S.C.C. File No. 36315

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

B E T W E E N:

WORLD BANK GROUP

Appellant

- and –

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

Respondents

FACTUM OF THE INTERVENERS, TRANSPARENCY INTERNATIONAL CANADA INC. AND TRANSPARENCY INTERNATIONAL e.V.

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Mark A. Gelowitz (31857J)
Geoffrey Grove (56787B)
Tel: (416) 862-4743 / (416) 862-4264
Fax: (416) 862-6666
Email: mgelowitz@osler.com / ggrove@osler.com

Counsel for the Interveners,
Transparency International Canada Inc. and
Transparency International e.V.

OSLER, HOSKIN & HARCOURT LLP
Suite 1900, 340 Albert Street
Ottawa, ON K1R 7Y6

Patricia J. Wilson

Tel: (613) 235-7234
Fax: (613) 235-2867
Email: pwilson@osler.com

Ottawa Agent for the Interveners,
Transparency International Canada Inc. and
Transparency International e.V.

TO: **The Registrar of the Supreme Court of Canada**

AND TO: **LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**
130 Adelaide Street West, Suite 2600
Toronto, ON M5H 3P5

Alan J. Lenczner, Q.C. (11387E)
Tel: (416) 865-3090
Fax: (416) 685-2844
E-mail: alenczner@lsrsg.com

Counsel for the Applicant / Appellant World Bank Group

BORDEN LADNER GERVAIS
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: (613) 237-5160
Fax: (613) 230-8842

Agent for the Applicant / Appellant World Bank Group

AND TO: **FENTON, SMITH**
2nd Floor
235 King Street East
Toronto, ON M5A 1J9

Scott Fenton / Lynda E. Morgan
Tel: (416) 955-4551 / (416) 955-0074
Fax: (416) 955-1237
E-mail: sfenton@fentonlaw.ca / lmorgan@fentonlaw.ca

Counsel;for the Respondent, Kevin Wallace

GOWLING LAFLEUR HENDERSON
160 Elgin Street
Suite 2600
Ottawa, ON
K1P 1CP

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 788-3857
E-mail: jeff.beedell@gowlings.com

Agent for the Respondents, Kevin Wallace, Ramesh Shah and Mohammad Ismail

DAVID B. COUSINS
100 Observatory Lane
Suite 814
Richmond Hill, ON L4C 1T4

David B. Cousins
Tel: (416) 977-8871
Fax: (905) 787-1073
E-mail: davidcousins@bellnet.ca

Counsel for the Respondent, Ramesh Shah

WELLS CRIMINAL LAW
202-559 College Street
Toronto, ON M5G 1A9

Kathryn A. Wells
Tel: (416) 944-1485
Fax: (416) 944-2529
E-mail: kwells@wellscriminallaw.com

Counsel for the Respondent, Mohammad Ismail

AND TO: **ADDARIO LAW GROUP**
101-171 John Street
Toronto, ON M5T 1X3

Frank R. Addario / Megan Savard
Tel: (416) 649-5055
Fax: (866) 714-1196
E-mail: faddario@addario.ca / msavard@addario.ca

Counsel for the Respondent, Zulfiquar Bhuiyan

GOWLING LAFLEUR HENDERSON
160 Elgin Street
Suite 2600
Ottawa, ON
K1P 1CP

Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 788-3857
E-mail: matthew.estabrooks@gowlings.com

Agent for the Respondent, Zulfiquar Bhuiyan

AND TO: **PUBLIC PROSECUTION SERVICE OF CANADA**
130 King Street West
Suite 3400
Toronto, ON M5X 1K6

Richard Roy / Nick Devlin
Tel: (416) 952-6213 / (416) 952-2109
Fax: (416) 973-8253 / (416) 952-2116
E-mail: Richard.roy@ppsc-sppc.gc.ca / nick.devlin@ppsc-sppc.gc.ca

Counsel for the Respondent, Her Majesty the Queen in Right of Canada

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA
160 Elgin Street
12th Floor
Ottawa, ON K1A 0H8

Francois Lacasse
Tel: (613) 957-4770
Fax: (613) 941-7865
E-mail: francois.lacasse@ppsc-sppc.gc.ca

Agent for Her Majesty the Queen

AND TO: **HENEIN HUTCHISON LLP**
235 King Street East
Third Floor
Toronto, ON M5A 1J9

Scott C. Hutchison / Samuel Walker
Tel: (416) 368-5000
Fax: (416) 368-6640
E-mail: shutchison@hhllp.ca

Counsel for Criminal Lawyers' Association of Ontario

GOWLING LAFLEUR HENDERSON
160 Elgin Street
Suite 2600
Ottawa, ON
K1P 1CP

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 788-3857
E-mail: jeff.beedell@gowlings.com

Agent for Criminal Lawyers' Association of Ontario

AND TO: **STOCKWOODS LLP**
77 King Street West
Suite 4130
Toronto-Dominion Centre
Toronto, ON M5K 1H1

Nader R. Hasan / Gerald Chan / Tiffany O'Hearn Davies
Tel: (416) 593-7200
Fax: (416) 593-9345
E-mail: naderh@stockwoods.ca

Counsel for British Columbia Civil Liberties Association

POWER LAW
130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

David Taylor
Tel: (613) 702-5563
Fax: (613) 702-5563
E-mail: dtaylor@powerlaw.ca

Agent for British Columbia Civil Liberties Association

AND TO: **BORDEN LADNER GERVAIS LLP**
1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Guy J. Pratte / Duncan Ault
Tel: (416) 367-6728
Fax: (416) 361-2721
E-mail: gpratte@blgcanada.com

Counsel for 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

BORDEN LADNER GERVAIS
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: (613) 237-5160
Fax: (613) 230-8842
E-mail: neffendi@blg.com

Agent for 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

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FACTUM OF
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PART I - OVERVIEW

1. Canada has played an important role in the global fight against corruption and bribery on the international stage since Parliament enacted the *Corruption of Foreign Public Officials Act*[1] (the "**CFPOA**") in 1998. At stake in this case is the manner in which Canada can continue to do so for the benefit of Canadians and all citizens of the world.

2. This appeal considers whether an immunity conferred under Canadian law to an international organization should be vitiated by acts of cooperation between the international organization and domestic Canadian law enforcement officials. Transparency International Canada Inc. and Transparency International e.V. (together, the "**TI Interveners**") submit that the answer is no, for two reasons.

3. First, Canada's grant of privileges and immunities to international organizations such as the World Bank Group (the "**World Bank**") has been and will continue to be essential for the protection of whistleblowers in international anti-corruption efforts. It is not possible for global anti-corruption efforts to succeed without strong protections for whistleblowers, who play an essential role in exposing corruption, fraud, mismanagement and other wrongdoing, often at serious personal risk. It is therefore critical that international organizations retain the ability to provide whistleblowers with ironclad and internationally-recognizable assurances that their identities will not be revealed. These assurances are necessary so that whistleblowers remain protected from the very real threat of retaliation or reprisal if their identities are revealed – otherwise, those with relevant information will stay silent out of fear.

4. Second, in order for Canada to participate fully in the global fight against corruption and to fulfill its international obligations in this regard, the privileges and immunities that Canada grants to international organizations must be meaningful as a matter of law. Without broad recognition of these privileges and immunities, Canada's (and other countries') ability to

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[1] *Corruption of Foreign Public Officials Act*, (S.C. 1998, c. 34).

coordinate effectively with international organizations, such as the World Bank, in anti-corruption efforts is undermined.

5. Canada has an international responsibility to pursue allegations of corruption against its nationals under its own domestic laws, including the CFPOA. Much of the cooperation between Canadian agencies and international organizations is made possible as a result of the privileges and immunities that Canada and other states have provided to these organizations. This Court's decision on this appeal has the potential either to reinforce or undermine Canada's ability to work with international organizations in pursuing anti-corruption efforts.

PART II - ARGUMENT

A. Privileges and Immunities for International Organizations are Needed to Protect Whistleblowers

6. Whistleblowers play an essential role in the global anti-corruption campaign. Witness accounts offer invaluable insights into corruption and are powerful tools in the fight against it.

7. The importance of whistleblowers in identifying illegal or otherwise improper conduct has been recognized in Canada and in jurisdictions around the world. Federally in Canada, section 425.1 of the *Criminal Code* prohibits an employer from attempting to dissuade an employee from providing information to law enforcement agencies.[2] Since April 2007, Canada has also provided protection to whistleblowers in the federal public sector through the *Public Servants Disclosure Protection Act* (the "**PSDPA**").[3] The objective of the PSDPA is to encourage public servants to come forward with information if they suspect wrongdoing in the workplace and to protect them from reprisal when they do so. Many provinces have enacted similar legislation.[4]

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2 *Criminal Code*, (R.S.C., 1985, c. C-46).

3 *Public Servants Disclosure Protection Act*, SC 2005, c. 46.

4 *Public Service of Ontario Act*, RSO 2006; *Public Interest Disclosure Act*, RSM 2007 (Manitoba); *Public Interest Disclosure of Wrongdoing Act*, RSNS 2010 (Nova Scotia); *Public Interest Disclosure Act*, RSS 2011(Saskatchewan); *Public Interest Disclosure Act*, RSNB 2012 (New Brunswick); and *Public Interest Disclosure Act*, RSA 2012 (Alberta).

8. Similarly, the United States government has emphasized the importance of whistleblowers in various legislation. The *Whistleblower Protection Enhancement Act*[5] and the *Dodd-Frank Act*[6] serve to encourage and protect whistleblowers in the public and private sectors, respectively. Under a program created by the *Dodd-Frank Act*, whistleblowers in the private sector who come forward to expose violations of securities laws are eligible to receive significant monetary rewards.

9. In the decision of this Court in *Merck v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, Binnie J. recognized the purpose and importance of Canadian statutes that urge whistleblowers to report wrongdoing and assure them of protections when doing so. He noted that even where whistleblower laws are directed at the private sector (*e.g.*, in the *Merck* case, *The Labour Standards Act*[7] in Saskatchewan), the purposes of this legislation "still has a public interest focus because it aims to prevent wrongdoing 'that is or is likely to result in an offence'."[8] He went on to describe the important public goals that are served by whistleblower legislation in Canada, as follows:

> The underlying idea is to recruit employees to assist the state in the suppression of unlawful conduct. This is done by providing employees with a measure of immunity against employer retaliation. "[R]eports from insiders allow for early detection and reduction of harm, reduce the necessity for and expense of public oversight and investigation and may ultimately deter malfeasance".[9]

10. As a part of anti-corruption efforts on the global stage, international organizations, including the World Bank, are often instrumental in gathering information from whistleblowers and working together with law enforcement agencies of member states in order to assist domestic criminal justice systems with the investigation and prosecution of serious international crimes. As Nordheimer J. noted in the decision below, the World Bank (and other international organizations)

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5 *Whistleblower Protection Enhancement Act of 2012*, c. 23, s. 743.

6 *Dodd-Frank Wall Street Reform and Consumer Protection Act*, H.R. 4173, 2010.

7 *The Labour Standards Act*, RSS 1978, c L-1. Note that this legislation was replaced in August 2014 by *The Saskatchewan Employment Act*, SS 2013, c S-15.1.

8 *Merck v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 S.C.R. 425 at para. 14, per Binnie J; TI Book of Authorities, Tab 1.

9 *Id.*, quoting E. S. Callahan, T. M. Dworkin and D. Lewis "Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest" (2004), 44 *Virginia Journal of International Law* 879, at p. 882; TI Book of Authorities, Tab 9.

"have no right of [their] own to institute criminal proceedings against persons who are involved in fraud and corruption".[10] As a result, these international organizations play the important role of directing information *from* individuals with knowledge of wrongdoing *to* the countries of the alleged wrongdoer's nationality, which have the ability to investigate further and, if appropriate, impose penal sanctions for the public benefit.

11. In this case, the information that the RCMP relied on to obtain wiretap authorizations originated with four individuals who brought forward credible allegations of corruption to the World Bank's Integrity Vice Presidency ("**INT**") relating to events that occurred in Bangladesh.[11] The evidence that these whistleblowers provided, together with the cooperation between the RCMP and the INT, formed the foundation for this prosecution under the CFPOA.[12] Indeed, much of the INT's key information is gathered from whistleblowers.[13]

12. It is critical that these whistleblowers and countless others in similarly precarious positions are afforded robust protections, particularly in developing countries where corruption is often rampant. Individuals who come forward with allegations of corruption and other serious crimes take on significant personal risk. They may be fired, sued, blacklisted, arrested, threatened or, in extreme cases, assaulted or killed.[14]

13. A core principle of whistleblower protection is that the identity of the whistleblower or any information that may be used to ascertain the identity of the whistleblower must not be revealed. In this regard, the World Bank has given evidence that "the need to keep certain information confidential lies at the core of INT's investigative procedures" in order both to "protect those who assist INT in its investigations who might otherwise face retaliation" and to "reassure potential

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[10] Nordheimer J.'s Decision, para. 32.

[11] Nordheimer J.'s Decision, para. 5.

[12] Affidavit of Tanit Loraine Gilliam sworn March 18, 2015 (the "Gilliam Affidavit"), paras. 4-5; Appellant's Record, Volume VI, Tab 7, p. 143.

[13] Affidavit of Galina Mikhlin-Oliver sworn February 18, 2015 (the "MO Affidavit"), para. 25; Appellant's Record, Volume I, Tab 5, p. 38.

[14] MO Affidavit, para. 28; Appellant's Record, Volume I, Tab 5, p. 39.

complainants and whistleblowers that their identities, including information they provide which can facilitate the discovery of their identity, will be kept confidential."[15]

14. In criminal cases, this Court has confirmed that the identities of police informers are protected by a "near-absolute privilege".[16] The principles on which the Canadian "informer's privilege" is based track closely the rationale for robust whistleblower protections on the international stage. In *R. v. Barros*, Binnie J. explained that there is a need for the informer's privilege because the privilege "encourages other potential informers to come forward with some assurance of protection against reprisal. A more flexible rule that would leave disclosure up to the discretion of the individual trial judge would rob informers of that assurance and sap their willingness to cooperate."[17]

15. While Canadian courts have recognized the importance of protecting an informant's identity in these cases, an exclusive reliance on the Canadian concept of the "informer's privilege" is insufficient given the international aspects of the global anti-corruption regime. The World Bank's governing documents have been incorporated into the national laws of 188 separate member countries.[18] Each of these countries will have their own concepts of whether, to what extent and under what circumstances an informer's identity ought to be protected, and when it may be disclosed.

16. Against this international backdrop, it is first and foremost the privileges and immunities that Canada and other states have conferred to the World Bank (among other international organizations) that provide the safe environment in which whistleblowers can confidently put themselves forward to report bribery and corruption in countries around the world. Most whistleblowers who provide information to the World Bank and other international organizations do not do so in Canada. Rather, they often come forward in developing countries, such as Bangladesh, with little or no knowledge of or interest in the Canadian concept of the "informer's privilege" and the extent to which it may operate to protect their identities.

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15 MO Affidavit, para. 26; Appellant's Record, Volume I, Tab 5, p. 39.

16 *R. v. Barros*, [2011] 3 S.C.R. 368, p. 374, per Binnie J; TI Book of Authorities, Tab 2.

17 *Id.*, p. 385, per Binnie J.

18 MO Affidavit, paras. 4-5; Appellant's Record, Volume I, Tab 5, p. 32.

17. The promise of confidentiality from international organizations is of little worth if it must be subject to the caveat that the whistleblowers' identities and other information provided may be compelled by and revealed in Canadian courts, or the courts of other countries. For a would-be whistleblower outside of Canada, an international organization's qualified assurance of confidentiality based on the local practices of a foreign legal system provides cold comfort and could, in the words of Binnie J., foreseeably "sap the willingness to cooperate" from those who might otherwise have been prepared to provide important information.

18. Indeed, without internationally-recognizable assurances, which the World Bank and other international organizations can only provide if the privileges and immunities accorded to them are affirmed by all participating jurisdictions, there is a real risk that prospective whistleblowers will stop reporting bribery and corruption through these channels. As the World Bank has stated, "[u]nless the promise of confidentiality is credible, because it is respected by jurisdictions around the world in which [the World Bank] operates, the sources will dry up and the public interest in law enforcement will be the loser."[19]

B. A Broad Recognition of Privileges and Immunities is Necessary for Canada to Continue to Participate Effectively in Global Anti-Corruption Efforts for the Public Good

19. The privileges and immunities that Canada has accorded to certain international organizations such as the World Bank facilitate cooperation between Canada and these organizations in the furtherance of Canada's international obligations to combat corruption, among other obligations. This cooperation results in a significant public benefit enjoyed by Canadians and all citizens of the world. If international organizations' privileges and immunities are watered down or undermined, so too is Canada's ability to effectively pursue and prosecute its nationals in coordination with these organizations under the CFPOA.

20. The current international anti-corruption infrastructure was born out of, and continues to operate as a result of, significant cooperation among dozens of sovereign states and international organizations. In 1997, Canada, together with 34 other countries, signed the Organization for Economic and Cooperative Development Convention on Combatting Bribery of Foreign Officials in International Business Transactions (the "**OECD Convention**"). These states were bound

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[19] MO Affidavit, para. 25; Appellant's Record, Volume I, Tab 5, p. 37.

together under the OECD Convention out of a recognition that corruption undermines good governance and economic development, and that all countries share a responsibility to combat bribery in international business transactions.[20] Similarly, in 2003, the United Nations General Assembly adopted the United Nations Convention against Corruption, an international anti-corruption treaty that requires member countries to implement measures aimed at preventing corruption.[21]

21. In Canada, one of the products of these international efforts is the CFPOA, which Parliament enacted in 1998 and the Government of Canada implemented in 1999 to satisfy its obligations under the OECD Convention.[22]

22. Given this international context, it is clear that the Canadian public derives a significant benefit from the prosecution of its nationals under the CFPOA. Courts across Canada have recognized both the important public benefits that arise from pursuing corruption charges and the burden that Canada must bear in prosecuting its nationals who are accused of participating in foreign corruption schemes. For example, in *R. v. Niko Resources Ltd.*, a prosecution under the CFPOA, Brooker J. of the Alberta Court of Queen's Bench observed that the bribing of a foreign official by a Canadian company is "an embarrassment to all Canadians" that "prejudice[s] Canada's efforts to foster and promote effective governmental and commercial relations with other countries."[23] Similarly, in *R. v. Karigar*, Hackland J. of the Ontario Superior Court observed that the time has come to reject the notion that bribery in developing countries is simply a "cost of doing business" for Canadian companies:

> ... the corruption of foreign public officials, particularly in developing countries, is enormously harmful and is likely to undermine the rule of law. The idea that bribery is simply a cost of doing business in many countries, and should be treated as such by

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[20] MO Affidavit, para. 17; Appellant's Record, Volume I, Tab 5, p. 36.

[21] United Nations General Assembly resolution 58/4 of 31 October 2003, United Nations Convention against Corruption.

[22] See CFPOA, the full title of which is "An Act respecting the corruption of foreign public officials and the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to make related amendments to other Acts".

[23] *R. v. Niko Resources Ltd.*, [2012] A.W.L.D. 4536, paras. 13-14 (Alta. Q.B.); TI Book of Authorities, Tab 5.

> Canadian firms competing for business in those countries, must be disavowed.[24]

23. In view of the above, even if the "benefits / burdens" analysis articulated in this Court's decision in *Sparling v. Quebec (Caisse de dépôt & de placement)*[25] applies to the question of whether a waiver of an international organization's privileges and immunities has occurred, it cannot be that a prosecution of Canadian nationals under a Canadian statute that was enacted expressly in ratification of Canada's international obligations is merely for the benefit of the international organization itself.

24. On the contrary, as our courts have acknowledged on several occasions, prosecutions under the CFPOA are conducted for the public good. They are conducted for the benefit of all Canadians and indeed for the good of all of the citizens of the world.

25. Any benefit that might accrue to the World Bank (or other international organizations who provide information to Canadian law enforcement) as a result of a prosecution in Canada is *de minimus* and ancillary to the overall public benefit that results from this domestic state action. Indeed, in this case, while the World Bank may "have no right of [its] own to institute criminal proceedings against persons who are involved in fraud and corruption" (as Nordheimer J. stated), the World Bank already derives its own benefit from the INT's work through the World Bank's "debarment" process, whereby the World Bank protects the funds it makes available by declaring those who have engaged in corrupt activities ineligible for World Bank financing.[26] Indeed, the funds that the World Bank seeks to protect are in large measure the funds of member countries, including Canada, who helped to fund the bank through capital contributions.[27]

26. As a result of the OECD Convention and other international instruments, it is Canada's international responsibility to pursue allegations of corruption under its own domestic laws against its own nationals. Indeed, under-enforcement is a significant issue among OECD member states,[28]

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[24] *R. v. Karigar*, 2014 ONSC 3093 (S.C.J.); TI Book of Authorities, Tab 4.

[25] *Sparling v. Quebec (Caisse de dépôt & de placement)*, [1988] 2 S.C.R. 1015; TI Book of Authorities, Tab 7.

[26] MO Affidavit, para. 20; Appellant's Record, Volume I, Tab 5, p. 36

[27] MO Affidavit, para. 12; Appellant's Record, Volume I, Tab 5, p. 34.

[28] As Rachel Brewster observed in the Chicago Journal of International Law, under-enforcement remains a significant issue among OECD member states: "While the signing and ratification of the OECD Treaty creates an international obligation for member governments to enact domestic legislation prohibiting foreign corrupt

and Canada remains under international pressure to fulfill its obligations under the OECD Convention, including by way of prosecutions under the CFPOA.[29]

27. Canada has increased enforcement efforts under the CFPOA over the past several years, and a body of decisions under the CFPOA is beginning to emerge.[30] In addition to the pending prosecution against the four accused in this case, there is currently one other prosecution underway in Canada under the CFPOA involving SNC-Lavalin's activities in Libya, in which former employees of the company and the company itself have been charged.[31]

28. The continued involvement and assistance of international organizations such as the World Bank will facilitate Canada's ongoing ability to meet its international obligations and to discharge the important mandate established under the OECD Convention and the CFPOA.

29. However, assistance from the World Bank and other international organizations to Canadian law enforcement agencies in respect of investigations and prosecutions under the CFPOA and other laws may be diminished if these organizations' immunities are compromised. There is every reason to believe that the Court's decision in this case will have an international impact and could affect the World Bank's cooperation with law enforcement agencies in other countries, especially given evidence from the World Bank that "it would be destructive of INT's

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activity, the incentives for states to under-enforce this agreement remain. The same competitive concerns that made some states reluctant to sign onto the OECD Treaty may make some governments reluctant to enforce their rules stringently." See Rachel Brewster, "The Domestic and International Enforcement of the OECD Anti-Bribery Convention", *Chicago Journal of International Law*, Vol. 15, No. 1, Summer 2014; TI Book of Authorities, Tab 8.

29 Gilliam Affidavit, para. 21; Appellant's Record, Volume VI, Tab 7, p. 146. See, also, Susana C. Mijares, "The Global Fight Against Foreign Bribery: Is Canada a Leader or a Laggard?" *Western Journal of Legal Studies*, Volume 5, Issue 4, Article 2, 2015, who noted that Transparency International and the OECD Working Group on Bribery commented in 2012 on "Canada's weak role in combatting foreign bribery" and "Canada's insufficient implementation and enforcement of the OECD Convention"; TI Book of Authorities, Tab 10.

30 See *R. v. Watts*, [2005] A.J. No. 568, TI Book of Authorities, Tab 6; *R. v. Niko Resources Ltd.*, *supra*, TI Book of Authorities, Tab 5; *R. v. Karigar*, 2013 ONSC 5199, TI Book of Authorities, Tab 4; *R. v. Griffiths Energy International*, [2013] A.J. No. 412, TI Book of Authorities, Tab 3. Also note that Parliament passed significant amendments to the CFPOA in June 2013 as a part of the *Fighting Foreign Corruption Act*, S.C. 2013, c. 26, including to: (a) increase the maximum sentence of imprisonment applicable to the offence of bribing a foreign public official from five to fourteen years for the directing mind of a company; (b) eliminate the facilitation payments exception to that offence; (c) create a new offence relating to books and records and the bribing of a foreign public official or the hiding of that bribery; and (d) establish nationality jurisdiction that would apply to all of the offences under the Act, which now permits Canada to carry out prosecutions of Canadian citizens and permanent residents regardless of where the act occurred.

31 Gilliam Affidavit, para. 21; Appellant's Record, Volume VI, Tab 7, p. 146

and [the World Bank's] credibility and reputation, and would severely undermine the ability of INT to fulfill its investigative mandate going forward, were it to ever be required, as a matter of any national law, to breach its undertakings or promise of confidentiality it has made to whistleblowers, complainants and witnesses."[32]

C. Conclusion

30. In the TI-Interveners' submission, this Court should take care to ensure that its decision does not have the effect of chilling cooperation between individual states and international organizations, which has proven to be such an important aspect of the fight against global corruption.

31. In order for international anti-corruption efforts to succeed, whistleblowers must be afforded strong protections and internationally-recognizable assurances that their identities will not be revealed, including by way of a broad recognition of the privileges and immunities Canada and other countries have granted to international organizations. Otherwise, there is a real risk that whistleblowers around the world will stay silent, and the vital information that they provide will be diminished.

PART III - SUBMISSIONS AS TO COSTS

32. The TI Interveners do not seek costs and ask that no costs be ordered against them.

PART IV - ORDER SOUGHT

33. The TI Interveners take no position on the disposition of this appeal. The TI Interveners renew their request to make oral submissions at the hearing of this appeal.

October 22, 2015

MARK A. GELOWITZ / per GGT
Mark A. Gelowitz

Geoffrey E.J. Grove

OSLER, HOSKIN & HARCOURT LLP
Lawyers for the interveners Transparency International Canada Inc. and Transparency International e.V.

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[32] MO Affidavit, para. 28; Appellant's Record, Volume I, Tab 5, p. 39.

PART V - TABLE OF AUTHORITIES