Federal Court of Appeal | Cour d'appel fédérale

Date: 20250303

Docket: A-345-23

Citation: 2025 FCA 50

CORAM: **RENNIE J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

EXPORT DEVELOPMENT CANADA

Appellant

and

THE INFORMATION COMMISSIONER OF CANADA

Respondent

and

PUBLIC SECTOR PENSION INVESTMENT BOARD and CANADA POST CORPORATION

Interveners

Heard at Ottawa, Ontario, on November 5, 2024.

Judgment delivered at Ottawa, Ontario, on March 3, 2025.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: RENNIE J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

I. Overview

[1] This appeal concerns an access to information request received by Export Development Canada (EDC), leading to an order of the Information Commissioner of Canada (Commissioner) requiring EDC to disclose customer-related information to the requestor. In response to EDC's application for review, the Federal Court issued a judgment (Decision) upholding the order (2023 FC 1538, *per* Tsimberis J.). EDC has appealed from the Decision to this Court.

[2] EDC submits that the information at issue (disputed information) qualifies for exemptions from disclosure provided by sections 24 and 18.1 of the *Access to Information Act*, R.S.C. 1985, c. A-1 (ATIA). The pertinent statutory provisions are reproduced in an appendix.

[3] EDC's primary argument rests on section 24 of the ATIA. This exemption incorporates a prohibition on disclosure contained in section 24.3 of the *Export Development Act*, R.S.C. 1985, c. E-20 (EDA). In doing so, section 24 prohibits the disclosure of information obtained by EDC in relation to its customers without their consent.

[4] EDC argues in the alternative that the disputed information is protected by section 18.1 of the ATIA. Section 18.1 provides a discretionary exemption for a record that contains "trade secrets or financial, commercial, scientific or technical information that belongs to, and has consistently been treated as confidential" by EDC or one of three other listed crown

corporations. Two of the three other crown corporations have intervened in this appeal and have asked this Court to clarify the requirements of section 18.1.

[5] For the reasons below, I would allow the appeal on the basis that the disputed information is protected from disclosure pursuant to section 24 of the ATIA. For simplicity, this exemption will sometimes be referred to in these reasons as the "section 24.3 exemption". While not necessary to resolve this case, I would also provide some clarity regarding the requirements of section 18.1.

II. Factual background

[6] EDC, like many other crown corporations, has not always been subject to the ATIA. That changed in 2006 when, in order to increase transparency in government, several crown corporations, including EDC, were required to comply with access to information requests. The inclusion of EDC within the scope of the ATIA laid the groundwork for the case at hand.

[7] On July 9, 2019, EDC received this request for information:

> Please provide a summary of any financial assistance over $50,000 provided by EDC from 2009 to 2019 to any Canadian company operating in Honduras. In particular name each company and provide the type and amount of financial assistance to that company. For loans, please indicate when repayment was due, and when repayment was made.

[8] In response to the request, EDC located some pertinent information relating to insurance policies it had provided to Canadian exporters operating in Honduras during the relevant period.

EDC provided a chart to the requestor which disclosed four general headings: program (i.e., policy type), policy number, customer name (i.e., exporter), and maximum liability amount. EDC notified the requestor that the balance of the chart was being redacted by virtue of sections 24 and 18.1 of the ATIA.

[9] The requestor filed a complaint with the Commissioner pursuant to the ATIA. Following an investigation, the Commissioner and EDC agreed that customer names were properly redacted and policy types should have been disclosed. They continued to disagree with respect to disclosing policy numbers and maximum liability amounts. These two items, which were generated by EDC, constitute the disputed information.

[10] Ultimately, the Commissioner issued an order requiring EDC to disclose the disputed information as well as the policy types (which were not in dispute). The Commissioner's report provided extensive reasons, including responses to EDC's submissions. I will not describe those reasons here since, as explained below, this is an appeal from a *de novo* determination of the Federal Court.

III. Legislative scheme

[11] When several crown corporations were made subject to the ATIA for the first time in 2006, it was recognized that some of them were not adequately protected by the ATIA's existing exemptions. New exemptions were required to meet their specific needs. With respect to EDC, it

was given protection by the two exemptions central to this appeal – sections 24 and 18.1 of the ATIA.

[12] Before discussing these provisions, it is useful to canvass some pre-existing exemptions in the ATIA which may also apply to EDC's customer-related information. This is notable since, despite the existence of these other exemptions, Parliament determined that EDC needed further protections.

[13] One of the pre-existing exemptions, paragraph 20(1)(b) of the ATIA, is in the form of a prohibition on disclosure. The information it applies to (and applied to at the relevant time) is:

> financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party.

[14] Another provision is section 18, which contains discretionary exemptions that only apply if the disclosure of information would be harmful to Canada. The objective of section 18, which is to protect the economic interests of Canada, is achieved by way of specific harms-based tests. Two paragraphs, 18(a) and (b), protect some information that also may be covered by the exemptions in sections 24 and 18.1.

[15] The information protected by paragraphs 18(a) and (b) is described below. The description is based on the current version of the legislation, which does not differ materially from the version in force at the relevant time. The information that is exempt under paragraphs 18(a) and (b) is:

> trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and has substantial value or is reasonably likely to have substantial value; and
>
> information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution or to interfere with contractual or other negotiations of a government institution.

[16] As mentioned, in 2006 Parliament added two new exemptions which gave EDC greater protection. Customer-related information, and other sensitive information, is protected to some degree by existing sections 20 and 18, but the new provisions enhance the protection.

[17] The first new provision is the section 24.3 exemption, which involves an interplay between section 24 of the ATIA and section 24.3 of the EDA. Section 24 of the ATIA prohibits the disclosure of information where such disclosure is restricted by provisions in other statutes listed in Schedule II of the ATIA. In effect, section 24 is an override provision so that statutory prohibitions in other statutes listed in Schedule II take precedence over the ATIA. Section 24.3 of the EDA is one of these statutory provisions. It prohibits EDC from disclosing, without consent:

> all information obtained by [EDC] in relation to its customers.

[18] The second new provision is section 18.1 of the ATIA, which provides a discretionary exemption for the following information:

> trade secrets or financial, commercial, scientific or technical information that belongs to, and has consistently been treated as confidential by,
>
> (a) the Canada Post Corporation;

(b) Export Development Canada;

(c) the Public Sector Pension Investment Board; or

(d) VIA Rail Canada Inc.

IV. Federal Court decision

A. *General*

[19] EDC applied to the Federal Court pursuant to subsection 41(2) of the ATIA for a review of the Commissioner's order.

[20] In its decision, the Federal Court first provided an overview of the ATIA. Citing subsection 2(1), the Federal Court explained that the purpose of the ATIA is "to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions." The Federal Court noted that a broad interpretation of the right of access under subsection 4(1) of the ATIA was adopted since it is "quasi-constitutional" (citing *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 at para. 40). Accordingly, exemptions should be interpreted strictly so as to infringe on the public's right to access the least (citing *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1989] 1 F.C. 265 at 274, 1988 CanLII 5656 (App. Div.)).

[21] Turning to the application at hand, the Federal Court observed that a *de novo* determination is required by virtue of sections 41 and 44.1 of the ATIA. In conducting an independent review of the matter, the Federal Court noted, the onus is on EDC to establish that it is authorized to refuse to disclose the disputed information. The two alternative routes for authorization that the Federal Court considered are outlined below.

B. *Section 24.3 of the EDA*

[22] EDC argued before the Federal Court that the section 24.3 exemption is broad enough to include any information relating to the customer acquired through the keeping of its account with EDC, including the disputed information. The Court undertook a textual, contextual and purposive interpretation of section 24.3 of the EDA (discussed below) and rejected this broad interpretation. Instead, the Federal Court agreed with the Commissioner's narrower interpretation that this exemption does not encompass information created by EDC because such information was not "obtained by" EDC in the sense intended by section 24.3. This finding applies to the disputed information.

C. *Section 18.1 of the ATIA*

[23] Next, the Federal Court considered the exemption in section 18.1 of the ATIA. The Federal Court began by noting that this provision had not yet been interpreted by any court and so embarked on a "novel statutory interpretation exercise" (Decision at paras. 70, 75).

[24] The Federal Court's articulation of its view of the appropriate test under section 18.1 is outlined at paragraph 83 of the Decision:

> [83] … [T]he four elements which must all be met for information which a crown corporation is able to properly exercise its discretion in refusing to disclose under subsection 18.1 of the ATIA are:
>
> 1. Trade secrets or financial, commercial, scientific or technical information as those terms are commonly understood;
>
> 2. Which has a reasonable nexus between the information requested and the Corporation's economic interests;
>
> 3. Belonging to one of the corporations listed in subsection 18.1(1); and,
>
> 4. Has been treated consistently in a confidential manner.

[25] In applying the elements of this test, the Federal Court found that the disputed information satisfied the first element because it was commercial in nature. However, the Court also found that the redacted information had no nexus to EDC's economic interests and so could not be shielded under section 18.1 of the ATIA. Furthermore, the Federal Court found that the phrase "belongs to" in section 18.1 connotes ownership that is exclusive. The Court concluded that since EDC had created the disputed information, that information belonged to EDC.

[26] As for the final element of the Federal Court's test, the Court concluded that EDC had failed to treat the information consistently in a confidential manner. While EDC referred the Federal Court to section 3.5.4 of its Transparency & Disclosure Policy, entitled "Treatment of Confidential Transaction Information", the Federal Court found there was insufficient evidence that EDC had consistently treated the disputed information confidentially. The Court also concluded that, to make matters worse for EDC, section 3.5.2 of the policy, entitled "Individual

Transaction Reporting", explicitly permits disclosure of the disputed information. The Federal Court's conclusion on these points is summarized succinctly at paragraph 105 of the Decision:

> [105] EDC has offered no evidence that they consistently treat the information as confidential beyond section 3.5.4 of their Policy. Without a confidentiality agreement in place, EDC's communication of the information to its customers without any notice or restriction on that information's further use by the customer, or the customer's dissemination of the information to other third parties, casts doubt on the proposition that EDC consistently treated the redacted information as confidential. Finding section 3.5.2 of the Policy undermines that proposition, and acknowledging EDC has nothing else to offer in support of their proposition, EDC has failed to establish that they consistently treat the information as confidential.

[27] For all of the above reasons, the Federal Court concluded that EDC could not use section 18.1 of the ATIA to shield the disputed information.

V. Analysis

A. *Issues*

[28] The main issue in this appeal is whether the Federal Court erred when it concluded that the term "obtained by" in section 24.3 of the EDA precludes the section 24.3 exemption from applying to information created by EDC.

[29] EDC also raises two alternative arguments:

(a) Is the disputed information encompassed by the section 24.3 exemption because the disclosure of this information could reveal information provided by customers? EDC raises this argument for the first time in this Court.

(b) Did the Federal Court err when it determined that the disputed information does not qualify for the section 18.1 exemption because the information had no nexus to EDC's economic interests and because EDC did not consistently treat the information as confidential?

[30] In addition, as mentioned, two interveners stated that they disagree with some of the Federal Court's views concerning section 18.1 and asked the Court to provide guidance on this.

B. *Standard of review and principles of statutory interpretation*

[31] As mentioned earlier, the Federal Court was required by the ATIA to decide the application on a *de novo* basis (see ss. 41 and 44.1). Accordingly, the appellate standards of review apply in this Court: see *Fraser v. Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 167 at paras. 33-37; *Canada (Health) v. Elanco Canada Limited*, 2021 FCA 191 at paras. 22-33.

[32] Most of the issues before the Court raise questions of statutory interpretation and are subject to correctness review. To the extent there are questions of fact or questions of mixed fact and law (excluding extricable questions of law), these are reviewable on the basis of palpable and overriding error. (See *Housen v. Nikolaisen*, 2002 SCC 33.)

[33] With respect to the applicable principles of statutory interpretation, a textual, contextual, and purposive analysis of the relevant provisions must be undertaken. The applicable principles were concisely described in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54:

> [10] It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

C. *The section 24.3 exemption*

(1) Introduction

[34] EDC's principal argument is that the Federal Court misinterpreted the term "obtained by" in section 24.3 of the EDA when it concluded that customer-related information generated by EDC itself is not included in this provision. This is an issue of statutory interpretation and is subject to correctness review.

[35] EDC submits that "obtained by" is a broad term and that section 24.3 of the EDA applies to all customer-related information contained in EDC's records, however obtained. Subsection 24.3(1) provides:

24.3 (1) Subject to subsection (2), all information obtained by the Corporation in relation to its customers is privileged and a director, officer, employee or agent of, or adviser or consultant to, the Corporation must not knowingly communicate, disclose or make available the information, or permit it to be communicated, disclosed or made available.	**24.3 (1)** Sous réserve du paragraphe (2), les renseignements recueillis par la Société sur ses clients sont confidentiels et aucun administrateur, dirigeant, mandataire, conseiller, expert ou employé de celle-ci ne peut sciemment les communiquer ou les laisser communiquer ou y donner accès ou permettre à quiconque d'y donner accès.

[36] The Federal Court undertook a textual, contextual and purposive analysis and summarized its conclusion as follows:

> [67] I agree with the Commissioner that subsection 24.3(1) cannot be interpreted as including documents created by EDC. If this were Parliament's intention, the word "created" would be present in subsection 24.3(1). In any event, even if there were two different interpretations open to the Court, as mentioned should be done in *Rubin* at para 23, I must interpret subsection 24.3(1) as not infringing the public's right to access the information.

[37] As explained below, I reach a different conclusion.

(2) The text

[38] The textual analysis undertaken by the Federal Court (at paragraphs 38-43) relied on dictionary meanings of "obtain" and "recueillir". These dictionaries defined "obtain" as: "to come into possession of; get, acquire, or procure"; and "recueillir" as: "rassembler des choses", "obtenir pour soi", "recevoir", and "acquérir" (Decision at para. 38). The Federal Court

concluded that neither the English nor the French wording was broad enough to encompass EDC's position (Decision at para. 40).

[39] The Federal Court also found that the more expansive meaning suggested by EDC would render the term "obtained by" meaningless. The judge indicated that Parliament could have achieved the broader meaning by simply deleting the words "obtained by the Corporation" from section 24.3 (Decision at paras. 41-43).

[40] Although the terms "obtain" and "recueillir" can have the meanings described by the Federal Court, these are not the only ordinary meanings of these terms. The words "obtain" and "recueillir" are common, non-technical words that can be used in many contexts. In reference to information, a common use is: "I obtained this knowledge through study", or "I mulled the problem over and obtained the answer." It so happens that paragraph 18(c) of the ATIA uses the term "obtain" in a similar way: "scientific or technical information obtained through research by an officer or employee of a government institution" (emphasis added). Without getting into too many examples, those provided above at least demonstrate that one can obtain something in the sense of reaping the fruits of one's own efforts – a notion that could well describe EDC's efforts in procuring the disputed information at issue in this case.

[41] Accordingly, the words "obtained by" in section 24.3 may include information that was generated through EDC's own efforts.

[42] As for the Federal Court's additional argument (at paragraph 41) that EDC's interpretation renders the words "obtained by" meaningless and that they must have some greater import, I disagree. In my view it is unlikely that Parliament would have used a general term like "obtained by" to fundamentally circumscribe the scope of section 24.3, as suggested by the Federal Court. Rather, it is more likely that Parliament would have used explicit language, such as by adding that the information must be obtained from a third party.

[43] Lastly, EDC submits, and I agree, that the Federal Court's interpretation results in incoherence. There is no apparent reason for Parliament to prohibit the disclosure of information obtained from a third party, but not the same information generated by EDC itself.

[44] For these reasons, I conclude that, although the terms "obtain" and "recueillir" can have several meanings, their use in section 24.3 suggests that an interpretation encompassing EDC's position is most likely. Still, in order to determine the most appropriate meaning, the context and purpose should be considered.

(3) The context

[45] As for the context, the Federal Court determined (at paragraphs 44-56) that the context supports a narrow interpretation of "obtained by". The Federal Court's analysis focussed on the language in other provisions in the ATIA, but as I will explain this language does not provide the appropriate context.

[46] Section 24.3 of the EDA was enacted in 2006 when EDC was made subject to the ATIA. But the language in the provision was not new. It was modelled after an already existing statutory provision, section 37 of the *Business Development Bank of Canada Act*, S.C. 1995, c. 28 (BDCA). Section 37 was enacted in 1995 when the Federal Business Development Bank was continued as a body corporate under the name "Business Development Bank of Canada" (BDC) and was made subject to the ATIA. At the same time, section 37 was listed in Schedule II of the ATIA, ensuring via the general prohibition in section 24 of the ATIA that section 37 would override the ATIA.

[47] Since any differences from the original are not material, the current wording of subsection 37(1) of the BDCA is reproduced below:

37 (1) Subject to subsection (2), all information obtained by the Bank or by a subsidiary in relation to its customers is privileged and a director, officer, employee or agent or mandatary of, or adviser or consultant to, the Bank or a subsidiary must not knowingly communicate, disclose or make available the information, or permit it to be communicated, disclosed or made available.	**37 (1)** Sous réserve du paragraphe (2), les renseignements recueillis par la Banque ou par ses filiales sur leurs clients sont confidentiels et aucun administrateur, dirigeant, mandataire, conseiller, expert ou employé de la Banque ou de l'une de ses filiales ne peut sciemment les communiquer, en permettre la communication, y donner accès ou permettre à quiconque d'y donner accès.

[48] Section 37 provides the appropriate context in this case. Its interpretation, which is discussed under the purposive analysis below, informs the proper interpretation of section 24.3 of the EDA, which was modelled after it.

[49] As mentioned, the Federal Court chose to focus its contextual analysis on provisions in the ATIA. In particular, the Federal Court compared section 24.3 of the EDA to various provisions in the ATIA, using them as interpretative aids to restrict the meaning of section 24.3. This approach failed to give due appreciation to the history of the section 24.3 exemption canvassed above. Rather than focusing on the wording in section 37 of the BDCA, the Federal Court wrongly assumed that the wording of various ATIA provisions had to be read in harmony with that of section 24.3 of the EDA so as to inform its meaning.

[50] In one instance, the Federal Court compared section 24.3 of the EDA to section 18.1 of the ATIA and concluded that a broad interpretation of section 24.3 risks making EDC's inclusion in section 18.1 redundant (Decision at para. 50). In this way, the Federal Court saw section 18.1 as a contextual factor limiting the scope of section 24.3 of the EDA.

[51] However, there is no redundancy occasioned by EDC's position. As described below, at the time of section 18.1's enactment, EDC saw section 18.1 as applying to "commercial systems in place to assess risk, determine [EDC's] pricing and assess different markets." Accordingly, EDC's position with respect to section 24.3, which has remained consistent, does not risk this other provision becoming redundant.

[52] In another example, the Federal Court suggested that if the disputed information was intended to be protected by section 24.3 of the EDA, the provision would have used the phrase "obtained or created by" since this phrase was used in other sections of the ATIA, like section 16.1. This conclusion, however, misunderstands how section 24.3 originated. The wording used

in sections like section 16.1 was added as part of the legislative package in 2006. However, as mentioned, section 24.3 was patterned after section 37 of the BDCA which was enacted years earlier. Accordingly, the Federal Court erred when it assumed that Parliament intended a harmonious reading of these sections of the ATIA and section 24.3 of the EDA.

[53] In yet another example, the Federal Court found a parallel between the term “obtained by” in section 24.3 and the phrase “supplied to” in paragraph 20(1)(b) of the ATIA. The Court commented that the phrase “supplied to a government institution by a third party” in the latter provision had been judicially interpreted as excluding information obtained through negotiation in *Canada Post Corp. v. Canada (National Capital Commission)*, 2002 FCT 700 at para. 14 [*Canada Post*]. According to the Federal Court, the narrow meaning of “supplied to” in paragraph 20(1)(b) of the ATIA was similarly intended by the term “obtained by” in section 24.3 of the EDA.

[54] This analogy is also flawed. First, as indicated, section 24.3 was modelled after a provision in the BDCA, not the ATIA. Still more, the Federal Court misconstrued *Canada Post* by failing to give due appreciation to the words “by a third party” in paragraph 20(1)(b). The Federal Court focussed only on the words “supplied to”. *Canada Post*, however, did not focus solely on these words. It relied on the information being supplied “by a third party”. With no similar language in section 24.3 of the EDA, the parallel drawn by the Federal Court seems to be based on an oversight.

[55] In sum, a correct context for section 24.3 of the EDA must focus on the language in section 37 of the BDCA. The Federal Court made several errors by instead seeking to harmonize its reading of section 24.3 of the EDA with the language in various provisions in the ATIA. These errors ultimately led the Federal Court to incorrectly conclude that the context supports a narrow interpretation of "obtained by". The relevance of section 37 as both a contextual and purposive factor will be considered next as part of the purposive analysis. At this point, however, I will note that the contextual factors raised by the Federal Court do not favour a narrow interpretation.

(4) Purpose

[56] As for the purpose of section 24.3 of the EDA, the Federal Court rejected EDC's submission that Parliament intended section 24.3 to apply to all client-related information "however so obtained". It found that EDC's position did not have sufficient support (Decision at paras. 57-65). In addition, the Court concluded that EDC's position is contrary to its own treatment of the disputed information under its disclosure policy (Decision at para. 66).

[57] With respect to the disclosure policy, the Court incorrectly concluded that the policy permitted disclosure of the disputed information (Decision at para. 66). As explained below, this conclusion was simply based on an incorrect reading of the policy.

[58] The Federal Court concluded that section 3.5.2 of the policy permits EDC to disclose the disputed information, but this interpretation ignores other parts of section 3.5. Section 3.5, read

in its entirety, makes it clear that section 3.5.2, the provision relied on by the Federal Court, only applies to financing transactions, as defined in the policy. These transactions do not encompass the disputed information.

[59] The Federal Court also addressed the confidentiality provision in section 3.5.4 of the policy (Decision at paras. 98-99). The Court concluded that this provision does not apply to information created by EDC, such as the disputed information. However, section 3.5.4 does apply to information created by EDC because the provision explicitly states that it includes information in specified "reports and documents prepared by EDC". Accordingly, I conclude that the Federal Court also misconstrued the confidentiality provision.

[60] Based on the above, reading the relevant parts of the policy carefully makes it clear that insurance provided by EDC to exporters is not required to be disclosed under EDC's disclosure policy. In my view, the Federal Court ignored certain parts of section 3.5 and made a palpable and overriding error in doing so. Accordingly, the Court's conclusion concerning the disclosure policy should be disregarded.

[61] As for EDC's submissions, EDC argued that section 24.3 was intended to equate to the duty of confidentiality applicable to a banker. In the seminal judicial authority on bankers' confidentiality, the duty is described as follows: "[O]ne of the implied terms of the contract is that the bank enter into a qualified obligation with their customer to abstain from disclosing information as to his affairs without his consent" (emphasis added) (*Tournier v. National Provincial and Union Bank of England* (1923), [1924] 1 K.B. 461 at 484 (C.A.) [*Tournier*]; cited

with approval in *Guertin v. Royal Bank of Canada* (1983), 1 D.L.R. (4th) 68 (Ont. H.C.)). The rationale was stated by Lord Justice Atkin this way: "[T]he test is … what the Court considers [the banker and customer] must necessarily have agreed upon, it appears to me that some term as to secrecy must be implied." (See *Tournier* at 483-484.)

[62] As mentioned, the Federal Court found that there was insufficient support for EDC's position (Decision at paras. 57-65). As explained below, I respectfully disagree.

[63] First, just as there is an implied term of confidentiality in a banking arrangement, confidentiality should similarly be implied in respect of a transaction undertaken by a financial institution like EDC. It could be different if EDC's mandate was to provide government subsidies, but the evidence in the record suggests that this is not the case. I fail to see a material difference in this respect between the financial services provided by a traditional bank and those provided by EDC.

[64] This conclusion also has some support in the legislative history surrounding the enactment of section 37 of the BDCA. Before reviewing this evidence, I would note that the Supreme Court recently reiterated the caution that "while Hansard evidence has frailties, it may 'play a limited role in the interpretation of legislation' (Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 35)" (*Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 at para. 87). Accordingly, the materials below have been reviewed with this caution in mind.

[65] In the House of Commons debates concerning this legislation on May 29, 1995, section 37 was mentioned briefly by Mr. Osvaldo Nunez, a Member of the Opposition:

> [Section 37] restricts access to information regarding the bank's clients. This practice is normal for a financial institution. It would be useful, however, to add a provision stipulating that Parliament could access this information for a parliamentary inquiry.

[66] This comment, although brief, is favourable to EDC's position because Mr. Nunez states that restricting access to information regarding clients reflects the industry standard. This suggests that section 37 effectively mirrors the principle in *Tournier*. Since section 24.3 of the EDA is virtually identical to section 37, it follows that EDC is also subject to the same duty of confidentiality. This is not surprising because both corporations provide financing to Canadian businesses.

[67] EDC's view of section 24.3 has been consistent since it first became subject to the ATIA. In 2006, EDC's president, Mr. Rob Wright, testified before a parliamentary committee that was considering the proposed amendments to the ATIA. Mr. Wright spoke in general terms, explaining that sections 24 and 18.1 were crucial to assure clients that they would not be affected by EDC's inclusion in the ATIA. The comments by committee members suggest that they agreed with EDC in this regard.

[68] Mr. Wright's presentation focused mostly on section 24 rather than on section 18.1. His written text, which was provided alongside the oral presentation, makes it clear that EDC was relying on section 24 to protect customer information. It is likely that this text expressed EDC's view more clearly than Mr. Wright's more informal oral remarks. The text indicated the following:

> EDC customers and their foreign buyers should not have to worry that their commercially sensitive information could risk falling into the hands of their competitors. Section 24 puts those fears to rest.
>
> [Emphasis added]

[69] As for the purpose of section 18.1, the only detailed comment provided by Mr. Wright was that section 18.1 protects EDC's "commercial systems in place to assess risk, determine our pricing, and assess different markets." Accordingly, from the start, EDC has taken the position that it needs both section 18.1 and section 24.

[70] In its reasons, however, the Federal Court concluded that Mr. Wright's testimony did not support EDC's position. The Court cited excerpts from Mr. Wright's oral testimony that appeared to limit the scope of section 24.3 of the ATIA and section 37 of the BDCA to information obtained directly from customers (Decision at para. 59).

[71] However, there are other excerpts in Mr. Wright's testimony that reflect a broader interpretation of these provisions, namely, that protection was intended for EDC and BDC for information "from our clients and about our clients". Certainly, this was how one of the committee members, Mr. Paul Dewar, interpreted Mr. Wright's testimony concerning section 24.3, when he commented to him:

> You did mention concerns about having the freedom of information touch clients. I'm certain we can all appreciate why that might be a problem.
>
> [Emphasis added]

[72] In addition, another parliamentary committee at the time heard from Minister John Baird, who was then the President of the Treasury Board and had sponsored the 2006 amendments. The Federal Court determined that Minister Baird's comments do not support EDC's interpretation of the section 24.3 exemption (Decision at para. 60). I do not agree.

[73] Minister Baird stated: "Addressing all of [the Commissioner's] concerns would have created consequences that, I believe, would not be acceptable to this committee or to Canadians across the country." He then referred to EDC as an example: "… Canadian exporters that rely on access to Export Development Canada's programs should not be hampered in competing on the world stage because their international customers dealt with EDC, with their information subject to the access to information laws."

[74] While Minister Baird did not specify particular statutory provisions, he emphasized the importance of EDC's concerns. Indeed, while the exact mechanics may have been unclear, what was clear was that the government took the position that nothing concerning EDC's inclusion in the ATIA should be seen as limiting EDC's ability to protect sensitive customer information so as to hamper Canadian exporters. Sensitive customer information would include the disputed information. EDC is now seeking to protect the disputed information through the section 24.3 exemption. This is not surprising since EDC understood this exemption, at the time of its enactment, to have been crafted for this purpose, namely, to set EDC's customers' fears about disclosure of their information to rest.

[75] Testimony on behalf of EDC was also provided by Mr. Eric Siegel, chief operations officer of EDC. His testimony before Parliament was generally consistent with EDC's position in this appeal, with one exception. In addressing this exception, I will explain why it does not undermine EDC's position.

[76] During his testimony, Mr. Siegel was asked to comment on the Commissioner's submission that EDC did not need to be included among the crown corporations protected by section 18.1. Mr. Siegel stated that section 18.1 was necessary for EDC to protect information obtained from clients where EDC works with that information and creates internal records based on it.

[77] In providing this answer, Mr. Siegel's testimony conflicts with that of Mr. Wright concerning section 18.1. As mentioned, Mr. Wright indicated that section 18.1 was needed to protect EDC's commercial systems from disclosure, not customer information. Mr. Siegel's testimony is also inconsistent with EDC's overarching position that it needed to give its customers a guarantee that all information relating to them would be kept confidential. Such a guarantee could only come from a provision that is clear and without conditions. Only section 24, and not section 18.1, meets that criterion.

[78] Difficulties with section 18.1 were identified and understood by participants in the parliamentary discussions. For example, not long after Mr. Siegel spoke, Moya Greene, president and chief executive officer of Canada Post Corporation, testified that section 18.1 was ambiguous. In response to questions about whether she had concerns about this, Ms. Greene

provided the lukewarm response that she was satisfied the meaning would be clarified over time through litigation. She concluded that "the level of ambiguity is manageable."

[79] While this ambiguity may have been "manageable" for Canada Post, EDC, which needed to provide a guarantee of confidentiality to its customers, was in an entirely different position. While Mr. Siegel's remarks may have been appropriate for other institutions under section 18.1, he failed to appreciate that they were inapt for EDC.

[80] Accordingly, I conclude Mr. Siegel's answer regarding the need for section 18.1 should not be taken as representing EDC's view.

[81] As mentioned, EDC submits and I agree that a broad interpretation of section 24.3 is required to avoid incoherence. Only by interpreting section 24.3 in a manner that includes information generated through EDC's own efforts can the incoherence occasioned by the Federal Court's interpretation be avoided. There is no apparent reason for Parliament to prohibit the disclosure of information obtained from a third party, but not the same information generated by EDC itself.

[82] For all these reasons, I find that Parliament intended the interpretation of the section 24.3 exemption suggested by EDC.

(5) Conclusion

[83] In my view, the statutory interpretation analysis favours EDC's position that the section 24.3 exemption applies to customer-related information, however obtained. This includes the disputed information. I would add that this is not a case where there are two possible interpretations of the exemption, and the Court must accept the one that is narrower. There is, in my view, only one possible interpretation supported by the record.

[84] In light of this conclusion, it is not strictly necessary to discuss EDC's alternative arguments. However, it is appropriate to provide some general comments concerning EDC's argument in the alternative that the disputed information is protected by section 18.1. This will go some way to address the interveners' concerns about some of the Federal Court's findings regarding this section.

D. *The section 18.1 exemption*

[85] By way of context, EDC submitted, both before this Court and the Federal Court, in the alternative, that the disputed information is exempt pursuant to section 18.1.

[86] As mentioned, the Federal Court rejected this submission for two reasons. First, the disputed information does not have a "reasonable nexus with [EDC's] economic interests". Second, the Federal Court was not satisfied that EDC consistently treated the information as confidential. (See Decision at para. 106.)

[87] One of the interveners is the Public Sector Pension Investment Board (PSP). It is a crown corporation that manages funds transferred to it by the Government of Canada for the funding of benefits earned by members of public sector pension plans. In order to carry out this mandate, PSP seeks investment opportunities and invests with partners around the world. PSP submits that the Federal Court's interpretation of the section 18.1 exemption is overly restrictive and affects PSP's ability to carry out its mandate.

[88] The other intervener is Canada Post. It is responsible for maintaining a competitive and financially self-sustaining postal system for businesses and individuals across Canada. Canada Post submits that the Federal Court's restrictive interpretation of section 18.1 "unduly jeopardizes the unique competitive commercial interests of the Crown corporations which it seeks to protect."

[89] Both interveners expressed concern about the Federal Court's findings that section 18.1 implies a "reasonable nexus" test and that the term "belongs to" means exclusive ownership.

[90] With respect to the Federal Court's finding concerning "reasonable nexus", this issue was also raised by EDC. However, the parties were in agreement on this issue in this Court – the Commissioner conceded that section 18.1 does not impose this condition and the Federal Court erred by incorrectly reading in such a requirement.

[91] It is clear that the parties and interveners are correct and there is no "reasonable nexus" test in section 18.1. This is consistent with the text and with Parliament's intent to provide

broader exemptions to certain crown corporations newly brought under the ATIA. Accordingly, I would clarify that section 18.1 does not have a requirement that information must have a reasonable nexus with the institution's economic interests.

[92] Furthermore, in my view, this error tainted the Federal Court's entire analysis concerning section 18.1, including its finding that "belongs to" means exclusive ownership. Accordingly, the Federal Court's section 18.1 analysis, as a whole, should be disregarded. Although EDC and the interveners ask this Court to provide guidance on other interpretative issues concerning the section 18.1 exemption, these determinations are best made afresh, on a case-by-case basis, with an appropriate factual basis.

E. *Conclusion and proposed disposition*

[93] For the reasons above, I conclude that the disputed information is exempt from disclosure by virtue of the section 24.3 exemption.

[94] I would allow the appeal without costs. I would set aside the judgment issued by the Federal Court, without costs, and order that the disputed information is exempt from disclosure under the ATIA.

"Judith Woods"

J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
J.B. Laskin J.A."

APPENDIX

STATUTORY PROVISIONS
(Current to 2024)

Access to Information Act, R.S.C. 1985, c. A-1	***Loi sur l'accès à l'information*, L.R.C. (1985), ch. A-1**
Purpose of Act	**Objet de la loi**
2 (1) The purpose of this Act is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.	**2 (1)** La présente loi a pour objet d'accroître la responsabilité et la transparence des institutions de l'État afin de favoriser une société ouverte et démocratique et de permettre le débat public sur la conduite de ces institutions.
Right to access to records	**Droit d'accès**
4 (1) Subject to this Part, but notwithstanding any other Act of Parliament, every person who is	**4 (1)** Sous réserve des autres dispositions de la présente partie mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :
(a) a Canadian citizen, or	**a)** les citoyens canadiens;
(b) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,	**b)** les résidents permanents au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.
has a right to and shall, on request, be given access to any record under the control of a government institution.	
Records relating to investigations, examinations and audits	**Documents se rapportant à des examens, enquêtes ou vérifications**
16.1 (1) The following heads of government institutions shall refuse to disclose any record requested under this Part that contains information that was obtained or created by them or on their behalf in the course of an investigation,	**16.1 (1)** Sont tenus de refuser de communiquer les documents qui contiennent des renseignements créés ou obtenus par eux ou pour leur compte dans le cadre de tout examen, enquête ou vérification fait par eux ou sous leur autorité :

examination or audit conducted by them or under their authority:

(a) the Auditor General of Canada;

(b) the Commissioner of Official Languages for Canada;

(c) the Information Commissioner; and

(d) the Privacy Commissioner.

a) le vérificateur général du Canada;

b) le commissaire aux langues officielles du Canada;

c) le Commissaire à l'information;

d) le Commissaire à la protection de la vie privée.

Exception

(2) However, the head of a government institution referred to in paragraph (1)(c) or (d) shall not refuse under subsection (1) to disclose any record that contains information that was created by or on behalf of the head of the government institution in the course of an investigation or audit conducted by or under the authority of the head of the government institution once the investigation or audit and all related proceedings, if any, are finally concluded.

Exception

(2) Toutefois, aucun des commissaires mentionnés aux alinéas (1)c) ou d) ne peut s'autoriser du paragraphe (1) pour refuser de communiquer les documents qui contiennent des renseignements créés par lui ou pour son compte dans le cadre de toute enquête ou vérification faite par lui ou sous son autorité une fois que l'enquête ou la vérification et toute instance afférente sont terminées.

Economic interests of Canada

18 The head of a government institution may refuse to disclose any record requested under this Part that contains

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and has substantial value or is reasonably likely to have substantial value;

(b) information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution or to interfere with contractual or other

Intérêts économiques du Canada

18 Le responsable d'une institution fédérale peut refuser la communication de documents contenant :

a) des secrets industriels ou des renseignements financiers, commerciaux, scientifiques ou techniques appartenant au gouvernement du Canada ou à une institution fédérale et ayant une valeur importante ou pouvant vraisemblablement en avoir une;

b) des renseignements dont la communication risquerait vraisemblablement de nuire à la compétitivité d'une institution fédérale ou d'entraver des

negotiations of a government institution;	négociations — contractuelles ou autres — menées par une institution fédérale;
(c) scientific or technical information obtained through research by an officer or employee of a government institution, the disclosure of which could reasonably be expected to deprive the officer or employee of priority of publication; or	**c)** des renseignements techniques ou scientifiques obtenus grâce à des recherches par un cadre ou employé d'une institution fédérale et dont la divulgation risquerait vraisemblablement de priver cette personne de sa priorité de publication;
[…]	[…]
Economic interests of certain government institutions	**Intérêts économiques de certaines institutions fédérales**
18.1 (1) The head of a government institution may refuse to disclose a record requested under this Part that contains trade secrets or financial, commercial, scientific or technical information that belongs to, and has consistently been treated as confidential by,	**18.1 (1)** Le responsable d'une institution fédérale peut refuser de communiquer des documents qui contiennent des secrets industriels ou des renseignements financiers, commerciaux, scientifiques ou techniques qui appartiennent à l'une ou l'autre des institutions ci-après et qui sont traités par elle de façon constante comme étant de nature confidentielle :
(a) the Canada Post Corporation;	**a)** la Société canadienne des postes;
(b) Export Development Canada;	**b)** Exportation et développement Canada;
(c) the Public Sector Pension Investment Board; or	**c)** l'Office d'investissement des régimes de pensions du secteur public;
(d) VIA Rail Canada Inc.	**d)** VIA Rail Canada Inc.
Exceptions	**Exception**
(2) However, the head of a government institution shall not refuse under subsection (1) to disclose a part of a record that contains information that relates to	**(2)** Toutefois, il ne peut s'autoriser du paragraphe (1) pour refuser de communiquer toute partie d'un document qui contient des renseignements se rapportant :
(a) the general administration of an institution referred to in any of paragraphs (1)(a) to (d); or	**a)** soit à l'administration de l'institution visée à l'un ou l'autre des alinéas (1)a) à d);

(b) any activity of the Canada Post Corporation that is fully funded out of moneys appropriated by Parliament.

b) soit à toute activité de la Société canadienne des postes entièrement financée sur des crédits votés par le Parlement.

Third party information

20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part that contains

Renseignements de tiers

20 (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

(a) trade secrets of a third party;

a) des secrets industriels de tiers;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

[…]

[…]

Statutory prohibitions against disclosure

24 (1) The head of a government institution shall refuse to disclose any record requested under this Part that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

Interdictions fondées sur d'autres lois

24 (1) Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements dont la communication est restreinte en vertu d'une disposition figurant à l'annexe II.

Export Development Act, R.S.C. 1985, c. E-20

***Loi sur le développement des exportations,* L.R.C. (1985), ch. E-20**

Purposes

10 (1) The Corporation is established for the purposes of

Mission

10 (1) La Société a pour mission :

(a) supporting and developing, directly or indirectly, domestic business, at the request of the Minister and the Minister of Finance for a period specified by those Ministers;

a) de soutenir et de développer, directement ou indirectement, l'activité commerciale intérieure, à la demande du ministre et du ministre des Finances, pour la période qu'ils précisent;

(b) supporting and developing, directly or indirectly, Canada's export trade and Canadian capacity to engage in that trade and to respond to international business opportunities; and

(c) providing, directly or indirectly, development financing and other forms of development support in a manner that is consistent with Canada's international development priorities.

b) de soutenir et de développer, directement ou indirectement, le commerce extérieur du Canada ainsi que la capacité du pays d'y participer et de profiter des débouchés offerts sur le marché international;

c) de fournir, directement ou indirectement, du financement de développement et d'autres formes de soutien du développement, d'une manière compatible avec les priorités du Canada en matière de développement international.

Privileged information

24.3 (1) Subject to subsection (2), all information obtained by the Corporation in relation to its customers is privileged and a director, officer, employee or agent of, or adviser or consultant to, the Corporation must not knowingly communicate, disclose or make available the information, or permit it to be communicated, disclosed or made available.

Renseignements protégés

24.3 (1) Sous réserve du paragraphe (2), les renseignements recueillis par la Société sur ses clients sont confidentiels et aucun administrateur, dirigeant, mandataire, conseiller, expert ou employé de celle-ci ne peut sciemment les communiquer ou les laisser communiquer ou y donner accès ou permettre à quiconque d'y donner accès.

Authorized disclosure

(2) Privileged information may be communicated, disclosed or made available

(a) for the purpose of the administration or enforcement of this Act and legal proceedings related to it;

(b) for the purpose of prosecuting an offence under this Act or any other Act of Parliament;

(c) to the Minister of National Revenue solely for the purpose of administering or enforcing the *Excise Tax Act*, the *Income Tax Act*, the *Select Luxury Items Tax Act*, the

Communication autorisée

(2) La communication des renseignements protégés et l'accès à ceux-ci sont autorisés dans les cas suivants :

a) ils sont destinés à l'application ou à l'exécution de la présente loi et des procédures judiciaires qui s'y rapportent;

b) ils sont destinés aux poursuites intentées en vertu de la présente loi ou de toute autre loi fédérale;

c) ils sont destinés au ministre du Revenu national uniquement pour l'administration ou l'application de la *Loi sur la taxe d'accise*, de la *Loi de l'impôt sur le revenu*, de la *Loi sur la taxe sur certains biens de luxe*, de la

Digital Services Tax Act or the *Global Minimum Tax Act*; or	*Loi sur la taxe sur les services numériques* ou de la *Loi sur l'impôt minimum mondial*;
(d) with the written consent of the person to whom the information relates.	**d)** ils sont communiqués avec le consentement écrit de la personne à laquelle ils se rapportent.
Business Development Bank of Canada Act, S.C. 1995, c. 28	***Loi sur la Banque de développement du Canada*, L.C. 1995, ch. 28**
Privileged information	**Renseignements protégés**
37 (1) Subject to subsection (2), all information obtained by the Bank or by a subsidiary in relation to its customers is privileged and a director, officer, employee or agent or mandatary of, or adviser or consultant to, the Bank or a subsidiary must not knowingly communicate, disclose or make available the information, or permit it to be communicated, disclosed or made available.	**37 (1)** Sous réserve du paragraphe (2), les renseignements recueillis par la Banque ou par ses filiales sur leurs clients sont confidentiels et aucun administrateur, dirigeant, mandataire, conseiller, expert ou employé de la Banque ou de l'une de ses filiales ne peut sciemment les communiquer, en permettre la communication, y donner accès ou permettre à quiconque d'y donner accès.
Authorized disclosure	**Communication autorisée**
(2) Privileged information may be communicated, disclosed or made available	**(2)** La communication des renseignements protégés et l'accès à ceux-ci sont toutefois autorisés dans les cas suivants :
(a) for the purpose of the administration or enforcement of this Act and legal proceedings related to it;	**a)** ils sont destinés à l'application ou à l'exécution de la présente loi et des procédures judiciaires qui s'y rapportent;
(b) for the purpose of prosecuting an offence under this Act or any other Act of Parliament;	**b)** ils sont destinés aux poursuites intentées en vertu de la présente loi ou de toute autre loi fédérale;
(c) to the Minister of National Revenue solely for the purpose of administering or enforcing the *Income Tax Act* or the *Excise Tax Act*; or	**c)** ils sont destinés au ministre du Revenu national uniquement pour l'administration ou l'application de la *Loi de l'impôt sur le revenu* ou de la *Loi sur la taxe d'accise*;
(d) with the written consent of the person to whom the information relates.	**d)** ils sont communiqués avec le consentement écrit de la personne à laquelle ils se rapportent.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	RENNIE J.A. LASKIN J.A.
DATED:	MARCH 3, 2025

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