

FOREIGN CORRUPTION: CANADA'S TOP COURT SHIELDS TOP BANK AND WHISTLEBLOWERS

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A recent unanimous ruling by the Supreme Court of Canada ("**SCC**") delivered a significant legal victory for international institutions in the fight against corruption, upholding legal immunities which protect the World Bank's records and personnel from the reach of Canadian legal proceedings.

The case of *World Bank Group v. Wallace*, 2016 SCC 15, arose from the prosecution of four individuals under Canada's *Corruption of Foreign Public Officials Act* ("**CFPOA**") in relation to alleged bribery of government officials in Bangladesh. The CFPOA was strengthened in 2012 and the Canadian authorities have significantly increased enforcement of the law in recent years. Three of the accused were former employees of a Canadian company, and the fourth was a representative of a Bangladeshi official. The alleged bribery occurred in relation to a supervision contract for the US\$3 billion Padma Multipurpose Bridge construction project in Bangladesh. The World Bank was one of the bridge project's main financial backers.

The alleged corruption came to light in 2010, when the Bank received multiple emails from four whistleblowers. The tips were received by The Integrity Vice President ("**INT**"), an independent unit responsible for the investigation of allegations of fraud, corruption and collusion in relation to projects financed by the Bank. After investigating the allegations, the Bank withdrew its US\$1.2 billion credit commitment, debarred the company involved for 10 years and shared relevant emails and other findings from its investigation with the RCMP. The RCMP used the Bank's information to obtain wiretap authorizations to gather its own evidence. The four accused challenged the judicial wiretap authorizations after they were charged under the CFPOA. They sought orders for production of material in the Bank's files and to examine two of the Bank's internal investigators.

A judge of the Ontario Superior Court of Justice rejected the immunities claimed by the Bank, in part because it had shared certain information with the RCMP. The judge also ruled that the two INT representatives could be examined by counsel for the accused. The Bank appealed the order to the SCC, and several international institutions including the Organization for Economic Cooperation and Development intervened in support of its position. Transparency International, a non-governmental organization dedicated to reducing corruption, also intervened in order to stress the role of these immunities in protecting whistleblowers, while the Criminal

Lawyers Association and the BC Civil Liberties Association intervened in support of the rights of accused persons to make a full answer and defence.

The SCC held that the immunities for both the INT's documents and its personnel were applicable and not waived. It emphasized that Canada, like other member states in the World Bank institutions, had implemented legislation (the *Bretton Woods and Related Agreements Act*) and related Cabinet orders which recognize the legal foundations for the World Bank. These include immunities which shield its "archives" and personnel from legal processes otherwise applicable under Canadian law. The SCC interpreted the definition of archival immunity broadly to include the investigative records of the INT unit, and also concluded that it was not subject to waiver. Even if it were, the SCC rejected the argument that the voluntary disclosure of certain documents constituted an implied waiver of the immunity applicable to all other documents in the possession of an international institution.

Counsel for the accused also unsuccessfully sought to have the relevant INT investigators testify. It was not disputed that the INT representatives were performing acts in their official capacity. The SCC accepted that legal process immunity for officials acting in such a capacity could only be waived by express rather than implied waiver and that the doctrine of "constructive waiver" was not applicable. Given the absence of any express communication by INT that its officials would be subject to Canadian law, the officials were immune from being compelled to be examined.

The SCC's ruling helps to place Canada on a solid footing with other progressive jurisdictions in efforts to address cross-border corruption issues. The confirmation that protections provided for whistleblowers will be respected by Canadian courts should promote further information sharing and collaboration between international institutions and Canadian law enforcement authorities regarding investigations of corruption or other misconduct.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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