Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: Royal Bank of Canada v. Trang | 2015 CarswellOnt 2673 | (S.C.C., Feb 9, 2015)

Original
2014 ONCA 883
Ontario Court of Appeal

Royal Bank of Canada v. Trang

2014 CarswellOnt 17254, 2014 ONCA 883, [2014] O.J. No. 5873, 123 O.R. (3d) 401, 248 A.C.W.S. (3d) 456, 327 O.A.C. 199, 379 D.L.R. (4th) 601

Royal Bank of Canada, Plaintiff (Appellant) and Phat Trang and Phuong Trang a.k.a. Phuong Thi Trang, Defendants and Bank of Nova Scotia, Respondent

Alexandra Hoy A.C.J.O., John Laskin, Robert J. Sharpe, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 16, 2014
Judgment: December 9, 2014
Docket: CA C57306

Proceedings: affirming *Royal Bank of Canada v. Trang* (2013), 2013 CarswellOnt 8164, 2013 ONSC 4198, Gray J. (Ont. S.C.J.)

Counsel: James Satin, Justin Winch, for Appellant
No one for Respondent
Megan Brady, Kate Wilson, Privacy Commissioner of Canada, appearing as *amicus curiae*

Subject: Corporate and Commercial; Property; Public

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Privacy and freedom of information --- Federal privacy legislation — Collection of personal information — Disclosure

Defendants owned property, which they had mortgaged to S bank — Plaintiff, R bank, had judgment against defendants — R bank sought to obtain mortgage discharge statement from S bank — S bank refused to provide statement on basis that disclosure was prohibited by Personal Information Protection and Electronic Documents Act (PIPEDA) — R bank brought unsuccessful motion to compel disclosure of statement — R bank appealed — Appeal dismissed — Statement was "personal information" of defendants — Per incuriam exception to stare decisis did not apply to previously decided case — Both sensitivity of information and defendants' reasonable expectations supported S bank's refusal to disclose statement without defendants' express consent — Neither s. 3 nor s. 5(3) of PIPEDA was alternative to obtaining consent or exception to need for consent — No provision of Execution Act required disclosure of mortgage statement — With foresight, R bank could have obtained defendants' consent to disclosure of statement by term in its loan agreement — R bank also could have sought to obtain statement by motion under R. 60.18(6)(a) of Rules of Civil Procedure.

Financial institutions --- Banking records — Disclosure of records by bank

Defendants owned property, which they had mortgaged to S bank — Plaintiff, R bank, had judgment against defendants — R bank sought to obtain mortgage discharge statement from S bank — S bank refused to provide statement on basis that disclosure was prohibited by Personal Information Protection and Electronic Documents Act (PIPEDA) — R bank brought unsuccessful motion to compel disclosure of statement — R bank appealed — Appeal dismissed — Statement was "personal information" of defendants — Per incuriam exception to stare decisis did not apply to previously decided case — Both sensitivity of information and defendants' reasonable expectations supported S bank's refusal to disclose statement without defendants' express consent — Neither s. 3 nor s. 5(3) of PIPEDA was alternative to obtaining consent or exception to need for consent — No provision of Execution Act required disclosure of mortgage statement — With foresight, R bank could have obtained defendants' consent to disclosure of statement by term in its loan agreement — R bank also could have sought to obtain statement by motion under R. 60.18(6)(a) of Rules of Civil Procedure.

The defendants owned a property, which they had mortgaged to S bank. The plaintiff, R bank, had a judgment against the defendants. R bank sought to obtain a mortgage discharge statement from S bank. S bank refused to provide the statement on the basis that disclosure was prohibited by the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

R bank brought an unsuccessful motion to compel disclosure of the statement. R bank appealed.

Held: The appeal was dismissed.

Per Laskin J.A. (Cronk and Blair JJ.A. concurring): The statement was "personal information" of the defendants. The *per incuriam* exception to *stare decisis* did not apply to the previously decided case.

Both the sensitivity of the information and the defendants' reasonable expectations supported S bank's refusal to disclose the statement without the defendants' express consent. Neither s. 3 nor s. 5(3) of PIPEDA was an alternative to obtaining consent or an exception to the need for consent. Further, no provision of the *Execution Act* required disclosure of the mortgage statement.

With foresight, R bank could have obtained the defendants' consent to disclosure of the statement by a term in its loan agreement. R bank also could have sought to obtain the statement by a motion under R. 60.18(6)(a) of the *Rules of Civil Procedure*.

Per Hoy A.C.J.O. (dissenting)(Sharpe J.A. concurring): The appeal should be allowed and S bank should be ordered to

produce the statement to R bank. An order requiring S bank to disclose the statement to R bank did not have to be sought under R. 60.18(6)(a) of the the Rules to constitute "an order made by a court" within the meaning of s. 7(3)(c) of PIPEDA. A further motion by R bank was not required before disclosure could be ordered.

A court order was unnecessary in any event because the defendants' consent to the disclosure of the statement could be implied. The statement constituted "less sensitive" information for the purposes of s. 4.3.6 of Schedule 1 to PIPEDA, and disclosure accorded with the reasonable expectations of an individual in the defendants' position.

Further, the previously decided case should be overruled. It was therefore unnecessary to consider whether it was open to depart from that case on the basis of the *per incuriam* doctrine.

Table of Authorities

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Aecon Industrial Western v. BBF, Local 146 (2013), (sub nom. *Aecon Industrial Western v. IBB, Local Lodge No. 146)* 558 A.R. 108, 2013 ABQB 122, 2013 CarswellAlta 287 (Alta. Q.B.) — considered

Canadian Imperial Bank of Commerce v. Sutton (1981), 21 C.P.C. 303, 126 D.L.R. (3d) 330, 1981 CarswellOnt 365, 34 O.R. (2d) 482 (Ont. C.A.) — considered

Citi Cards Canada Inc. v. Pleasance (2011), 4 C.P.C. (7th) 264, 103 O.R. (3d) 241, 328 D.L.R. (4th) 707, 272 O.A.C. 371, 2011 ONCA 3, 2011 CarswellOnt 6, 99 R.P.R. (4th) 163 (Ont. C.A.) — followed

David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co. (2006), 216 O.A.C. 400 (note), 2006 CarswellOnt 441, 2006 CarswellOnt 442, 350 N.R. 398 (note) (S.C.C.) — referred to

Douglas v. Loch Lomond Ski Area (2010), 7 C.P.C. (7th) 338, 2010 CarswellOnt 9266, 2010 ONSC 6483 (Ont. S.C.J.) — considered

Englander v. Telus Communications Inc. (2004), 2004 CarswellNat 4119, [2005] 2 F.C.R. 572, 2004 CAF 387, 36 C.P.R. (4th) 385, 2004 CarswellNat 5422, 247 D.L.R. (4th) 275, 2004 FCA 387, 328 N.R. 297, 1 B.L.R. (4th) 119 (F.C.A.) — referred to

McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2005), 23 C.C.L.I. (4th) 191, 15 C.P.C. (6th) 1, (sub nom. *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.)* 76 O.R. (3d) 161, [2005] I.L.R. I-4422, 2005 CarswellOnt 2500, (sub nom. *Polowin (David) Real Estate Ltd. v. Dominion of Canada General Insurance Co.)* 199 O.A.C. 266, 255 D.L.R. (4th) 633, 19 M.V.R. (5th) 205 (Ont. C.A.) — referred to

Mountain Province Diamonds Inc. v. De Beers Canada Inc. (2014), 25 B.L.R. (5th) 141, 2014 ONSC 2026, 2014 CarswellOnt 4208 (Ont. S.C.J.) — considered

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Tournier v. National Provincial & Union Bank of England (1923), [1924] 1 K.B. 461, [1923] All E.R. Rep. 550, 29

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Cases considered by *Alexandra Hoy A.C.J.O.* (dissenting):

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Canadian Imperial Bank of Commerce v. Sutton (1981), 21 C.P.C. 303, 126 D.L.R. (3d) 330, 1981 CarswellOnt 365, 34 O.R. (2d) 482 (Ont. C.A.) — considered in a minority or dissenting opinion

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David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co. (2006), 216 O.A.C. 400 (note), 2006 CarswellOnt 441, 2006 CarswellOnt 442, 350 N.R. 398 (note) (S.C.C.) — refered to in a minority or dissenting opinion

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Statutes considered by *John Laskin J.A.*:

Execution Act, R.S.O. 1990, c. E.24
Generally — referred to

s. 28 — considered

Personal Information Protection Act, S.A. 2003, c. P-6.5
Generally — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5
Generally — referred to

Pt. 1 — referred to

s. 3 — considered

s. 5 — considered

s. 5(1) — considered

s. 5(3) — considered

ss. 6-9 — referred to

s. 7 — considered

s. 7(3) — considered

s. 7(3)(c) — considered

s. 7(3)(h.1) — considered

s. 7(3)(i) — considered

Sched. 1 — referred to

Sched.1, s. 4.2.4 — considered

Sched.1, s. 4.3 — considered

Sched.1, s. 4.3.1 — considered

Sched.1, s. 4.3.4 — considered

Sched.1, s. 4.3.5 — considered

Sched.1, s. 4.3.6 — considered

Statutes considered by *Alexandra Hoy A.C.J.O.* (dissenting):

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5
Generally — referred to

s. 5(3) — considered

s. 7(3)(c) — considered

s. 7(3)(i) — considered

Sched.1, s. 4.3.6 — considered

Sched.1, s. 4.3.8 — considered

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s. 28 — considered

Rules considered by *John Laskin J.A.*:

Rules of Practice, R.R.O. 1970, Reg. 545
R. 591 — considered

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R. 1.03(1) "judgment" — considered

R. 34.10 — considered

R. 34.10(2)(b) — considered

R. 34.10(3) — considered

R. 60.18(6) — considered

R. 60.18(6)(a) — considered

Rules considered by *Alexandra Hoy A.C.J.O.* (dissenting):

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 34.10(2) — considered

R. 34.10(2)(b) — considered

R. 34.10(3) — considered

R. 60.18(1) "creditor" — considered

R. 60.18(1) "debtor" — considered

R. 60.18(2) — considered

R. 60.18(2)(b) — considered

R. 60.18(2)(c) — considered

R. 60.18(2)(e) — considered

R. 60.18(6) — considered

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Regulations considered by *John Laskin J.A.*:

Land Registration Reform Act, R.S.O. 1990, c. L.4
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s. 6 — considered

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Regulations Specifying Publicly Available Information, SOR/2001-7

s. 1(c) — considered

Authorities considered:

Cardozo, Benjamin N., *The Nature of the Judicial Process* (New Haven: Yale University Press, 1960)

Ogilvie, M.H., *Bank and Customer Law in Canada*, 2nd ed. (Toronto: Irwin Law, 2013)

Words and phrases considered:

per incuriam

Literally, per incuriam means &ldquothrough lack of care" in law, it means a decision made without regard to a statutory provision or earlier binding authority.

stare decisis

. . . [means] stand by things decided . . .

APPEAL by plaintiff from judgment reported at *Royal Bank of Canada v. Trang* (2013), 2013 ONSC 4198, 2013 CarswellOnt 8164 (Ont. S.C.J.), dismissing plaintiff's motion to compel disclosure of mortgage statement held by bank.

***John Laskin J.A.*:**

A. Overview

1 This appeal raises important issues about the interpretation and application of the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*").[1]

2 The appellant, Royal Bank of Canada ("RBC"), has a judgment against the defendants, Phat and Phuong Trang. The Trangs own a property, which they have mortgaged to the respondent, Bank of Nova Scotia ("Scotiabank"). RBC wants the Sheriff to sell the Trangs' property so it can collect its judgment. The Sheriff, however, refuses to sell the property without a mortgage discharge statement from Scotiabank. RBC twice sought to obtain this statement by examining the Trangs as judgment debtors, but they did not appear for either examination. RBC also asked the mortgagee, Scotiabank, to produce a mortgage statement. Scotiabank said *PIPEDA* precluded it from doing so.

3 RBC brought a motion for an order that Scotiabank produce a mortgage discharge statement. The motion judge dismissed the motion, relying on this court's judgment in *Citi Cards Canada Inc. v. Pleasance*, 2011 ONCA 3, 103 O.R. (3d) 241 (Ont. C.A.). RBC now appeals the motion judge's order to this court. Its general position is that *Citi Cards* was wrongly decided or is distinguishable and that *PIPEDA* should not be applied to frustrate or unnecessarily increase the costs of enforcing a judgment lawfully obtained.

4 In support of its position, RBC makes five specific submissions. First, the mortgage discharge statement RBC seeks is not "personal information" of the debtors under *PIPEDA*.

5 Second, cl. 4.3.6 of Schedule 1 to *PIPEDA* permits Scotiabank to produce the mortgage discharge statement because that statement contains "less sensitive" information, which the Trangs impliedly consented to disclose. RBC contends that the decision in *Citi Cards* is wrong and should be overruled or that it was *per incuriam* because the court did not consider cl. 4.3.6 of Schedule 1 and had it done so, it would have decided the case differently.

6 Third, in the alternative, s. 3 of *PIPEDA* authorizes disclosure of the mortgage discharge statement. Fourth, s. 28 of the *Execution Act*,[2] which permits a judgment creditor to sell a mortgagor's equity of redemption, authorizes disclosure of the discharge statement. Fifth, *Citi Cards* is distinguishable because RBC, unlike the creditor in that case, has exhausted all other means to obtain the statement.

7 Because we have been asked to overrule *Citi Cards*, we sat as a panel of five, in accordance with our court's practice when we are asked to overrule one of our previous decisions.

8 Neither the Trangs nor Scotiabank participated in this appeal. To ensure that their positions were properly represented, Hoy A.C.J.O. appointed the Privacy Commissioner of Canada as *amicus curiae*. *Amicus* submits that in *Citi Cards* this court correctly interpreted *PIPEDA*, and that neither s. 3 nor cl. 4.3.6 of Schedule 1 of the Act permits Scotiabank to produce the mortgage discharge statement. *Amicus* contends, however, that RBC could obtain the statement by a court-ordered examination in aid of execution of Scotiabank under rule 60.18(6)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

B. Background

9 The facts and chronology giving rise to this litigation are brief and undisputed.

- The Trangs own a property at 334 Sentinel Road, Toronto.
- Scotiabank holds the first mortgage on the property. The mortgage was registered on November 21, 2005, for the face amount of $262,500.
- In April 2008, RBC loaned the Trangs approximately $35,000. The loan went into default, and on December 17, 2010, RBC obtained a judgment against the Trangs for $26,122.76 plus interest and costs.
- RBC filed a writ of seizure and sale with the Sheriff in Toronto. The writ has been filed for more than a year.
- RBC served the Trangs with notices of examination in aid of execution for April 5, 2011. The Trangs did not appear.
- On November 15, 2011, RBC requested a mortgage discharge statement from Scotiabank. RBC advised Scotiabank that the Sheriff would not sell the property without the statement. On November 23, 2011, Scotiabank advised RBC that unless the Trangs consented, *PIPEDA* precluded it from producing the statement. The Trangs have not consented.
- RBC then obtained an order for another examination of the Trangs in aid of execution. This examination was scheduled for February 17, 2012. Again the Trangs did not appear.
- In May 2012, RBC brought a motion to compel Scotiabank to produce a mortgage discharge statement. On June 6, 2012 [2012 CarswellOnt 7128 (Ont. S.C.J.)], the motion judge dismissed RBC's motion. He held that he was bound by *Citi Cards*.
- RBC appealed the motion judge's order. On December 21, 2012, this court quashed RBC's appeal on the ground that the motion judge's order was interlocutory. The order was interlocutory because it did not finally dispose of the question whether RBC could obtain an order requiring Scotiabank to produce the mortgage statement. The panel said that RBC could seek to examine a Scotiabank representative under rule 60.18(6)(a).

• On February 21, 2013, following the panel's order quashing its appeal, RBC examined a representative of Scotiabank, its senior legal counsel. Significantly, however, the Scotiabank representative appeared *voluntarily*, not by court order. At the examination, she said the bank was "prohibited from voluntarily disclosing [a mortgage discharge statement] under ... *PIPEDA*".

• RBC then brought another motion to compel Scotiabank to produce the mortgage statement. On June 18, 2013, the motion judge dismissed the motion. He held: "I remain of the view that *PIPEDA*, as interpreted by the Court of Appeal in *Citi Cards*, prohibits the release of the requested information. Any change must come from the Court of Appeal, and not from me." It is this decision from which RBC appeals.[3]

C. PIPEDA

10 *PIPEDA* is a federal statute, enacted nearly 15 years ago in recognition of the era of technology in which we now live. It is, as this court said in *Royal Bank v. Welton*,[4] a "privacy statute." Subject to specified exemptions, it protects individuals' right to privacy in their personal information, defined simply and very broadly as "information about an identifiable individual". Part 1 of *PIPEDA*, which is the part of the Act relevant to this appeal, deals with "protection of personal information in the private sector."

11 Although *PIPEDA* is federal legislation, it applies across Canada unless it has been displaced by provincial legislation that the Governor-in-Council by order has declared is substantially similar to *PIPEDA*. Ontario has not enacted a substantially similar privacy law of general application in the private sector. Thus *PIPEDA* governs the commercial activities of all Ontario lending institutions, whether provincially regulated or federally regulated as are RBC and Scotiabank.

12 Section 3 of *PIPEDA* sets out the purpose of Part 1:

> 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.

13 The Supreme Court of Canada has recognized the important role of privacy in our society. In commenting on the similarly worded purpose of Alberta's *Personal Information Protection Act*, S.A. 2003, c. P-6.5, the court said:

> The focus is on providing an individual with some measure of control over his or her personal information: Gratton, at pp. 6 ff. The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as "quasi-constitutional" because of the fundamental role privacy plays in the preservation of a free and democratic society.

See *UFCW, Local 401 v. Alberta (Information and Privacy Commissioner)*, 2013 SCC 62, [2013] 3 S.C.R. 733 (S.C.C.), at para. 19.

14 The overarching purpose of Part 1 of *PIPEDA*, set out in s. 3, is reproduced as an express requirement in s. 5(3) of the Act:

> 5. (3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

15 In other words, *PIPEDA* seeks to balance individuals' right to privacy in their personal information with organizations' need to collect, use and disclose that information in their commercial activities. See *Englander v. Telus Communications Inc.*, 2004 FCA 387, [2005] 2 F.C.R. 572 (F.C.A.), at paras. 38-40.

16 Consent is a cornerstone of *PIPEDA*. Collection, use or disclosure of personal information ordinarily requires an individual's knowledge and consent. An organization may collect, use or disclose personal information without an individual's knowledge or consent only in the limited circumstances enumerated in s. 7 of the Act. So, for example, s. 7(3) sets out the circumstances in which an organization may disclose personal information without an individual's knowledge or consent. The exemptions in ss. 7(3)(c) and (i) were the two exemptions argued in *Citi Cards*:

> 7. (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
>
> . . . . .
>
> (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.

These limited exceptions in s. 7 attempt to strike the appropriate balance, reflected in s. 3, between privacy rights and organizational needs.

17 The provisions of the Act must be read together with Schedule 1, which lists ten key principles for the protection of personal information.[5] The principles contain both obligations and recommendations for organizations. Under s. 5(1) of the Act, and subject to ss. 6 to 9, organizations must comply with the obligations set out in the Schedule.

18 Clause 4.3 of the Schedule deals with principle three — consent. This principle and the other nine principles are not written in typically legal language. Clause 4.3.1 provides that consent is required for the disclosure of personal information and that usually an organization will seek that consent at the time of collection:

> 4.3.1 Consent is required for the collection of personal information and the subsequent use or disclosure of this information. Typically, an organization will seek consent for the use or disclosure of the information at the time of collection. In certain circumstances, consent with respect to use or disclosure may be sought after the information has been collected but before use (for example, when an organization wants to use information for a purpose not previously identified).

19 Clause 4.3.5 provides that "[i]n obtaining consent, the reasonable expectations of the individual are also relevant."

20 Clause 4.3.6 is the clause of the Schedule RBC relies on in this court. That clause distinguishes between "sensitive" and "less sensitive" information and introduces the notion of implied consent for less sensitive information:

> 4.3.6 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).

I will return to this provision when I discuss RBC's main ground of appeal.

D. This Court's Decision in *Citi Cards*

21 The fact situation in *Citi Cards* is similar to the fact situation in the present appeal. Citi Cards held a judgment against Mr. Pleasance for a credit card debt. It sought to enforce that judgment by a Sheriff's sale of the Pleasance home, owned jointly by Mr. Pleasance and his wife. The Sheriff would not sell the home without mortgage discharge statements from the two mortgagees of the home, both banks.[6] Neither mortgagee would produce a statement because of *PIPEDA*.

22 Unlike in the appeal before us, Citi Cards did not seek to examine the judgment debtor or his wife. Instead it simply brought a motion for an order that the banks produce discharge statements. The motion judge dismissed the motion. He ruled that the statements contained "personal information" of Mr. Pleasance and that *PIPEDA* prohibited the banks from releasing that information. He also ruled that Citi Cards had an alternative remedy — a motion under rule 60.18(6) to examine Bibi Pleasance, the debtor's wife.

23 Citi Cards appealed and this court dismissed its appeal. Blair J.A. wrote the reasons of the panel. He, too, concluded that *PIPEDA* prevented the banks from disclosing the mortgage discharge statements.

24 In this court, *Citi Cards* relied on two exemptions in s. 7(3) of *PIPEDA* to obtain disclosure of the mortgage discharge statements: where disclosure is required to comply with a court order under s. 7(3)(c); and where disclosure is "required by law" under s. 7(3)(i).

25 Before addressing these two exemptions, Blair J.A. discussed whether the information *Citi Cards* sought was "personal information" of Mr. Pleasance and whether the purpose of *PIPEDA*, as stated in s. 3, contemplated balancing the interests of a third party in Citi Cards' position. Blair J.A. held that the mortgage discharge statements *Citi Cards* sought were "personal information" of Mr. Pleasance. He wrote, at para. 22 of his reasons:

> This is a very elastic definition and should be interpreted in that fashion to give effect to the purpose of the Act. There can be no doubt that financial information pertaining to a debtor, collected and used by a financial institution in the course of a mortgage transaction — including the particulars of and the balance owing on the debtor's mortgage — is "information about an identifiable individual". Current mortgage balances are not information that is publicly available.

26 On the purpose of the statute, he said, at para. 23 of his reasons:

> As the purpose of the Act — expressed in s. 3 cited above — indicates, what is balanced is the individual's right to privacy in his or her personal information, on the one hand, and the organization's need to collect or use the information, on the other hand. *The Act does 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*.
>
> [Emphasis added.]

27 Blair J.A. then turned to the two exemptions *Citi Cards* relied on. He concluded that neither applied.

28 The "court order" *Citi Cards* relied on to come within s. 7(3)(c) was the order it sought on the motion. Blair J.A. held, at para. 25:

> 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.

29 To come within the "required by law" exemption, *Citi Cards* argued that as Mr. Pleasance would be required by law to disclose the balances outstanding on his two mortgages, so too should the banks. In rejecting that argument, Blair J.A. said, at para. 32, that the disclosure "required by law" must be required independently of *PIPEDA*. And he knew "of no law requiring a financial institution to disclose mortgage statements to an unsecured judgment creditor seeking to enforce its remedy by way of sheriff's sale in the absence of default under the mortgage and steps taken by the mortgagee to enforce the mortgage by way of Notice of Sale".

30 Nonetheless, Blair J.A. recognized the difficulty that *PIPEDA* posed for a judgment creditor in Citi Cards' position. He allowed that a mortgagee could, in some circumstances, be ordered to produce a discharge statement to the judgment creditor on a motion under rule 60.18(6)(a). Under that rule, a creditor who has difficulty in enforcing a judgment may obtain an order from the court to examine a person who has knowledge of the debtor's means to satisfy the judgment. But Blair J.A. concluded that the motion judge did not err in exercising his discretion not to order disclosure and to require Citi Cards to pursue another remedy. The motion judge, Blair J.A. held, was "rightly concerned" about the privacy rights of Mr. Pleasance, and of Ms. Pleasance, who was a joint owner of the property Citi Cards sought to sell.

E. Analysis

31 In this court, apart from its submission on the *Execution Act*, RBC does not rely on either of the two exemptions in s. 7(3) of *PIPEDA*, which were at issue in *Citi Cards*. Instead it relies mainly on cl. 4.3.6 of Schedule 1 and s. 3 of the Act to authorize Scotiabank to disclose the mortgage discharge statement. It also argues that *Citi Cards* is distinguishable because unlike the judgment creditor in that case, RBC has pursued all of its alternative remedies. And it first contends that the mortgage discharge statement is not even "personal information" of the debtors.

First Issue: Is the mortgage discharge statement "personal information" of the debtors?

32 In oral argument, RBC took the position that the mortgage discharge statement it seeks was not even "personal information" of the Trangs. It pointed out that all the details of the Trangs' mortgage — the principal amount, the rate of interest, the payment periods and the due date — were made publicly available when the mortgage was registered. Therefore the Trangs could not claim a privacy interest in the mortgage discharge statement as that statement would simply set out the current principal and interest owing on the mortgage at the time RBC asked the Sheriff to sell the property.[7]

33 I do not agree with RBC's position. I accept that the financial details of the Trangs' mortgage, when it was registered, are on the public record in the Ontario Land Registry System. That they are is authorized both by Ontario regulation and by *PIPEDA*. The Ontario legislature decided to make the details of a mortgage publicly available at the time a mortgage is registered, that is at the beginning of the mortgagor/mortgagee relationship: see O. Reg. 19/99 (Electronic Registration), s. 6, passed under the *Land Registration Reform Act*.[8]

34 In turn, s. 7(3)(h.1) of *PIPEDA* recognizes that consent is not required for the disclosure "of information that is publicly available and is specified by the regulations." But under s. 1(c) of the *Regulations Specifying Publicly Available Information*,[9] the only information that is considered publicly available for the purpose of s. 7(3)(h.1) of the statute is "personal information that appears in a registry collected under a statutory authority and to which a right of public access is authorized by law".

35 Thus mortgagors, such as the Trangs, cannot claim a privacy interest in the financial details of their mortgage at the time their mortgage is registered. Provincial regulation requires those financial details be made publicly available, and their public availability is authorized by *PIPEDA* and the regulations under it.

36 Current mortgage balances, however, are not publicly available information in the Ontario Land Registry System or under *PIPEDA*. Yet it can hardly be denied that a current mortgage balance is, under *PIPEDA*, personal information of a mortgagor — it is "information about an identifiable individual." Nor can it be said that the Trangs have waived any privacy interest in their current mortgage balances simply because the details of their mortgage at the time of registration are on the public record. For these reasons, RBC's argument that the mortgage discharge statement is not personal information of the Trangs must fail.

Second Issue: Does cl. 4.3.6 of Schedule 1 to PIPEDA permit Scotiabank to provide a mortgage discharge statement to RBC?

37 This is the main issue in this appeal. RBC's submission on this issue has two branches: the first branch is that this court's decision in *Citi Cards* was *per incuriam* because it did not consider cl. 4.3.6 of Schedule 1. Therefore *stare decisis* does not bind us to follow *Citi Cards*; we are free to come to a different decision. The second branch is that even if the *per incuriam* exception to *stare decisis* does not apply, *Citi Cards* is wrong because it failed to give effect to cl. 4.3.6 of Schedule 1. RBC argues that in accordance with that clause, Scotiabank had the Trangs' implied consent to disclose the mortgage discharge statement to a judgment creditor. We should therefore overrule our court's previous decision. I am not persuaded by either branch of RBC's submission.

(a) The per incuriam exception to stare decisis does not apply

38 Strictly applied, the principle of *stare decisis* — "stand by things decided" — means we ought to follow *Citi Cards* even if we disagree with it. *Per incuriam* is a well-recognized exception to *stare decisis*. Literally, *per incuriam* means "through lack of care"; in law, it means a decision made without regard to a statutory provision or earlier binding authority.

39 Under the *per incuriam* exception, the court may depart from one of its previous decisions if two conditions are met:

- The panel deciding the earlier case did not advert to judicial or statutory authority binding on it; and
- If the panel had considered this authority, it would have decided the case differently.

See *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2005), 76 O.R. (3d) 161 (Ont. C.A.), at paras. 107-11, leave to appeal to S.C.C. refused, [*David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*] (2006), [2005] S.C.C.A. No. 390 (S.C.C.).

40 The reasons in *Citi Cards* do not refer to cl. 4.3.6 of Schedule 1 to *PIPEDA*. That does not automatically mean the panel failed to consider the clause. But even assuming that the first condition for applying the *per incuriam* exception has been met, the second condition has not. Clause 4.3.6 would not have changed the result in *Citi Cards* because it does not permit a mortgagee to disclose a discharge statement to a judgment creditor of the mortgagor. The mortgagee does not have the mortgagor's implied consent to do so.

(b) Scotiabank does not have the Trangs' implied consent to disclose a mortgage discharge statement to RBC

41 RBC makes two arguments why we should find that the Trangs impliedly consented to disclose a mortgage discharge statement: the statement contains "less sensitive" information; and to refuse disclosure would frustrate, inconvenience and unnecessarily increase the cost of enforcing a lawfully obtained judgment.

42 *Amicus* responds by arguing that a mortgage discharge statement contains sensitive financial information for which express consent for disclosure is required, that implied consent to disclose is not within the reasonable expectations of the mortgagor, and that RBC had other means to obtain the statement.

(i) Implied consent

43 Under cl. 4.3.1 of Schedule 1, consent is required for the disclosure of personal information. The Trangs have not expressly consented to disclosure of a mortgage discharge statement to RBC. Clause 4.3.6 of Schedule 1, however, includes the notion of implied consent for the disclosure of personal information. For convenience, I reproduce the clause:

> 4.3.6 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).

44 To determine whether an individual impliedly consents to disclosure, two considerations are relevant: the sensitivity of the information in question; and the reasonable expectations of the individual. The first consideration is found in cl. 4.3.6 itself; the second consideration is found in cl. 4.3.5.[10]

(ii) Sensitivity of the information

45 *PIPEDA* does not define "sensitive" and "less sensitive" information, or the circumstances in which consent may be implied. Clause 4.3.6 of Schedule 1 does, however, establish a link between the sensitivity of the information and the appropriate form of consent.

46 Where information is likely sensitive, an organization should seek express consent. And under cl. 4.3.4 of Schedule 1, any information can be sensitive depending on the context:

> 4.3.4 The form of the consent sought by the organization may vary, depending upon the circumstances and the type of information. In determining the form of consent to use, organizations shall take into account the sensitivity of the information. Although some information (for example, medical records and income records) is almost always considered to be sensitive, any information can be sensitive, depending on the context....

47 Where information is less sensitive, consent may be implied. But even less sensitive information may, depending on the context, require express consent. The important point, however, is that the sensitivity of the information must be assessed in the overall context of the relationship between the organization and the individual — here, between Scotiabank and the Trangs. In assessing that sensitivity, the relationship between the Trangs and RBC has no role to play. As Blair J.A. said in *Citi Cards*, at para. 23, "[t]he Act does not contemplate a balancing between the privacy rights of the individual and the interests of a third-party organization".

48 Nonetheless, RBC submits that the information in a mortgage discharge statement is less sensitive information. Therefore the Trangs can be taken to have impliedly consented to its disclosure. RBC contends that as the details of the mortgage at the beginning of the mortgagor/mortgagee relationship are publicly available, the details during the course of that relationship can hardly be considered sensitive information.

49 It is tempting to agree with RBC's submission and conclude that any mortgagor must be taken to have impliedly consented to the disclosure to a judgment creditor of the money owing on one of the mortgagor's assets. After all, as RBC points out, earlier disclosure is mandated by regulation. Disclosure at a later time would reflect the balance owing on the same asset; only the amount would differ. And not to imply consent would seem to serve no purpose other than to assist the Trangs, and mortgagors in their position, in avoiding payment of a lawfully obtained judgment against them.

50 This temptation, however, runs up against the very broad protection the Act affords to the privacy of an individual's personal information. Undoubtedly, the amount the Trangs owe on their mortgage is, to them, personal information, even though it seems to be just a number.

51 Yet it is not just a number. The balance owing on a person's mortgage can be an important piece of private information

that opens a window to many aspects of that person's financial profile. It indicates financial worth. It measures how a person deals with financial liabilities. It opens a portal to a person's financial stability or instability. In many contexts, the disclosure of this seemingly innocuous information to a third party without consent may affect a person's interests adversely. Even the timing of the disclosure could be sensitive.

52 And, how is Scotiabank to assess the sensitivity of the information so that it can say its customers, the Trangs, impliedly consented to disclosure to another bank? It is one thing for Scotiabank to invoke implied consent to advance its own needs. It is quite another for Scotiabank to invoke implied consent to advance the needs of a third party.

53 This temptation to find implied consent also runs up against the language and scheme of the Act. The language of the consent principle in the Schedule does not support RBC's position. For example, as is evident from cl. 4.3.4, income records of an individual are almost always considered sensitive information. A mortgage discharge statement is like an income record in the sense that it contains personal financial information of the mortgagor, often of a significant financial asset. And, as I have said, both express and implied consent under the Schedule focus on the relationship between the organization and the individual, not on a stranger to that relationship.

54 Thus I do not agree with RBC's submission. It seems to me that the information in a mortgage discharge statement is sensitive information for which the mortgagee would need the mortgagor's express consent to disclose to a third party, such as a judgment creditor. And, Scotiabank does not have the Trangs' express consent to do so.

55 A current mortgage balance is not publicly available information. Just because the legislature chose to make the details of a mortgage publicly available at the beginning of the mortgage relationship does not strip a mortgage balance during the course of a mortgage relationship of the sensitivity it would ordinarily have — a sensitivity for which implying consent to disclosure would be inappropriate. As the Supreme Court said in the *Alberta (Information and Privacy Commissioner)* case: "The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy."

56 Moreover, the context in which disclosure is sought increases the sensitivity of the information. Disclosure is not sought by the "organization", in this case by the mortgagee, Scotiabank, but by a stranger to the mortgage relationship: RBC, a third party judgment creditor. In that context, information about the state of the Trangs' mortgage is sensitive information. In reality it is information about the debtors themselves and about their financial situation. To disclose that information to a judgment creditor without a court order requires their express consent.

(iii) Reasonable expectations of the individual

57 Clause 4.3.5 of Schedule 1 provides that "[i]n obtaining consent, the reasonable expectations of the individual are also relevant." Even if a current mortgage balance can be considered "less sensitive" information, disclosure of a discharge statement to a judgment creditor is not within the reasonable expectations of a mortgagor.

58 An individual's reasonable expectations must be assessed objectively. That objective assessment flows from s. 5(3) of the statute, which provides that an organization may "disclose personal information only for purposes that a reasonable person

would consider are appropriate in the circumstances." But, to repeat what Blair J.A. noted in *Citi Cards*, that assessment must focus on the relationship between the individual and the organization — here between the Trangs and Scotiabank. The reasonable expectations of RBC, a stranger to that relationship, are irrelevant in deciding whether implying consent to disclosure is appropriate.

59 What then are the reasonable expectations of a mortgagor who gives a mortgage to a bank? I think the Trangs could reasonably expect two things from Scotiabank. First, they could expect the protection of their personal information afforded by the common law. And the common law has long recognized that a bank owes a duty to keep a customer's personal information confidential. A bank ought not to disclose that information without the customer's consent, unless required to do so by law, court order or some overriding public duty,[11] or unless the bank's own interests require disclosure. See M.H. Ogilvie, *Bank and Customer Law in Canada*, 2d ed. (Toronto: Irwin Law, 2013), at pp. 324-38; *Tournier v. National Provincial & Union Bank of England* (1923), [1924] 1 K.B. 461 (Eng. C.A.).

60 Under this last exception, Scotiabank could collect, use and disclose personal information concerning the Trangs to administer and, if necessary, enforce its mortgage. In doing so, Scotiabank would be legitimately protecting its own interests.

61 Second, the Trangs could also reasonably expect that if Scotiabank were going to disclose their personal information for a purpose unrelated to the administration or enforcement of the mortgage, it would obtain the Trangs' consent. In other words, personal information legitimately collected for one purpose should not be disclosed for an entirely different purpose without the individual's consent. Indeed, cl. 4.2.4 of Schedule 1 to *PIPEDA* so provides:

> 4.2.4 When personal information that has been collected is to be used for a purpose not previously identified, the new purpose shall be identified prior to use. Unless the new purpose is required by law, the consent of the individual is required before information can be used for that purpose....

62 Thus I agree with Blair J.A.'s comment, at para. 23 of his reasons in *Citi Cards*: "This information is collected and used by the Banks for purposes of administering the mortgage; it is not collected or used for purposes of facilitating another judgment creditor's execution on its judgment."

63 In summary, both the sensitivity of the information and the Trangs' reasonable expectations supported Scotiabank's refusal to disclose the mortgage discharge statement to RBC without the Trangs' express consent.

(iv) Costs, inconvenience and other means to obtain the discharge statement

64 RBC had two ways to obtain the mortgage discharge statement from Scotiabank: by a term in its loan agreement with the Trangs or by a court-ordered examination under rule 60.18(6)(a) of the *Rules of Civil Procedure*. The first would have eliminated any costs or inconvenience to RBC; the second would impose some modest costs and inconvenience. I will discuss these two alternatives in more detail after addressing RBC's other grounds of appeal.

Third Issue: Does s. 3 of PIPEDA permit Scotiabank to provide a mortgage discharge statement to RBC?

65 RBC relies on s. 3 of the Act, which for convenience I reproduce here:

> 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.

66 RBC emphasizes the concluding words of s. 3 — "for purposes that a reasonable person would consider appropriate in the circumstances." And as I have said, those words also appear in s. 5(3) of the Act. RBC submits that "a reasonable person would believe it to be reasonable to order the disclosure of the balance owing on a mortgage when the alternative would be frustrating the enforcement of a judgment which has been lawfully obtained through court process."

67 Even if one were to accept the "reasonableness" of RBC's position, its submission on s. 3 or s. 5 cannot succeed. Neither is an independent basis for authorizing disclosure under *PIPEDA*. Section 3 emphasizes that the purposes for which an organization may collect, use or disclose information are those that a reasonable person would consider appropriate in the circumstances. And s. 5(3) obligates an organization to collect, use or disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances.

68 Indeed, by its wording, s. 5(3) applies in addition to the requirement of consent. But neither s. 3 nor s. 5(3) is an alternative to obtaining consent or an exception to the need for consent. An organization that collects, uses or discloses personal information for a purpose consistent with ss. 3 and 5(3) will nonetheless contravene *PIPEDA* if it fails to obtain the affected individual's consent, unless an exception to the requirement for consent applies.

69 I would not give effect to this ground of appeal.

Fourth Issue: Does s. 28 of the Execution Act authorize Scotiabank to provide a mortgage discharge statement to RBC?

70 In his initial reasons, the motion judge suggested that a judgment creditor is entitled, in law, to disclosure of a mortgage statement from a mortgagee because the judgment creditor needs the statement to exercise its right to sell the equity of redemption in the judgment debtor's real property — a right expressly recognized under s. 28 of the *Execution Act*.

71 RBC has taken up the motion judge's suggestion. It submits, in substance, that a mortgagee is required by law to disclose a mortgage discharge statement, as without it the judgment creditor cannot assess the value of the equity of redemption, and the Sheriff will not sell the debtor's property.

72 Although RBC's submission seems to make practical sense, no provision of the *Execution Act* requires disclosure of a mortgage statement, and thus no provision of that Act satisfies the "required by law" exception in s. 7(3)(i) of *PIPEDA*. Accordingly I would not give effect to this ground of appeal.

Fifth Issue: Is Citi Cards distinguishable?

73 In *Citi Cards*, the motion judge held, and Blair J.A. agreed, that the judgment creditor had not exhausted its alternate remedies because it had not tried to examine the debtor's wife. In this appeal, RBC submits that it has exhausted its alternate remedies because it has twice tried to examine the Trangs, each time without success. It therefore submits that because it took reasonable steps to obtain the mortgage statement from the debtors, it should be entitled to that statement from Scotiabank.

74 The motion judge rejected this submission. In his view, that RBC had exhausted other means to obtain the statement did not add to its substantive argument that it was entitled to the statement under *PIPEDA*. Although I agree with the motion judge, as Blair J.A. noted in *Citi Cards*, and as I will discuss, where a judgment creditor has exhausted other means to obtain a mortgage statement, that will be a relevant consideration when a court decides whether to exercise its discretion to order the mortgagee to produce the statement on a motion under rule 60.18(6). Subject to this caveat, I would not give effect to this ground of appeal.

Means to obtain the mortgage discharge statement

75 RBC could have obtained the mortgage discharge statement in one of two ways: either by a term in its loan agreement with the Trangs or by a motion under rule 60.18(6)(a) of the *Rules of Civil Procedure*.

(a) The loan agreement

76 With foresight, RBC could have obtained the Trangs' consent to the disclosure of a mortgage discharge statement by a term in its loan agreement. For example, the term might have provided that if the Trangs defaulted on their loan and RBC obtained a judgment against them, then for the purpose of enforcing the judgment, the Trangs would agree that any mortgagee of their property could deliver a mortgage discharge statement to RBC. The Trangs' express consent to disclosure of the discharge statement in the loan agreement would be sufficient to meet the requirements of *PIPEDA* and for Scotiabank to deliver the discharge statement to RBC. However, RBC did not obtain the Trangs' consent in its loan agreement.

(b) A motion under rule 60.18(6)(a)

77 Although RBC did not obtain the Trangs' consent in its loan agreement, it can still seek to obtain the mortgage discharge statement by a motion under rule 60.18(6)(a) of the *Rules of Civil Procedure*. That rule states:

> 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).

Under rule 1.03(1), an order includes a judgment. To obtain an order under rule 60.18(6), the party seeking the order must show a "difficulty" in enforcing its judgment. What is a "difficulty" for the purpose of the rule? I think "difficulty" will have to be assessed case by case. But the refusal of the Sheriff to sell without a discharge statement is not a "difficulty" that entitles the execution creditor to go directly to rule 60.18(6) before at least attempting other means to obtain the information. In exercising

their discretion under rule 60.18(6), courts should be reticent to require strangers to the litigation to appear on a motion.

78 Our court has already endorsed this approach in commenting on Rule 591, the predecessor to rule 60.18(6). In *Canadian Imperial Bank of Commerce v. Sutton* (1981), 34 O.R. (2d) 482 (Ont. C.A.), at p. 484, Lacourcière J.A. wrote:

> Caution, however, should be exercised by a judge before whom an application is made so that persons who are strangers to the litigation are not unduly harassed by examinations. The relatives of a judgment debtor or a stranger should not be ordered to be examined unless the judgment creditor has exhausted all means available before resorting to an application of this kind. However, the wording of the Rule leaves it to the discretion of the court to make an order where a difficulty arises in the execution or enforcement of a judgment.

79 Here, RBC can show "difficulty" in enforcing its judgment, both because the Trangs failed to appear for two judgment debtor examinations and because Scotiabank will not produce a discharge statement. Therefore, RBC can resort to a rule 60.18(6)(a) motion. It can seek an order to examine a representative of Scotiabank.

80 Moreover, under rules 34.10(2)(b) and (3), Scotiabank would be required to bring to the examination and produce a discharge statement:

> 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.
>
> (3) Unless the court orders otherwise, the notice of examination or summons to witness may require the person to be examined to bring to the examination and produce for inspection,
>
> > (a) all documents and things relevant to any matter in issue in the proceeding that are in his or her possession, control or power and are not privileged; or
> >
> > (b) such documents or things described in clause (a) as are specified in the notice or summons.

81 An order made under rules 60.18(6)(a) and 34.10 is an order that would permit Scotiabank to disclose the mortgage discharge statement to RBC without the Trangs' consent. It would satisfy the exemption in s. 7(3)(c) of *PIPEDA*.[12] The motion that RBC twice brought to compel Scotiabank to produce a discharge statement would not satisfy that exemption.

82 Section 7(3)(c) of *PIPEDA* authorizes an organization (Scotiabank) to disclose personal information (a mortgage discharge statement) without the individual's (Trangs') knowledge and consent if disclosure is required to comply with a court order or the rules of court relating to the production of records. By its wording, s. 7(3)(c) does not itself authorize disclosure. Instead, it authorizes disclosure without consent if the order for disclosure is based on an authority or rule separate from *PIPEDA*. This distinction is important because it gives effect to *PIPEDA*'s objective: to protect an individual's right of privacy and to permit only narrow exceptions to that right.

83 This important distinction is evident in this case. RBC did not obtain an order on a motion under rule 60.18(6)(a). Instead, it simply brought a motion — not once, but twice — to require Scotiabank to produce the discharge statement. It could succeed on that motion only if the exemption in s. 7(3)(c) authorized disclosure. But it does not. It is, as Blair J.A. wrote in *Citi Cards*, at para. 25, "circular" to say Scotiabank is required to disclose a discharge statement "because disclosure is required by an order not yet made."[13]

84 In contrast, an order made on a motion under rules 60.18(6)(a) and 34.10 is a court order made on the basis of a separate authority or "rules of court" — our *Rules of Civil Procedure*. An order under these rules does not engage "circular" reasoning.[14] It is grounded in specific procedural rules, which satisfy the exemption in s. 7(3)(c) of *PIPEDA*. On a successful motion under rules 60.18(6)(a) and 34.10, Scotiabank would be required, in the words of the exemption, "to comply with ... an order made by a court ... to compel the production of information, or to comply with rules of court relating to the production of records".

85 My colleague suggests that "[i]t 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." Respectfully, I do not agree that RBC's access to justice has been imperilled. *PIPEDA* is a privacy statute. By passing it, Parliament has recognized the high value Canadians place on the privacy of their personal information. Exceptions, which allow our personal information to be disclosed without our knowledge or consent, are carefully and narrowly tailored. A party seeking disclosure without consent must satisfy the court that one of the narrow exceptions applies.

86 RBC, which is hardly an unsophisticated lender, had a procedural route available to come within the exception in s. 7(3)(c) and obtain the discharge statement. In *Citi Cards*, Blair J.A. identified that procedural route as a motion under rule 60.18(6)(a). Instead, however, RBC twice sought to short-circuit this route by bringing a motion *Citi Cards* had already said would not satisfy the exception. And when RBC finally sought to examine Scotiabank, it did not bring a rule 60.18(6)(a) motion to obtain a court order, which is a prerequisite to coming within the exception. Instead, it asked only that a representative of Scotiabank appear for an examination voluntarily. Although a Scotiabank representative did so, she properly indicated that *PIPEDA* prevented her from disclosing the discharge statement without a court order or the Trangs' consent.

87 A motion under rule 60.18(6)(a) undoubtedly would increase RBC's cost and inconvenience in enforcing its judgment. Because RBC failed to obtain the Trangs' express consent, that cost and inconvenience seem to be a small price to pay for protecting the Trangs' privacy rights.

88 As important, under rule 60.18(6)(a), the court has discretion whether to make the order requested. Because of this discretion, the court can act as a gatekeeper for the disclosure of personal information. That it has this role is entirely appropriate because it is in the best position to balance the interests of the various affected parties and determine whether disclosure is justified.

89 In exercising its discretion, the court may, for example, take into account whether, as between the execution creditor and the judgment debtor, the information is sensitive, and whether the judgment creditor has exhausted other means to enforce its judgment. Here, that RBC has twice sought without success to examine the Trangs would be a relevant consideration. In other cases — and *Citi Cards* is an example — the court may be concerned to protect the interests of a spouse or co-mortgagor who is not a debtor.

F. Conclusion

90 RBC may still bring a motion for an order to examine a representative of Scotiabank under rule 60.18(6)(a). On the record before us, however, I would dismiss RBC's appeal. As *amicus* does not seek costs, I would make no order for costs.

***E.A. Cronk J.A.*:**

I agree.

***R.A. Blair J.A.*:**

I agree.

***Alexandra Hoy A.C.J.O.* (dissenting):**

A. Overview

91 I agree with Laskin J.A. that a mortgage discharge statement (a "Statement") constitutes "personal information" of the Trangs. I also agree that neither s. 3 nor s. 5(3) of *PIPEDA* is an alternative to obtaining consent to disclosure of personal information or an exception to the need for consent. Finally, I agree that s. 28 of the *Execution Act* does not satisfy the "required by law" exception in s. 7(3)(i) of *PIPEDA*. However, I would allow this appeal, and would order Scotiabank to produce the Statement to RBC. In my view, there are two bases for doing so.

92 First, an order requiring a mortgagee to disclose a Statement to a creditor need not have been sought under rule 60.18(6)(a) to constitute "an order made by a court" within the meaning of s. 7(3)(c) of *PIPEDA*. Respectfully, *Citi Cards Canada Inc. v. Pleasance* [2011 CarswellOnt 6 (Ont. C.A.)] is wrong to the extent that it holds otherwise. Unlike my colleague, I do not believe a further motion by RBC is required before disclosure can be ordered. It is clear from the motion judge's thorough and careful reasons that he would have ordered disclosure had he thought he could, and, in my view, it would have been appropriate to do so. (Indeed, it is also clear that my colleague would order disclosure of the Statement if RBC had simply labelled its motion as one under rule 60.18(6)(a).) I would accordingly order disclosure of the Statement.

93 Second, a court order is unnecessary in any event because the Trangs' consent to the disclosure of the Statement can be implied. The Statement constitutes "less sensitive" information for the purposes of s. 4.3.6 of Schedule 1 to *PIPEDA*, and disclosure accords with the reasonable expectations of an individual in the Trangs' position. Had this court in *Citi Cards* considered s. 4.3.6, it would have — or at least should have — come to a different result.

94 Below, I elaborate on these two bases. I then comment on my colleague's view (expressed at para. 76 of his reasons) that with foresight RBC could have obtained disclosure of the Statement by a term in its loan agreement. Finally, I explain why this court should overrule *Citi Cards*. My colleague's reasons set out in detail the facts and chronology giving rise to this litigation. I will not repeat them.

B. "An Order Made by a Court" Within the Meaning of Section 7(3)(C) of PIPEDA

95 I differ from my colleague in relation to the "order made by a court" requirement in two respects.

96 First, as I indicate above, I would not require RBC to bring another motion in order to obtain disclosure of the Statement. Whether RBC purported to move under rule 60.18(6)(a) or simply asked the court for an order requiring the mortgagee to disclose the Statement is immaterial. In either case, the relief sought is substantively identical. Requiring a further motion would not be just, and it certainly would not be expeditious. It would cause RBC to incur further expenses that are unwarranted and disproportionate to the amount at issue.

97 Second, I would take a less cautious approach to when a motion judge can reasonably order an examination of a mortgagee under rule 60.18(6)(a).

98 I deal with this second point of difference first.

Creditors like RBC should not be required to overcome unnecessary hurdles before resorting to rule 60.18(6)(a) to obtain a Statement

99 At para. 77 of his reasons, my colleague refers to rule 60.18(6)(a):

> 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).

He then writes:

> Under rule 1.03(1), an order includes a judgment. To obtain an order under rule 60.18(6), the party seeking the order must show a "difficulty" in enforcing its judgment. What is a "difficulty" for the purpose of the rule? I think "difficulty" will have to be assessed case by case. But the refusal of the Sheriff to sell without a discharge statement is not a "difficulty" that entitles the execution creditor to go directly to rule 60.18(6) before at least attempting other means to obtain the information. In exercising their discretion under rule 60.18(6), courts should be reticent to require strangers to the litigation to appear on a motion.

100 In response to the question of what constitutes a "difficulty" for the purpose of rule 60.18(6), I would say this. Where an execution creditor seeks a Statement from a mortgagee, the prerequisites to a rule 60.18(6)(a) examination order should be simple and expeditious. In my view, it could be reasonable for a motion judge to order an examination of the mortgagee under rule 60.18(6)(a) if the debtor failed to attend a single judgment debtor examination, or simply did not respond to a written request that he or she sign a form consenting to the provision of a Statement to the creditor.

101 In some cases, a judgment creditor may wish to examine the debtor. However, in other cases the creditor's only objective may be to obtain a Statement. If the debtor does not respond to a written request that he or she sign a form consenting to the provision of a Statement to the creditor, it should not be necessary for the creditor to seek to examine the judgment debtor and any co-mortgagor before bringing a motion for an order requiring the mortgagee to disclose the Statement — provided, of course, that the execution creditor serves the judgment debtor and any co-mortgagor with the motion. And it certainly should not be necessary to wait until the judgment debtors have failed to attend at two scheduled judgment debtor examinations, and an order to compel the debtor's attendance has been obtained. Requiring multiple motions results in unwarranted delay and expense and does not foster access to justice. Further, simply being in a position to tell a debtor that a motion (with potential cost consequences) may be brought to secure the Statement may be sufficient to encourage the debtor's cooperation in obtaining the Statement.

102 My colleague says that courts should be reticent to require a stranger to the litigation to appear on a motion under rule 60.18(6)(a). For this principle, he cites p. 484 of *Canadian Imperial Bank of Commerce v. Sutton* (1981), 34 O.R. (2d) 482 (Ont. C.A.):

> Caution, however, should be exercised by a judge before whom an application is made so that persons who are strangers to the litigation are not unduly harassed by examinations. The relatives of a judgment debtor or a stranger should not be ordered to be examined unless the judgment creditor has exhausted all means available before resorting to an application of this kind. However, the wording of the Rule leaves it to the discretion of the Court to make an order where a difficulty arises in the execution or enforcement of a judgment.

103 In *Sutton*, the "stranger" was the defendant's sister, and the court upheld an order that she be examined.

104 In my view, where an examination of a mortgagee is sought to obtain a Statement, a mortgagee is not a "stranger to the litigation" in the sense contemplated by *Sutton*. Only the mortgagee can produce the Statement, whether with the debtor's consent, or pursuant to court order. As the motion judge observed at para. 31 of *Royal Bank of Canada v. Trang*, 2012 ONSC 3272, 20 R.P.R. (5th) 79 (Ont. S.C.J.) (his "First Judgment"), the state of account between a mortgagor and a mortgagee does not simply govern the rights between those parties. As he wrote, "It also defines the value of the equity of redemption, and will affect priorities as among mortgagees and creditors." Section 28 of the *Execution Act* gives RBC the right to sell the Trangs' equity of redemption. That right cannot be exercised without knowing what the equity is worth.

105 Further, a court order that a mortgagee produce a Statement would in my view not "unduly harass" the mortgagee — the concern expressed in *Sutton*. As I note above, only mortgagees can produce Statements, and the production of Statements by mortgagees is commonplace.

106 I am accordingly of the view that where an examination of a mortgagee is sought under rule 60.18(6)(a) in order to obtain a Statement, less caution need be exercised by a motion judge than in the case of examinations of other persons, for other purposes. In a proper case, a motion judge should be able to order the mortgagee to produce the Statement, without the creditor having brought any prior motions, and without having to wait until the judgment debtors have failed to attend at one or more judgment debtor examinations.

In this case, it is immaterial whether the motion is brought under rule 60.18(6)(a) or otherwise

107 This takes me to my second, and more significant, point of difference. Given the fact that the effect of a motion under rule 60.18(6)(a) — when combined with rule 34.10(2) — is that the mortgagee is required to produce the Statement, it should not matter whether the execution creditor purports to move under rule 60.18(6)(a), or simply asks for an order requiring the mortgagee to disclose the Statement. RBC sought the same relief in this case as my colleague agrees would result from a motion brought and granted under rule 60.18(6)(a): disclosure of the Statement.

108 The following oft-cited passage at para. 25 of *Citi Cards* emphasizes the purported circularity of relying on an "order not yet made":

> 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.

109 Yet when a motion is brought for an order under rule 60.18(6)(a) that, if granted, will result in the disclosure of a Statement, an order has "not yet [been] made" at the time the motion is brought. In that respect, it is no different than a motion for disclosure brought on any other basis. The following comment by the motion judge in this case, at para. 22 of his First Judgment, is apt: "[I]f the substantive provisions of *PIPEDA* prohibit the disclosure of the information it is difficult to see how the procedural provisions of rule 60.18(6)(a) can permit them to be overridden. This would seem to have the same degree of circularity referred to by Blair J.A. at paras. 25 and 33 of *Citi Cards*."[15]

110 Respectfully, 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. In both cases, an execution creditor is asking a court to exercise its discretion to determine if an order to disclose a Statement is justified. The only difference is the label attached to the motion.

111 While motions with the objective of obtaining a Statement for the sole purpose of satisfying the requirement that there be "an order made by a court" within the meaning of s. 7(3)(c) of *PIPEDA* would usually be brought under rule 60.18(6), the failure to advert to or move under such rule should not in and of itself disentitle the moving party to relief. I note that in *Citi Cards*, the motion judge proceeded on the basis that the motion had been brought under rule 60.18(6)(a), even though it was not clear that it had been.

112 In this case, 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. The facts in this case are different from the facts in *Citi Cards*. In *Citi Cards*, the execution creditor obtained a judgment against the husband alone. The house was jointly owned by the husband and wife. The husband could not be located, and the execution creditor made no attempt to add the wife as a party or examine her as a non-party under rule 60.18(6)(a) before seeking disclosure from the mortgagor. Here, the Trangs are both judgment debtors. All affected parties were aware of the relief sought. RBC twice served them with Notices of Examination. It obtained an order requiring them to attend and to produce all relevant documents that the Trangs did not comply with.

113 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 Trangs' mortgage to enforce a valid judgment. The principal amount of this judgment is only

$26,122.76.

114 My colleague would require RBC to bring yet another motion. I cannot agree. Form should not triumph over substance. Many creditors are not as sophisticated as RBC, and can ill-afford the expense of being in and out of court to enforce a valid judgment for a relatively modest amount. Further, as I explain below in my discussion of the second basis on which I would allow this appeal, Scotiabank was (and is) entitled to provide a Statement to RBC without the necessity of an order.

115 I now turn to that second basis.

C. The Outstanding Balance on the Mortgage is "Less Sensitive" Information and the Trangs' Consent to Disclosure of the Statement to RBC is Implied

116 As my colleague explains, s. 4.3.6 of Schedule 1 to *PIPEDA* includes the notion of implied consent for the disclosure of "less sensitive" information. He concludes that a Statement is not "less sensitive" personal information and, even if it were, its disclosure to a judgment creditor is not within the reasonable expectations of a mortgagor. Therefore, the Trangs cannot have impliedly consented to its disclosure.

117 I disagree. In my view the Statement constitutes "less sensitive" information, and the Trangs' consent to its disclosure can be implied. Therefore, s. 4.3.6 of Schedule 1 to *PIPEDA* permits Scotiabank to provide this information to RBC without the necessity of a court order. Had the court in *Citi Cards* considered s. 4.3.6 it would have — or at least in my view should have — come to a different result.

The Statement constitutes "less sensitive" information

118 The fact that all the details of the Trangs' mortgage — the principal amount, the rate of interest, the payment periods and the due date — were made publicly available when the mortgage was registered makes the current balance outstanding on that mortgage "less sensitive" personal information. Indeed, absent pre-payments or defaults under the mortgage, a third party could calculate the current balance outstanding on the mortgage from the details that were made publicly available when the mortgage was registered. The current mortgage balance is generally no more sensitive than the amount of the mortgage publically disclosed at the time that the mortgage was registered.

119 As the motion judge points out in his First Judgment at paras. 5 and 12, as a practical matter, this issue only arises where the mortgage that enjoys priority is in good standing. If the mortgage is in significant arrears, there is a strong likelihood that the mortgagee will have initiated its own enforcement proceedings, that subsequent encumbrancers — including execution creditors — will have been duly served or notified, and that the details of the state of the mortgage will have been revealed.

120 And as the motion judge noted at para. 28 of his First Judgment, the provision of Statements "was formerly a commonplace, and, in the case of mortgagees who are not under federal legislation, it remains so. It seems odd that Parliament would have intended to protect a debtor who is subject to a final judgment of the Court in this way, and prevent the judgment creditor from realizing on the judgment that the Court has awarded."

121 Even if the outstanding balance on the Trangs' mortgage were "sensitive" personal information, it became "less sensitive" information when RBC became a "creditor" of the Trangs, within the meaning of Rule 60.18(1) of the *Rules of Civil Procedure*,[16] and first scheduled an examination in aid of execution pursuant to rule 60.18(2).[17] Just as Scotiabank would be required to bring the Statement to an examination under rule 60.18(6)(a) and produce it to RBC, under rules 34.10(2)(b) and (3),[18] the Trangs were *required* to bring the Statement to their rule 60.18(2) examination and to produce it to RBC.

The Trangs' consent to disclosure to RBC of the outstanding balance on their mortgage can be implied

122 I agree with my colleague that to determine whether, for the purposes of *PIPEDA*, an individual impliedly consents to disclosure both the sensitivity of the information in question and the reasonable expectations of the individual are relevant. In determining the reasonable expectations of an individual, s. 3 of *PIPEDA* invites us to analyze whether the information is to be disclosed "for purposes that a reasonable person would consider appropriate in the circumstances".

123 As I explain above, the statement of account between a mortgagor and mortgagee affects the rights of other creditors. In my view, a reasonable mortgagor would consider it appropriate that his or her mortgagee be entitled to provide a Statement to affected third parties. The mortgagor in these cases has engaged in a transaction knowing that detailed information about the transaction is publicly available. The mortgagor knows that information about the transaction is highly relevant to the legal rights of creditors should the mortgagor fail to pay his or her debts. It would be unreasonable for the mortgagor to think that any privacy rights he or she might enjoy in the information as to the current state of the mortgage could stand in the way of creditors enforcing their legal rights. That is particularly so because, as I indicate above, if the mortgage is in arrears (presumably making the information more sensitive), it will almost certainly be revealed in the mortgagee's enforcement proceedings.[19]

124 And even if that were not the case, a reasonable mortgagor would certainly consider it appropriate that his or her mortgagee provide a Statement to his or her "creditor", within the meaning of rule 60.18(1), once that creditor scheduled an examination of the mortgagor in aid of execution under rule 60.18(2). As I also explain above, the mortgagor is required to produce the Statement at his or her examination in aid of execution. By providing the Statement, the mortgagee would simply facilitate the fulfillment of the mortgagor's obligations at the examination in aid of execution. To conclude otherwise would accept that a *reasonable* mortgagor in a society governed by the rule of law intends to frustrate his or her creditors and to flout his or her obligations under the *Rules of Civil Procedure*. An unreasonable mortgagor might do so. A reasonable one would not.

125 I am mindful of s. 4.3.8 of Schedule 1 to *PIPEDA* in concluding that the Trangs can be taken to have impliedly consented to the production of a Statement by Scotiabank to RBC. That section provides: "An individual may withdraw consent at any time, subject to legal or contractual restrictions *and reasonable notice*" [emphasis added]. In my view, the Trangs did not withdraw their consent to the production of a Statement to execution creditors such as RBC by failing to attend at two scheduled judgment debtor examinations. They have not given notice to Scotiabank, as required by s. 4.3.8 of Schedule 1 to *PIPEDA*.

126 Therefore, the Trangs' consent to the provision by Scotiabank of a Statement to RBC can be implied, and Scotiabank was permitted to provide the Statement to RBC without a court order.

D. The Notion That RBC Could Have Obtained the Trangs' Express Consent

127 My colleague posits that, with foresight, RBC could have obtained the Trangs' express consent to the disclosure of the Statement by a term in its loan agreement. That may be so. However, creditors are not always sophisticated financial institutions with in-house counsel and comprehensive, standard loan documentation. Creditors may be family members, neighbours, or small businesses who have lent relatively small amounts without the benefit of legal advice or legal documentation. My colleague's suggestion may therefore not be implemented by many creditors.

E. Citi Cards Should be Overruled

128 Because I would overrule *Citi Cards*, it is not necessary for me to consider whether it is open to this court to depart from *Citi Cards* on the basis of the *per incuriam* doctrine.

129 There are, in my view, several factors favouring overruling *Citi Cards*.

130 First, the result in *Citi Cards* has been the subject of unfavourable comments in this jurisdiction: see *EnerWorks Inc. v. Glenbarra Energy Solutions Inc.*, 2012 ONSC 748, 39 C.P.C. (7th) 190 (Ont. Master) where, in reference to *Citi Cards*, Master Short wrote, at para. 7, "[h]owever, what often does required something approaching rocket science is recovering the amount of a judgment once it has been awarded." The motion judge in this case also struggled with the effect of, and reasoning in, *Citi Cards*. And the reasoning in *Citi Cards* has been questioned in another jurisdiction: see *Toronto Dominion Bank v. Sawchuk*, 2011 ABQB 757, 86 C.B.R. (5th) 1 (Alta. Master).[20] This was identified as a relevant consideration in *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* [2006 CarswellOnt 441 (S.C.C.)], at para. 131.

131 Second, the value of certainty fostered by adherence to precedent has little application in this case: see *Polowin* at para. 139, quoting Justice Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1960) at p. 151: "There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of litigants." It is difficult to see how any party could have relied on *Citi Cards* in planning its affairs. Indeed, by allowing creditors to have ready access to the information they need to enforce their claims, this court would fulfil, rather than disappoint or frustrate, the reasonable expectations of both borrowers and lenders.

132 Third, *Citi Cards* is of relatively recent vintage: see *Polowin* at para. 140: "Better then to correct an error early than to let it settle in."

133 Fourth, the manner in which the case was argued in *Citi Cards* is a relevant consideration in assessing whether the decision should be overruled: see *Polowin* at para. 141. It is apparent that the argument made before the court in this case, based on the concept of implied consent enshrined in s. 4.3.6 of Schedule 1 to *PIPEDA*, was not made in *Citi Cards*. Here, all relevant provisions of *PIPEDA* were presented to the court. And the specific issue of implied consent — the issue upon which the second basis on which I would allow this appeal is based — was not before the court in *Citi Cards*.

134 Fifth, as I have already explained in my analysis of the first basis on which I would allow this appeal, and as the

circumstances of this case reveal, the roadblock erected by *Citi Cards* is a source of considerable cost, inconvenience and unnecessary litigation. The appellant, trying to enforce a modest claim of under $30,000, has been forced to bring multiple motions and is now before this court for the second time. Overruling *Citi Cards* removes the need for a further court attendance in this case and the need for a court order in similar circumstances. This equates to the elimination of a non-trivial barrier to justice, particularly for creditors trying to enforce relatively modest claims.

135 In my respectful view, *Citi Cards* was wrongly decided and it should be overruled.

F. Disposition

136 For the foregoing reasons, I would allow the appeal and order Scotiabank to produce the Statement to RBC.

***Robert J. Sharpe J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 S.C. 2000, c. 5.

2 R.S.O. 1990, c. E.24.

3 The motion judge gave brief reasons. But he gave more extensive reasons in his June 6, 2012, decision.

4 2009 ONCA 48, 93 O.R. (3d) 403 (Ont. C.A.), at para. 22, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 111 (S.C.C.).

5 These principles reproduce the Model Code for Protection of Personal Information, previously adopted by the Canadian Standards Association.

6 The two mortgagees were The Toronto-Dominion Bank and The Canada Trust Company. Although the latter was not technically a bank, for simplicity I refer to both financial institutions as "banks".

7 We were not provided with the typical mortgage discharge statement. I assume that the statement at least would show the principal balance outstanding, the rate of interest and whether the mortgage was in good standing.

8 R.S.O. 1990, c. L.4.

9 S.O.R./2001-7.

10 See para. 19 of these reasons.

11 For example, to prevent a fraud or other crime.

12 See para. 16 of these reasons.

13 Blair J.A.'s interpretation has been followed in several cases: *Mountain Province Diamonds Inc. v. De Beers Canada Inc.*, 2014 ONSC 2026, 25 B.L.R. (5th) 141 (Ont. S.C.J.), at para. 61; *Douglas v. Loch Lomond Ski Area*, 2010 ONSC 6483 (Ont. S.C.J.), at para. 18; and *Aecon Industrial Western v. BBF, Local 146*, 2013 ABQB 122, 558 A.R. 108 (Alta. Q.B.), at para. 11.

14 Perrel J. made the same point in *Mountain Province Diamonds*, at para. 64: "I read s. 7(3)(c) of *PIPEDA* as requiring a court order for disclosure [pursuant to some jurisdiction found outside of *PIPEDA*] to be made first and it would then not be circular reasoning for that order to trigger the exception under *PIPEDA*".

15 Para. 33 of Blair J.A.'s reasons addresses the exception to the requirement of consent to disclosure in s. 7(3)(i) of *PIPEDA*, namely where the disclosure is "required by law":
The appellant suggests, again, that because rule 60.18(6)(a) permits the court to make an order in aid of execution for the examination of a person other than a debtor "who the court is satisfied may have knowledge of the [debtor's debts]", the application judge had a lawful basis and the authority to order the Banks to provide the mortgage statement and, therefore, that they should be "required by law" to do so. But it does not follow that because the Banks might be ordered to disclose, they are presently "required by law" to do so. This argument, again, has the tinge of circularity to it that was rejected in another context above.

16 RBC has obtained a judgment against the Trangs and has filed a writ of seizure and sale with the Sheriff in Toronto. It is a "creditor" and each of the Trangs is a "debtor", as those terms are defined in Rule 60.18(1):
(1) Definitions — In subrules (2) to (6),
a. "creditor" includes a person entitled to obtain or enforce a writ of possession, delivery or sequestration;

b. "debtor" includes a person against whom a writ of possession, delivery or sequestration may be or has been issued.

17 That rule provides:
(2) Examination of debtor — A creditor may examine the debtor in relation to,

. . .

(b) the debtor's income and property;

(c) the debts owed to and by the debtor;

. . .

(e) the debtor's present, past and future means to satisfy the order;
The Notices of Examination specifically required the Trangs to bring with them and produce at their examination "all documents relating to [their] assets".

18 Rules 34.10(2)(b) and (3) provide:
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.

(2) Unless the court orders otherwise, the notice of examination or summons to witness may require the person to be examined to bring to the examination and produce for inspection
(a) all documents and things relevant to any matter in issue in the proceeding that are in his or her possession, control or power and are not privileged; or

(b) such documents or things described in clause (a) as are specified in the notice or summons.

19 See *Aecon Industrial Western v. BBF, Local 146* [2013 CarswellAlta 287 (Alta. Q.B.)], referred to by my colleague at note 13 of his reasons. In that case, Master Schlosser observed that an individual has less of an expectation of privacy in a Statement than in the information about a union member that he ordered to be disclosed. He wrote, at para. 9: "It might also be said that in a foreclosure context, the amount of outstanding indebtedness is not information collected *from* an individual in the same sense that the information is collected here. In other words, the individual is not providing the bank, in a foreclosure context, with information that an individual would ordinarily (and otherwise) could expect to keep private. It is the bank's own record of the state of affairs between it and the debtor."

20 None of the cases cited by my colleague at notes 13 and 14 of his reasons involve the disclosure of a Statement to an execution creditor. Further, as I explain below, in *Aecon Industrial Western* the Court expressed concern about the position of Ontario execution creditors under *Citi Cards*; and *Douglas v. Loch Lomond Ski Area* [2010 CarswellOnt 9266 (Ont. S.C.J.)] predates *Citi Cards* and considers an application for disclosure under PIPEDA on its merits.

In *Mountain Province Diamonds Inc. v. De Beers Canada Inc.* [2014 CarswellOnt 4208 (Ont. S.C.J.)], Perell J. concluded, based on *Citi Cards*, that he did not have jurisdiction to order the disclosure of payroll records of one joint venturer to the other because "a disclosure order has not yet been made pursuant to some jurisdiction found outside of *PIPEDA*": para. 65. *Mountain Province Diamonds Inc.* did not concern the disclosure of a Statement.

In *Aecon Industrial Western*, Master Schlosser concluded that the Alberta *Personal Information Protection Act*, R.S.A. 2003, c. P-6.5 permitted him to order a union to disclose employment information about a union member to an execution creditor. In a footnote to that decision, Master Schlosser commented: "Execution creditors in Ontario may be in a corner unless *Citi Cards* is revisited or *PIPEDA* is amended."

Douglas v. Loch Lomond Ski Area pre-dates *Citi Cards*. In *Douglas*, an individual injured at a ski club brought a Norwich application seeking photos of all female ski club members between the ages of 12 and 20 years of age to help him try to determine the identity of the female snowboarder who had crashed into him on the ski hill. The motion judge concluded that such an order was not appropriate. He characterized the disclosure sought as "an overt fishing expedition" — he was not persuaded that providing the requested disclosure would result in the identification of the tortfeasor. The applicant's interests therefore did not outweigh the privacy interests of the female members. The motion judge did not decline to order disclosure because a disclosure order had not yet been made pursuant to some jurisdiction outside of *PIPEDA*.

End of Document

History (4)

Direct History (4)

1. Royal Bank of Canada v. Trang
2013 ONSC 4198 , Ont. S.C.J. , June 18, 2013
Judicially considered 1 time

Affirmed by

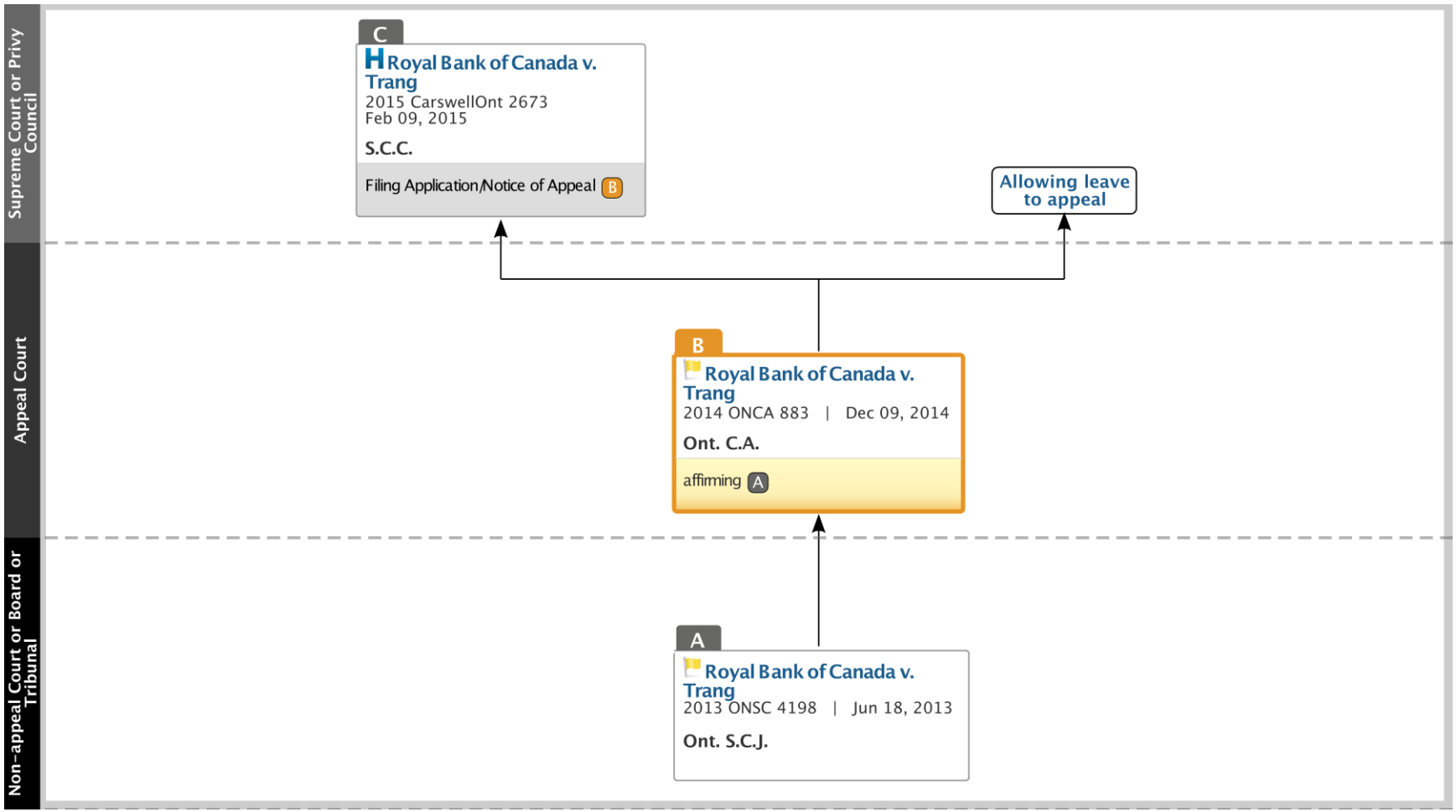
2. Royal Bank of Canada v. Trang
2014 ONCA 883 , Ont. C.A. , Dec. 09, 2014
Judicially considered 5 times

Application/Notice of Appeal filed in

3. Royal Bank of Canada v. Trang
2015 CarswellOnt 2673 , S.C.C. , Feb. 09, 2015

AND Leave to appeal allowed by

4. Royal Bank of Canada v. Trang
2015 CarswellOnt 10839 , S.C.C. , July 16, 2015



Citing References (9)

Treatment	Title	Date	Type	Depth
Recently added (treatment not yet designated)	**1. Premier Brands Ltd. v. Monk's Group of Pubs Inc.** 2015 CarswellOnt 13329 (Ont. S.C.J.)	Aug. 05, 2015	Cases and Decisions	
Referred to in	**2. Nanne v. 3011650 Nova Scotia Ltd.** 2015 ONCA 391 (Ont. C.A.)	June 05, 2015	Cases and Decisions	
Referred to in	**3. Canadian Planning and Design Consultants Inc. v. Libya (State)** 2015 ONSC 3386 (Ont. S.C.J.) **Judicially considered 2 times**	May 29, 2015	Cases and Decisions	
Referred to in	**4. PIPEDA Report of Findings No. 2015-001, Re** 2015 CarswellNat 868 (Can. Privacy Commr.)	Apr. 07, 2015	Cases and Decisions	
Referred to in	**5. R. v. Caswell** 2015 ABCA 97 (Alta. C.A.) **Judicially considered 3 times**	Mar. 06, 2015	Cases and Decisions	
Referred to in	**6. Ontario Psychological Assn. v. Mardonet** 2015 ONSC 1286 (Ont. S.C.J.) **Judicially considered 1 time**	Feb. 26, 2015	Cases and Decisions	
—	**7. STARE DECISIS**	Jan. 21, 2015	Words & Phrases	—
—	**8. PER INCURIAM**	Dec. 09, 2014	Words & Phrases	—
—	**9. ICLL/IDJC 290691, The Importance of exceptions**	2015	Secondary Sources	—

