CITATION: Subway v CBC, 2019 ONSC 6758
COURT FILE NO.: CV-17-571237
DATE: 20191122

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Subway Franchise Systems of Canada, Inc., Subway IP Inc., and Doctors Associates Inc.	*William McDowell, Sana Halwani, Paul-Eric Veel, and Kaitlin Soye*, for the Plaintiffs
Plaintiffs	
– and –	
Canadian Broadcasting Corporation, Charlsie Agro, Kathleen Coughlin, Eric Szeto and Trent University	*Christine Lonsdale, Gillian Kerr, and William Main*, for the Defendants, Canadian Broadcasting Corporation, Charlsie Agro, Kathleen Coughlin, and Eric Szeto
Defendants	*Alexander Pettingill, Joyce Tam, and Natasha O'Toole*, for the Defendant, Trent University
	HEARD: September 24 and 26, 2019

E.M. MORGAN, J.

ANTI-SLAPP MOTION

I. The *Marketplace* Report

[1] This case arises from the February 24, 2017 broadcast of an investigative report on the show *Marketplace* (the "*Marketplace* Report"), created, aired, and published online by the Defendant, Canadian Broadcast Corporation and its employees the Defendants, Charlsie Agro, Kathleen Coughlin, Eric Szeto (collectively "CBC"). The subject matter of the *Marketplace* Report was a comparison of the chicken sandwiches sold by the Plaintiffs (collectively "Subway") and four other fast food chains in Canada.

[2] The *Marketplace* Report stated that Subway's chicken sandwiches faired poorly in comparison with the other four 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 *Marketplace* Report by an independent DNA testing laboratory run by the Defendant, Trent University ("Trent").

[3] Subway has brought a $210 million defamation action against CBC and Trent in respect of the broadcasting and publication of the *Marketplace* Report. It claims that the investigation done by CBC and Trent was faulty, that the show was defamatory, and that the airing and publishing of the *Marketplace* Report caused it business losses and seriously damaged its reputation.

[4] CBC and Trent submit that Subway's lawsuit is aimed not at vindicating Subway's reputation or recovering any real losses it suffered, but rather at chilling public discussion of an important consumer protection issue. Both sets of Defendants move to dismiss the action pursuant to section 137.1 of the *Courts of Justice Act*, RSO 1990, c. C43 ("*CJA*") on the grounds that Subway's law suit amounts to a Strategic Litigation Against Public Participation ("SLAPP") suit.

II. The anti-SLAPP criteria

[5] Broadly speaking, section 137.1 of the *CJA* is designed to protect free expression in the face of a libel or similar action aimed at matters of public interest:

> The purpose of the statute 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. It would seek to accomplish these purposes by encouraging the responsible exercise of free expression by members of the public on matters of public interest and by discouraging litigation and related legal conduct that interferes unduly with such expression.
>
> *Report of the Anti-SLAPP Advisory Panel to the Attorney General of Ontario* (2010), p. 18.

[6] With this policy in mind, the section has been enacted in order to facilitate an expedient way to consider the free speech implications of a law suit. The idea is to be able to terminate a law suit at an early stage if it unduly hampers speech about matters of public interest.

[7] The anti-SLAPP provisions are not meant to create a forum in which to review the entire evidence that one or both of the parties would bring to bear if the merits of the law suit were being adjudicated. As the Court of Appeal put it in *1704604 Ontario Ltd. v Pointes Protection Association*, 2018 ONCA 685, para 78, "if…the motion record raises serious questions about the credibility of affiants and the inferences to be drawn from competing primary facts, the motion judge must avoid taking a 'deep dive' into the ultimate merits of the claim under the guise of the much more limited merits analysis required by s. 137.1(4)(a)."

[8] The criteria for dismissing an action under that provision are set out in section 137.1(3) and (4) of the *CJA*. Those subsections create a two-part test: a 'public interest' hurdle and a 'merits'

hurdle. For the first part of the test, the onus is on CBC and Trent as moving parties to establish that the matters covered in the broadcast and online publication in issue raised a matter of public interest. If this threshold is crossed, the onus then shifts to Subway as the party seeking to litigate the alleged defamation to establish that its claim has substantial merit and that the CBC and Trent have no valid defense.

[9] The shifting onus is apparent in the wording and structure of ss. 137.1(3) and (4):

> (3) On 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.

[10] Although the statutory framework and legal tests are the same, the issues raised by CBC's motion and Trent's motion are quite different. I will therefore divide my reasons by first addressing the former and, separately, the latter.

II. Does the CBC's broadcast/publication pass the public interest test

[11] As a first step in the s. 137.1 analysis, the Court must consider whether the *Marketplace* Report was a broadcast or a publication that "relates to a matter of public interest." In approaching the phrase "public interest", I must "consider the subject matter of the publication as a whole. The defamatory statement should not be scrutinized in isolation": *Grant v Torstar Corp.*, [2009] 3 SCR 640, para 101.

[12] That said, there is no fixed definition of what is in the public interest. It is in some sense a judgment call for the judge hearing the case. Lord Denning explained that the principle behind the phrase requires a touch of realism and common sense. In *London Artists, Ltd. v Littler*, [1969] 2 All ER 193, 198 (CA), he opined that, "Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest…"

[13] The Court of Appeal has made it clear that deciding what is in the public interest requires an objective assessment: *Pointes Protection*, para 65. The threshold question is, in effect, "what is the expression about?" *Ibid.*, para 55. The test focuses on the nature of the subject matter, and is not about the quality, truth, or manor of the expression. As in much of defamation law, the analysis is from the point of view of the ordinary reasonable person who has to understand the publication: *Leenen v CBC* (2000), 48 OR (3d) 656 (SCJ).

[14] The *Marketplace* Report dealt with the ingredients of sandwiches sold by popular fast food chains. It relayed the results of DNA tests performed by the Trent laboratory, which indicated that two types of Subway chicken products, chicken patty and chicken strips, contained significantly less chicken DNA than the other chicken products tested.

[15] It is not particularly controversial to say that the public has an interest in knowing the ingredients, and percentage quantities thereof, of the foods they commonly ingest. Courts have had little hesitation in concluding that consumer advisory and protection issues regarding businesses catering to the public are within the "public interest": *Level One Construction Ltd. v Burnham*, 2018 BCSC 1354, para. 179.

[16] Although counsel for Subway takes some issue with the notion that a DNA reading, rather than a more consumer-oriented assessment of chicken or animal protein content, is really of interest to the public, the broader question of the ingredients of Subway's sandwiches are widely interesting to Subway's chicken consumers. In any case, "It is enough that some segment of the community would have a genuine interest in receiving information on the subject": *Grant*, para 102.

[17] I have little hesitation concluding that CBC has met the threshold "public interest" test. The *Marketplace* Report was an example of investigative journalism. The Supreme Court of Canada has indicated that "investigative journalism fill[s] what has been described as a democratic deficit in the transparency and accountability of our public institutions": *R v National Post*, [2010] 1 SCR 477, para 55. There is a public interest in keeping investigative journalism viable and free from undue litigation burdens.

[18] Furthermore, the *Marketplace* Report raised a quintessential consumer protection issue. There are few things in society of more acute interest to the public than what they eat. To the extent that Subway's products are consumed by a sizable portion of the public, the public interest in their composition is not difficult to discern and is established on the evidence. I consider that CBC has satisfied its burden under s. 137.1(3) of the *CJA*.

III. The 'merits' test against CBC

[19] Once the "public interest" threshold is crossed, the onus under s. 137.1(4) of the *CJA* shifts to Subway to establish that the proceeding should not be dismissed.

[20] The merits test is divided into two inquiries. As the Court of Appeal has explained it in *Pointes Protection*, para 70:

> Broadly speaking, s. 137.1(4)(a) speaks to the potential merits of the lawsuit. Section 137.1(4)(a)(i) refers explicitly to the 'merit' of the 'proceeding', which I take to be the merits of the claim the plaintiff must prove to succeed in the litigation. Section 137.1(4)(a)(ii) addresses the absence of any 'valid defence', which I take to mean any affirmative defence found in the statement of defence, if one has been filed, or specifically advanced in the material filed on the s. 137.1 motion by the defendant.

a) Does the claim against CBC have substantial merit?

[21] The first step required by s. 137.1(4)(a)(i) is for Subway to show that its claim has substantial merit. To do so, it must adduce evidence that its claim "is legally tenable and supported by evidence, which could lead a reasonable trier to conclude that the claim has a real chance of success": *Pointes Protection*, para 80.

[22] Subway's claim against CBC alleges that the *Marketplace* Report was defamatory. It is aimed at both the on-air broadcast and the online publication.

[23] The *Marketplace* Report was promoted by CBC as the "Chicken Challenge". It was characterized as an investigative contest, comparing various chicken products sold by Subway and its closest competitors. Subway identifies the following statements in the *Marketplace* Report as setting the stage for and engaging in defamatory statements which harmed its business reputation:

> So everyone's wondering how much chicken is really in your chicken?...
> What did you find in our chicken test? Most of the samples came back as very close to 100% chicken...
> Any guesses which one of these samples had the least amount of chicken?...
> Sample D! Our DNA test shows that it could be less than 50% chicken... Sample C? Well our DNA test shows it's only slightly more than 50 % chicken. Who makes both C and D? Subway...
> Subway's strips and oven roasted chicken could be only about 50% chicken. And guess what? The rest – mostly soy.
> CBC included additional statements in the Broadcast characterising Subway's statements about its products as 'misrepresentation' and 'misleading'.

[24] As indicated, the broadcast of the *Marketplace* Report was accompanied by an article published by CBC on its website. That article is entitled, "What's in your chicken sandwich? DNA tests show Subway sandwiches could contain just 50% chicken". Again, Subway identifies the following statements in the online publication as forming the CBC's defamatory message:

> DNA tests show Subway sandwiches could contain just 50% chicken...
> A DNA analysis of the poultry in several popular grilled chicken sandwiches and wraps found at least one fast food restaurant isn't serving up nearly as much of the key ingredient as people may think...
> Looks like chicken. Tastes like chicken. But is it really all chicken?

[25] Subway also identifies that starting on February 24, 2017, CBC used Twitter to promote and further disseminate statements about the Subway chicken products. CBC posted a variety of tweets designed to promote the *Marketplace* Report broadcast and the accompanying online article, as follows:

> Get ready east coast!! How much chicken is actually in your fast food grilled chicken?? @cbcmarketplace will tell you next !!!...
> Any guesses what else could be in your chicken??...
> If you ordered a chicken sandwich at Subway, it might only be about half chicken…
> More from @cbcmarketplace investigation: DNA test shows Subway sandwiches could contain just 50% chicken…
> Order chicken instead of red meat? You might be getting less real chicken than you think at fast food restaurants…
> Is your chicken actually chicken?

[26] Counsel for Subway submits that the meaning of the CBC publications was clear and understood by a global audience. News media in Canada and the United States reported that CBC had determined that Subway's chicken sandwiches contain only 50% chicken. For example:

> *CBS Los Angeles*: 'The results show the Oven Roasted Chicken patty is 53.6 percent chicken while the Sweet Onion Chicken Teriyaki strip is 42.8 percent chicken'.
> *Breitbart News*: 'Subway's 'chicken' sandwich only contains 50 percent chicken'.
> *NBC12 On Your Side (Virginia)*: 'Tests show that chicken sandwiches from some places may only contain 50 percent chicken.'
> *Munchies (Vice)*: '…Subway's oven-roasted chicken… was allegedly only 53.6 percent chicken. … Subway's sweet onion chicken teriyaki strips turned out to be only 42.8 percent chicken.'

[27] Subway claims that the statements made by CBC are false and defamatory. Its claim is supported by evidence that it says demonstrates that its chicken products are substantially more than 50% chicken. The voluminous materials compiled by Subway and submitted in the record before me are geared toward establishing that the CBC, relying on Trent's laboratory tests, got it wrong. Subway's evidence is that the chicken in its chicken sandwiches is made by a third party, Grand River Foods ("Grand River"), to Subway's specifications, and that the chicken products contain 1% or less soy filler.

[28] Subway's in-house food scientist deposed that Subway has verified that its specifications are followed by obtaining periodic product testing results from Grand River. She went on to state that after the broadcast of the *Marketplace* Report, Subway had its chicken products tested by independent laboratories, Maxxam and Elisa technologies. Those independent labs verified that Subway's chicken products are in the range of 1% soy.

[29] The Vice-President of Product Development and Quality Assurance at Grand River also provided affidavit evidence specifically denying that Subway's chicken products are "only slightly

more than 50% chicken" and refuting that they are "mostly soy", as announced in the *Marketplace* Report. He described the manufacturing process, testing, and quality controls that Grand River employs for Subway products. He also indicated that soy filler is expensive, and that there is no financial or expedient reason for any manufacturer to substitute soy for chicken in a food product.

[30] Subway's record also contains much evidence that CBC had any number of warnings, or "red flags" regarding what it alleges was the faulty testing performed at Trent, but failed to follow up on those warnings. In addition, Subway contends, and there is correspondence to support, that CBC rushed Subway to respond and effectively ignored Subway's responses and pleas for more time and testing before going public with the *Marketplace* Report.

[31] Trent's laboratory tests, performed at CBC's request, formed the basis for the reported information about the supposedly high soy content of the Subway's chicken products. These tests provided a DNA analysis of the chicken products from various fast food restaurants; they were not corroborated by any other information. Indeed, Subway contends that CBC declined to try to corroborate the results of the tests prior to airing the *Marketplace* Report.

[32] The record submitted by Subway contains a substantial amount of evidence indicating that the Trent laboratory tests were of limited or no value in determining the chicken content of Subway's products. Dr. Rainer Schubbert, an expert on food testing using DNA-based methods, swore an affidavit on this motion addressing the scientific methodology of the tests and the conclusions reached by Trent. He concluded that the tests conducted by Trent were fundamentally flawed and inconsistent with the standards of practice in the food science industry. Dr. Schubbert testified that the tests could not have accurately determined the amount of animal versus plant DNA in Subway's products, and that they were not capable of determining the proportions of chicken versus plant content in the chicken products.

[33] Dr. Schubbert also deposed that, separate from what he identified as the substandard methodology used by Trent, the laboratory tests did not yield the conclusions that CBC attributed to them in the *Marketplace* Report. According to Dr. Shubbert, the tests actually revealed that the Subway's chicken products contained on average less than 1% soy DNA and not the approximately 40-50% soy DNA as reported by CBC. He also opined that Trent breached the standards of a reasonably competent lab carrying out DNA quantification analysis. He went on to identify the fact that Trent's lab was not properly accredited for the testing in which it engaged, and that it did not keep the kind of documentary record of its tests that one would expect of a reasonably competent lab.

[34] In addition, Dr. Schubbert reviewed the food composition tests that Subway commissioned from accredited labs following the broadcast and publication of the *Marketplace* Report. It was his view that these independent lab tests indicated that the chicken products in question contained only a few parts per million of soy. These results are consistent with the amount of soy listed in the ingredient specifications followed by Grand River for Subway's chicken products.

[35] To make a case in libel, Subway must establish three elements: (a) the impugned statements refer to it; (b) the statements were published (or broadcast) to a third party or to the public at large; and (c) the statements complained of are defamatory in the sense that they tend to lower Subway's

reputation in the community from the viewpoint of reasonable persons: *Grant*, para 28. The first two elements are not in dispute, although the third element – the defamatory character of the statements made about Subway's chicken sandwiches in the *Marketplace* Report – are contested by CBC.

[36] The test for determining whether the statements are defamatory is an objective one. The question of defamation does not turn on CBC's intent in broadcasting or publishing the impugned statements. Courts across Canada have pointed out that the "threshold for finding that a publication is defamatory is not particularly high": *Color Your World Corp v Canadian Broadcasting Corp* (1998), 156 DLR (4th) 27 (ONCA); *Wang v British Columbia Medical Assn*, 2013 BCSC 394, at para 24, aff'd 2014 BCCA 162.

[37] The *Marketplace* Report was aimed at the consuming public, not at a specialized audience with technical competence in DNA analysis. The relevant meaning to attribute to the impugned statements is the impression an ordinary, reasonable person without specialized knowledge of the subject matter would infer. In view of this test, it is not difficult to conclude that the impugned statements bear the defamatory meaning that Subway has pleaded – i.e. that its chicken sandwiches contain less than 50% chicken. This message would tend to lower the reputation of Subway in the eyes of reasonable persons.

[38] Following the broadcast and online publication of the *Marketplace* Report, a number of other publications recycled the message that Subway's chicken products contained less than 50% chicken. These republications were the "natural and probable result of the original publication": *Black v Breeden*, [2012] 1 SCR 666, para 20.

[39] The case law on libel provides that the original author, CBC, will be liable for third-party republication where "they convey the same defamatory message as the defendant's original statement, whether or not the messages are stated to be verbatim quotes": *McNabb v Equifax Canada*, 93 ACWS (3d) 238, para 22. This is the case regardless of whether the further publications engaged in "some slight alterations to the republication" as long as "the sense of the original publication is still the same": Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd edn. (Toronto: Thomson Reuters Canada, 2017) (loose-leaf release 2019-3), ch. 7.5 (1).

[40] The 'merits' stage of the s. 137.1 analysis does not require a full adjudication of the claim on its merits. The section "provides a judicial screening or triage device designed to eliminate certain claims at an early stage of the litigation process": *Pointes Protection*, para 73. Accordingly, I am not mandated at this stage to determine whether Subway has a winning case. Rather, I have to determine whether its claim has more than a mere chance of winning. In the Court of Appeal's words: "A claim has 'substantial merit' for the purposes of s. 137.1 if, upon examination, the claim is shown 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": *Ibid.*, para 80.

[41] On the state of the record before me, Subway has successfully passed this stage of the s. 137.1(4) test. While I make no definitive finding, there is considerable evidence that suggests the false and harmful nature of the information conveyed to the public in the *Marketplace* Report.

[42] On an objective reading of the impugned statements identified in the CBC broadcast and publication, these alleged falsities went directly to Subway's business reputation as a purveyor of food. In supporting its claim, Subway has done a significant amount of work in obtaining expert evidence, in having the chicken products in question tested and re-tested by independent laboratories, and in demonstrating the wide circulation of the CBC's broadcast and publication.

[43] Subway's claim against CBC has substantial merit for the purposes of s. 137.1(4)(a)(i) of the *CJA*.

b) Doe CBC have a valid defence?

[44] CBC's defence to the libel claim is that of responsible communication. To establish that defence, CBC must satisfy a two-part test. In the first place, the *Marketplace* Report generally, and the impugned statements in particular, must be on a matter of public interest: *Grant*, para 126. As set out at Part II above, this element of the test is already satisfied.

[45] Second, in order to raise a responsible communication defence, CBC must demonstrate that it was reasonably diligent in the steps taken to validate the accuracy of the factual statements made in the *Marketplace* Report: *Ibid.* Given the strength of the evidence that Subway has collected, this is the more challenging portion of the s. 137.1(4)(a)(ii) test.

[46] The responsible communication defense does not require CBC to establish that its reporting was accurate, although accuracy can of course add to the sense of diligence that the media brought to bear on the subject: *Casses v Canadian Broadcasting Corporation*, 2015 BCSC 215, paras 498-530. What CBC must demonstrate is that its efforts in gathering and communicating the impugned information were responsible: *Gant*, para 122. The Supreme Court has observed that "sometimes the public interest requires that untrue statements should be granted immunity, because of the importance of robust debate on matters of public interest": *Ibid.*, para 55.

[47] There is considerable divergence between Subway's evidence and that of CBC regarding the diligence of CBC's efforts to be accurate. CBC says that it chose Trent, a reputable university laboratory that operates independently and was open to being scrutinized by outside experts. CBC and Trent contend that Trent ran multiple tests on the Subway products and those of its competitors, and consistently found that Subway's chicken was an outlier in having substantially more plant DNA than the others. CBC also states that it retained an outside expert in DNA testing, Dr. Robert Hanner, who confirmed that Trent's laboratory methodology and results were credible.

[48] Perhaps most importantly, CBC submits that it gave Subway ample time to respond to the *Marketplace* Report before it went to air and that Subway declined. According to CBC's evidence, Subway's only response was to indicate that its chicken was supplied by a third-party source – Grand River – and that as far as Subway is concerned, the chicken products are produced in accordance with Subway's specifications. In an email sent from a Subway representative to the CBC less than a week before the February 24, 2017 airing of the investigation, Subway provided its response to the DNA test results that had been forwarded to it by CBC several weeks previously:

> SUBWAY Canada cannot confirm the veracity of the results of the lab testing you

had conducted.

However, we are concerned by the alleged findings you cite with respect to the proportion of soy content. Our chicken strips and oven roasted chicken contain 1% or less of soy protein. We use this ingredient in these products as a means to help stabilize the texture and moisture. All of our chicken items are made from 100% white meat chicken which is marinated, oven roasted and grilled.

Finally, all of our chicken items (and every item on our menu, for that matter) are inspected by the Canadian Food Inspection Agency, and all of our offerings meet or exceed CFIA standards. The same holds true for all Canadian and U.S. labelling requirements.

[49] CBC responded the next day and explained that two rounds of DNA testing had been conducted on Subway's products, and that those tests indicated that it was "unreasonable to say Subway uses 1% or less soy protein in the chicken". Subway was again asked for its response:

So we're asking Subway, once again -- what is the exact DNA content in the chicken strips and oven roasted products? What is the proportion of all ingredients used? What type of soy protein (specifically) is being used? If you can provide any additional information you think will clarify the matter, please do.

[50] In response, the Subway representatives provided a further statement:

Again, we disagree with your test results. Our recipe calls for 1% or less of soy protein in our chicken products. We tested our chicken products recently for nutritional and quality attributes and found it met our food quality standards. We will look into this again with our supplier to ensure that the chicken is meeting the high standard we set for all of our menu items and ingredients.

[51] A paraphrased version of Subway's responses was included in the *Marketplace* Report. Subway declined to provide any further responses, or to supply its own test data to the CBC. No representative of Subway appeared in the CBC broadcast.

[52] Counsel for CBC submit that this exchange is significant in assessing the strength of its responsible communication defense. They analogize Subway's response (or near lack thereof) to that of the plaintiff in *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689, where the plaintiff had refused to respond to allegations of past criminal conduct. The Court of Appeal reasoned that the media had given the plaintiff ample opportunity to respond to the comments about him, and that this fact is "entitled to considerable weight in assessing the responsible communication defence": *Ibid.*, para 45.

[53] Generally speaking, providing the target of the publication a right to respond speaks not only to diligence but to fundamental fairness. In *Grant*, para 16, the Supreme Court observed:

In most cases, it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond. Failure to do so also heightens

> the risk of inaccuracy, since the target of the allegations may well be able to offer relevant information beyond a bare denial [citations omitted].

[54] CBC's counsel submits that providing Subway with an opportunity to respond with a live interview, which Subway declined, fulfilled the journalistic obligation to give all sides of the story an opportunity to be heard. It forms an important part of what CBC says made its communication of the story a responsible communication.

[55] On the other side of the coin, Subway contends that CBC had numerous warning signs indicating that the Trent laboratory results were unreliable. In view of those "red flags", Subway argues that CBC could have taken a number of precautionary steps that it either ignored or refused to take. Among the warning signs about the Trent testing that CBC disregarded, Subway identifies several that are potentially quite significant:

(a) CBC knew that accreditation of a laboratory by the International Organization for Standardization ("ISO") was important, but declined to have an ISO-accredited lab conduct testing;

(b) Trent had not done this type of testing before;

(c) Dr. Robert Hanner, an expert retained by CBC, expressed concerns both before Trent started doing the testing and after Trent delivered its preliminary analysis about whether Trent could determine the percentage of chicken in a sample;

(d) The testing took months to complete, with a litany of excuses from Trent as to why they were not completed;

(e) Subway disputed the tests; and

(f) CBC spoke to a confidential source from Grand River regarding the composition of the chicken sandwich products. That source did not corroborate the results of the Trent tests.

[56] CBC concedes that a high degree of diligence was required, given the severity of the allegations and their likely impact on Subway. The record reveals that once CBC learned of Subway's objection to the test results, its personnel redoubled their efforts to verify those results. In a transcript of a telephone call on February 13, 2017 between CBC and Matthew Harnden of Trent, CBC learned that, "it varies enough that you couldn't be able to report accurately 50 per cent because it could go plus or minus 50 per cent, depending on water weight or whatever is in there." The wording of the *Marketplace* Report was framed to reflect this potential margin of error.

[57] The fact that CBC retained Dr. Hanner as its own independent expert to review the Trent findings is a reflection of its understanding of the need for diligence. Indeed, the concerns expressed by Dr. Hanner after reviewing Trent's methodology and results were quite significant. CBC argues that this serious level of inquiry establishes Dr. Hanner's independence and the fact that he was not brought on board by CBC in order to rubber stamp the Trent lab results.

[58] It was Dr. Hanner who pointed out to CBC that Trent was not ISO certified, and should be. In his email to CBC on February 9, 2017, Dr. Hanner stated: "If you are interested in doing more of this sort of work in the future, I can direct you to a facility that is ISO 17025 certified (e.g. for DNA-based analysis) that can provide clinical diagnostic data that could stand up in court. The report that you have been given will not."

[59] On that same date, Dr. Hanner expressed concern not only about the quality of the laboratory, but the nature of its test results. His email to CBC indicates: "You need to be aware these results could easily be over-stated as the methods (as reported) do not stand up to scrutiny because they lack detail and appear to contain conflicting details (e.g. on gene target used for animals)." In a telephone interview with CBC, Dr. Hanner emphasized that, "DNA alone is probably not the answer."

[60] Subway notes that this conclusion adds strength to its observation that even Trent does not purport to give an opinion on what the DNA results actually mean from the consumer's point of view. The invoice issued by Trent to CBC for the lab work states: "will provide a final report that will show the amount of chicken as a percentage in each sample." Trent never did provide that information.

[61] Having said all of that, Dr. Hanner eventually gave a tempered approval to the test results. After receiving more detailed information about the Trent laboratory's methodology and testing, he sent a follow-up email to CBC on February 11, 2017. That final evaluation before the publication date did not exactly approve of the percentages that Trent came up with or that CBC eventually broadcast and published, but it did confirm that the Trent results were reliable enough to allow a comparison between all of the restaurant products that they tested in the same way:

> I am happy with the follow up report and am pleased that they acknowledge that they are reporting DNA ratios and that they cannot be taken as exact mass ratios in the product – but are indeed good indicators that Subway has much more soy in their product than the others…

[62] CBC did not communicate with Dr. Hanner again until after broadcast of the *Marketplace* Report. On March 1, 2017, a week after the broadcast and online publication, Dr. Hanner sent an email to CBC explaining his view in greater detail. Subway relies heavily on this final communication to indicate that CBC had not done all the due diligence it needed to do before going public with the Trent test results. Dr. Hanner's *ex post facto* email stated:

> I do want to come back to this issue of processing. If for some reason their chicken has experienced heavy processing that degrades DNA while the soy has not, it will make the soy seem over-represented, unless manufacturers are willing to allow us to test ingredients at different points along the production process to determine whether and to what extent that DNA may be degraded, it becomes challenging to extrapolate DNA ratios to ingredient mass ratios. So, to comfortably say their claim of 1% or less soy is 'unreasonable' without knowledge of the manufacturing process might be over-stepping what we can say from the data.

[63] CBC did not get this communication from Dr. Hanner in time to have used the information conveyed therein in the *Marketplace* Report itself, but it did take the message seriously. On March 1, 2017, it posted an online, post-publication follow-up story entitled, "Subway defends its chicken". This story, posted on CBC's *Marketplac*e blog, included Subway's own test results. The article concedes that DNA testing is "nuanced" and does not reveal percentages, and explains that Subway's own laboratory tests showed a 1% soy content in the chicken products.

[64] It is CBC's view that Subway's testing does not counter its report of Trent's testing, since the 1% soy content does not indicate how much of the product is actually chicken. By publishing this follow-up article, however, CBC concedes that Subway's own laboratory results are important for its readership to know. In addition, CBC posted on this blog all of its correspondence with Subway's representatives.

[65] Although the post-publication postings do not constitute a retraction or an apology to Subway, they do indicate that CBC was not intentionally ignoring Subway's concerns. They can be seen as an indicator that CBC was neither cavalier nor intentionally injurious in publishing the *Marketplace* Report in the first place. They may also reduce any negative impact of the initial *Marketplace* Report and its accompanying online article: see *United Soils Management Ltd. v Mohammed*, 2019 ONCA 128, para 25.

[66] In this type of motion, it is not necessary to determine whether the responsible communication defence will ultimately be successful. As already indicated, under s. 137.1(4)(a)(ii) of the *CJA* the burden is on Subway to demonstrate that there are reasonable grounds to believe that CBC has "no valid defence" to its claim: *Pointes Protection*, para 83. In other words, it must show on a balance of probabilities that, "[a] reasonable trier on this record could not be satisfied that [the defendant] did not have a valid defence of responsible communication": *Armstrong*, para 52.

[67] In *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166, the Court of Appeal further refined the onus on a plaintiff in satisfying the s. 137.1(4)(a)(ii) requirement. The Court explained that a party in Subway's shoes need not entirely eliminate the very possibility that a defence might be successful. After all, that would require a full trial of the issue raised by the defence, and would not be an appropriate test for a motion that has been fashioned as a "triage"-like vetting of the case. Rather, in *Bondfield*, para 15, the Court stated that a plaintiff "would meet that onus if it showed that a reasonable trier could reject all of the various defences put in play by the [defendant]."

[68] In making that assessment with respect to the CBC's responsible communication defence, the Supreme Court's reminder about journalistic context is germane to the analysis: "[T]he decision to include a particular statement may involve a variety of considerations and engage editorial choice, which should be granted generous scope": *Grant*, para. 118. This deference must be brought to bear in defining the contours of the defence and its potential success.

[69] Subway has mounted a weighty attack on CBC's reportage. Its evidence on this motion comes to 14 volumes, including 10 affidavits from 8 witnesses. That effort itself raises a question as to how to approach a s. 137.1 motion.

[70] In *Hamlin v Kavanagh*, 2019 ONSC 5552, para 45, Cavanagh J., citing *Pointes Protection*, para 78, reminded us that, "The motion judge must be careful that a s. 137.1 motion does not slide into a *de facto* summary judgment motion". He reasoned that the approach to be taken must be appropriate to the more limited merits analysis engaged in under section 137.1(4)(a). Justice Cavanagh then described the paucity of evidence from the defendant and went on to conclude, at para 81, that he was satisfied that "a trier could reasonably conclude that the defendants did not conduct a sufficiently diligent investigation… [and] that a trier could reasonably concluded that the defence of responsible communication would not succeed": *Ibid.*

[71] The present case is analogous to *Hamlin* in terms of the large quantity of evidence adduced by Subway as plaintiff. It is not analogous to *Hamlin*, however, in terms of the quantity of evidence adduced by CBC as defendant. Here, Subway and CBC have both gone to great effort to support their side of the case.

[72] Having said that, Subway has not really countered the crux of CBC's responsible communication defence. For the most part, Subway's voluminous evidence is aimed at demonstrating that its own testing by Maxxam and Elisa technologies was more accurate than Trent's and therefore more accurate than what CBC reported. Although Subway's counsel accuses CBC of ignoring the evidence that Subway itself put forward, that evidence alone does little to counter the substantial efforts that CBC put into trying to verify its information.

[73] Trent may or may not have engaged in faulty testing – that remains to be discussed in Part IV below. However, this is not a case like *Hamlin*, where one side failed to produce the evidence needed to make its point. It is likewise not analogous to *Serafin v Malkiewicz*, [2019] EWCA Civ 852 (CA), where the steps taken by the defendant to verify the information on which the published article was based were themselves problematic. There, the Court found that the defendant had made no attempt to contact people who might otherwise been able to verify its story, and had made no "reasonable inquiries" in that regard.

[74] The CBC, by contrast, made significant efforts to inquire into the veracity of the tests they were reporting. On the state of the record, I find it hard to conceive of a reasonable jury finding that CBC has no valid defense of responsible communication. CBC made inquiries of Trent staff – an already independent source – and hired its own expert to investigate and advise on Trent's methodology and results. These efforts to contact credible sources go a great way toward establishing the responsibility criterion that is fundamental to CBC's defence: see *Miller v Associated Newspapers Ltd.*, [2005] EWHC 557 (QB).

[75] CBC sought Subway's input into the article, and to the extent that it could given Subway's limited willingness to go on the record, it incorporated Subway's position into the *Marketplace* Report and the follow-up blog. CBC therefore went substantially down the road of accommodating Subway's concerns by providing the context in which the impugned statements about Subway's chicken products were made: see *Al-Fagih v H.H. Saudi Research & Marketing (U.K.) Ltd.*, [2001] EWCA Civ 1634, para 52. this is a far distance from the type of "bald retailing of libels" in which Subway accuses CBC of engaging: see *Prince Radu of Hohenzollern v Houston*, [2007] EWHC 2735 (QB).

[76] I am satisfied that a trier of fact could not reasonably concluded that CBC's defence of responsible communication would not succeed.

IV. The balance of harms between Subway and CBC

[77] My conclusion under s. 137.1(4)(a)(ii) of the *CJA* that CBC does have a potentially valid defence in the proceedings should, strictly speaking, end the analysis of CBC's motion. Section 137.1(4)(a) is conjunctive. Once a defendant clears the threshold public interest question in s. 137.1(3) of the *CJ*A, the plaintiff must satisfy both of the s. 137.1(4) criteria. If one of them is not satisfied by Subway then the action can be dismissed as against the defendant for whom that criteria is not satisfied – in this case, CBC.

[78] I am mindful, however, that the balancing exercise in s. 137.1(4)(b) has been characterized as "the heart of Ontario's Anti-SLAPP legislation": *Pointes Protection*, para 86. Both Subway and CBC have invested considerable energy in addressing the concerns espoused in this subsection of the *CJ*A. Accordingly, a brief discussion of the most prominent aspect of it is appropriate.

[79] Section 137.1(4)(b) embodies the final public interest hurdle for an anti-SLAPP motion. It requires the court to weigh the harm suffered by Subway as a result of CBC's broadcast and publication of the *Marketplace* Report against the harm suffered by the public if CBC's expression is not protected. The Court of Appeal has indicated that this balancing requirement "reflects the legislature's determination that the success of some claims that target expression on matters of public interest comes at too great a cost to the public interest in promoting and protecting freedom of expression": *Ibid.*

[80] It is Subway's position that the *bona fide* purpose of instigating this action was not to silence CBC on an issue of public interest, but to recoup losses it has sustained to its private, business interest. To this end, counsel for Subway has presented the evidence that exists at this stage of financial damage caused by the *Marketplac*e Report and its re-publication particularly in U.S.-based media.

[81] Monetary damages suffered or likely to suffered as a consequence of the alleged defamatory statements is a key feature in the assessment of the harm: *United Soils*, para 22. For the purposes of s. 137.1(4)(b), Subway can satisfy this criterion by presenting "potentially credible evidence of significant general and pecuniary damages attributable to the allegations": *Platnick v Bent*, 2018 ONCA 687, para 108. Furthermore, a s. 137.1 motion is "not the place to resolve the causal connection issue as it relates to the alleged damages": *Ibid.*, paras 106-108. It may therefore be sufficient for a temporal connection between the publication and the losses to be established: *Bondfield*, para 25.

[82] That said, there is authority from the Court of Appeal requiring a plaintiff to "provide material that can establish the causal link between the defendant's expression and the damages claimed": *Pointes Protection*, para 92. What is certainly true is that it is "not the motion judge's function to make a finding in respect of the scope of [the plaintiff's] damages claim": *Platnick*, para 108. In a s. 137.1 motion, damages are not required to be assessed by the same standard as they are at the end of a trial.

[83] Subway contends that it has incurred some $500,000 in legal fees (other than in this action) in dealing with the fallout from the *Marketplace* Report. That may sound like a significant amount, and indeed may well be a significant amount in some contexts, but it is not particularly large in the context of Subway's business: see *New Dermamed Inc. v Sulaiman*, 2019 ONCA 141, para 15. Subway is said to be the largest restaurant company in the world. It operates in multiple jurisdictions across the globe, and has incurred those legal fees in the context of a report that it says resulted in a $210 million loss. While the fees are large, they are not significant in the greater scheme of the case.

[84] Subway has also advanced a large claim for lost sales. It has delivered two reports from Susan Glass, a business valuator at KPMG, explaining those losses. In her initial report, Ms. Glass provided a preliminary estimate of the damages suffered by the Plaintiffs as a result of the Publications. She estimated Subway's damages due to lost sales in the United States to be in the range of $52.3 million and in Canada in the range of $1.5 million.

[85] There is no doubt in the record that the Subway chicken controversy has become well known. CBS's estimate of the audience for the *Marketplace* Report is in the range of 858,000 viewers. Subway's best estimate of the total impressions of this story, from every possible source, is an extraordinary 3 billion. The story was reported in, among other places, USA Today, New York Post, Brietbart News, and Perez Hilton. In the aftermath of the *Marketplace* Report, the chicken content of Subway's sandwiches became a frequent pop culture reference, apparently complete with a joke about the issue on Saturday Night Live.

[86] CBC counters this with the observation that it seems unlikely, even with the repetition of all or parts of the *Marketplace* Report in several U.S. news outlets, that a Canadian-based news magazine broadcast and publication would have such an overweight impact in the United States as compared with Canada. Counsel for CBC points out that the losses in Canada, even taking Subway's figures at face value, are very small given the size of the Subway global enterprise.

[87] Perhaps more to the point, CBC's position is that the U.S.-based losses asserted by Subway at this stage are greatly inflated. The record contains transcripts of conference calls held between Subway and its franchisees discussing the impact of the *Marketplace* Report which suggest that CBC may have a strong point in this respect.

[88] It would seem from these transcripts that by March 7, 2017, two weeks after the airing of the *Marketplace* Report, Subway had concluded that the broadcast and online publication had some small impact on sales in Canada, but that bad weather was the primary factor affecting Canadian sales post-*Marketplace* Report. In the United States, a much bigger market, it did not appear to the Subway representatives on that call that the *Marketplace* Report had any noticeable impact on sales. Subway's best understanding was:

> [I]n Canada there probably is a little bit of an impact, very difficult to say what the magnitude is. And the United States, I have a difficult time saying that any impact is clearly attributable to the chicken at this point.

[89] Subway also monitored the social media impact of the *Marketplace* Report. By March 7, 2017, it had concluded and expressly noted that "from a social commentary standpoint, it's no longer an important story that's out there." The social conversation volume in the US had diminished to "a few dozen" comments. Despite these conclusions expressed internally to its franchisees, Subway shortly thereafter issued a Notice of Action claiming $210 million in damages.

[90] In their factum, counsel for CBC submit that, "The disconnect between the amount claimed and Subway's internal assessment constitutes another hallmark of a SLAPP." In oral argument, CBC's counsel posed this as a rhetorical question: "Why is Subway bringing such a large claim when their own analysis was that the damage was rather light?"

[91] CBC's counsel contends that Subway has brought its substantial financial clout to bear on pursuing a damages claim that is out of all proportion to its realistic losses, with the aim of silencing its critics such as CBC. It is CBC's submission that this use of financial might is in keeping with Subway's generally litigious tendency to use every effort to keep criticism or consumer protection investigation at bay.

[92] Counsel for Subway takes issue with that characterization. They submit that although Subway has a number of past and ongoing lawsuits, there is no indication anywhere that each of those actions represents in its own context anything other than a legitimate business claim. In any case, even to the extent that those unrelated actions are aimed at redress for false speech, I am compelled to say, as the Supreme Court itself has said, that there is nothing inherently wrong with that type of litigation: *WIC Radio Ltd. v Simpson*, [2008] 2 SCR 420, para 15.

[93] Subway's counsel further indicate that Ms. Glass' figures are in the nature of preliminary assessments, and will doubtless vary with the final expert report to be submitted if this matter were to proceed to trial. They submit that the court must be able to make a "ballpark" estimation of damages, not a precise assessment, and that in retaining a damages expert at this early stage they have avoided the pitfall of providing a bald, unsourced statement of losses: *Pointes Protection*, para 91.

[94] While I understand and agree with much of what Subway submits on this point, I am puzzled as to how to answer CBC's rhetorical question. CBC says that Subway is using litigation as an intimidation tactic to chill any further consumer reports or investigations of its products, and that the sheer magnitude of the claim is part and parcel of that objective. I cannot dismiss that explanation out of hand.

[95] On the other side of the s. 137.1(4)(b) balancing exercise, it is incumbent on me to "assess the public interest in protecting the actual expression that is the subject matter of the lawsuit": *Ibid.*, para 93. The 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.

[96] It is CBC's view that it is performing an important public service in investigating and reporting on these types of issues which impact a broad swath of the public but which no one

member of the public could take on and expose alone. Counsel for CBC submit that it is necessary to preserve that public function, and that the Court must do so by ensuring that libel suits do not effectively put a chill on all such investigative journalism of large corporate suppliers of food and other consumer goods.

[97] CBC's perspective on Subway's claim against it accords with the underlying objective of the anti-SLAPP policy enacted in s. 137.1 of the *CJA*. The section itself begins with a statement of its own the purposes:

> (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.

[98] Under the circumstances, I find that these public purposes are fulfilled by dismissing the action as against CBC. They outweigh any potential impact that this may have on the private interest of Subway.

V. The motion by Trent

[99] Subway's claim against Trent is based on two causes of action: defamation and negligence. The defamation claim is related to the participation of Trent personnel in the *Marketpla*ce Report and the reporting of its test results, while the negligence claim alleges that Trent engaged in faulty laboratory testing of Subway's chicken products resulting in erroneous conclusions about the content of those products.

Adopting an unusual legal strategy, Trent's anti-SLAPP motion is aimed solely at the negligence claim. Even if Trent were entirely successful on the motion it has brought, Subway's claim against it would remain alive but be limited to defamation alone. In their factum, counsel for Subway characterize this approach as "transparently tactical", which may be the case, although that motivation does not directly impact on the analysis to be pursued here. Either Trent has a meritorious argument that Subway's negligence claim runs afoul of s. 137.1 of the *CJA*, or it does not have a meritorious argument.

a) Are Trent's lab tests a matter of public interest?

[100] In *Grant*, para 52, the Supreme Court of Canada held that the need to protect the public interest rests on two rationales: the "proper functioning of democratic governance" and the "chilling effect on what is published." In fashioning this threshold part of the anti-SLAPP policy, the legislature has "recognized the need to protect and foster a broad spectrum of expression relating to matters of public interest": *Pointes Protection*, para 29. Section 137.1 of the *CJA* was enacted to ensure that litigation not be permitted "to suppress the kind of democratic expression

that is crucial for our democracy": *Ibid.*, para 33, quoting Ontario, Legislative Assembly, *Official Report of Debates* (Hansard), 41st Parl, 1st Sess, No 41A (10 December 2014), pp. 1971-72.

[101] It is therefore uncontroversial to say that s. 137.1 is focused on freedom of expression. For this obvious reason, the Court of Appeal has observed that, "Defamation lawsuits, perhaps because of the relatively light burden the case law places on the plaintiff, have proved to be an ideal vehicle for SLAPPs": *Pointes Protection*, para 3.

[102] Negligence actions, on the other hand, have not proved to be such an ideal vehicle for SLAPPs. Like actions in contract, they are aimed at conduct rather than at speech, and the arguments of each side take on a correspondingly different form. There is typically no justificatory defence to a contractual breach or to negligent conduct. Rather, in contract and tort one cannot readily distinguish between the ingredients of the alleged wrongdoing and the defences that might be raised: *Ibid.*, para 71.

[103] In terms of the merits of the action, Subway claims that Trent's laboratory testing was incompetent and fell below the applicable standard of care. Trent says that its laboratory tests were administered competently and in accordance with the requisite standard of care. Unlike in defamation claims, where defamatory language can be justified as "responsible communication", there is no "clear demarcation between the elements of the tort that the plaintiff must prove, and the various affirmative defences that the defence must prove if the plaintiff meets its initial onus: *Ibid.*, para 72, citing *Grant*, paras 28-29.

[104] Accordingly, the terms of s. 137.1 of the *CJA* are an awkward fit for claims which are framed other than in defamation-related torts such as libel and slander. The legislative purpose is to protect free and democratic expression, not conduct at large, and the statute is correspondingly designed to address expressive torts, not wrongdoing at large.

[105] The recent sextology of cases from the Court of Appeal aptly demonstrates the point. A defamation action taking aim at Facebook postings about a car accident is appropriately subject to a s. 137.1 analysis, *Veneruzzo v Storey*, 2018 ONCA 688, whereas negligent driving itself is not. An email posted on a widely circulated listserv alleging a physician's misdiagnosis is understandably subject to s. 137.1 analysis, *Platnick*, *supra*, whereas medical malpractice itself is not. Commentary on Twitter criticizing real estate companies engaged in mortgage syndication is properly the subject of a s. 137.1 analysis, *Fortress Real Developments Inc. v Rabidoux*, 2018 ONCA 686, a consultant's faulty property market analysis itself is not.

[106] In a similar vein, social media statements accusing a person of sexual assault and bullying conform with a s. 137.1 analysis, *Armstrong*, *supra*, whereas an allegation of sexual assault itself does not. Internet postings alleging that a competitor mistreats employees is an apt subject for s. 137.1 analysis, *Able Translations Ltd. v Express International Translations Inc.*, 2018 ONCA 690, workplace infractions themselves are not. Statements before an administrative body regarding environmental protection fit within the framework of a s. 137.1 analysis, *Pointes Protection*, *supra*, whereas allegations of breach of a settlement agreement for the administrative proceeding do not.

[107] The common thread among these cases is that while the defamation claim may or not be an attempt to chill expression on a matter of public interest, the alleged wrongdoing that is the subject matter of the expression is not. Claims alleging negligent driving, medical malpractice, faulty advice by a consultant, mistreatment of employees, breach of contract, etc. all raise potential causes of action, but none of them pose the kind of freedom of expression issues at which s. 137.1 of the *CJA* is directed. They are not themselves SLAPPs and are therefore not subject to a s. 137.1 anti-SLAPP motion.

[108] All of which raises a fundamental question about Trent's s. 137.1 motion against Subway. As indicated, Trent moves here for dismissal of the negligence claim against it but not the defamation claim. It would be conceivable that the part of Subway's suit against Trent alleging defamatory speech by its personnel when interviewed on the *Marketplace* Report amounts to an attempt to chill a message of public interest. But that question is not before the court. It is far more difficult to conceive that the part of Subway's suit against Trent alleging negligent laboratory work amounts to an attempt to chill any message at all.

[109] I pause here to note that counsel for Trent take the view that it is the reporting of the laboratory tests, and not the tests themselves, that is the crux of Subway's claim. As they explain it, no harm was caused to Subway by the tests even if they were substandard and faulty; rather, the wrong came about because of the conveying of the test results to CBC. In making this point, they rely on the Alberta Court of Queens Bench decision in *Fulton v Globe & Mail* (1997), 152 DLR (4th) 377, para 18, which held that research that never gets disseminated "gives rise to no legal consequences in that no damages can flow from unpublished negligent research."

[110] With respect, in focusing on the publication of the lab test results rather than the test itself, Trent is in effect turning its attention to the defamation claim and away from the negligence claim. In order to give effect to the way in which Trent has framed its motion, one must isolate the claim of negligence. From that perspective, the dissemination of the research is a step in the process taken by Trent to fulfill its engagement by CBC, but that is not the site of the negligence.

[111] Subway claims that Trent owed it a duty of care in conducting laboratory tests on Subway products, and that in falling below the requisite standard of care it breached this duty. The dissemination of the lab results to CBC is, from the perspective of the negligence claim, beside the point.

[112] Like virtually all negligence claims, Subway's negligence claim against Trent is aimed at remedying what the claimant alleges is faulty workmanship or conduct. Subway could have the same negligence claim even if the substandard testing was disseminated only to Subway itself, thereby eliminating any defamation claim. In that case the damages might flow from a different type of harm – e.g. changing the production process unnecessarily – but the cause of action in negligence would nevertheless be focused on Trent's laboratory and testing standards, as it is here.

[113] The point of the negligence suit is to hold the laboratory to the appropriate scientific and professional standard, and not to prevent its reporting of test results. Trent's reporting is not alleged to have been substandard, its laboratory methodology is.

[114] The public has an interest in seeing that chemistry laboratories are held to an appropriate standard of care in the same way that it has an interest in seeing that doctors, car drivers, real estate consultants, etc. are held to a standard of care appropriate to their industry or activity. But a medical malpractice claim against a physician or a personal injury claim against a driver does not itself raise matters of public interest in the way it is understood in the defamation and anti-SLAPP context.

[115] If it were otherwise, any malpractice or negligence clam could potentially be dismissed under s. 137.1 of the *CJA*. As with the negligence branch of Subway's claim here, those types of claims do not go beyond the general interest in resolving "a private quarrel or personal allegations", and do not challenge "free expression on a matter of public interest": *Pointes Protection*, para 34, quoting Ontario Legislative Assembly, *Official Report of Debates* (Hansard), 41st Parl, 1st Sess, No 112 (27 October 2015), p. 6017. The anti-SLAPP legislation seeks to prevent the chilling of speech, not the chilling of medical treatment, automobile driving, or laboratory testing.

[116] As moving party, Trent has failed to satisfy the court that Subway's negligence claim against it "arises from an expression made by the person that relates to a matter of public interest" as required by s. 137.1(3). Trent's motion has therefore not crossed the threshold for an anti-SLAPP motion, and it can be dismissed on this ground alone.

b) Does the claim against Trent have substantial merit?

[117] Since Trent has not passed the s. 137.1(3) hurdle there is no need to go into the two-part merits test under s. 137.1(4) of the *CJA*. However, it is worthwhile engaging in a brief analysis of this challenge to Subway's negligence claim if only to make some further observations about the way in which the anti-SLAPP provisions are deployed in Trent's motion.

[118] Counsel for Trent submit that the problem with Subway's negligence claim is that Subway was not Trent's customer in hiring the lab, and that therefore there is no duty of care owed by Trent to Subway. They argue that without an established duty of care, Subway cannot succeed in its negligence claim and that it must fail the first branch of the merits test.

[119] Trent's counsel characterizes this argument as akin to a motion to strike the claim under Rule 21 of the *Rules of Civil Procedure*. That is, if there is no duty of care then there is no valid cause of action in negligence and the negligence action must be dismissed under s. 137.1 in much the same way as it would be struck out under Rule 21.01. In keeping with this view, counsel for Trent have put forward no evidence on the motion. They contend that the entire point can be addressed on the pleadings and as a matter of law.

[120] Trent's counsel argue that the relevant case law does not recognize a duty of care to third parties in negligence cases. They cite *Hercules Managements Ltd. v Ernst & Young*, [1997] 2 SCR 165, para 125 for the proposition that reasonable foreseeability of a person suffering losses is not sufficient to ground a negligent misrepresentation claim absent detrimental reliance by that person. They label Subway's negligence claim a "dressed up defamation" claim: see *Avalon Rare Metals Inc. v Hykawy*, 2011 ONSC 5569, para 4. They submit that a negligence claim is both superfluous

and improper where a defamation claim covers the same ground: *Byrne v Maas*, 2007 CanLII 49483 (SCJ).

[121] Counsel for Trent go on to analogize Subway's claim to that of the plaintiff in *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2018 ONCA 407. In that case, franchisees of Subway's competitor, Mr. Sub, claimed to have suffered economic loss as a result of a notorious incident of bacterial contamination of Maple Leaf brand meats which Mr. Sub restaurants serve on a regular basis. The economic loss to the franchisees was claimed as flowing from the loss of goodwill that accompanied foods using Maple Leaf products. The Court of Appeal held, at para 68, that "the type of injury claimed – economic losses arising from reputational harm – did not fall within the scope of any duty owed to the franchisees."

[122] Subway's counsel counter this by pointing to the well known test for duty of care in *Anns v Merton London Borough Council* [1978] AC 728 (HL). That case, adopted by the Supreme Court of Canada in *Cooper v Hobart*, [2001] 3 SCR 537, held that absent some overriding policy consideration negating a duty of care, a *prima facie* duty in tort is established where the harm that occurred was a reasonably foreseeable consequence of a defendant's conduct and where there is a sufficient relationship of proximity between the perpetrator and victim. The Supreme Court in *Deloitte & Touche v Livent Inc.*, [2017] 2 SCR 855 reconfirmed that foreseeability and proximity are at the core of the duty of care analysis.

[123] Counsel for Subway submit that there are indeed grounds for establishing that a duty of care is owed by Trent to Subway. They point to the evidence in the record establishing that Trent staff went to Subway restaurants with CBC to purchase chicken products for testing, that they purchased the Subway products themselves, that they knew they were testing Subway products in particular, that they knew CBC intended to use the test results in the *Marketplace* Report, and that Trent's representatives appeared on the *Marketplace* broadcast. With all of that, Subway submits that it was reasonably foreseeable that negligent testing by Trent would cause harm to Subway.

[124] Subway's counsel go on to argue that there is nothing wrong with bringing a simultaneous negligence and defamation claim, and that the existence of a cause of action in defamation "does not negate the availability of a cause of action in negligence where the necessary elements are made out": *Young v. Bella*, [2006] 1 SCR 108, para 56. They also state that Subway is claiming actual business losses beyond reputational harm, and that in such a case "if proximity and foreseeability are established and the damages cover more than just damage to reputation, a negligence claim is possible": *R v Ottawa Crime Stoppers*, 2018 ONSC 4207, para 21.

[125] Counsel for Subway analogize Subway's claim to that of the plaintiff in *Haskett v Equifax Canada Inc* (2003), 63 OR (3d) 577 (ONCA), which held that credit reporting agencies owe a duty of care to the subjects of their reports. They also rely on *Correia v Canac Kitchens*, 2008 ONCA 506, which held that private investigation firms owe a duty of care to individuals who are the subject of their investigations, and on *Rubens v Sansome*, 2017 NLCA 32, which found that physicians hired by insurance companies to do an independent examination of an insured owe a duty of care to the patient being examined.

[126] At its most basic, Trent's position is that its duty of care in negligence is to CBC as its contracting party and that this duty is limited to the party with whom the laboratory contracted. Subway's position is that Trent's duty of care in negligence extends beyond CBC to Subway given not only the foreseeability of harm to Subway but the involvement of Trent personnel with Subway and the proximity of Subway, as the subject of Trent's laboratory testing, to the lab testing itself.

[127] As reviewed briefly above, there appears to be case law supporting both positions. While Subway's claim is not novel in the sense that there have been other analogous claims that have been tested by the court, the law is in a state of flux on the duty of care issue. This uncertainty alone makes Subway's negligence claim one that should not be dismissed at an early stage like this. The Supreme Court of Canada has stated that in such a case, "The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial": *R v Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45, para 21. I therefore would not dismiss Subway's negligence claim even if the motion to dismiss were properly brought by Trent.

[128] In my view, however, Trent's motion was not properly conceived and framed. As already discussed, Trent's counsel have specifically compared this motion under s. 137.1 to a motion to strike under Rule 21. Relying on *Rizvee v Newman*, 2017 ONSC 4024, para 141, they argue that "it is completely open to the court to halt any part of a claim that engages and satisfies the test for dismissal set forth in s. 137.1.

[129] In response, Subway submits that it is unfair for Trent to by-pass Rule 21 in this way. According to Subway's counsel, not only does Trent not even allege that the negligence claim is a SLAPP aimed at chilling expression and therefore a substantively poor fit with s. 37.1, but Trent has fashioned a procedurally unfair way to put the issue before the court. Counsel for Subway point out that in a motion under Rule 21.01(1)(b), the onus would be on Trent, as moving party, to demonstrate that Subway's pleading discloses no cause of action and must be struck. By contrast, in an anti-SLAPP motion, the onus is on Subway under s. 137.1(4)(a)(i) to defend its own pleading as part of the merits test.

[130] The reversal of onus that results from using s. 137.1 as its vehicle for challenging Subway's non-defamation pleading creates an unfair advantage for Trent. Section 137.1 is specifically designed to make it easier for a moving defendant to have the case dismissed. The reversal of onus, in which a plaintiff bears the burden of saving its claim from dismissal, is part of the policy of facilitating the dismissal of claims that are construed as SLAPP. Section 137.1 accomplishes its policy goals "by first, distinguishing between claims that arise from an expression that relates to a matter of public interest and other claims, and second, by providing for the early and inexpensive dismissal of claims based on expressions relating to matters of public interest": *Pointes Protection*, para 48.

[131] Trent cannot take advantage of the s. 137.1 mechanism as a means of challenging Subway's negligence claim. That claim does not entail expression relating to a matter of public interest, and so the s. 137.1 procedures, including the shifting onus, are inappropriate and should not be applied to Trent's motion.

[132] Subway's negligence claim has sufficient merit to sustain it at this stage, and, in any case, it is improperly attacked through s. 137.1 of the *CJA*.

c) Does Trent have a valid defence and what is the balance of harms?

[133] As indicated above, Trent has brought this motion on the basis of the pleadings alone, without evidentiary support. There is therefore no record on which to base any evaluation of Trent's case. It may or may not be able to support its laboratory methodology and results, but that cannot be determined here.

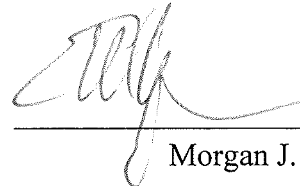
[134] The balance of harm is in Subway's favour since there is nothing to balance its evidence against. There is no public interest in the s. 137.1 sense in the way that Trent conducted its lab tests, and so any evidence of harm suffered by Subway is more than sufficient for present purposes. To put it simply, anything outweighs nothing.

VI. Disposition

[135] CBC's motion is granted; Subway's action against CBC is dismissed.

[136] Trent's motion is dismissed; Subway's action against Trent will proceed on its course.

[137] The parties may make written submissions with respect to costs. Given the mixed result, I would ask that all counsel have their submissions to me within two weeks of today. They should not exceed 3 pages. If any counsel feels a need to respond to another party's submissions after receiving them, I would ask that they do so within two weeks thereafter.



Morgan J.

Date: November 22, 2019

CITATION: Subway v. CBC, 2019 ONSC 6758
COURT FILE NO.: CV-17-571237
DATE: 20191122

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Subway Franchise Systems of Canada, Inc., Subway IP Inc., and Doctors Associates Inc.

Plaintiffs

– and –

Canadian Broadcasting Corporation, Charlsie Agro, Kathleen Coughlin, Eric Szeto and Trent University

Defendants

REASONS FOR JUDGMENT

Morgan J.

Released: November 22, 2019