

## financial services litigation bulletin

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### private loans: disclosure of mortgage statements to third-party creditors violates PIPEDA

A recent decision of the Ontario Court of Appeal should be heard as a warning bell by financial institutions that are in the practice of providing mortgage information about their clients upon the request of their clients' creditors. In *Citi Cards Canada Inc v Pleasance*,<sup>1</sup> the Court held that banks are not obligated to furnish this type of information and that such disclosure is actually prohibited by the *Personal Information Protection and Electronic Documents Act*<sup>2</sup> ("PIPEDA"). In providing mortgage discharge statements upon a creditor's request, banks may have been unwittingly violating federal privacy law.

#### facts

This notable case centred on fairly common facts. In *Citi Cards*, a credit card company (the "creditor") obtained a judgment against the debtor for outstanding credit card debt. The creditor sought to enforce its judgment by way of a sheriff's sale of the debtor's home. However, the sheriff refused to carry out the sale without mortgage discharge statements (the "mortgage statements") from The Canada Trust Company and Toronto-Dominion Bank (the "banks"). As the debtor could not be located, the creditor requested the mortgage statements directly from the banks. The banks refused to provide the statements, taking the position that PIPEDA prohibited the disclosure of this information to third parties. The creditor turned to the court for an order compelling the banks to produce the mortgage statements.

#### a debtor's right to privacy trumps the interests of a judgment creditor

The Court of Appeal, upholding the lower court's ruling, refused to order the banks to turn over the mortgage statements. The Court's concern was that such production would violate the privacy rights of the debtor as set out in PIPEDA, not to mention those of his wife, who co-owned the house.

<sup>1</sup> 2011 ONCA 3 [*Citi Cards*].

<sup>2</sup> SC 2000, c 5 ["PIPEDA"].

PIPEDA, a ten-year old piece of legislation, regulates how companies deal with information about individuals collected in the course of their commercial activities. The Court held that PIPEDA applied to the banks and agreed that the sought-after mortgage statements constituted “personal information” that were prohibited from disclosure pursuant to the regime.

In coming to this conclusion, the Court also looked at the stated purpose of the legislation, which is to “balance the privacy rights of individuals” with the “needs of organizations to collect, use or disclose personal information for reasonable purposes.” The court emphasized that the interests that need balancing are those of the individual (i.e. the debtor) and those of the organizations who collect information (i.e. the banks). The fact that a third-party judgment creditor also had an interest in these mortgage statements was of no importance when considering the debtor’s privacy rights pursuant to PIPEDA.

### exceptions do not apply

The creditor argued that two exceptions to the general prohibition against disclosure applied, entitling it to the statements.

First, it argued that the banks were under an obligation to provide the mortgage statements to “comply with an order of the court.” However, the only court order that would require production was the one sought on the current application. The Court criticized the circularity of this argument.

Secondly, the creditor argued that a “required by law” exception applied. It argued that since the debtor would be required by law to disclose the information if examined in aid of execution, the banks should be so required as well. The Court rejected this argument for numerous reasons, not the least of which was that the creditor’s reasoning directly conflicted with the wording of the legislation.

### alternative remedies available

The Court also refused to order the production of the mortgage statements because there was an alternative remedy available: the creditor could bring a motion to examine the debtor’s wife. In light of her privacy interests, and those of her husband, the Court held that this was an appropriate next step in lieu of making an order which would otherwise violate PIPEDA.

## implications for financial institutions

This is the first time that the Court of Appeal has ruled on the application of PIPEDA to this type of information. As the Court pointed out in its ruling, the furnishing of mortgage statements by financial institutions in these situations is a matter of uneven treatment in Ontario, with some, but not all, lenders providing them upon request. The Court has now clearly stated that institutions providing mortgage statements to third parties, in the absence of a judicial order, are breaching their clients' privacy rights. Financial institutions should review their policies to ensure they do not inadvertently violate PIPEDA and accidentally find themselves subject to its penalties.

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### a cautionary note

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