STHI LEGAL NOTES

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To Refer or Not to Refer

What do terminated employees who are looking for work need and what do many employers fear giving? The answer of course is a job reference.

This very scenario formed the basis of a lawsuit that recently made its way to the Ontario Superior Court of Justice. One of the main points at issue in the case, was whether the reference provided by the plaintiff's former employer was defamatory.

The Facts

Papp had worked as an economist for Stokes Economic Consulting for a little less than three years when he was let go. He was told that his employment was terminated because there was a shortage of work. When Papp began his job hunt, he asked Stokes, the company's CEO, if he could use him as a reference to which the latter agreed.

Papp applied for a job as a socio-economic statistician with the Yukon Government. After the initial interviews, Papp was told by Ho, one of the interviewers, that he was the first ranked candidate for the job.

Ho then contacted Stokes, one of Papp's references. Based on Stokes' answers to a series of questions concerning the quality of Papp's work and his ability to work as part of a team and get along with his co-workers, Papp was de-certified from the position and did not get the job.

Papp sued his former employer for both wrongful dismissal and defamation.

In this issue

The Law of Defamation

Defamation occurs when someone says or writes something about another person that hurts their reputation. In certain circumstances, the person who has been defamed may be able to sue for damages. In order to sue for defamation in Canada, a plaintiff must prove three things.

1. The impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
2. The words in fact referred to the plaintiff; and
3. The words were published, meaning that they were communicated to at least one person other than the plaintiff.

The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless.

Once the plaintiff has established the above elements, it is then up to the defendant to offer a valid defence in order to escape liability. The defences available are as follows.

1. The statements were substantially true, also referred to as justification.
2. The statements were made in a protected context - in other words, they are privileged.

If the defendant is relying on the defence of justification, he or she must bring forth evidence showing that the statements made were in fact substantially true.

If the defamatory statements were not true, then a defendant must show that they were protected statements based on the context they were made in. For instance, if the statements were made during Parliamentary or legal proceedings, then they will attract absolute privilege and will not be actionable. Others, like reference letters or credit reports, or reporting concerns to the police or a workplace authority in good faith, enjoy qualified privilege. Qualified privilege can be defeated only by proof that the defendant acted with malice or recklessness.

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Is a Cheque a Gift?

It is not the gift, but the thought that counts.
Henry Van Dyke

As we saw in our Winter 2018 issue, (*A Generous Gift*) gift giving can be tricky, especially if large sums of money are involved. This month we consider whether a cheque is a gift.

What is a Gift?
To most of us a gift is simply an item we buy, put in a box, wrap in paper and ribbons and then give to someone we like. While this is not inaccurate, the law does identify certain essential elements that make a gift a gift. They are:

(a) the giver's intention to make a gift;

(b) the acceptance of the gift by the recipient; and

(c) the delivery of the gift to the recipient.

Unlike a contract, which requires that some sort of consideration or value be exchanged between two parties, it is the absence of consideration which is one of the central indicia of a gift at law. Rather, a gift is a voluntary transfer of property to another without an expectation of remuneration.

Our Fact Situation
Arlindo and Mary had been neighbours for almost 15 years. During that time, Arlindo had helped Mary with her household maintenance, had chauffeured her around and had helped her with such chores as groceries and banking.

Shortly before she died, Mary made a will in which she left Arlindo $100,000. In addition, she wrote him a cheque for $100,000. Arlindo took it to Mary's bank to cash it. There was insufficient funds in the account the cheque was drawn on, although she did have enough in her other accounts. Rather than tell Arlindo, the bank said they would have to investigate and gave him back the cheque. Unfortunately, Mary died before the issue could be straightened out. When Arlindo tried to deposit the cheque at his own bank it was returned to him and marked "funds frozen". (Once Mary's bank was notified that she had died, it froze all her accounts.)

Based on legal advice, Mary's executor took the position that the cheque was an imperfect gift that was not legally enforceable.

Although Arlindo received the $100,000 bequest, he chose to sue for the full amount of the cheque.

What Happened in the Courts?
Arlindo advanced a variety of legal arguments to support his claim, but when all was said and done he was unsuccessful on the ground that the $100,000 cheque failed for lack of delivery.

It was clear that Mary had intended to gift Arlindo with $100,000 and that she had the mental capacity to do so. It was also clear that Arlindo had accepted the gift. However, the cheque itself was merely a direction to the bank to pay Arlindo the money. What this means is that the third essential element of a gift, delivery, did not occur when Arlindo received the cheque. Rather delivery could not be completed until the bank gave him the money.

In the circumstances, the bank was unable to comply with the direction because there were insufficient funds in Mary's account and they needed permission from Mary, which they did not get before she died, to take money from her other accounts in order to cover the full $100,000.

Arlindo did try to argue that he was entitled to the money for services rendered. However, aside from the fact that there was no evidence of a contract between he and Mary, there was no evidence to show that his motivation for helping Mary all those years was because he would be compensated.

If Mary had in fact owed Arlindo money for services rendered, then he could have enforced the value of the cheque against the estate since he would have been a creditor. But the evidence clearly demonstrated that the money was a gift that would become a legal gift only once the money was actually in Arlindo's hands.

In addition to losing the case, Arlindo was ordered to pay costs in the amount of $14,000.

The Moral of the Story
Whether you are the giver or the recipient of a gift of money by way of cheque, you must remember that a cheque is not money nor has a transfer of property taken place. Rather, a cheque is a direction to the bank to pay a certain sum of money to the payee recipient. Until that cheque has cleared, the gift remains incomplete. So don't let those gift cheques lie around gathering dust.

Moral #2 is that a bird in the hand is worth more than two in the bush. While Arlindo received $100,000 under the will, he ended up having to pay $14,000 in court costs, plus whatever he had to pay his own lawyer through to the Court of Appeal.

Protecting Condominium Owners Act

In 2012, the provincial government indicated its intention to review Ontario's *Condominium Act*. Some of the key areas that the government sought to improve are how condos are governed, regulating the management of condos as well as strengthening transparency and accountability of condo corporations.

After a number of years and consultations with key players, *The Protecting Condominium Owners Act* is now a reality – sort of. Although the legislation has been passed, many of the provisions of the Act are not yet in force. Below are some of the key sections of the Act that are now law and what you need to know about them.

The Condominium Authority of Ontario
As part of the changes to the condo landscape, the government has set up the *Condominium Authority of Ontario* (CAO) to educate the condo community and to help resolve disputes. The CAO will help ensure condo owners and residents are equipped with the necessary tools and information.

Mandatory Forms
In order to help standardize and facilitate communications between the condo owners and the condo board, the Ministry of Government and Consumer Services has introduced a series of 15 forms. These forms include a variety of Information Certificates (e.g. New Owner Information Certificate), Meeting of Owners forms (e.g. Proxy Form) and Records of the Corporation forms (e.g. Request for Records).

The easiest place to locate these new forms is on the CAO's website (condoauthorityontario.ca) under the Resources tab - Government of Ontario Forms.

Directors
All directors elected or appointed after October 31, 2017 must now complete mandatory training within six months of joining the board. Any director who fails to comply will immediately and automatically cease to be a director. However, once a director has completed the training it is valid for seven years.

To assist in this training, the CAO has 21 free short online modules of approximately 10 to 20 minutes each. Directors will need to log in using their corporation's account with CAO. Corporations get their online account once they register with the CAO (www.condoauthorityontario.ca)

Directors must comply with new disclosure obligations, including:

- whether they (or a related person) are party to any legal action;
- whether they have been convicted of an offence under the Condo act;
- whether they have a material interest in a contract or transaction related to the condo;
- whether they are in arrears of their condo fees for more than 60 days.

Various
- Boards may now hold board meetings by teleconference or by another form of electronic communications if all the directors have consented.
- All condo managers must now be licensed by the Condo Management Regulatory Authority of Ontario.
- Condo corporations must provide owners with regular Information Certificates that indicate the board, finances, insurance, reserve fund, legal proceedings and other matters about the corporation.
- Condo corporations must now send out in the prescribed form, an advance notice of a meeting, including the Annual General Meeting.

For general information about condo living we encourage you to visit the CAO's website at condoauthorityontario.ca

If you have questions or concerns please contact us. Our firm is expert in providing all of the services Condominium Corporations and Property Managers require including litigation services in the areas of construction law, contractor disputes and declaration, by-law and Rule and Regulation enforcement, as well as compliance advice relating to the new Condominium Act and its regulations.

Employment Standards - A Reminder

As of April 1, 2018, casual, part-time, temporary and seasonal employees cannot be paid at a rate of pay less than full-time or permanent employees if:

- They do substantially the same kind of work, in the same establishment;
- Their work requires substantially the same skill, effort and responsibility; and
- Their work is performed under similar working conditions.

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The Analysis
In the fact situation before the court, Papp had established the 3 elements he was required to.

1. The words spoken by Stokes were defamatory, since they lowered Papp's reputation in the eyes of the interviewers, such that he was not offered the job despite having been ranked first;
2. Stokes' words did refer to Papp; and
3. The words were communicated to at least one person other than the plaintiff, i.e. to Ho.

The result is that the onus shifted to Stokes. He argued that the statements made by him about Papp were substantially true.

During the trial, three employees of Stokes Economic Consulting, including Stokes' son, testified about Papp and the work environment. They agreed that the workplace was informal and normally relaxed and friendly. They also indicated, however, that at times Papp's work ethic was not the best, that he could belittle other staff and that he could be argumentative.

Although Stokes was not fully aware of all these issues first hand, prior to his phone meeting with Ho he did speak to his son, whom he had left in charge while he was away from the office for an extended period of time. In addition, Stokes spoke to the other two employees to confirm what his son had told him, since he knew his son and Papp did not always get along.

During his own testimony, Stokes stated that he had no animosity toward Papp but did feel an obligation to answer Ho's questions honestly. He also indicated that where possible he spoke of Papp's positive technical qualities.

The trial judge concluded on a balance of probabilities that what Stokes said to Ho was substantially true. He found that while Papp's technical ability to do the work assigned to him was good, he did not work well in the team setting at Stokes Economic Consulting Inc. He went on to find that Stokes genuinely believed to be true what he told Ho and that he did not act with malice nor was he reckless in his comments.

In the end, the case for damages for defamation was dismissed against Stokes and his company.

With respect to the wrongful dismissal claim, the parties had previously come to an agreement that Papp had been wrongfully terminated and that he was entitled to payment in the amount of four months in lieu of reasonable notice.

To Refer or Not to Refer
So this brings us back to the original question. Legally if the reference you provide for a former employee, even if negative, is true and you know it to be true, then you have a solid defence against an accusation of defamation. Having said that, the truth of the reference does not necessarily prevent a former employer from bringing a lawsuit against you.

Your safest strategy in these situations may be to decline to act as a reference or to simply confirm that the employee did work for you at one point along with the position that he or she held.

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