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The Supreme Court of Canada Rules on When Lenders May Share Personal Information Without Violating Federal Privacy Legislation

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Introduction: Privacy Legislation and Secured Lenders

Privacy legislation, exemplified in Canada by the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), has been passed in one form or another in almost every jurisdiction in the developed world. In Canada, the Courts have held that PIPEDA aims to achieve the legitimate purpose of protecting the private, personal information of individual consumers, when such information is gathered by organizations in the course of commercial activities.

It has never been totally clear, however, just how privacy legislation dovetails with the day-to-day world of banking and secured lending, in which personal private information of borrowers is shared between lenders many thousands of times every day. The lack of harmonization between privacy legislation and established banking practice is particularly evident when creditors are required to enforce their *in rem* rights against real property. **A common complaint of bankers and lenders is that PIPEDA can create major headaches and lead to costly, negative and unintended consequences when loans have to be enforced against borrowers.**

In the recent case of *Royal Bank of Canada v. Trang*, the Supreme Court of Canada dealt with one such unintended consequence. In *Trang*, the Supreme Court of Canada changed the existing law in Ontario, gave direction to the courts throughout Canada and provided guidance to bankers and lenders in dealing with requests for information from fellow creditors. **The most immediate significance of this case is that the Supreme Court has held that a creditor may, without violating PIPEDA, share certain information with other creditors on request, when that information is reasonably required by the other creditor in order to enforce its rights against the property (in this case, real property) of the**

debtor. The Court provides valuable guidance as to the circumstances in which such information may be shared.

Perhaps more interestingly, the Court goes on to make a number of statements that may signal a new (or, perhaps, a reminder of an older) approach in the way Courts deal with commercial disputes. Specifically, **the Court agreed with the dissenting judge at the Ontario Court of Appeal, Justice Hoy, in criticizing interpretations of the law that lead to overly-formalistic results that do not accord with common sense and commercial reasonableness.** These statements, although pitched at a high level of generality, may be used in future cases as evidence of the general direction of the Courts in this type of case.

The Issues Raised by PIPEDA in a Lending Context

The types of problems that can, and, as *Trang* illustrates, frequently do occur in this context are not difficult to imagine. For example:

- As was the case in *Trang*, where a creditor obtains a Court-issued judgment for possession of the property and has requisitioned the relevant court officials (in Ontario, the local county sheriff's office) to take possession of the property, is the first mortgage-holder prevented by PIPEDA from sharing with the judgment creditor information that is required by the sherriff in order to enforce the judgment?
- If a lender wants to advance a second mortgage loan to a borrower and wants to know the balance of the existing first mortgage, can this be disclosed by the first mortgagee to the second mortgagee directly, without violating privacy legislation?
- Can a mortgagee who has sold a property under power of sale and now needs to pay out the indebtedness owing to the first mortgagee obtain the outstanding balance, annual interest rate, costs incurred, and per diem interest in respect of the first mortgage? Do statutory provisions that permit or require disclosure under mortgage law statutes create an exemption under PIPEDA for permitted disclosure "as required by law"?

What's the Big Deal? Don't All Loan Agreements Today Contain "Consent to Disclosure" Clauses?

Most banking and loan arrangements today contain express written "consent to disclosure" clauses, pursuant to which borrowers agree, at the time they apply for the loan, to this type of disclosure. The question that arises is whether these clauses are worded broadly enough to encompass every conceivable situation in which disclosure of personal information may be requested. In addition, relying on fine-print clauses that may not have been drawn to the debtor's attention when the documents were signed, which is often many years ago, is not typically the preferred option for any lender or litigator.

Also, as *Trang* shows, many existing loan agreements relating to loans advanced prior to the advent of privacy laws do not contain these consent provisions.

The Facts in *Trang*

In April, 2008, RBC lent the Trangs approximately $35,000. The Trangs defaulted on the loan and in 2010, RBC obtained a judgment against the Trangs.

The Trangs owned property in Toronto. Scotiabank held the first mortgage on the property, in the face amount of $262,500. In order to collect on its judgment, RBC filed a writ of seizure and sale with the sheriff in Toronto, which permits the sheriff to sell the Trangs' property pursuant to the *Execution Act*.

The sheriff, however, refused to sell the property without first obtaining a mortgage discharge statement from Scotiabank. The mortgage discharge statement was necessary for the sheriff to know Scotiabank's interest in the property, and to ascertain the rights as between Scotiabank and RBC.

In an attempt to obtain the mortgage discharge statement, RBC served the Trangs with multiple notices of examination in aid of execution. The Trangs did not appear. RBC also requested a mortgage discharge statement from Scotiabank. Scotiabank refused to provide the statement on the basis that PIPEDA precluded it from doing so without the Trangs' consent. RBC sought an order compelling Scotiabank to

produce the mortgage discharge statement.

A Quick Word About PIPEDA

PIPEDA is a federal stature that governs the collection, use and disclosure of personal information by organizations in the course of commercial activities. PIPEDA prevents organizations from disclosing personal information without the knowledge and consent of the affected individual, which, significantly, can be implied. The *Act* contains specific definitions of what constitutes "personal information", as well as a number of exceptions in which personal information can be disclosed in certain circumstances.

The Court accepted that the balance owing and other details surrounding the Trangs' mortgage with Soctiabank constituted personal information for purposes of the statute. The issue before the Court was whether the requested disclosure fit into one or both of two exceptions contained in PIPEDA, namely: (a) whether the Trangs had impliedly consented to disclosure of their personal information when they took out the loan from RBC; or (b) whether the disclosure was permitted by a specific exception set out in PIPEDA regarding disclosure when ordered by a Court or otherwise permitted by law.

It should be noted that the loan documentation executed by the Trangs in connection with both the RBC loan and the Scotiabank mortgage did not contain a consent to disclosure of personal information. RBC was forced to argue that the Trangs had given implied consent, or that the disclosure was required by a court order, or otherwise permitted by law.

How the Courts Have Handled this Issue in the Past

The first judge to hear the case denied RBC's motion. The judge observed that the sharing of mortgage discharge statements between banks in these circumstances was formerly commonplace, and he questioned whether Parliament intended to protect debtors by preventing judgment creditors from realizing on their Court judgments. Nonetheless, the judge felt bound by an earlier 2011 Court of Appeal decision, *Citi Cards Canada Inc. v. Pleasance*. In *Citi Cards*, a creditor similarly sought disclosure of mortgage discharge statements from mortgagees in order to enforce a judgment through a sheriff's sale of the debtor's home. The Court of Appeal in *Citi Cards* held that a mortgage discharge statement was "personal information" for the purposes of PIPEDA and that none of the exceptions in the *Act* applied.

On appeal, the majority of the Court of Appeal upheld the motion judge's decision and declined to overrule *Citi Cards*. The majority concluded that a mortgage discharge statement is "personal information" for the purposes of PIPEDA, and that the Trangs did not impliedly consent to disclosure of the mortgage discharge statement.

The majority observed that RBC could have obtained the mortgage discharge information it sought in several ways that would have complied with PIPEDA. First, RBC could have obtained the Trangs' consent to disclosure by a term in its loan agreement. Second, RBC could apply under the Ontario *Rules of Civil Procedure* for an order for the examination under oath of a representative of Scotiabank. Scotiabank would be required to bring the mortgage discharge statement to the examination. Such an order would satisfy the exemption in PIPEDA because it would be made on the basis of a separate authority, namely the *Rules of Civil Procedure* which would not cause the "circular" reasoning described in *Citi Cards*.

The assumption underlying the reasoning of the majority at the Court of Appeal was that when there is a choice of legal avenues open to a creditor to pursue its rights against a borrower, the creditor is bound to utilize avenues of recovery that are compliant with PIPEDA, notwithstanding that those avenues of recovery may be more expensive and time consuming than simply requesting the information from a fellow creditor. This aspect of the case was perhaps the most controversial and attracted considerable criticism from various commentators.

The Supreme Court's Decision

In a judgment concurred-in by a full nine-judge panel of the Supreme Court of Canada, the Court

overturned the decision of the Ontario of Appeal and found that the order sought by RBC constitutes an "order made by a court" under PIPEDA. The Court ordered that Scotiabank disclose the mortgage discharge statement to RBC. The Supreme Court overruled the Court of Appeal's decision in *Citi Cards*.

The Court agreed that financial information is generally extremely sensitive; it is one of the types of private information that falls at the heart of a person's "biographical core". However, the degree of sensitivity of specific financial information is a contextual determination. The sensitivity of financial information, here the current balance of a mortgage, must be assessed in the context of the related financial information already in the public domain, the purpose served by making the related information public, and the nature of the relationship between the mortgagor, mortgagee, and directly affected third parties. When mortgages are registered electronically on title, the principal amount of the mortgage, the rate of interest, the payment periods and the due date are made publicly available.

The Court observed, as had the courts below, that a mortgage discharge statement "is not something that is merely a private matter between the mortgagee and mortgagor, but rather is something on which the rights of others depends, and accordingly is something they have a right to know". In other words, the legitimate business interests of other creditors are a relevant part of the context which informs the reasonable expectations of the mortgagor.

The more intriguing statements made by the Court related to the reasonable expectations of borrowers and lenders, and the rule of the Court in enforcing those expectations. For example, the Court held that a reasonable person borrowing money knows that, if he or she defaults on a loan, his or her creditor will be entitled to recover the debt against his or her assets. It follows that a reasonable person expects that a creditor will be able to obtain the information necessary to realize on its legal rights. From the opposite perspective, it would be unreasonable for a borrower to expect that as long as he or she refused to provide the information, a creditor would never be able to recover the debt.

At the end of the day, it is not exactly clear how far the principles set out in this case extend. Would the same principles apply in a situation where a borrower is applying for a second mortgage? Obviously, the potential new lender, even before it has made the loan will seek to obtain information regarding the relationship between the borrower and the existing first mortgagee. Could it be argued, based on the comments made by the Supreme Court of Canada in *Trang*, that any borrower applying for a loan cannot reasonably expect that the lender will not communicate with, and request information from, existing creditors, in order to assess risk, value, etc. and therefore express consent (although obviously prudent to obtain) is unnecessary?

It can be argued that the Supreme Court is making clear that commercial cases should always be interpreted in the context of the legitimate and objective expectations of reasonable commercial parties in the same circumstances. To be sure, these are not new ideas, and this is not the first time a Court has encouraged this approach. Nonetheless, *Trang* represents a potentially-important case in Canadian commercial law. As the dissenting judge at the Court of Appeal, Justice Hoy said, and the Supreme Court agreed: "overly formalistic and artificial interpretations of the law…and a legal system which is unnecessarily complex and rule-focused is antithetical to access to justice". **It remains to be seen whether this signals a new direction in which the interests of all litigants will be interpreted to include the interest of "big bad banks" and other lenders to obtain timely and cost effective loan enforcement.**