

## Case In Point

# Ontario Court of Appeal Finds Anti-SLAPP Motions Can Apply To Causes of Action Beyond Defamation

**Date:** January 25, 2021

The Ontario Court of Appeal recently released two decisions which consider the Strategic Litigation Against Public Participation (SLAPP) provisions of the *Courts of Justice Act*. The provisions are aimed at discouraging actions that have the harmful effect of chilling individuals and organizations from speaking out on matters of public interest. The first decision of the Court reaffirmed the appropriate standards to apply for an anti-SLAPP motion. The second decision clarifies that the provisions apply to negligence claims as well as other torts.

In 2017, CBC had engaged Trent University (Trent) to determine the percentage of chicken in cooked chicken products. Based on its determinations, CBC then aired an episode on *Marketplace* and posted an online article comparing the chicken in products of Subway Franchise Systems of Canada, Inc. (Subway) to that of its competitors. It produced its finding that Subway's chicken is only 50% chicken and the rest made mostly of soy. Further comments were made on Twitter. CBC posted a follow up article with Subway's own test results showing 1% soy in their chicken.

Subway brought a \$210 million action against both CBC and Trent for defamation and a claim against Trent for negligence, claiming financial loss as a result of the *Marketplace* report.

In response to Subway's lawsuit, CBC and Trent brought anti-SLAPP motions. Sections 137.1 to 137.5 of the *Courts of Justice Act* provides for an expedited mechanism for defendants of a SLAPP suit to seek a dismissal of the action on an expedited and less costly manner. As such, a defendant can bring a motion at any time after a proceeding has been commenced for an order dismissing the proceeding.

## CBC Decision

The motion judge granted CBC's anti-SLAPP motion. Subway [appealed](#) this decision to the Court of Appeal.

It was not contested on appeal that the expression related to a matter of public interest and that the action had substantial merit. The issues on appeal were whether CBC had a valid defence of responsible communication, and whether the harm Subway suffered in allowing the action to proceed outweighed the public interest in protecting the impugned expression.

On the first issue, the Court of Appeal found that the motion judge erred in law by applying a higher standard to whether CBC had no valid defence of responsible communication than the standard articulated by the Supreme Court of Canada in its recent cases [1704604 Ontario Ltd. v. Pointes Protection Association](#) and [Bent v. Platnick](#). In *Bent*, 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 ... do not tend to weigh *more* in [the defendant's] favour" (emphasis in original). The Court of Appeal held that Subway met this standard.

With respect to the second issue, the Court held that the motion judge failed to appreciate Subway's reputational harm, the likelihood of serious financial harm and that this proceeding did not bear the *indicia* of a SLAPP suit. The motion judge erred in law by engaging in an assessment of damages as though he were the trial judge, failing to appreciate that damage may be an ongoing process, and failing to appropriately weigh the public interest.

Subway's appeal was allowed. The action continues against CBC and its named employees.

## **Trent Decision**

Trent brought an anti-SLAPP motion seeking to dismiss Subway's negligence action against it (it did not bring an anti-SLAPP motion with respect to the defamation claim). The motion judge denied Trent's motion and Trent [appealed](#).

The Court of Appeal allowed the appeal. It held that Trent satisfied the initial threshold of showing that the negligence claim arose from an expression on a matter related to the public interest. The motion judge erred in law by viewing s. 137.1 of the *Courts of Justice Act* as aimed at a limited category of torts like defamation. It was also an error of law not to appreciate the centrality of expression to this negligence claim.

The Court held that Subway failed to satisfy its burden of showing that the negligence claim met the substantial merit requirement under s. 137.1(4) of the *Courts of Justice Act*.

It determined that Subway did not have a real prospect of success on the issue of whether a relationship of proximity and thus a duty of care existed necessary to support Subway's claim for pure economic loss against Trent. Subway failed to advance the determinative elements to establish proximity for a claim within the performance of a service category or negligent misrepresentation. There was no undertaking of responsibility by Trent in favour of Subway and no reliance by Subway. Trent's only express undertaking was to conduct testing for CBC. Subway did not rely on the test results of Trent. The Court of Appeal also rejected Subway's novel duty of care argument, finding it was not legally tenable.

Trent's appeal was allowed and the motion judge's order was replaced with an order dismissing Subway's negligence claim.

## **Takeaway**

These decisions are important for employers for two reasons.

First, they serve as reminders to be mindful of the anti-SLAPP provisions prior to bringing an action that could be seen as an attempt to silence a party with respect to an issue of public interest.

Second, they make clear that anti-SLAPP motions can apply to other causes of action, including tort/negligence.

Whether you are contemplating bringing an anti-SLAPP motion or are defending against one, please feel free to contact your Hicks Morley lawyer.