

## Privacy and Property: The Supreme Court clarifies the limits of *PIPEDA*

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The Supreme Court of Canada has recently released a decision that will help clarify the relationship between legitimate business concerns and the privacy interests of individuals. In *Royal Bank of Canada v Trang*<sup>1</sup> (“*Trang*”), the Supreme Court removed a number of hurdles that judgment creditors often face when attempting to execute against a judgment debtor’s real property. Whereas a judgment creditor was previously required to obtain a debtor’s consent or a court order before obtaining a mortgage discharge statement (a prerequisite to a sheriff’s sale), the *Trang* decision allows the same creditor to obtain the debtor’s implied consent simply by filing a writ of seizure and sale with the sheriff. At a broader level, *Trang* makes clear that individuals cannot hide behind the *Personal Information Protection and Electronic Documents Act*<sup>2</sup> (“*PIPEDA*”) to escape their legal obligations.

The facts in *Trang* are relatively straightforward. Royal Bank of Canada was a judgment creditor of the Trangs, who owned property that was subject to a mortgage held by Scotiabank. Pursuant to their judgment, RBC filed a writ of seizure and sale against the property. However, when RBC attempted to undertake a sheriff’s sale, the sheriff declined to sell the property without first obtaining a mortgage discharge statement from Scotiabank, as required by the *Execution Act*.<sup>3</sup> Scotiabank refused to provide the mortgage discharge statement, asserting that *PIPEDA* precluded it from doing so without the Trangs’ consent.

At the Ontario Court of Appeal, the majority of a five-judge panel agreed with Scotiabank, concluding that a mortgage discharge statement is “personal information” that is protected from non-consensual disclosure under *PIPEDA*. Relying on its earlier reasoning in *Citi Cards Canada Inc. v Pleasance*,<sup>4</sup> the Court of Appeal maintained that RBC’s request for the Trangs’ financial information did not fit cleanly into any of the exceptions to the consent requirements contained in *PIPEDA*.

The Supreme Court disagreed, opting for a commercially sensible result that prioritizes legitimate business concerns. Writing for a unanimous court, Justice Côté held that RBC was entitled to receive a discharge statement from Scotiabank for two reasons. First, Justice Côté concluded that *PIPEDA* was not intended to interfere with the court’s inherent jurisdiction to order the disclosure of financial information, including mortgage discharge statements, to facilitate debt repayment. The court relaxed the strict requirement that a creditor seeking financial disclosure must demonstrate certain difficulties in enforcing its judgment, noting that a creditor “should not be required to undergo a cumbersome and costly procedure to

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<sup>1</sup> 2016 SCC 50.

<sup>2</sup> SC 2000, c 5.

<sup>3</sup> RSO 1990, c E-24.

<sup>4</sup> 2011 ONCA 3.

realize its debt”.<sup>5</sup> As a result, judgment debtors who fail to attend an examination or refuse to consent to the disclosure of a mortgage discharge statement will be deemed sufficiently “difficult”, thereby entitling creditors to an order for disclosure, notwithstanding the potential barriers imposed by *PIPEDA*.

Second, and perhaps more importantly, after a contextual analysis of the information contained within mortgage discharge statements, Justice Côté reasoned that judgment debtors provide their “implied consent” consent to its disclosure under certain circumstances. Consequently, the need to obtain an order for disclosure will occur sparingly, as implied consent provides a sufficient basis for the disclosure of the discharge statement. As most of the information relating to the mortgage is already publicly registered on title, the court held that the contents of a mortgage discharge statement should be considered “less sensitive” than other forms of financial information.

The court also held that a “reasonable [mortgagor] expects that a creditor will be able to obtain the information necessary to realize its legal rights.”<sup>6</sup> Interestingly, the court concluded that the legitimate business interests of others (in this case, RBC) were a relevant part of the context that informed the reasonable expectations of the mortgagor.

*Trang*’s emphasis on context when determining whether consent is implied should be of general assistance to commercial entities seeking disclosure of “less sensitive” forms of information. At a minimum, *Trang* will require future privacy assessments to consider more than just the interests of the individual seeking protection under *PIPEDA*. Using broad language, Justice Côté writes:

*In my view, when determining the reasonable expectations of the individual, the whole context is important ... to do otherwise would unduly prioritize privacy interests over the legitimate business concerns that PIPEDA was also designed to reflect...*<sup>7</sup>

While the implications of these global statements are still uncertain, the effects of *Trang* will undoubtedly be welcomed by judgment creditors. Just as the *Personal Property Security Act*<sup>8</sup> provides judgment creditors with the ability to obtain account information from secured parties, a judgment creditor is now able to directly obtain the discharge statement from the mortgagee without the express consent of the debtor. In the past, creditors seeking to enforce a writ against mortgaged real property have been required to locate and serve the debtor with a notice of examination in aid of execution, force their attendance at the examination, and compel the disclosure of a discharge statement by obtaining a court order against either the debtor or the mortgagee. However, the Supreme Court has made it clear

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<sup>5</sup> *Supra*, note 1 at para 32.

<sup>6</sup> *Supra*, note 1 at para 48.

<sup>7</sup> *Supra*, note 1 at para 44.

<sup>8</sup> RSO 1990, c. P-10, s 18.

that filing a writ of seizure and sale with the sheriff is now sufficient to trigger a mortgagor's implied consent to the disclosure of a mortgage discharge statement.

While *Trang* provides a principled justification for the disclosure of a mortgagor's personal information, a prudent lender might nonetheless wish to obtain a borrower's express consent to the disclosure of certain financial information as a term of the standard mortgage agreement. This preventive step may assist in avoiding the expense and trouble associated with legal proceedings commenced under *PIPEDA* or, as was the case in *Trang*, motions to compel the disclosure of private financial information.