130] Finally, broad third party production requests can derail pre-trial proceedings. The production order in this case could involve hundreds or even thousands of pages. Sweeping disclosure requests are a common cause of delays (P. J. LeSage and M. Code, *Report of the Review of Large and Complex Criminal Case Procedures* (2008), at pp. 45-55). The same can be said of third party requests. The process of obtaining, reviewing and vetting documents in wiretap cases may require significant resources on the part of police (see, on this point, R. W. Hubbard, P. M. Brauti and S. K. Fenton, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (loose-leaf), vol. 2, at pp. 8-12 to 8-12.7). In the case of an *O'Connor* request, the same would apply to third parties. A narrow relevance threshold is therefore needed to prevent "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" production requests (*R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32, quoted by Lamer C.J. and Sopinka J., who were in the majority on this issue, in *O'Connor*, at para. 24).

[131] Lower courts have acknowledged these concerns, both as regards documents in the hands of the police and documents in the hands of third parties (*Ahmed; R. v. Ali*, 2013 ONSC 2629; *R. v. Alizadeh*, 2013 ONSC 5417; *Croft; R. v. Way*, 2014 NSSC 180, 345 N.S.R. (2d) 258). We need not address the boundaries of *Stinchcombe* disclosure in the *Garofoli* context, as that issue is not before us. However, it is clear that lower courts consider disclosure and production of documents to be analogous to cross-examination. They have therefore applied the same relevance threshold. Where courts have departed from this proposition, they have done so in cases where the documents being sought were found to come within *Stinchcombe* disclosure requirements (see *R. v. Bernath*, 2015 BCSC 632, at paras. 78-80 (CanLII); *R. v. Edwardsen*, 2015 BCSC 705, 338 C.R.R. (2d) 191, at paras. 73-74; *R. v. Lemke*, 2015 ABQB 444). It is axiomatic that if in fact the documents in question are in the hands of the authorities and are determined to be subject to *Stinchcombe* disclosure, they must be produced.

[132] We agree that these two discovery tools — cross-examination of affiants and third party production orders — should be subject to the same relevance threshold. Therefore, to obtain third party production in the *Garofoli* context, an accused must show a reasonable likelihood that the records sought will be of probative value to the issues on the application. As with cross-examination of an affiant, it must be reasonably likely that the records will be *useful*.

[133] The “reasonable likelihood” threshold is appropriate to the *Garofoli* context and fair to the accused. It does not require an accused to first prove the evidence which is being sought. By the same token, it prevents fishing expeditions and ensures efficient use of judicial resources. In short, it focuses on the issues relevant to a *Garofoli* application, which are narrower than those relevant to the case as a whole.

[134] As in the case of applications to cross-examine the affiant, the accused will already have access to the documents that were before the authorizing judge, including the affidavit in support of the authorization (*Criminal Code*, s. 187(1.4)); *Pires*, at paras. 25-26). These documents are clearly relevant and the accused is presumptively entitled to them (*Criminal Code*, s. 187(1.4); *Pires*, at paras. 25-26; *Ahmed*, at para. 30). The accused also has a right to access the rest of the investigative file under *Stinchcombe* disclosure, subject of course to the exceptions identified in *Stinchcombe* and *McNeil*. This disclosure should be sufficient to enable the accused to show a basis for third party production requests, if such a basis exists. While an accused has a right to production of relevant documents, there is no right to embark on a fishing expedition. The right does not extend to every document relating to the case, regardless of who holds it or where it is. This is especially so when production is sought in aid of a *Garofoli* application.

[135] Having addressed the relevant legal test, we turn now to its application in this case.

(4) Application

[136] The respondents argue that the documents they seek are likely relevant to their *Garofoli* application and therefore should be produced. In the alternative, they argue that the documents in the World Bank Group's possession should be presumed relevant because certain documents which would have been disclosed under *Stinchcombe* were lost or not created.

[137] Respectfully, the trial judge erred in assessing both arguments. Although he correctly placed the burden on the respondents, he did not properly assess the relevance of the documents being sought. In particular, he blurred the distinction in a *Garofoli* application between the affiant's knowledge and the knowledge of others involved in the investigation.

[138] In this case, that distinction is crucial. While the documents sought may be relevant to the ultimate truth of the allegations in the affidavits (a matter upon which we make no comment), they are not reasonably likely to be of probative value to what Sgt. Driscoll knew or ought to have known since he did not consult them. Even if the documents were to reveal material omissions or errors in the affidavits, this would not undermine the preconditions for issuing the authorization unless there was something in the documents which showed that Sgt. Driscoll knew or ought reasonably to have known of them.

[139] To show that Sgt. Driscoll knew or ought reasonably to have known about the information contained in these documents, the respondents must show that it was unreasonable for him to rely on the information he received from the INT and other officers. The respondents have not done so. The World Bank Group was forthcoming and cooperative with the RCMP. The INT shared what it knew about the tipsters, including concerns regarding their credibility and their reasons for seeking anonymity, if known.

[140] Furthermore, Mr. Haynes is a professional investigator with a reputable international organization. Like the RCMP, the INT was attempting to uncover the truth behind the tipsters' allegations. Under these circumstances, Sgt. Driscoll did not need to double-check his information with the original communications between the tipsters and the INT — though, in fact, he did consult many of these communications. He also provided his draft affidavit to Mr. Haynes to check for accuracy, completeness and protection of source identity. Mr. Haynes did so and Sgt. Driscoll had no reason to doubt his integrity.

[141] Mr. Haynes's position in this case is analogous to that of an informer handler: someone who acts as an intermediary between an affiant or investigator and an informant. Lower courts have repeatedly rejected the proposition that affiants must have directly consulted informers or informer handler notes, or otherwise investigated the information communicated to them by other officers (see, e.g., *Croft*; *Ahmed*; *Ali*). While affiants must not allow themselves, either knowingly or through wilful

blindness, to be misled by informer handlers and other officers, there is no evidence of any discrepancies or errors that should have put Sgt. Driscoll “on notice” to investigate further.

[142] Only one set of documents among those sought would tend to show what Sgt. Driscoll knew: Mr. Haynes’s notes of any conversations he had with Sgt. Driscoll. But the record is silent on whether Mr. Haynes made any such notes. Regardless, the fact remains that the respondents have received voluminous disclosure, including all documents in the Crown’s possession covered by *Stinchcombe*. It is not unfair to ask them to demonstrate the relevance of their requests on the basis of the information they already have. This disclosure includes:

- The redacted wiretap and search warrant affidavits;
- A draft of the affidavit used for the first wiretap application;
- All materials that were before the authorizing judges;
- The notes made by all of the main RCMP investigators, including those of the lead investigator, Staff Sgt. Bédard;

- Forty liaison reports sent between the INT and the RCMP from March 31, 2011 to January 27, 2012, including 33 that contained source information;
- Transcripts and the original audio of all relevant intercepted communications;
- More than one million items seized in the execution of search warrants at SNC-Lavalin offices, including 2,332 potentially relevant documents.

[143] Of particular importance, the respondents have the affidavits presented to the authorizing judges (redacted to protect the tipsters' identities), as well as every report and document referred to therein that the RCMP have in their possession. They have the handwritten notes of Staff Sgt. Bédard, which include conversations he sat in on between Sgt. Driscoll and the second tipster. The respondents have also cross-examined Sgt. Driscoll on some issues relevant to the *Garofoli* application, albeit in the context of a prior disclosure motion. It is speculative that an examination of the records sought would reveal an omission or error which Sgt. Driscoll knew or ought to have known about but which escaped the already extensive disclosure.

[144] We also reject the respondents' second argument. The respondents claim that *Stinchcombe* disclosure is incomplete because Sgt. Driscoll's emails were lost,

and because Sgt. Driscoll took no notes of his work preparing the affidavits. They submit that while third party documents would not ordinarily be presumed relevant, the World Bank Group's documents benefit from such a presumption because these first party documents were lost or not created.

[145] Accepting this argument would require a significant change to the *O'Connor* framework. We do not believe such a change is necessary. When information covered by *Stinchcombe* disclosure is missing, destroyed or otherwise unavailable, the loss must be addressed through the remedial framework set forth in *R. v. La*, [1997] 2 S.C.R. 680. This is the appropriate framework for addressing the lost emails and missing notes, and it may well be the appropriate framework for addressing any prejudice resulting from the World Bank Group's assertion of its immunities.

[146] The respondents did not argue these issues on this appeal, and they are best left to the trial judge. We do, however, note that the trial judge has already ordered disclosure of the draft affidavit as a remedy for the lost emails and missing notes. We further note that most of Sgt. Driscoll's emails have been recovered. Most were copied to other RCMP officers, and the INT has voluntarily provided all emails sent from Mr. Haynes to Sgt. Driscoll. These factors will no doubt play a role in determining whether the alleged deficiencies in *Stinchcombe* disclosure have occasioned any actual prejudice to the respondents.

[147] The respondents have failed to show the relevance of the documents sought to their planned *Garofoli* application. The relevance of the World Bank Group's documents to other issues in this case is a matter for the trial judge.

V. Conclusion

[148] The World Bank Group's immunities cover the records sought and its personnel, and they have not been waived. Moreover, the INT's records were not disclosable under Canadian law. In the result, we would dismiss the respondents' motion to strike, allow the appeal and set aside the production order.

[149] In the circumstances, given the issues raised, we would make no order as to costs. In doing so, we wish to make it clear that we do not accept Mr. Bhuiyan's submission as to the World Bank Group's conduct in this case.

Appeal allowed.

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