

Credit Reports and the Law of Defamation

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Individuals and businesses are zealously concerned with protecting their respective reputations. Having a stellar reputation can be an important asset. For individuals, a positive reputation is important for career success. A positive reputation can lead to better job opportunities and promotions within the workplace. For businesses, a positive reputation can lead to attracting better employees, to increased sales, to higher profits and to higher company value.

One of the ways to measure reputation, particularly financial reputation, is through a credit rating. A person with a positive credit rating is generally, among other things, able to easily borrow money at preferable interest rates.

Credit ratings are impacted by credit reports, which are summaries of a person's credit history compiled by credit bureaus. These bureaus obtain information from various sources, including lenders and creditors, about how a person uses credit, such as whether a person regularly misses loan payments or whether debts have been sent to a collection agency. A person with a low credit score will have a negative financial reputation. Accordingly, it is not surprising that a person with a low credit score will sometimes bring a defamation action against either a credit bureau or creditor for damages caused to his or her reputation as a result of information disclosed on a credit report.

The tort of defamation allows a person to recover damages where their reputation is harmed by false written or oral statements of another that are made to a third person. Lenders and creditors who provide information about a person to a credit bureau certainly provide written or oral statements to a third person.

However, the recent British Columbia decision in *Sun v. Mercedes-Benz Financial Services Canada Corp.*, 2022 BCSC 443 serves as a reminder that a defamation action for a low credit score is a very difficult action to win.

In this case, the plaintiffs leased a car for use in their business. Under the lease, they were required to pay \$381 a month for 51 months. As well, the lease provided that the plaintiffs, as lessees, were not allowed to use the car in "any unintended, injurious or unlawful manner." To do so constituted an act of default under the lease and permitted the lessor to exercise various remedies, including terminating the lease, taking possession of the car and selling it.

During the term of the lease, the car was involved in an alleged crime. The police were required to intercept the car and seize it. The police then contacted the lessor to collect the car. The lessor determined that the lease had been breached and advised the plaintiffs that in order to get the car back they would need to pay out the lease.

No pay out payment was made.

Eventually, the car was sold and the lessor informed two credit agencies that the plaintiffs' lease was in default. The credit agencies reported that the car had been repossessed and that there was a balance owing on the lease for approximately \$20,000. In addition, one of the credit reports noted that the car was in poor condition.

The plaintiffs argued, among other things in their action, that the lessor was liable for defamation because of the information provided to the credit agencies.

The Court dismissed the plaintiffs' action and with respect to the defamation claim held that the information provided by the lessor to the credit agencies was protected by qualified privilege.

A qualified privilege attaches to the occasion upon which a communication is made. As described over 100 years ago by the House of Lords in *Adam v. Ward*, [1917] A.C. 309 (H.L.):

...a privileged occasion is...an occasion where the person who makes the communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

On multiple occasions, Ontario courts have explained that information provided by business for purposes of credit reports is protected by this defence. In *Cusson v. Quan*, 2007 ONCA 771 at paragraph 39, (reversed by the Supreme Court of Canada on other grounds, 2009 SCC 62) the Court stated:

Employment references, business and credit reports, and complaints to police, regulatory bodies or public authorities are classic examples of occasions of qualified privilege.

In *Spencer v. Equifax Canada Inc.*, 2011 ONSC 7284, the court found that a defamation action was inapplicable to information contained in a credit report because credit reports fell into the realm of qualified privilege.

The defence of qualified privilege can only be defeated where the person suffering the alleged reputational loss can prove malice.

As determined by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), malice is commonly understood as spite or ill-will. However, it also includes “any indirect motive or ulterior purpose” that conflicts with the sense of duty or the mutual interest which the occasion created. Malice can also be established in circumstances where the alleged defamatory communication was made dishonestly or in knowing or reckless disregard for the truth.

In *De Teresi v. Dale Strieman & Kurz*, 2007 CanLII 1890 (ON SC), the court dismissed a defamation action about information on a credit report based on the defence of justification. As explained in that case, citing a leading text on the law of defamation:

Justification or the truth of the matter asserted is a complete defence to an action for defamation. The published material must be false.
“What is true cannot be defamatory.” A plaintiff has no right to have his or her character free of an imputation that is true.

Accordingly, it is not necessarily wise to bring a defamation action over information contained in a credit report.

A better way for a person to deal with what is believed to be false information found in a credit report is to dispute the accuracy of the reported information with the reporting agency. In Ontario, this can be done pursuant to the *Consumer Reporting Act*, R.S.O. 1990, c. C-33. A dispute triggers a reporting agency to use, within a reasonable time, its best endeavours to confirm or complete the information in a report and correct, supplement or delete the information in accordance with good practice. As determined in *Ekaterina Matutschovsky v. Equifax Canada Inc.*, 2009 CanLII 13619 (ON SC), a credit agency must carry out its functions honestly, accurately, with skill and diligence, and in accordance with its statutory obligations. When a dispute is made, the credit agency must:

- 1) ensure that the data in its database came from an approved member who has been appropriately screened;
- 2) ensure that there are no obvious errors on the face of the information in its database;
- 3) contact the member for verification of the data;
- 4) accurately and specifically describe the problem raised by the customer to the member; and
- 5) insist upon a prompt and complete reply from the member.

Courts have also found that credit reporting agencies owe a person a duty of care regarding their credit rating and can be liable for damages for negligence in certain circumstances: *Clark v. Scotiabank*, 2004 CanLII 34438 (ON SC).

As can be seen, a defamation action for allegedly false information in a credit report is not necessarily the best way to deal with a negative credit score. A consumer is often better off to, first, ensure that they are meeting their debts in a timely fashion, and, second, use the legislative process that might be available to them to dispute negative information contained in a report.

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact **Stephen Thiele** at 416.865.6651.



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