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Fair is Fowl and Fowl is Fair: Implications of the Ontario Court of Appeal's Decisions in *Subway v CBC*

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The Ontario Court of Appeal recently released two decisions under Ontario's anti-SLAPP (Strategic Litigation Against Public Participation) legislation: *Subway Franchise Systems of Canada, Inc. v Canadian Broadcasting Corporation*, 2021 ONCA 25 and *Subway Franchise Systems of Canada, Inc. v Canadian Broadcasting Corporation*, 2021 ONCA 26.

For parties considering pursuing or responding to an anti-SLAPP motion, these decisions provide useful guidance on two questions:

1. Whether a negligence claim can properly be the subject of an anti-SLAPP motion, and
2. How discretionary and fact-specific defences will be considered under the "no valid defence" prong of the test on an anti-SLAPP motion.

Procedural History

Subway's claim arose after an investigation by the Canadian Broadcasting Corporation show *Marketplace* into the contents of Subway's (and other popular food chains') chicken sandwiches.

The CBC reported that Subway's chicken contained "only slightly more than 50% chicken". CBC engaged a laboratory at Trent University to do the testing.

Subway commenced a claim for $210 million against CBC and Trent – CBC for defamation relating to the reporting and Trent for defamation and negligence for their allegedly careless testing.

Both defendants brought motions under s. 137.1 of the *Courts of Justice Act*, RSO 1990, c C.43 (Ontario's anti-SLAPP legislation).

Section 137.1 provides for a mechanism to dismiss at an early stage a lawsuit that arises from an expression on a matter related to the public interest. It provides in part as follows:

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.

(3) On a motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the 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.

At first instance, Trent's motion was dismissed. The motion judge held that the negligence claim did not arise from an *expression* by Trent on a matter related to the public interest. CBC's motion was granted and Subway's claim was dismissed. Subway was ordered to pay CBC's full indemnity costs and Trent was ordered to pay partial indemnity costs to Subway.

Subway and Trent appealed. The twin decisions from the Ontario Court of Appeal are some of the earliest from that Court applying the Supreme Court of Canada's decisions in *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22 and *Bent v Platnick*, 2020 SCC 23.

Negligence Claims and Anti-SLAPP

A key question before the Court of Appeal in *Subway Franchise Systems of Canada, Inc. v Canadian Broadcasting Corporation*, 2021 ONCA 25 was: When does a claim that is framed in negligence fall within the scrutiny of Ontario's anti-SLAPP legislation?

At first instance, the motion judge held that Trent failed to meet the threshold requirement under s. 137.1 that the proceeding *arose from an expression*. The motion judge held that the action for negligence was about Trent's laboratory testing, standards, and methodology, *not* the reporting of the results to CBC or the public through CBC's broadcast.

On appeal, Trent argued that the proceeding *arose from an expression* because it was only through communication of the test results that Subway could sustain damage. Trent argued that unpublished research could not give rise to a claim in negligence, as no damages can flow from unpublished negligent research.

Justice Zarnett, writing for the Court of Appeal, agreed. He held that the motion judge erred in law by circumscribing s. 137.1 too narrowly to defamation claims. He held that it was also an error of law not to appreciate the centrality of expression to the negligence claim in this case.

Given this finding, Justice Zarnett then reviewed whether Subway had discharged its burden to show that the negligence claim had "substantial merit" and that Trent had "no valid defence".

On the substantial merit issue, Justice Zarnett reasoned that Subway would not likely be able to establish a relationship of proximity between itself and Trent to ground a duty of care. Justice Zarnett relied in part on the decision in *Shtaif v Toronto Life Publishing Co. Ltd.*, 2013 ONCA 405, where the Court of Appeal rejected the notion that reporters investigating a story were in a relationship of proximity with the subject of the story solely by reason of conducting the investigation. Justice Zarnett found that a laboratory hired by investigative journalists was unlikely to be in a proximate relationship where the journalists themselves were not. Justice Zarnett further found that Subway would be unable to demonstrate any "expectations, representations, reliance, or statutory obligations as between Trent and Subway" that could ground a novel duty of care.

Therefore, the negligence claim was dismissed under s. 137.1 and the costs award from the motion against Trent was set aside.

Responsible Communication and anti-SLAPP

In *Subway Franchise Systems of Canada, Inc. v Canadian Broadcasting Corporation*, 2021 ONCA 26, the Court of Appeal overturned the decision of the motion judge that Subway had *not* discharged its burden to show that CBC had "no valid defence".

The motion judge held that the CBC had exercised due diligence in its reporting and that Subway did not establish grounds to believe that the defence of responsible communication was not valid.

Justice Thorburn, writing for the Court of Appeal, reasoned that "[i]n so finding, the motion judge erred in law by applying a standard that was higher than the standard articulated by the Supreme Court in its recent decisions."

In *Bent v Platnick*, 2020 SCC 23, the Supreme Court held that a plaintiff need only demonstrate "that there is *a* basis in the record and the law — taking into account the stage of the proceeding — to support a finding that the defences [the defendant] put in play do not tend to weigh *more* in [the defendant's] favour."

Applying the standard articulated in *Bent*, the Court of Appeal overturned the motion judge and found that Subway had met the test.

The Court of Appeal analyzed the defence of responsible communication, which applies where the publication at issue is on a matter of public interest, and the publisher diligently tried to verify the allegations taking into account:

1. the seriousness of the allegations;
2. the public importance of the matter;
3. the urgency of the matter;
4. the status and reliability of the source;
5. whether the plaintiff's side of the story was sought and accurately reported;
6. whether the inclusion of the defamatory statement was justifiable;
7. whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
8. any other relevant circumstances.[1]

The Court of Appeal found that Subway had demonstrated that there were some issues around the reliability of the testing performed by Trent and that there was no particular urgency in reporting the allegations.

Notably, a number of the reliability issues were also considered by the motion judge, who nevertheless held that the responsible communication defence was likely to succeed.[2]

The Court of Appeal's analysis highlighted the reliability issues and the urgency of the reporting, rather than CBC's efforts to inquire into the veracity of the tests on which they were reporting and their efforts to include Subway's position in the reporting (which were the focus of the motion judge's analysis).

The Supreme Court of Canada and the Ontario Court of Appeal have held that "'[g]rounds to believe' means 'something more than mere suspicion, but less than … proof on the balance of probabilities'".[3] Both Courts also noted that anti-SLAPP motions take place at an early stage in the proceedings when only a limited assessment of the evidence is permissible.[4]

In this case, the fact that Subway had raised issues with CBC's reporting process (despite significant efforts on the part of CBC to verify the tests and get Subway's side of the story) was enough to show there were "grounds to believe" that CBC would not make out the responsible communications defence.

The test articulated by the Supreme Court of Canada and applied by the Court of Appeal in this case seems to create a low bar for a plaintiff to show that a defence would not "tend to weigh *more* in [a defendant's] favour", where a defence is discretionary and fact-specific. The defence of responsible communication is an example of a highly fact-specific defence. It involves a consideration of numerous non-exhaustive factors to determine whether a report was diligently researched and fairly presented. Given the recent statements from the Supreme Court and the Court of Appeal, defendants relying on the defence of responsible communication may now be concerned that any attack on the defendant's process could lead to a finding that there are "grounds to believe" that the defendant has no valid defence.

Take-Aways

Where a defendant is relying on a discretionary and fact-specific defence such as responsible communication, in light of the recent decisions from the Supreme Court of Canada and the Court of Appeal, the likelihood of success on an anti-SLAPP motion may be diminished.

However, the Ontario Court of Appeal has acknowledged that the anti-SLAPP regime is properly extended to claims in negligence where communication or expression are central to the claims.

[1] *Grant v Torstar Corp.*, 2009 SCC 61, at para 126.

[2] *Subway v CBC*, 2019 ONSC 6758, at paras 55, 72-75.

[3] *Subway Franchise Systems of Canada, Inc. v Canadian Broadcasting Corporation*, 2021 ONCA 26, at para 54.

[4] *Ibid*, at para 55.

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