Tab B-11

1995 CarswellAlta 200
Alberta Court of Appeal
Gainers Inc. v. Pocklington Holdings Inc.
1995 CarswellAlta 200, [1995] 9 W.W.R. 117, [1995] A.W.L.D. 735, 169 A.R. 288, 30 Alta. L.R. (3d) 273, 56 A.C.W.S. (3d) 9, 97 W.A.C. 288

GAINERS INC. v. POCKLINGTON HOLDINGS INC., POCKLINGTON FINANCIAL CORPORATION and POCKLINGTON FOODS INC.

Hunt J.A.
Heard: June 15, 1995
Judgment: June 19, 1995
Docket: Doc. Edmonton Appeal 9503-0423-AC

Counsel: *Alan R. Gray*, for respondent (plaintiff and defendant by counterclaim).
Scott J. Hammel, for appellants (defendants and plaintiffs by counterclaim).
Subject: Civil Practice and Procedure

Headnote

Practice --- Practice on appeal — Staying of proceedings pending appeal — Stay of execution
Civil procedure — Appeals — Stay pending appeal — Case management judge granting order allowing plaintiff to request documents directly from third parties in event defendants failing to do so by certain date and requiring third parties to comply — Defendants appealing and seeking stay pending appeal — Preliminary assessment of merits of appeal indicating arguable points to be made, irreparable harm existing in sense that appeal might be rendered nugatory if third parties providing documents in compliance with order, and balance of convenience requirement being met with imposition of conditions requiring defendants to pursue production of documents and take actions to expedite appeal.
Civil procedure — Discovery — Discovery of documents — Availability — Documents in possession or control of non-party — Case management judge granting order allowing plaintiff to request documents directly from third parties in event defendants failing to do so by certain date and requiring third parties to comply — Defendants appealing and seeking stay pending appeal — Preliminary assessment of merits of appeal indicating arguable points to be made, irreparable harm existing in sense that appeal might be rendered nugatory if third parties providing documents in compliance with order, and balance of convenience requirement being met with imposition of conditions requiring defendants to pursue production of documents and take actions to expedite appeal.
The plaintiff sought repayment from the defendants of certain sums allegedly expended by the plaintiff for goods and services that actually benefitted the defendants. The case management judge issued an order providing in part that if the defendants failed to provide by a certain date information and documents from persons providing any services for which the plaintiff had paid, the plaintiff might request the persons who had provided such services to provide such information directly. The order further provided that in any event the plaintiff was entitled to request any person providing any services for which the plaintiff had paid to provide information and documents relating to those services and those persons "shall" provide such information. The original order contained the word "which" instead of "shall" but was later amended. The defendants appealed within the required time period after the amendment, but after expiry of the time period following the original order. The defendants sought a stay of execution of the above paragraphs of the order.
Held:
Application allowed on conditions.
The parties honestly held differing views as to whether the amendment was merely a correction of a typographical error or whether the amendment made an important difference in the effect of the order. In these circumstances, and based only on the oral submissions of counsel, the court was not in a position to determine that the appeal period ran from the original order. There would be a serious difficulty in excising unamended paragraphs from the order for the purposes of appeal.
A preliminary assessment of the merits of the appeal indicated that there were arguable points to be made concerning the scope of authority of a case management judge, the extent of the court's authority over third parties outside the jurisdiction and the scope of certain *Rules of Court*. Irreparable harm could be found in the sense that if the stay was not granted, an appeal could be rendered nugatory as the disputed information might already have been provided. The balance of convenience require ment would be met if certain conditions were imposed. Accordingly, the stay would be granted on conditions requiring the defendants to request relevant documents from suppliers, to provide the plaintiff

with lists of documents which would be produced or for which privilege would be claimed, and requiring the defendants to cooperate in expedition of the appeal.

Table of Authorities

Cases considered:

Canadian Newspapers Co. v. Manitoba (1985), [1986] 2 W.W.R. 411 (Man. C.A.) — *referred to*

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 63 Alta. L.R. (2d) 189, 94 A.R. 17 (Q.B.) — *referred to*

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1989), 98 A.R. 374, 45 C.C.L.I. 143 (Q.B.) [affirmed (1990), 74 Alta. L.R. (2d) 262, 41 C.P.C. (2d) 222, 108 A.R. 161 (C.A.)] — *referred to*

Glover v. Glover (1980), 29 O.R. (2d) 401, 18 R.F.L. (2d) 126, 18 C.P.C. 107, 113 D.L.R. (3d) 174, 42 N.R. 475, affirmed (sub nom. *Glover v. Bell Canada)* [1981] 2 S.C.R. 563, 25 R.F.L. (2d) 334, 130 D.L.R. (3d) 382, 42 N.R. 472 — *referred to*

Horsemen's Benevolent & Protective Assn. of Alberta v. Alberta (Racing Commission) (1989), 97 A.R. 287 (C.A.) — *referred to*

Permanent Investment Corp. v. Ops & Graham (Township), [1967] 2 O.R. 13, 62 D.L.R. (2d) 258 (C.A.) — *referred to*

Saunders v. Nelson (December 23, 1994), Doc. Vancouver B921203, Sinclair Prowse J. (S.C.), [1995] B.C.W.L.D. 536 — *referred to*

Specialty Underwriting Services Ltd. v. Corp. of Lloyd's (January 15, 1993), Doc. CA016518, Prowse J.A. (C.A.), [1993] B.C.W.L.D. 569 — *referred to*

Rules considered:

Alberta Rules of Court

R. 209*referred to*

R. 219*referred to*

R. 506*referred to*

Application for stay of execution of order with respect to production of documents from third parties.

***Hunt J.A.* (Written memorandum of judgment):**

1 This is an application for a stay of execution, pending appeal, of paras. 4 and 5 of an Order of Mr. Justice McDonald entered May 15, 1995. Although the Notice of Motion referred also to para. 3 of the Order, that part of the application was not pursued in oral judgment. The paragraphs of the Order sought to be stayed read as follows:

> 4. In the event that, by April 7, 1995, the Defendants have not provided to the Plaintiff the information and documents which the officers of the Defendants have undertaken to obtain from persons, firms, and corporations that have provided any services for which the Plaintiff has paid; the Plaintiff may request those persons, firms, and corporations to provide the information and documents relating to those services, and the persons, firms, and corporations shall provide the requested information and documents with the protection of this Court from any claim with respect to production of the information and documents.
>
> 5. In any event, the Plaintiff may request any person, firm, or corporation, that has provided any goods or services for which the Plaintiff has paid (including, without restricting the generality of the foregoing, Davis Ward & Beck, Carrera Management Inc., Regio-Con Western Services Ltd., Government Consultants International Inc., Ogilvie & Company, Robert V. Lloyd, Robert V. Lloyd Professional Corporation, Fred Doucet, Fred Doucet Consulting International Inc., Bell Felesky Flynn, Kemp Risk Management & Analysis Ltd., Wisener & Partners Company Ltd., Airacre Management Ltd., Morban & Company, Reed Stenhouse, Thompson & Mitchell, KPMG Peat Marwick, G.W. Linton & Associates Ltd., F.E. Horton, Kasian Architects, The Hathaway Corporation, Linnell Taylor & Associates Ltd., Jeffrey Goodman & Associates Inc., 390306 Alberta Ltd., Grant Naylor, Henry Van Nistelrooy, Eggertson and Associates Ltd., Kevin Sept., Touche Ross, Bank of Montreal, Barclay's Bank, Campbell Moss Limited, General Appraisal Corporation, and Palmer & Jarvis Associates) to provide information and documents relating to those services; and the persons, firms, and corporations *shall* provide the requested information and documents with the protection of this Court from any claim with respect to production of the information and documents. [italics added]

2 It was put to me in the course of argument on the motion that McDonald J. gave the above Order in his capacity as a case management judge pursuant to the authority of R. 219, which contemplates pre-trial conferences in which the court may consider matters that may aid in the disposition of the action and give such directions as it considers advisable.

3 The Order was first made on March 24, 1995 and entered on April 28, 1995. The wording was later changed. The original Order had contained the word "which" in place of the word "shall" in para. 5 italicized above. The Amended Order was entered on May 15, 1995.

4 The Respondent, Gainers Inc., argues that the appeal is out of time because it was not filed within the time required by R. 506. It says the Order really being appealed is the Order entered on April 28, 1995. It says that Order is exactly the same in substance as the Amended Order and that the reason for the amendment was a typographical error, the result of which was that the Order did not make sense. It is further argued that, in any event, no change was ever made to para. 4, so the appeal period has clearly expired in that regard.

5 The Appellants say the amendment was made only after both counsel had listened to the clerk's recording, which made it clear what the Order had actually been. They argue further that it was not their understanding that the intent of the original para. 5 was to *compel* the third parties to produce the mentioned information and documents upon request; it was only upon hearing the tape that it became clear to them that this was indeed the intent of the Order, and thus the Amended Order was entered. In other words, they say there is an important difference in the effect of the Amended Order, which effect has caused them to appeal it.

6 I have some sympathy for the argument of the Respondent, as I too had some difficulty comprehending the sense of para. 5 as it was originally drafted. On the other hand, based only on their oral submissions, I am hardly in a position to decide which counsel is correct about the reasons why the original Order was amended. Under the circumstances I think I must accept that they honestly hold differing views on the subject. Given this, I cannot agree that the appeal period ran from the original Order. See *Permanent Investment Corp. v. Ops & Graham (Township)* (1967), 62 D.L.R. (2d) 258 (Ont. C.A.).

7 Moreover, while I am sympathetic to the arguments (discussed in more detail below) made by the Respondent concerning the timing of this trial, I note that the original Order was not entered for more than a month after it was granted. This is hardly the sort of assiduous pursuit one might have expected given the urgency of the trial coming on. Whatever the reason for the amendment, the Order was not amended for more than two weeks after the original Order was entered. Under these circumstances I find complaints by the Respondent about foot-dragging on the part of the Appellants a little less compelling than they might otherwise have been.

8 As for the argument that, in any event, the appeal period as to para. 4 has expired, I think there would be a serious difficulty in trying to excise parts of the Order for the purposes of an appeal. There is certainly a link between the two paragraphs, and I am not convinced that it is appropriate to deal with one on the appeal and not the other.

9 Accordingly, I am unable to conclude that the appeal is out of time. I turn to an outline of the background and substance of this stay application.

10 Briefly, in this litigation the Respondent seeks repayment from the Appellants of approximately $7.5 million, claiming that such sums were expended by the Respondent for goods and services that actually benefitted the Appellants. During the material times Peter Pocklington was the sole Director of all four corporate parties, which corporate parties, roughly speaking, formed a chain of subsidiaries of one another. (As a result of certain pledge agreements and defaults on loans granted by the Government of Alberta, the Respondent is now controlled by the Government.)Of particular interest in the context of this application are legal services, accounting services, and business consulting services which are alleged to have been paid for by the Respondent but to have been for the benefit of the Appellants. The individuals, firms and companies specifically listed in para. 5 are said to have provided such services and been paid by the Respondent.

11 During discoveries, the Respondent says it sought to ascertain from Pocklington the nature of various of these services paid for by the Respondent, and whether the services were for the benefit of the Appellants. Pocklington was generally not able to answer such questions in detail and made various undertakings to provide information about the nature of the services provided by a number of named individuals, firms and companies.

12 During discoveries, he was also asked to undertake to "provide a general authorization to obtain whatever information or documents may be in the possession of any of the professionals or other people who provided services to Gainers as indicated in the pleadings" (discovery transcript, p. 664). As I understand it, he declined to provide this broad undertaking, in

part taking the position that the Respondent was free to approach whomever it wished to approach. It is my understanding that there has now been compliance with most of the relevant undertakings or that compliance is in process (and I do not concern myself generally with that matter because, if there is not compliance, appropriate remedies are available to the Respondent). The Respondent says that the impugned Amended Order was made by the case management judge to facilitate the obtaining of information that has proven difficult to obtain from third parties, and to facilitate preparation for trial, a date having been secured in September (i.e., about three months hence).

13 The Respondent took no issue with the Appellants' position that, in order to grant a stay, the Court should go through three steps:

1. A "preliminary and tentative" assessment of the merits of the appeal.
2. Consider whether the applicant for the relief otherwise would suffer irreparable harm. This step may merge into or be part of the third step.
3. Consider the balance of convenience for granting the relief.

See *Horsemen's Benevolent & Protective Assn. of Alberta v. Alberta (Racing Commission)* (1989), 97 A.R. 287 (C.A.), at p. 290.

The Merits of the Appeal

14 The Respondent says, quite simply, that the Amended Order was a valid exercise of the case management judge's authority pursuant to R. 219.

15 The Appellant says it has a myriad of good grounds of appeal. Among these are the following:

16 — The chambers judge had no jurisdiction to make the order he did. Rule 209 sets out a procedure for obtaining production of documents from third parties; this procedure was not followed in the Amended Order. Case law under R. 209 makes it clear that the Rule cannot be used to go on a fishing expedition, that the documents must be adequately described, and, that while they are not determinative, the third parties' objections to production must be considered. See *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 63 Alta. L.R. (2d) 189 (Q.B.), and *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1989), 98 A.R. 374 (Q.B.). Moreover, the Amended Order is so broad that it goes beyond the production of documents and purports to compel third parties to "provide information". This is tantamount to examination for discovery of third parties, which our *Rules of Court* do not contemplate. In addition, para. 5 of the Amended Order is overly broad in referring to "any person, firm, or corporation, that has provided any goods or services for which the Plaintiff has paid", without regard to services for which repayment is sought in this action.

17 — The affected third parties ought to have been notified. Although R. 209 does not require this, case law such as *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (supra), and *Glover v. Glover* (1980), 113 D.L.R. (3d) 174 (Ont. C.A.), affirmed S.C.C. [[1981] 2 S.C.R. 563], implies this is a requirement.

18 — The Appellants have never been asked, through undertakings, to obtain information from the vast majority of the third parties specified in para. 5. Thus, the relief granted by the Amended Order was premature. See *Specialty Underwriting Services Ltd. v. Corp. of Lloyd's*, [1993] B.C.J. 188 (C.A.), January 15, 1993.

19 — Alberta courts do not have the authority to order parties from outside the jurisdiction to produce documents and answer questions. See *Specialty Underwriting Services Ltd. v. Corp. of Lloyd's* (supra) and *Saunders v. Nelson*, [1994] B.C.J. 3039 (S.C.), December 23, 1994.

20 I am satisfied that this branch of the test has been met. Among other matters, there are arguable points to be made concerning the scope of the authority of a case management judge in light of the other *Rules of Court*, the extent of the Court's authority over third parties outside the jurisdiction, and the scope of R. 209.

Irreparable Harm

21 The Appellants argue that, without a stay, the third parties will have to comply with the Amended Order. They may produce material that is privileged or that is totally irrelevant to the action. Given the general nature of the Amended Order, they may have to produce vast amounts of material that is unnecessary. Some of the parties mentioned are corporate entities

now controlled by parties other than those who controlled them at the material times; such parties will be ill-equipped to know what to produce in the absence of a more specific order. If the material is produced, an appeal will be rendered nugatory. See *Canadian Newspapers Co. v. Manitoba* (1985), [1986] 2 W.W.R. 411 (Man. C.A.).

22 The Respondent says that, in the action, the Appellants have argued that all the services were provided for the Respondent. If the Appellants are correct about this, there can be no question of privilege. (Of course, if the Respondent's position — that the services were provided for the benefit of the Appellants — is correct, there could be a question of privilege, at least as regards the legal advice. I agree that it is hard to see how privilege could arise in relation to the accounting or business consulting services, although it is possible that arguments of commercial confidentiality might arise in that context.)

23 The Respondent also notes that the Appellants' counsel does not represent the third parties; if the third parties wish to object to having to comply with the Amended Order, they are free to do so.

24 I agree that, if the stay is not granted, an appeal could be rendered nugatory in that the disputed information may already have been provided.

Balance of Convenience

25 The Appellants say that, if the appeal is unsuccessful, there will have been no harm done to the Respondent as it will then be entitled to obtain the disputed information. They concede that the appeal may interfere with the September 20 trial date, but note that, although the action was commenced in early 1990, the original Order was obtained as recently as March 1995. The Appellants have proposed conditions for expediting the appeal and for obtaining some of the disputed information in the meantime. In view of their arguments about the effect of the Amended Order, they say they pursued the appeal as expeditiously as possible.

26 Although I am mindful of the fact that the stay could affect the September trial, I am satisfied that the legal issues being raised justify the possible delay. Moreover, I accept the argument made by the Appellants that, since the Respondent obtained the disputed Order so late — more than five years after the action was commenced — the Respondent must bear some responsibility for the delay, if there is any. I have heard submissions from both sides about proposed conditions.

27 The stay will be granted on the following conditions:

28 1. The Appellants shall, by June 21, 1995, send letters by registered mail (hereinafter called "the Requests") to all of the persons, corporations, and firms listed in para. 5 of the Amended Order (hereinafter called the "Suppliers"), which can be located with reasonable efforts, requesting that, by July 3, 1995, they produce for inspection any documents which they have in their possession relating to any goods or services for which the Respondent has paid and claims reimbursement in this Action.

29 2. The Appellants shall provide copies of the Requests to counsel for the Respondent.

30 3. The Suppliers may produce the documents requested in the Requests, with the protection of this Court from any claim arising from the production of the documents.

31 4. Within 10 days of being advised that any document will be produced by any of the Suppliers, the Appellants shall:

32 (a) Advise counsel for the Respondent as to where and when the document will be made available for inspection by counsel for the Respondent; or

33 (b) Provide counsel for the Respondent with a written statement (hereinafter called "Claim") claiming that the document is irrelevant to this action, confidential, or privileged, and providing a description of the document adequate to allow counsel for the Respondent to consider the Claim.

34 5. In the event the Respondent wishes to challenge any Claim, such Claim shall be determined by the Case Management Justice in the manner directed by him.

35 6. Counsel for the Respondent shall be entitled to examine the Appellants' designated officer for discovery on any Claim, as though conducting an examination on an affidavit of documents.

36 7. Any documents received by the Respondent or its counsel subsequent to June 7, 1995, from any third party to whom the Respondent or its counsel has sent a copy of the Amended Order, and any copies of the documents made, shall be provided to counsel for the Appellants immediately and such documents shall become subject to the terms of this stay.

37 8. The Appellants shall:

38 (a) Provide counsel for the Respondent with a proposed agreement as to contents of the appeal book, by June 21, 1995;

39 (b) File the agreement as to contents of appeal book or set an application for the determination of contents of the appeal book by June 23, 1995;

40 (c) File and serve the appeal book, within seven days after counsel for the Respondent signs an agreement as to the contents of the appeal book or those contents are determined by this Honourable Court; and

41 (d) File the Appellant's factum within seven days after the appeal book has been filed and served.

42 9. Counsel for the Appellants and counsel for the Respondent shall jointly apply to have this Appeal heard in the special sittings of this Honourable Court opening on July 24, 1995.

43 10. This Order shall not affect any rights the Respondent may have to obtain directly from the Suppliers any information or documents relating to goods or services provided by them.

Application allowed on conditions.

Tab B-12

2003 ABQB 69
Alberta Court of Queen's Bench
Weatherill Estate v. Weatherill
2003 CarswellAlta 81, 2003 ABQB 69, [2003] A.W.L.D. 170, [2003] A.J. No. 88, 119 A.C.W.S. (3d) 729, 11 Alta. L.R. (4th) 183, 337 A.R. 180, 40 E.T.R. (2d) 314, 49 E.T.R. (2d) 314

MALORA LEE, TRUSTEE OF THE ESTATE OF MARY LOUISE WEATHERILL, Plaintiff (Respondent) and WILLIAM WEATHERILL, DIANE WEATHERILL and BONNIE WALD, Defendant (Appellants)

Slatter J.
Heard: January 21, 2003
Judgment: January 28, 2003
Docket: Edmonton 0103-14560

Counsel: *G.H. Crowe*, for Plaintiff / Respondent
S. Pride-Boucher, for Defendant / Appellant
Subject: Estates and Trusts; Civil Practice and Procedure

Headnote

Estates --- Testamentary capacity and undue influence — Undue influence — Practice and procedure — Evidence — General
Plaintiff gave instructions to solicitor for will, which was executed in May 1998 — Plaintiff was declared incompetent by her physician in 1999, but prepared holograph will in January 2000 — Plaintiff agreed to transfer land to son for less than fair market value in May 2000 — Trustee was appointed for plaintiff, and action was brought against defendant son and son's wife — Defendants brought application for production of 1998 will, which was dismissed by master — Defendants appealed — Appeal allowed — Making of will in 1998 was relevant to plaintiff's capacity to transfer land in 2000 — Contents of will were relevant to issue of undue influence — No compelling reason was shown why production would be abusive — Expense of production was not issue — As plaintiff had alleged undue influence, she could not claim that documents relating to her motivation to dispose of her property should be kept confidential.
Practice --- Discovery — Discovery of documents — Resisting production
Plaintiff gave instructions to solicitor for will, which was executed in May 1998 — Plaintiff was declared incompetent by her physician in 1999, but prepared holograph will in January 2000 — Plaintiff agreed to transfer land to son for less than fair market value in May 2000 — Trustee was appointed for plaintiff, and action was brought against defendant son and son's wife — Defendants brought application for production of 1998 will, which was dismissed by master — Defendants appealed — Appeal allowed — Making of will in 1998 was relevant to plaintiff's capacity to transfer land in 2000 — Contents of will were relevant to issue of undue influence — No compelling reason was shown why production would be abusive — Expense of production was not issue — As plaintiff had alleged undue influence, she could not claim that documents relating to her motivation to dispose of her property should be kept confidential.

Table of Authorities

Cases considered by *Slatter J.*:
Goodman Estate v. Geffen, [1991] 5 W.W.R. 389, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate)* [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, 80 Alta. L.R. (2d) 293, (sub nom. *Geffen v. Goodman Estate)* 81 D.L.R. (4th) 211, 127 N.R. 241, 1991 CarswellAlta 91, 1991 CarswellAlta 557 (S.C.C.) — referred to
Tulick Estate v. Ostapowich, 62 Alta. L.R. (2d) 384, 91 A.R. 381, 1988 CarswellAlta 194 (Alta. Q.B.) — referred to
Rules considered:
Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to
R. 186.1 [en. Alta. Reg. 277/95] — considered
R. 187.1(2) [en. Alta. Reg. 172/99] — considered
APPEAL from order of master dismissing application for production of document.

Slatter J.:

1 This appeal from the Master involves the question of whether the Plaintiff is required to produce a certain document (a 1998 will of the Plaintiff) as part of the discovery process. The learned Master dismissed the application for production of the will, and the Defendants appeal.

Facts

2 As this is an interlocutory application, and none of the facts have been proven, I will only comment on them to the extent that is necessary. I am merely repeating the allegations in the pleadings, without making any specific findings about matters in dispute.

3 This is a family dispute about a particular piece of land. The Plaintiff and her late husband owned the land for many years. There is some evidence on the record that the lands were always "earmarked" for the Defendant William Weatherill. In the 1980's he entered into an agreement to purchase the land, but the agreement was frustrated by the untimely death of his father. At a meeting in 2000 there was a "family agreement" that William should purchase these lands, and not pay the full price in anticipation of an inheritance from the Plaintiff. In May of 2000 the Defendant William and his wife entered into an agreement with the Plaintiff to purchase these lands. On the face of it, the purchase price appears to be below the fair market value of the lands, and this transfer is now challenged. Allegations of undue influence are made in the pleadings, and the pleadings also question the capacity of the Plaintiff to contract at the relevant times.

4 A little more background is necessary in order to understand the present dispute about discovery of documents. In May of 1998 the Plaintiff attended before a solicitor, Richard Wyrozub, and gave him instructions for the preparation of a will. The will was apparently prepared and executed, and it is the production of this will that is in dispute. It is alleged that after the will was executed the Plaintiff discussed her will with her children, and advised that "the lands would go to the boys".

5 In November of 1998 Reginald Weatherill, another son of the Plaintiff and a brother of the Defendant William, had Mr. Wyrozub prepare a farm lease for the lands. This ten-year lease was executed in February of 1999. It is alleged that the other members of the family did not know about this lease. The validity of this lease is also being challenged in collateral litigation between William and Reginald, to which the present Plaintiff has been added as a third party.

6 The Plaintiff had executed an enduring power of attorney. On September 7, 1999 this power was triggered when her physician issued a declaration of incapacity.

7 On January 8, 2000, the Plaintiff prepared a holograph will. This will is listed in the affidavit of records filed by the Plaintiff.

8 In May of 2000, the challenged transfer of the lands took place.

9 In 2001 a trustee was appointed for the Plaintiff, and this action was commenced. On March 18, 2002, it was ordered that this action and the action concerning Reginald's lease should be tried together. The Defendants in this action applied for production of a copy of the 1998 will, but on September 23, 2002 the Master dismissed that application. After referring to *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.) the learned Master stated in a brief memorandum that he had "concluded there is nothing in that case that leads me to believe that a will executed in 1998, before the declaration of incapacity [by the physician in 1999], can help the Defendants overcome the presumed undue influence in May of 2000."

The Duty to Discovery Documents

10 The parties are in agreement as to the duty of a litigant to discover records. The only dispute is over the application of the law to the facts. Both parties note that Rule 187.1(2) requires the parties to "disclose relevant and material records". They both then refer to Rule 186.1 which reads:

> **186.1** For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues

raised in the pleadings.

The Defendants argue that the making of the will in 1998 is relevant to the capacity of the Plaintiff in 2000 when the disputed transaction took place. They also argue that the contents of the will are relevant to the issue of undue influence, because the will may show the intention of the Plaintiff to deal with the lands in a way that is consistent with the challenged transaction. In an argument that the Master accepted, the Plaintiff argues that the real issue is the capacity of the Plaintiff in the year 2000, and that the events of 1998 are too remote to be "relevant and material".

11 Up until 1999 discovery in Alberta was very wide-ranging. Generally discovery was available on anything "touching the matters". This form of discovery was found to be excessive. It was requiring the production of documents and the answering of questions that were only relevant in the remotest sense. It was felt that some parties were abusing the Rule by relying on literal compliance with it; demands were being made for the production of endless lists of documents that had little bearing on any real issue. As a result, the Rules Committee recommended that discovery be limited to matters that are "relevant and material". The purpose of the Rule was to control abuses and to limit the costs of litigation, while still allowing an appropriate degree of pre-trial discovery.

12 In my view the courts should take a pragmatic view of the scope of discovery. Too formalistic an application of the Rule serves to increase the costs of litigation, rather than decreasing them. This case is a good example. The cost of photocopying the disputed will would have been a few dollars. Instead of that, the parties have spent thousands of dollars arguing about whether the document is producible. This was not the result intended by the amendment to the Rule.

13 The pragmatic counsel who is called upon to produce a document which is arguably irrelevant, or at least not materially relevant, will analyze the situation as follows. First of all, the document cannot help or hurt counsel's client. If the document can help or hurt, then it is material. If the document is truly harmless, the pragmatic counsel will produce it rather than fight over it.

14 The pragmatic counsel might nevertheless decline to produce such harmless documents for a number of reasons:

(a) Floodgates. Counsel may be concerned that the request for one or a few documents is merely a precursor to a flood of similar requests. At some point the floodgates must be closed. Controlling excessive demands for documents was one purpose of the new Rule.

(b) Confidentiality. Harmless documents may be confidential. The confidentiality in question may be personal, or it may relate to business secrets. While confidentiality is not a bar to discoverability, it may be a factor that prompts the pragmatic counsel to decline to produce a record which is not materially relevant, but which could easily and cheaply be produced.

(c) Expense. There may be harmless documents that will be very expensive to collect and obtain. This may be because the document is filed in a way that makes it difficult to access, or it may be in the control of a third party who demands a fee, or for other reasons. In these instances the pragmatic counsel might decline to incur the expense of producing what appears to be a marginally relevant document.

I do not suggest that the Rule over the discoverability of a document should be determined by the expediency of the day. Parties are not required to produce the documents that are not material and relevant, and they should be entitled to refuse to produce if they so choose. However, the above factors can be explored by the Court in trying to understand why production of a particular document is resisted. If the records being requested are modest in number, they are not confidential, and they are not expensive to obtain, then why is the litigant fighting so hard to avoid production, given that the documents are by definition supposedly harmless? Is the production of the document within the mischief the 1999 amendments were designed to prevent? These are factors that can certainly be taken into consideration when costs are considered.

15 Examination for discovery now is narrower than it used to be. It is however still quite wide, and is perhaps still wider than the test for admissibility at trial. Certainly discovery is not narrower than admissibility at trial. In interpreting the Rules, the Court should avoid creating an artificial situation where a litigant is not entitled to obtain information on discovery, which the litigant could quite clearly introduce at the trial.

16 In determining whether a document is relevant and material, the starting point is the pleadings. The pleadings define the issues, and relevance must be determined with respect to the issues. The pleadings are also relevant with respect to the issue of materiality. However, with respect to materiality one must also have regard to the issue in question. Where does the burden of proof lie? Is the issue something that is capable of direct proof, or is it something like a person's state of mind, which can only be proven indirectly. Does one party essentially have to try and prove a negative? How are cases of this type

usually proven at trial? The less amenable a fact is to direct proof, the wider will be the circle of materiality. There are some facts that can only be proven by essentially eliminating all the competing scenarios, thereby leaving the fact in issue as the sole logical inference. When a state of mind is in issue, it can generally only be proven by demonstrating a pattern of conduct of the person whose state of mind it is. In deciding whether a particular document is material, one must take a very pragmatic view, viewing the situation from the perspective of the party who must prove the fact in question. At an interlocutory stage of proceedings, the Court should not measure counsels' proposed line of argument too finely; if counsel can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient. Again it must be remembered that the purpose of the Rule was to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry.

17 That relevance is determined by the pleadings, while materiality is more a matter of proof can be seen by the wording of the Rule. The Rule talks about records that can "help determine" an issue, or that can "ascertain evidence" that will determine an issue. These are words of proof, and materiality must be determined with that in mind.

18 It is sometimes said that the new Rules prevent the discovery of "tertiary" issues. This is one way of saying that the 1999 amendments were intended to prevent excessive discovery. However, as a working tool the search for "tertiary" issues is unhelpful in many cases. There is no clear dividing line between primary, secondary, and tertiary evidence. As I have indicated, some facts can only be proven by tertiary or even more remote evidence. A good example is an attempt to prove a negative. The application of the new Rule to particular fact situations must be primarily pragmatic.

19 The Defendants argue that the will is relevant to two issues. The first is the capacity of the Plaintiff. It seems clear from the record that the Plaintiff did not suffer any sudden and catastrophic loss of capacity. At worst she is experiencing the normal effects of the aging process. It is not uncommon for medical experts to testify that this sort of loss of capacity is gradual, and perhaps exists before it is apparent. The passage of time between the will in October of 1998 and the challenged transfer in May of 2000 is not so great that a court might not draw an inference on capacity in 2000, from capacity in 1998. Now that the two actions have been combined for trial, the capacity of the Plaintiff at the time of the 1999 lease is also in issue. It would seem artificial to say that the will is producible in the lease action, but not in this action. It is not necessary for the purpose of this application to decide if the Court would draw any inferences on capacity in 2000, based on capacity in 1998; it is a possible line of reasoning and not mere speculation, and the record would appear to be materially relevant. It may assist in determining an issue at trial.

20 The Defendants argue that the contents of the will are not relevant to any issue of capacity. It is true that the circumstances surrounding the making of this will perhaps have more to say about the Plaintiff's capacity than the actual contents. However, if the contents of the will bear a rational relationship to her family's circumstances and her estate as it existed at that time, that is some evidence of her capacity. Evidence of this type is routinely introduced in trials involving capacity and undue influence.

21 Likewise, the will is relevant to the issue of undue influence. In such cases it is important to know whether it was truly the transferor's intention to transfer the property, or whether that intention was imposed on her. As I have indicated, there is some family history suggesting that these lands were always earmarked for the Defendant. If the 1998 will left the lands to William, that would be compelling evidence. Likewise, if the will said anything about Reginald being entitled to farm the lands, that too would be relevant. If the will is silent, or disposes of the land in some inconsistent way, that is also relevant. Again, whether the trial judge will draw any inferences from this need not be decided at this point; it is only necessary to show that the inference is possible.

22 The Defendants argue that a person's intention in a testamentary instrument is not necessarily the same as that same person's *inter vivos* intention. That is undoubtedly true, but it is not uncommon for people to commence distribution of their estates prior to their death. The acceleration of inheritances is not unknown. These are all factors that the trial judge must take into account in deciding whether to draw the inferences the Defendants urge. The ability of a party to make the argument at trial should not be foreclosed by too limited a view of discovery.

23 The Defendants point out that the law suggests that the onus of disproving undue influence will fall on them. There are cases that suggest that undue influence will be presumed where transfers are made at an undervalue and the donee is in a position of confidence with the donor: *Tulick Estate v. Ostapowich* (1988), 62 Alta. L.R. (2d) 384, 91 A.R. 381 (Alta. Q.B.). If this law was found to apply to the facts of this case, the Defendants would have the burden of proving a negative, namely

that there was no undue influence. They are also required to prove the mental state of the Plaintiff. Such issues are notoriously hard to prove, and they are impossible to prove directly. Accordingly, in a case like this there is a wider category of discovery that would be "material".

24 It seems clear to me that on this record the Defendants would be entitled to call Mr. Wyrozub at trial as a witness, and ask him how he assessed the Plaintiff's capacity in 1998 when the will and the lease were prepared. It seems unlikely that the trial judge would rule that his evidence is so unlikely to be relevant that he could not even be called. If his evidence can be called at trial it seems particularly artificial to say that documents surrounding his evidence are not producible on discovery.

25 Viewed from the other side, no compelling reason has been shown why production would be abusive. Production of the will might well trigger production of Mr. Wyrozub's file, but that in itself would not be a major undertaking. There is no floodgates issue. The Plaintiff protests that the Defendants are asking for something which is "none of their business". The privacy interest in question would be that of the Plaintiff. Having alleged in this claim that she was unduly influenced, she does not have a strong argument that documents relating to her motivation to dispose of her property should now be kept confidential. Furthermore, there is evidence that she discussed the contents of her will with her family. Expense is not an issue. As I have mentioned, the will could be photocopied for a few dollars.

26 In all of the circumstances, it appears that the document in question might well assist the Court in making the findings of fact that are required regarding capacity and undue influence. Those are notoriously difficult issues to prove, and they are almost invariably proved indirectly and by inference. The production of this document is not within the mischief that the 1999 amendments to the Rules were designed to prevent. I have concluded that the document is relevant and material, and it should be produced.

27 The parties may speak to costs within 30 days of the date of these reasons, if they are unable to agree.

Appeal allowed.

Tab B-13

2006 ABCA 246
Alberta Court of Appeal
NAC Constructors Ltd. v. Alberta (Capital Region Wastewater Commission)
2006 CarswellAlta 1086, 2006 ABCA 246, [2006] A.W.L.D. 3041, [2006] A.W.L.D. 3042, [2006] A.W.L.D. 3049, [2006] A.J. No. 1051, 152 A.C.W.S. (3d) 394, 404 W.A.C. 272, 412 A.R. 272, 56 C.L.R. (3d) 299, 63 Alta. L.R. (4th) 19

NAC Constructors Ltd. (Respondent / Plaintiff) and Alberta Capital Region Wastewater Commission (Appellant / Defendant)

E. McFadyen, W. O'Leary, R. Berger JJ.A.
Heard: June 5, 2006
Judgment: August 25, 2006
Docket: Edmonton Appeal 0603-0047-AC
Proceedings: reversing *NAC Constructors Ltd. v. Alberta (Capital Region Wastewater Commission)* (2006), 2006 CarswellAlta 1119 (Alta. Q.B.)

Counsel: P.V. Stocco for Appellant
P.L. Morrison for Respondent
Subject: Civil Practice and Procedure; Contracts

Headnote

Civil practice and procedure --- Discovery — Examination for discovery — Range of examination — General principles
Relevant and material — Plaintiff brought action for damages for breach of implied contract after its bid was rejected by commission in tendering process for selection of contractor to construct wastewater treatment plant — Plaintiff alleged that commission accepted bid that was noncompliant with tender requirements — Plaintiff contended that commission was bound to accept its bid because its bid was compliant — At examination for discovery, commission refused to answer question whether consultant that assisted in bid process ever raised issues of noncompliance of accepted bid — Commission was ordered to answer disputed question — Commission appealed — Appeal allowed — Evidence of opinions or advice given to commission by consultant could not reasonably be expected to significantly help court determine core issue of compliance or any subsidiary issues such as whether commission observed its implied obligation to plaintiff to act fairly, equally, and in good faith — Nor would such evidence help to ascertain evidence that could reasonably be expected to significantly help determine those issues — Disputed evidence might be relevant to issues in pleadings but it was not relevant for discovery purposes within meaning of R. 200(1.2) and R. 186.1 of Alberta Rules of Court — Resolving issues of compliance did not depend on opinions and advice given by consultant to commission.
Civil practice and procedure --- Discovery — Discovery of documents — Scope of documentary discovery — General principles
Relevant and material — Plaintiff brought action for damages for breach of implied contract after its bid was rejected by commission in tendering process for selection of contractor to construct wastewater treatment plant — Plaintiff alleged that commission accepted bid that was noncompliant with tender requirements — Plaintiff contended that commission was bound to accept its bid because its bid was compliant — At examination for discovery, commission refused to produce bid review worksheet prepared and provided to it by its consultant that assisted in bid process, and to produce cover letter from consultant to commission that accompanied bid review worksheet — Commission was ordered to produce documents — Commission appealed — Appeal allowed — Evidence of opinions or advice given to commission by consultant could not reasonably be expected to significantly help court determine core issue of compliance or any subsidiary issues such as whether commission observed its implied obligation to plaintiff to act fairly, equally, and in good faith — Nor would such evidence help to ascertain evidence that could reasonably be expected to significantly help determine those issues — Disputed evidence might be relevant to issues in pleadings but it was not relevant for discovery purposes within meaning of R. 200(1.2) and R. 186.1 of Alberta Rules of Court — Resolving issues of compliance did not depend on opinions and advice given by consultant to commission.
Construction law --- Contracts — Building contracts — Execution of formal contract — Tendering process — Process and procedure
Plaintiff brought action for damages for breach of implied contract after its bid was rejected by commission in tendering process for selection of contractor to construct wastewater treatment plant — Plaintiff alleged that commission accepted bid that was noncompliant with tender requirements — Plaintiff contended that commission was bound to accept its bid

because its bid was compliant — At examination for discovery, commission refused to answer question whether consultant that assisted in bid process ever raised issues of noncompliance of accepted bid, and commission refused to produce bid review worksheet prepared and provided to it by its consultant, and to produce cover letter from consultant to commission that accompanied bid review worksheet — Commission was ordered to answer disputed question and produce documents — Commission appealed — Appeal allowed — Evidence of opinions or advice given to commission by consultant could not reasonably be expected to significantly help court determine core issue of compliance or any subsidiary issues such as whether commission observed its implied obligation to plaintiff to act fairly, equally, and in good faith — Nor would such evidence help to ascertain evidence that could reasonably be expected to significantly help determine those issues — Disputed evidence might be relevant to issues in pleadings but it was not relevant for discovery purposes within meaning of R. 200(1.2) and R. 186.1 of Alberta Rules of Court — Resolving issues of compliance did not depend on opinions and advice given by consultant to commission.

Table of Authorities

Cases considered:

Auer v. Lionstone Holdings Inc. (2005), 2005 ABCA 78, 2005 CarswellAlta 221, 20 C.C.L.I. (4th) 1, 13 M.V.R. (5th) 163, 250 D.L.R. (4th) 679, 363 A.R. 84, 343 W.A.C. 84, 45 Alta. L.R. (4th) 350, [2005] 9 W.W.R. 615 (Alta. C.A.) — referred to

Decock v. Alberta (2000), 2000 CarswellAlta 384, 186 D.L.R. (4th) 265, 79 Alta. L.R. (3d) 11, [2000] 7 W.W.R. 219, 255 A.R. 234, 220 W.A.C. 234, 2000 ABCA 122 (Alta. C.A.) — referred to

D'Elia v. Dansereau (2000), 2000 CarswellAlta 617, 82 Alta. L.R. (3d) 298, 2000 ABQB 425, 267 A.R. 157 (Alta. Q.B. [In Chambers]) — referred to

Hepworth v. Canadian Equestrian Federation (2000), 2000 ABCA 327, 2000 CarswellAlta 1529, 277 A.R. 138, 242 W.A.C. 138 (Alta. C.A.) — referred to

Hirtz v. Alberta (Public Trustee) (2002), 2002 ABCA 29, 2002 CarswellAlta 194, [2002] 5 W.W.R. 35, 99 Alta. L.R. (3d) 1, 18 C.P.C. (5th) 144, 303 A.R. 25, 273 W.A.C. 25 (Alta. C.A.) — referred to

Johnston v. Bryant (2003), 17 Alta. L.R. (4th) 24, 2003 ABCA 169, 2003 CarswellAlta 763, 327 A.R. 378, 296 W.A.C. 378 (Alta. C.A.) — considered

Northland Bank v. Wettstein (1997), 1997 CarswellAlta 339, (sub nom. *Northland Bank (Liquidation), Re)* 200 A.R. 150, (sub nom. *Northland Bank (Liquidation), Re)* 146 W.A.C. 150 (Alta. C.A.) — referred to

Tolko Industries Ltd. v. Railink Ltd. (2003), 2003 ABQB 349, 2003 CarswellAlta 559, 333 A.R. 270, 14 Alta. L.R. (4th) 388, 32 C.P.C. (5th) 268 (Alta. Q.B.) — referred to

Weatherill Estate v. Weatherill (2003), 2003 ABQB 69, 2003 CarswellAlta 81, 49 E.T.R. (2d) 314, 11 Alta. L.R. (4th) 183, 337 A.R. 180 (Alta. Q.B.) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

R. 186.1 [en. Alta. Reg. 277/95] — considered

R. 200(1.2) [en. Alta. Reg. 172/99] — considered

APPEAL by defendant from judgment reported at *NAC Constructors Ltd. v. Alberta (Capital Region Wastewater Commission)* (2006), 2006 CarswellAlta 1119 (Alta. Q.B.), compelling answers to questions refused on examination for discovery.

***Per curiam*:**

I. Introduction

1 The Alberta Capital Region Wastewater Commission ("Commission") appeals an order compelling it to answer three questions its representative declined to answer on examination for discovery. The issue is whether the information sought is within the scope of oral examination permitted by the *Alberta Rules of Court*. In our view it is not. The appeal is allowed.

II. Background

2 Earth Tech Canada Inc. ("Earth Tech") was retained by the Commission as a consultant to assist in the tendering process for the selection of a contractor to construct a wastewater treatment plant. Earth Tech's responsibilities included analyzing the bids and providing advice and recommendations to the Commission. Maple Reinders Inc. ("Maple") and the

respondent, NAC Constructors Ltd. ("NAC"), were among those who filed bids. Earth Tech reviewed all the tenders, discussed them with the Commission and prepared and submitted a written summary of them to the Commission. Maple's bid was the lowest and it was awarded the construction contract. NAC's bid was the second lowest.

3 NAC commenced this action for damages for breach of the implied contract between it and the Commission. It alleges that Maple's bid should have been rejected as non-compliant because it was delivered after the tender closing time, did not name a proposed sub-contractor for control implementation as required by the tender documents, and did not satisfy certain technical tender requirements (no corporate seal, no witness to execution, and failure to state the total bid in words). NAC says its bid ought to have been selected and claims damages for loss of profit and loss of contribution to overhead.

4 NAC's Amended Statement of Claim raises the following issues: (i) whether Maple's bid failed to comply with the tender conditions as alleged; (ii) whether Maple's bid was capable of being accepted by the Commission even if filed after the closing time; and (iii) whether the Commission breached its implied contract with NAC by not rejecting the Maple bid and awarding the construction contract to it.

5 In its Statement of Defence, the Commission denies the Maple bid was non-compliant as alleged and pleads that, in any case, NAC's bid did not comply with the tender rules and conditions. No particulars of NAC's alleged non-compliance are pleaded. The Statement of Defence raises several other issues not raised directly by NAC in the Amended Statement of Claim: (i) was the Commission bound to award the construction contract to the lowest compliant bidder; (ii) did the Commission discharge its implied obligation to NAC to act fairly and equally and in good faith in the tendering process; and (iii) did the Commission reject any tenders received after the tender closing time.

6 On oral examination for discovery in July, 2004 the Commission's representative testified that none of the bids received was rejected as non-compliant with the established tendering process. Counsel for NAC questioned him concerning three matters related to communications between Earth Tech and the Commission, each of which was objected to and taken under advisement. The Commission later declined to disclose the information requested. On November 1, 2004 NAC applied for an order compelling the Commission to produce the information. NAC did not examine a representative of Earth Tech for discovery until May 10, 2005, almost a year after the Commission representative was examined.

7 The disputed questions requested the Commission to:

> (i) produce the bid review worksheet prepared by Earth Tech and furnished to the Commission (Undertaking 5);
> (ii) produce the covering letter sent by Earth Tech to the Commission with the bid review worksheet (Undertaking 6); and
> (iii) advise if Earth Tech ever raised with the Commission any issues of non-compliance in respect of the Maple bid, including expression of the total bid in words, identity of the proposed control sub-contractor, names of material manufacturers, existence and particulars of builders' risk insurance coverage, or any other issues identified by Earth Tech as potential instances of non-compliance with the tender conditions (Undertaking 17).

The documents and information described in the Undertakings is hereinafter referred to as "the disputed evidence".

8 In brief written reasons, the chambers judge ordered the Commission to disclose the disputed evidence. The reasons indicate that the chambers judge was alive to the *Rules* and principles relating to the scope of oral examination.

III. Scope of Discovery

9 The *Rules* governing the scope of oral examination for discovery were amended effective November 1, 1999 (A/R 172/99). The obligation of a witness to answer questions on oral examination is now limited to questions seeking evidence that is both "relevant and material" within the meaning of those terms in the *Rules*. Rule 200(1.2) states in part that:

> During the oral examination ... a person is required to answer only relevant and material questions.

10 New Rule 186.1 defines the concepts of relevance and materiality in relation to oral examination for discovery. It says:

> For the purpose of this Part, a question ... is relevant and material only if the answer to the question ... could reasonably be expected
>
> > (a) to significantly help determine one or more of the issues raised in the pleadings, or
> > (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

11 In *Johnston v. Bryant* (2003), 327 A.R. 378, 2003 ABCA 169 (Alta. C.A.), the Court observed at para. 12 that " Rule 186.1 is intended to limit the scope of discovery from what it was under previous rules". It is "designed to limit ... tertiary lines of inquiry": *Auer v. Lionstone Holdings Inc.* (2005), 363 A.R. 84, 2005 ABCA 78 (Alta. C.A.), at para. 30, citing *Hirtz v. Alberta (Public Trustee)* (2002), 303 A.R. 25, 2002 ABCA 29 (Alta. C.A.). In *Hepworth v. Canadian Equestrian Federation* (2000), 277 A.R. 138, 2000 ABCA 327 (Alta. C.A.), at para. 12, the Court held the disputed questions were proper under both the new and old discovery *Rules*. Issues raised in the pleadings are the basis for determining both relevance and materiality: *D'Elia v. Dansereau* (2000), 267 A.R. 157, 2000 ABQB 425 (Alta. Q.B. [In Chambers]), at para. 17.

12 Oral examination for discovery is now confined to eliciting facts of primary relevance, that is, facts that are directly in issue, or of secondary relevance, that is, facts from which the existence of the primary facts may be directly inferred. Both primary and secondary relevance are determined by reference to the issues raised by the pleadings. Questions seeking information that could reasonably be expected to lead to facts or records of secondary relevance (that is, questions asking for information that is only of tertiary relevance) need no longer be answered.

13 In addition to being relevant within the meaning of Rule 186.1, information sought on discovery must be material, that is, be reasonably expected to "*significantly*" help determine one or more of the issues raised in the pleadings. The materiality of evidence refers to its pertinency or weight in relation to the issue it is adduced to prove: *Black's Law Dictionary*, (6th ed. 1990). Facts or documents may be relevant within Rule 186.1, but, either alone or in combination with other evidence, be of no significant help to the examining party in proving or disproving a fact in issue. As Slatter J. observed in *Weatherill Estate v. Weatherill* (2003), 337 A.R. 180, 2003 ABQB 69 (Alta. Q.B.), at para. 17, "... relevance is determined by the pleadings while materiality is more a matter of proof ...". See also *Tolko Industries Ltd. v. Railink Ltd.* (2003), 14 Alta. L.R. (4th) 388, 2003 ABQB 349 (Alta. Q.B.), at para. 6.

IV. Grounds of Appeal

14 The Commission argues that its refusal to provide the disputed evidence is justified because the evidence is not relevant and material within the meaning of those terms in Rule 186.1. The compliance or non-compliance of the Maple and NAC tenders are questions of law that are ultimately for the court to determine. The Commission maintains that evidence of opinions or advice communicated to it by Earth Tech could not reasonably be expected to (i) "significantly help" the court determine the core issues of compliance or any of the subsidiary issues that flow from them, including the issue of whether the Commission observed its implied obligation to NAC to act fairly and equally and in good faith, or (ii) to "ascertain evidence that could reasonably be expected to significantly help determine" those issues.

15 NAC submits the disputed evidence is relevant and material to the issues raised in the pleadings, in particular the issue of whether the Commission's award of the construction contract to Maple was a breach of its implied agreement with NAC and other tenderers. It argues that the disputed evidence could reasonably be expected to significantly help determine whether Maple's bid was submitted in time and was otherwise compliant, as well as whether NAC's bid was compliant.

V. Standard of Review

16 Whether discovery questions are relevant and material within Rule 186.1, in light of the issues raised in the pleadings, is a question of law. Although reasonableness is the applicable standard in reviewing a chambers judge's exercise of discretion (*Decock v. Alberta* (2000), 255 A.R. 234, 2000 ABCA 122 (Alta. C.A.), at para. 13), when the matter in issue is a question of law, the standard of review is correctness: *Northland Bank v. Wettstein* (1997), 200 A.R. 150 (Alta. C.A.) at para. 9.

VI. Analysis

17 We agree with the Commission's argument. The disputed evidence may comprise opinions and advice that relates to compliance of the Maple and NAC bids, the fundamental and determinative issues raised by the pleadings, and that evidence may be relevant to those issues in a broad sense. But it is not material to them within the *Rules* fixing the scope of examination for discovery. Resolution of the issues of compliance of the tenders does not depend in any way on the opinions and advice communicated by Earth Tech to the Commission. The disputed evidence cannot reasonably be expected to significantly assist in proving or disproving the issues of compliance.

VII. Conclusion

18 In our view, the chambers judge erred in law in assuming that any opinions or advice expressed by Earth Tech in the disputed evidence could be material within the meaning of Rules 200(1.2) and 186.1.

19 The appeal is allowed. The Commission cannot be compelled to disclose the disputed evidence.

Appeal allowed.

Tab B-14

2015 ABQB 2
Alberta Court of Queen's Bench
Dow Chemical Canada Inc. v. Nova Chemicals Corp.
2015 CarswellAlta 9, 2015 ABQB 2, [2015] A.W.L.D. 1101, [2015] A.W.L.D. 1166, 248 A.C.W.S. (3d) 791

Dow Chemical Canada Inc. and Dow Europe GmbH, Plaintiffs (Defendants by Counterclaim) Applicant and Nova Chemicals Corporation, Defendant (Plaintiff by Counterclaim) Respondent

Neil Wittmann C.J.Q.B.
Heard: December 15, 2014
Judgment: January 2, 2015
Docket: Calgary 0601-07921

Counsel: B.C. Yorke-Slader, Q.C., B.R. Crump, A.D. Grosse, for Plaintiffs / Defendants by Counterclaim, Dow Chemical Canada Inc. and Dow Europe GMBH
W.J. Kenny, Q.C., C.C.J. Feasby, M.E. Comeau, T. Gelbman, for Defendant / Plaintiff by Counterclaim, Nova Chemicals Corp.
Subject: Civil Practice and Procedure; Evidence; Natural Resources

Headnote

Civil practice and procedure --- Discovery — Discovery of documents — Application for order for production — General principles

Defendant operated three plants that manufactured ethylene using ethane as feedstock — It was sole owner of two and co-owner with plaintiffs of third — It operated third pursuant to joint venture and other agreements — Plaintiffs commenced action alleging defendant had improperly taken ethylene from and failed to optimize production at co-owned plant — It claimed losses and damages exceeding $800 million — Defendant claimed it had been necessary to reallocate ethylene during period in issue in order to optimize production as result of ethane shortage — During course of discovery, defendant produced some 102,671 records consisting of 653,566 pages — Plaintiffs claimed that it had failed to produce certain documents related to polyethylene reactor defendant planned to construct, alleged conversion, daily distribution of ethylene and ethane shortage — Plaintiffs applied for order directing defendant to produce above-noted documents — They also applied for order striking defence in respect of plant capacity and ethane shortage for failure to comply — Trial scheduled for four months commencing January 2015 — Applications dismissed — Each party legally obliged to disclose all relevant and material records — Under s. 5.2(1) of Alberta Rules of Court, records considered relevant and material only if they could reasonably be expected to significantly help determine one or more issues raised in pleadings or ascertain evidence that could reasonably be expected to do so — Relevance determined with reference to pleadings — Materiality questioned whether information could assist directly or indirectly in proving fact in or disproving issue — Defendant had already produced documents, as ordered, in relation to polyethylene reactor it planned to construct — Plaintiffs' suspicion that there must be more was insufficient to warrant further order for production — While historical screen shots of computer program used to allocate ethylene from co-owned plant each day might be relevant and material, requiring defendant to create such documents would be abusive — Defendant provided adequate explanation for delay in production of records that had been misplaced when one employee left and another took over — In result, court not satisfied defendant had failed, without sufficient cause, to disclose relevant and material records in timely way.

Natural resources --- Oil and gas — Practice and procedure — Miscellaneous

Defendant operated three plants that manufactured ethylene using ethane as feedstock — It was sole owner of two and co-owner with plaintiffs of third — It operated third pursuant to joint venture and other agreements — Plaintiffs commenced action alleging defendant had improperly taken ethylene from and failed to optimize production at co-owned plant — It claimed losses and damages exceeding $800 million — Defendant claimed it had been necessary to reallocate ethylene during period in issue in order to optimize production as result of ethane shortage — During course of discovery, defendant produced some 102,671 records consisting of 653,566 pages — Plaintiffs claimed that it had failed to produce certain documents related to polyethylene reactor defendant planned to construct, alleged conversion, daily distribution of ethylene and ethane shortage — Plaintiffs applied for order directing defendant to produce above-noted documents — They also applied for order striking defence in respect of plant capacity and ethane shortage for failure to comply — Trial scheduled for four months commencing January 2015 — Applications dismissed — Each party legally obliged to disclose all relevant and material records — Under s. 5.2(1) of Alberta Rules of Court, records considered relevant and material only if they could reasonably be expected to significantly help determine one or more

issues raised in pleadings or ascertain evidence that could reasonably be expected to do so — Relevance determined with reference to pleadings — Materiality questioned whether information could assist directly or indirectly in proving fact in or disproving issue — Defendant had already produced documents, as ordered, in relation to polyethylene reactor it planned to construct — Plaintiffs' suspicion that there must be more was insufficient to warrant further order for production — While historical screen shots of computer program used to allocate ethylene from co-owned plant each day might be relevant and material, requiring defendant to create such documents would be abusive — Defendant provided adequate explanation for delay in production of records that had been misplaced when one employee left and another took over — In result, court not satisfied defendant had failed, without sufficient cause, to disclose relevant and material records in timely way.

Table of Authorities

Cases considered by *Neil Wittmann C.J.Q.B.*:

Browne v. Dunn (1893), 6 R. 67 (U.K. H.L.) — followed

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, (sub nom. *Hryniak v. Mauldin)* [2014] 1 S.C.R. 87, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, (sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, 12 C.C.E.L. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 21 B.L.R. (5th) 248 (S.C.C.) — referred to

Czuy v. Mitchell (1976), 1 Alta. L.R. (2d) 97, [1976] 6 W.W.R. 676, 2 C.P.C. 83, 1 A.R. 434, 72 D.L.R. (3d) 424, 1976 CarswellAlta 11 (Alta. S.C. (App. Div.)) — referred to

Dow Chemical Canada Inc. v. Nova Chemicals Corp. (2010), 2010 ABQB 524, 495 A.R. 338, 2010 CarswellAlta 1778, 35 Alta. L.R. (5th) 51 (Alta. Q.B.) — referred to

Dow Chemical Canada Inc. v. Nova Chemicals Corp. (2014), 2014 CarswellAlta 97, 2014 ABQB 38 (Alta. Q.B.) — referred to

Dow Chemical Canada Inc. v. Nova Chemicals Corp. (2014), 2014 CarswellAlta 1255, 2014 ABCA 244 (Alta. C.A.) — considered

H. (G.R.) v. Alberta (Public Trustee) (2002), 99 Alta. L.R. (3d) 1, [2002] 5 W.W.R. 35, 2002 CarswellAlta 194, 2002 ABCA 29, 18 C.P.C. (5th) 144, 303 A.R. 25, 273 W.A.C. 25 (Alta. C.A.) — considered

Harden v. Chang (2013), 434 Sask. R. 57, 2013 SKQB 419, 2013 CarswellSask 826 (Sask. Q.B.) — referred to

Knight v. Imperial Tobacco Canada Ltd. (2011), 2011 CarswellBC 1968, 2011 CarswellBC 1969, 2011 SCC 42, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 419 N.R. 1, 86 C.C.L.T. (3d) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 335 D.L.R. (4th) 513, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin. L.R. (5th) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 308 B.C.A.C. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — referred to

Lay v. Lay (2012), 2012 ABCA 303, 2012 CarswellAlta 1717 (Alta. C.A.) — referred to

Marcotte c. Longueuil (Ville) (2009), 62 M.P.L.R. (4th) 1, [2009] 3 S.C.R. 65, 2009 SCC 43, 2009 CarswellQue 9842, 2009 CarswellQue 9843, (sub nom. *Usinage Pouliot inc. v. Longueuil (Ville de))* 311 D.L.R. (4th) 1, (sub nom. *Marcotte v. Longueuil (Ville))* 394 N.R. 1 (S.C.C.) — considered

McElheran v. Canada (2006), 2006 ABCA 161, 2006 CarswellAlta 1348 (Alta. C.A.) — referred to

Operation Dismantle Inc. v. R. (1985), [1985] 1 S.C.R. 441, 59 N.R. 1, 18 D.L.R. (4th) 481, 12 Admin. L.R. 16, 13 C.R.R. 287, 1985 CarswellNat 151, 1985 CarswellNat 664 (S.C.C.) — referred to

Stacey v. Foy (2014), 2014 ABCA 394, 2014 CarswellAlta 2130 (Alta. C.A.) — referred to

Sun Life Assurance Co. of Canada v. Tom 2003-1 Ltd. Partnership No. 2 (2010), 516 A.R. 95, 2010 ABQB 815, 2010 CarswellAlta 2783 (Alta. Q.B.) — referred to

Wagner v. Petryga Estate (2001), 2001 ABQB 690, 2001 CarswellAlta 991, 292 A.R. 320 (Alta. Q.B.) — referred to

Weatherill Estate v. Weatherill (2003), 2003 CarswellAlta 81, 2003 ABQB 69, 11 Alta. L.R. (4th) 183, 49 E.T.R. (2d) 314, 337 A.R. 180, 40 E.T.R. (2d) 314 (Alta. Q.B.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 3.68(4) — considered

R. 3.68(4)(b) — considered

R. 3.68(4)(b)(ii) — considered

R. 3.68(4)(b)(iii) — considered

R. 5.2(1) — considered
R. 5.10 — considered
R. 5.11 — considered
R. 6.11 — considered
R. 6.11(1) — referred to

APPLICATION by plaintiff co-owners for disclosure of documents, and to have defence of defendant company struck out.

Neil Wittmann C.J.Q.B.:

Introduction

1 The Plaintiffs, Dow Chemical Canada Inc. and Dow Europe GmbH ("Dow") have brought two applications. On November 4th, 2014, no formal application was filed, only a brief ("the First Application") stating that "the Plaintiffs apply for relief in respect of Nova's multiple failures to make record discovery." The relief sought by Dow was that Nova be "directed immediately to produce ... documents as more specifically discussed above". The second application by Dow seeks relief for "Defendant's non-compliance with Court Orders and other significant deficiencies". The Defendant, Nova Chemicals Corporation ("Nova") opposes the applications.

2 The second application ("the Striking Application") does not appear to be dated but was returnable November 26th, 2014 at 10:00 a.m. at which time a case management court appearance was scheduled. Dow, by way of a Supplementary Brief has asked this Court for a remedy pursuant to the *Alberta Rules of Court* ("ARC"), specifically ARC 3.68(4). Dow submits that Nova's defence ought to be struck out as it relates to the capacity of E3 as well as any assertion or defence by Nova that there was an ethane shortage.

3 The applications did not proceed November 26th, 2014 because, according to counsel for Dow, just prior to the scheduled hearing on November 24th, 2014, Nova served three affidavits and a brief seeking to avoid the relief sought in the First Application, that is a direction that the documents requested be ordered produced. Nova also raised fresh complaints about Dow's record production and about undertaking responses which Dow says were not yet due. The Court was notified by counsel that these matters were adjourned by consent to December 15th, 2014 at 10:00 a.m. The trial is scheduled to begin January 13th, 2015 for an estimated period of four months.

Background

4 The nature of the dispute between Dow and Nova in this litigation has been described earlier by this Court in *Dow Chemical Canada Inc. v. Nova Chemicals Corp.*, 2014 ABQB 38 (Alta. Q.B.) and 2010 ABQB 524 (Alta. Q.B.).

5 As previously stated in those decisions, there are three ethylene plants at or near Joffre, Alberta called E1, E2 and E3 by the parties, where ethylene is manufactured using ethane as a feed stock. The ownership of E1 and E2 is solely Nova but E3 is jointly owned by Nova and Dow. The operator of E3 is Nova by virtue of a Joint Venture Agreement made between Dow and Nova. There are other agreements, including an Operating and Services Agreement ("OSA") and a Plant Co-owners Agreement and a Liquid Co-Products Marketing Agreement.

6 Key allegations by Dow include that Nova has improperly taken some of the ethylene from E3 owned by Dow and that Nova failed to optimize production at E3. The subsidiary allegations in dispute surrounding Dow's "Optimization Claim" include Nova's defence to it, namely, that it was necessary to reallocate ethylene during the period in issue in order to optimize production because of an ethane shortage. The documents in issue in this application, which Dow alleges Nova has failed to produce, surround the productive capability to optimize E3's ethylene production. Dow alleges this puts in issue the production capacity of E3, as well as whether there was an ethane shortage as alleged by Nova.

7 A trial judge has been assigned and has met with the parties' counsel at least once and has corresponded with the parties' counsel with respect to technical requirements in the courtroom. According to Nova's brief, Nova has produced "102,671 records consisting of 653,566 pages." Moreover, expert reports have been exchanged according to previous Case Management Orders, not necessarily by the stated deadlines, but as modified by agreement of counsel. Thus, all of the witnesses to be called by the parties appear ready to proceed with the trial as scheduled, including the expert witnesses.

Recent History

followed by a consideration of the Striking Application.

The First Application

The R3 records

17 R3 is a proposed polyethylene reactor that Nova plans to construct. R3 will make polyethylene from ethylene and the R3 reactor will require ethylene from Nova. Dow asserts that Nova has not added any ethylene producing capacity at Joffre and reasons that Nova plans to use some unused capacity from E3, for R3 or for new merchant ethylene sales. This Court ordered the production of R3 documents in paragraph 2(a) of its Case Management Order pronounced July 15th, 2014 which states as follows:

> 2. Nova shall provide the following by September 1, 2014:
>
> (a) Records created for senior management or the Board of the Defendant [Nova] during the R3 approval process relative to the projected ethylene production volumes or capacity of E3.

18 Dow has made an argument that the R3 documents have not been produced in violation of this Court's July 15th, 2014 Order. Its first argument is based on the premise that there must be more documents from the R3 team than have already been produced because of the size of the team - over 50 members - and the lack of any e-mail traffic from or to 30 members of it, which Dow says is "inconceivable". Secondly, Dow submits that the Board of Directors of Nova, in their meetings, have materials prepared for the Nova CEO or Senior Executives, presenting slides to the Board and that no complete Board Meeting Minutes for any one meeting have been produced.

19 Dow goes on to suggest that of the Board Minutes produced, there are no pre-read materials or backups produced, but for four sets. Dow asserts that almost no corresponding speaker notes have been produced with slide decks from 19 Board meetings, nor has there ever been any drafts of speaker notes produced. In addition, Dow says Nova's consultant Bain, hired to analyze R3 and "Western Feed Stock Supply" issues from 2009 to 2012, has resulted in only a few of those emails produced. Nova, in response to its ongoing dispute with Dow over the R3 production wrote counsel for Dow, October 8th, 2014 and indicated that they had that day completed the R3 production.

20 Randy Woelfel, the former Chief Executive Officer of Nova, was examined December 4th and 5th, 2014 in Santa Fe, New Mexico. He attended questioning and the entire transcript was put before the Court and excerpts were referred to by both Dow and Nova at the hearing of these applications. It is apparent to the Court that Dow's Supplementary Brief supporting the Striking Application was made based on the questioning of Woelfel. More detail on that questioning as it relates to any of the document production issues on the First Application, will be dealt with later under the Striking Application.

21 Based on the filed materials and the submissions of counsel, this Court will not make a further Order for document production as it pertains to R3 records. Dow has not established, on the balance of probabilities that relevant and material records either exist, or if they exist, have been withheld by Nova. Nova has repeatedly stated that their outside counsel has reviewed all of the documents Dow says must exist, using the criteria of what is relevant and material. The Court comments parenthetically that drafts of speaking notes for a presentation to a Board or a CEO need not be produced, if they are not "relative to the projected ethylene production volumes or capability of E3." The Court has no reason to doubt the integrity or diligence of Nova's counsel when they make the assertions they have made in this regard. As will be seen below, where a mistake has been made or document overlooked, Nova has acknowledged its mistake or error. No such mistake or error has been made evident when it comes to the relevant and material records relative to the projected ethylene production volumes or capability of E3 during the R3 approval process. Thus, this Court dismisses Dow's request that more R3 Records be produced.

The MIMI Documents

22 Next, Dow asserts that Nova has failed to produce MIMI documents "reflecting its conversion of Dow's E3 ethylene". MIMI is computer software that Nova used that was linked to meters at Joffre, in order to divide E3's ethylene between Dow and Nova. It is common ground between the parties that the MIMI software code had default settings to divide E3's ethylene production 50/50 between Nova and Dow, based on the relevant joint venture project agreements between the parties. According to the questioning of Joyce Choma, November 22nd, 2010, at the material time she was Nova's Ethylene Contract

Administrator. Her practice would be to access the MIMI program by overriding the default on a daily basis and manually replacing the values deviating from 50% percent for Dow and 50 % percent for Nova.

23 Apparently Ms. Choma personally maintained hard copy printouts of the input allocations for sharing E3 production back to 2000. What Dow has asked for is an Order that Nova be ordered "immediately to cease the rolling destruction of the data and to produce whatever remains of it to Dow". Dow also asked the Court to order the most knowledgeable Nova Information Technology person to be produced to state how the data came to be destroyed during the action.

24 In her Affidavit sworn November 24th, 2014 (the Choma Affidavit), Ms. Choma confirms the 50% percent allocation on the input screen for MIMI as the default position and that there are situations when she would have to manually enter a number different from 50% percent. Exhibit "A" to the Choma Affidavit is a screenshot of the input screen dialogue box. Ms. Choma swears that it is not a "record" that she would preserve, use or refer to in the ordinary course of business and that it is nothing more than a data entry tool. Exhibit "B" to the Choma Affidavit is a report called "TOP 773-1". Ms. Choma swears that each co-owners' (Dow's and Nova's) percentage ethylene take is entered and the MIMI reporting reflects the change on the TOP 773-1 report. It shows what the historical input data was. She then states that some of her answers to questioning August 7th, 2012 were incorrect because she could not in fact review the historical input screens back to 2006 and that no historical input data was available prior to 2006. At paragraph 26, she states that "Historical Input Screens" are accessible for a rolling 12 month period that she can access historical input screens going back a year.

25 During oral argument, Nova's counsel said that they could have Ms. Choma take screen shots back for 395 days and sit in front of a screen for 2 or 3 days "for absolutely no benefit whatsoever. It is abusive and it's a waste of time."

26 Further, Nova's counsel said that Dow has minute by minute plant data, they have reports, they know exactly what came out of E3 and they know exactly whether they got 50% percent or not. Dow does not dispute that the percentage from E3 actually allocated to Dow on a daily basis has been disclosed on the TOP 773 Reports. But, it says the percentage allocation would be more easily ascertained were the screen shot input data to be produced. Counsel for Nova states that the MIMI Input Screen is not relevant or material and that the percentage for any given day can be calculated from the stated volumes on the TOP 773 Reports.

27 I do not agree with Nova that the MIMI screen shots are not relevant and material. They are. I do agree that there is a practical difficulty in taking screen shots. In view of the difficulty and in view of the actual information produced to Dow as to their daily allocation and the ability to calculate a percentage, to require Nova to create screen shots would be abusive. Therefore, I am not going to order Nova to produce screen shots unless they intend to adduce screen shots in evidence at the trial. If so, they will be required to produce them to Dow forthwith.

28 Secondly, there will be no order to Nova to change their technology methodology in terms of ethylene allocation. Therefore, this aspect of Dow's application for further documents as they relate to MIMI and the MIMI software program is dismissed.

The Striking Application

29 Some of the submissions made by Dow and Nova in the Striking Application overlap with the First Application, in terms of content and the alleged failure of Nova to produce relevant material documents in a timely manner. The authority to strike a pleading or portions of a pleading is found in ARC 3.68(4)(b)(ii)(iii) which states as follows:

3.68(4) The Court may

(b) strike out all or any pleadings if a party without sufficient cause does not

(ii) comply with rule 5.10, or

(iii) comply with an order under rule 5.11.

30 Rule 5.10 states that when a party, having served an Affidavit of Records on other parties, later discovers or obtains control of a relevant material record, it is obliged to notify the other party and serve a Supplementary Affidavit of Records. ARC 5.11 indicates that on application, the Court may order a Record to be produced, if relevant and material, if it has been omitted from an Affidavit.

31 Nova, in response to Dow's Striking Application makes the case that the parties agreed, with the Court's concurrence,

that they would not file and serve formal Affidavits of Records, so that the remedy asked for by Dow under ARC 3.68(b) (ii) or (iii) cannot be granted. Nova submits that this is "not merely a technical argument". In the context of the case management of this matter, I reject the submission that it is not a technical argument. It is. That said, Nova's submissions resisting Dow's claim, discussed in more detail below, are basically that Nova has diligently complied with its duty to disclose its records and that there is sufficient cause for not disclosing relevant and materials records in a timely fashion. Thus, Nova argues the Court, acting judicially, ought not to grant the remedy. Moreover, the Court is cautioned by Nova that the striking remedy in this case is tantamount to a summary judgment and Nova cites authority for the proposition that such remedy must be granted with great care, especially in the circumstances of this case.

32 Dow has submitted that the history of this matter demonstrates unequivocally that the *only* proper remedy available to it, in light of Nova's antecedent conduct with respect to its production of relevant and material records, is the striking remedy. It follows that Dow argues there is no sufficient cause for Nova's alleged failure and Dow details Nova's failure to produce relevant and material records.

Authorities of the Parties

33 Nova has cited *Sun Life Assurance Co. of Canada v. Tom 2003-1 Ltd. Partnership No. 2*, 2010 ABQB 815 (Alta. Q.B.); *Wagner v. Petryga Estate*, 2001 ABQB 690 (Alta. Q.B.); *Harden v. Chang*, 2013 SKQB 419 (Sask. Q.B.); *Stacey v. Foy*, 2014 ABCA 394 (Alta. C.A.); *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.); *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.); *McElheran v. Canada*, 2006 ABCA 161 (Alta. C.A.); *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.) [hereinafter Hryniak]; *Dow Chemical Canada Inc. v. Nova Chemicals Corp.*, 2014 ABCA 244 (Alta. C.A.); *Lay v. Lay*, 2012 ABCA 303 (Alta. C.A.).

34 Dow has also cited *Wagner*, *Sun Life*, and *Harden*. Both parties rely on ARC 3.68(4)(b), 5.10, 5.11 and 6.11(1).

35 ARC 6.11 mandates that a Court may consider certain types of evidence at an application hearing. During oral argument, the Court questioned counsel as to whether there was any dispute whatsoever about materials put before the Court for this application, including documents handed to the Court or included with their briefs, such as the Holloway expert reports which were not presented in an Affidavit. All counsel agreed that all of the materials before the Court could properly be considered to dispose of this application.

Factual Basis for the Striking Application

36 It is plain and obvious from the ordinary meaning of ARC 3.68(4)(b) that the applicant must prove that a party failed, "without sufficient cause", to do an act it is otherwise required to do. As stated earlier, getting past the "technical requirements" referred to by Nova, in the context of this matter, Nova must have failed, without sufficient cause, to disclose a relevant and material record in a timely way, or at all, or pursuant to one of the Case Management Orders of this Court.

Submission of Dow

37 Dow relies on Case Management Orders of this Court; April 26th, 2013, which states that Nova will have "completed its production in response to all outstanding document requests by May 31st, 2013"; September 26th, 2013, wherein Nova was ordered to produce documents from the files of David Tulk ("the Tulk files") and the July 15th, 2014 Order quoted above. Dow says Nova has failed to comply with these Orders. Dow also appears to complain that since on or about December 1st, 2014 Nova "has produced thousands of pages of engineering records concerning E3s maintenance, repair and operation dating all the way back to 2002". Dow says that these documents ought to have been produced long ago, that the pleadings clearly indicate that they ought to have been so produced. Dow was also adamant that the July 15th, 2014 Court Order as quoted above has been ignored and relies heavily on the December 4th and 5th, 2014 questioning of the former CEO of Nova, Woelfel.

38 Dow says that all of the above "confirm that Nova continues to fail to comply with the Court's Order".

Submission of Nova

39 Nova argues that it is largely complied with its obligations, has exercised due diligence at every turn and that to the

extent there has been any failure or omission, there is sufficient cause to explain it within the meaning of ARC 3.68(4)(b). Nova argues that the Tulk Records delay in production is explained in the Affidavit of Alba Apuzzo, sworn November 24th, 2014 (the "Apuzzo Affidavit"). That Affidavit states that "some Tulk Records were misplaced as a result of Mr. Tulk leaving Nova's employment in 2009" and, that when answering undertakings Tulk identified and located Tulk records that were not previously known to Apuzzo who, as part of her responsibilities as Director, External Business Relations, Olefins & Feed Stock, has been responsible for coordinating the work of Nova personnel in the action, including record production and answers to undertakings. She also deposes that the Tulk Records in the "Litigation Hold Room" were reviewed in connection with the original production that occurred in late 2009 and that many of these records were produced. As the result of Tulk's questioning in September 2012 and the Court Order of September 26th, 2013, Apuzzo says all of the Tulk Records in the Litigation Hold Room were scanned and produced and that Nova did not know of any relevant Tulk Records other than those. Subsequently, additional Tulk Records were discovered, including electronic records discovered by Mr. Tulk, who was asked to assist in the production.

40 Ms. Apuzzo was not cross-examined on her Affidavit.

41 With respect to the MIMI data, Nova relies on the Choma Affidavit, referenced in the First Application. Ms. Choma was not cross-examined on her Affidavit which was filed in opposition to the Striking Application.

The Woelfel Questioning

42 As indicated earlier on December 4th and 5th, 2014, the former CEO of Nova, Randy Woelfel was questioned by Dow's counsel. Dow frames its argument around the Woelfel questioning in conjunction with a previous questioning of Nova's corporate representative, Flint, as well as the Affidavit of Graeme Flint ("the Flint Affidavit"), sworn November 24th, 2014 in opposition to the Striking Application. Flint was not cross examined on the Flint Affidavit. Dow frames its argument on the basis that the Flint Affidavit deposes to the R3 polyethylene production can be achieved by running E1, E2 and E3 at 105 % percent of name plate capacity. The Flint Affidavit has attached to it as Exhibit "A" an August 31st, 2011 Memorandum setting forth the analysis. Dow complains that this is revision 2 of the Memorandum and that other versions have been "withheld" from production. When Woelfel was questioned, he indicated that he and the Board had never even heard of Flint's 105% percent theory. Dow did not include, in their written brief or their oral argument, any reference to Woelfel's testimony at pp 205-206, the following:

> Q.: So your understanding of the logic for the Nova planning of R3 and the ethylene for it was that Nova was intending to use the excess capacity at E1 and E2 with no consideration of E3 at all?
> A.: That's correct.

43 Dow details through the Woelfel questioning that the Nova Management Board met every two weeks, a total of approximately 100 times during Woelfel's four years as CEO in 2009 through 2014 and there were agendas, minutes and presentations, including a website kept up to date which Nova's senior management had access to. Dow has identified many records from CEO Reports to the Board, which were not produced. What Dow has not identified is whether any of these documents are relevant and material to either E3 capacity or the alleged ethane shortage.

44 I am not satisfied that Dow has satisfied the onus of showing that Nova has, without sufficient cause, withheld or failed to produce relevant material documents pertaining to these issues based on the Woelfel questioning, the Flint Affidavit or the previous questioning of Flint.

Recent E3 Ethylene Production Records - the Holloway Report

45 Dow complains that Nova continues to produce a number of documents comprising of some 4,650 pages on November 13th, 2014 and that Nova states it's still in the process of producing many more such documents which include incident reports, and operator work team weekly meeting minutes dating back to 2005 and the cracking area work team minutes between 2001 and 2005. Dow notified the Court via a letter dated December 30th, 2014 that Nova has produced 63,884 pages of Nova records since December 12th, 2014. According to Dow, most of these records are operational, with more to come. Nova's answer to this alleged late production is that it arose because of the Surrebuttal expert report delivered by Holloway on September 24th, 2014 to Nova, which provided an assessment and recalculation of E3's alleged productive capacity throughout the claim period. Part of that report contained statements in opposition to Nova's expert witnesses, documented reasons for reduced ethylene production. There is disagreement between counsel because of the failure of the Court to set a

deadline for the Surrebuttal Report which was already delayed because counsel agreed to delays for the Rebuttal Reports. The Rebuttal to the Holloway Report was to be delayed to May 31st, 2014 but by agreement of counsel, this was extended to June 9th, 2014. Counsel did not agree as to when the Surrebuttal Report was to be delivered nor did the Court make an Order in that regard. Nova says it is producing relevant and material records, responding to the analysis contained in the Surrebuttal Report of Holloway and points out that had Dow had Holloway prepare a "True Report in Chief" in January 2014, or a timely Surrebuttal Report in July 2014, Nova would have been in a position to reassess relevance and materiality at an earlier date and would have proceeded with the production. Dow scoffs at this proposition and states that prudent operation goes to the issue of E3's capacity and that the documents ought to have been produced in any event.

46 Again, on this issue, I am not satisfied that Dow has made out a case to strike the pleadings of Nova as it pertains to E3 capacity. There are many facets to the production capacity of any plant. Regular maintenance, unforeseen breakdown, perhaps even operator error are among them. Dow has put prudent operation in issue through its expert reports. Nova has now focused on that issue. It may have been an oversight not to do so earlier, but the Court need not decide whether those documents ought to have been produced earlier. The ARC 5.10 recognizes that a party may find relevant and material records later, after an affidavit of records has been served. Notice and disclosure to the other party is mandated. That is what happened here. There was sufficient cause within the meaning of ARC 3.68(4) and I so find.

The Redaction Issue

47 There are previous confidentiality orders made in this action by consent. Dow and Nova are competitors. They have other competitors. When something is relevant and material in a document, there is no reason in logic or in fact why other parts of the document are not irrelevant and immaterial. If there is no reason for the opposite party to see irrelevant and immaterial information, the Court ought not to interfere with a valid redaction. The history of redacted documents, in terms of so called national security cases in this country, especially in a judicial inquiry setting, is such that the suspicion of truth seekers is excited when any document is redacted, for example by governments. To allay that concern, the Court orders that each redacted document produced by Nova be preserved and be available in its un-redacted form and accessible to the trial judge, in the event the redacted document is tendered in evidence. The process for determining whether the redaction is legitimate or not should, in the view of this Court, follow that which would be followed by a Court reviewing a document over which privilege is claimed. In other words, the un-redacted form will be compared to the redacted document and the Court will decide if it has been properly redacted to the extent that the party opposite wishes to raise this as an issue. That said, the details of the process will be solely up to the trial judge.

Electronic Disclosures - Relevant and Material Production

48 The principle of timely and affordable access to civil justice, including proportionality, is now embodied in Canadian Law and in Alberta: *Hryniak* at paras 28-33; *CNRL* at para 5.

49 In *Marcotte c. Longueuil (Ville)*, 2009 SCC 43 (S.C.C.) at paragraph 67, Deschamps J. observed:

> What is clear from these different sources is that the purpose of art. 4.2 C.C.P. is to reinforce the authority of the judge as case manager. The judge is asked to abandon the role of passive arbiter. At first glance, this case management function does not mean that it would be open to a judge to prevent a party from exercising a right. However, the judge must uphold the principle of proportionality when considering the conditions for exercising a right.

50 A helpful discussion is contained in "*The Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery*", October 2010, The Sedona Conference. The *Sedona Canada Commentary* sets forth a number of principles including a statement that the concept of proportionality plays an important role in ensuring a fair and just outcome. Justice is not to be denied under the guise of proportionality. Also of significance is a fundamental assumption of cooperation, communication and common sense among and between counsel (page 3). The perception of this Court is that cooperation, communication and common sense among and between counsel has not been consistently present in this case. In *Weatherill Estate v. Weatherill*, 2003 ABQB 69 (Alta. Q.B.), Slatter J. (as he then was) admonished counsel to take a pragmatic view of the scope of discovery. He suggested that rather than spend thousands of dollars on disputing whether a document ought to be produced, counsel ought to produce an arguably irrelevant document, if it cannot help or hurt his client and that "the pragmatic counsel will produce it rather than fight over it" (para 13).

51 It is the view of this Court, that this approach is highly dependent on context. In the context of that litigation, it is wise

counsel. In the context of this litigation, producing irrelevant and immaterial documents, spawns a plethora of ill-advised and costly disclosure. The R3 documents appear to this Court, to be an example. Producing thousands of pages of materials that went before the Nova Board on R3 to show that none had anything to do with the capacity of E3, would be an example. What is needed is dimensional pragmatism in the context; otherwise records discovery will regress towards the pre 1999 scope or worse.

Nova's Affidavits in Opposition - The Rule in *Browne v. Dunn*

52 Nova filed three affidavits in opposition to the Striking Application on November 24th, 2014: the Choma Affidavit, the Flint Affidavit and the Apuzzo Affidavit. None of these deponents were cross-examined. But their evidence was impugned by other evidence put forward by Dow in terms of excerpts from the evidence of the prior questioning of Flint, Choma and Apuzzo, the questioning of Woelfel and the questioning of Tulk. The Court was urged on the basis of the other evidence to discount or in fact to disbelieve the evidence contained in the three affidavits, in so far as it assisted Nova's argument that there was sufficient cause for failing to make a timely production of a relevant and material record or Nova's assertion that all relevant and material records had been produced.

53 The rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.), briefly stated, concerns a party that undertakes a cross-examination, failing to put evidence to a witness that contradicts the witness' testimony. The rule later allows the Court to lessen the weight of contradictory evidence usually adduced later in the proceeding. Subsequent authority in Canada has shown that the rule is not a rule, but rather gives rise to the exercise of judicial discretion. It is a guide to fairness. It seems to this Court that the underlying concept or principle surrounding *Browne and Dunn* can be applied here. As stated earlier, the Woelfel questioning on December 4th and 5th, 2014 that seems to have given rise to the Supplementary Brief of Dow in support of its Striking Application. This is evidence led in the application after the three Nova affidavits in opposition to it were filed and left unchallenged by cross-examination. The Woelfel questioning has been used by Dow as a platform for discounting or casting doubt on the veracity of the three affidavits. The lack of cross-examination in these circumstances, coupled by the use of other evidence, namely the questioning of Woelfel and the antecedent questioning of Flint, Tulk and Choma, gives rise to the exercise of this Court's discretion to discount the evidence relied on by Dow. Dow has not proven on the balance of probabilities that Nova's pleadings ought to be struck on the grounds alleged. Therefore, I dismiss that application.

Summary and Conclusion

54 The First Application and the Striking Application are dismissed.

55 Any records disclosed and produced by either party may be questioned on, if no questioning has occurred on those records, even after the commencement of the trial on reasonable terms.

56 Nova will have its costs of these applications to be assessed on a party-and-party basis. In the event of a dispute as to costs, the parties may return to this Court for direction.

Application dismissed.

Tab B-15

1988 CarswellAlta 118
Alberta Court of Queen's Bench
Re/Max Real Estate (Edmonton) Ltd. v. Border Credit Union Ltd.
1988 CarswellAlta 118, [1988] 6 W.W.R. 146, [1988] A.W.L.D. 1350, 11 A.C.W.S. (3d) 117, 60 Alta. L.R. (2d) 356, 90 A.R. 15

RE/MAX REAL ESTATE (EDMONTON) LTD. and BOYLES REAL ESTATE (1979) LTD. v. BORDER CREDIT UNION LIMITED

Master Funduk [in Chambers]
Judgment: July 25, 1988
Docket: Edmonton No. 8703 28941

Counsel: *J.G. Skinner*, for plaintiffs.
S.A. McLachlin, for defendant.
Subject: Civil Practice and Procedure

Headnote

Practice --- Discovery — Discovery of documents — Affidavit of documents — Sufficiency where production objected to — Statement of grounds of privilege

Civil procedure — Discovery — Discovery of documents — Affidavit of documents — Form and content — Affidavit to list all documents relating to any matter or questions in the action — Claim of privilege not being ground for exclusion of relevant documents from affidavit.

Civil procedure — Discovery — Discovery of documents — Affidavit of documents — Further and better affidavit — Defendant withholding relevant documents from affidavit of documents on basis of solicitor-client privilege — Court ordering defendant to discover all relevant documents relating to the matters or questions in issue, producible or not, in accordance with R. 186(2).

In an action for commission on the sale of certain lands, the plaintiffs claimed the defendant had not discovered all relevant documents as required under R. 186(2). Counsel for the defendant had indicated in a letter to counsel for the plaintiffs that there were other relevant documents which had not been discovered because the latter thought they were not producible on the basis of solicitor-client privilege. The plaintiffs applied for an order requiring the defendant to deliver a further and better affidavit of documents.

Held:

Application granted.

The discovery of documents is not the same as the production of documents. Under R. 186(2) any document which "relates to any matter or question in the action" must be discovered, whether the document is producible or not. The probative value of documents is not to be determined by the defendant nor can the defendant say the documents will not assist the plaintiff. In Alberta, the relevancy of documents is determined within the framework of R. 186(2), for the purpose of R. 194(1). An order for a further and better affidavit of documents under R. 194(1) may be granted where the applicant meets the burden of satisfying the court that relevant documents have not been discovered. Here, the letter written by counsel for the defendant effectively conceded that there were other relevant documents and an error was made by counsel for the defendant in thinking that documents need not be discovered if they are not producible.

Table of Authorities

Cases considered:

British Assn. of Glass Bottle Mfr. Ltd. v. Nettlefold, [1912] A.C. 709 (H.L.) — *considered*

Chertkow v. Retail Credit Co., 26 Alta. L.R. 291, [1932] 1 W.W.R. 905, [1932] 3 D.L.R. 390 (C.A.) — *considered*

Farrer v. Kelso, [1917] 2 W.W.R. 1024 (Sask. Dist. Ct.) — *not followed*

Gainers Ltd. v. C.N.R., [1926] 2 W.W.R. 79 (Alta. S.C.) — *considered*

Hutchinson and Dowding v. Bank of Toronto, 48 B.C.R. 315, [1934] 1 W.W.R. 446 (S.C.) — *referred to*

Irwin v. Jung (1912), 17 B.C.R. 69, 1 W.W.R. 524, 1 D.L.R. 153 (C.A.) — *referred to*

Jones v. Monte Video Gas Co. (1880), 5 Q.B.D. 556 (C.A.) — *not followed*

Lazin v. Ciba-Geigy Can. Ltd., [1976] 3 W.W.R. 460, 66 D.L.R. (3d) 380 (Alta. C.A.) — *referred to*

Louden v. Consol.-Mouton Trimmings Ltd., [1956] O.W.N. 552, 15 Fox Pat. C. 167, 24 C.P.C. 77 (H.C.) — *considered*

Mark Fishing Co. v. United Fishermen & Allied Wkrs. Union (1968), 64 W.W.R. 530, 68 D.L.R. (2d) 410

(B.C.C.A.) — *referred to*
Nova, An Alta. Corp. v. Guelph Engr. Co., 30 Alta. L.R. (2d) 183, [1984] 3 W.W.R. 314, 42 C.P.C. 194, 5 D.L.R. (4th) 755, 80 C.P.R. (2d) 93, 50 A.R. 199 (C.A.) — *referred to*
Ritholz v. Man. Optometric Soc. (1958), 66 Man. R. 226, 24 W.W.R. 504 (Q.B.) — *referred to*
Skoye v. Bailey, [1917] 1 W.W.R. 144 (Alta. C.A.) — *applied*
Stapley v. Canadian Pacific Railway (1912), 5 Alta. L.R. 341 at 344, 6 D.L.R. 180, 2 W.W.R. 1010, 22 W.L.R. 85, 1912 CarswellAlta 176 (Alta. S.C. en banc) — not followed
Strass v. Goldsack, [1975] 6 W.W.R. 155, 58 D.L.R. (3d) 397 (Alta. C.A.) — *referred to*

Rules considered:

Alberta Rules of Court, 1914
R. 372(1) [now R. 194(1)]
Alberta Rules of Court
R. 186(2)
R. 194(1)

Authorities considered:

Stevenson and Côté, An Annotation of the Alberta Rules of Court (1981).

Application for order requiring defendant to deliver a further and better affidavit of documents.

***Master Funduk*:**

1 This is an application by the plaintiffs for an order requiring the defendant to deliver a further and better affidavit of documents.

2 It is necessary to look at the issues raised in the pleadings.

3 The plaintiffs say that in April 1987 land owned by Little Albert's was listed for sale with Borden. The plaintiffs say that if a sale occurred Borden would receive a commission. The plaintiffs say that the listing was to expire 1st August 1987.

4 The plaintiffs say that in July 1987 they solicited an offer from one Torris and that a few days later a sale agreement was entered into for $125,000.

5 The plaintiffs further say that the land was at all relevant times subject to a mortgage to the defendant. The plaintiffs say that on 3rd September the defendant acquired title to the land from Little Albert, that the defendant adopted the sale agreement with Torris or alternatively received an assignment of the vendor's interest in the agreement, and that the defendant completed the sale to Torris on 29th September.

6 It should be noted that the allegations about when the defendant acquired title, when it adopted the agreement or had it assigned to itself, and when it completed the sale to Torris, indicate those steps occurred after the expiration of the listing. However, the plaintiffs also allege that the listing agreement provides that any sale made within 90 days after 1st August to any person who had been contacted about or had been shown the land during the currency of the listing agreement would entitle Borden to a commission.

7 The plaintiffs say that they are entitled to a commission based on the listing agreement or alternatively on a quantum meruit basis. There is a further alternative claim which I need not detail.

8 In its defence the defendant first denies everything except "where specifically hereafter admitted". It then goes on to make certain specific denials. There are no admissions.

9 The effect of the defence is that *everything* alleged by the plaintiffs is denied by the defendant. That means that *everything* alleged by the plaintiffs is in issue.

10 The plaintiffs say that the defendant has not *discovered* all relevant documents. The plaintiffs say that there are four files which the defendant has in its possession or power relating to the matters or questions in this action. The plaintiffs say that the defendant has not *discovered* all documents in those four files. The plaintiffs want a proper *discovery* of all documents relating to the matters or questions in issue. That is the scope of what the plaintiffs seek at this time.

11 I emphasize discovery because it appears that counsel for the defendant has confused the discovery of documents with the production of documents.

12 The sole criterion for discovering documents is that set out in R. 186(2). Any document which "relates to any matter or question in the action" *must* be discovered. A party cannot refuse to discover a document on the ground it is not producible, for whatever reason.

13 If any judicial authority is needed for the statement that discovery and production are different things, and that discovery does not hinge on producibility, resort can be had to *Skoye v. Bailey*, [1971] 1 W.W.R. 144 (Alta. C.A.). Johnson J.A., speaking for the court, states at pp. 145-46:

> This appeal is concerned solely with what documents must be included in the affidavit of production. We are not concerned with what documents must subsequently be produced.
>
> Since the inception of this province, a party to a cause or matter has been required to discover all documents "in his possession or power" relating to the matter in question in the cause. The words used until recently in the English Rule were "possession, custody or power". The authorities agree that there is no difference in the scope of the documents that are required to be discovered under these Rules. Possession as it relates to discovery of documents has a much wider meaning than when applied to the actual production of the documents. As Jessel M.R. said during argument in the case of *Swanston v. Lishman* (1881), 45 L.T. 360 at p. 361:
>
> > The rule as to discovery is the exact contrary to that as to production. You must set out every document you have in your possession, whether you are bound to produce them or not, ...
>
> It is conceded by the grounds for appeal which have been quoted that Alberta Gas Trunk Line Company Limited has documents in its possession which relate to the pipe line and the explosion which caused the tragedy. It is not disputed that some or maybe all of the defendants have had possession of these documents for the purpose of their employment. These documents have been retained by the company and are in its possession and certain of these defendants, as officers or employees of the company who are charged with the preservation of these documents, are in possession of them within the interpretation of this Rule and they should be disclosed.
>
> It was suggested that because of changes in the Rules of Court, these older decisions can no longer be applied. No changes have been made in these Rules which would have that effect.
>
> It is true that by R. 191 a party is entitled to obtain production for inspection of any documents referred to "in the pleadings, particulars or affidavits of any other party" but the Rule specifically does not apply to any documents referred to in the affidavit of documents, "the production of which is therein objected to". Rule 193 provides that a party who omits to give notice of the time for inspection "or objects to give the inspection, the party desiring it may apply to the court for an order of inspection." On such an application the Chamber Judge will consider any objection to the production of documents. That stage has not been reached in these proceedings.

14 *Skoye* probably says it all in relation to the present application.

15 Counsel for the defendant says that the affidavit of documents is conclusive: *Jones v. Monte Video Gas Co.* (1880), 5 Q.B.D. 556 (C.A.). I do not agree.

16 One Court of Queen's Bench judge recently said that any practice decision more than 20 years old is not worth considering. He might point to *Jones* as justification for that proposition.

17 An affidavit of documents is the discovery of documents. The scope of discoveries, be it a discovery of documents by affidavit or at an oral discovery, or the usual pre-trial oral discovery, is a "broad ... process": *Nova, An Alta. Corp. v. Guelph Engr. Co.*, 30 Alta. L.R. (2d) 183, [1984] 3 W.W.R. 314, 42 C.P.C. 194, 5 D.L.R. (4th) 755, 80 C.P.R. (2d) 93, 50 A.R. 199 (C.A.).

18 The judicial trend to requiring a full disclosure is summed up in two sentences by Moir J.A. in *Strass v. Goldsack*, [1975] 6 W.W.R. 155, 58 D.L.R. (3d) 397 (Alta. C.A.), at p. 165:

> ... one must not forget the object of litigation is to assist the court in arriving at the truth. In reaching the truth, and a just result, anything that stands in the way of justice must be restricted.

19 The matter is really one of practice, not substantive law. As indicated in *Nova*, the courts are the masters of their own

practice. There is no good reason why today the courts of this province should be bound by English practice decisions, if we ever were.

20 In the face of the plain language of R. 194(1), the matter should be approached in the same manner as any other application is approached. The applicant has the burden of satisfying the court that it should grant the order sought.

21 How the applicant makes it "appear to the court" that a document has been omitted is a matter of evidence. What evidence is allowable is dictated by the rules of evidence. It is a matter of relevancy and it then becomes a matter of the probative value of that evidence which is properly admissible and whether the applicant has made out a case for what it seeks on a balance of probabilities.

22 The burden lies on the plaintiffs to make out a case for the order sought: *Lazin v. Ciba-Geigy Can. Ltd.*, [1976] 3 W.W.R. 460, 66 D.L.R. (3d) 380 (Alta. C.A.).

23 *Jones* is an 1880 English Court of Appeal decision on a matter of practice. It is not, and never was, binding on Alberta courts. The principle enunciated is not acceptable to this court.

24 Counsel for the defendant also relies on *Hutchinson and Dowding v. Bank of Toronto*, 48 B.C.R. 315, [1934] 1 W.W.R. 446 (S.C.); *Farrer v. Kelso*, [1917] 2 W.W.R. 1024 (Sask. Dist. Ct.); *Loudon v. Consol.-Moulton Trimmings Ltd.*, [1956] O.W.N. 552, 15 Fox Pat. C. 167, 24 C.P.R. 77 (H.C.); *Irwin v. Jung* (1912), 17 B.C.R. 69, 1 W.W.R. 524, 1 D.L.R. 153 (C.A.); *British Assn. of Glass Bottle Mfr. Ltd. v. Nettlefold*, [1912] A.C. 709 (H.L.).

25 I do not see how *Hutchinson* assists the defendant. It merely states that which should be self-evident. A party need not discover a document which is not relevant to the issues raised in the pleadings. The point is summed up in two sentences at p. 447:

> The point made upon the present application is this: That upon the case set up in this pleading all questions relating to the company's insolvency or the bank's knowledge thereof are irrelevant. With this contention I agree.

26 In Alberta, the relevancy of documents is determined within the framework of R. 186(2), for the purpose of R. 194(1).

27 *Farrer* applies *Jones*. I say no more about *Farrer*.

28 *Loudon* says that prima facie an affidavit of documents is conclusive. If it is following the principle in *Jones*, I do not agree. If it says that, *without more*, the party cannot be ordered to provide a further and better affidavit of documents, I agree. An order under R. 194(1) is not granted merely by the asking. He who wants the order must "make it appear" to the court that relevant documents have not been discovered.

29 *Irwin* also follows *Jones*. I say no more about it other than that I agree with one point, that the matter is a "rule of practice".

30 *British Assn.* says that as a general rule an affidavit of documents is conclusive. If that means that *without more* the affidavit stands, I have no difficulty. If it means the affidavit is unimpeachable and cannot be contradicted, I do not agree.

31 In any event, this court is not bound by a 1912 English practice decision.

32 *Stapley v. C.P.R.* (1912), 5 Alta. L.R. 341, 2 W.W.R. 1010, 6 D.L.R. 180 (Alta. S.C. en banc), also states that [p. 1011]:

> The general rule is that an affidavit on production is conclusive and must be accepted as true by the opposite party respecting not only the documents that are or have been in the possession of the party making discovery and their relevancy ...

33 However, *Stapley v. Canadian Pacific Railway* has been overtaken by what is now R. 194(1), which clearly negates the "conclusive" effect that was given to an affidavit of documents.

34 R. 194(1) can be traced back to the 1914 Rules and R. 372(1).

35 *Stapley v. Canadian Pacific Railway* was decided in 1912, which is obviously prior to the 1914 Rules.

36 I do not find it necessary to research if in 1912 there was a like rule to the 1914, R. 372(1). That would involve going back to the North West Territories Judicature Ordinance as it stood in 1905 when Alberta became a province and also seeing if there were any changes by Alberta between 1905 and 1912.

37 In *Gainers Ltd. v. C.N.R.*, [1926] 2 W.W.R. 79 (Alta. S.C.), Master Blain indicates that the relevant rule did not exist in 1912. He states at p. 80:

> *Stapley v. C.P.R.* was decided in 1912 and C.R. 372 came into force in 1914. The English practice and procedure was being followed in Alberta in 1912, but is not now and for some years has not been in force in this province. C.R. 372 provides that:
>
> > If it be made to appear to a judge that any document in the possession or power of a party has been omitted or that a claim of privilege has been improperly made in an affidavit of documents filed, he may order a further and better affidavit.
>
> C.R. 382 provides for the cross-examination of the person who has made an affidavit of documents. As I stated, on the argument, the right to so cross-examine was to get away from the practice in England, which was not thought to be a good practice for this province, and to enable a party to discredit the affidavit of documents of the opposite party. I have since the argument consulted Mr. Justice Beck, a member of the Rules Commission, who tells me he suggested this right of cross-examination for the express purpose of getting away from the English practice.

38 I would conclude that Master Blain did the research which led him to say that in 1912 there was not a rule like the 1914, R. 372.

39 Stevenson and Côté, Alberta Rules of Court, also appear to be of the view that the 1914, R. 372 is new. They say that the present R. 194(1) is designed to get around the principle of unimpeachability found in *Stapley v. Canadian Pacific Railway*.

40 I agree.

41 There is a troubling statement in *Chertkow v. Retail Credit Co.*, 26 Alta. L.R. 291, [1932] 1 W.W.R. 905, [1932] 3 D.L.R. 390 (C.A.), that [pp. 908-909] "the true facts cannot be established by any other affidavit contradicting [the affidavit of documents]." That appears to be a reversion to the English practice of not allowing a contrary affidavit. In light of the scope of R. 194(1), I am not able to rationalize *Chertkow*. I would say that was not the issue before the court, so the statement was made without the benefit of submissions by counsel on that point.

42 In my view, the better approach to this kind of issue is that found in *Mark Fishing Co. v. United Fishermen & Allied Wkrs. Union* (1968), 64 W.W.R. 530, 68 D.L.R. (2d) 410 (B.C.C.A.).

43 Counsel for the defendant submits that the plaintiffs are going on a "fishing expedition". That description of some thing has been so overworked it is virtually meaningless.

44 The plaintiffs merely want the defendant to discover documents in accordance with R. 186(2). That can never be called a "fishing expedition".

45 Counsel for the defendant submits that the plaintiffs are hoping to find something to show there was an adoption by the defendant of the agreement for sale between Little Albert's and Torris, but that there is nothing which would show this.

46 Again, the simple answer is R. 186(2). If a document "relates to any matter or question" in the action it must be discovered. Its probative value is another matter.

47 It is not an answer to say that the documents will not assist the plaintiffs. That is for the trier of fact to decide. The defendant does not sit in judgment.

48 The comments in *Chertkow*, at p. 911, negate that kind of answer.

49 The plaintiffs' witness says that there are four "files" relating to the issues, all being files which it is alleged the defendant's counsel had opened.

50 There is an alleged "mortgage file", an alleged "quit claim" file, an alleged "sale to Torris" file, and the file that is "listed" in the affidavit. It is the contents of the first three files that are the subject matter of this application. The plaintiffs' witness has even given the solicitors file numbers.

51 The affidavit of documents does list some documents which would appear to come from some of these "files".

52 The simple evidentiary answer to the application is the written admission by counsel for the defendant, found in a letter dated 29th June 1988 by him to counsel for the plaintiffs. It reads:

> We have your letter of May 31, 1988.
>
> We have disclosed in our Affidavit of Documents *all relevant non-privileged documents* both in our possession and in the possession of Border Credit Union Limited in each of the four files referred to in your letter and in the files of Border Credit Union Limited.
>
> All documents passing between our office as solicitors for Border Credit Union and Border Credit Union on each of those four files are privileged as between solicitor and client. Solicitor and client privilege is not dependant upon litigation being in progress or contemplated. [emphasis mine]

53 It is that letter which leads me to conclude that counsel for the defendant has confused discovery of documents with production of documents.

54 Rule 186(2) requires the discovery of all relevant documents, producible or not.

55 The clear conclusion from the letter is that there are other relevant documents which have not been discovered because counsel thinks they are not producible. That is not the way to deal with relevant documents which, it is claimed, are not producible, for whatever reason.

56 I do not interpret the letter as saying that other documents are privileged from production because they are irrelevant. That would be an illogical position. If a document is irrelevant it is irrelevant. A claim for privilege from production cannot logically arise for that kind of document. That kind of fallacy is pointed out in *Ritholz v. Man. Optometric Soc.* (1958), 66 Man. R. 226, 24 W.W.R. 504 (Q.B.).

57 The claim for privilege founded on a "solicitor-client" basis necessarily means counsel for the defendant concedes that there are other relevant documents.

58 Counsel for the defendant has made a "mistake in principle" to use the phrase in *British Assn.* Even the English decisions accept that as a basis for ordering better discovery of documents.

59 There will be an order in accordance with the plaintiffs' notice of motion originally returnable on 11th July for both items 1 and 2.

60 Any claim to not being required to *produce* documents should be claimed in the affidavit in accordance with the Rules.

61 Any possible dispute about the production of any documents is a future issue. I have already referred to *Nova*. It is the latest (and probably final) decision on that kind of issue. It is recommended (mandatory) reading.

62 For the record, the counsel who appeared for the defendant on this application is not the counsel conducting the action for the defendant and he is not the author of the letter.

Application granted.

Tab B-16

1992 CarswellBC 227
British Columbia Supreme Court
G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.
1992 CarswellBC 227, [1992] 6 W.W.R. 584, [1992] B.C.W.L.D. 1733, [1992] B.C.J. No. 1477, 34 A.C.W.S. (3d) 392, 43 C.P.R. (3d) 491, 70 B.C.L.R. (2d) 180, 8 C.P.C. (3d) 54

G.W.L. PROPERTIES LTD. and BENTALL PROPERTIES LTD. v. W.R. GRACE & CO. OF CANADA LIMITED, W.R. GRACE & COMPANY — CONN., MESSINA (CANADA) DEVELOPMENT COMPANY LIMITED, LES INDUSTRIES CAFCO LTEE./INDUSTRIES CAFCO LTD. and UNITED STATES MINERAL PRODUCTS COMPANY

WORKERS' COMPENSATION BOARD, FRANK MUSSON, PINCHIN HARRIS HOLLAND ASSOCIATES LIMITED and GREAT-WEST LIFE ASSURANCE COMPANY (Third Parties)

Lowry J. [in Chambers]
Heard: June 19, 1992
Judgment: June 30, 1992
Docket: Doc. Vancouver C900884

Counsel: *D.B. Church* and *B.J. Freedman*, for plaintiffs.
E.A. Dolden and *B.S. Cramer*, for defendants Les Industries Cafco Ltée/Industries Cafco Ltd., United States Mineral Products Company
Subject: Intellectual Property; Civil Practice and Procedure; Property

Headnote

Practice --- Discovery — Discovery of documents — Scope of documentary discovery — General
Practice --- Discovery — Discovery of documents — Privileged document — General
Civil procedure — Discovery — Discovery of documents — Documents subject to production — Plaintiff building owners suing manufacturer of asbestos-bearing fireproofing insulation and seeking production of documents relating to defendant's research and development of its products — Plaintiffs not entitled to production of formula for defendant's asbestos-free product still on market.
The plaintiffs owned three office towers built between 1965 and 1975. They alleged that the defendants manufactured or supplied asbestos-bearing fireproofing insulation products installed in the buildings during construction. They sued for damages under various heads, alleging that the defendants knew or ought to have known that the products posed a serious health and safety hazard. The plaintiffs applied under R. 26(10) for production of all documents relating to one defendant's formulae for both asbestos-bearing and asbestos-free fireproofing insulation, as well as all documents relating to the research and development of those products. The defendant consented to the application with one exception. It refused to disclose its process for manufacturing asbestos-free insulation including, in particular, the actual combination of ingredients used. The defendant had spent years developing that product, which was still on the market.
Held:
Application dismissed with respect to contested material.
The defendant did not contend, in order to justify the distribution of an asbestos-bearing product, that it had been physically impossible to make an asbestos-free product at an earlier date. The assistance in establishing liability that the plaintiffs would gain from the disclosure of the defendant's actual manufacturing process, and of the formula for the asbestos-free product first manufactured in 1969, appeared to be slight. The formula in question was a trade secret and the probative value of the documentation did not outweigh the potential risk of an adverse effect on the defendant if disclosure were ordered. As well, it was unlikely that any protective order the court might make would be adequate.

Table of Authorities

Cases considered:

Dufault v. Stevens (1978), 6 B.C.L.R. 199, 86 D.L.R. (3d) 671 (C.A.) — *applied*
Forestal Automation Ltd. v. R.M.S. Industrial Controls Inc. (1977), 4 B.C.L.R. 219, 80 D.L.R. (3d) 41, 35 C.P.R. (2d) 114 (S.C.) — *referred to*
Nicholson v. John Deere Ltd. (1986), 58 O.R. (2d) 53, 34 D.L.R. (4th) 542, affirmed (1989), 68 O.R. (2d) 191, 57

D.L.R. (4th) 639 (C.A.) — *referred to*
Rentway Canada Ltd. v. Laidlaw Transport Ltd. (1989), 49 C.C.L.T. 150, 16 M.V.R. (2d) 86 (Ont. H.C.) — *referred to*

Rules considered:

British Columbia Supreme Court Rules, 1990
R. 26(10)
R. 26(11)

Application by plaintiffs pursuant to R. 26(10) for order compelling production of documents. For related proceedings, see 70 B.C.L.R. (2d) 171.

Lowry J.:

1 The plaintiffs make application pursuant to R. 26(10) for an order compelling the production of particular documents from the defendants, Les Industries Cafco Ltée/Industries Cafco Ltd. and United States Mineral Products Company ("Cafco"). At issue is the production of documents that are said to contain trade secrets.

2 The plaintiffs are the owners of three office towers constructed between 1965 and 1975 in Vancouver. They allege that Cafco, as well as W.R. Grace & Co. and W.R. Grace & Co. — Conn. ("Grace"), manufactured or supplied asbestos-bearing fireproofing insulation products that were installed in the buildings during construction. The owners plead that Cafco and Grace knew, or ought to have known, the products posed a serious hazard to health and safety; they breached duties they owed to the owners and occupiers of buildings generally; and they are liable for the damages the owners claim to have suffered in the result that include the cost of removing the products from the buildings, lost revenue and lost property value.

3 The owners seek production of all documents relating to Cafco's product formula for both asbestos- and non-asbestos-bearing insulation, as well as all documents relating to the research for, and development of, these products. It is my understanding that the owners seek only those documents that relate to fireproofing products as opposed to documents relating to products produced for insulation against sound or heat. Certainly counsel's argument was confined to fireproofing products. Also, I understood counsel for the owners to say that no documents coming into existence after the year 1970 were sought. The owners seek only documents relating to the asbestos-bearing product that Cafco was manufacturing and distributing when the towers were built and the non-asbestos product that Cafco began to market in 1969.

4 Counsel for Cafco conceded at the outset of his argument, that with one exception, Cafco was required to produce the documentation sought. The exception is, however, substantive. Cafco resists the disclosure of the process it has employed in manufacturing non-asbestos fireproofing insulation including, in particular, the actual combination of ingredients used. Cafco objects to disclosing its "product formula." The product was the first commercially viable, tested and approved, non-asbestos, spray applied fireproofing product to be put on the market. It took years to develop and is the product that Cafco is selling today. Cafco contends the formula is a trade secret and is, in any event, not relevant to the issues arising in this case which is about nothing other than asbestos-bearing products.

5 Counsel for the owners contends the formula is relevant to the issues pleaded. He submits that it may be evidence of the availability of an alternative product, free of the alleged hazard to health and safety posed by the asbestos-bearing products installed in the towers. He says once the owners know the ingredients of the product produced in 1969, they may be able to establish that one or both of the manufacturers could have produced and supplied an asbestos-free insulation as early as 1965. The formula may, he says, prove to be evidence that would assist the owners in their case against Grace as well as against Cafco.

6 The availability of safer alternatives has, in Canada, been considered to be a factor in determining a manufacturer's liability in products cases, as it has in the United States: see *Nicholson v. John Deere* (1986), 58 O.R. (2d) 53, 34 D.L.R. (4th) 542, affirmed (1989), 68 O.R. (2d) 191, 57 D.L.R. (4th) 639 (C.A.), and *Rentway Canada Ltd. v. Laidlaw Transport Ltd.* (1989), 49 C.C.L.T. 150, 16 M.V.R. (2d) 86 (Ont. S.C.).

7 Counsel for the owners says any proprietary interest in the formula sought can be protected with an order limiting the use that can be made of the documents in which it is contained and the persons to whom they may be shown. But he then says the formula is not a trade secret in any event. He contends the constituent ingredients can be determined through analysis. The product, he says, has been on the market for over 20 years and there is nothing about it that can be a real secret. He says

this, however, in the absence of any evidence to support his contention.

8 The question is whether Cafco's non-asbestos product formula must be disclosed. In making an order for production of documents under R. 26(10), the court is required to exercise a discretion. I find the considerations most conveniently expressed in *Dufault v. Stevens* (1978), 6 B.C.L.R. 199, 86 D.L.R. (3d) 671 (C.A.). That was a case concerned with the production of documents in the possession of a non-party under R. 26(11) but I regard what was said there equally applicable, in principle, to an application under R. 26(10). Craig J.A., writing for the court said (at p. 204 [B.C.L.R.]):

> If a party seeking the order is able to satisfy the judge that the document, or information in a document, may relate to a matter in issue, the judge should make the order unless there are compelling reasons why he should not make it ...
> It seems to me, however, before a judge refuses an application for production and inspection on the ground that it may embarrass or adversely affect a person who is not a party to the action he should be satisfied that: (1) the probative value of the document, or the information in the document, would be slight; and (2) the production and inspection of the document would cause so much embarrassment to the non-party, or have such an adverse effect on him, that it would be unjust to require him to produce it for the inspection of the parties to the action.

9 I consider Cafco's non-asbestos product formula may be of assistance to the owners in proving the availability of an alternative product in their case against both Cafco and Grace. However, I question the extent to which proving that a particular asbestos-free product could have been made four years before it was, will really assist the owners in establishing liability in this case.

10 On the case as now pleaded, the owners allege Cafco and Grace knowingly manufactured and distributed a dangerous product. It is this that the manufacturers deny. As I understand the manufacturers' case, they do not contend that it was not physically possible to make an asbestos-free product four years earlier in order to justify the distribution of the asbestos-bearing insulation that was on the market. They say the products they did make were not dangerous and that, if they posed any danger to health or safety, the danger was not known, and should not have been known, to them.

11 The pleadings exchanged between the owners and Cafco, in particular, raise as the central issue the state of that manufacturer's knowledge about its asbestos-bearing product. There is no allegation that Cafco had, or could have had, an alternative product available. There is accordingly no denial. To the contrary, on this application, Cafco freely admits that the raw materials used in its non-asbestos fireproofing product were commercially available before 1965 and the cost of manufacturing the product was competitive and economically feasible.

12 In my view, the assistance in establishing liability that the owners may derive from Cafco's disclosure of the actual manufacturing process, and the combination of ingredients for the asbestos-free product it began manufacturing in 1969, would appear, on my understanding of what is really at issue in this action, to be slight indeed.

13 I consider Cafco's non-asbestos product formula to be a trade secret. The evidence adduced on the application establishes that the manufacturing process and the combination of ingredients is closely held even within Cafco. The market is highly competitive and Grace is one of Cafco's major competitors. In my view, counsel's assertion that there can be nothing that is a secret about the formula serves, in the absence of any supporting evidence, only to undermine his contention that its disclosure is required to enable the owners to prove the availability of an alternative product.

14 Cafco has been involved in defending a large number of asbestos suits in the United States for some time. It has on only one occasion been required by court order to disclose its non-asbestos product formula. Other attempts to compel production have not succeeded. Where, in Louisiana, the formula was produced, a strict protective order was made. I am told the case was then settled summarily. The protective order was honoured. The American courts have apparently given no reasons relating to the production of Cafco's formula. I attach no significance to Cafco's experience in the United States litigation except to observe that the formula the owners seek to have disclosed in this action has not entered the public domain. It remains a trade secret.

15 I do not consider that in the circumstances of this litigation, adequate protection of Cafco's trade secret can be ensured. Counsel for the owners says that their solicitors intend to disclose documents produced as a result of the order made on this application to American attorneys, with whom they are consulting, who are engaged in asbestos related litigation all over the United States. The owners want to be able to disclose the non-asbestos product formula. Counsel says the court can rely on undertakings against any improper use of information that will be given by the firms of attorneys and others to whom the

documents will be disclosed. The court, he says, can enforce a protective order by imposing sanctions enforceable through the American courts in respect of the breach of any undertaking. I do not share his confidence. I am not prepared to decide this application on the assumption that the disclosure of Cafco's trade secret in these proceedings can be contained. Quite apart from the owners' use of the information, Grace, a major competitor of Cafco, is a party in this action. It is, in my view, unrealistic to suggest that once lost in these proceedings, any secrecy associated with Cafco's non-asbestos product formula could later be recovered.

16 I conclude that my discretion must be exercised against disclosure of Cafco's non-asbestos product formula. The probative value of the documentation is not sufficiently great to outweigh the real and very considerable adverse effect disclosure of this trade secret could have on this manufacturer. I consider the reasons for denying disclosure to be compelling.

17 I should record that Cafco sought to introduce evidence to support a submission that disclosure of the product formula was sought for an improper purpose. Objection was taken to the affidavit filed on the ground that it contained statements about conversations that took place on a without prejudice basis. I concluded that nothing turned on the contents of the offending affidavit but I did say I would have allowed the owners an opportunity to respond if I had decided the affidavit was admissible and that it would affect the disposition of this application.

18 The application is allowed and there will accordingly be an order that within 30 days Cafco list and produce for inspection and copying all of the documentation that it has conceded it is required to produce. The order will, however, provide that the process for manufacturing non-asbestos fireproofing insulation, including the combination of the ingredients used (i.e., that product formula) need not be disclosed.

19 The order will include protective terms in relation to any documents to be produced by Cafco that the owners have not obtained from some other source. The terms will be similar to those employed in the order made in *Forestral Automation Ltd. v. R.M.S. Industrial Controls Inc.* (1977), 4 B.C.L.R. 219 at 232, 80 D.L.R. (3d) 41, 35 C.P.R. (2d) 114 (S.C.), modified to avoid the necessity of disclosing the identity of potential expert witnesses who will have to give undertakings before they have access to the documents produced.

20 Counsel are asked to settle a form of order failing which the terms may be spoken to.

21 Costs in the cause.

Order accordingly.

Tab B-17

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

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

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

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

Royal Bank v. Welton (2009), 93 O.R. (3d) 403, 185 C.R.R. (2d) 2, 2009 ONCA 48, 2009 CarswellOnt 208, 306 D.L.R. (4th) 487, 244 O.A.C. 262 (Ont. C.A.) — considered

Royal Bank v. Welton (2009), 2009 CarswellOnt 5331 (S.C.C.) — referred to

Royal Bank of Canada v. Trang (2012), 2012 CarswellOnt 7128, 2012 ONSC 3272, 92 C.B.R. (5th) 144, 20 R.P.R. (5th) 79 (Ont. S.C.J.) — referred to

Tournier v. National Provincial & Union Bank of England (1923), [1924] 1 K.B. 461, [1923] All E.R. Rep. 550, 29 Com. Cas. 129 (Eng. C.A.) — referred to

UFCW, Local 401 v. Alberta (Information and Privacy Commissioner) (2013), 365 D.L.R. (4th) 257, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 561 A.R. 359, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 594 W.A.C. 359, [2014] 2 W.W.R. 1, 60 Admin. L.R. (5th) 173, 88 Alta. L.R. (5th) 1, (sub nom. *Alberta (IPC) v. UFCW, Local 401)* 2014 C.L.L.C. 210-003, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401)* [2013] 3 S.C.R. 733, 239 L.A.C. (4th) 317, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, local 401)* 297 C.R.R. (2d) 71, 2013 SCC 62, 2013 CarswellAlta 2210, 2013 CarswellAlta 2211, D.T.E. 2013T-775, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 451 N.R. 253 (S.C.C.) — considered

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

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 in a minority or dissenting

opinion
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
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.) — considered in a minority or dissenting opinion
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
Douglas v. Loch Lomond Ski Area (2010), 7 C.P.C. (7th) 338, 2010 CarswellOnt 9266, 2010 ONSC 6483 (Ont. S.C.J.) — considered in a minority or dissenting opinion
EnerWorks Inc. v. Glenbarra Energy Solutions Inc. (2012), 2012 ONSC 748, 2012 CarswellOnt 3526, 39 C.P.C. (7th) 190 (Ont. Master) — considered in a minority or dissenting opinion
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 in a minority or dissenting opinion
Royal Bank of Canada v. Trang (2012), 2012 CarswellOnt 7128, 2012 ONSC 3272, 92 C.B.R. (5th) 144, 20 R.P.R. (5th) 79 (Ont. S.C.J.) — considered in a minority or dissenting opinion
Toronto Dominion Bank v. Sawchuk (2011), 2011 ABQB 757, 2011 CarswellAlta 2131, 86 C.B.R. (5th) 1, 530 A.R. 172 (Alta. Master) — refered to in a minority or dissenting opinion

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

Execution Act, R.S.O. 1990, c. E.24
s. 28 — considered

Rules considered by *John Laskin J.A.*:
Rules of Practice, R.R.O. 1970, Reg. 545
R. 591 — considered
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to
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
R. 60.18(6)(a) — considered
Regulations considered by *John Laskin J.A.*:
Land Registration Reform Act, R.S.O. 1990, c. L.4
Electronic Registration, O. Reg. 19/99
s. 6 — considered
Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5
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*.