CITATION: Royal Bank v. Trang, 2012 ONSC 3272
COURT FILE NO.: 6464/10
DATE: 2012-06-06

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
ROYAL BANK OF CANADA	)	
Plaintiff	)	Justin R. Winch, for the Plaintiff, Moving Party
– and –	)	
PHAT TRANG and PHIONG TRANG aka PHUONG THI TRANG	)	
Defendants	)	
	)	No one appearing for the Bank of Nova Scotia, Responding Party
	)	
	)	**HEARD:** May 16, 2012

REASONS FOR JUDGMENT

GRAY J.

[1] The plaintiff is an execution creditor of the defendants. In this motion, it seeks to compel a mortgagee, the Bank of Nova Scotia, to provide a discharge statement, so that the plaintiff can realize on its judgment against the defendants. The sheriff will not sell the defendants' property without a discharge statement from the mortgagee. The mortgagee refuses to provide such a statement.

[2] The plaintiff, and this Court, are immediately confronted with a decision of the Court of Appeal that appears to prevent the plaintiff from obtaining the order it seeks: *Citi Cards Canada Inc.* v. *Pleasance* (2011), 103 O.R. (3d) 241 (C.A.). In that case, the Court held that the

requested statement could not be provided because of a federal statute, the *Personal Information Protection and Electronic Documents Act* (*PIPEDA).* The plaintiff argues persuasively that *Citi Cards* was delivered *per incuriam*, or is distinguishable.

[3] I am not persuaded that *Citi Cards* was delivered *per incuriam*, nor is it distinguishable. I am bound by it. Thus, with some regret, I dismiss the plaintiff's motion for the reasons that follow.

Background

[4] Rather than paraphrase, I will simply set out the contents of the affidavit (without exhibits) sworn in support of this motion by James M. Satin, a partner with the law firm representing the plaintiff, as follows:

> 1. I am a partner with the law firm of Devry Smith Frank *LLP* ("*DFS"*), lawyers for the plaintiff, Royal Bank of Canada ("RBC"), in this matter. As such, I have knowledge, information and belief of the matters hereinafter deposed. Where the information set out herein is not within my personal knowledge, I have identified the source of that information, and I believe that information to be true.
>
> 2. I swear this affidavit in support of a motion for an Order that The Bank of Nova Scotia ("BNS") provide to the applicant, RBC, as an execution creditor of the respondents, Phat Trang ("Phat") and Phuong Trang AKA Phuong Thi Trang ("Phuong") the mortgage discharge statement (the "Statement") relating to the mortgage registered against the Property (as defined below) in favour of BNS.
>
> 3. In order to explain the circumstance of the within motion, I would advise this Honourable Court of the following:
>
> a) Attached hereto and marked as **Exhibit "A"** to this my affidavit is a true copy of the Bank's judgment in this matter dated December 17, 2010 (the "Judgment").
>
> b) RBC filed a writ of seizure and sale (the "writ") with the Sheriff of the City of Toronto against Phat and Phuong. The writ has been filed with the Sheriff for more than one (1) year.
>
> c) In order to determine Phat and Phuong's ability to satisfy the Judgment, an examination in aid of execution of Phat and Phuong was scheduled for April 5, 2011 (the "Examination").
>
> d) Attached hereto and marked collectively as **Exhibit "B"** to this my affidavit are true copies of the Notices of Examination with respect to the Examination addressed to Phat and Phuong together with the affidavits of service of same.

e) On April 5, 2011, I attended the Examination at the offices of Devry Smith Frank *LLP* located 95 Barber Greene Road, Suite 100, Toronto, Ontario M3C 3E9 at 9:00 a.m. Despite having been served with the Notices of Examination with respect to same, Phat and Phuong did not appear. Attached hereto and marked as **Exhibit "C"** to this my affidavit is a true copy of the Certificate of Non-Attendance.

f) On November 15, 2011, RBC's lawyers, DSF, requested the Statement from BNS. In the letter, DSF explained that it intended to collect on the Judgment by instructing the Sheriff to sell the defendants' interest in the property municipally known as 334 Sentinel Road, Toronto, Ontario (the "property") pursuant to a sheriff's sale (the "Sheriff's Sale"). RBC further explained that before it can exercise its legal rights and remedies by proceeding with the Sheriff's Sale, it needed the Statement from BNS who holds a mortgage against the Property.

g) On November 23, 2011, BNS advised DSF that it would not provide the Statement because the Bank of Nova Scotia ("BNS") did not believe that the applicant was entitled to receive the statement. BNS advised that they thought that the Statement constituted personal information as defined by the Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5 ("PIPEDA") and consequently, BNS was unable to give the Statement to the applicant unless they had authorization from Phat and Phuong.

h) Following BNS's refusal to provide the statement, RBC brought a motion to compel Phat and Phuong's attendance at a newly scheduled Judgment Debtor Examination at which we hoped to get the required authorization. The motion was granted on January 5, 2012. Attached hereto and marked as **Exhibit "D"** to this my affidavit is the Order.

i) DSF scheduled a second examination in aid of execution of Phat and Phong returnable on February 17, 2012 (The "Second Examination"). Attached hereto and marked collectively as **Exhibit "E"** to this my affidavit are true copies of the Notices of Examination with respect to the Second Examination addressed to Phat and Phuong together with the affidavits of service of same.

j) Despite being served with Notices of Examination with respect to the Second Examination, as well as the court order compelling their attendance, Phat and Phuong did not attend at the Second Examination. A Certificate of Non-Attendance was obtained. Attached hereto and marked as **Exhibit "F"** to this my affidavit is a true copy of the Certificate of Non-Attendance.

4. RBC intends to collect on the Judgment by instructing the Sheriff to sell the defendants' interest in the property pursuant to a sheriff's sale. There is a first mortgage registered against the property in favour of BNS for $262,500 registered on November 21, 2005 as Instrument No. AT984917. RBC requires the Statement from BNS so that it can exercise its legal rights and remedies by proceeding with the Sheriff's Sale.

5. Had Phat and/or Phuong, attended at either the Examination or Second Examination, RBC would be entitled to the Statement from Phat and Phuong, or alternatively authorization to obtain the same direction from BNS.

6. Given that Phat and Phuong failed to attend at the examinations, RBC is left with acquiring the mortgage statement from BNS or having the judgment go unenforced.

7. The Defendants did not defend the Bank's action and are therefore not entitled to notice of this motion.

8. In light of the foregoing, I believe that this is a just and proper circumstance for this Honourable Court to order BNS to provide the Statement to RBC, without Phat and Phuong's consent, so that it is able to enforce its judgment.

[5] The plaintiff's judgment was obtained on December 17, 2010, in the amount of $26,122.76, and a writ of execution in that amount has been on file with the Sheriff for more than one year. While not stated in the affidavit, I will assume that the mortgage held by the Bank of Nova Scotia, in the face amount of $262,500, is not in default and is in good standing. Indeed, the difficulty only arises where a mortgage is in good standing and no steps have been taken to enforce it. If foreclosure, judicial sale, or power of sale proceedings are commenced, subsequent encumbrancers, including execution creditors, will be made defendants or given notice of the exercise of a power of sale, and will be entitled to redeem. They will obviously then be given full information as to the state of account between the mortgagee and mortgagor.

[6] In the final analysis, in this case, the Sheriff will not proceed to sell the defendants' property without a discharge statement from the Bank of Nova Scotia. Mr. Satin swears that without the statement, the plaintiff's judgment will simply go unenforced. I have no reason to disagree with Mr. Satin's view.

Submissions

[7] Mr. Winch, counsel for the plaintiff, submits that *Citi Cards* was delivered *per incuriam*. He submits that there were a number of statutory provisions that were not considered by the Court of Appeal that could have had a bearing on its decision, and that could have resulted in the Court deciding the matter differently. These include provisions of *PIPEDA* and its Schedule; the *Mortgages Act*; the *Execution Act*; the *Land Registration Reform Act*; and Ontario Regulation 19/99, made under the *Land Registration Reform Act*. He submits that the plaintiff has a clear right, both at common law and by statute, to sell the property of the debtors in order to satisfy the plaintiff's judgment, and an interpretation of the federal statute should be preferred that would permit that right to be exercised.

[8] Furthermore, Mr. Winch submits that *Citi Cards* is distinguishable. In *Citi Cards*, the plaintiff had made no effort to examine the judgment debtor or his wife, whereas in the case before me the plaintiff has sought to examine the judgment debtors, the defendants, unsuccessfully, on two occasions. Thus, he submits, the plaintiff has exhausted any reasonable effort to secure the cooperation of the judgment debtors in obtaining the required information, and the only way in which it can be obtained is directly from the mortgagee, the Bank of Nova Scotia.

[9] For these reasons, Mr. Winch submits that the plaintiff should be granted an order requiring the Bank of Nova Scotia to furnish a discharge statement.

Analysis

[10] What is sought by the plaintiff here was, in years past, provided almost as a matter of course. Mortgage statements, and mortgage discharge statements, are invariably required in order that real estate transactions and enforcement proceedings can be conducted smoothly.

[11] In many cases, statements of this sort are provided with the consent of the mortgagor. If a mortgagor is selling the property, he or she will require a statement from the mortgagee as to the current state of account, or a full statement as to what is required to discharge the mortgage if it is proposed that that will occur.

[12] In some cases, however, statements of this sort will be sought without the express consent of the mortgagor. Examples include sales under power of sale by a second or subsequent mortgagee, and, as in this case, sales by execution creditors. In such cases, the express consent of the mortgagor is unlikely to be obtained for obvious reasons, since provision of consent will facilitate enforcement and it is not in the interests of the mortgagor to assist. Nevertheless, enforcement cannot proceed without obtaining the required information from the prior mortgagee. As noted earlier, the problem really comes up only where the prior mortgage is in good standing. Where the prior mortgage is not in good standing the mortgagee will take its own enforcement proceedings.

[13] In years past, and as is still the case with respect to mortgagees under provincial jurisdiction, a mortgagee would routinely provide a statement, for a fairly nominal fee, showing the current state of account or, in the case of a discharge statement, the amount that is required to discharge the mortgage. This would include the outstanding principal, interest to the date the discharge is required, any interest penalty for premature payment of the mortgage, a statement of the daily amount of interest accruing after the relevant date, and the cost of providing the statement.

[14] Since the enactment of *PIPEDA*, federally–regulated banks have been reluctant to provide such statements, and the issue dealt with by the Court of Appeal in *Citi Cards* was whether banks could be required to produce such statements notwithstanding *PIPEDA*.

[15] In *Citi Cards*, Blair J.A. for the Court referred to this issue as a "knotty and interesting question" that is "of some importance to debtor/creditor relations and, particularly, to financial institutions that advance funding in that milieu."

[16] At para. 17 of his judgment, Blair J.A. noted that *PIPEDA* prohibits organizations from disclosing "personal information" without the knowledge or consent of the affected individual unless disclosure is permitted by one of the exemptions provided in s. 7(3) of the *Act*. Citi Cards, the applicant, relied on two exemptions, namely, that the disclosure is required to comply with an order of the Court, and that disclosure is required by law. Blair J.A. held that those exemptions did not apply.

[17] Blair J.A. held that information contained in a mortgage discharge statement is "personal information" of the debtor. At para. 22, he stated that "current mortgage balances are not information that is publically available." At para. 23, he stated, "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."

[18] One of the arguments made was that the statute provided an exemption for information required to comply with a court order. Blair J.A. rejected that argument. At para. 25, he stated:

> 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.

[19] Another argument was that the order requested could be made because the information was required by law. Blair J.A. rejected that argument. At para. 33, he stated:

> 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 the 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 statements and, therefore, that they should be "required by law" to do so. This argument, again, has the tinge of circularity to it that was rejected in another context above.

[20] At para. 37, Blair J.A. stated, in *obiter*, "There may well be situations where a financial institution could be ordered to make such information available as the result of a rule 60.18(6)(a) motion." He held, however, that before making such an order it would be appropriate to require the applicant to pursue another available alternate remedy, such as examining the judgment debtor or his or her spouse.

[21] Rule 60.18(6)(a) provides as follows:

> **Examination of Person other than Debtor**
>
> (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);

[22] What this rule contemplates is an order for an examination, not an order for the provision of information directly, other than through the vehicle of an examination. Even at an examination, it is doubtful, in my view, that a mortgagee could be required to create a statement or certificate in the form required by the Sheriff. It is also doubtful that merely providing the information verbally, or producing the documents from which the information can be constructed, would be sufficient to satisfy the Sheriff. Furthermore, if 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.* However, those issues are not before me.

[23] As noted earlier, counsel for the plaintiff argues that *Citi Cards* was delivered *per incuriam*, because there were a number of statutory provisions that were not referred to by the Court, that might have dictated a different result. With respect, I disagree. The *per incuriam* exception to *stare decisis* is very narrow, and does not assist the plaintiff here.

[24] In *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.), Laskin J.A., at para. 111, stated that the *per incuriam* doctrine is restricted to situations that arise if two conditions are met: the panel deciding the earlier case did not advert to judicial or statutory authority binding on it; and had the panel considered this authority, it would have decided the case differently. At para. 113, he stated:

> Third, the application of *stare decisis* or the *per incuriam* exception to it should not ordinarily turn on the evidentiary record filed by counsel. To hold otherwise runs up against the apt observation of MacKinnon J.A.: "The binding effect of precedent, where the court has made a clear statement of principle, cannot depend on whether, in the opinion of succeeding courts on an examination of the available record, the case was properly argued or not": *R. v. Bell* (1977), 15 O.R. (2d) 425 (C.A.), at p. 430.

[25] It is noteworthy that in *David Polowin* itself, having held that the *per incuriam* principle was inapplicable, the Court of Appeal proceeded to hold that one of its earlier decisions, *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2001), 54 O.R. (3d) 704 (C.A.), was wrongly decided, and overruled it on its merits. In accordance with its usual practice when the Court is asked to overrule one of its earlier decisions, a Court composed of five judges was empanelled. In my view, that is the proper way for this matter to be revisited, assuming the Court of Appeal is willing to do so, and not through the device of the *per incuriam* principle.

[26] I will refer to the arguments arising from certain statutory provisions later in these reasons, as they may be of assistance to the Court of Appeal if that Court decides to revisit the issue, but, for the reasons adverted to by Laskin J.A. In *David Polowin*, I do not agree that they justify departing from the clear holding of the Court in *Citi Cards* on the basis of the *per incuriam* principle.

[27] Nor to I agree that *Citi Cards* is distinguishable. The fact that the plaintiff has been unable to examine the debtors or otherwise obtain helpful information from the debtors does not confer a right on the plaintiff to obtain mortgage discharge statements from the mortgagee that the Court of Appeal in *Citi Cards* has held it is not entitled to obtain. There is nothing in *PIPEDA* that purports to grant an exception, where a person whose personal information is sought to be disclosed has been asked for the information and refuses to disclose it, or where other attempts to obtain it from the debtor have been unsuccessful.

[28] Having held that I am bound by *Citi Card*, and thus precluded from ordering the Bank of Nova Scotia to provide a mortgage discharge statement, I confess to some disquiet about the result. As noted earlier, the provision of such statements was formerly a commonplace, and, in the case of mortgagees who are not under federal jurisdiction, 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 the Court has awarded. In my view, there are some considerations that may compel a different result. However, these considerations are for the Court of Appeal, and not for me.

[29] What is sought to be disclosed, fundamentally, is the state of account between the mortgagee and mortgagor. I think there is a strong argument that the state of account is not something that is merely a private matter between the mortgagee and mortgagor, but rather is something on which the rights of others depends, and accordingly is something they have a right to know.

[30] For many years, statutes regulating land registration, now reflected in the *Land Registration Reform Act*, have required the disclosure of the state of account as between mortgagee and mortgagor at the outset of the relationship. Section 6 of Ontario Regulation 19/99, made under that *Act*, requires that a charge submitted for electronic registration contain a statement of the principal amount or other obligations secured by the charge; the rate of interest and periods of payment under the charge; and the due date of the charge or a statement that the charge is payable on demand, whichever is the case. Thus, at the outset of the relationship the state of account is disclosed to the world at large.

[31] The state of account does not simply govern the rights of the immediate parties to the transaction. It also defines the value of the equity of redemption, and will affect priorities as among mortgagees and creditors. As far as a prior mortgage is concerned, the state of account will define the priority that can be claimed as against a subsequent encumbrancer.

[32] Regardless of the stated face amount of the mortgage, the mortgagee has priority only with respect to the amount actually advanced under it. As stated in *Falconbridge on Mortgages*, (5th ed., loose leaf), at § 8.10.80:

> It should be noted that a registered mortgage is only security for the money or money's worth actually advanced under it and that this cannot exceed the amount for which the mortgage is expressed to be security and any advances over and above the registered amount of the mortgage may not be secured and may lose priority to any subsequently registered interests.

And further:

> Even if a first mortgagee has bound himself without qualification to advance the mortgage money, he is not entitled to priority with respect to advances made after he has received notice of a subsequent mortgage or execution.

[33] Once the principal amount of the mortgage is reduced, the amount outstanding defines the value of the equity of redemption. The face amount of the mortgage loses its relevance. Can the mortgagee simply refuse to disclose to subsequent encumbrancers the value of the equity of redemption, and the amount by which it can claim priority as against the subsequent encumbrancers? In my view, that is the real question.

[34] Under the *Execution Act*, it is clear that land may be sold in order to satisfy a judgment. Indeed, the equity of redemption itself may be sold.

[35] Certain provisions of the *Execution Act* are particularly germane. I would specifically mention sections 9(1), 10(6), 13 and 28. In its salient parts, s. 28 provides as follows:

> **Lands subject to mortgage**
>
> 28. (1) Where the word "mortgagor" occurs in this section, it shall be read and construed as if the words "the mortgagor's heirs, executors, administrators or assigns, or person having the equity of redemption" were inserted immediately after the word "mortgagor".

Interest of a mortgagor

(2) The sheriff to whom an execution against the lands and tenements of a mortgagor is directed may seize, sell and convey all the interest of the mortgagor in any mortgaged lands and tenements.

Equity of redemption

(3) The equity of redemption in freehold land is saleable under an execution against the lands and tenements of the owner of the equity of redemption in the owner's lifetime, or in the hands of the owner's executors or administrators after the owner's death, subject to the mortgage, in the same manner as land and tenements may now be sold under an execution.

Selling lands subject to more than one mortgage in execution

(4) Where more mortgages than one of the same lands have been made to the same mortgagee or to different mortgagees, subsections (2) and (3) apply, and the equity of redemption is saleable under an execution against the lands and tenements of the owner, subject to the mortgages, in the same manner as in the case of land subject to one mortgage only.

Effect of sale

(5) The effect of the seizure or taking in execution, sale and conveyance of mortgaged lands and tenements is to vest in the purchaser, the purchaser's heirs and assigns, all the interest of the mortgagor therein at the time the execution was placed in the hands of the sheriff, as well as at the time of the sale, and to vest in the purchaser, the purchaser's heirs and assigns, the same rights as the mortgagor would have had if the sale had not taken place, and the purchaser, the purchaser's heirs or assigns, may pay, remove or satisfy any mortgage, charge or lien that at the time of the sale existed upon the lands or tenements so sold in like manner as the mortgagor might have done, and thereupon the purchaser, the purchaser's heirs and assigns, acquire the same estate, right and title as the mortgagor would have acquired in case the payment, removal or satisfaction had been effected by the mortgagor. [Emphasis added]

[36] It seems to me that the rights reflected in these provisions would be somewhat illusory if the execution creditor is unable to ascertain the value of the "interest of the mortgagor" in the land, or the value of "the equity of redemption in freehold land", as contemplated in these provisions. It seems to me that a strong argument can be made that the person entitled to sell land in order to enforce a judgment is entitled to obtain information in order to make the right to sell effective.

[37] While the issue is not before me, it seems to me that the same considerations would apply in the case of a sale under power of sale by a second mortgagee. If the second mortgagee is unable to ascertain the state of account of the first mortgage, it is difficult to see how a sale by the second mortgagee can be effected. To exercise its power of sale, the second mortgagee will require a mortgage statement from the first mortgagee, or, more commonly, a discharge statement.

[38] How do these considerations intersect with *PIPEDA*? First, as noted earlier, *PIPEDA* applies only to federally-regulated organizations. It would seem odd that Parliament would have intended to interfere in only a portion of a commercial activity that has been conducted in a particular fashion for many years.

[39] Second, there are certain aspects of *PIPEDA* that may suggest a different approach.

[40] It should be noted that it is not sought, in these circumstances, to open up to public scrutiny the entire relationship between a bank and its customer. What is sought to be obtained is a small sliver of information that has become germane only because the customer has a final court judgment against him or her, and has a mortgage with a bank. Whatever other dealings the debtor may have with a bank, all that is required here is information as to the current state of the mortgage account so that the judgment of the Court can be enforced.

[41] Subject to certain exceptions, s. 7(3) of *PIPEDA* prohibits the disclosure of personal information, "without the knowledge or consent of the individual". Consent need not always be express; it may, in appropriate circumstances, be implied: see *Romspen Investment Corp. v. Woods Property Development Inc.* (2011), 286 O.A.C. 189 (C.A.).

[42] The operative provisions that deal with consent are actually found in Schedule 1 of *PIPEDA*. Section 5(1) of *PIPEDA* provides as follows:

> 5(1) Subject to sections 6 to 9, every organization shall comply with the obligations set out in Schedule 1.

[43] Section 4.3.6 of Schedule 1 provides as follows:

> 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). [emphasis added]

[44] Thus, the notion of implied consent is specifically recognized in the Schedule. In view of the fact that the state of account as between mortgagee and mortgagor is publically disclosed at the outset of the relationship, and that the current state of account governs a number of rights of third parties, it would be reasonable to ask whether there is implied consent on the part of the mortgagor to disclose to third parties the state of account when the exercise of those rights is in issue. In my view, a strong argument can be made that the answer to that question is yes. At the very least, for the reasons articulated, it can be argued that information as to the current state of the account is "less sensitive" as contemplated in s. 4.3.6 of the Schedule, and thus consent to its disclosure is implied.

[45] Furthermore, since the exercise of the express right recognized under the *Execution Act* to sell the equity of redemption depends on knowing what the equity of redemption is worth, there is, in my view, an equally strong argument that the creditor is entitled, in law, to that information. To the extent of defining the amount for which priority can be claimed by a mortgagee as against subsequent encumbrancers, a strong argument can be made that the mortgagee is required to disclose that information to a subsequent encumbrancer. This would not open the floodgates – it is only subsequent encumbrancers, who have a legitimate interest in the information, who would be entitled to it.

[46] There is also an argument that the mortgagee is required to disclose the information pursuant to s. 7(3)(b) of *PIPEDA*, because the disclosure is "for the purpose of collecting a debt owed by the individual to the organization." However, I recognize that if the mortgage is not in default it is unlikely that there is, at that point, any debt owing to the mortgagee that can be legally enforced or collected. Furthermore, the information would probably not be disclosed for the purpose of the mortgagee collecting the debt, but rather for the purpose of enabling an execution creditor to collect its debt, although the result of making the disclosure would be the collection of the debt by the mortgagee.

[47] These interpretive considerations may be assisted, in my view, by what Professor Sullivan refers to, in Chapter 9 of her text, as a "consequential analysis": see Sullivan, *Construction of Statutes* (5th ed., 2008), at pp. 299-323. The thesis is that the intention of Parliament or a legislature can sometimes be ascertained by a consideration of the consequences of one interpretation or another. At p. 314, the author states:

> Another recurring ground on which outcomes are judged to be absurd is pointless inconvenience or disproportionate hardship. While the legislature often imposes burdens and obligations on persons as part of the means by which its objects are achieved, when these seem greatly disproportionate to any advantages to be gained, and still more when these appear to serve no purpose at all, they may be judged absurd.

[48] Parliament has obviously considered it important to preserve as private the personal information about an individual that is in the possession of a federally-regulated enterprise. In the narrow circumstance, however, where an individual has been adjudged, by a court of competent jurisdiction, to owe a defined amount of money to someone, it may seem greatly disproportionate to prevent a creditor from having access to a small piece of the information in the possession of that enterprise where access to the information is to allow enforcement of the judgment. In such a circumstance it is legitimate to ask whether the real purpose of non-disclosure is to protect a legitimate right of privacy, or, instead to allow a judgment debtor to shelter behind the legislation to avoid or at least frustrate the lawful enforcement of the debt. If the latter, it may be legitimate to prefer an interpretation of the legislation that would avoid such a result.

[49] Before closing, I will refer to the Alberta case of *Toronto Dominion Bank v. Sawchuk* (2011), 86 C.B.R. (5th) 1 (Alta. Master).

[50] In that case, Master Schlosser was asked to decide whether he could order a first mortgagee to provide a mortgage payout statement to a foreclosing second mortgagee. He considered the decision of the Ontario Court of Appeal in *Citi Cards*.

[51] Master Schlosser held that *Citi Cards* was distinguishable. With respect, I do not think it is. For the reasons articulated earlier, I do not see how the right of a second mortgagee to enforce its mortgage, and thus requiring knowledge as to the state of account between the first

mortgagee and the mortgagor, is any different from an execution creditor seeking to sell the property, and thus requiring information as to the state of account between the mortgagee and the mortgagor. If *PIPEDA*, properly interpreted, prevents disclosure of the information to an execution creditor, I do not see how a second mortgagee is in any better position.

[52] At para. 8, Master Schlosser stated:

> Even if this case were not distinguishable from the case at bar, I decline to follow it. It is my view that a more pragmatic approach is mandated by our new rules. The appropriateness of disclosure in these circumstances requires balancing a range of the debtor's rights and not just an abstract consideration of privacy rights.

[53] Unlike Master Schlosser, I do not have the luxury of declining to follow a decision of the Ontario Court of Appeal. Whether I might have decided the case differently is beside the point. The decision is binding on me, and I must follow it.

Disposition

[54] For the foregoing reasons, the motion of the plaintiff to require the Bank of Nova Scotia to provide a mortgage discharge statement is dismissed.

[55] Since the Bank of Nova Scotia did not appear on this motion, this is obviously not a case for costs.

GRAY J.

Released: June 6, 2012

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