

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	13-DEC-2023 Martin Vaillancourt
DEPOSE	
OTTAWA, ON	-1-

Federal Court of Appeal File No. A-345-23
(Federal Court File No. T-1793-22)

FEDERAL COURT OF APPEAL

B E T W E E N:

EXPORT DEVELOPMENT CANADA

Appellant

- and -

THE INFORMATION COMMISSIONER OF CANADA

Respondent

**APPLICATION FOR REVIEW UNDER SECTION 41 OF THE
ACCESS TO INFORMATION ACT**

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the [Federal Courts Rules](#) and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the [Federal Courts Rules](#) instead of serving and filing a notice of appearance.

Copies of the [Federal Courts Rules](#), information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

December 13 , 2023

Issued by: Martin Vaillancourt
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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of Justice Tsimberis dated November 21, 2023, (the “**Decision**”) dismissing an application for review (the “**Application**”) brought by Export Development Canada (“**EDC**”) pursuant to subsection 41(2) of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the “**ATIA**”):

THE APPELLANT ASKS that this Court:

- (a) allow the appeal and set aside the Decision dismissing the Application;
- (b) declare that the Disputed Customer Account Information (defined below) is exempt from disclosure under the ATIA; and,
- (c) grant such further and other relief as this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

A. Nature of Appeal

2. This is an appeal from the Decision of Justice Tsimberis pursuant to subsection 41(2) of the ATIA, dismissing EDC’s application to set aside the Order of the Access to Information Commissioner dated July 22, 2022, (the “**Commissioner’s Order**”), holding that customers’ policy numbers and policies’ maximum liability amounts (the “**Disputed Customer Account Information**”) were not exempt from disclosure under subsection 24.3(1) of the *Export Development Act* (“**EDA**”), through subsection 24(1) of the ATIA, which incorporates by reference the provisions of certain other statutes.
3. The Decision was the first decision of the Federal Court to consider subsection 24.3(1) of the EDA in the context of a section 41 application, and the first time that subsection 18.1 of the ATIA was interpreted by any court.

B. Procedural History and Background

4. On July 9, 2019, EDC received a request for information pursuant to the ATIA from a requestor, dated July 3, 2019, (the “**Request**”). 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.

5. On October 7, 2019, EDC wrote to the requestor to formally respond to the Request. The information collected had been severed, and EDC noted 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.

6. As a result of 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 paragraphs 37(1)(a) and (b) of the ATIA (the **Initial Report**), and which included an order the Information Commissioner intended to issue with her Final Report.
7. On July 20, 2022, EDC advised it would disclose policy types, but would seek review in Federal Court in relation to the Commissioner’s decision to order disclosure of customer’s policy numbers and maximum liability amounts.
8. On July 22, 2022, the Information 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 Information Commissioner's findings, as well as an order (the **Order**) for the President of EDC to:

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

9. As per the Final Report, the Information Commissioner acknowledged that including the identities of EDC's customers within the information to be released would be a violation of the EDA. Given the OIC and EDC's respective positions, the remaining records at issue in the Application were therefore policy numbers and maximum liability amounts of the policies in question – namely, the Disputed Customer Account Information.
10. On September 2, 2022, EDC had issued a Notice of Application to review the findings and Order of the Information Commissioner in the Final Report, pursuant to subsection 41(2) of the ATIA.
11. A hearing was held on May 9, 2023.
12. Pursuant to the oral direction of the Applications Judge, further written submissions were made on June 8, 2023.

C. Issues at the Hearing

13. The parties to the proceeding raised *inter alia*, the following issues at the hearing:
 - (a) Does subsection 24.3(1) of the EDA apply to information about EDC customers obtained from EDC's own customer records?
 - (b) If subsection 24.3(1) of the EDA does not apply to information about EDC customers obtained from EDC's own customer records, were the policies' maximum liability amounts

nonetheless exempt from disclosure as a result of indirectly revealing information provided to EDC by its customers?

- (c) Does paragraph 18.1(b) of the ATIA apply to information that belongs to EDC (and that EDC considers proprietary), but that has been shared with an EDC customer under appropriate circumstances?

D. Issues on Appeal

14. The Appellant EDC submits that the application judge:

- (a) In respect to subsection 24.3(1) of the EDA:
 - (i) erred in law by concluding that subsection 24.3(1) EDA did not apply to customer information obtained from EDC's own systems, processes or records;
 - (ii) fundamentally misapprehended or failed to account for the evidence before her;
 - (iii) erred in law by interpreting "supplied to" as used in paragraph 20(1)(b) of the ATIA and "obtained by" as used in subsection 24.3(1) of the EDA as synonymous;
 - (iv) failed to consider whether Disputed Customer Account Information, namely maximum liability limits, would indirectly reveal information obtained by EDC from its customers;
- (b) In respect to section 18.1 of the ATIA:
 - (i) erred in law by reading into the legislative scheme an additional requirement not required by the legislation;
 - (ii) erred in law by omitting trade secrets, financial, scientific or technical information from the information exempted from disclosure under section 18.1 of the ATIA;

- (iii) erred in law by interpreting section 18.1 as being narrower in scope than section 18 of the ATIA;
 - (iv) erred in law by conflating the requirements of section 18.1 with factors which may influence the exercise of discretion under that section; and,
 - (v) fundamentally misapprehended or failed to account for the evidence before her.
15. The Appellant relies upon the *Export Development Act*, RSC 1985, c E-20, *Access to Information Act*, R.S.C. 1985, c. A-1; and the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended; and,
16. Such further and other grounds as counsel may advise and this Honourable Court may permit.
17. The Appellant requests that this appeal be heard in Ottawa.

December 13, 2023



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SOR/2021-151, s. 24