

Subway's \$210 million chicken content defamation claim against the CBC restored by Court of Appeal

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The Ontario Court of Appeal has restored Subway's defamation action against the CBC which was dismissed in 2019 pursuant to Ontario's anti-SLAPP legislation, while summarily dismissing a negligence claim against the University which conducted the tests used by CBC in its investigation: *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 26 (CanLII); 2021 ONCA 25 (CanLII).

In 2017, CBC's *Marketplace* television show reported that Subway's chicken sandwiches compared poorly with four other restaurants under investigation. Unlike its competitors, whose sandwich meats were made nearly entirely of chicken, Subway's chicken sandwiches were reported to be made of "only slightly more than 50% chicken." The products were tested for the CBC by a DNA test laboratory at Trent University ("Trent").

Subway then commenced a defamation action against CBC and Trent, claiming that their investigation was faulty, that the *Marketplace* episode was defamatory, and that Subway had suffered business losses and serious reputation damage as a result. Subway sought damages of \$210 million.

In 2019, Justice E.M. Morgan heard motions brought by the CBC and Trent to dismiss Subway's action pursuant to s. 137.1 of the *Courts of Justice Act* ("CJA"), Ontario's anti-SLAPP legislation. Essentially, CBC and Trent argued that the purpose of Subway's action was not to vindicate its reputation or recover any real damages, but to chill public discussion of an important consumer protection issue.

CBC's motion was successful and Trent's was not. Justice Morgan found that the court could not reasonably conclude that CBC's defence of "responsible communication" would not succeed, and further that the "public interest" aspect of CBC's program outweighed the potential impact of harm on the private business interests of Subway.

Conversely, Trent could not rely on the same protection since its anti-SLAPP motion was aimed to dismiss a negligence claim (based on how the tests were conducted) rather than defamation. Justice Morgan was not satisfied that Subway's negligence claim arose from an "expression" relating to a matter of public interest" as required by the statute.

The Court of Appeal reversed both decisions.

CBC's Defamation Claim Restored

Between the time of Justice Morgan's motion decision and the appeal, the Supreme Court of Canada released two decisions on the interpretation of s. 137.1 of the CJA which framed the Court of Appeal's analysis: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 ("*Pointes*") and *Bent v. Platnick*, 2020 SCC 23 ("*Bent*"). Based on *Pointes*, the Court of Appeal's view was that the objectives of the anti-SLAPP legislation required that a motions judge "need only conduct a preliminary assessment of the merits" (para. 39).

At the first stage of a motion under s. 137.1 of the CJA, a party seeking to dismiss a claim (here the CBC) must demonstrate that the litigation arises out of an expression that relates to "a matter of public interest." This was not contested in the motion, given the obvious public interest in knowing the ingredients and percentage quantities thereof in commercial produced food.

Once the "public interest" threshold is crossed, the onus shifts to the responding party (here Subway) to establish that a proceeding should not be dismissed. Specifically, the responding must satisfy the motion judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

There was little question that Subway's claim passed the "substantial merit" threshold, as there was considerable evidence obtained by Subway which challenged the test results in CBC's *Marketplace* episode. The potentially false and harmful nature of the information conveyed to the public by CBC struck at the core of Subway's reputation.

The primary issue on appeal was whether Subway had met the threshold of establishing that the CBC had no valid defence of "responsible communication," a defence used by media based on the reasonable diligence of steps taken to validate the statements made in reporting: *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 126; *Cassese v. Canadian Broadcasting Corporation*, 2015 BCSC 215, at paras. 498-530.

In this regard, the Court of Appeal found that the motions judge had erred in law by applying a higher standard to his assessment of whether Subway had to establish that CBC had no defence than the standard articulated by the Supreme Court of Canada in *Pointes* and *Bent*. In *Bent* at para. 103, the Supreme Court held that a plaintiff opposing a SLAPP dismissal motion need only establish that there is a basis in the record and the law to support a finding that the defences raised do not tend to weigh *more* in the defendant's favour. What this means is that Subway did not have to disprove that the CBC had a valid defence of responsible communication. Rather, Subway had to establish that the defence of responsible communication did not tend to weigh more in CBC's favour at this preliminary stage of the proceeding. In the Court of Appeal's view, there was sufficient evidence in Subway's favour to balance out the facts supporting CBC's responsible communication defence.

The Court of Appeal also found that the motions judge had erred in conducting a substantive damages assessment as part of the test for whether the harm likely to be or have been suffered by Subway was sufficiently to outweigh the public interest in permitting the proceeding to continue. Essentially, the Court of Appeal confirmed that it was not for a preliminary motions judge to assess whether or not Subway would ultimately prevail based on a detailed assessment of the evidence.

The Court of Appeal's view is that summary procedures such as a SLAPP motion are intended to avoid the need for a trial where it is clearly unnecessary to achieve a fair result. They are not meant to duplicate a trial at the outset of the proceeding. Subway had a legitimate business interest in upholding its reputation and challenging CBC's investigation. There was no evidence of ulterior motive, abuse of power, or other improper purpose. It was therefore an error for the motion judge to engage in an assessment of damages as though he were the trial judge, in failing to appreciate that damage assessment may be an ongoing process, and in failing to appropriately weigh the public interest. The claim against CBC was therefore restored.

Negligence Claim against Trent University Dismissed

Conversely, the Court of Appeal found that the negligence claim against Trent should be summarily dismissed under the SLAPP legislation. The Court of Appeal held that it was an error of law to view s. 137.1 of the CJA as aimed at a limited category of torts like defamation, and that the motion judge failed to appreciate the centrality of expression to the negligence claim against Trent. The negligence claim against Trent arose from an "expression" as described by the Supreme Court in *Pointes*: the expression was causally connected to the claim; there was a nexus between them; the expression grounded the claim; and the claim targeted the expression. The expression or communication of or about the test results was integral to all aspects of Subway's negligence claim against Trent, namely the existence of a duty of care, whether the duty was breached, and damages.



The point in *Pointes* (followed here) is that the requirement that the proceeding arise from an expression is met where the expression “grounds” the claim. Accordingly, Trent was entitled to seek a dismissal of the negligence action under the anti-SLAPP provisions.

Subway's negligence claim against Trent was essentially dismissed on the basis that the laboratory did not owe a duty of care to the entity whose products it tests. Subway's negligence claim against Trent was one for “pure economic loss” as there was no connection to physical or mental injury to a person, or to physical damage to property: *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2020 SCC 35, 450 D.L.R. (4th) 181, at para. 17. In the circumstances, Subway could not demonstrate a real prospect of successfully establishing a relationship of proximity based on any established categories in law. Trent had not provided an express undertaking to Subway, and Subway could not say that it had relied on Trent's services or statements. There was simply no basis in law for Subway's negligence claim against Trent based on the test results communicated by Trent to the CBC.

Of note, Trent did not move, as CBC did, to dismiss Subway's action against it for defamation but did so only in respect of the negligence claim. Accordingly, the action for defamation against Trent will continue, as will the defamation claim against CBC.

The Court of Appeal's decision restoring Subway's action against the CBC reflects a tendency to allow potentially meritorious defamation claims to proceed in order to challenge statements which have caused serious harm to business reputations. Investigative reporting obviously has an important role in society but businesses should also be permitted to uphold their reputations and put investigations to the test, particularly when it is the media who have created the “public interest” in the subject matter at issue (in this case the chicken content of Subway's chicken sandwiches compared to their competitors). It remains to be seen which side ultimately prevails. Subway had spent considerable effort to address the substantive findings in CBC's *Marketplace* investigation, and the Court of Appeal was clear that the claim should not be dismissed on a preliminary motion. Perhaps in another context where a plaintiff had not undertaken such work before commencing a lawsuit the result would be different. A PDF version is available to download [here](#).

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