

Subway's "50% Chicken" Lawsuit Against CBC Dismissed

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"Subway's strips and oven roasted chicken could be only about 50% chicken. And guess what? The rest – mostly soy".

These words sparked a \$210 million defamation lawsuit by Subway against the Canadian Broadcasting Corporation ("CBC") and Trent University.

CBC argued that the lawsuit amounted to a Strategic Litigation Against Public Participation ("SLAPP") suit.

Justice Morgan of the Ontario Superior Court of Justice agreed with CBC in [Subway v. CBC](#), 2019 ONSC 6758, and dismissed the claim against CBC.

Two-Part Test

Section 137.1 of the Ontario *Courts of Justice Act* is an anti-SLAPP provision designed to protect free expression in the face of a libel or similar action aimed at matters of public interest.

There is a two-part test to determine whether an action should be dismissed under section 137.1 of the *Courts of Justice Act*. There is a "public interest" hurdle and a "merits" hurdle.

The defendant must first prove that the expression made relates to a matter of public interest.

If this threshold is crossed, then the onus shifts to the plaintiff to establish that the claim has substantial merit and that the defendant has no valid defence.

Further, the plaintiff must show that the harm suffered or likely to be suffered as a result of the defendant's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

Public Interest

Justice Morgan held that the comments made by CBC passed the public interest test. He noted that there is a public interest in keeping investigative journalism viable and free from undue litigation burdens.

Moreover, the public has an interest in knowing the ingredients, and percentage quantities thereof, of the foods they commonly ingest.

Substantial Merit

Turning to the second part of the test, the “merits” stage does not involve a full adjudication of the claim on its merits. A claim has “substantial merit” if, upon examination, it shows to be legally tenable and supported by evidence, which could lead a reasonable trier to conclude that the claim has a real chance of success.

Justice Morgan determined that Subway’s claim against CBC had substantial merit. Subway submitted evidence showing that its chicken products contain no more than 1% soy filler. There was also evidence that the tests relied on by CBC were flawed.

Valid Defence

Justice Morgan was satisfied that CBC had a valid defence. CBC relied on the defence of responsible communication. This defence does not require a defendant to show that its reporting was accurate. However, the defendant must demonstrate that its efforts in gathering and communicating the impugned information were responsible.

CBC demonstrated that it was reasonably diligent in the steps taken to validate the accuracy of the statements made. CBC relied on testing by Trent University. Further, CBC retained its own expert who confirmed that the university’s laboratory methodology and results were credible.

Moreover, CBC gave Subway ample time to respond to the allegations that its sandwiches could contain just 50% chicken, and it incorporated Subway’s position into its television program and a follow-up blog.

Balance of Harms

Since Subway did not satisfy the onus of showing that CBC did not have a valid defence, Subway’s action against CBC was dismissed.

Nevertheless, Justice Morgan went on to consider the “balance of harms” part of the test. He noted that the purposes of the anti-SLAPP legislation are outlined in section 137.1 of the *Courts of Justice Act* as follows:

- To encourage individuals to express themselves on matters of public interest
- To promote broad participation in debates on matters of public interest
- To discourage the use of litigation as a means of unduly limiting expression on matters of public interest

- To reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action

Subway estimated that CBC's story reached 3 billion people. The story was reported in, among other places, USA Today, New York Post, Brietbart News, and Perez Hilton. Subway submitted expert evidence showing that its damages due to lost sales were around \$52.3 million in the United States and around \$1.5 million in Canada. Subway also incurred significant legal fees.

CBC argued that Subway's U.S.-based losses were greatly inflated and that it is unlikely that a Canadian-based news magazine broadcast and publication would have such an overweight impact in the United States.

Justice Morgan concluded that the public purposes are fulfilled by dismissing the action against CBC and outweigh any potential impact that this may have on the private interests of Subway.

His Honour indicated that "[t]he interest in this case goes well beyond the seemingly quaint issue of chicken sandwiches. It touches on food product ingredients and truth in labelling food products, which is a consumer protection issue of the highest order".

Conclusion

The objective of the anti-SLAPP legislation is to expand the democratic benefits of broad participation in public affairs and to reduce the risk that such participation will be unduly hampered by fear of legal action.

The legislation encourages the responsible exercise of free expression on matters of public interest and discourages litigation that interferes unduly with such expression.

Responsible communications challenging or calling out the actions of others can protect the public. Lawsuits which intend to discourage such communications should be weeded out at an early stage of the litigation process.