November 20, 2008

The Honourable Chris Bentley
Ministry of Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, Ontario
M5G 2K1

Via fax

Dear Mr. Attorney General:

Re: Urgent Need for Anti-SLAPP legislation in Ontario

The Canadian Environmental Law Association (CELA) and Ecojustice Canada (Ecojustice) are writing to you to request that the government expeditiously enact legislation to protect the public from the threat of SLAPP (Strategic Law Suits Against Public Participation) suits for participating in lawful activities.

CELA is a public interest group founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a community legal aid clinic specializing in environmental law, CELA represents individuals and citizens' groups before both trial and appellate courts and administrative tribunals on a broad range of environmental issues. In addition to litigation, CELA undertakes public education, community organizing and law reform activities.

Ecojustice is an independent, non-profit organization supported by 30,000 Canadians. Founded in 1990 as the Sierra Legal Defence Fund, the organization has grown into the largest non-profit environmental law organization in Canada, with offices in Vancouver, Toronto, Ottawa and Calgary. Ecojustice lawyers have appeared at all levels of courts and have played an important role in shaping government environmental policy and practice in Canada.

The Impact of SLAPP suits on Public Participation

SLAPP suits are usually brought by corporate interests against individual citizens and community and public interest groups who do not have the financial means to fight the claims in court. SLAPPs are initiated by filing lawsuits based on ordinary civil claims such as defamation, interference with economic interests, interference with contractual

relations, conspiracy, trespass and nuisance. These suits often target those who engage in lawful activities such as reporting health or environmental violations, filing complaints with government agencies, circulating petitions, writing letters to government or business, speaking at community, environmental or land use planning meetings, providing information to the media, and engaging in public information campaigns. In addition, inflated requests for cost awards at administrative tribunal hearings are being used as a means of stifling opposition or criticism and represent a new dimension to the SLAPP phenomenon in the administrative law context.

A SLAPP suit can have a devastating impact on the individuals or groups who are targeted. Defending a SLAPP suit involves a substantial investment of money, time and energy on the part of those who are often the least equipped with the resources to fight an action in court. Instead of going through a costly litigation process, some SLAPP targets may abandon their opposition and cease to engage in public participation on the issue. Consequently, despite the fact that most SLAPP suits do not proceed to judgment they still succeed in the public arena by silencing debate on matters of public interest. Moreover, SLAPPs can also have a chilling impact on the willingness of other individuals and community and public interest groups, who although not directly involved in the SLAPP suit, may be intimidated and cease participating in the government's decision-making process or simply from expressing their view on matters of public interest, for fear they will also be sued.

Although SLAPP suits occur in relation to citizen involvement with a broad range of issues, they have been particularly prominent in relation to environmental matters. An article by Chris Tollefson, Professor of Law at the University of Victoria states that "SLAPPs directly threaten the core values of modern environmental law and policy: the right of citizens to participate in decision-making."[1] According to Professor Tollefson, "as public participation is enhanced both quantitatively and qualitatively so will the incentive increase for powerful interests to respond by bringing [SLAPP suits]."[2] A copy of Professor Tollefson's article is attached.

The Impact of SLAPP suits on Access to Justice

CELA and Ecojustice have both represented clients in relation to SLAPP suits and are aware of a number of other cases in Ontario where SLAPP suits have been brought against citizens and community and public interest groups for participating in the environmental and land-use planning process. Although not limited to environmental and land-use planning processes, we speak to these issues specifically as that is our area of expertise.

The increasing use of SLAPP suits in Ontario constitutes a significant barrier to access to justice for those members of the public who seek to participate in environmental law and policy matters. The public's participation in the environmental decision-making process

[1] Chris Tollefson, "Strategic Lawsuits Against Public Participation: Developing a Canadian Response" (1994) 33 *Can. Bar Rev*. 200 at 201.
[2] *Ibid*.

has often resulted in important precedents that protect the environment and natural resources and prevent unnecessary harm to human health. However, for many individuals and groups the cost of access to environmental justice is already prohibitively expensive because of the high legal fees and expert expenses required to participate in environmental matters. We are extremely concerned that the rise of SLAPP suits will further impair the public's ability to seek environmental justice and undermine its willingness to participate in the environmental decision-making process.

The Need for Legislative Reform

CELA and Ecojustice are firmly of the view that preventing the proliferation of SLAPP suits in Ontario can only be effectively accomplished through legislative reform.

In Ontario, the *Environmental Bill of Rights, 1993* ("*EBR*") was enacted to enhance public participation in the environmental decision-making process and promote citizen empowerment. In order to protect employees who participated in the *EBR* sanctioned processes from reprisals by employers, the Act provides for whistle blower provisions. However, the *EBR* does not provide any protection against the SLAPP phenomenon nor do any of the other environmental and land use planning laws in Ontario.

Moreover, since SLAPP suits typically arise in the context of disputes between ostensibly 'private' parties, the Charter of Rights and Freedoms cannot be directly invoked defensively by a SLAPP target. This contrasts with the United States where SLAPP targets have been able to rely on the First Amendment right to petition with considerable success.

According to Professor Tollefson, the existing rules of civil procedure in most jurisdictions are also of little assistance to "ensure a speedy dismissal of SLAPP suits" because the test for dismissal at the early stages is very onerous.[3] In Ontario, the Rules of Civil Procedure allow a court to grant summary judgment if the court is satisfied that there is no genuine issue for trial. In a motion for summary judgment, however, the court will not assess credibility, weigh the evidence, or find the facts. Accordingly, Ontario courts – like their counterparts in other jurisdictions, have been very reluctant to grant summary judgment motions.

The Experience in Other Jurisdictions

The SLAPP phenomenon is not unique to Canada. In recent decades, SLAPPs have been a major problem in the United States, where hundreds possibly thousands of SLAPP suits are filed each year.[4] To reduce the chilling impacts of SLAPP suits, it appears that at least 27 U.S. States and territories have enacted statutory protections against SLAPPs.[5] The New South Wales Law Reform Commission in Australia also recommended changes

[3] *Ibid.*, at 207.
[4] *Ibid.*, at 204.
[5] See www.casp.net/statutes/menstate.html, current to Nov 2007.

to discourage SLAPP suits.[6] More recently, the Australian Capital Territory enacted the *Protection of Public Participation Act 2008* (A.C.T.).

In Canada, the only province to enact anti-SLAPP legislation was British Columbia. Unfortunately, the law was repealed following a change in government. However, Quebec's Justice Minister Jacques Dupuis introduced a bill in the National Assembly on June 13, 2008 which proposed to amend Quebec's Code of Civil Procedure to prohibit SLAPPs. It is anticipated that this bill will pass as it has the support of both opposition parties and was recommended by a committee of experts last year.[7]

We urge the government to enact anti-SLAPP legislation to protect Ontarians in their lawful exercise of their political rights to engage in public debate and dialogue on matters of public interest. These measures are essential in order to safeguard citizens' participation rights which constitute the bedrock of our democratic system of government.

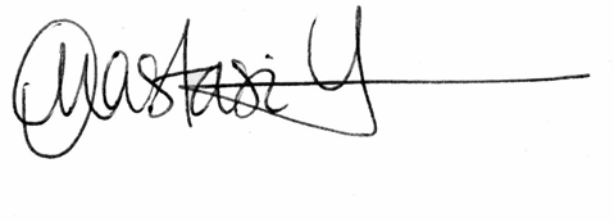
We recommend that you establish an expert panel to make recommendations regarding anti-SLAPP legislation for Ontario. We would also be pleased to meet with you or members of your staff to discuss this issue further.

Yours truly,

Canadian Environmental Law Association

Theresa McClenaghan
Executive Director and Counsel

Ecojustice Canada



Anastasia M. Lintner
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cc: Gord Miller, Environmental Commissioner of Ontario

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[6] Report 75 (1995), Defamation (www.lawlink.nsw.gov.au/lrc.nsf/pages/R75TOC). The NSW *Defamation Amendment Act 2002* took away the right of large corps to sue for defamation, but was repealed in 2004 (www.austlii.edu.au/au/legis/nsw/repealed_act/daa2002179/).

[7] Les poursuites stratégiques contre la mobilisation publique – les poursuites – bâillons (SLAPP), Rapport du comité au ministre de la Justice, 15 mars 2007 (French only).