

Update: Enforcing Judgments through the Sheriff's Sale Process – The Supreme Court of Canada Weighs In

Last year, we published an article discussing a major impediment that creditors face when attempting to enforce their judgments through the sale of a debtor's real property. Namely, mortgagees refuse to provide a discharge statement required by sheriffs to sell a debtor's real property without the debtor's consent because the discharge statement has been treated as "personal information" under the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). A review of cases in Ontario revealed an unsettled line of authorities that have left uncertainty regarding the approach to be taken in such cases.

Luckily (for judgment creditors), the Supreme Court of Canada granted leave to appeal the Ontario Court of Appeal's decision in *Royal Bank of Canada v Trang* ("Trang"), setting the stage for clarification on the proper approach to dealing with the privacy impediment of obtaining mortgage discharge statements when enforcing judgments.

The Definitive Answer: The Supreme Court of Canada's ruling in *Royal Bank of Canada v Trang*

In a unanimous decision, the Supreme Court of Canada allowed RBC's appeal and ordered Scotiabank to produce the mortgage discharge statement. More importantly, the Supreme Court set forth two bases for allowing the appeal and thus provided clarity to the issue of obtaining mortgage discharge statements to enforce judgments through the sale of a debtor's real property.

1. An order to produce a mortgage discharge statement constitutes an "order made by a court" under Section 7(3)(c) of PIPEDA.

PIPEDA governs the collection, use and disclosure of personal information by organizations during commercial activities. Under PIPEDA, an individual's consent is required to collect personal information and to subsequently use or disclose such information. Nonetheless, Section 7(3) contains exceptions for which an individual's consent is not required. One of these exceptions is found in Section 7(3)(c), which allows consent to be overridden if disclosure is required under "an order made by a court."

Upon analyzing Section 7(3), the Supreme Court found that the order sought by RBC constitutes an "order made by a court" and thus ordered that Scotiabank disclose the mortgage discharge statement to RBC.

The Supreme Court went on to state that such an order could (and should) have been granted to RBC either through the inherent jurisdiction of the court to order disclosure or under Rule 60.18(6) of the *Rules of Civil Procedure* (the "Rules"). Rule 60.18(6) is to

be applied less cautiously when a mortgagee is being examined to obtain a mortgage discharge statement. Moreover, the Supreme Court stated that a mortgagee is not a stranger to the litigation because it too has an interest in the property at issue.

A court can order the disclosure of a mortgage discharge statement under Rule 60.18(6) if either: (a) the debtor does not respond to a written request that he/she sign a form consenting to disclose the mortgage discharge statement to the judgment creditor; or (b) the debtor fails to attend a judgment debtor examination. A judgment creditor who files a writ of seizure and sale, completes any of the above-mentioned two steps, and provides notice is entitled to an order for disclosure as long as the creditor serves the debtor with the motion to obtain such disclosure.

2. The Trangs impliedly consented to the disclosure of the mortgage discharge statement because the information contained therein was "less sensitive".

PIPEDA provides that consent for disclosure for the purposes of the statute may be implied where the information is "less sensitive". The Supreme Court stated that although financial information is usually very sensitive, the degree of sensitivity is a contextual determination. With respect to mortgage discharge statements, the principal amount of the mortgage, interest rate, payment periods, and due date are made publicly available for mortgages electronically registered on title. The public nature of such information, along with the fact that the state of account between the mortgagee and mortgagor also impacts other creditors, led the Supreme Court to conclude that the information at issue is less sensitive than other financial information.

Further, the Supreme Court analyzed the reasonable expectations of a mortgagor in such contexts and concluded that a reasonable mortgagor is aware that:

- (a) financial details of their mortgage are publicly on title;
- (b) default on a debt may lead to a judgment enabling the sheriff to seize and sell the mortgaged property;

- (c) a judgment creditor has a right to obtain disclosure of a mortgage discharge statement via motion or examination;
- (d) a default entitles the creditor to recover the debt against the debtor's assets; and
- (e) a creditor is able to obtain the information required to realize on his/her legal rights.

The Supreme Court also noted that another aspect of the relevant context is the identity of the party seeking disclosure and the reason for doing so. More specifically, disclosure to someone who needs the information to exercise an established legal right is different from someone seeking disclosure due to curiosity or for nefarious purposes.

So, What Steps Should a Creditor Take?

In light of the Supreme Court's decision in *Trang*, a creditor who wishes to realize on his/her debt through the sale of the debtor's real property should:

1. Obtain a judgment against the debtor;
2. File a writ of seizure and sale with the sheriff of the district where the property is located;
3. Prove his/her claim and provide notice by completing at least one of the following:

- i. Send to the debtor a written request that he/she sign a form consenting to the provision of the mortgage discharge statement to the judgment creditor; or
 - ii. Serve the debtor with a notice of examination in aid of execution;
4. If the debtor fails to respond to the written request or fails to attend a single judgment debtor examination, serve the debtor with a motion to obtain disclosure of the mortgage discharge statement and file it with the court; and
 5. Obtain from the court an order for disclosure of the mortgage discharge statement and serve it on the mortgagee who will then be obligated to disclose the statement sought.

A Noteworthy Limitation

As a caution, organizations should be reluctant to consider the Supreme Court's decision in *Trang* to apply to *any* situation in which a legal right is asserted to private information. In other words, *Trang* deals with a specific legal issue in a particular context and should not be taken by organizations caught under *PIPEDA* to have lightened their duties to protect individuals' personal information.



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