

KEEPING CURRENT

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Bank hit with \$850,000 damages award for defaming former employee (*Curtis v. Bank of Nova Scotia*)

By Stephen Thiele

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In any civil action, evidence is important for the purposes of either proving or defending against a claim. While in most cases, the onus rests on the plaintiff to prove their claim on a balance of probabilities, in the law of defamation there are shifting burdens of proof which will require a defendant to prove on a balance of probabilities any specialized defence that might be relied upon to defeat a plaintiff's action. Lack of sufficient evidence is fatal to a specialized defence.

In [*Curtis v. The Bank of Nova Scotia, 2024 ONSC 2308 \(CanLII\)*](#), the failure of a bank to lead sufficient evidence demonstrating that a former employee had knowingly committed acts of fraud in approving a handful of mortgages resulted in the former employee obtaining a \$850,000 damages award against the bank for defamation.

The former employee had been employed by the bank as a Mortgage Development Manager and was one of the Toronto Region's top producers. Although the former employee was not permitted to accept mortgage broker referrals, he

was allowed to accept referrals from real estate agents who also had mortgage broker licences.

During an unrelated investigation conducted by the bank into potentially fraudulent mortgages, the bank's Security and Investigations ("S&I") unit discovered that the former employee had processed mortgage applications containing potentially fraudulent employment and income documentation. The applications had been referred to him by a licenced mortgage broker, who also may have been a realtor.

The former employee was advised that he was under investigation for having engaged in procedural irregularities and was interviewed by a Senior S&I investigator. The bank's Employee Relations Manager also attended the interview. The Manager took notes and concluded, among other things, that the former employee had knowingly submitted fraudulent documentation or turned a blind eye to such documents, and was evasive and not credible in answering questions.

On the same day as the interview, the former employee was also advised that he was suspended with pay. Given that the former employee's entire income was based on commission, the suspension with pay was meaningless. Also, since it was unclear how long an investigation might take, the former employee resigned to seek employment elsewhere.

In a letter accepting the resignation, the bank wrote, in part: "...we have now completed our investigation into irregular practices, and it is our conclusion that you breached the Guidelines for Business Conduct during the course of your employment with the Bank."

Although the bank never involved the police, the S&I investigator then initiated a "SIFT" alert on the Bank Crime Prevention and Investigation Office ("BCPIO") of the Canadian Bankers Association system advising that there was strong evidence which established that the former employee had knowingly uttered false documents on several mortgage applications. Those documents included falsified Notices of Assessment, letters of employment, pay stubs and financial statements as well as bank documents containing forged customer signatures. The investigator advised that those acts formed a prima facie case in relation to the alleged fraud.

Under its Policies & Procedures, the SIFT alert system is accessible to prospective employers in the banking industry who use the system to conduct background checks. The system is used to alert prospective employers about employees who have been dismissed for fraudulent or other criminal activity, including those terminated for serious breaches of Bank Code of Conduct. It is not intended to be used to name employees who are terminated for cause such as incompetence.

The criteria for entry onto the database is as follows:

1. Admission of criminal fraud;
2. No admission but agreement by the

- employee to pay for the loss;
3. No admission but direct evidence of fraud;
4. No admission but strong circumstantial evidence; and
5. Termination for cause.

As a result of the bank's submission to the SIFT alert system, the former employee was unable to find alternative employment and lost job offers from other banks. On separate occasions, the bank advised prospective employees that the former employee "...had submitted fraudulent documentation in support of mortgage applications."

While the bank conceded that the plaintiff's claim contained the three required elements for a successful defamation action ((i) the alert referred to the defendant, (ii) the alert was published to a third party; and (iii) the alert conveyed a defamatory meaning or innuendo that lowered the former employee's reputation in the estimation of reasonable persons), it relied on the defences of justification and qualified privilege. Essentially, the bank contended that its conclusion that the former employee had committed acts of fraud was true and that even if the conclusion was false its submission to the SIFT alert system was information it was obligated to provide to others in the banking industry, who were entitled to receive the information.

Justification or truth is a strong defence. Words that are true or substantially true cannot be false and therefore completely undermine a claim for defamation. However, the onus was on the bank to prove the truth of its statement that the former employee had committed fraud. In seeking to meet this burden the bank did not call the S&I investigator as a witness on the basis that she no longer worked for the bank and lived in another country.

Rather, the bank relied on evidence provided by a Manager who had attended the former employee's interview by the investigator, the



Manager's conclusions that the former employee had committed acts of fraud, the notes of the investigator, and evidence of another witness who, like the Manager, testified to simply trusting the investigative findings.

To prove the justification defence, the bank was required to lead cogent and convincing evidence that the former employee was involved in the alleged fraud as perpetrator and not a victim or dupe of an unsavoury realtor or mortgage broker.

The trial judge found that evidence proffered by the bank was based on hearsay and double hearsay and that there was no documentary proof of fraud. No conclusion had been reached that the former employee had knowingly submitted fraudulent documents to the bank, and there was no evidence that the bank had ever investigated the former employee for fraud.

With respect to the qualified privilege defence, the bank submitted that it owed a public duty to report fraud to the BCPIO and to express an honestly held belief in a reference to a prospective employer.

The qualified privilege defence can be defeated if the defamation exceeds the limits of the duty or interest occasioning the privilege. The maker of the comment must have a necessity to communicate the comment to a party who has a corresponding duty to receive it. The defence can also be defeated by showing that the defendant acted with malice.

The bank failed to meet the elements of the qualified privilege defence because its hearsay evidence fell short of establishing that the former employee had knowingly committed fraud. As a result of failing to establish this fact, the bank was unable to meet the criteria that it had duty to initiate a SIFT alert because under BCPIO's Policies and Procedures the lack of lending due diligence (which included the failure to "validate the clients provided assets,

liabilities or income information in order to obtain approval on a credit application), did not require a report to the SIFT system.

Without evidence showing that the former employee had "knowingly uttered fraudulent documents", the bank simply fell outside the policies of initiating the SIFT alert.

The trial judge concluded that, at its highest, the evidence showed that the former employee broke bank policies and failed to exercise due diligence.

In the alternative, the trial judge found that the bank also acted with malice.

The evidence showed that the bank took no steps to review its investigation after being sued by the former employee, thereby allowing the defamatory SIFT alert to remain on the system, accessible to others for a period of seven years. The SIFT alert was a constant source of direct harm to the former employee and the bank's decision to not take a hard look at the former employee's allegations pleading in his claim and failure to retract the alert was insensitive to the harm which the former employee suffered.

The trial judge concluded: "When [a] publication remains an active bar to employment prospects, [an] ongoing unjustified libel carries with it the accrual of malice to the point that it defeats the [defence of qualified] privilege."

In the result, the former employee was awarded \$75,000 in general damages and \$100,000 in aggravated damages. The general damages reflected the immediate impact of the defamation. The aggravated damages reflected the ongoing effect of the defamation.

The former employee was also awarded \$475,000 in special damages for loss of income. Although this award could potentially have been higher, the former employee's evidence was partially speculative and was unsupported by any labour market expert evidence.

Lastly, the former employee was awarded \$200,000 in punitive damages for the bank's failure to review the evidence and the justification for the SIFT alert. In the circumstances, the defamation impeded the former employee's future employment and was particularly harmful because of the importance employment places on personal identity and social standing. The trial judge found that the bank was obligated to correct and mitigate the harm it had caused, but had failed to do so.

The key takeaway from this case is that parties in a defamation action should not lose sight of the need to lead cogent and clear evidence. A defendant must carefully consider the elements of defences being relied upon and ensure that first-hand evidence is presented to support the elements. Meanwhile, a plaintiff who seeks special damages cannot simply rely upon speculative evidence of future loss, particularly future loss of employment or business income. Without expert reports to support these kinds of losses, there is a danger that special damages will not be awarded.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** in our dispute resolution group at 416.865.6651 or via email at sthiele@grllp.com.

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