Federal Court Cour fédérale

Date: 20231121

Docket: T-1793-22

Citation: 2023 FC 1538

Ottawa, Ontario, November 21, 2023

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

EXPORT DEVELOPMENT CANADA

Applicant

and

THE INFORMATION COMMISSIONER OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

A. *Nature of Matter*

[1] Export Development Canada (EDC) brings this application under section 41 of the *Access to Information Act*, RSC 1985, c A-1 [ATIA] for an order setting aside the Information Commissioner of Canada's ["Commissioner"] order providing for the disclosure of the redacted

information relating to the policy numbers and policies' maximum liability amounts. In so doing, the Commissioner found the redacted information is not exempt from disclosure pursuant to subsection 24.3(1) of the *Export Development Act*, RSC 1985, c E-20 [EDA] and/or sections 18.1 and 24 of the ATIA.

[2] The issue in this application is whether EDC must/may refuse to disclose information pursuant to subsection 24(1) of the ATIA (that incorporates by reference subsection 24.3(1) of the EDA) or pursuant to subsection 18.1(1)(b) of the ATIA.

[3] This application hinges on the statutory interpretation of the words "obtained by" contained in subsection 24.3(1) of the EDA (as incorporated by reference through section 24(1) of the ATIA) and the words "belongs to" contained in subsection 18.1(1)(b) of the ATIA in order to determine whether the exemptions apply. This application is the first time that subsection 24.3(1) of the EDA has been considered by the Federal Court in the context of a section 41 application, and the first time subsection 18.1 of the ATIA will be interpreted by any court. This application will address how section 18.1 of the ATIA is to be applied to particular customer account information.

B. *Factual Background*

[4] EDC is a Crown Corporation established by the EDA at section 3. EDC has mainly three different purposes according to subsection 10(1) of the EDA:

> 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;

> 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.

[5] To cite EDC's Director, Privacy and Information Risk, Ms. Laura W. Davison, "EDC carries out this mandate by providing investment and credit insurance, export finance, lease financing, loan and bond guarantees, amongst other services" (Davison's Affidavit at para 8).

[6] EDC has an obligation to disclose certain information as per the *Financial Administration Act*, RSC 1985, c F-11 and the ATIA. As such, EDC has a Transparency & Disclosure Policy [Policy] (Davison's Affidavit at Exhibit D).

[7] The parties generally agreed that the facts of this application are not in dispute and particularly on the following statements of facts (paras 10-15 of EDC's Memorandum of Fact and Law).

[8] On July 9, 2019, EDC received a request for information pursuant to the ATIA from the Requestor, dated July 3, 2019. The Request stated the following:

> 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.

[9] The responsive records for the Request are identified at Exhibit A of the Affidavit of Marc Deschênes. The record at issue consists of a chart setting out the policy types by acronym, the policy number, the customer name and the maximum liability amount associated with EDC insurance policies of $50,000 (plus) in Honduras between 2009-2019 and is organised in four columns.

(a) The first column, entitled “Program”, represents the overarching insurance program to which the policy in question belongs;

(b) The second column, entitled “Policy”, represents the specific policy type and number;

(c) The third column, entitled “Exporter”, provides the name of the EDC customer; and

(d) The fourth column, entitled “Max liability CAD”, provides the maximum liability amount, in Canadian dollars, for each policy (collectively, this information is defined as the Responsive Records).

[10] On October 7, 2019, EDC wrote to the Requestor to formally respond to the Request. The information collected had been severed with EDC noting that:

> [T]he severed information has been withheld under the following sections(s) of the [ATIA]: 18.1(1)(b) Export Development Canada; 24(1) statutory prohibitions,

[11] As a result of the EDC’s response to the Request, the Requestor filed a complaint with the OIC, which resulted in an investigation pursuant to the ATIA. On June 22, 2022, the OIC served an initial report pursuant to subsection 37(1)(a) and (b) of the ATIA (the Initial Report), and which included an order the Commissioner intended to issue with her Final Report. On July 20, 2022, Mairead Lavery, President and Chief Executive Officer of EDC wrote to the OIC, providing a formal response to the June 22, 2022 letter. In its July 20, 2022 letter, the EDC advised it would take the following actions, as required by subsection 37(1)(c):

> EDC **will** disclose the policy types (acronyms) currently withheld under paragraph 18.1(1) and/or subsection 24(1).
>
> EDC **will not** disclose the policy numbers, and maximum liability amounts, currently withheld under paragraph 18.1(1) and/or subsection 24(1), and will instead seek review by the Federal Court of the Information Commissioner's order in relation to this information. [emphasis original]

[12] On July 22, 2022, the Commissioner provided her final report, pursuant to subsection 37(2) of the ATIA (the Final Report). The Final Report provided information about the complaint and investigation, the Commissioner's findings, as well as an order (the Order) for the President of EDC to:

> Disclose policy types (acronyms), policy numbers, and maximum liability amounts, currently withheld under paragraph 18.1(1) and/or subsection 24(1).

[13] As per the Final Report, the Commissioner acknowledged that including the identities of EDC's customers within the information to be released would be a violation of the EDA. The only remaining records at issue in this application are the policy numbers and maximum liability amounts of the policies in question that have been redacted (the redacted information). The Commissioner held:

> [31] On its face, policy types, policy numbers and maximum liability amounts is not information obtained by EDC in relation to its customers. Instead, this is information created by EDC. With regard to the latter, while recognizing that maximum liability amounts may be based in part on information obtained by EDC, the amounts ultimately reflect EDC decisions based on internal analysis of the information before it and there is no indication that these amounts reflect or reveal any information directly obtained by EDC.

II. **Issues**

[14] This application raises the following issues:

1. What is the appropriate standard of review and who bears the burden of proof?

2. Whether EDC has shown that the disclosure of the redacted information is restricted by subsection 24(1) of the ATIA and subsection 24.3(1) of the EDA?

3. Whether EDC has shown that it was authorized to use its discretion not to disclose the redacted information pursuant to subsection 18.1(1)(b) of the ATIA?

4. If the redacted information meets the requirement of subsection 18.1(1)(b) of the ATIA, whether the head of EDC reasonably exercised its discretion in deciding to refuse to disclose the redacted information?

III. **Overview of the ATIA**

[15] Prior to addressing the issues raised, and as previously done by my colleague, the Honourable Mr. Justice Gleeson, in *Canada (Information Commissioner) v Toronto Port Authority*, 2016 FC 683, it is helpful to provide an overview of the ATIA's purpose, the jurisprudence interpreting the right to access records, and the role of exemptions.

(i) *Purpose of the ATIA*

[16] At section 2(1) of the ATIA, the legislator set out that “[t]he 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.”

[17] In *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23 at paras 21-22 [*Merck*], Justice Cromwell for the majority of the Supreme Court of Canada set out their Court’s jurisprudence on the purpose of the ATIA:

> [21] The purpose of the Act is to provide a right of access to information in records under the control of a government institution. The Act has three guiding principles: first, that government information should be available to the public; second, that necessary exceptions to the right of access should be limited and specific; and third, that decisions on the disclosure of government information should be reviewed independently of government (s. 2(1)).
>
> [22] In *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403, at para. 61, La Forest J. (dissenting but not on this point) underlined that the overarching purpose of the Act is to facilitate democracy and that it does this in two related ways: by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and officials may be held meaningfully to account to the public. This purpose was reiterated by the Court very recently, in the context of Ontario's access to information legislation, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815. The Court noted, at para. 1, that access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society". Thus, access to information legislation is intended to facilitate one of the foundations of our society, democracy. The legislation must be given a broad and purposive interpretation, and due account must be taken of s. 4(1), that the Act is to apply notwithstanding the provision of any other Act of Parliament.

[18] The Court adopts a broad interpretation of the right of access under subsection 4(1) of the ATIA because it “may be considered quasi-constitutional in nature” (*Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para 40). The Supreme Court of Canada has held that, while paragraph 2(b) of the *Canadian Charter of Rights and Freedoms* does not guarantee access to information, “[a]ccess is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government” (*Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 30 [*Criminal Lawyers' Association*]).

(ii) *Right of Access and Exemptions*

[19] Subsection 4(1) of the ATIA provides that:

> **Right to access to records**
>
> **4 (1)** Subject to this Part, but notwithstanding any other Act of Parliament, every person who is
>
> **(a)** a Canadian citizen, or
>
> **(b)** a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,
>
> has a right to and shall, on request, be given access to any record under the control of a government institution.

[20] The ATIA, specifically subsection 4(1), provides a broad “right of timely access” (*Statham v Canadian Broadcasting Corp*, 2010 FCA 315 at para 1 [*Statham*]) to any record under the control of a government institution, subject to “a number of exemptions from the general rule of disclosure” (*Merck* at para 96). Hence “[t]he interpretation of a statutory exception in the Act must respect the purpose of the Act as stated in subsection 2(1) while at the

same time give effect to the purpose of the exception. The right of the public to know the workings of government is not absolute. It must yield to the values sought to be protected by the statutory exceptions" (*3430901 Canada Inc v Canada (Minister of Industry)*, 1999 CanLII 9066 (FC), [1999] FCJ No 1859 at para 44 [*Telezone FC*]).

[21] Yet Justice Heald of the Federal Court of Appeal determined that, "[w]hen it is remembered that subs. 4(1) of the Act confers upon every Canadian citizen and permanent resident of Canada a general right to access and that the exemptions to that general rule must be limited and specific, I think it clear that Parliament intended the exemptions to be interpreted strictly" (*Rubin v Canada (Canada Mortgage and Housing Corp)*, 1988 CanLII 5656 (FCA), [1988] FCJ No 610 at para 25 [*Rubin*]). Those exemptions exist from sections 13 to 24 of the ATIA, and as determined by the Supreme Court of Canada in *Merck* at paragraph 97:

> [97] […] They may be categorized according to whether they are class- or harm-based exemptions and according to whether they are mandatory or discretionary. Where there is a class exemption, the exemption applies to all records determined to fall into that class of record. However, a harm-based exemption applies only if the specified harm or risk of harm is present. Some exemptions are mandatory: once the record has been shown to fall within the exemption, the head of the institution has no discretion and must refuse to disclose it, subject only to any applicable override, such as the one found in s. 20(6), a topic not in issue here. Other exemptions are discretionary: once there has been an initial determination that the record falls within the statutory exemption, the head has discretion as to whether or not disclosure will be refused or granted.

[22] The exemption for statutory prohibitions against information disclosure in subsection 24(1) of the ATIA is mandatory, in that "[t]he head of a government institution shall refuse to

disclose any record (…) that contains information that disclosure of which is restricted by or pursuant to a provision set out in Schedule II" (*Merck* at paras 24, 98).

[23] By contrast, the exemptions under subsection 18.1(1) of the ATIA are discretionary:

> **Economic interests of certain government institutions**
>
> **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,
>
> **(a)** the Canada Post Corporation;
>
> **(b)** Export Development Canada;
>
> **(c)** the Public Sector Pension Investment Board; or
>
> **(d)** VIA Rail Canada Inc.

[24] In cases involving application of the ATIA, it is recognized that the ATIA sets out a substantive right of access to requesters, who are to be given access to any record under the control of a government institution upon request, subject only to limited and specific exceptions set out in the ATIA.

[25] Requested information should only be withheld in limited and specific circumstances, and "where there are two interpretations open to the Court, it must, given Parliament's stated intention, choose the one that infringes on the public's right to access the least. It is only in this way that the purpose of the Act can be achieved" (*Rubin* at para 23).

IV. **Analysis**

A. *What is the appropriate standard of review and who bears the burden of proof?*

[26] Section 44.1 of the ATIA provides that a section 41 application stemming from the ATIA requires a *de novo* determination.

[27] As such, a section 41 application such as this one before the Federal Court is not a judicial review of an administrative decision, but rather is "to be heard as a new proceeding." While doing so, the Court shall take the role of a trial court to undertake a new and independent review of the entire matter, which enable the parties to submit new evidence, and the Court may hear new arguments, make her own findings, and the judge may order any remedies (see *Preventous Collaborative Health v Canada (Health)*, 2020 CanLII 103848 (FC) at para 21; *Canada (Health) v Preventous Collaborative Health*, 2022 FCA 153 at para 14; *Merck* at paras 250-251).

[28] Subsection 48(1) of the ATIA places the burden of proof on the government institution to establish that it is authorised to refuse to disclose the redacted information. Thus, EDC bears the onus of establishing that the redacted information:

- Belongs to and has consistently been treated as confidential by EDC under subsection 18.1(1) of the ATIA; or

- It was obtained by EDC in relation to its customers under section 24.3 of the EDA, thereby restricting its disclosure, which in turn authorizes EDC to refuse disclosure under subsection 24(1) of the ATIA.

[29] This Court is to determine whether EDC is restricted from disclosing the record under subsection 24(1) of the ATIA or authorised to refuse to disclose the information under subsection 18.1(1)(b) of the ATIA. And, if it is determined that EDC is authorised to refuse to disclose the information under subsection 18.1(1)(b), EDC must further establish that its discretionary decision to do so was reasonable (*Husky Oil Operations Limited v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2018 FCA 10 at para 62).

B. *Whether EDC has shown that the disclosure of the redacted information is restricted by subsection 24(1) of the ATIA and subsection 24.3(1) of the EDA?*

[30] Subsection 24(1) of the ATIA is a mandatory exemption requiring government institutions to refuse to release information, the disclosure of which is restricted by a provision set out in Schedule II of the ATIA.

[31] Schedule II of the ATIA incorporates by reference section 24.3 of the EDA, which reads as follows in English and French:

Privileged information	**Renseignements protégés**
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	**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

Corporation must not knowingly communicate, disclose or make available the information, or permit it to be communicated, disclosed or made available. [...]	communiquer ou les laisser communiquer ou y donner accès ou permettre à quiconque d'y donner accès. [...]

[32] As mentioned earlier, this issue hinges on the statutory interpretation of subsection 24.3(1) of the EDA and particularly the words "obtained by". EDC's interpretation of subsection 24.3(1) is that the words "all information obtained by the Corporation in relation to its customers" is broad enough to include any information relating to the customer acquired through the keeping of its account with EDC, including the redacted information.

[33] After considering the case law and for many of the reasons raised by the Commissioner in Section C of its Memorandum of Fact and Law, the Court agrees with the Commissioner's interpretation of subsection 24.3(1) of the EDA and conclusion that EDC incorrectly applied this exemption to justify withholding the redacted information. The Court will summarize and deal with each of these reasons, in turn, below, and for efficiency has borrowed some of the language from the Commissioner's Memorandum of Fact and Law.

[34] The applicability of subsection 24.3(1) of the EDA is dependent on whether EDC has established that the redacted policy numbers and maximum insurance amounts is information "obtained by [EDC] in relation to its customers", notwithstanding EDC's evidence that it created the information.

(1) The redacted information at issue was created by EDC

[35] EDC's evidence is to the effect that it "assigns and issues policy numbers to its clients. Clients have no rights or ability to change or alter their policy numbers. The policy numbers are used by EDC as part of its internal financial management system and remains under EDC's possession or control."

[36] As it relates to the maximum liability figures, EDC states that it "is the only party that may assign the policy limit and the customer only becomes aware of the policy limit once EDC provides it to the customer." It follows that EDC was creating such figures (i.e. numbers) through its own internal processes and evaluations.

[37] Since EDC created the aforementioned redacted information, it could not have existed prior thereto. As such, the redacted information was not "obtained by" / "recueillis par" EDC to fall within the scope of subsection 24.3 of the EDA.

(2) The words "obtained by" in their grammatical and ordinary sense

[38] The English word "obtain" is defined at Dictionary.com as "to come into possession of; get, acquire, or procure", which denotes that the something that "came into possession of" or the something "gotten or acquired" already existed (*Collins English Dictionary*, sub verbo "obtain", online: www.dictionary.com/browse/obtain). While the French word "*recueillir*" is defined at the Le Larousse and Le Robert online dictionaries as "*rassembler des choses*," "*obtenir pour soi*," "*recevoir*," "*acquérir*" (*Larousse*, sub verbo "recueillir", online:

dictionnaire.lerobert.com/definition/recueillir; *Le Robert Dico en Ligne*, sub verbo "recueillir", online: dictionnaire.lerobert.com/definition/recueillir). Again, the French word "*recueillir*" still implies that the things that are "*recueillis*" already existed at the time of the "*rassemblage*".

[39] In *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, the Supreme Court of Canada stated at paragraph 10:

> [. . .] <u>When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process.</u> 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.

[40] Neither the English nor French text of subsection 24.3(1) of the EDA support EDC's position that information which it itself created, assigned and issued is information "obtained by" / "recueillis par" EDC within the ordinary meaning of those words and within the broader context in which those words appear.

[41] The words "obtained by" / "recueillis par" cannot be so broadly interpreted to mean "any information relating to customers" "however so obtained, and in whatever way such information stands in relation to customers", as pleaded by the EDC (A's memo, page 10, para 28), including the redacted information that was created, assigned and issued by EDC. Accepting EDC's interpretation of subsection 24.3(1) requires a reading of the statute that completely excludes the words "obtained by". It essentially renders those words meaningless.

[42] The Supreme Court of Canada in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 at para 45 stated that “every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.” Courts should therefore avoid adopting interpretations that render any portion of a statute meaningless. Parliament therefore must have intended for the words “obtained by” / “recueillis par” to have a purpose in the interpretation of this provision.

[43] Had Parliament intended for subsection 24.3(1) to be read as “all information in relation to its customer is privileged” as suggested by EDC, it could have easily done so by omitting the words “obtained by the Corporation”/ “recueillis par la Societé” at the time of subsection 24.3(l)’s enactment. However, Parliament did not; the words “obtained by the Corporation” must serve their purpose.

(3) Subsection 24.3(1) of EDA in harmony with provisions of the ATIA

[44] In 2007, section 24.3 was added to the EDA and incorporated by reference into subsection 24(1) of the ATIA. This, along with the introduction of section 18.1(1)(b) of the ATIA, addressed EDC becoming subject to the right of access under the Act. These amendments resulted from the enactment of Bill C-2 under the *Federal Accountability Act*, which introduced a number of other changes to the ATIA.

[45] One of the other changes to the ATIA was the introduction of a number of additional exceptions to the right of access, many of which explicitly differentiate between information

“obtained” and information “created” by government institutions subject to the ATIA: subsections 16.1(1), 16.2(1), 16.3(1), 16.4(1) and 16.6.

[46] As an example, section 16.1 of the ATIA reads (emphasis added):

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, examination or audit conducted by them or under their authority:	16.1 (1) Sont tenus de refuser de communiquer les documents qui contiennent des renseignements ***crées ou obtenus*** **par eux** ou pour leur compte dans le cadre de tout examen, enquête ou vérification fait par eux ou sous leur autorité :
(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 1’information; d) le Commissaire à la protection de la vie privée.

[47] As pointed out by the Commissioner, the omission by Parliament of the word “created” in subsection 24.3(1) of the EDA, <u>when at the same time</u>, Parliament opted in subsections 16.1(1), 16.2(1), 16.3(1) and 16.4(1) to refer distinctly to “information that was obtained or created by” various institutions, cannot be ignored. This should be taken to signify Parliament’s intent to limit what would be restricted from disclosure under subsection 24.3(1).

[48] This is also supported by Parliament’s further inclusion of subsection 18.1(1)(b) to the ATIA listing EDC as a government institution subject to the ATIA, discussed in further detail below, which addresses information *belonging to* EDC itself, in contrast to information *obtained by* EDC in relation to its customers.

[49] Both provisions are significant as they indicate a distinction in treatment between EDC's *own* information (at subsection 18.1(1)(b) of the ATIA) and EDC's *customers'* information (at subsection 24.3(1) of the EDA) . EDC's *own* information cannot automatically fall within the scope of subsection 24.3 of the EDA.

[50] Such an overly broad interpretation of section 24.3 of the EDA, if accepted, risks rendering subsection 18.1(1)(b) of the ATIA redundant and therefore meaningless, and would remove its discretionary nature.

[51] EDC argues that giving the grammatical and ordinary meaning of the words "obtained by" /"recueillis par" EDC in relation to its customers at subsection 24.3(1) of the EDA, would render subsection 20(1)(b) of the ATIA superfluous. Information "supplied to a government institution by a third party" (as used in ATIA's subsection 20(1)(b)) requires that the information be provided to a government institution by the third party.

[52] The Court is satisfied on the evidence that the correct interpretation of "in relation to its customers" must mean from or about EDC's clients. As was stated by EDC's then President and CEO, Rob Wright, before the Parliamentary Committee when reviewing and considering Bill C-2 (which led to the introduction of s. 24.3 of the EDA) on May 10, 2006, "section 24 … would make it against the EDC Act for us to release information we receive <u>from our clients</u> and <u>about our clients</u> in a way that might affect their commercial interest."

[53] Further, “information obtained by EDC in relation to its customers” encompasses not only information that emanates from or that is provided to EDC by its customer, but also information that EDC obtains in relation to such a customer from a third party source. Each provision provides for a different test to justify its application.

[54] It has previously been held that if the information is a result of a negotiation between the parties, it cannot be characterized as “supplied to a government institution” (*Canada Post Corp v Canada (National Capital Commission*, 2002 FCT 700 [*Canada Post*] at para 14, citing *Halifax Development Ltd v Canada (Minister of Public Works & Government Services)*, 1994 CarswellNat 3178, [1994] FCJ No 2035 at para 3). Indeed, to find otherwise, would essentially make every negotiated contract with a government institution exempt from disclosure, and the public would have no access to this information.

[55] Logically, if information arising from a negotiation between the parties is not “supplied to” the EDC for the purposes of subsection 20(1)(b) of the ATIA, neither could newly created information only based in part on client information be “obtained by” the EDC for the purposes of subsection 24.3(1) of the EDA. I interpret “supplied to” as used in subsection 20(1)(b) of the ATIA and “obtained by” as used in subsection 24.3(1) of the EDA as synonymous for this reason.

[56] Therefore, as is the case with numerous exceptions to the right of access under the ATIA, while there may be overlap in the coverage of subsection 24.3(1) and subsection 20(1), these

provisions do not offer duplicative coverage so as to justify reading in the words "created by" EDC into subsection 24.3(1) of the EDA.

(4) Subsection 24.3(1) is not a codification of the common law duty of banker's confidentiality

[57] EDC has not provided the Court with any legislative source supporting its submission that subsection 24.3(1) of the EDA evidences an intention to codify the common law duty of banker's confidentiality. In paragraphs 27 to 30 of their memorandum, EDC argues that subsection 24.3 of the EDA should afford client-related information "however so obtained" by EDC the same manner and level of protection as subsection 37(1) of the *Business Development Bank of Canada Act* (BDBCA).

[58] Testimony given by EDC's Mr. Wright does not suggest that subsection 24.3(1) was intended or understood to provide a blanket protection of all information under EDC's control, regardless of whether that information was created by EDC and would not reveal any commercially confidential client information.

[59] Mr. Wright's testimony refers to the proposed provision's protection of commercially confidential client information obtained from EDC's customers. According to Mr. Wright: "[the proposed section 24.3 would continue]... to protect commercially confidential client information from release" and that analogous wording in the BDBCA had "... worked effectively in protecting the information [which the Business Development Bank of Canada] have from their clients..." He spoke of EDC's need for "... a great deal of commercially sensitive information

from [its] clients...” in order to deliver its services and cautioned that unless EDC can assure its customers that EDC “is going to protect the information that [EDC] can obtain in confidence”, 60% of EDC’s work in partnership abroad will not engage.

[60] Also, I agree with the Commissioner that Minister Baird’s comments do not speak about broadening the scope of section 24.3 to include the common law duty of banker’s confidentiality as alleged in EDC’s submissions. His comments speak of how Canadian exporters should not be hampered in competing on the world stage because of their information being subject to the ATIA, but do not support EDC’s contention that the information at issue was intended to fall within the scope of section 24.3. In this regard, EDC’s submissions to the Court do not explain how the disclosure of policy numbers and maximum liability figures exclusively assigned and issued by EDC in relation to unidentified customers would hamper Canadian exporters in competing on the world stage.

[61] EDC’s reliance on the Ontario Court of Justice’s decision in *Re Application by Export Development Canada*, 2016 ONCJ 74 [*EDC reference case*], also does not support its broad interpretation of subsection 24.3(1) or the applicability of the common law duty of banker’s confidentiality. Although in this decision the court referenced the legislative history of section 24.3, those references do not support EDC’s contention that it was intended to broaden the ordinary meaning of the words “obtained by.” To the contrary, the *EDC reference case* does not opine on the meaning of this particular phrase at all.

[62] The *EDC reference case* involved the issue of whether subsection 24.3(1) of the EDA insulated EDC from complying with a production order issued by the Court as part of an RCMP investigation. The Court held that subsection 24.3(2) of the EDA puts EDC in the same position as all other financial institutions *vis à vis* its obligation to comply with a validly issued court order. Nowhere within this decision does the Court refer to the common law duty of banker's confidentiality, much less suggest that subsection 24.3(1) was intended to provide blanket protection to all information relating in any way to EDC customers regardless of whether that information was created by EDC and would not reveal any commercially confidential client information.

[63] Furthermore, EDC's reliance on the jurisprudence relating to subsection 37(1) of the BDBCA, which uses language similar to subsection 24.3, does not support its broad interpretation. In *Agence du revenu du Quebec c Banque de developpement du Canada*, 2013 QCCQ 5202 [*Agence du revenue*], and relying on subsection 37(1) of the BDBCA, the Respondent bank refused to produce the entirety of the documents sought by the Applicant Agency:

> Tous les documents concernant la cause # 700-22-025767-111 centre Pompe à beton Pierre Pilon inc. et Pierre Pilon, dont un jugement a été accordé en faveur de la Banque de Développement du Canada le 2012-02-20 pour une somme de 51 946,37 $. <u>Ainsi que tous les documents liés à la saisie et à la vente des actifs de la société, dont la liste des actifs et l'état des débours.</u>

[64] The Commissioner is correct that the Court of Québec ordered their production, finding that this information <u>was not obtained by the Bank about its customer</u>, but rather that it fell

within the scope of debtor enforcement proceedings in which the Bank was successful against its customer.

[65] Although the information clearly pertained to a specific client, the Court of Québec found that it was not information *obtained by the Bank* in relation to its client. The *Agence du revenu* case shows that there are some limits to what section 37 of the BDBCA actually encompasses, which is inconsistent with EDC's contention that section 24.3 similarly applies to "any information relating to the customer acquired through the keeping of its account."

[66] Finally, EDC's contention that subsection 24.3(1) of the EDA requires that it protect any information regarding its customers through the "keeping of its accounts", is also difficult to reconcile with EDC's Policy, which describes various types of information associated with EDC's "keeping of its accounts" that EDC will disclose. Per section 3.5.2 of that Policy, this includes reporting on "individual transaction information on all signed financing transactions" in the category of "political risk insurance (to lenders)", which is amongst the information at issue in the current Application.

(5) Conclusion

[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.

[68] Indeed, the Supreme Court of Canada in *Macdonell v. Quebec (Commission d'accès à l'information)*, 2022 SCC 71 at para 18 cited *Rubin* to say:

> It is important to emphasize that this does not mean that the Court is to redraft the exemptions found in the Act in order to create more narrow exemptions. A court must always work within the language it has been given. If the meaning is plain, it is not for this Court, or any other court, to alter it.

[69] For the purposes of this context with the EDC, the Court interprets "information obtained by the Corporation in relation to its customers" as "information obtained by or supplied to EDC that is from or about an EDC client." Information created by EDC cannot also be obtained by or supplied to EDC, and is therefore excluded from the scope of subsection 24.3. EDC cannot rely on subsection 24.3 with respect to the redacted information.

C. *Whether EDC has shown that it was authorized to use its discretion not to disclose the redacted information pursuant to subsection 18.1(1)(b) of the ATIA?*

(1) Interpretation

[70] While I note that subsection 18.1(1)(b) of the ATIA has never been interpreted by any court, attention must be drawn to the striking similarities in the form and function between subsections 18.1(1)(b) and 20(1)(a) and (b) of the ATIA. When written together as a paragraph without bullet points, subsection 20(1)(a) and (b) read as follows:

> Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part that contains trade secrets of a third party, 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…

[71] When reading these two subsections side-by-side, there are only two operative differences. First, subsection 18.1 is permissive while subsection 20(1) is mandatory. Second, subsection 18.1 applies to information that belongs to the listed corporations, whereas subsection 20(1) applies to information supplied to a government institution by a third party. To illustrate this point, please see a condensed versions of both subsections 18.1 and 20(1) below with elements underlined and common elements italicized:

Economic interests of certain government institutions	**Third party information**
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* [...]	**20 (1)**: The head of a government institution shall refuse to disclose any record requested under this Part that contains *trade secrets or 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* [...]

[72] With these two caveats in mind, the subject matter of information should be covered by both sections (trade secrets or financial, scientific or technical information) is the same, as well as the qualifying treatment (consistently treated as confidential) of the information.

[73] Given the striking similarities between subsections 18.1 and 20(1)(a) and (b) of the ATIA, and the novelty of this analysis, the logical starting point to elucidate a test for the application of subsection 18.1 is the test for subsection 20(1)(b), requiring all four of the following elements to be met:

1. Financial, commercial, scientific or technical information as those terms are commonly understood;
2. Confidential in its nature, according to an objective standard which takes into account the content of the information, its purposes and the conditions under which it was prepared and communicated;

3. Supplied to a government institution by a third party; and,

4. Treated consistently in a confidential manner by the third party.

> *Canada (Office of the Information Commissioner) v Calian Ltd*, 2017 FCA 135 [*Calian*] at para 51, citing *Air Atonabee Ltd v Canada (Minister of Transport)*, [1989] FCJ No 453 at para 34 [*Air Atonabee*], as summarized in *St-Joseph Corp v Canada (Public Works and Government Services)*, 2002 FCT 274 at para 41 [*St-Joseph*].

[74] As has been followed in the myriad of cases since *Air Atonabee*, all four elements must be met in order for a government institution to rely on subsection 20(1)(b) of the ATIA to refuse disclosure (see for example *Canada Post* at para 10).

[75] Since there is no previous interpretation of subsection 18.1 of the ATIA, this analysis must take the form of a novel statutory interpretation exercise. This means the Court must take notice of the modern approach of statutory interpretation, which Justice Martin of the Supreme Court described thusly:

> This analysis, which is concerned with legislative intent, is guided by the words that Parliament has chosen to use, the way it intended to achieve its objectives, and the scheme it has put in place. Under the modern approach to statutory interpretation, the meaning of words and phrases are interpreted in their context and within the scheme of the Act in which they are found. Parliament also is presumed to intend for its provisions to be read harmoniously, and to be interpreted and applied so they fit together in a way that respects Parliament's multiple objectives and gives purpose and meaning to each provision. In the present case, where the dispute involves multiple legislative objectives and the inter-relationship between two or more statutory provisions, the scheme of the Act and the objectives underlying each of the relevant provisions are particularly significant.
>
> *R v Rafilovich*, 2019 SCC 51 at para 20, citing *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at para 21, and *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4 at para 48.

[76] In addition to the words, phrases, intent, and scheme of the provision, the title of the provision also forms part of the provision, and may be used to construe it (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed at 63, citing *O'Connor v Nova Scotia Telephone Co* (1893), 22 SCR 276 at 292-293).

[77] The title of subsection 18.1 of the ATIA is "Economic interests of certain government institutions", differing from subsection 20's title "Third party information" and subsection 24.3 of the EDA's title "Privileged information". While it may be clear that subsection 20 of the ATIA and subsection 24.3 of the EDA are expressly concerned with protecting sensitive information obtained by or supplied to EDC, the title of subsection 18.1 of the ATIA is a strong suggestion that the intent of the subsection is the protection of EDC's economic interests. This calls into question what EDC's economic interests are.

[78] Subsection 18 of the ATIA is similarly titled "Economic interests of Canada", and this heading was interpreted in the trial division decision of *Calian*, where Justice Brown found that there was no evidence to conclude the requested disclosure "could reasonably be expected to either a) prejudice the competitive position of a government institution; or b) interfere with contractual or other negotiations of a government institution" (*Calian Ltd v Canada (Attorney General)*, 2015 FC 1392 at para 112). It can be extrapolated from this lack of finding that a disclosure request, which would engage economic interests can reasonably be expected to either prejudice the entity's competitive position, or interfere with contractual or other negotiations.

[79] As previously mentioned at the outset, subsection 10(1) of the EDA establishes the purposes of EDC as:

(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;

(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.

[80] These purposes are supplemented by a direction in subsection 10(1.02) of the EDA that requires EDC to carry out its purposes “in a manner <u>that complements the products and services available</u> from commercial financial institutions and commercial insurance providers.”

[81] Reading EDC’s purposes and manner of their carrying them out together, it is clear that EDC’s economic interests must be in relation to their competitive position or contractual or other negotiations with respect to their complementing the products and services available from commercial financial institutions and commercial insurance providers in ways that support or develop, directly or indirectly:

A. Domestic business at the Minister and the Minister of Finance request;

B. Canada’s export trade and Canadian capacity to engage in that trade while responding to international business opportunities; and,

C. Development financing and other forms of development support in a manner consistent with Canada’s international development priorities.

[82] In order for information to be covered by subsection 18.1 of the ATIA, there must be a reasonable nexus between the information requested and EDC's economic interests as outlined above. If there were no such nexus, the information requested would not fall under this subsection.

[83] Making the necessary modifications to the *Calian* test to establish a test for subsection 18.1, the 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.

[84] As with subsection 20(1)(b)'s test, the structure and language of subsection 18.1 suggests failing any one of these elements would preclude EDC's ability to rely on subsection 18.1 to exercise discretion and refuse to disclose information.

(2) Commercial information

[85] The Court agrees with both parties that the redacted information in dispute is commercial in nature.

(3) Having a reasonable nexus to EDC's economic interests

[86] In EDC's Policy at section 3.5.4, entitled "Treatment of Confidential Transaction Information", EDC lists three types of information relating to their commercial competitiveness:

A. Information the release of which might prove detrimental to the economic interests of Canada;

B. Proceedings, deliberations and records of EDC's Board of Directors and its committees, including documentation created for use by or presentation to the Board of Directors or its committees; and,

C. Financial, business, or other proprietary information which might prove to affect EDC's activities in capital or financial markets, or to which said markets may be sensitive, or which might affect EDC's competitive position.

[87] While these categories were drafted by EDC for internal policies like their Policy, they offer insight into the kinds of information EDC handles which *they consider to be* related to their economic interests.

[88] Information in item A would squarely fall under the defined information affecting Canada's economic interests in subsection 18.1 of the ATIA.

[89] Item B, capturing documentation, proceedings, deliberations, and records of, for use by, or presentation to EDC's Board of Directors and its committees are likely highly sensitive and wide-reaching in nature, which would include all manner of information available at EDC. Information in item B would therefore have a reasonable nexus with their economic interests.

[90] Item C requires some interpretation. Financial, business, or other proprietary information is broad for an institution that deals almost exclusively with financial products, businesses, and proprietary information. The caveat on these broad terms is that EDC suggests this information would be covered if it "might prove to affect EDC's activities in capital or financial markets, or to which said markets may be sensitive, or which might affect EDC's competitive position." This caveat is also broad and vague. However, Mr. Wright offered some keen insight into what subsection 18.1 is getting at, and which should enlighten what item C really means:

> I think that [subsection 24 of the EDA] and [subsection 18.1 of the ATIA] recognize that we have commercial systems in place to assess risk, determine our pricing, and assess different markets. Again, this gives [EDC] a provision to provide additional protections for those systems.

[91] Another example of what should be protected under subsection 18.1 of the ATIA was given to the Senate in a Committee Meeting on September 21, 2006:

> …the proposed new section 18.1 of the [ATIA] recognizes the need for [EDC] to protect records containing trade secrets, financial, commercial, scientific and technical information.
>
> Let me give you an example. As a significant insurer of accounts receivable to all sizes of Canadian exporters, [EDC] has developed <u>its own proprietary systems to evaluate and score credit risks of thousands of international buyers. These systems are the engine on which exporters rely for timely decisions from EDC and on which EDC manages billions of dollars of exposure</u>. They represent an integral component of our, and ultimately the Canadian exporters', competitive arsenal. <u>Were the system, the processes and the information required to deliberate on credit not protected, EDC would be immediately frustrated in its ability to operate</u>. [Emphasis added]

[92] Evidently, subsection 18.1 of the ATIA was not intended to shield all manner of information from public scrutiny. Indeed, it seems that, unlike subsection 24.3 of the EDA,

subsection 18.1 of the ATIA is not concerned with *client* information at all. The ambit of this provision is to protect the *commercial systems* EDC develops and uses in pursuit of its economic interests identified above, as well as the information used to *create and administer* these commercial systems.

[93] To clarify the line between these provisions, the Court's understanding of EDC's process and flow of information is that EDC would obtain information in relation to their clients, which would be protected under subsection 24.3 of the EDA. This information would be "fed" into EDC's proprietary systems, created and maintained using information to assess risk, determine pricing, and assess markets, the whole of which would fall under subsection 18.1 of the ATIA. The output of this process (e.g. maximum liability amounts), being the result of "feeding" client-related information obtained by EDC into EDC's proprietary systems, would not fall under either of these provision unless EDC could demonstrate in a challenge such as this that the information at issue could reveal the raw client-related information or the systems themselves.

[94] The redacted information, constituted by policy numbers and maximum liability amounts, are outputs of EDC's proprietary systems. In Marc Deschênes' Affidavit, an explanation of EDC's methodology is provided, which I shall not elaborate upon, but systems such as these are the intended scope of subsection 18.1 of the ATIA. These systems are integral to EDC's ability to carry out its purposes, and therefore have a reasonable nexus to its economic interests. In the context of maximum liability amounts, unless EDC can demonstrate their systems could be reverse-engineered and disclosed merely by revealing the results determined by their systems, their economic interests are not engaged simply by the disclosure of the maximum liability

amount. I have reviewed Marc Deschênes' Affidavit and disclosing the policy numbers and maximum liability amounts would not reveal EDC's proprietary systems or other confidential information. For these reasons, the redacted information has no nexus to EDC's economic interests and cannot be shielded under subsection 18.1 of the ATIA.

(4) Belonging to EDC

[95] Subsection 18.1's term "belongs to" has never been interpreted, and while the Court has been drawn to interpretations of the phrase in other contexts with other Acts, it is this Court's position that the nature of information "belonging to" a particular government institution is a fact-specific analysis and should be analyzed in the context of each case as it arises. However, it must be said that "belonging to" denotes ownership over the information in question. In the context of the ATIA, and especially in the context of subsection 18.1 of the ATIA that only covers four specific institutions in an effort to protect these institutions' economic interests, the Court must interpret that this ownership is *exclusive* ownership.

[96] In this case, EDC's evidence is that the redacted information was created exclusively by them by feeding client-related information into one of EDC's proprietary systems. Having created the redacted information themselves, this is a clear instance where EDC's ownership of the newly created redacted information is established. EDC created the redacted information themselves using their proprietary systems, and so the redacted information "belongs to" them. For these reasons, the redacted information belongs to EDC and satisfies this criterion of subsection 18.1 of the ATIA.

(5) Has been treated consistently in a confidential manner

[97] EDC's evidence on their treatment of the redacted information is to the effect that the information falls into the second major line of its business (i.e. insurance) and details the applicable financial services (in this case, Political Risk Insurance, Performance Security Insurance, Performance Security Guarantee, or Contract Frustration Insurance), and the limit of coverage extended (Davison's Affidavit at para 10).

[98] EDC suggests section 3.5.4 of their Policy outlines that they have consistently treated the information as confidential. Section 3.5.4 entitled "Treatment of Confidential Transaction Information" lists, *inter alia,* two types of confidential customer information:

A. Financial, business, or other proprietary information, intellectual property, or other non-public information that has been disclosed to EDC under any obligation of confidentiality;

B. Financial, business, or other proprietary information of third parties where disclosure might adversely affect the third party;

and *inter alia* the following confidential EDC information:

C. Financial, business, or other proprietary information which might prove to affect EDC's activities in capital or financial markets, or to which said markets may be sensitive, or which might affect EDC's competitive position.

[99] Before moving to analyze the remainder of the evidence submitted, it bears noting that section 3.5.4 of EDC's Policy appears not to apply to the information requested in dispute for the same reason EDC cannot rely on subsection 24.3(1) of the EDA. The information requested was not disclosed to EDC and was not financial, business or other proprietary information of third parties; in fact, by its own admission, EDC created the information requested, so information

types A and B above do not apply. Nor would information types B or C apply to any information derived from exchanges or negotiations with third parties, including customers, unless EDC can effectively demonstrate all such information might adversely affect the third party or prove to affect EDC's activities in the capital or financial markets or EDC's competitive position.

[100] To make matters worse for EDC, section 3.5.2 entitled "Individual Transaction Reporting" of the same Policy expressly allows EDC to disclose information on "all signed financing transactions" relating to "Political Risk Insurance", which is one of the applicable financial services of the redacted information (Davison's Affidavit at para. 10). Specifically, section 3.5.2 allows the disclosure of, among other things, the name of the Canadian company receiving EDC financial support, the country where support will be used, a description of the commercial transaction, and specified ranges within which the amount of EDC financial support falls. The Commissioner rightly points out that merely following this policy would allow EDC to disclose at least most of the information requested relating to political risk insurance policies. As such, section 3.5.2 of the Policy would contradict EDC's submission that "(t)here is no evidence before the Court that the Disputed Customer Account Information was disclosed by EDC, contrary to its own policy."

[101] EDC has also failed to demonstrate that the information might prove to affect the capital or financial markets or their competitive position. EDC submits it "could reasonably expect to suffer significant financial and reputational harm" by releasing the redacted information (A's memo para 80). Its only argument in support of this belief was that "customers may not engage

with EDC if it were unable to offer assurance that it is able to protect the financial information in its possession" (A's memo para 80).

[102] The Court does not find this to be reasonable; EDC's clients would expect EDC to follow its own policies, including the Policy that expressly permits the disclosure of EDC client information. EDC appears to be arguing that adhering to its own Policy could result in significant financial and reputational harm, and the Court cannot accept this suggestion. By its own evidence, section 3.5.4 of the Policy may not apply to the information requested, section 3.5.4 of the Policy as currently written could not apply to information EDC created, and section 3.5.2 of the Policy expressly permits the disclosure of individual transaction information in this line of EDC's business. In addition, EDC has failed to prove adhering to the Commissioner's request and its own Policy could result in any financial or reputational harm, let alone potentially affect their activities in capital or financial markets, to which said markets may be sensitive, or which might affect their competitive position. Similar to what the Honourable Justice Kelen held in *Canada Post* at para 19, I "would have expected (EDC) to have entered into a confidentiality agreement to protect disclosure of financial information which could reasonably be expected to result in financial loss or prejudice to its competitive position".

[103] In the trial division instance of *Calian*, which the Federal Court of Appeal upheld, the Application Judge concluded that because a third party had understood information supplied to a government institution might be shared with other government departments as a result of a limited disclosure clause, the third party had not established that the information was treated consistently as confidential (see *Calian* at paras 52-54).

[104] Following the jurisprudence interpreting this requirement for subsection 20(1)(b), *Canada Post* held that consistent treatment must be supported by evidence showing "careful, consistent measures to restrict access to the information" (*Canada Post* at paras 11-14). Notably in *Canada Post*, the lack of a confidentiality agreement regarding the information in question raised this concern. There, the Court concluded that entering into (and thereby being able to produce) a confidentiality agreement concerning the information at the outset would have established a practice of consistently treating the information concerned as confidential (*Canada Post* at para 19). In this Application, EDC has offered no evidence that they have entered into a confidentiality agreement with any of its customers, including the customers that are the subject of the redacted information.

[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.

(6) Conclusion

[106] Since the Court finds EDC has failed to meet their onus of proving the redacted information has a reasonable nexus with its economic interests, nor have they provided sufficient

evidence to show EDC consistently treats the redacted information as confidential, EDC cannot shield the redacted information under subsection 18.1 of the ATIA.

D. *If the redacted information meets the requirement of subsection 18.1(1)(b) of the ATIA, whether the head of EDC reasonably exercised its discretion in deciding to refuse to disclose the redacted information?*

[107] Given that the Court is not satisfied that the redacted information meets the requirements of subsection 18.1(1)(b) of the ATIA, the Court need not consider whether EDC reasonably used its discretion to refuse the disclosure of the redacted information.

V. **Conclusion**

[108] Subsection 24.3 of the EDA requires EDC to refuse disclosure of information obtained by or supplied to EDC that is from or about an EDC client. The source of this information must be external to EDC. Information that EDC creates, either exclusively or jointly with another party, is not protected by subsection 24.3 of the EDA. As EDC created the redacted information, it is not protected by subsection 24.3 of the EDA.

[109] Subsection 18.1 of the ATIA permits EDC to refuse disclosure of trade secrets or financial, commercial, scientific or technical information with a reasonable nexus to EDC's economic interests, which belongs exclusively to EDC and has been treated consistently in a confidential manner by the EDC. While the EDC has convinced this Court that the redacted information belongs to EDC, EDC has failed to prove the redacted information has a reasonable nexus with the EDC's economic interests, nor have they proven EDC has consistently treated the

redacted information in a confidential manner. As such, the redacted information cannot be protected under subsection 18.1 of the ATIA.

[110] The Court will order that EDC disclose the redacted information, to which no exemption applies.

[111] With respect to the question of costs, the parties agree that there should be no costs awarded given that this application raises a novel issue of statutory interpretation. The Court is in agreement. Costs will not be awarded.

JUDGMENT in T-1793-22

THIS COURT'S JUDGMENT is that:

(a) The Application is dismissed.

(b) The Applicant shall disclose the redacted information within thirty (30) days of this Judgment pursuant to section 49 of the *Access to Information Act*.

(c) No costs are awarded.

"Ekaterina Tsimberis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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