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November 18, 2016

# At the Boundaries of Commerce, Concealment, and Common Sense: Royal Bank of Canada v Trang

“Privacy is something you can sell, but you can't buy it back.”

— Bob Dylan

On November 17, 2016, the Supreme Court of Canada released *Royal Bank of Canada v Trang*, an important case about the relationship between privacy rights and the reality of commercial life.

This case was an appeal from a decision of a five-judge panel of the Ontario Court of Appeal, which had upheld the dismissal of a motion by the Royal Bank for an order requiring Scotiabank to deliver a mortgage discharge statement so that the Royal Bank could obtain a sheriff’s sale of Scotiabank’s mortgagor’s property.

Both courts below had held that the information in the discharge statement was “personal information” for the purposes of the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) and could not be disclosed without the mortgagor’s consent in the absence of a statutory exception under subsection 7(3) of PIPEDA. That subsection provides for detailed exceptions permitting the unauthorized disclosure of personal information, none of which explicitly apply to a mortgagee disclosing a discharge statement to an execution creditor of the mortgagor.

The Court of Appeal had convened a five-judge panel in *Trang* because its earlier decision in *Citi Cards Canada Inc v Pleasance* had recognized a privacy right in the information in a mortgage discharge statement and dismissed the argument that the “court order” exception under subsection 7(3) of PIPEDA allowed disclosure. The Court reasoned that it would be circular for the exception to be used as the justification for granting the very order authorizing the disclosure.

The majority of the Court of Appeal in *Trang* held that the Bank was not without a remedy.  That was because in any case where a debtor refused to consent to the disclosure of a discharge statement, the Bank could bring a motion for a third party examination of the mortgagee bank under rule

60.18(6)(a), to which examination the mortgagee would be required to bring the discharge statement.

A unanimous Supreme Court of Canada introduced a healthy dose of pragmatism and common sense into the analysis of these situations. Noting that a judgment creditor "should not be required to undergo a cumbersome and costly procedure to realize its debt," the Court dismissed the circularity concerns that informed *Citi Cards* and recognized that the Royal Bank was entitled to an order for disclosure without going through the artifice of a third party judgment debtor examination.

Most importantly, the Court proceeded to cut the PIPEDA Gordian knot entirely in circumstances where a judgment creditor seeks a mortgage discharge statement from a mortgagee. The Court observed that, given the less sensitive nature of mortgage information, prior explicit consent to the disclosure of a mortgage discharge statement to a judgment creditor seeking to execute on the mortgaged property is not necessary. Noting that the "legitimate business interests of other creditors are a relevant part of the context which informs the reasonable expectations of the mortgagor", the Court observed that a mortgagor impliedly consents to such disclosure when entering into the mortgage in the first place.

This case is a welcome development in placing common-sense limits on the reach of privacy legislation. As the Court observed, the Royal Bank had every legitimate expectation of collecting its judgement debt, but was nevertheless forced into multiple court attendances—including two trips to the Court of Appeal, simply to enforce a judgment debt. It is worth asking whether a mortgagor's expectation of privacy requires that kind of excess and waste.

At its core a right of privacy is a right to be left alone—a right to be free from intrusion into one's personal affairs. There is an increasing tendency to think of privacy as almost a personal right of property in information concerning oneself. When taken to extremes—notably the "right to be forgotten" cases—it can become a right to erase history and to avoid facing the consequences of one's actions, thereby frustrating the legitimate expectations of honest third parties.

The Supreme Court of Canada's decision in *Trang* reminds us that a certain amount of commercial realism can still come into play at the boundaries of privacy legislation. Privacy rights, while important, must be balanced with "the legitimate business concerns that PIPEDA was also designed to reflect."