

Supreme Court of Canada in *World Bank Group v Wallace*: On Production of Records, Immunities of International Organizations and the Global Fight against Corruption

D M Y T R O G A L A G A N *

ABSTRACT

On 29 April 2016, the Supreme Court delivered a judgment in *World Bank Group v Wallace*, an unusual case in which persons charged with corruption of foreign public officials applied to a Canadian court for production of documents in possession of an international organization. This decision is of great importance for Canadian law for two reasons. First, it discusses the privileges and immunities of international organizations against compulsory production of documents in criminal cases. Second, it sets the relevant test for assessing applications for *O'Connor* third-party production orders brought within a challenge to a wiretap authorization under the *Garofoli* framework. The author argues that the Court correctly interpreted the provisions of the World Bank Group's governing documents on archival and personnel immunity in accordance with general principles of treaty interpretation, but did not take an opportunity to balance these immunities and assess their waiver against the accused's right to make a full answer and defense. The Court also followed its previous jurisprudence on challenges to wiretap authorizations and production of documents by third parties. Furthermore, this paper suggests the Court's reasoning was largely influenced by policy considerations, such as

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promotion of international cooperation and strengthening of Canada's role in the global fight against corruption.

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I. INTRODUCTION

In the *World Bank Group v Wallace*, an unusual case involving an international organization and allegations of corruption of foreign public officials, the Supreme Court of Canada (“the Court”) duly rejected the request for production of documents.¹ The author will first show how the Court correctly interpreted the provisions of the World Bank Group’s (“WBG”) governing documents on archival and personnel immunity in accordance with general principles of treaty interpretation. The Court, however, did not take an opportunity to balance the immunities (and to assess their waiver) against the accused’s right to make a full answer and defense. Secondly, the author will show that the Court followed previous jurisprudence on challenges to wiretap authorizations and production of documents by third parties.

This paper argues that the Court’s reasoning is largely influenced by policy considerations, namely the promotion of international cooperation (especially with such reputable international organizations as the WBG) and strengthening of Canada’s role in the global fight against corruption. As early as 1996, the President of the World Bank, James Wolfensohn, urged global leaders to “deal with the cancer of corruption,”² and in 1998 the *Corruption of Foreign Public Officials Act*³ was enacted, making it a criminal offence for a Canadian corporation or individual to bribe a foreign official.⁴

¹ *World Bank Group v Wallace*, 2016 SCC 15, [2016] 1 SCR 207 [*World Bank*].

² The World Bank, *People and Development: Annual Meetings Address by James Wolfensohn, President, Working Paper No 99712*, (1996) online: <<http://go.worldbank.org/PUC5BB8060>>.

³ *Corruption of Foreign Public Officials Act*, SC 1998, c 34 [CFPOA].

⁴ See Gerry Ferguson, *Global Corruption: Law, Theory and Practice: An Open Access Coursebook on Legal Regulations of Global Corruption under International Conventions and Under US, UK and Canadian Law*, 2nd ed (Victoria: The Author, 2017) at 1.72, 2.45-2.46. online: <<http://iclr.law.ubc.ca/global-corruption-law-theory-and-practice>>

In Canada, there have been several major convictions for foreign bribery, two cases are currently awaiting trial and investigations are underway in some 15-20 other cases.⁵ In *World Bank*, the Court put its decision in perspective right at the outset of the case:

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.⁶

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.⁷

This paper will briefly set out the facts and procedural history of *World Bank* case and then analyze the Court's findings on the archival and personnel immunity of the WBG's Integrity Vice-Presidency (INT) and on the Canadian law on third-party production of records in criminal cases. Relying on the traditional doctrinal legal methods, the author will closely examine the text of the Court's decision and seek to position the judgment within the existing jurisprudence of the Court.

II. FACTS OF THE CASE

The Padma Multipurpose Bridge ("Padma Bridge") was expected to connect Dhaka, the capital and the largest city in Bangladesh, with the Southwest Region of the country.⁸ It was planned that several international development organizations, including the WBG, would provide most of the

[Ferguson].

⁵ *Ibid* at 1.72.

⁶ *Supra* note 1 at para 1.

⁷ *Ibid* at para 2.

⁸ The World Bank, *Bangladesh – Multipurpose Bridge Project: Environmental and Social Impact Assessment*, Executive Summary 58505 (2010) 1-5.

funds necessary to complete the project. The WBG consists of five separate international organizations headquartered in Washington, D.C., among them are the International Bank for Reconstruction and Development (“IBRD”) and the International Development Association (“IDA”), which together make up the World Bank.⁹ Within the structure of the WBG, it was the IDA that was to lend US\$1.2 billion of the total US\$2.9 billion estimated cost of the Padma Bridge.¹⁰

The Padma Bridge project, however, did not run as smoothly as expected. In 2010, the INT received the first email suggesting that there was corruption in the process for awarding the contract to supervise the construction of the Padma Bridge (the “Supervision Contract”).¹¹ Eventually, the INT received emails from four tipsters who alleged that Kevin Wallace and two other employees of SNC-Lavalin,¹² an engineering and construction group headquartered in Montreal, Quebec, and Zulfiqar Bhuiyan (allegedly a representative of a Bangladeshi official), conspired to bribe the committee of Bangladeshi officials to award the Supervision Contract to SNC-Lavalin. Within the INT, Mr. Haynes and Mr. Kim were assigned to investigate this alleged wrongdoing committed by the employees of the Canadian company.¹³

Once the INT contacted the Royal Canadian Mounted Police (“RCMP”) in March 2011 and shared the tipsters’ emails, investigative reports, and other documents, the RCMP sought and obtained three wiretap authorizations to intercept private communications pursuant to Part VI of the *Criminal Code*¹⁴ in order to obtain direct evidence of the

⁹ The World Bank, “About the World Bank” (2017), online: <<http://www.worldbank.org/en/about>>.

¹⁰ The World Bank, *Bangladesh Padma Multipurpose Bridge Project*, online: <<http://projects.worldbank.org/P111017/bangladesh-padma-multipurpose-bridge-project?lang=en&tab=financial>>.

¹¹ See *World Bank*, *supra* note 1 at paras 12-14; Ferguson, *supra* note 4 at 1.2-1.4.

¹² Mohammad Ismail (Director, International Projects) reported to Ramesh Shah (Vice-President of the International Division) who, in turn, reported to Kevin Wallace (Vice-President, Energy and Infrastructure).

¹³ *World Bank*, *supra* note 1 at paras 12-14.

¹⁴ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]. The first wiretap authorization was granted on 24 May 2011 and other authorizations were granted on 24 June and 8 August 2011.

respondents' involvement in corruption of Bangladeshi public officials.¹⁵ Sgt. Jamie Driscoll, who was assigned to prepare an affidavit for the application, largely relied on the information shared by the INT, Mr. Haynes's knowledge of the bidding process for the Supervision Contract, and direct communication with one of the tipsters. Sgt. Driscoll did not make any handwritten notes of his work as affiant, and all his emails during the period of the investigation were lost due to a computer problem. Sgt. Driscoll testified that he did not make notes because, in preparation of the affidavits, he was relying on the work of others rather than actively investigating. The Crown charged the four respondents under the CFPOA and intended to present the intercepted communications at trial.¹⁶

Ultimately, the WBG was not satisfied with the Bangladeshi government's commitment to combat corruption. On the 29th of June 2012, the World Bank issued a press release stating that it had "credible evidence corroborated by a variety of sources which points to a high-level corruption conspiracy"¹⁷ and cancelled the IDA credit. Since then, the Padma Bridge project is funded from the Government of Bangladesh's own resources. As of January 2017, work on the main bridge is 35% complete and expected to be finished by November 2018.¹⁸

III. PROCEDURAL HISTORY AND HOLDING

The respondents challenged the wiretap authorizations that allowed the Crown to intercept communications which it planned to use at trial. In support of their *Garofoli*¹⁹ application to cross-examine the wiretap affiant, they brought an application in the Ontario Superior Court of Justice

¹⁵ *World Bank*, *supra* note 1 at paras 16-22, 102-111.

¹⁶ *World Bank*, *supra* note 1 at paras 12, 20-21, 102.

¹⁷ The World Bank, "World Bank Statement on Padma Bridge" (29 June 2012), online: <<http://www.worldbank.org/en/news/press-release/2012/06/29/world-bank-statement-padma-bridge>>.

¹⁸ Padma Multipurpose Bridge Project, "Present Status of the Project", online: <<http://www.padmabridge.gov.bd/cstatus.php>>.

¹⁹ *R v Garofoli*, [1990] 2 SCR 1421, [1990] SCJ No 115 [*Garofoli*]. More details on *Garofoli* applications and challenges to wiretap authorizations will be discussed later on in this article.

seeking an O'Connor²⁰ third-party production order requiring the WBG to produce a broad range of documents (the "INT's records").²¹ The trial judge had to address two issues raised in this application: (i) whether the WBG, as an international organization, had the privileges and immunities that made it immune from the jurisdiction of Canadian courts regarding an order for production of documents,²² and (ii) whether the documents sought in the context of a *Garofoli* application met the test for relevance.²³

The trial judge concluded that, in the case at hand, the WBG waived its immunity, giving Canadian courts jurisdiction to order production of documents, and the applicants satisfied the first stage of O'Connor framework for production of documents held by a third party. The trial judge ordered the WBG to produce some of the documents set out in the application.²⁴

²⁰ *R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235 [O'Connor]. More details on O'Connor third-party production orders will be discussed later on in this article.

²¹ *Wallace v Canada*, 2014 ONSC 7449, [2014] OJ No 6534 (QL) [Wallace] at Appendix A:

- 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.

²² *Ibid* at paras 15-55.

²³ *Ibid* at paras 56-66.

²⁴ *Ibid* at para 67. The WBG was ordered to produce the documents set out in paragraphs (a), (b), (c) and (e) of the application (see *supra* note 21). The trial judge ruled, however, that a further hearing was necessary to address the relevance of documents referred to in paragraphs (d) and (f).

The WBG did not appear before the trial judge as it took the position that, being immune from the court process, it was not under an obligation to attend and assert immunity, and instead relied on the Crown to do so.²⁵ The WBG then appealed the trial judge's decision directly to the Supreme Court on the authority of *Dagenais v Canadian Broadcasting Corp.* and *A. (L.L.) v B. (A.)*,²⁶ which allows a third party affected by an order of a superior court judge to challenge that order before the Supreme Court.²⁷

Ultimately, the Supreme Court allowed the appeal and set aside the production order issued by the trial judge, as the Court held that the WBG's immunities covered the INT records and its personnel. These immunities had not been waived, and the INT records were not relevant under the *Garofoli* framework.²⁸ The subsequent section of this paper analyzes the reasons behind the conclusion reached by the Supreme Court.

IV. LEGAL ANALYSIS

This section analyzes two separate aspects of the Supreme Court reasoning in *World Bank*: (i) the archival and personnel immunities of the INT and (ii) the law of third party production of records in criminal cases.

A. The Archival and Personnel Immunities of the INT

This subsection covers the Court's reasoning as to the INT's immunities. It starts with the assessment of the INT's position in the WBG's overall structure and then turns to the character (whether absolute or functional) of the INT's immunities, the scope and alleged waiver of the INT's archival immunity, as well as the applicability and alleged waiver of the INT's legal process immunity for personnel.

1. Position of the INT in the World Bank Group's Overall Structure

Because the WBG, as a group of five separate international organizations, does not benefit from any immunities conferred by any treaty

²⁵ *Ibid* at para 20.

²⁶ *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 120 DLR (4th) 12; *A (LL) v B (A)*, [1995] 4 SCR 536, 130 DLR (4th) 422.

²⁷ *World Bank*, *supra* note 1 at para 31.

²⁸ *Ibid* at para 148.

and the parties had not made any claims of immunity under customary international law,²⁹ the Court had to dive into the texts of governing documents of the WBG's constituent organizations. Therefore, as a preliminary matter, the Court had to assess the position of the INT within the structure of the WBG.

The trial judge noted that Mr. Kim's earlier affidavit describes the INT as an independent unit within the WBG reporting directly to the President, but does not clarify whether the INT is structurally part of one of the five organizations that together comprise the WBG.³⁰ The judge decided to proceed on the basis that the INT is part of the IBRD, taking into account, first, that "[t]here is no sensible reason to conclude that the INT is somehow completely separate and apart from the entities that form the WBG" and, second, that there was some indirect evidence (including the fact that the letterhead used by the INT Director of Operations bears the name of the IBRD) that the WBG considers the INT part of the IBRD.³¹

The Supreme Court analyzed this matter in greater detail. The Court took into account that the legal foundation for the WBG's integrity regime is set out in the *IBRD* and *IDA Articles of Agreement*, which require the World Bank to make arrangements to ensure that the financing is used only for its intended purpose, with due attention to economy and efficiency, and without regard to political or other non-economic considerations.³²

²⁹ *Ibid* at para 43.

³⁰ *Wallace*, *supra* note 21 at para 24.

³¹ *Ibid* at para 25.

³² *World Bank*, *supra* note 1 at para 51; See *Bretton Woods and Related Agreements Act*, RSC 1985, c B-7, where the Articles of Agreement of the IBRD and the IDA are annexed as Schedules II and III [*Bretton Woods Act*]. The IBRD's and IDA's immunities, granted to them in their respective Articles of Agreement, have been implemented in Canada by two Orders in Council: *International Development Association, International Finance Corporation and Multilateral Investment Guarantee Agency Privileges and Immunities Order*, SOR/2014-137, and *International Monetary Fund and International Bank for Reconstruction and Development Order*, PC 1945-7421 (the "Orders in Council"). *IBRD Articles of Agreement*, amendment effective 16 February 1989, section 5(b) [*IBRD Agreement*] reads as follows:

(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.

Therefore, the INT, being part of the WBG's integrity regime, benefits from the personal and archival immunities provided for in the *Articles of Agreement* of the IBRD or the IDA³³ because these immunities are identical, the Court decided not to determine conclusively whether the INT is covered by the IBRD's or the IDA's *Articles of Agreement*.³⁴

Such a conclusion logically flows from the texts of the IBRD's and IDA's *Articles of Agreement*, especially taking into account the circumstantial evidence referred to by the trial judge. It would be unreasonable to argue that the INT, a unit tasked with ensuring integrity in the execution of projects financed by the WBG, was designed to be a completely separate entity stripped of the privileges and immunities available to other organizations that comprise the WBG. It is unfortunate that neither the trial judge nor the Supreme Court could benefit from the testimony of the INT's representatives.

IDA Articles of Agreement, effective 24 September 1960, sections 1(g) and (h) of Article V reads as follows [*IDA Agreement*]:

(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.

³³ *World Bank*, *supra* note 1 at paras 50-51, 53; See also *IBRD Agreement*, *supra* note 32, sections 5 and 8 of Article VII; *IDA Agreement*, *supra* note 32, Article VIII. The two are virtually identical and provide as follows:

Section 5 Immunity of archives

The archives of the [INBR or IDA] shall be inviolable.

...

Section 8 Immunities and privileges of officers and employees

All governors, executive directors, alternates, 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;

³⁴ *World Bank*, *supra* note 1 at paras 43, 50.

It should also be noted that, as it would be the case with other international treaties, the Supreme Court interpreted the *Articles of Agreement* of the IBRD and the IDA in accordance with the rules of interpretation set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*,³⁵ i.e. that the scope of the INT's immunities had to be interpreted "in accordance with the ordinary meaning of the treaty terms and in light of their purpose and object."³⁶ Such an approach to treaty interpretation is hardly surprising in light of the Court's earlier precedents³⁷ and the fact that 114 states are parties to the VCLT,³⁸ and even states that are not parties to the VCLT, for instance, the United States, consider many of its provisions to constitute customary international law on the law of treaties.³⁹

2. *Applicability of s. 3 of the IBRD's and IDA's Articles of Agreement*

One of the respondents, Mr. Bhuiyan, alleged that s. 3 of Article VII of the IBRD's or Article VIII of the IDA's *Articles of Agreement*⁴⁰ permits the Court to issue a document production order.⁴¹ The Court reasonably

³⁵ *Vienna Convention on the Law of Treaties*, 23 May 1969, Can TS 1980 No 37 (entered into force 27 January 1980) [VCLT].

³⁶ *World Bank*, *supra* note 1 at para 47.

³⁷ *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at paras 11-12, [2014] 3 SCR 431; *Thibodeau v Air Canada*, 2014 SCC 67 at para 35, [2014] 3 SCR 340; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at paras 51-52, 160 DLR (4th) 193; *Thomson v Thomson*, [1994] 3 SCR 551 at 577-78, 119 DLR (4th) 253.

³⁸ VCLT, *supra* note 35 at 331.

³⁹ US Department of State, "Vienna Convention on the Law of Treaties", online: <<http://www.state.gov/s/l/treaty/faqs/70139.htm>>.

⁴⁰ *IBRD Agreement*, *supra* note 32, Article VII s 3; *IDA Agreement*, *supra* note 32, Article VIII s 3. Both agreements are virtually identical and provide 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 [IBRD or IDA] 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].

⁴¹ *World Bank*, *supra* note 1 at paras 54-55.

adopted the view that, because the IBRD and the IDA regularly engage in borrowing and lending and their creditors need access to courts to settle potential claims, s. 3 merely confirms that the IBRD and the IDA (unlike some other international organizations) may be sued in a court of a competent jurisdiction.⁴² Since the present case involved a request for document production directed at the INT's personnel in the context of a criminal investigation, it was "simply not the kind of action contemplated by s. 3."⁴³ The Court thus concluded that s. 3 was inapplicable to the case at hand.

3. Are the INT's Immunities Absolute or Functional?

The next issue that the Supreme Court had to deal with was the question whether the INT's immunities are absolute or functional. The respondents argued that immunities provided for in ss. 5 and 8 are "functional" (i.e. that a particular immunity applies only when the INT is able to demonstrate that it is necessary to carry out the INT's operations and responsibilities) as opposed to "absolute" (i.e. that the INT's immunities are not subject to the case-by-case determination of necessity).⁴⁴ The respondents referred to the text of s. 1, which provides that the privileges and immunities shall be accorded to the IBRD or the IDA to "enable the [IBRD or IDA] to fulfill the functions with which [they are] entrusted."⁴⁵

⁴² *World Bank*, *supra* note 1 at para 55; See August Reinisch & Jakob Wurm, "International Financial Institutions before National Courts" in Daniel Bradlow & David Hunter, eds, *International Financial Institutions and International Law* (Netherlands: Kluwer Law International, 2010) 103 at 123-24; Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions*, 6th ed (London: Sweet and Maxwell, 2009) at 496 [Sands & Klein]. In *Osseiran v International Finance Corp*, 552 F (3d) 836 at 840 (DC Cir 2009), the court pointed out that "parties may hesitate to do business with an entity insulated from judicial process; promises founded on good faith alone are worth less than obligations enforceable in court."

⁴³ *World Bank*, *supra* note 1 at para 55.

⁴⁴ *Ibid* at para 56.

⁴⁵ *Ibid* at para 57; Citing the *IBRD Agreement*, *supra* note 32, Article VII s 1; *IDA Agreement*, *supra* note 32, Article VIII s 1. Both Agreements are virtually identical and provide as follows:

The Court came up with four counter-arguments and concluded that s. 1 is “merely a descriptive, purposive clause.”⁴⁶ First, s. 1, unlike ss. 3, 5 and 8, is not implemented in Canadian law through the Orders in Council.⁴⁷ Second, unlike the functional immunity of the Northwest Atlantic Fisheries Organization,⁴⁸ ss. 5 and 8 are not expressly made subject to any condition of functional necessity.⁴⁹ Third, s. 6 provides that the IBRD’s and the IDA’s property and assets shall be free from any restrictions only “[t]o the extent necessary to carry out the operations provided for in this [Article of Agreement]”.⁵⁰ These words would be redundant if the immunities set out in Article VII of the IBRD’s and Article VIII of the IDA’s *Articles of Agreement* were subject to the functional necessity requirement that the respondents attempted to read into s. 1.⁵¹ Fourth, the Court contrasted the immunities set out in the IBRD’s and IDA’s *Articles of Agreement* and the “broad and flexible immunity”⁵² provided for in Article 105 of the *Charter of the United Nations*.⁵³ Instead of relying on the functional

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.

⁴⁶ *World Bank*, *supra* note 1 at para 58.

⁴⁷ *Ibid* at para 59.

⁴⁸ *Northwest Atlantic Fisheries Organization Privileges and Immunities Order*, SOR/80-64, s 3(1) states that this 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” (emphasis added).

⁴⁹ *World Bank*, *supra* note 1 at para 59.

⁵⁰ *IDA Agreement*, *supra* note 32, Article VIII s 6; *IBRD Agreement*, *supra* note 32, Article VII s 6. The two Agreement are virtually identical and provide as follows:

To the extent necessary to carry out the operations provided for in [the Articles of Agreement] and subject to the provisions of [the Articles of Agreement], all property and assets of [the IBRD or the IDA] shall be free from restrictions, regulations, controls and moratoria of any nature.

⁵¹ *World Bank*, *supra* note 1 at para 60.

⁵² *Ibid* at para 61.

⁵³ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) [*UN Charter*]. Article 105(1) &(2) of the UN Charter provide as follows (emphasis added):

approach, which prioritizes flexibility over certainty, the drafters decided to set out the specific immunities that would enable the IBRD and the IDA to pursue their objectives.⁵⁴ The Court thus concluded that 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.”⁵⁵

In general, Paul Gormley explains that the functional theory of immunity is:

[B]ased upon the nature of the act performed. In other words, the courts of the forum will look to the dispute, criminal or civil, and determine whether or not the action of the diplomat, consul, or person of a regional or international organization was functioning in his official capacity representing the interests of his government (or organization), or whether he was engaged in a personal matter having no relation to his official duties.⁵⁶

The shift towards functional privileges and immunities, i.e. towards more limited immunities than those enjoyed by diplomatic officials, represents the evolutionary process in the history of the law of international organizations.⁵⁷ In particular, whereas the “Covenant of the League of Nations” provided that “officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities,”⁵⁸

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1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

⁵⁴ *World Bank*, *supra* note 1 at paras 62-63.

⁵⁵ *Ibid* at para 63.

⁵⁶ Paul Gormley, “The Future Privileges and Immunities Required by the Personnel of Regional and International Organizations from the Jurisdiction of American Courts” (1963) 32:2 U Cin L Rev 131 at 133 [Gormley].

⁵⁷ Anthony Miller, “Privileges and Immunities of United Nations Officials” (2007) 4 Intl Organizations L R 169 at 174-179 [Miller (2007)]; Anthony Miller, “The Privileges and Immunities of the United Nations” (2009) 6 Intl Organizations L R 7 at 9-16 [Miller (2009)].

⁵⁸ “Covenant of the League of Nations” (1920) 1 League of Nations Off J 3 at 5 para 4 (emphasis added); See also, “Covenant of the League of Nations” (1920) 1 League of Nations Off J 3 at 5 para 5 (“buildings and other property occupied by the League or

the *UN Charter* describes privileges and immunities in functional terms, granting them only on connection with acts performed by the UN officials in the discharge of their duties.⁵⁹ Also, as early as in 1963, Paul Gormley wrote that the “trend in contemporary international law is for the nations to rely more heavily upon the functional test, (...) [as well as that] it is evident that a functional approach will be employed much more extensively, in particular as to the personnel of organizations”⁶⁰ and it “seems fairly obvious that the functional test, under which immunity is granted for necessary official actions, *will become the dominant international standard* in the future.”⁶¹ Since then, a number of authors have suggested that the immunities enjoyed by international organizations shall be functional and restricted, taking into account that “organizations clinging to their immunities produces harmful effects.”⁶²

It should be noted, however, that since the *Bretton Woods Agreement* was which was developed at the UN Monetary and Financial Conference held in July 1944,⁶³ it would be improper to read into the IBRD’s and the IDA’s *Articles of Agreement* the functional necessity requirement that was incorporated into Article 105 of the *UN Charter* signed on June 26th, 1945. Furthermore, Anthony Miller affirms that functional (rather than diplomatic) character of the privileges and immunities conferred on the UN officials “was a deliberate choice by the drafters of Article 105 of the Charter”⁶⁴ and explains this choice in the following manner:

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

its officials or by Representatives attending its meetings shall be inviolable”).

⁵⁹ Miller (2007), *supra* note 57 at 174.

⁶⁰ Gormley, *supra* note 56 at 134.

⁶¹ Paul Gormley, “The Future Privileges and Immunities Required by the Personnel of Regional and International Organizations from the Jurisdiction of American Courts: Part II” (1963) 32:3 U Cin L Rev 279 at 301 (emphasis in the original).

⁶² Cedric Ryngaert, “The Immunity of International Organizations Before Domestic Courts: Recent Trends” (2010) 7 Intl Organizations L R 121 at 124 [Ryngaert].

⁶³ “The Bretton Woods Agreement - I” (1945) 1:2 The World Today 71 at 71; Henry Morgenthau, “Bretton Woods and International Cooperation” (1945) 23:2 Foreign Affairs 182 at 182.

⁶⁴ Miller (2007), *supra* note 57 at 253.

of the functions and duties of officials, rather than trying to formulate concrete provisions dealing with particular privileges and immunities.⁶⁵

It appears that the drafters of the IBRD's and the IDA's *Articles of Agreement* made a deliberate choice to set out the privileges and immunities of these organizations in greater detail and free them from the functional necessity requirement. Moreover, the Court appropriately used the rule against surplusage to avoid reading the functional necessity requirement into s. 1 that would make the words "[t]o the extent necessary to carry out the operations provided for in this [Articles of Agreement]" in s. 6 redundant.⁶⁶

In the United States, the *International Organizations Immunities Act*⁶⁷ provides that certain international organizations, their property and assets "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments."⁶⁸ Such organizations may, however, "expressly waive their immunity for the purpose of any proceedings."⁶⁹ At the time the *IOIA* was enacted, foreign states enjoyed absolute immunity in the US courts, but the international community has since developed exceptions to foreign sovereign immunity and the *Foreign Sovereign Immunities Act*⁷⁰ codified this practice of restrictive immunity.⁷¹ The courts, however, have continued to uphold absolute immunity of international organizations covered by the *IOIA*.⁷² For instance, the D.C. District Court held the World Bank's immunity to be "absolute immunity foreign sovereigns enjoyed in 1945."⁷³ Steven Herz also argues that the *FSIA*, which imposes limits on the sovereign immunity of foreign governments, is itself limited by the terms of treaties in force at the time of its enactment, so that

⁶⁵ Miller (2009), *supra* note 57 at 16.

⁶⁶ *World Bank*, *supra* note 1 at para 60.

⁶⁷ *International Organizations Immunities Act*, 22 USC s 288-288I (1945) [*IOIA*].

⁶⁸ *Ibid* at s 288 a(b).

⁶⁹ *Ibid*.

⁷⁰ *Foreign Sovereign Immunities Act*, 28 USC s 1330, 1332, 1391(f), 1441(d) & 1602-1611 (1976) [*FSIA*].

⁷¹ Aaron Young, "Deconstructing International Organization Immunity" (2012) 44:1 *Geo J Int'l L* 311 at 314, 320-321.

⁷² *Ibid* at 314.

⁷³ *Hudes v Aetna Life Ins Co*, 806 F Supp (2d) 180 at 187 (DDC 2011), citing *Atkinson v Inter-Am Dev Bank*, 156 F (3d) 1335 at 1341 (DC Cir 1998).

immunities set out in the governing documents of international organizations to which the United States was a party in 1976 should be given full effect.⁷⁴

Cedric Ryngaert points that functional immunity of an international organization, if based on a treaty, typically reads “the international organization and its officials shall enjoy in the territory of its Member States such privileges and immunities as necessary for the fulfilment of its purposes”.⁷⁵ If construed narrowly, immunity attaches where “upholding jurisdiction would obstruct the fulfilment of the organization’s mission,” if broadly – “as soon as the suit against the organization relates to activities that bear a direct relation with the organization’s mission.”⁷⁶ In practice, such immunities are usually interpreted broadly and, even when courts deem immunities to be subject to functional necessity, “immunity becomes virtually absolute, as most activities of the organization somehow relate to the fulfilment of a function of the organization.”⁷⁷ August Reinisch and Ulf Weber explain this paradox as follows:

As opposed to states, the international legal personality of international organizations is generally considered to be functionally limited. In other words, international organizations enjoy legal personality only to the extent required to perform their functions. In a legal sense they are unable to act beyond their functional personality. Any acts not covered by such a limited personality are *ultra vires*. At the same time international organizations enjoy functional immunity, covering acts in the performance of their functions. Since international organizations can only act within the scope of their functional personality there is no room left for non-functional acts for which immunity would be denied.⁷⁸

Therefore, even if in *World Bank* case the respondents were successful in persuading the Court that the INT’s immunities set out in ss. 5 and 8 were functional, the ultimate result would be the same. Because the existence of the integrity regime is necessary for the WBC’s efficient

⁷⁴ Steven Herz, “International Organizations in US Courts: Reconsidering the Anachronism of Absolute Immunity” (2008) 31 *Suffolk Transnat’l L R* 471 at 529–530.

⁷⁵ Ryngaert, *supra* note 62 at 130.

⁷⁶ *Ibid.*

⁷⁷ *Ibid* at 146.

⁷⁸ August Reinisch & Ulf Andreas Weber, “In the Shadow of *Waite* and *Kennedy*: The Jurisdictional Immunity of International Organizations, the Individual’s Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement” (2004) 1 *Int’l Org L Rev* 59 at 63.

functioning, the INT would be able to enjoy the immunities in the case at hand.

The Court nevertheless noted that the scope of immunities set out in ss. 5 and 8 is to be “interpreted purposively, taking into consideration their object outlined in s. 1.”⁷⁹ While it is unclear what such restrictive interpretation would mean in practice, the author agrees that reasonable limitations may be imposed on the exercise of the IBRD’s and the IDA’s immunities. However, instead of relying on the functional immunities doctrine, which runs contrary to the text of the IBRD’s and the IDA’s *Articles of Agreement*, the Court could have analyzed the human rights implications of its decision on the INT’s immunities. The interveners, the British Columbia Civil Liberties Association and the Criminal Lawyers’ Association (Ontario), argued that the public interest in upholding the international organization’s immunity had to be balanced against the accused person’s constitutional right to make full answer and defense.⁸⁰ Unfortunately, the Court chose not to address the argument based on the *Canadian Charter of Rights and Freedoms*⁸¹ and, instead, relied solely on the text of the IBRD’s and the IDA’s *Articles of Agreement*.

4. Scope of the INT’s Archival Immunity

Once the Court established that the INT’s immunities are absolute, it had to interpret the scope of s. 5, which provides that the “archives of the [IBRD or the IDA] shall be inviolable.” The trial judge concluded, based on a dictionary definition, that the term “archives” encompasses only historical records, and the word “inviolable” presupposes protection from searches and seizures only, not from production for inspection or use.⁸²

The Supreme Court engaged in a significantly deeper analysis of the text of s. 5 and concluded that the word “archives” refers to the entire collection of the IBRD’s and IDA’s documents. The Court relied on (i) the definitions provided in various dictionaries,⁸³ (ii) the definitions in

⁷⁹ *World Bank*, *supra* note 1 at para 64.

⁸⁰ *Ibid* at para 40.

⁸¹ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c11 [*Canadian Charter*].

⁸² *Wallace*, *supra* note 21 at paras 54-55.

⁸³ *Black’s Law Dictionary*, 10th ed, *sub verbo* “archive”; *Canadian Oxford Dictionary*, 2nd ed, *sub verbo* “archive”; *Collins Canadian Dictionary*, *sub verbo* “archives”; *Lexis: le dictionnaire*

international treaties,⁸⁴ and (iii) the argument that narrow interpretation of the term “archives” would undermine the purpose of s. 5.⁸⁵ The Court recalled that international organizations are granted immunities to protect them from intrusions by member states and their courts, and shielding an entire collection of the international organization’s documents is paramount to ensuring their proper functioning.⁸⁶ To limit the scope of “archives” solely to historical documents “would leave exposed current and more sensitive documents, whose confidentiality is likely more important to the IBRD’s independent functioning.”⁸⁷

The Court thus concluded that current records and documents of the IBRD and the IDA form part of their “archives” and turned to analyze the term “inviolable”. Here the Court adopted a slightly different approach. The Court relied on (i) the history of international law, where the term “inviolable” traditionally implied the freedom from unilateral interference,⁸⁸ (ii) international law scholarship, which suggests that the “inviolability” of archives shields them from investigations, confiscations or

érudit de la langue française, sub verbo “archives”; Merriam-Webster’s Collegiate Dictionary, 11th ed, sub verbo “archive”; Multidictionnaire de la langue française, 5th ed, sub verbo “archives”.

⁸⁴ *Vienna Convention on Consular Relations*, 24 April 1963, Can TS 1974 No 25 art 1(1)(k) (entered into force 19 March 1967).

⁸⁵ *World Bank*, *supra* note 1 at paras 68-73.

⁸⁶ *Ibid* at para 71, citing *Amaratunga v Northwest Atlantic Fisheries Organization*, 2013 SCC 66 at paras 29-30, 45, [2013] SCR 866.

⁸⁷ *World Bank*, *supra* note 1 at para 73.

⁸⁸ *Ibid* at paras 75-78. See “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 Off J* 1422 at 1423; *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, Can TS 1948 No 2, art II, s 4 (entered into force 17 September 1946); *Vienna Convention on Diplomatic Relations*, 18 April 1961, Can TS 1966 No 29, art 24 (24 April 1964) .

any other kind of interference,⁸⁹ and (iii) the decisions of foreign courts.⁹⁰ Furthermore, the purpose of the IBRD's and the IDA's immunities is to shield the information, not merely documents, from *unilateral interference* so as to ensure the proper and independent functioning of these international organizations, and it was therefore "irrelevant whether this information is revealed in the context of a search and seizure or in the context of a compelled production order" because the "purpose underlying the immunity is thwarted in either case."⁹¹

Legal scholarship and case law of the United States support such an interpretation. With respect to the UN archives, Anthony Miller stated that the "inviolability of documents means that they cannot be taken, copied or otherwise used without UN consent" and this immunity extends to the information contained in such documents.⁹² Also, the D.C. District Court reversed a conviction of the United Nations' employee for refusing to answer a question before a subcommittee of the United States Senate, reasoning that the answer depended upon the information contained in the United Nations files, was privileged by the *UN Charter* and could not legally be revealed.⁹³

In summary, the Court held that immunity specified in s. 5 covers all documents and records stored by the INT from searches, seizures, and

⁸⁹ *World Bank*, *supra* note 1 at para 79; See James Fox, *Dictionary of International and Comparative Law*, 3rd ed (Dobbs Ferry, NY: Oceana Publications, 2003) *sub verbo* "inviolability"; GAOR, 42nd Sess, UN Doc A/CN.4/432 (1990) at 95-99; Wilfred Jenks, *The Proper Law of International Organisations* (London: Stevens & Sons, 1962) at 234; Charles Morton, *Les privilèges et immunités diplomatiques: Étude théorique suivie d'un bref exposé des usages de la Suisse dans ce domaine* (Lausanne: Imprimerie La Concorde, 1927) at 56-57; A S Muller, *International Organizations and their Host States: Aspects of their Legal Relationship* (The Hague: Kluwer Law International, 1995) at 205; Sands & Klein, *supra* note 42 at 502; Biswanath Sen, *A Diplomat's Handbook of International Law and Practice*, 3rd ed (The Hague: Martinus Nijhoff, 1980) at 117-118.

⁹⁰ *World Bank*, *supra* note 1 at para 79. See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)*, [2014] EWCA Civ 708 at para 61; *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 ILR 101 (Brussels CA); *Owens, Re Application for Judicial Review*, [2015] NIQB 29 at paras 63 & 69.

⁹¹ *World Bank*, *supra* note 1 at para 74.

⁹² Miller (2009), *supra* note 57 at 54.

⁹³ *Keeney v United States*, 218 F (2d) 843 (DDC 1954).

production orders.⁹⁴ The Court’s reasoning diligently followed the rules of interpretation outlined in Articles 31 and 32 of the *VCLT* as the Court interpreted the treaty (i.e. the IBRD’s and the IDA’s *Articles of Agreement*) in accordance with the ordinary meaning of its terms (i.e. the terms “archives” and “inviolable” as used in international law) and took into account the purpose and object of the treaty (i.e. ensuring the proper and independent functioning of the IBRD and the IDA).

5. *Waiver of the INT’s Archival Immunity*

The Supreme Court held that the IBRD’s and the IDA’s archival immunity cannot be waived.⁹⁵ The Court explained that (i) the inviolability of archives implies protection from all forms of *unilateral* interference, and *voluntary* disclosure of the INT’s documents is not covered by s. 5, (ii) unlike s. 8, the text of s. 5 does not mention the possibility of waiver, and (iii) once a document is copied and transferred to a third party, the copy transferred no longer forms part of the “archives” and is no longer covered by s. 5.⁹⁶

This line of reasoning is not flawless. On the one hand, the Court properly applied the rule against surplusage in holding that, because s. 8 (dealing with the personnel immunity) provides for the possibility of waiver, whereas s. 5 (dealing with the archival immunity) does not mention such a possibility, the archival immunity is not subject to a waiver to the same extent as the personnel immunity. On the other hand, the Court failed to analyze if there is a conceptual difference between privilege and immunity in the context of waiver. For instance, does the Court’s finding that the term “archives” includes current documents of international organizations mean that the IBRD or the IDA should argue they relied on a legal opinion of external counsel (or should they disclose a part of such an opinion)? Does this legal opinion still benefit them from archival immunity? In a similar case decided on the basis of Canadian law, the Court held that attorney-client privilege may be waived implicitly.⁹⁷ The author suggests that in this case the Court should have interpreted the waiver of the INT’s archival immunity purposively, in light of s. 1 and with due regard to the respondents’ constitutional right to make a full answer and defense. It appears that the Court, while deciding on this issue, was concerned

⁹⁴ *World Bank*, *supra* note 1 at para 81.

⁹⁵ *Ibid* at para 82.

⁹⁶ *Ibid* at para 83.

⁹⁷ *R v Campbell*, [1999] 1 SCR 565 at 611-615, 171 DLR (4th) 193.

primarily with the advancement of cooperation with international organizations and the global fight against corruption, rather than the technicalities of the IBRD's and the IDA's *Articles of Agreement* or the accused persons' rights.

6. The INT's Legal Process Immunity for Personnel

The appeal was not only concerned with the production of the INT records, but also with the subpoenas that required Mr. Haynes and Mr. Kim to give evidence. Therefore, the Court had to address the legal process immunity for the IBRD's and the IDA's personnel. It was undisputed that s. 8 provides a shield not only against civil suits and prosecutions, but also against legal processes such as subpoenas, and that Mr. Haynes and Mr. Kim acted in their official capacity when they obtained the documents and information sought by the respondents.⁹⁸ Therefore, the only contested issue was whether the INT's legal process for immunity of personnel was waived.

7. Waiver of the INT's Legal Process Immunity for Personnel

To decide whether the INT's legal process immunity for personnel had been waived, when the INT shared certain information with the RCMP, the Court had to rule if the IBRD's and the IDA's *Articles of Agreement* required express or implied (constructive) waiver. The INT never expressly waived personnel immunity and consistently reiterated that it shared information with the RCMP without prejudice to its immunity.⁹⁹

The Court held that the object and purpose of the IBRD's and the IDA's *Articles of Agreement* imply an express waiver requirement. First, implied waiver would subject the IBRD's and the IDA's immunities to case-by-case determination and thus require their representatives to appear in various national courts to argue whether their conduct amounted to a waiver.¹⁰⁰ Second, the concepts of implied waiver vary among different jurisdictions, and subjecting immunities set out in s. 8 that solely to express waivers would prevent attempts by member states (or their courts) to control

⁹⁸ *World Bank*, *supra* note 1 at para 87.

⁹⁹ *Ibid* at para 95.

¹⁰⁰ *Ibid* at para 90.

the IBRD or the IDA through application of these concepts.¹⁰¹ Finally, the Court noted that exposing the IBRD or the IDA to implied waivers would “have a chilling effect on collaboration with domestic law enforcement” and “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.”¹⁰² In this manner the Court expressly recognized that its decision was directly influenced by considerations of the WBG’s role in the global fight against corruption.

The Court also rejected the application of common law selective waiver doctrine to the interpretation of international treaties (the IBRD’s and the IDA’s *Articles of Agreement*).¹⁰³ The trial judge confirmed that a party cannot selectively waive a privilege and, relying on “benefit/burden exception” to Crown immunity,¹⁰⁴ concluded that the WBG waived its immunities when it actively assisted the RCMP with the investigation and sought to benefit from the intercepted communications.¹⁰⁵ The judge acknowledged that the WBG, as an international organization, does not have the right to institute criminal proceedings on its own, but found that the WBG chose to cooperate with the RCMP due to the “desire to promote its own goal of ensuring the integrity of projects in which it is involved.”¹⁰⁶ To avoid the waiver, the WBG should have “simply advised the RCMP of the [corruption] allegations (...) and then left it to the RCMP to conduct its own investigation.”¹⁰⁷

The Supreme Court disagreed with this line of argument. In line with its general support of the Canadian government’s proactive role in the global fight against corruption, the Court found that the WBG could not have “benefitted” from the Crown’s prosecution of the respondents, because criminal prosecutions “are, by their very nature, in the interest of the public and not the complainant or any other private party.”¹⁰⁸ The

¹⁰¹ *Ibid* at para 92-93.

¹⁰² *Ibid* at para 94.

¹⁰³ *Ibid* at para 96.

¹⁰⁴ See *Sparling v Québec (Caisse de dépôt & de placement)*, [1988] 2 SCR 1015, 55 DLR (4th) 63.

¹⁰⁵ *Wallace*, *supra* note 21 at paras 29-36.

¹⁰⁶ *Ibid* at para 32, see also para 35.

¹⁰⁷ *Ibid* at para 33.

¹⁰⁸ *World Bank*, *supra* note 1 at para 98.

Court also correctly pointed out that the “benefit/burden exception” doctrine was irrelevant for the determination of an international organization’s immunity, since the doctrine is designed to cover a different category of cases – those where the Crown takes advantage of the rights provided for in the legislation but is not subject to the accompanying liabilities and restrictions, thus benefitting from more than the legislation was intended to provide.¹⁰⁹

While the Court’s decision to uphold the immunity set out in s. 8 is understandable in light of the underlying policy favoring international cooperation, in particular with the WBG, and zero tolerance approach to corruption, the author suggests that it would have been more appropriate to analyze the question of waiver (or estoppel) in light of international law, including the practice of the International Court of Justice,¹¹⁰ rather than to refer to inconsistencies between the concepts of implied waiver in different jurisdictions.

The Court chose to address this question, even though finding that the IBRD’s or the IDA’s immunities covered the INT’s archives and personnel (and these immunities had not been waived) rendered the second issue (the likely relevance of the INT’s records) moot.

B. Canadian Law on Third Party Production in Criminal Cases

In general, the law of third party records applies when an accused seeks the court’s assistance in gaining access to documents (other than documents created in the course of a criminal investigation) that contain information about the “third parties” in a proceeding (complainants and witnesses).¹¹¹ There are four different avenues open to an accused person seeking to gain

¹⁰⁹ *Ibid* at paras 97-98.

¹¹⁰ “Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)” [2005] ICJ Reports 168 at para 293; “Certain Phosphate Lands in Nauru (Nauru v Australia)” [1992] ICJ Reports 240 at paras 12-21. On implied and express waivers of diplomatic immunity, see also Richard Kay, “*United States v. Deaver: Implied and Express Waivers of Diplomatic Immunity*” (1988) 12:2 *Md J Int’l L & Trade* 259 at 271.

¹¹¹ David M Paciocco, “A Primer on the Law of Third Party Records” (2005) 9:2 *Can Crim L R* 157 at 158 [Paciocco, “A Primer”].

access to records. Some records are subject to *Stinchcombe*¹¹² disclosure, when others can be subpoenaed, accessed in accordance with the *Mills*¹¹³ framework or produced in accordance with the common law requirements laid out in *O'Connor*.¹¹⁴ The appropriate regime for access to records thus depends upon where the records are located and whether the third party has a reasonable expectation of privacy in such records.¹¹⁵

This subsection will draw a line between *Stinchcombe* and *O'Connor* regimes, set out the *Garofoli* framework for challenges to wiretap authorizations, then turn to the assessment of what a proper threshold for third-party production of records on a *Garofoli* application is, and conclude with a brief note on *O'Connor* and remedial framework applicable in cases where documentary evidence has been lost or never created.

1. *Stinchcombe* and *O'Connor*

In *World Bank*, the Court started the analysis of the domestic law of third party production in criminal cases by drawing a line between the *O'Connor* and *Stinchcombe* frameworks. The *O'Connor* framework addresses the right of an accused to obtain documents that are in possession of third parties and requires the accused to demonstrate that the documents sought are “logically probative to an issue at trial or the competence of a witness to testify”¹¹⁶ to justify production.¹¹⁷ In contrast, the *Stinchcombe* framework, applies when the documents are in possession or control of the Crown or the police. The burden is placed on the Crown to justify non-disclosure.¹¹⁸ These two frameworks serve the same purpose, that is “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.”¹¹⁹

Before turning the analysis to the requirements for *O'Connor* production order made within the *Garofoli* application, it is worth setting out both the *Stinchcombe* and *O'Connor* frameworks in greater detail. In

¹¹² *R v Stinchcombe*, [1991] 3 SCR 326, [1991] 1 WWR 97 [*Stinchcombe*].

¹¹³ Sections 278.1-278.9 of the *Criminal Code* as interpreted in *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1 [*Mills*].

¹¹⁴ Paciocco, “A Primer”, *supra* note 111 at 158-159.

¹¹⁵ *Ibid* at 158, 168-169.

¹¹⁶ *O'Connor*, *supra* note 20 at para 22 (emphasis in original).

¹¹⁷ *World Bank*, *supra* note 1 at paras 112, 115.

¹¹⁸ *Ibid* at paras 114-115.

¹¹⁹ *Ibid* at para 115.

Stinchcombe, the Court established the Crown's obligation to disclose all relevant information in its possession.¹²⁰ The Crown's discretion to withhold information is limited to "such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers."¹²¹ Because disclosure requests arise early in proceedings, when the defense "simply wants to know *if* the information *could* be relevant to the accused's case and thus will not argue the specific relevance of the information,"¹²² *Stinchcombe* sets a particular legal threshold, requiring disclosure of all but *clearly irrelevant* information.

Brian Gover points out that the *Stinchcombe* standard, which defines relevant information as "inculpatory or exculpatory information which, if withheld, would give rise to a *reasonable possibility* of impairment of the right of the accused to make full answer and defence,"¹²³ differs from the standard adopted in the United States, which states that "[t]he evidence is material only if there is a *reasonable probability* that, had the evidence been disclosed to the defence, the result of the proceeding would have been different."¹²⁴ Whereas the American framework looks to the probable outcome of the case, the Canadian standard asks whether the accused person's right to make full answer and defense was inhibited.¹²⁵

The Court's decision in *R v McNeil*¹²⁶ made the *Stinchcombe* disclosure obligation even "more muscular."¹²⁷ First, the Court confirmed that the Crown must disclose all material information, "[u]nless the information is

¹²⁰ *Stinchcombe*, *supra* note 112 at 331-346. See also Loretta Colton, "R v Stinchcombe: Defining Disclosure" (1995) 40:2 McGill LJ 525 at 527, 532-533 [Colton]; Andrew Flavelle Martin, "Beyond the Goudge Inquiry: Is the Coroner Part of 'The Crown' for *Stinchcombe* Disclosure Obligations?" (2009) 67 UT Fac L Rev 9 at 20-21, 34-35 [Martin]; Jodie van Dieen, "O'Connor and Bill C46: Differences in Approach" (1997) 23:1 Queen's LJ 1 at 3-4 [van Dieen].

¹²¹ *Stinchcombe*, *supra* note 112 at 336 (emphasis added).

¹²² Colton, *supra* note 120 at 534.

¹²³ Brian Gover, "Stinchcombe: Bad Case, Good Law?" (1991) 8 CR (4th) 307 at 310 (emphasis added).

¹²⁴ *United States v Bagley*, 473 US 667 at 682 (emphasis added).

¹²⁵ Colton, *supra* note 120 at 537.

¹²⁶ *R v McNeil*, 2009 SCC 3, [2009] 1 SCR 66 [McNeil].

¹²⁷ David Paciocco, "Stinchcombe on Steroids: The Surprising Legacy of *McNeil*" (2009) 62 CR (6th) 26 at 31, see also 28-31 [Paciocco, "Stinchcombe"].

clearly irrelevant, privileged, or its disclosure is otherwise governed by law.”¹²⁸ Furthermore, the Court held that (i) the police have a duty to disclose to the prosecuting Crown “all material pertaining to the investigation,”¹²⁹ and (ii) the Crown counsel, if put on notice of the existence of relevant information, is under an obligation to inquire further and obtain the information, if it is reasonably feasible.¹³⁰

An O’Connor application involves a two-step process.¹³¹ First, the accused has to demonstrate that the “information is likely to be relevant.”¹³² The aim of this threshold is to deter “speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming” requests for production.¹³³ Secondly, if the accused meets the “likely relevance” test, the documents are produced to the trial judge, who “must examine and weight 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.”¹³⁴ It is important to note the fact that a production order has been granted does not automatically lead to the admissibility of evidence at trial.¹³⁵

Some commentators suggest that, to avoid “fishing expeditions,” the “likely relevance” standard has to be construed as “something more than information which is relevant in the sense of being logically probative” and include an “assessment of the utility of the record, such as its relation to a material issue between the parties.”¹³⁶ In *McNeil*, however, the Court confirmed that an “accused persons cannot be required, as a condition to accessing information that may assist in making full answer and defence, to demonstrate the specific use to which they might put information which

¹²⁸ *Ibid* at para 18.

¹²⁹ *Ibid* at para 52.

¹³⁰ *Ibid* at para 49.

¹³¹ See *McNeil*, *supra* note 126 at paras 28-32; *Martin*, *supra* note 120 at 21, 35; *Paciocco*, “*Stinchcombe*”, *supra* note 127 at 31-33; *van Dieen*, *supra* note 120 at 18-21.

¹³² *O’Connor*, *supra* note 20 at para 19.

¹³³ *Ibid* at para 24.

¹³⁴ *Ibid* at para 30.

¹³⁵ *van Dieen*, *supra* note 120 at 26.

¹³⁶ *Ibid* at 37.

they have not even seen.”¹³⁷ This limitation helps to avoid a Catch-22 situations where the accused is required to prove evidence he has not seen.

In summary, the “third-party” O’Connor threshold (“likely relevant”) is higher than the “first-party” Stinchcombe standard (not “clearly irrelevant”). It was the former, more stringent threshold that the Court had to apply in the context of a *Garofoli* application.

2. Challenges to Wiretap Authorizations under *Garofoli*

In 1990, the Court decided a number of cases that developed the law pertinent to the use of wiretaps.¹³⁸ In *Duarte*, the Court for the first time recognized that electronic surveillance constitutes a “search” within the meaning of s. 8 of the *Canadian Charter*.¹³⁹ In *Dersch*, the Court held that the accused does not need to show *prima facie* misconduct to be granted access to the sealed packet containing the documents relating to the wiretap authorization; the accused only needs to assert that the admission of the evidence is challenged and that access is required in order to permit full answer and defense.¹⁴⁰ The right of access to the officer’s wiretap affidavit thus gained constitutional status.¹⁴¹ Finally, the *Garofoli* framework assesses the reasonability of a wiretap authorization, i.e. whether the statutory preconditions were met.¹⁴² Even though *Garofoli* “was not strictly speaking a *Charter* case,”¹⁴³ the Court affirmed it in *R v Pires*; *R v Lising*,¹⁴⁴ “which

¹³⁷ McNeil, *supra* note 126 at para 29.

¹³⁸ *R v Duarte*, [1990] 1 SCR 30, 71 OR (2d) 575 [*Duarte*]; *Garofoli*, *supra* note 19; *R v Lachance*, [1990] 2 SCR 1490, [1990] SCJ No 116 (QL); *Dersch v Canada (AG)*, [1990] 2 SCR 1505, 77 DLR (4th) 473 [*Dersch*], *R v Zito*, [1990] 2 SCR 1520, 80 CR (3d) 311. See Nathan Forester, “Electronic Surveillance, Criminal Investigations, and the Erosion of Constitutional Rights in Canada: Regressive U-Turn or a Mere Bump in the Road Towards Charter Justice?” (2010) 73 Sask L Rev 23 at 49–56 [Forester].

¹³⁹ *Duarte*, *supra* note 138 at 42; Forester, *supra* note 138 at 49.

¹⁴⁰ *Dersch*, *supra* note 138 at 1517; Colton, *supra* note 120 at 544–545.

¹⁴¹ Forester, *supra* note 138 at 53.

¹⁴² *Garofoli*, *supra* note 19 at 1452. See also *Duarte*, *supra* note 138 at 44–46; Glen Luther, “Of Excision, Amplification and Standing: Making Sense of the Law of Evidence in the Context of Challenges to Warranted Searches” (2006) 11:1 Can Crim L Rev 1 at 4–5 [Luther].

¹⁴³ Luther, *supra* note 142 at 4.

¹⁴⁴ *R v Pires*; *R v Lising*, 2005 SCC 66, [2005] 3 SCR 343 [*Pires*].

now stands as the leading case on the process and standard of review in wiretap cases.”¹⁴⁵

In *World Bank*, the wiretap authorizations were sought and obtained under ss. 185 and 186 of the *Criminal Code*. An authorization may be given if it is “in the best interests of the administration of justice”¹⁴⁶ and where other investigative procedures “have been tried and have failed,” are “unlikely to succeed” or the matter is urgent so that “it would be impractical to carry out the investigation of the offence using only other investigative procedures.”¹⁴⁷

In *R v Araujo*,¹⁴⁸ the Court was called upon to determine the meaning of “investigative necessity” and rejected the “last resort” standard which would require the police to exhaust all other investigative means before applying for a wiretap authorization.¹⁴⁹ The Court concluded that a “pure last resort test would turn the process of authorization into a formalistic exercise that would take no account of the difficulties of police investigations targeting sophisticated crime.”¹⁵⁰ Instead, the Court held that “[t]here must be, practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry.”¹⁵¹ Although some commentators argue that the *Garofoli* standard, as confirmed in *Araujo*, impairs the accused’s right to make a full answer and defense, this test, “which is overwhelmingly deferential to authorizing judges,”¹⁵² remains good law.

¹⁴⁵ Forester, *supra* note 138 at 54–55.

¹⁴⁶ *Criminal Code*, *supra* note 14, s 186(1)(a).

¹⁴⁷ *Ibid* s 186(1)(b).

¹⁴⁸ *R v Araujo*, 2000 SCC 65, [2000] 2 SCR 992 [*Araujo*].

¹⁴⁹ Forester, *supra* note 138 at 65.

¹⁵⁰ *Araujo*, *supra* note 148 at para 29.

¹⁵¹ *Ibid* at para 29 (emphasis added).

¹⁵² Forester, *supra* note 138 at 66. Forester also points out that “it has never been enough for the accused to show that there were material errors or omissions in the affidavit, or otherwise deceitful conduct by the police, to have an authorization set aside” (p 54). As the Court held in *Garofoli*, *supra* note 19 at 1452 (emphasis added):

The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather

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

In general, the accused may challenge the “facial validity” of the wiretap authorization, arguing that the record before the authorizing judge was insufficient to make out the statutory preconditions, or the “sub-facial validity” by arguing that the record before the authorizing judge did not accurately reflect what the affiant knew or ought to have known.¹⁵³ In *Pires* the Court affirmed that, since the wiretap authorization is a mere investigative tool, on a *Garofoli* application the judge tests whether the affiant has a “reasonable belief in the existence of the requisite statutory grounds”¹⁵⁴ for granting a wiretap authorization, not the ultimate truth of the allegations in the affidavit (this is a matter to be decided on trial).¹⁵⁵

The Court ruled that third party production within a *Garofoli* application serves the same purpose as cross-examination of the affiant, and these two forms of discovery should be treated alike.¹⁵⁶ In *Garofoli*, the Court concluded that an accused may cross-examine the affiant with the leave of the court.¹⁵⁷ The trial judge should grant leave when “satisfied that cross-examination is necessary to enable the accused to make full answer and defence” and a “basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization.”¹⁵⁸ Some commentators suggested that the accused should be permitted to cross-examine the affiant as of right to permit the accused to “probe the veracity of the police information” and thus unearth possible *Charter* violations.¹⁵⁹ The Supreme Court in *Pires*, however, clearly held that the “*Garofoli* leave requirement is entirely consistent with *Charter* principles” and “it would be unwise to

than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

¹⁵³ See *Araujo*, *supra* note 148 at paras 50-54; *Pires*, *supra* note 144 at para 41; *World Bank*, *supra* note 1 at para 120; *Luther*, *supra* note 142 at 5.

¹⁵⁴ *Pires*, *supra* note 144 at para 41.

¹⁵⁵ *Ibid* at paras 30, 41. See *World Bank*, *supra* note 1 at paras 119-122.

¹⁵⁶ *World Bank*, *supra* note 1 at paras 125, 132.

¹⁵⁷ *Garofoli*, *supra* note 19 at 1465.

¹⁵⁸ *Ibid*.

¹⁵⁹ *Forester*, *supra* note 138 at 55.

permit cross-examination of the affiant as of right.”¹⁶⁰ The relevant test is a “reasonable likelihood that cross-examination of the affiant will elicit testimony of *probative value to the issue for consideration by the reviewing judge*,” because the accused has “no constitutional right to adduce irrelevant or immaterial evidence.”¹⁶¹

In *World Bank*, the Court continued this restrictive approach. First, the relevance of the information sought is to be assessed in relation to the narrow issues on a *Garofoli* application, i.e. whether the affiant knew or ought to have known that information in the affidavit was false.¹⁶² Second, production of documents creates the risk of inadvertent identification of the tipsters.¹⁶³ Third, broad production requests may cause delays and derail pre-trial proceedings.¹⁶⁴ In summary, the “reasonable likelihood” standard for granting cross-examination or production of documents on *Garofoli* application is not unduly burdensome (the accused is not required to provide the evidence that the accused seeks to obtain), but, at the same time, it ensures that the accused (who already has access to the package of documents that was before the authorizing judge, as well as the rest of the investigative file disclosed under *Stinchcombe*) does not embark on a fishing expedition.¹⁶⁵

Such an approach appears reasonable in light of the need to preserve the identity of the tipsters and maintain a very broad scope for a respondents’ production request. In particular, out of four tipsters who emailed the INT, only one did not remain anonymous to the RCMP, whereas the second tipster shared his or her identity with the INT investigators, and two other tipsters did not reveal their identities either to the INT or the RCMP.¹⁶⁶ Earlier, “two of the four tipsters were found to be confidential informants under Canadian law” and, “[t]herefore, the identities of these two informants are protected by informer privilege.”¹⁶⁷ As the Court recognized in *R v Liepert*, it is “virtually impossible for the

¹⁶⁰ *Pires*, *supra* note 144 at para 38.

¹⁶¹ *Ibid* at para 3 (emphasis added).

¹⁶² *World Bank*, *supra* note 1 at para 128; see also *Pires*, *supra* note 144 at paras 3, 40-41.

¹⁶³ *World Bank*, *supra* note 1 at para 129; see also *Pires*, *supra* note 144 at paras 3, 36.

¹⁶⁴ *World Bank*, *supra* note 1 at para 130; see also *Pires*, *supra* note 144 at paras 3, 31.

¹⁶⁵ *World Bank*, *supra* note 1 at paras 133-134.

¹⁶⁶ *Ibid* at para 14.

¹⁶⁷ *Ibid* at para 15.

court to know what details may reveal the identity of an anonymous informer.”¹⁶⁸ Furthermore, the Court had authority, envisaged in *O'Connor*, to reject “disruptive, unmeritorious, obstructive and time-consuming” production requests.

In *World Bank*, the Court pointed out that on a sub-facial validity challenge the authorizing judge should not blur the distinction between the affiant’s knowledge and the knowledge of other people involved in the investigation.¹⁶⁹ First, while the INT records may be relevant to the ultimate truth of the allegations in the affidavits prepared by Sgt. Driscoll, it is not reasonably likely that they are of a probative value to what Sgt. Driscoll knew or ought to have known – Sgt. Driscoll simply did not consult those documents and nothing indicates that it was unreasonable for him to rely on the information already provided by the INT.¹⁷⁰ Secondly, Mr. Haynes, whose role as an intermediary between the tipsters and the affiant was similar to that of an informant handler, as a professional with a reputable organization and Sgt. Driscoll had no obligation to double-check his information with the original communications between the INT and the tipsters.¹⁷¹ Third, the respondents already benefitted from extensive disclosure.¹⁷² The only set of documents which could show what Sgt. Driscoll knew at the time he prepared the affidavits were Mr. Haynes’s notes of his conversations with Sgt. Driscoll, but there is no indication if

¹⁶⁸ *R v Leipert*, [1997] 1 SCR 281 at para 28, [1997] 3 WWR 457.

¹⁶⁹ *World Bank*, *supra* note 1 at para 137.

¹⁷⁰ *Ibid* at paras 138-139.

¹⁷¹ *Ibid* at paras 140-141. Sgt. Driscoll consulted many of these communications and sent the first draft of his affidavit to Mr. Haynes for review.

¹⁷² *Ibid* at paras 102-111, 142-143. Information disclosed to the respondents included the redacted wiretap and search warrant affidavits; all materials that were before the authorizing judges; transcripts and the original audio of all relevant intercepted communications; electronic notes made by Sgt. Driscoll at his initial meeting with the World Bank Group officials; every INT report that Sgt. Driscoll consulted; an electronic copy of the draft of the first affidavit (Sgt. Driscoll checked the content of the affidavit with Mr. Haynes for accuracy and to prevent the inadvertent identification of tipsters); handwritten notes of the investigation made by all of the main RCMP investigators; and more than one million items seized at SNC-Lavalin offices. The INT also provided to the RCMP copies of the entire email correspondence between Mr. Haynes and Sgt. Driscoll, and they were shared with the respondents.

Mr. Haynes made any such notes.¹⁷³ In summary, it was fair to require the respondents to demonstrate likely relevance of the INT records on the basis of the extensive information already available to respondents.¹⁷⁴

In conclusion, the Court did not modify either the *Garofoli* or *O'Connor* framework and did not reject the possibility that a third party production order may be issued within a *Garofoli* application. Instead, on the basis of existing precedents, the Court stipulated two conditions to be satisfied to obtain a production order for the purposes of a challenge to a wiretap authorization, namely a reasonable likelihood that (i) such third party records will be of probative value to the issues on the *Garofoli* application (and not merely demonstrate errors or omissions in the affidavit) and (ii) such records “support an inference that the affiant knew or ought to have known about the errors or omissions.”¹⁷⁵

The Court also noted that this narrow approach is dictated by “[p]olicy considerations.”¹⁷⁶ In other words, the Court’s decision in *World Bank* was influenced by considerations of efficiency in the global fight against corruption, which requires (i) allowing law enforcement agencies to use adequate investigative techniques, including electronic surveillance, and (ii) ensuring adequate protection of confidential informants (“tipsters” or whistleblowers).

4. *O'Connor, R v La, and the Loss of Evidence*

In *World Bank*, the respondents argued that because *Stinchcombe* disclosure was incomplete, since Sgt. Driscoll took no notes of his work preparing the affidavits and his emails were lost, the INT’s records (as third party records) are presumed relevant because the first party records were destroyed or never created.¹⁷⁷ The Court held that a proper avenue to address this issue would be within the framework set out in *R v La*¹⁷⁸ and not by modifying the *O'Connor* framework for third party records.¹⁷⁹

¹⁷³ *Ibid* at para 142.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* at para 124.

¹⁷⁶ *Ibid* at para 116.

¹⁷⁷ *Ibid* at para 144.

¹⁷⁸ *R v La*, [1997] 2 SCR 680, 148 DLR (4th) 608 [*La*].

¹⁷⁹ *World Bank*, *supra* note 1 at para 145.

Certainly, an obligation to create and preserve records is important because the accused's right to disclosure or production of documents is "effectively meaningless if such records do not exist."¹⁸⁰ In *La*, the Court held that if the prosecuting Crown has lost evidence that should have been disclosed to the accused, the Crown has a duty to explain what happened to that evidence and, unless the explanation satisfies the trial judge, the loss of evidence amounts to a breach of the *Charter*.¹⁸¹ Furthermore, the Court held that to establish a *Charter* breach, where the police do not create records, the accused needs to furnish "evidence which would justify the conclusion that the police failed to make a record *deliberately to avoid production*."¹⁸² The Court has not established any duty of third parties to create records.¹⁸³

Although the Court in *World Bank* did not rule on the possible implications of *La* (as this issue was not argued by the parties), in accordance with this legal framework and in light of disclosure of the draft affidavit and notes made by other RCMP investigators, as well as the fact that the INT voluntary provided all emails exchanged between Mr. Haynes and Sgt. Driscoll,¹⁸⁴ there was no indication that Sgt. Driscoll did not create handwritten notes to avoid disclosure, thus it is unlikely that the respondent's argument under *La* would have been successful.

V. CONCLUSION

In summary, the Supreme Court's decision in *World Bank* does not constitute a major reform of existing law on the immunity of international organizations or production of documents by third parties. It is rather an overhaul of the existing legal regime, where the Court diligently interpreted the IBRD's and the IDA's *Articles of Agreement* in accordance with general principles of treaty interpretation, giving the words of these documents their ordinary meaning and taking into account the objective and purpose of the

¹⁸⁰ Martin, *supra* note 120 at 22.

¹⁸¹ *La*, *supra* note 178 at para 1; See Graeme Mitchell, "R v La: The Evolving Right to Crown Disclosure and the Supreme Court Divided" (1997) 8 CR (5th) 179 at 179, 183-185.

¹⁸² *R v Buric*, [1997] 1 SCR 535 at 536, 114 CCC (3d) 95 (emphasis added). See also *R v Carosella*, [1997] 1 SCR 80, 142 DLR (4th) 595.

¹⁸³ Martin, *supra* note 120 at 22.

¹⁸⁴ *World Bank*, *supra* note 1 at para 146.

IBRD's and the IDA's governing documents, and held that the INT, an integral part of the WBG's integrity regime, benefits from the IBRD's and the IDA's archival and personnel immunities. Further, in line with policy aimed at fostering international cooperation and strengthening Canada's role in the global fight against corruption, the Court interpreted requirements for waiver of the INT's immunities strictly and did not engage in balancing the INT's immunity against the accused's right to make full answer and defense.

The Court also confirmed that the production of documents under *O'Connor* is subject to a higher threshold than disclosure under *Stinchcombe*, and this threshold is even higher when a production request is made within a *Garofoli* application that, by definition, deals with a limited number of issues related to wiretap authorizations. The Court thus confirmed that *O'Connor*, *Garofoli*, and *Pires* remain good law in Canada. The frameworks from the previous cases remain complex, and skilled defense work is necessary to ensure an accused person has the right to make a full answer and defense. Furthermore, in light of widespread corruption around the globe and increasing efforts of Canadian law enforcement agencies to combat corruption in international trade, it is likely that issues akin to those raised in *World Bank* will come before Canadian courts again in the near future. It remains to be seen, in particular, how the Supreme Court would apply a *La* remedial framework in a situation where third party records are ruled to be "likely relevant", when their production is prevented by the third party's immunity.