

The Supreme Court of Canada Strengthens the Judgment Creditor Tool Box

Litigation | Litigation & Dispute Resolution | Privacy Law | Rules of Civil Procedure | Supreme Court of Canada

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Collecting can be a pain. Getting a judgment is one thing but getting paid is a different ball game entirely, particularly when privacy legislation stands in the way of pursuing certain remedies. However, the Supreme Court of Canada in *Royal Bank of Canada v. Trang*, [2016] 2 SCR 412 recently provided a practical and balanced interpretation of privacy rights under the *Personal Information and Electronic Documents Act* (the “**Act**”) as they relate to the disclosure of personal information by financial institutions.

One of the most valuable tools for judgment creditors is to file a Writ of Seizure and Sale against a judgment debtor. The Writ encumbers any land owned or subsequently acquired by the judgment debtor. Practically speaking, if the judgment debtor seeks to sell or mortgage their land, they will first have to pay out your judgment.

Once a Writ has been filed, judgment creditors can direct the Sheriff to seize and sell real property owned by the judgment debtor. The Sheriff is empowered to do so by the *Execution Act*, R.S.O. 1990, c. E.24. However, if the judgment debtor's property is subject to a mortgage, which is often the case, judgment creditors are required to obtain a current mortgage statement from the mortgagee (lender) so the Sheriff can ascertain the mortgagee's interest in the property. Until recently, this posed a major road block for judgment creditors as institutional mortgagees have been wary to disclose their clients' personal information without express consent to do so. Fear no more.

Background of decision

Phat Trang and Phuong Trang (the “**Trangs**”) had a \$35,000 unsecured loan through Royal Bank of Canada (“**RBC**”) which they defaulted on. In December 2010, RBC obtained judgment against the Trangs for \$26,122.76 plus interest and costs and filed a Writ of Seizure and Sale with the Sheriff in Toronto. The Trangs owned a property in Toronto which was subject to a first mortgage in favour of the Bank of Nova Scotia (“**BNS**”) in the principal amount of \$262,500. However, the Sheriff would not sell the property unless RBC provided a mortgage statement from BNS who refused to do so on the basis that it would contravene the privacy protections set out in the Act.

The Trangs ignored RBC's attempt to conduct an examination in aid of execution. RBC did, however, examine a representative of BNS who appeared voluntarily (not by court order) and maintained the refusal to produce a current mortgage statement for the Trangs. Cue RBC's motion to compel BNS to do so.

RBC's motion was heard by Justice Gray on 18 June 2013, and was not opposed by BNS (or the Trangs). Nevertheless, Justice Gray held that he was bound by the unanimous decision of the Court of Appeal for Ontario in *Citi Cards Canada Inc. v. Pleasance* (2011), 2011 ONCA 3 (CanLII) where the Court found that a mortgage discharge statement was “personal information” as defined by the Act and was precluded from disclosure without the mortgagor's consent. In doing so, the Court noted that Act did not “contemplate a balancing between the privacy rights of the individual and the interests of a third-party organization that may by happenstance have commercial dealings with the individual that make the targeted information attractive to it”.

On 16 June 2014, RBC's appeal of Justice Gray's decision was heard by the Court of Appeal for Ontario. The majority upheld Justice Gray's decision but noted that RBC could have brought a motion under Rule 60.18(6)(a) of the *Rules of Civil Procedure* which provides that “[w]here any difficulty arises concerning the enforcement of an order, the court may make an order for the examination of any person who the court is satisfied may have knowledge of the matters...”. The Court went on

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to note that the combined obligations under Rule 60.18(6)(a) and Rule 34.10 (which requires parties to bring all relevant records to an examination) would have satisfied the exception in section 7(3)(c) of the Act which permits an organization to disclose personal information without the consent of the individual if the disclosure is required to comply with a court order. Unfortunately for RBC, their motion was not brought under Rule 60.18(6)(a) and the Court was prepared to send them back to the drawing table.

Given that RBC was asking the Court of Appeal to overrule its prior decision in *Citi Cards*, the Court sat as a panel of five and Justice Hoy, who wrote a lengthy dissent, appointed the Privacy Commissioner of Canada as *amicus curiae*. Neither BNS nor the Trangs responded to the appeal. In her dissent, Justice Hoy reasoned, amongst other things, that it was “immaterial whether a judgment creditor purports to move under [Rule 60.18(6)(a)] or (as here) simply asks the court for an order requiring disclosure”. A glimmer of practicality shines through.

On 17 November 2016, the Supreme Court of Canada unanimously allowed RBC’s appeal and ordered BNS to produce the mortgage discharge statement to RBC. The basis for the SCC’s decision was twofold, (i) the order sought by RBC constituted an “order made by a court” under section 7(3)(c) of the Act which permitted the disclosure of personal information without consent of the individual, and (ii) the Trangs impliedly consented to the disclosure of the mortgage discharge statement by BNS to RBC.

In terms of the first issue, the SCC disagreed with Justice Gray and the Court of Appeal who both concluded that the order sought by RBC did not constitute an “order made by a court” given that the order had not yet actually been made. According to the lower Courts, it was a circular argument. This reasoning was consistent with the decision in *Citi Cards* where Justice Blair held that “[e]ven the most liberal interpretation of the legislation cannot lead to such a pliant result”. However, the SCC held that the Act does not diminish the Court’s authority to make orders requiring disclosure and that it would be “overly formalistic and detrimental to access to justice” to require RBC to bring yet another motion under Rule 60.18(6)(a). The Court found the distinction to be “artificial”. On a practical level, the Court noted 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”. Well said.

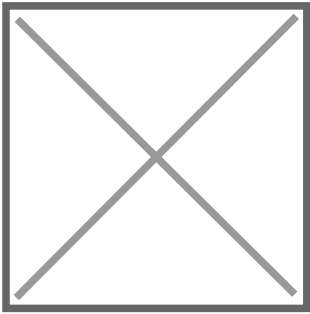
On the second, arguably more important issue, the Court relied upon Schedule 1, cl. 4.3.6 and Schedule 1, cl. 4.3.5 of the Act which acknowledges there can be “implied consent” in connection with “less sensitive” information and that the reasonable expectations of the individual are a relevant consideration. In the end, the SCC found that the information contained on the mortgage discharge statement was “less sensitive” and that a reasonable person would expect that a creditor would have access to the information it required in order to recover against the debtor’s assets. This resulted in the SCC unanimously concluding that “...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”. After two attendances before Justice Gray, two trips to the Court of Appeal for Ontario and a visit to Ottawa, RBC can finally collect of the Trangs’ debt.

Practical Implications

It goes without saying that RBC took one for the team. This was a \$26,000 problem that made it all the way to the Supreme Court of Canada. Clearly, RBC (as a frequent judgment creditor) saw this as a road block that needed clearing. Quite frankly, it was a much needed shift from an otherwise difficult to understand stance by our province’s highest appellate Court. It was also an important decision regarding access to justice and balancing the legislated right of individuals to protect against the disclosure of their personal information. The Court must continue to strike a balance so that the enforcement of orders is not unreasonably frustrated and remains economically viable. Going forward, financial institutions can rely on the SCC’s decision in acceding to the requests of judgment creditors in similar circumstances. As Justice Hoy aptly noted in her dissent, “[t]his equates to the elimination of a non-trivial barrier to justice, particularly for creditors trying to enforce relatively modest claims”.

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