



**SUPREME COURT OF CANADA**

**CITATION:** Royal Bank of Canada v. Trang, 2016  
SCC 50

**APPEAL HEARD:** April 27, 2016  
**JUDGMENT RENDERED:** November 17, 2016  
**DOCKET:** 36296

**BETWEEN:**

**Royal Bank of Canada**  
Appellant

and

**Phat Trang, Phuong Trang a.k.a.**  
**Phuong Thi Trang and Bank of Nova Scotia**  
Respondents

**CORAM:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner,  
Gascon, Côté and Brown JJ.

**REASONS FOR JUDGMENT:** Côté J. (McLachlin C.J. and Abella, Cromwell, Moldaver,  
(paras. 1 to 52) Karakatsanis, Wagner, Gascon and Brown JJ. concurring)

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ROYAL BANK OF CANADA v. TRANG

**Royal Bank of Canada**

*Appellant*

v.

**Phat Trang, Phuong Trang a.k.a. Phuong Thi Trang and  
Bank of Nova Scotia**

*Respondents*

**Indexed as: Royal Bank of Canada v. Trang**

**2016 SCC 50**

File No.: 36296.

2016: April 27; 2016: November 17.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner,  
Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Privacy — Disclosure of personal information — Disclosure without  
knowledge or consent — Exceptions — Compliance with court order — Implied  
consent — Judgment creditor sought to enforce judgment obtained against debtors by  
selling their home — Sherriff refused to sell house without mortgage discharge*

*statement from mortgagee — Mortgagee refused to produce discharge statement on ground that Personal Information Protection and Electronic Documents Act precluded disclosure — Whether Act precludes mortgagee from disclosing mortgage discharge statement to judgment creditor without mortgagor/debtor’s consent — Whether order sought by judgment creditor constitutes “order made by a court” pursuant to s. 7(3)(c) of Act — Whether debtors impliedly consented to disclosure of mortgage discharge statement — Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, s. 7(3)(c), schedule 1, cl. 4.3.6.*

The Royal Bank of Canada (“RBC”) is a judgment creditor of Phat and Phuong Trang (“debtors”) and seeks a sheriff’s sale of the debtors’ property, for which the sheriff requires a mortgage discharge statement. RBC has been unable to obtain the statement from the debtors and thus brought a motion to compel the Bank of Nova Scotia (“Scotiabank”), the debtors’ mortgagee, to produce the mortgage discharge statement. RBC’s motion was dismissed and the majority of the Court of Appeal upheld the motion judge’s decision.

*Held:* The appeal should be allowed. Scotiabank is ordered to produce the mortgage discharge statement to RBC.

The *Personal Information Protection and Electronic Documents Act* (“*PIPEDA*”) governs the collection, use and disclosure of personal information by organizations in the course of commercial activities. In general, *PIPEDA* prohibits organizations from disclosing personal information without the knowledge and

consent of the affected individual. There are a number of exceptions for which the requirement for knowledge and consent are not necessary for disclosure including where disclosure is “required to comply with . . . an order made by a court” (s. 7(3)(c)).

An order requiring disclosure can be made by a court if either the debtor fails to respond to a written request that he or she sign a form consenting to the provision of the mortgage discharge statement to the creditor, or fails to attend a single judgment debtor examination. A creditor who has already obtained a judgment, filed a writ of seizure and sale, and completed one of the two above-mentioned steps has proven its claim and provided notice. Provided the judgment creditor serves the debtor with the motion to obtain disclosure, the creditor should be entitled to an order for disclosure. A judgment creditor in such a situation should not be required to undergo a cumbersome and costly procedure to realize its debt.

In this case, the order sought by RBC constitutes an “order made by a court” under s. 7(3)(c) of *PIPEDA* and Scotiabank should be ordered to disclose the mortgage discharge statement to RBC. *PIPEDA* does not interfere with the court’s ability to make orders. The motion judge had the power under either the Ontario *Rules of Civil Procedure* or the inherent jurisdiction of the court to order disclosure. The mere fact that the relevant rule number was not pled is not fatal here. It would be overly formalistic and detrimental to access to justice to conclude that RBC must make yet another application, this time specifying the particular rule of procedure, to

obtain the order it seeks. It is clear that this is a case in which it was appropriate to make an order for disclosure.

Furthermore, schedule 1, cl. 4.3.6 of *PIPEDA* acknowledges that consent to disclosure for the purposes of the statute can be implied when the information is “less sensitive”. The sensitivity of financial information 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. The legitimate business interests of other creditors are a relevant part of the context which informs the reasonable expectations of the mortgagor. Also relevant is the identity of the party seeking disclosure and its purpose for doing so. 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. The current balance of a mortgage is a snapshot at a point in time in the life of a publicly disclosed mortgage. The state of account between a mortgagor and mortgagee affects more than just the relationship between them — it also affects other creditors. In the context at bar, the information at issue is less sensitive than other financial information. A reasonable mortgagor would be aware that the financial details of their mortgage were publicly registered on title, and that default on a debt could result in a judgment empowering the sheriff to seize and sell the mortgaged property. A reasonable mortgagor would know that a judgment creditor in such circumstances has a legal right to obtain disclosure of the mortgage

discharge statement through examination or by bringing a motion. A reasonable person borrowing money knows that if he defaults on a loan, his creditor will be entitled to recover the debt against his assets. It follows that a reasonable person expects that a creditor will be able to obtain the information necessary to realize on his legal rights.

In the present case, RBC in obtaining a writ of seizure and sale, and filing it with the sheriff, makes operational the consent to disclosure given by the debtors concurrent with their giving a mortgage to Scotiabank. Consent for the purpose of assisting a sheriff in executing a writ of seizure and sale was implicitly given at the time the mortgage was given. Here, the debtors consented to disclosure. As a result, Scotiabank is not precluded by *PIPEDA* from disclosing the mortgage discharge statement to RBC.

### **Cases Cited**

**Overruled:** *Citi Cards Canada Inc. v. Pleasance*, 2011 ONCA 3, 103 O.R. (3d) 241; **referred to:** *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Toronto (City) (Re)*, 2000 CanLII 21004; *Barker v. Leeson* (1882), 1 O.R. 114; *Grand Trunk Pacific Railway Co. v. Dearborn* (1919), 58 S.C.R. 315; *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461; *PIPEDA Report of Findings No. 2014-013, Re*, 2014 CarswellNat 6605 (WL Can.); *PIPEDA Case Summary No. 2009-003, Re*, 2009 CarswellNat 6206 (WL Can.); *PIPEDA Case Summary No. 311, Re*, 2005 CarswellNat 6734 (WL Can.).

## **Statutes and Regulations Cited**

*Execution Act*, R.S.O. 1990, c. E.24, ss. 2(2), 9(1), 28(3).

*Land Registration Reform Act*, R.S.O. 1990, c. L.4, s. 3(1).

O. Reg. 19/99, s. 6.

O. Reg. 657/05, s. 1(2) [am. 289/15, s. 1].

*Personal Information Protection and Electronic Documents Act*, S.C. 2000 c. 5, Part 1, ss. 3, 4(1)(a), 5(1), 7(3), Sch. 1, cls. 4.3, 4.3.1, 4.3.2, 4.3.5, 4.3.6.

R.R.O. 1990, Reg. 688, s. 2(2).

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rr. 34.10, 60.18(6).

## **Authors Cited**

Austin, Lisa M. “Reviewing PIPEDA: Control, Privacy and the Limits of Fair Information Practices” (2006), 44 *Can. Bus. L.J.* 21.

Charnetski, William, Patrick Flaherty and Jeremy Robinson. *The Personal Information Protection and Electronic Documents Act: A Comprehensive Guide*. Aurora, Ont.: Canada Law Book, 2001.

APPEAL from a judgment of the Ontario Court of Appeal (Hoy A.C.J.O. and Laskin, Sharpe, Cronk and Blair JJ.A.), 2014 ONCA 883, 123 O.R. (3d) 401, 379 D.L.R. (4th) 601, 327 O.A.C. 199, [2014] O.J. No. 5873 (QL), 2014 CarswellOnt 17254 (WL Can.), affirming a decision of Gray J., 2013 ONSC 4198, [2013] O.J. No. 2806 (QL), 2013 CarswellOnt 8164 (WL Can.). Appeal allowed.

*Peter W. Hogg, Q.C., Catherine Beagan Flood, Pamela Huff and Nickolas Tzoulas, for the appellant.*

No one appeared for the respondents.

*Barbara McIsaac, Q.C., and Kate Wilson, for the amicus curiae.*

The judgment of the Court was delivered by

CÔTÉ J. —

[1] This appeal raises the issue of the proper interpretation of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“*PIPEDA*”). The Royal Bank of Canada (“RBC”) is a judgment creditor of Phat Trang and Phuong Trang (“the Trangs”) and seeks a sheriff’s sale of the Trangs’ property, for which the sheriff requires a mortgage discharge statement. RBC has been unable to obtain the statement from the Trangs and thus brought a motion to compel the Bank of Nova Scotia (“Scotiabank”), the Trangs’ mortgagee, to produce the mortgage discharge statement. The Trangs and Scotiabank are not involved in the present appeal, and counsel for the Privacy Commissioner of Canada (“Privacy Commissioner”) have been appointed *amicus curiae*.

[2] *PIPEDA* governs the collection, use and disclosure of personal information by organizations in the course of commercial activities (s. 4(1)(a)). In general, *PIPEDA* prohibits organizations from disclosing “personal information” without the knowledge and consent of the affected individual (see Sch. 1, cl. 4.3). There are a number of exceptions for which the requirement for knowledge and consent are not necessary for disclosure including where disclosure is “for the purpose of collecting a debt owed by the individual to the organization” (s. 7(3)(b)), “required to comply with . . . an order made by a court” (s. 7(3)(c)), or “required by law” (s. 7(3)(i)). At issue is whether, in light of *PIPEDA*, Scotiabank is precluded from disclosing the mortgage discharge statement to RBC without the Trangs’ consent.

[3] I would allow the appeal and order Scotiabank to produce the mortgage discharge statement to RBC. I find, as Hoy A.C.J.O. did, that there are two bases for allowing this appeal. First, disclosure is required to comply with an order made by a court. Second, the Trangs impliedly consented to disclosure in the circumstances of this case. While it is not essential to have both of these bases to dispose of the appeal, both are present in this case, and each one of them, on its own, would suffice to dispose of this case.

## I. Facts

[4] In April 2008, RBC loaned the Trangs approximately \$35,000. The Trangs defaulted on the loan and on December 17, 2010, RBC obtained a judgment against the Trangs for \$26,122.76 plus interest and costs.

[5] The Trangs own property in Toronto. Scotiabank holds the first mortgage on the property, which was initially for \$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*, R.S.O. 1990, c. E.24, s. 9(1):

9. (1) The sheriff to whom a writ of execution against lands is delivered for execution may seize and sell thereunder the lands of the execution debtor, including any lands whereof any other person is seized or possessed in trust for the execution debtor and including any interest of the execution debtor in lands held in joint tenancy.

[6] The sheriff, however, refused to sell the property without first obtaining a mortgage discharge statement from Scotiabank. Section 28(3) of the *Execution Act* provides that where land is subject to a mortgage, “[t]he equity of redemption in freehold land is saleable under an execution . . . subject to the mortgage”. In addition, s. 2(2) of the *Execution Act* states that “[t]he principal residence of a debtor is exempt from forced seizure or sale . . . if the value of the debtor’s equity . . . does not exceed the prescribed amount”. Although s. 2(2) of the *Execution Act* has been in force since October 25, 2010, the exemption amount (\$10,000) has only been prescribed since December 1, 2015 (O. Reg. 657/05, s. 1(2), am. O. Reg. 289/15, s. 1), and therefore does not apply in the present case. The mortgage discharge statement is necessary for

the sheriff to know Scotiabank's interest in the property, and to ascertain the rights as between Scotiabank and RBC.

[7] In an attempt to obtain the mortgage discharge statement, RBC served the Trangs with notices of examination in aid of execution, scheduled for April 5, 2011. The Trangs did not appear. On November 15, 2011, RBC requested the 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 then obtained an order for a second examination in aid of execution, scheduled for February 17, 2012. The Trangs again did not appear. In May 2012, RBC sought an order compelling Scotiabank to produce the mortgage discharge statement.

[8] The issue on appeal generally only arises when a prior mortgage is in good standing, but a subsequent mortgagee or judgment creditor seeks to sell the property. Where the prior mortgage is not in good standing, that mortgagee would take its own enforcement proceedings.

## II. Background Proceedings

A. *Ontario Superior Court of Justice, 2012 ONSC 3272, 92 C.B.R. (5th) 144*

[9] The motion judge denied RBC's motion on the basis that the Ontario Court of Appeal's decision in *Citi Cards Canada Inc. v. Pleasance*, 2011 ONCA 3,

103 O.R. (3d) 241, was binding, and prevented him from ordering Scotiabank to produce the mortgage discharge statement to RBC.

[10] 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 Ontario Court of Appeal held that a mortgage discharge statement was "personal information" for the purposes of *PIPEDA* and that none of the exceptions in s. 7(3) applied. Regarding the s. 7(3)(c) exception, where disclosure is required to comply with an order of the court, the Court of Appeal essentially concluded that it would be circular to find that s. 7(3)(c) was itself a source of authority to make an order for disclosure. The court further concluded that the s. 7(3)(i) exception, which applies when disclosure is "required by law", only applies when the organization (here Scotiabank) is required by law to disclose information, which it concluded was not the case.

[11] Following *Citi Cards*, the motion judge denied RBC's motion. In *obiter*, however, the judge questioned the result. He observed that provision 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.

B. *Court of Appeal for Ontario, 2012 ONCA 902, 97 C.B.R. (5th) 52*

[12] The Court of Appeal quashed the appeal of the first motion on the ground that the motion judge's order was interlocutory because it did not finally dispose of the question whether RBC could obtain an order compelling Scotiabank to provide the mortgage statement. It was determined that RBC could seek to examine a Scotiabank representative.

C. *Ontario Superior Court of Justice, 2013 ONSC 4198*

[13] On a second motion to compel Scotiabank to produce the mortgage statement, following RBC's unproductive examination of a Scotiabank representative, the same motion judge again dismissed the motion. The motion judge indicated that he remained of the view that *PIPEDA*, as interpreted in *Citi Cards*, prohibited the release of the requested information.

D. *Ontario Court of Appeal, 2014 ONCA 883, 123 O.R. (3d) 401*

(1) Majority Reasons (per Laskin J.A.)

[14] The majority of the Court of Appeal upheld the motion judge's decision on the second motion. It 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. It declined to overrule *Citi Cards* and observed that the exceptions for disclosure ordered by a court (under s. 7(3)(c)) and required by law (under s. 7(3)(i)) did not apply in this case.

[15] The majority observed that RBC could obtain the mortgage discharge statement in two ways. First, with foresight, RBC could have obtained the Trangs' consent to disclosure by a term in its loan agreement. Second, RBC could apply for a motion under rule 60.18(6)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to get an order for the examination of a representative of Scotiabank. Under rules 34.10(2)(b) and 34.10(3), Scotiabank would be required to bring the mortgage discharge statement to the examination. Such an order would satisfy the exemption in s. 7(3)(c) of *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*.

(2) Dissenting Reasons (per Hoy A.C.J.O.)

[16] Hoy A.C.J.O. would have allowed the appeal on two grounds. First, she would not require RBC to bring yet another motion to obtain disclosure of the statement. In her view, an order need not be sought under rule 60.18(6) to constitute “an order made by a court” within the meaning of s. 7(3)(c) of *PIPEDA*. Given that the effect of a motion under rule 60.18(6) is that the mortgagee is required to produce the discharge statement, it is immaterial whether the judgment creditor purports to move under that rule or (as here) simply asks the court for an order requiring disclosure. Further, Hoy A.C.J.O. held that where a party seeks an examination of a mortgagee under rule 60.18(6)(a) to obtain a discharge statement, a motion judge can

exercise less caution than for examinations of other persons for other purposes. She would have overruled *Citi Cards*.

[17] Second, Hoy A.C.J.O. concluded that the Trangs impliedly consented to disclosure because the mortgage discharge statement is “less sensitive” information under cl. 4.3.6 of Sch. 1 to *PIPEDA*, and a mortgagor would reasonably expect that his or her mortgagee would be entitled to provide a mortgage discharge statement in this case.

### III. Issues

[18] The issue on appeal is whether *PIPEDA* precludes a mortgagee, Scotiabank, from producing a mortgage discharge statement to a judgment creditor, RBC, without the mortgagor’s express consent. More specifically, the issues are as follows:

1. Does the order sought by RBC constitute an “order made by a court” under s. 7(3)(c) of *PIPEDA*?
2. Did the Trangs impliedly consent to disclosure of the mortgage discharge statement?

### IV. Submissions of the Parties

#### A. *RBC’s Submissions*

[19] RBC argues that the Trangs impliedly consented to disclosure since the mortgage discharge statement is “less sensitive” information, and the reasonable expectations of the Trangs cannot be properly assessed without considering who the recipient of the information is and the purpose for which they seek it. RBC further argues that the order it seeks against Scotiabank is an “order made by a court” under s. 7(3)(c) of *PIPEDA* since the court’s inherent jurisdiction allows it to order disclosure of the statement. RBC also argues that disclosure was “required by law” under s. 7(3)(i) of *PIPEDA*, and that disclosure is permitted because Scotiabank was “collecting a debt” under s. 7(3)(b).

B. *Privacy Commissioner’s Submissions*

[20] The Privacy Commissioner submits that the order sought by RBC does not meet the exception in s. 7(3)(c) of *PIPEDA*. While a creditor may bring a motion under rules 60.18(6) and 34.10 against the mortgagee to compel production, in the present case, RBC made no reference to rule 60.18(6)(a) in its motions seeking production of the discharge statement.

[21] The Privacy Commissioner further submits that the Trangs did not impliedly consent to disclosure. Mortgage discharge statements contain sensitive personal financial information. In addition, disclosure by the mortgagee to a judgment creditor is not within a mortgagor’s reasonable expectations, which are assessed based solely on the mortgagor-mortgagee relationship. The Privacy Commissioner

also contends that the disclosure was not “required by law” under s. 7(3)(i) of *PIPEDA*, and was not for the purpose of “collecting a debt” under s. 7(3)(b).

## V. Analysis

### A. *Overview*

[22] As already noted, *PIPEDA* is a federal statute that establishes rules governing the collection, use and disclosure of personal information by organizations in the course of commercial activities (s. 4(1)(a)). In brief, it is “consumer protection legislation for the digital economy” (W. Charnetski, P. Flaherty and J. Robinson, *The Personal Information Protection and Electronic Documents Act: A Comprehensive Guide* (2001), at p. 2). The purpose of Part 1 of *PIPEDA* (“Protection of Personal Information in the Private Sector”) is stated as follows in s. 3:

**3** The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

[23] Part 1 of *PIPEDA* applies to personal information that an organization “collects, uses or discloses in the course of commercial activities” (s. 4(1)(a)). Section 5(1) states that “every organization shall comply with the obligations set out in Schedule 1”, which sets out 10 key principles derived from the Canadian Standards

Association's *Model Code for the Protection of Personal Information* (see Charnetski, Flaherty and Robinson, at pp. 5-6). Clause 4.3 of Sch. 1 codifies the third principle, consent. Under cl. 4.3.1, the general rule is that "[c]onsent is required for the collection of personal information and the subsequent use or disclosure of this information", and cl. 4.3.2 states that "[t]he principle [of consent] requires 'knowledge and consent'." This third principle of informed consent is foundational to *PIPEDA*, and generally requires express consent. Yet, as I will explain, implied consent may be accepted in strictly defined circumstances.

[24] *PIPEDA* does not set out a blanket prohibition on disclosure without knowledge and consent. Section 7(3) of *PIPEDA* clearly provides a list of exceptions, for which knowledge and consent of the individual are not required for the disclosure of personal information:

**(3)** For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

...

**(b)** for the purpose of collecting a debt owed by the individual to the organization;

**(c)** required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

...

**(i)** required by law.

The full provision in force at the time is reproduced in an Appendix at the end of these reasons.

[25] As a result of s. 7(3), *PIPEDA* does not diminish the powers courts have to make orders, and does not interfere with rules of court relating to the production of records. In addition, *PIPEDA* does not interfere with disclosure that is for the purpose of collecting a debt owed by the individual to an organization, or disclosure that is required by law. In other words, the intention behind s. 7(3) is to ensure that legally required disclosures are not affected by *PIPEDA*.

B. *Does the Order Sought by RBC Constitute an “Order Made by a Court” Under Section 7(3)(c)*

[26] I find that the order sought by RBC constitutes an “order made by a court” under s. 7(3)(c), and I would order that Scotiabank disclose the mortgage discharge statement to RBC. An order made by a court requires disclosure, as recognized by the operation of s. 7(3)(c). This is in contrast, as we will see, with implied consent which results only in permission for a mortgagee to disclose the mortgage discharge statement.

[27] RBC and the Privacy Commissioner agree that it is possible for RBC to obtain an order for disclosure that meets the exception in s. 7(3)(c). The disagreement on this point is a procedural one, namely whether it was sufficient that RBC sought an order for disclosure by Scotiabank, or whether RBC had to have invoked

rule 60.18(6) of the *Rules of Civil Procedure* specifically. The relevant provisions of the *Rules of Civil Procedure* are as follows:

60.18 . . .

. . .

(6) Where any difficulty arises concerning the enforcement of an order, the court may,

(a) make an order for the examination of any person who the court is satisfied may have knowledge of the matters set out in subrule (2); . . .

34.10 . . .

(2) The person to be examined shall bring to the examination and produce for inspection,

. . .

(b) on any examination, including an examination for discovery, all documents and things in his or her possession, control or power that are not privileged and that the notice of examination or summons to witness requires the person to bring.

[28] The motion judge and majority of the Court of Appeal concluded that the order sought by RBC does not constitute an “order made by a court” under s. 7(3)(c) on the basis that it would be circular to find that Scotiabank is required to disclose a mortgage discharge statement on the basis that disclosure is required by an order not yet made. This follows from *Citi Cards* where Blair J.A. said:

The “order” requiring compliance, upon which Citi Cards relies, is the order sought on this application. It is circular to argue that the Banks are required to disclose the mortgage statements because disclosure is

required by an order not yet made. Even a liberal interpretation of the legislation cannot lead to such a pliant result. [para. 25]

[29] With respect, I reject this reasoning. I agree with Hoy A.C.J.O.'s reasoning at paras. 128-35 in support of her conclusion that *Citi Cards* should be overruled, and I would do so. As I discussed above, *PIPEDA* does not interfere with the court's ability to make orders. The motion judge had the power under either the *Rules of Civil Procedure* or the inherent jurisdiction of the court to order disclosure. Further, he would have ordered disclosure if he thought that he could, as Hoy A.C.J.O. recognized: “. . . had the motion judge thought he could order disclosure of the statement, it is clear from his reasons that he would have done so. It is also clear that it would have been appropriate to do so” (para. 112). I agree. An order could and should have been made.

[30] In this case, the mere fact that the rule number was not pled is not fatal. It would be overly formalistic and detrimental to access to justice to conclude that RBC must make yet another application, this time specifying rule 60.18(6)(a), to obtain the order it seeks. Again, I agree with Hoy A.C.J.O.: “. . . “any distinction between a motion brought under rule 60.18(6)(a) with the objective of obtaining a statement and any other motion brought, in accordance with the Rules of Civil Procedure, for the same purpose is artificial” since, in either case, the relief sought is substantively identical (para. 110; see also para. 96). Critically, she correctly pointed out:

It would fly in the face of increasing concerns about access to justice in Canada to dismiss this appeal and require RBC to bring yet another

motion. A legal system which is unnecessarily complex and rule-focused is antithetical to access to justice. RBC has brought two motions and made two trips to this court over a several year period — simply to discern how much remains outstanding on the Trang’s mortgage to enforce a valid judgment. [para. 113]

I add that not all litigants have the resources RBC has available, or are able to make multiple trips to court. Ensuring access to justice requires paying attention to the plight of all litigants.

[31] Further, it is clear that this is a case in which it was appropriate to make an order for disclosure. The majority of the Court of Appeal observed that a party seeking an order under rule 60.18(6) must demonstrate “difficulty” in enforcing its judgment, and that “courts should be reticent to require strangers to the litigation to appear on a motion” (para. 77). Hoy A.C.J.O. concluded, however, that rule 60.18(6)(a) can be applied less cautiously where a mortgagee is being examined in order to obtain a mortgage discharge statement. I agree. As Hoy A.C.J.O. noted, a mortgagee is not a stranger to the litigation in the sense that its interest in the property is at issue as well — the sheriff requires the mortgage discharge statement in part to settle the priority between mortgagees and creditors. Moreover, in practice, only the mortgagee can produce a mortgage discharge statement.

[32] I also agree with Hoy A.C.J.O. regarding the application of rule 60.18(6). I conclude that an order requiring disclosure can be made by a court in this context if either the debtor fails to respond to a written request that he or she sign a form consenting to the provision of the mortgage discharge statement to the creditor, or

fails to attend a single judgment debtor examination. A creditor who has already obtained a judgment, filed a writ of seizure and sale, and completed one of the two above-mentioned steps has proven its claim and provided notice. Provided the judgment creditor serves the debtor with the motion to obtain disclosure, the creditor should be entitled to an order for disclosure. A judgment creditor in such a situation should not be required to undergo a cumbersome and costly procedure to realize its debt. The foregoing is a sufficient basis to order Scotiabank to produce the statement to RBC, and I would so order. But there is more in the present case.

C. *Did the Trangs Impliedly Consent to Disclosure of the Mortgage Discharge Statement?*

[33] RBC argues that the Trangs impliedly consented to the disclosure of the mortgage discharge statement by Scotiabank to RBC. I agree.

[34] Schedule 1, cl. 4.3.6 of *PIPEDA* acknowledges that consent for the purposes of the statute can be implied consent when the information is “less sensitive”:

The way in which an organization seeks consent may vary, depending on the circumstances and the type of information collected. An organization should generally seek express consent when the information is likely to be considered sensitive. Implied consent would generally be appropriate when the information is less sensitive. Consent can also be given by an authorized representative (such as a legal guardian or a person having power of attorney).

In my view, Hoy A.C.J.O. correctly pointed out (at para. 117) that the court in *Citi Cards* should have considered cl. 4.3.6. Had it done so, as Hoy A.C.J.O. did and as I do here, *Citi Cards* may have been decided differently.

[35] Clause 4.3.5 of *PIPEDA* states that in obtaining consent, the reasonable expectations of the individuals are relevant:

In obtaining consent, the reasonable expectations of the individual are also relevant. For example, an individual buying a subscription to a magazine should reasonably expect that the organization, in addition to using the individual's name and address for mailing and billing purposes, would also contact the person to solicit the renewal of the subscription. In this case, the organization can assume that the individual's request constitutes consent for specific purposes. On the other hand, an individual would not reasonably expect that personal information given to a health-care professional would be given to a company selling health-care products, unless consent were obtained. Consent shall not be obtained through deception.

[36] In terms of sensitivity, I agree with the Privacy Commissioner that financial information is generally extremely sensitive. As this Court observed in *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, financial information is one of the types of private information that falls at the heart of a person's "biographical core" (paras. 47-48). 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. As the motion judge and Hoy A.C.J.O.

observed, 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 pursuant to the *Land Registration Reform Act*, R.S.O. 1990, c. L.4, s. 3(1); R.R.O. 1990, Reg. 688, s. 2(2); and O. Reg. 19/99, s. 6.

[37] The legislature decided to make this information available to the public, in part to allow creditors with a current or future interest in the land to make informed decisions. As the Office of the Information and Privacy Commissioner of Ontario observed in *Toronto (City)(Re)*, 2000 CanLII 21004:

The land registration system requires that all pertinent information be made available as a matter of public record, and the extent to which this represents an invasion of any individual's privacy, that result is justified and defensible. Transparency is integral to the public administration of the system, and has been incorporated into the statutory framework that regulates land registration in Ontario. Said another way, in implementing Ontario's land registration system, the Legislature has considered and debated the appropriate balance between the right to privacy and the need for transparency, and has made a decision that transparency outweighs privacy, in the public interest.

The rationale supporting the need to place personal information contained in land registration documents on the public record is based on the context of an individual land transaction. The public interest is addressed by ensuring that the parties to this particular transaction have all pertinent information involving the property. [p. 23]

[38] Making information about the mortgage public serves what Chancellor Boyd described as an intent of registration, albeit in the context of chattel mortgages: "The intent is, that persons who are about to become the creditors of others by parting with money or money's worth, may, by searches in the public office, obtain

information for their guidance . . .” (*Barker v. Leeson* (1882), 1 O.R. 114, at p. 117, quoted with approval in *Grand Trunk Pacific Railway Co. v. Dearborn* (1919), 58 S.C.R. 315, at p. 318).

[39] When creditors seek to enforce their legal rights against a mortgagor, the broad scope of the publicly available information about a mortgage is relevant to the sensitivity of the current balance of that mortgage. The current balance is a snapshot at a point in time in the life of a publicly disclosed mortgage. Disclosing the current balance of the mortgage furthers the intent of ensuring that the parties “have all pertinent information involving the property”. Disclosure gives certainty to the rough calculations that could already be made from the publicly available information.

[40] Moreover, the common law recognizes that the implied obligation of a bank to not disclose information about those from whom it has obtained a security interest is subject to certain exceptions. In *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461 (C.A.), at p. 473, Bankes L.J. outlined four such exceptions:

On principle I think that the qualifications can be classified under four heads: (a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.

[41] Finally on this point, I agree with RBC that the state of account between the mortgagor and mortgagee affects more than just the relationship between them — it also affects other creditors.

[42] In the context at bar, I find that the information at issue is less sensitive than other financial information.

[43] Turning to the reasonable expectations of the individual, the parties disagree on the appropriate scope of the inquiry. The Privacy Commissioner submits that only the relationship between the Trangs as mortgagors and Scotiabank as mortgagee is relevant to assessing the Trangs' reasonable expectations in the circumstances; the relationship between the Trangs and RBC has no role to play. On the other hand, RBC argues that the party receiving the disclosure is a relevant consideration when determining the Trangs' reasonable expectations.

[44] In my view, when determining the reasonable expectations of the individual, the whole context is important. This is supported by the Office of the Privacy Commissioner's consideration of context in various decisions: *PIPEDA Report of Findings No. 2014-013, Re, 2014 CarswellNat 6605 (WL Can.)*; *PIPEDA Case Summary No. 2009-003, Re, 2009 CarswellNat 6206 (WL Can.)*; *PIPEDA Case Summary No. 311, Re, 2005 CarswellNat 6734 (WL Can.)*. Indeed, to do otherwise would unduly prioritize privacy interests over the legitimate business concerns that *PIPEDA* was also designed to reflect, bearing in mind that the overall intent of *PIPEDA* is “to promote both privacy and legitimate business concerns”:

L. M. Austin, “Reviewing PIPEDA: Control, Privacy and the Limits of Fair Information Practices” (2006), 44 *Can. Bus. L.J.* 21, at p. 38.

[45] As the motion judge observed in the initial motion, and as I have already noted, 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” (2012 ONSC 3272, para. 29). 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.

[46] Another part of the relevant context is the identity of the party seeking disclosure and the purpose for doing so. Disclosure to a person who requires the information to exercise an established legal right is clearly different from disclosure to a person who is merely curious or seeks the information for nefarious purposes.

[47] The Trangs had a mortgage with Scotiabank and an outstanding debt to RBC. A reasonable mortgagor in their position would be aware that the financial details of their mortgage were publicly registered on title, and that default on the RBC debt could result in a judgment empowering the sheriff to seize and sell the mortgaged property. In my view, a reasonable mortgagor would know that the outstanding mortgage balance would ultimately be provided to the sheriff as a matter of law, once the writ of seizure and sale is filed. A reasonable mortgagor would also know that in such circumstances, the property would be sold to satisfy the RBC debt,

subject to the settling of the mortgage with Scotiabank. Moreover, a reasonable mortgagor would know that a judgment creditor in such circumstances has a legal right to obtain disclosure of the mortgage discharge statement through examination or by bringing a motion.

[48] Here, RBC is seeking disclosure regarding the very asset it is entitled to, and intends to, realize on. A reasonable person borrowing money knows that if he defaults on a loan, his creditor will be entitled to recover the debt against his 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 refused to comply with his obligation to provide information, his creditor would never be able to recover the debt.

[49] In the case at bar, a reasonable person would consider it appropriate for a mortgagee to provide a mortgage discharge statement to a judgment creditor who has obtained a writ of seizure and sale of the mortgaged asset from the court and filed it with the sheriff. A judgment creditor who has completed these steps has demonstrated that it intends to exercise an established legal right that depends on the disclosure of the mortgage discharge statement. In this case, RBC also sought the mortgage discharge statement through the examination process, but this additional step is not necessary. Obtaining a writ of seizure and sale, and filing it with the sheriff, makes operational the consent to disclosure given by the Trangs concurrent with their giving

a mortgage to Scotiabank. In my view, consent for the purpose of assisting a sheriff in executing a writ of seizure and sale was implicitly given at the time the mortgage was given. To be clear, this does not mean that a bank may disclose a mortgage discharge statement to any party who requests it. For example, it is reasonable to expect that a bank will not disclose a mortgage discharge statement to a person with no legal interest in the property.

[50] In conclusion, I find that the Trangs consented to disclosure. As a result, Scotiabank is not precluded by *PIPEDA* from disclosing the mortgage discharge statement to RBC.

[51] As the two bases outlined above are sufficient to dispose of this appeal, I decline to determine whether disclosure falls within the “for the purpose of collecting a debt” exemption in s. 7(3)(b) or within the “required by law” exemption in s. 7(3)(i).

## VI. Conclusion

[52] I would allow the appeal and order Scotiabank to produce the mortgage discharge statement to RBC.

## APPENDIX

*Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5*

7 . . .

. . .

### **Disclosure without knowledge or consent**

(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

(a) made to, in the Province of Quebec, an advocate or notary or, in any other province, a barrister or solicitor who is representing the organization;

(b) for the purpose of collecting a debt owed by the individual to the organization;

(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

(i) it suspects that the information relates to national security, the defence of Canada or the conduct of international affairs,

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law, or

(iii) the disclosure is requested for the purpose of administering any law of Canada or a province;

(c.2) made to the government institution mentioned in section 7 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* as required by that section;

**(d)** made on the initiative of the organization to an investigative body, a government institution or a part of a government institution and the organization

**(i)** has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, or

**(ii)** suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;

**(e)** made to a person who needs the information because of an emergency that threatens the life, health or security of an individual and, if the individual whom the information is about is alive, the organization informs that individual in writing without delay of the disclosure;

**(f)** for statistical, or scholarly study or research, purposes that cannot be achieved without disclosing the information, it is impracticable to obtain consent and the organization informs the Commissioner of the disclosure before the information is disclosed;

**(g)** made to an institution whose functions include the conservation of records of historic or archival importance, and the disclosure is made for the purpose of such conservation;

**(h)** made after the earlier of

**(i)** one hundred years after the record containing the information was created, and

**(ii)** twenty years after the death of the individual whom the information is about;

**(h.1)** of information that is publicly available and is specified by the regulations;

**(h.2)** made by an investigative body and the disclosure is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province; or

**(i)** required by law.

*Appeal allowed.*

*Solicitors for the appellant: Blake, Cassels & Graydon, Toronto.*

*Solicitors appointed by the Court as amicus curiae: Barbara McIsaac  
Law, Ottawa; Office of the Privacy Commissioner of Canada, Gatineau.*