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Mortgage and Real Property Law Report

Vol. 23, No. 1 • February 2017

A Legal Newsletter for the Mortgage and Real Estate Industries

The Supreme Court of Canada Rules on Lender Disclosure of Mortgage Discharge Statements

In the landmark decision of *Royal Bank of Canada v. Trang*, the Supreme Court of Canada ruled definitively on whether a mortgagor implicitly consents to a lender's disclosure to others of a borrower's mortgage discharge statement, or whether privacy law steps in to protect such information. The decision has significant implications to creditors, lenders and borrowers alike.

The facts were straightforward: The Trangs borrowed money from Royal Bank of Canada ("**RBC**"), which obtained a judgment against them when they defaulted on the loan. However, RBC was unable to enforce the judgment by seizing and selling the Trangs' real property because it could not do so unless provided with a mortgage discharge statement from Scotiabank, which held the Trangs' mortgage on the property and Scotiabank refused to provide the statement. Scotiabank's refusal to provide the statement relied on the *Personal Information Protection and Electronic Documents Act* (PIPEDA), which it felt prohibited the disclosure of the Trangs' information without their knowledge and consent.

RBC applied for a court order compelling Scotiabank to comply. Both the lower and Appeal courts confirmed that in this scenario, Scotiabank was neither required nor permitted to disclose the Trangs' mortgage discharge statement to RBC.

On further appeal to the Supreme Court of Canada, the earlier rulings were overturned. The Court held that PIPEDA expressly allows that the Trangs' consent to disclosure could be implied in certain circumstances – namely where the information is "less sensitive". Although financial information is generally considered highly sensitive, in all cases the exact level of sensitivity must be assessed in context, by looking at: (1) any related financial information already in the public domain; (2) the purpose served by making the related information public; and (3) the nature of the relationship between the Trangs, Scotiabank, and directly-affected parties such as RBC. Other considerations included the identity and legitimate business interests of other creditors such as RBC, as well as the reasons behind the need for disclosure.

The court observed that certain mortgage-related information about the Trangs was already available on the province's electronic land registry, which was the result of a legislative decision to balance privacy concerns with public disclosure needs. In particular, a mortgage discharge statement is "not something that is merely a private matter between the mortgagee and mortgagor, but rather is something on which the rights of others depends, and accordingly is something they have a right to know." The Trangs could not reasonably expect that their privacy rights could stand in the way of RBC's right to collect its debt and their overall expectations as to disclosure and consent should be informed by such legitimate third-party needs.

Under PIPEDA, the Trangs' expectations as to whether Scotiabank needed their consent were also relevant. The court found that a reasonable mortgagor would be aware that some mortgage details were publicly registered, that a mortgage default might trigger a judgment against them, that information would be shared with a sheriff to enable seizure and sale, and that the property would be sold. He or she would also know that disclosure of the mortgage discharge statement might be part of this process. As the court put it:

> *"A reasonable person borrowing money knows that if he defaults on a loan, his creditor will be entitled to recover the debt against his assets. It follows that a reasonable person expects that a creditor will be able to obtain the information necessary to realize on its legal rights."*

In the end, the court concluded that the Trangs' mortgage discharge statement was of the "less sensitive" variety of financial information, and that they had implicitly consented to have the information released to RBC. The Court ordered Scotiabank to make that necessary disclosure. See *Royal Bank of Canada v. Trang*, 2016 SCC 50.

Can a Borrower in Default Prevent a Lender's Power of Sale by Leasing the Property?

This question was tested in *Toronto-Dominion Bank v. Hosein*.

In 2011, Toronto-Dominion Bank took a $130,000 mortgage over a townhouse condominium. By late 2012, the borrower was in default and the bank took steps to enforce its mortgage security. But, unbeknownst to the bank, the borrower had freshly leased the property to a tenant for five years on very favourable terms.

The bank tried unsuccessfully to get a copy of the lease and redirect the tenant's rent payments so they could be applied to the outstanding mortgage. So, the bank

was ultimately forced to apply under the *Mortgages Act* (the "**MA**") for a court order to set aside the tenancy. But that application was rejected, with the court finding that the provisions of the MA were in conflict with the *Residential Tenancies Act, 2006* (the "**RTA**"), which set out that a tenancy could be "***terminated*** only in accordance with" its own provisions. The court found the bank could not proceed under the MA because the RTA prevailed.

The bank appealed, successfully. The provisions of the MA (in section 52) allowed a mortgagee to apply to "***set aside***" a residential tenancy made by a borrower "in contemplation of or after default under the mortgage" if it had the object of: (1) discouraging the mortgagee from taking possession on default; or (2) adversely affecting the value of the mortgagee's interest.

On the other hand, the RTA (in section 37(1)) sets out how a residential tenancy can be "***terminated***," and goes on to govern the manner in which a landlord can recover possession of a rented unit.

The Court of Appeal found that the MA's use of the term "***set aside***" was deliberately different from the RTA's reference to "***terminated***," and that it had to be presumed that the legislature therefore intended different meanings. Drawing an analogy to the distinction between an annulment and a divorce, the court found that to "***set aside***" a tenancy renders it never to have existed, while to "***terminate***" it means to bring it to an end.

The two Acts were therefore found not to be in conflict and could be read together harmoniously.

Here, the bank's application under the MA was not to ***terminate*** the lease; it was to ***set aside*** the alleged "sweetheart deal" tenancy between the mortgagor and the tenant, entered into after default and after a Notice of Sale had been issued. This move was clearly intended by the mortgagor to thwart the bank from exercising its rights as mortgagee. Also, the bank's remedy of setting aside the lease still conformed with other tenant-security objectives found in various MA provisions, which were also not in conflict with the RTA.

The court allowed the appeal and made an order setting aside the tenancy agreement accordingly. See *Toronto-Dominion Bank v. Hosein*, 2016 ONCA 628.

Ontario Court Enforces Condominium's Rules Banning Short Term Rentals

The condo corporation of a 244-unit Ottawa residential condominium had become aware that an increasing number of owners were offering their units for short-term rentals on websites such as AirBnB, Hotels.com and Expedia.ca. Rentals were for as short as a single night, and typically included the use of the condo's amenities such as the parking area, exercise room, pool, and meeting rooms. This was disruptive to other owners, who were essentially forced to tolerate a hotel operation for complete strangers being run without their consent from inside the residential complex.

The condo corporation went to court to enforce its rules and declaration that restricted the use of its units to "single-family dwellings" only, and prohibited leases of less than four months in duration. The application was directed specifically at the activities in one particular unit, owned by a lawyer and his wife, for which the court said there were "no less than 13 [online] reviews of guests who leased it in recent months."

In hearing the application, the court noted that the *Condominium Act, 1998* expressly allows for a condo declaration and rules to include prohibitions and restrictions on unit use, occupation and leasing. It found that the restrictions promulgated by the condominium's declaration in this case were entirely valid and enforceable.

In particular, the rules against short-term use were not overly restrictive, and were in keeping with those approved of in similar court decisions. The declaration purported to restrict unit occupation for "single-family dwelling" purposes, which was a legitimate objective. In this context, courts have previously defined "family" to mean a "social unit consisting of parent(s) and their children, whether natural or adopted, and includes other relatives if living with the primary group"; prior decisions have also upheld and enforced such single-family provisions in the past.

Having found the condo rules and declaration valid, the court examined the owners' impugned conduct. It concluded that the term "single family use" could not be reasonably interpreted to include their operation of a hotel-like business in which they repeatedly offered their unit to complete strangers on the internet for as short as a single night.

Overall, the evidence was compelling that these owners were leasing their unit commercially, in clear breach of the declaration and rules. Given their prior intransigence (including an outright refusal to even acknowledge the valid restrictions and their harsh and persistent criticism of the condo board's attempts to enforce them), the owners were formally ordered by the court to comply, even though they had promised not to lease their unit going-forward. See *Ottawa-Carleton Standard Condominium Corp. No. 961 v. Menzies*, 2016 ONSC 7699.

LEGAL ALERTS

New Corporate Requirement to List Real Property Holdings

Under Ontario's new *Forfeited Corporate Property Act*, in force December 10, 2016, corporations are subject to new record-keeping obligations requiring the maintenance of a registry of the corporation's ownership interests in Ontario land. The changes stipulate deadlines for establishing the registry and impose penalties for non-compliance.

Change in Land Transfer Tax Rates

For certain commercial real estate transactions closing on or after January 1, 2017, the provincial Land Transfer Tax (LTT) rate on consideration over $400,000 has been increased to 2%, up from the former 1.5%. The LTT on certain single-family residences has also been increased from 2% to 2.5% on any consideration above $2 million.

New Larger Land Transfer Tax Rebate for First-Time Buyers

Effective January 1, 2017, the rebate of Provincial LTT for first-time homebuyers has been increased to $4,000.

The statements of law and comments contained in this Newsletter are of a general nature. Prior to applying the law or comments to any specific problem, please obtain appropriate legal advice.