Date: 20070827

Docket: A-202-06

Citation: 2007 FCA 272

CORAM: **DÉCARY J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Appellant

and

CHIEF COMMISSIONER, CANADIAN HUMAN RIGHTS COMMISSION

Respondent

and

CANADIAN BANKERS ASSOCIATION

Intervener

Heard at Toronto, Ontario, on April 30, 2007.

Judgment delivered at Ottawa, Ontario, on August 27, 2007.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: DÉCARY J.A.
NADON J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This appeal raises a number of issues with respect to the interplay between the *Employment Equity Act*, S.C. 1995, c. 44 (the EEA) and the *Access to Information Act*, R.S.C. 1985, c. A-1 (the ATIA). When the Canadian Human Rights Commission (the Commission) decided that it was bound to release the results of its audit of the Canadian Imperial Bank of Commerce's (the CIBC) compliance with the EEA pursuant to an access request under the ATIA, the latter objected on the

basis that the information contained in the report was privileged and was otherwise exempt from disclosure under one or more provisions of the ATIA. The Commission disagreed, as did the Federal Court. The CIBC now appeals to this Court.

The Facts

[2] The facts are not complicated. In June 2000, the Commission informed the CIBC, that it wished to audit its compliance with its obligations pursuant to the EEA. The CIBC cooperated with the Commission in the conduct of the audit, submitting such information as was asked of it from time to time.

[3] In the fall of 2002, the Commission issued its "CIBC Interim Employment Equity Report" (the Interim Report) containing its preliminary findings to the CIBC. In November 2002, the Commission received a request under the ATIA for disclosure of the Interim Report. It informed the CIBC of the request and invited its comments. The CIBC opposed the release of the Interim Report on the ground of the statutory privilege created by section 34 of the EEA. The CIBC claimed, as well, that the report contained sensitive commercial information which it had supplied to the Commission in confidence. The Commission advised the CIBC by letter dated February 13, 2003, that it did not intend to disclose the Interim Report because it contained confidential commercial information, and was thus exempt from disclosure pursuant to paragraph 20(1)(*b*) of the ATIA.

[4] On July 9, 2004, the Commission advised the CIBC that it had now received a request under the ATIA for disclosure of its Final Report, without disclosing that the request was made orally and

not in writing. Once again, the CIBC was invited to comment and once again it opposed the release of the report, relying on the same grounds as it did in opposing the release of the Interim Report. On October 26, 2004, the Commission advised the CIBC that it intended to disclose the Final Report.

[5] Two days later, the Commission notified the CIBC that its decision not to release the Interim Report had, in fact, been based on paragraph 16(1)(*c*) of the ATIA, the exemption in favour of information which could be injurious to an ongoing lawful investigation, and not on paragraph 20(1)(*b*) as it had advised the CIBC earlier.

[6] The CIBC then applied to the Federal Court under section 44 of the ATIA for judicial review of the Commission's decision. The application judge, Blanchard J., in a decision reported at 2006 FC 443, [2006] F.C.J. No. 630 (*Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission*), dismissed the application except with respect to two discrete pieces of information.

The Issues

[7] The CIBC argues that this appeal raises the following issues:

> 1- Whether the Commission had jurisdiction to disclose the Final Report in the absence of a written request, as required by section 6 of the ATIA.
>
> 2- Whether the information provided to the Commission by the CIBC which was reproduced in the Final Report (the CIBC information) is subject to the ATIA when it is not under the "control" of the Commission since section 34 of the EEA gives the CIBC, not the Commission, the authority to grant or withhold its consent to disclosure.

> 3- Whether the CIBC information falls within the exemptions to disclosure set out at paragraph 20(1)(*b*) or 20(1)(*c*) or section 16 or 19 of the ATIA.
>
> 4- Whether the Commission breached the principles of fundamental justice when it misstated the grounds on which it had declined to disclose the Interim Report, thereby misleading the CIBC as to the submissions which it ought to make to oppose the disclosure of the Final Report.
>
> 5- Whether the CIBC should pay the Commission's costs.

The Canadian Bankers Association (the CBA) was granted intervener status in this matter. Its position is essentially that of the CIBC, supplemented by an argument as to the interplay between the confidentiality provisions in legislation governing banks and financial institutions and the ATIA.

Standard of Review

[8] The standard of review applicable to the application judge was set out by my colleague Evans J.A. in *Canada (Information Commissioner) v. Canada (Minister of Industry)*, 2007 FCA 212, [2007] F.C.J. No. 780, at paragraph 65 of the Court's reasons. While Evans J.A. was in dissent in this case, his colleagues adopted his formulation of the standard of review:

> [65] Questions relating to the interpretation of the *Access Act* by an institution head in refusing to disclose records in response to an access request are reviewable on a standard of correctness, while the exercise of any statutory discretion under the *Access Act* is reviewable for unreasonableness *simpliciter*: see, for example, *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at paras. 14-19; *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421, at paras. 28-47.

[9] The standard of review applicable to this Court, sitting on appeal from the application judge, was set out in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paragraph 43:

> 43 …The role of the Court of Appeal was to determine whether the reviewing judge had chosen and applied the correct standard of review, and in the event she had not, to assess the administrative body's decision in light of the correct standard of review, reasonableness. At this stage in the analysis, the Court of Appeal is dealing with appellate review of a subordinate court, not judicial review of an administrative decision. As such, the normal rules of appellate review of lower courts as articulated in *Housen*, *supra*, apply. The question of the right standard to select and apply is one of law and, therefore, must be answered correctly by a reviewing judge…

[10] In the present case, the application judge proceeded on the basis of correctness or, where certain arguments were not raised before the Commission, on the basis of a *de novo* determination: see paragraphs 31 and 32 of the application judge's reasons.

Submissions and Analysis

Whether the Commission had jurisdiction to disclose the Final Report in the absence of a written request, as required by section 6 of the ATIA.

[11] Section 6 of the ATIA provides as follows:

6. A request for access to a record under this Act shall be made in writing to the government institution that has control of the record and shall provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record.	6. La demande de communication d'un document se fait par écrit auprès de l'institution fédérale dont relève le document; elle doit être rédigée en des termes suffisamment précis pour permettre à un fonctionnaire expérimenté de l'institution de trouver le document sans problèmes sérieux.

[12] The CIBC argues that the Commission did not have jurisdiction to deal with the request for disclosure of the Final Report because the request for that record was made orally and not in

writing. The Commission took the position that there was a written request, the original request for the Interim Report, and that it treated the verbal request for the disclosure of the Final Report as a valid request under section 6 "in keeping with both the spirit and purpose of the ATIA.": see paragraph 39 of the application judge's reasons.

[13] The application judge agreed with the Commission's position. While acknowledging that it would have been desirable for a second written request to have been made for the Final Report, he found that the absence of a written request did not make the Commission's decision void. He found that the Commission's acceptance of the oral request satisfied the spirit and purpose of the ATIA, which is to provide "- rather than hinder -" access to information. He went on to find that even if the CIBC's complaint were well founded, it would make no difference as the requester would then simply make a written request for the Final Report.

[14] The CIBC also argued that the Commission was *functus officio* once it declined to disclose the Interim Report so that it lacked jurisdiction to entertain a request for the Final Report pursuant to the original written request for the Interim Report. The Commission argued that each decision was a separate decision based upon a separate request so that the doctrine of *functus officio* did not apply. The application judge agreed with the Commission.

[15] In my view, it is not helpful to view the Commission's conduct through the lens of judicial proceedings. Casting the issue of a written request as one of jurisdiction obscures the real issue which is the consequence of non-compliance with the requirement that requests for information

must be made in writing. Similarly, invoking the doctrine of *functus officio* begs the question of whether there were one or two requests for access to information.

[16] I can think of no reason why the Commission should not have complied with the plain language of section 6 of the ATIA and demanded that the request for disclosure of the Final Report be made in writing. Such a requirement is not onerous and is easily satisfied. The written request then defines the boundaries of the disclosure sought as well as providing a firm reference point for the time limits in the legislation. Invoking the "spirit and purpose of the ATIA" as justification for the failure to observe a straight-forward legislative requirement leaves the impression of an *ex post facto* rationalization.

[17] That said, what are the consequences of non-compliance with the requirement that a request for information be made in writing? The fact that the legislation imposes an obligation does not, in and of itself, define the consequences of non-compliance. There is nothing in the ATIA which purports to make anything done in the absence of a written request void. The obvious purpose of the written request is to "provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record.": see section 6 of the ATIA.

[18] The distinction between a mandatory, as opposed to a directory, provision was not argued before us, that question having been supplanted by the question of jurisdiction. As Iacobucci J. wrote in *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, at pp. 123-124:

> … the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. But the process perhaps evokes a special concern for "inconvenient" effects, both public and private, which will emanate from the interpretive result.

[19] Given that we have not had the benefit of an adversarial argument on this issue, I prefer not to express a view beyond saying that, on the facts of this case, I am not persuaded that any statutory purpose has been defeated by the failure to insist upon a written request. Given the nature of the record in issue here, the Commission had no difficulty identifying the record which it was being asked to disclose. Furthermore, no issue has been taken with respect to the 30 day time limit imposed in section 7 of the ATIA. As a result, I will assume, without deciding, that the request for disclosure of the Final Report was not void solely by reason of not having been made in writing.

[20] This disposes not only of the "jurisdictional" argument but also of the "*functus officio*" argument since the request for the Final Report was a valid, if flawed, request for disclosure.

[21] For those reasons, I would not interfere with the application judge's disposition of this issue.

Whether the information provided to the Commission by the CIBC which was reproduced in the Final Report (the CIBC information) is subject to the ATIA when it is not under the "control" of the Commission since section 34 of the EEA gives the CIBC, not the Commission, the authority to grant or withhold its consent to disclosure.

[22] The premise underlying this issue is that the information contained in the Final Report is the same information as was provided by the CIBC to the Commission and which was covered by the statutory privilege created by section 34 of the EEA, reproduced below:

34. (1) Information obtained by the Commission under this Act is privileged and shall not knowingly be, or be permitted to be, communicated, disclosed or made available without the written consent of the person from whom it was obtained.	34. (1) Les renseignements obtenus par la Commission dans le cadre de la présente loi sont protégés. Nul ne peut sciemment les communiquer ou les laisser communiquer sans l'autorisation écrite de la personne dont ils proviennent.

[23] The CIBC's argument on this issue turns on the meaning of "under the control of a government institution", a phrase which is found in section 6 of the ATIA, reproduced above, and section 4, reproduced below:

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is	4. (1) Sous réserve des autres dispositions de la présente loi 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.	

[24] The CIBC's argument, briefly stated, is that since section 34 prohibits the release of the information which it provided to the Commission without its consent, it has the power to decide if the information is to be released. As a result, the information is not within the control of the government institution.

[25] The CIBC relies upon *Andersen Consulting v. Canada*, [2001] 2 F.C. 324 (T.D.) (*Andersen Consulting)* for the proposition that where material in the Crown's hands is subject to a limitation as to the use to which it may be put, that material is not within the control of a government institution. In *Andersen Consulting*, the limitation was the implied undertaking which, it will be recalled, is the rule which precludes the use of information obtained in the course of the discovery process in civil litigation for any purpose other than the litigation itself.

[26] As there is no statutory definition of control, the Commission relies upon *Canada Post Corporation v. Canada (Minister of Public Works*, [1993] 3 F.C. 320 (T.D.) for the proposition that records which are in the possession of the government are within its control.

[27] The application judge noted the introductory words of section 4, "notwithstanding any other Act of Parliament", and interpreted them to mean that the "provisions of the ATIA take precedence over other statutory provisions restricting disclosure, except for those included in Schedule II of the ATIA.": see Reasons for decision, at page 47. The broad exemption of the statutory provisions listed in Schedule II arises from section 24 of the ATIA:

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

[28] Section 34 of the EEA does not appear in Schedule II of the Act. The application judge concluded from this that Parliament intended the ATIA to apply to information in the Commission's hands, notwithstanding the privilege created by section 34.

[29] Finally, the application judge distinguished *Andersen Consulting* on the basis that while the implied undertaking kept the control over the documents in question out of the Crown's hands, in the present case, the legal obligations created by the EEA and the ATIA put the control over the Final Report into the Commission's hands. No legal restriction such as section 34 of the EEA operated to remove control of the Final Report from the Commission.

[30] The application judge concluded that exempting the information protected by section 34 of the EEA from the operation of the ATIA would deprive the broad language of section 4 ("notwithstanding any other Act of Parliament") of any practical significance.

[31] The CIBC attacked the application judge's conclusion by pointing to the Treasury Board's Access to Information Policies and Guidelines which define "under the control" as follows:

> Under the control (relever de) – A record is under the control of a government institution when that institution is authorized to grant or deny access to the record, to govern its use and, subject to the National Archivist, to dispose of it.

[32] In addition, the CIBC pointed to other statutory dispositions which limit the use to which information gathered under the EEA may be put. Specifically, the CIBC relied upon the following dispositions:

9. (3) Information collected by an employer under paragraph (1)(a) is confidential and shall be used only for the purpose of implementing the employer's obligations under this Act.	9. (3) Les renseignements recueillis par l'employeur dans le cadre de l'alinéa (1)a) sont confidentiels et ne peuvent être utilisés que pour permettre à l'employeur de remplir ses obligations dans le cadre de la présente loi.
. . .	. . .
34. (2) No member of the Commission or person employed by it who obtains information that is privileged under subsection (1) shall be required, in connection with any legal proceedings, other than proceedings relating to the administration or enforcement of this Act, to give evidence relating to that information or to produce any statement or other writing containing that information.	34. (2) Il ne peut être exigé d'un commissaire ou d'un agent de la Commission qui obtient des renseignements protégés dans le cadre de la présente loi qu'il dépose en justice à leur sujet, ni qu'il produise des déclarations, écrits ou autres pièces à cet égard, sauf lors d'une instance relative à l'application de la présente loi.
. . .	. . .
34. (5) No information obtained by the Commission or a Tribunal under this Act may be used in any proceedings under any other Act without the consent of the employer concerned.	34. (5) Les renseignements obtenus par la Commission ou un tribunal dans le cadre de l'application de la présente loi ne peuvent être utilisés, sans le consentement de l'employeur concerné, dans des procédures intentées en vertu d'une autre loi.

[33] The CIBC argued that these limitations on the use of information gathered during the employment equity audit would all be defeated if the information was simply available for the asking pursuant to the ATIA.

[34] The CIBC also revisited the *Andersen Consulting* case and pointed out that the key to the reasoning in that case was the distinction between, on the one hand, a unilateral limitation imposed

by one party or a mere contractual limitation on the use which may be made of information and, on the other hand, a condition imposed by the law itself on the government institution which receives a document. In this case, the CIBC argued that the Commission received the CIBC information subject to the limits imposed by section 34 so that the case fell squarely within the principle set out in *Andersen Consulting*.

[35] In addition, the CIBC challenged the application judge's reasoning with respect to section 4 of the ATIA by pointing out that the latter only applies if the information in question is under the control of the government institution. As a result, the question of whether a record is under the control of the government institution must be answered without regard to section 4. The application judge erred to the extent that he reasoned that the Final Report was under government control because section 4 applied "notwithstanding any other act of Parliament.".

[36] As a preliminary matter, I am satisfied, on the basis of the colour coded material filed by the CIBC that the bulk of the information contained in the Final Report was information provided to the Commission in the course of the EEA audit, and was not drawn from public sources. To that extent, there is a factual foundation for the argument that the Final Report is caught by the privilege created by section 34 of the EEA. In my view, the application judge erred when he concluded that it was sufficient that the information in the Final Report be of the same sort as information in the public record. As will be seen later, the test is whether the information itself can be found in the public record.

[37] The question as to whether records are under the control of a government institution has arisen on a few occasions. The jurisprudence was summarized by Hugessen J. in *Andersen Consulting* as follows at para. 14:

> 14 While there appears to be virtually no jurisprudence under the *National Archives of Canada Act*, the cases under the Access to Information Act have taken a generous view of the sense to be given to the concept of control. In particular, it has been held that an obligation of confidentiality imposed by the originator of the document (*Baldasaro, Blacklock and Tucker v. Canada*, (1986), 4 F.T.R. 120 (F.C.T.D.)), by the governmental *recipient (Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, (1997), 4 Admin. L.R. (3d) 96 (F.C.T.D.)), or by a party entering into contractual relations with the government *(Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (C.A.)), do not operate to remove such documents from being in the "control" of a government department within the meaning of that statute.

[38] In short, an expectation of confidentiality arising from the dealings between the source of the record and the government institution is not sufficient to withdraw a record from the control of the government institution.

[39] *Andersen Consulting* is not an ATIA case. *Andersen Consulting* deals with section 5 of the *National Archives of Canada Act*, R.S.C. 1985, (3rd Supp.), c. 1, which prohibits the destruction or disposition of records "under the control of a government institution". It is the use of this phrase in both the *National Archives of Canada Act* and ATIA which invites the application of the reasoning in that case to the facts of the present dispute.

[40] The difficulty with the CIBC's argument is that it confounds control of the record and control of the information. If one were to draw an analogy, one might think of the difference between ownership of a book and ownership of the copyright in the content of the book. The owner

of a book has the control of the physical volume, even though he or she may not be authorized to reproduce the work contained in that book.

[41] In the same way, the Commission has control of the Final Report, considered as a record, even if there may be limits on the use which it may make of the information contained in the report. The fact that section 34 imposes certain limits on the Commission's ability to disseminate the information contained in the record is not a reason for concluding that the record itself is not under the control of the Commission. While the application judge did not employ this reasoning, he came to the same conclusion and so, there is no reason to interfere with his conclusion on this issue.

[42] This leads to the CIBC's subsidiary argument which is that while the record may be subject to the control of the Commission, the information is not subject to the provisions of the ATIA because it is privileged. The effect of privilege is often described in terms of exclusion of evidence. For example, in their introductory comments to the subject of privilege, the editors of *The Law of Evidence in Canada* (2nd ed.) (Butterworths, Toronto, 1999) describe it as an exclusionary rule: see article 14.1. But privilege also refers to freedom from forced disclosure, as in solicitor-client privilege. We are concerned here with privilege as freedom from forced disclosure, and not with whether the privileged information is admissible in a court of law. The latter point is dealt with by subsection 34(5) of the EEA.

[43] As there is no higher claim to disclosure in our system of law than the necessity of rendering justice (or preventing injustice) [see, for example, *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R.

445, at paragraphs 46 and 47] privilege, the ability to resist forced disclosure in legal proceedings, would seem to imply the ability to resist forced disclosure in any other context. Thus the argument that a privileged communication is not subject to forced disclosure pursuant to the ATIA.

[44] This argument would be difficult to resist were it not for section 24 of the ATIA which exempts the information described in the statutory dispositions listed in Schedule II to the ATIA from disclosure under the ATIA. The federal statute book contains 32 statutes which create a statutory privilege, in the sense of immunity from forced disclosure, as opposed to immunity from liability as in the law of defamation. Of those 32 statutes, 19 of them are listed in Schedule II. It is difficult to resist the inference that the other 13, including section 34 of the EEA, were intended to be subject to the ATIA.

[45] If that is so, as I conclude it must be, information in the government's hands is subject to disclosure pursuant to the ATIA, unless it is exempt under the terms of the Act, or unless the provision under which it is created or communicated is listed on Schedule II, statutory guarantees of confidentiality (including statutory privilege) serve a very limited purpose. They do not withdraw communications from the operation of the ATIA though they may act as a statutory indications of the treatment to be afforded those communications under the ATIA.

[46] As a result, there is no reason to interfere with the application judge's disposition of this issue.

Whether the CIBC information falls within the exemptions to disclosure set out at paragraph 20(1)(*b*) or 20(1)(*c*) or section 16 or 19 of the ATIA.

[47] The CIBC argued that the CIBC information contained in the Final Report was exempt from disclosure under the terms of paragraph 20(1)(*b*) (confidential commercial information), paragraph 20(1)(*c*) (information whose disclosure could adversely affect a party's competitive position), section 16 (information whose disclosure could interfere with a lawful investigation) and section 19 (personal information). The last two cases can be dealt with relatively summarily.

[48] Section 16 of the ATIA, in its material parts, provides as follows:

16. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains	16. (1) Le responsable d'une institution fédérale peut refuser la communication de documents :
. . .	. . .
(*c*) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information:	*c*) contenant des renseignements dont la divulgation risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois fédérales ou provinciales ou au déroulement d'enquêtes licites, notamment :
. . .	. . .
(iii) that was obtained or prepared in the course of an investigation; or	(iii) des renseignements obtenus ou préparés au cours d'une enquête;

[49] The CIBC argues that the release of the CIBC information contained in the Final Report will have a chilling effect on subsequent EEA audits because employers, and employees, will be aware of the fact that their information is subject to disclosure under the terms of the ATIA.

[50] Section 16 is a discretionary exemption. In order to succeed, the CIBC would have to show that the Commission exercised its discretion unreasonably. The investigations which will suffer the chilling effect are those to be undertaken by the Commission. If the Commission is not apprehensive about any chilling effect, it is not apparent why the CIBC would be. Nothing has been put before the Court to suggest that the Commission's exercise of its discretion is unreasonable.

[51] The application judge disposed of this issue on the basis that the CIBC had not shown a reasonable basis for its claim that "that disclosure of the Final Report could be injurious to future employment equity compliance review audits.": see para. 66. While not expressing myself in the same way, I come to the same conclusion.

[52] Section 19 deals with personal information and provides as follows:

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.	19. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.

[53] Section 3 of the *Privacy Act*, R.S. 1985, c. P-21, defines personal information as follows:

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,	« renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :
(*a*) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,	*a*) les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;

(*b*) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

b) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;

(*c*) any identifying number, symbol or other particular assigned to the individual,

c) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;

(*d*) the address, fingerprints or blood type of the individual,

d) son adresse, ses empreintes digitales ou son groupe sanguin;

(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

e) ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

(*f*) the correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

f) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;

(*g*) the views or opinions of another individual about the individual,

g) les idées ou opinions d'autrui sur lui;

(*h*) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

h) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa e), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;

(*i*) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant :

(*j*) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :

(i) the fact that the individual is or was an officer or employee of the government institution,

(i) le fait même qu'il est ou a été employé par l'institution,

(ii) the title, business address and telephone number of the individual,

(ii) son titre et les adresse et numéro de téléphone de son lieu de travail

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iii) la classification, l'éventail des salaires et les attributions de son poste,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,

(v) the personal opinions or views of the individual given in the course of employment,

(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

(*k*) information about an individual who is or was performing services under contract

k) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services

for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,	à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées au cours de la prestation;
(*l*) information relating to any relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and	*l*) des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;
(*m*) information about an individual who has been dead for more than twenty years;	*m*) un individu décédé depuis plus de vingt ans.

[54] The CIBC argued that section 3 of the *Privacy Act* required that the comments made by a small group of managers who are members of a visible minority be kept confidential on the ground that the information contained in the Final Report and the knowledge common to CIBC employees would reveal the identity of these managers. The CIBC was also concerned about the disclosure of the identity of certain persons who fell in certain groups listed in Appendix A to the Final Report.

[55] The application judge relied on the decision of the Supreme Court in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at page 426, as authority for the proposition that personal information is information about an identifiable individual. It was his considered opinion that nothing in the Final Report could reasonably lead to the identification of the individuals in question, or of their individual opinions with respect to various matters raised in the report. This was a conclusion of fact, or of inferences to be drawn from facts, both of which enjoy the greatest

deference. Nothing was put before us which would justify interfering with the application judge's conclusions on this issue.

[56] The two major grounds of opposition advanced by the CIBC are paragraphs 20(1)(*b*) and 20(1)(*c*) of the ATIA. Section 20 provides as follows:

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains	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;
(*c*) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or	*c*) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;
(*d*) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.	*d*) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

[57] The application judge accepted that the CIBC information was commercial information but he was not persuaded that the information was confidential. He carefully reviewed the information in the Final Report and compared it to information available in the EEA annual reports which the

CIBC filed each year as a requirement of the *Bank Act*, S.C. 1991, c. 46. The judge concluded that the kind of information disclosed in the annual reports was generally the same kind of information found in the Final Report with a few exceptions. In those cases where specific information was not available in the annual reports, the application judge considered whether the CIBC had a reasonable expectation of confidentiality.

[58] The application judge rejected the CIBC's contention that it had a reasonable expectation that the Final Report would not be disclosed. He did so on the basis that the ATIA supersedes the provisions of section 34 of the EEA and that, in any event, the Commission specifically advised the CIBC that the Commission was subject to the ATIA so that the Commission could, upon request, be required to release any information which was not exempt under the terms of the ATIA.

[59] Finally, the application judge considered the CIBC's argument that there was a greater public benefit in non-disclosure, in the form of employee confidence in the confidentiality of material shared in the course of implementation of employment equity programs, and in the full and frank exchange of information between employers and the Commission than there was in disclosure. The application judge found that there was no factual basis for the assertion that employees would consider that their confidence had been betrayed if aggregated employment data were made public. The application judge considered it unlikely that responsible employers would not cooperate with the Commission simply because of the possibility of disclosure of employment equity information. In the application judge's view, there was a public benefit "in making

transparent the performance of employers in meeting their statutory requirements under the EEA.": see Reasons for Order, at para. 90.

[60] The CIBC disagrees with the application judge's conclusions as to the confidential nature of the information in question as well as the CIBC's reasonable expectation that the information would not be disclosed.

[61] I have already indicated my view that the material contained in the Final Report was material provided by CIBC in the course of the audit, and was not material taken from the public record. The application judge compared the Final Report to the CIBC's 2002 EEA Annual Report and found that much the same kind of information appeared in that report as appeared in the Final Report. Unfortunately, that is not the test to be applied. In *Air Atonabee Ltd. v. Canada (Minister of Transport)*, 27 F.T.R. 194, the test for confidential information was said to be that *"the content of the record* be such that the information it contains is not available from sources otherwise accessible by the public"(emphasis added): see *Air Atonabee Ltd.*, at para. 42 Thus the test is not whether information of the same kind is available in the public record but whether the specific information can be found there. Consequently, the application judge erred in law in applying the wrong test when deciding if the information in question was confidential.

[62] The next leg of the test is whether there is an objective basis for saying that the information was communicated in the expectation that it would be kept in confidence. The application judge's reasons for concluding that there was no reasonable basis for CIBC's belief in confidentiality are

problematic. The first reason given, that section 4 of the ATIA overrides section 34 of the EEA, calls for a conclusion of law, and one which is not necessarily obvious. As noted earlier, a privileged communication is one which is capable of resisting forced disclosure in a court of law. It is not self-evident that such a communication would be subject to disclosure to anyone curious enough to make a request under the ATIA. The fact that the CIBC was wrong about the effect of section 34 does not mean that its views were unreasonable.

[63] The second reason given, that the Commission put the CIBC on notice of its view that it could be required to disclose the information, is, with respect, unpersuasive. The CIBC's view of its rights and obligations under the ATIA does not become unreasonable simply because the Commission takes a different view of its own obligations under that Act. The Commission's opinion as to the ATIA's requirements is no more authoritative than the CIBC's. While the Commission, like all government institutions is bound to respect the letter and the spirit of the ATIA, it is, I must say, surprising that it would assume a position on disclosure which is so clearly at odds with the EEA's assurances of confidentiality.

[64] The reasonableness of a decision is a function of the reasons given to justify it:

> 49 This signals that the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision…
>
> [*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 49].

[65] In my view, the application judge's conclusion on this question is unreasonable: the reasons given for it do not adequately support the application judge's conclusion on this important element of the test for the application of the exemption found at paragraph 20(1)(*b*) of the ATIA.

[66] The last element of the test for the application of the exemption found at paragraph 20(1)(*b*) of the ATIA is the public interest in the disclosure of the information. This requirement was framed as follows in *Air Atonabee Ltd.*:

> (c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication .
>
> [*Air Atonabee Ltd.*, at para 42.]

[67] The application judge concluded that there was a public benefit in knowing the progress of employers in meeting their statutory obligations under the EEA. He also found that the relationship He also found that "the relationship between the Applicant and the Respondent is not exceptional so as to warrant treating the Final Report as confidential.": see Reasons for Order, at para. 92.

[68] The public benefit requirement is intended to ensure that the benefit of the exemption only accrues in the public interest. It does not call for a weighing of the public interest between disclosure and non-disclosure. If the relationship is not contrary to the public interest, and if that relationship will be fostered by preserving the confidentiality of the communications passing between the parties to the relationship, then non-disclosure is indicated. The application judge erred in applying a comparative test where none is required.

[69] There cannot be any doubt that the confidential relationship between the Commission and the subject of an employment equity audit is in the public interest. Section 34 of the EEA makes it abundantly clear that the confidentiality of that relationship is to be maintained. I find that the application judge erred in law in applying the wrong test with respect to the public benefit aspect of the test for the exemption found at paragraph 20(1)(*b*) of the ATIA. The application of the correct test leads to the conclusion that this element is present.

[70] In the end result, I am of the view that the application judge erred in concluding that the information in the Final Report is not exempt from disclosure as confidential commercial information pursuant to paragraph 20(1)(*b*) of the ATIA and that, as a result, the appeal should be allowed. However, for the sake of completeness, I propose to deal with the remaining grounds of appeal.

[71] The application judge rejected the CIBC's evidence with respect to paragraph 20(1)(*c*) of the ATIA, dealing with the effect of disclosure upon the CIBC's competitive position, as "speculative". In large part, that evidence is to the effect that CIBC's competitors will, by reading the Final Report, get the benefit of CIBC's experience and of the considerable sums which it has paid consultants to assist it in its employment equity programs. CIBC alleges that it will lose any competitive advantage it has in recruiting and developing minority group employees if the information contained in the Final Report is disclosed.

[72] The application judge's conclusions on this aspect of the case are conclusions of mixed law and fact which are owed considerable deference. While the CIBC relies upon Mr. Proszowski's unchallenged and uncontradicted evidence, the application judge treated it as conclusory in nature, consisting of bare conclusions unsupported by any justification. It was certainly open to the judge to come to that assessment of the quality of the evidence before him.

[73] The CIBC also alleges that the judge applied the wrong legal test, the probability of harm rather than the possibility of harm ("would" rather than "could" suffer material loss). In my view, the CIBC is making too much of the word "would" where it appears in the application judge's summary of his conclusions:

> [116] In my view, the evidence adduced by the Applicant falls short of establishing that it would suffer any material financial loss or that there is a reasonable expectation of harm to its competitive position if the Final Report is disclosed…

[74] It is clear from a reading of the application judge's reasons that he is responding to the allegation made by Mr. Proszowski, who says in his affidavit:

> 79. Disclosure of the exempt information *would* reasonably be expected to cause probable harm to CIBC's competitive position in that:
>
> a) competitors *would* learn…
> b) competitors *would* learn…
> c) competitors *are likely* to adopt…

[75] The application judge's language simply reflects the arguments which were made before him. As a result, I find nothing unreasonable in the application judge's conclusions on this issue.

Whether the Commission breached the principles of fundamental justice when it misstated the grounds on which it had declined to disclose the Interim Report, thereby misleading the CIBC as to the submissions which it ought to make to oppose the disclosure of the Final Report.

[76] The CIBC takes exception to the Commission's revision of the grounds upon which it refused to disclose the Interim Report after the CIBC had made its submissions with respect to the disclosure of the Final Report. Had it known the grounds which the Commission ultimately relied upon, it would have framed its representations to meet those concerns. The CIBC characterizes this as the absence of a fair hearing, leading to a loss of jurisdiction.

[77] While I believe the CIBC's argument overreaches, I must say that the Commission's revisiting of the grounds for its refusal to disclose the Interim Report is surprising and somewhat troubling. I have difficulty conceiving how one might confuse a refusal based upon confidential commercial information with one based upon interference with a lawful investigation. The concerns raised by the Commission at the time said nothing about interference with its investigation and were directed at the confidential nature of the information. I think it unlikely that the person who made the initial decision intended to make a decision other than the one which was made. That decision cannot later be withdrawn and treated as inoperative when further and better grounds which, incidentally, do not conflict with the disclosure of the Final Report, come to mind later.

[78] That said, the CIBC was never under any illusions as to the burden it had to meet. The request for disclosure of the Final Report was a discrete request, subject to evaluation on its own terms. The CIBC may well have taken comfort in the fact that disclosure of the Interim Report was refused on the ground that it contained commercial confidential information, but it is inconceivable

that the CIBC would not have made that argument in any event. If it had other, better arguments to make and failed to make them, that can only be attributed to strategic considerations which, while not trivial, do not rise to the level of a denial of natural justice.

[79] I would not interfere with this aspect of the application judge's decision.

Whether the CIBC should pay the Commission's Costs

[80] Section 53 of the ATIA provides as follows:

53. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.	53. (1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.
(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.	(2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

[81] Given my conclusion that the appeal should be allowed, this issue is now moot. Costs should follow the event.

The Canadian Bankers Association's position

[82] I do not propose to revisit the issues which are common to the CIBC and the CBA. The issue raised by the CBA which is specific to the banking industry is the application of the ATIA to information that banks, who are not subject to the ATIA, provide to federal regulators. The CBA's

concern is the potential for disclosure of that information as a result of the application judge's finding that the CIBC had no reasonable basis for its expectation, arising from the statutory privilege created by section 34 of the EEA, that the information it provided to the Commission would remain confidential.

[83] The CBA points to various statutory provisions which impose an obligation of confidentiality on federal regulators. For example, section 636 of the *Bank Act*, S.C. 1991, c. 46, provides that all information obtained by the Superintendent in the administration and enforcement of the *Bank Act* is confidential and is to be treated accordingly. Similar provisions appear in the *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985 (3rd Supp), c. 18 (s. 22(1)) , as well as in the *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9 (s. 17), and the *Canada Deposit Insurance Act*, R.S.C. 1985, c. C-3 (s. 45.2). The CBA argues that it is essential that communications made to the financial regulators remain in confidence. If paragraph 20(1)(*b*) is interpreted so that these statutory dispositions are not sufficient to found a reasonable belief on the part of the banks that the information they provide the regulators will be kept in confidence, then serious mischief could result.

[84] My finding that the CIBC did have a reasonable basis for its belief that the information it provided to the Commission would remain confidential essentially disposes of the issue raised by the CBA. Nonetheless, it is worth repeating that, just as the statutory privilege in section 34 does not preclude the application of section 4 of the ATIA, neither does any statutory guarantee of confidentiality. None of the statutory provisions to which the CBA referred us is found on Schedule

II which means that any claim for non-disclosure must bring itself within one of the exemptions provided for in the ATIA. The nature of the information provided to the regulators and the circumstances under which it is provided are relevant to the claim for exemption. A statutory guarantee of confidentiality is not, in and of itself, a sufficient basis for a claim of exemption under paragraph 20(1)(*b*) of the ATIA.

[85] That said, a statutory guarantee of confidentiality (or privilege) can serve the more limited function of providing an objective basis for a belief that the information in question will be held in confidence. Where a statute requires the disclosure to a federal regulator of sensitive commercial information and provides assurances of confidentiality, it would be perverse to hold that the legislator did not intend the person or entity providing the information to rely upon those assurances. Parliament does not deal with Canadians in bad faith.

Conclusion

[86] The appeal should be allowed and the decision to disclose the Final Report remitted to the Commission with a direction that it disposes of that request on the basis that the Final Report contains confidential commercial information which is treated consistently in a confidential manner by the CIBC as provided in paragraph 20(1)(*b*) of the ATIA. The CIBC is entitled to its costs in this Court and in the Federal Court. The CBA will bear its own costs.

"J.D. Denis Pelletier"

J.A.

"I agree
Robert Décary J.A."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-202-06

APPEAL FROM A JUDGMENT OR ORDER OF THE HONOURABLE JUSTICE BLANCHARD DATED APRIL, 24, 2006, NO. T-1941-04

STYLE OF CAUSE:
CANADIAN IMPERIAL BANK OF COMMERCE and CHIEF COMMISSIONER, CANADIAN HUMAN RIGHTS COMMISSION and CANADIAN BANKERS ASSOCIATION

PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 30, 2007
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	DÉCARY J.A. NADON J.A.
DATED:	August 27, 2007

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