# Supreme Court of Canada Rules on Production of Discharge Statements and Privacy Implications

**November 23, 2016**

The Supreme Court of Canada's decision in *Royal Bank of Canada v. Trang*, ("*Trang*") reviewed the obligations of financial institutions to preserve personal information and clarified when disclosure of personal information without consent will be permitted.

## Background

In April 2008, the Royal Bank of Canada ("RBC") loaned Phat and Phuong Trang approximately $35,000. The Trangs defaulted on the loan, and RBC obtained a judgment against them. RBC filed a writ of seizure and sale with the sheriff in order to collect. The sheriff refused to sell the Trang's property without first obtaining a mortgage discharge statement from Scotiabank, which held the first mortgage on the property. Scotiabank took the position that they could not produce the statement without the consent of the Trangs, as it contained their personal information protected under the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). The Court of Appeal for Ontario agreed that the discharge statement contained personal information and could not be disclosed without consent. According to the Court of Appeal, lenders in the position of RBC would either have to obtain consent to disclosure as a term of their loan agreements, or return to court and apply for a separate order under rule 60.18(6)(a) of the *Rules of Civil Procedure* to examine a representative of the mortgagor.

## SCC Decision

The Supreme Court reversed this result, and ordered Scotiabank to produce the mortgage discharge statement to RBC. The Court reached this result on two separate grounds. First, the Court held that an order sought by a judgment creditor constitutes an "order made by a court" pursuant to s. 7(3)(c) of PIPEDA, and that such an order permitted Scotiabank to produce the discharge statement without the consent of the parties. The Court concluded that it would be "overly formalistic and detrimental to access to justice" to find otherwise and insist that RBC return to court in a second proceeding to obtain the discharge statement. Where a party has obtained a judgment

in their favour, an order requiring disclosure can be made if the debtor either fails to respond to a written request that they sign a form consenting to the provision of the mortgage discharge statement to the creditor, or fails to attend a single judgment debtor exam.

A creditor who has obtained a judgment, filed a writ of seizure and sale, and completed one of these two steps has proven its claim and provided adequate notice of its intention to realize.

Second, the Supreme Court accepted that the Trangs impliedly consented to the disclosure of the mortgage discharge statement. Justice Côté adopted a contextual and purposive approach that considered the reasonable expectations of the parties. The Court considered that the full amount of the mortgage, as well as the interest rate and payment periods, were already registered electronically on title in the public domain. Its public availability rendered this financial information less sensitive. It was also relevant that RBC sought the information to exercise an established legal right, and not merely out of curiosity. As well, the Supreme Court accepted that "a reasonable person expects that a creditor will be able to obtain the information necessary to realize on its legal rights." Weighing these contextual factors, they concluded that the Trangs impliedly consented to disclosure of the discharge statement when they mortgaged the property.

# Implications of the Decision

This decision has considerable implications for creditors and third party lenders. There is a strong suggestion that debtors should not be able to use data protection laws (such as PIPEDA) to frustrate the ability of creditors to realize amounts owing. Organizations will be able to disclose information provided that the context of the transactions, the sensitivity of the information, and the reasonable and legitimate interests of all involved parties support the existence of implied consent.

This result may also streamline the process of execution and realization of debts as creditors may be able to obtain necessary information from third parties, such as discharge statements, without re-attending court to obtain separate orders. Overall, this Supreme Court holding should facilitate the collection of debts by successful judgment creditors, who now have a more practical and less expensive path to enforcement.

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