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Breaking the Silence

The urgent need for anti-SLAPP
legislation in Ontario



CANADIAN ENVIRONMENTAL
LAW ASSOCIATION

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Legislation in Ontario

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Summary

Strategic Lawsuits Against Public Participation (SLAPPs) are on the rise in Ontario. This has been recognised by the Environment Commissioner of Ontario and various non-governmental organizations and municipalities across the province. It has also been acknowledged by the Ontario Government which recently convened an expert advisory panel to provide advice on how to design an effective anti-SLAPP law for the province.

This report examines the need for anti-SLAPP legislation that protects citizens from being exposed to these meritless lawsuits. The report concludes that the Ontario Government should enact anti-SLAPP legislation that includes the following three components:

- **RIGHT TO PUBLIC PARTICIPATION** – Anti-SLAPP legislation should include a statutory provision explicitly guaranteeing the right to engage in public participation. This should be framed broadly to cover the many different ways citizens and groups participate. It should protect all forms of public participation and provide broad immunity from civil liability for persons and groups engaging in public participation.
- **EARLY DISMISSAL MECHANISMS** – Anti-SLAPP legislation should include mechanisms to allow for early review and an expeditious process for summarily determining the matter as well as means to simplify and lighten the burden on the defendant to defend against the SLAPP, including the provision of financial assistance. There should be a reverse onus in summary dismissal proceedings so that the initiator of the lawsuit must show that the action is proper and has merit.
- **SLAPP DISINCENTIVES** – Anti-SLAPP legislation should provide strong disincentives, financial and otherwise, to dissuade potential SLAPP plaintiffs from initiating meritless claims. These include the authority of a court to award full indemnity costs and punitive damages against SLAPP plaintiffs and to require the officers and directors of a corporation which institutes a SLAPP to personally pay damages.

Anti-SLAPP legislation should include a statutory provision explicitly guaranteeing the right to engage in public participation.



The Need for Anti-SLAPP Legislation in Ontario

SLAPPs threaten and undermine well-established public participation rights by improperly using the judicial system to dissuade citizens from participating in public decision-making processes.

In an article published almost 16 years ago in the *Canadian Bar Review*, Chris Tollefson, professor at the Faculty of Law, University of Victoria, predicted that SLAPPs – which had been, for the most part, an American phenomenon – would ‘become a significant feature of the Canadian environmental law scene.’¹ Professor Tollefson’s prediction was borne out when approximately a decade later, a report by the Uniform Law Conference of Canada (ULCC) identified SLAPPs in Canada as an ‘observable reality [which] constitute a serious threat to the participation of citizens and groups in public debate.’²

SLAPPs are legal proceedings that have the principal effect of silencing public discussion on issues of public significance.³ They threaten and undermine well-established public participation rights by improperly using the judicial system to dissuade citizens from participating in public decision-making processes.⁴ The key to addressing SLAPPs is through a balanced approach that ensures citizens’ rights to public participation whilst preserving the rights of plaintiffs to pursue legitimate claims in court. Anti-SLAPP laws should neither protect nor support unscrupulous activists; but rather they should strive to ensure adequate and effective democratic decision-making, sustainable development and improved government regulation.

The power of a SLAPP comes from the use of the court system to intimidate the target and to exhaust its often-limited resources.⁵ It is not the strength of the case, but the threat of onerous and expensive proceedings which makes SLAPPs so harmfully effective. SLAPPs divert attention away from the discussion of a public issue and into the private courtroom. They often require enormous resources to defend against, particularly when the discovery process is used as a tool to harass and exhaust the resources of the defendant.⁶

Chilling Effect of SLAPPs

To be successful, anti-SLAPP laws must not only protect the targeted defendant, but also protect others who may want to engage in public participation.⁷ Often, despite being within their legal rights, SLAPP targets end up abandoning the advocacy work that triggered the suit. In fact, the mere threat of being sued is generally sufficient to intimidate a target into submission.⁸ But the impacts of SLAPPs does not end there. The fear of also being SLAPPed, deters other people from participating on the same or other issues of public interest. The direct effect of a SLAPP is often dwarfed by the indirect effect it has on other citizens and its impacts on the 'civic climate' – making it less conducive to participation by individuals and groups. Research indicates that 'SLAPP plaintiffs fail to win their cases 77-82 per cent of the time'.⁹ However, the failure of the SLAPP plaintiff to win the case does not counter the chilling effect it has on subsequent public participation. While the action is dismissed in the majority of SLAPPs that reach the courts, the real issue is the silencing effect it has on citizens who are sued and its impact on the public generally.¹⁰

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What is a SLAPP?

SLAPPs are sometimes difficult to conceptualize. A good example of a SLAPP is given in a recent article by Dr. Catherine Norman of John Hopkins University. She describes a SLAPP in the following way:

Marc walks his dog by the canal twice a day. One day, he notices that the water smells foul and that there are several dead fish near the trail. He walks upstream until he finds an outflow pipe at a local manufacturing facility that seems to be the source of the odour. He notes the name, calls up his State EPA to complain, writes a letter to the editor for the local paper suggesting that the company ought to be shut down, and posts a few outraged status updates on a social networking page.

A few days later, Marc gets a call. He is being sued by the company for defamation, and they are asking for damages of \$2.4 million dollars. He will need a lawyer, at considerable expense. Until the matter is resolved, he will have a hard time getting credit or a mortgage. Eventually, a judge will likely throw the case out, because all of Marc's actions constitute protected speech [in the US], and the Judge may well require the company to pay Marc's legal costs – but 'eventually' and 'likely' and 'may well' are not especially consoling to Marc. When this is over, he will never do anything like it again. Perhaps more saliently, his example will serve as a warning to other citizens or groups who might otherwise speak out on matters of public interest and governance that doing so could mean facing significant personal liability as well as the expense and risk of standing trial.

See Catherine S. Norman, 'Anti-SLAPP Legislation and Environmental Protection in the USA: An Overview of Direct and Indirect Effects', 19:1 *Review of European Community and International Environmental Law* (2010), 28, at 28.

Impact on Public Participation and Governance

Anti-SLAPP measures ensure that the processes by which citizens participate in governance are guaranteed and protected. They protect the rights of citizens and move civil society and the justice system in the direction of increasing openness and civic participation.¹¹ SLAPPs threaten public rights that are critical to the functioning of our democratic system and have a direct, detrimental impact on democratic participation and dialogue. While the source of the harm may be 'private' the harm itself directly affects the democratic process and is unquestionably 'public'.¹²

The harm SLAPPs cause is not limited to the defendants; the public at large also feels the effects. SLAPPs threaten public rights that are critical to the functioning of our democratic system and have a direct, detrimental impact on democratic participation and dialogue.

Public participation is widely regarded as essential to ensure that a broad spectrum of societal views and concerns are reflected in the development of new laws and policies as well as the issuance of approvals in relation to specific projects. Public participation ensures that government decisions have a greater air of legitimacy and tend to promote the acceptance of those decisions, even by those who may disagree with the final outcome.¹³ Moreover, public input can provide decision makers with important information which they might not otherwise have. This includes information such as knowledge of local conditions and circumstances, as well as environmental violations due to the proponents' past behaviour.

Ontario has a variety of laws from the *Environmental Bill of Rights, 1993* to the *Planning Act* that provide opportunities for public inputs in decision-making processes. SLAPPs threaten to undermine these provisions by dissuading citizens from making use of them. Thus, anti-SLAPP legislation would have a positive impact in ensuring that existing laws are properly applied and made effective.

Financial, Emotional and Physical Effects of being SLAPPED

SLAPPs cause significant emotional and financial stress on defendants who may find themselves embroiled in lengthy litigation proceedings and facing the resulting difficulties of keeping a job, maintaining family stability or even obtaining financial credit (with a significant legal claim pending against them). The Ontario Lawyers' Professional Indemnity Company (LawPRO) describes the anguish of being served with a lawsuit:

Your emotions run the gamut from anger, defensiveness, giving up, and loss of control to fear and guilt. You may feel sick to your stomach and start losing sleep; your [work] suffers because of a lack of focus; you withdraw socially or want to just talk about the problem ad nauseam; you may use or abuse alcohol and/or drugs. And the process has not even started yet!

SLAPPs attack not just the finances and reputation of the public interest advocate, but also – in many cases – their emotional and physical well-being.

See 'Practice Surviving being Sued' 9:2 *LawPRO* (September 2010), 27, at 27, found at <<http://www.practicepro.ca/LAWPROMag/PracticePitfalls.pdf>>.

Effect on Monitoring and Enforcement

Part of governments' rationale for expanding public participation has been a recognition that enforcement resources are inadequate and that public participation and citizen assistance is necessary to help address this weakness.¹⁴ SLAPPs affect the monitoring and enforcement of environmental laws and the activities of polluters. Research suggests that SLAPPs have measurable negative impacts on the enforcement of environmental laws and allow polluters to generally take a less diligent approach to pollution abatement. In other words, when they know the public will be reluctant to complain or speak against them, polluters are more prone to pollute. Likewise, with less of a public call for enforcement action, it is often the case that fewer government resources will be allocated to monitoring and enforcement activities. Regarding impacts in the U.S., Catherine Norman states that SLAPPs affect the costs and quality of the entire regulatory enterprise.¹⁵ SLAPP suits impact the dynamic and complex interactions between private citizens, environmental regulators, and polluting entities altogether and can even change the beliefs of one group about the power and actions of another.¹⁶

Research suggests that SLAPPs have measurable negative impacts on the enforcement of environmental laws and allow polluters to generally take a less diligent approach to pollution abatement. In other words, when they know the public will be reluctant to complain or speak against them, polluters are more prone to pollute.

SLAPPs Chill Lawyers Too

The pervasiveness and effect of SLAPPs have come to the point that the Ontario Lawyers' Professional Indemnity Company (LawPRO), which is the legal malpractice insurer for Ontario lawyers, has made a point of warning Ontario lawyers of the risks of malpractice when taking on public interest clients. Labeling the representation of public interest advocates as a 'malpractice hazard', LawPro states:

Representing a public interest group can be risky for lawyers, says LawPRO Litigation Director and Counsel Lorne Shelson. Such a group may, for example, be the target of a SLAPP (strategic litigation against public policy) lawsuit, with enormous costs consequences that its members did not anticipate. [...]

A public interest group may look on its lawyer as a knight on a white charger, but when things go wrong, the group may quickly turn on the lawyer, cautions Shelson. Scattering for cover, the group's members may point fingers at the lawyer, saying "had you properly advised us, we wouldn't have tilted at this particular windmill." [...]

As in other areas of practice, excess insurance is a valuable risk management tool for lawyers who represent public interest groups.

This sort of advice from the lawyers' insurer may chill the enthusiasm of lawyers considering representing such clients. The fact that the insurer feels obliged to even raise this issue is very telling in regard to the prevalence and effects of SLAPPs in Ontario.

See 'Practice Pitfalls: LawPRO looks at specific Malpractice Hazards in different Practice Areas' 9:2 *LawPRO* (September 2010), 2, at 3-4, found at <<http://www.practicepro.ca/LAWPROMag/PracticePitfalls.pdf>>.

Anti-SLAPP Laws in Other Jurisdictions

Anti-SLAPP laws facilitate public participation, protect the environment, and maintain the integrity and effectiveness of the regulatory system. In this sense, an anti-SLAPP law is not solely a legislative act, but also ‘a communicative gesture sending a strong message to various stakeholders that the legislative and judicial authorities are aware of the existence of these abusive lawsuits and that they are not to be tolerated’.¹⁷

BC became the first province to enact anti-SLAPP legislation following *Fraser v. Saanich*, one of the first court decisions to formally recognize the existence of SLAPPs in Canada.

British Columbia became the first province to enact anti-SLAPP legislation following *Fraser v. Saanich*,¹⁸ one of the first court decisions to formally recognize the existence of SLAPPs in Canada. The *Protection of Public Participation Act*, however, was repealed six months after it was enacted, following a change in government in the 2001 BC provincial election.¹⁹ Subsequently, in Quebec, impetus for anti-SLAPP legislation grew following a controversy over a multi-million dollar lawsuit by a Montréal-based metal recycling company against environmentalists over allegations regarding pollution caused by the company to the Etchemin River near Quebec City. In response, Quebec has amended its Code of Civil Procedure to dismiss an action if it was found to be a SLAPP.²⁰

On the international front, the US states lead jurisdictions in providing for protection by means of anti-SLAPP laws. In 1989, the state of Washington was the first to pass such a law.²¹ Today, 27 states and one territory have enacted anti-SLAPP legislation. Ten more

Public Participation in Ontario

In Ontario, public participation in the environmental decision-making process is incorporated in numerous laws. Ontario’s *Environmental Bill of Rights, 1993 (EBR)*, provides ‘means by which residents of Ontario may participate in making of environmentally significant decisions by the Government of Ontario.’ It creates public participation tools, allowing for notice of environmentally significant decisions and public comment periods, expanded rights of appeal with respect to government decisions, and provisions permitting members of the public to request government reviews of policies, laws and approvals. The EBR also allows citizens to request the government to investigate alleged environmental violations and creates a cause of action for harm to a public resource. Other provincial statutes, such as the *Planning Act* and *Places to Grow Act*, also provide for public participation with respect to environmentally significant decisions.

On the federal level, the *Canadian Environmental Assessment Act (CEAA)* provides for public participation at several stages during the environmental assessment process. Similarly, the *Canadian Environmental Protection Act, 1999 (CEPA)*, sets out a number of public participation mechanisms. The *Pest Control Products Act* also contains public participation mechanisms with the aim of ‘facilitating public access to relevant information and public participation in the decision-making process.’

U.S. jurisdictions, including the U.S. federal government,²² are presently considering passing anti-SLAPP bills.²³

On August 28, 2008, the Australian Capital Territory's Parliament became the first Australian jurisdiction to enact anti-SLAPP legislation.²⁴ The *Protection of Public Participation Act* was largely in response to a high-profile SLAPP suit, *Gunns v. Marr and Ors.*²⁵ Gunns Ltd, a forestry company, sued conservation groups and individuals claiming approximately AUS \$6.3 million in damages. The forestry company alleged that the defendants had interfered with its contractual relations and had conspired to cause injury by other illegal means.

A fuller comparison of anti-SLAPP legislation in various jurisdictions, summarizing their strengths and weaknesses, is attached as an Annex to this report.

Ontario is now also starting to take the issue more seriously with its establishment of an expert advisory panel to provide input advice on how to design an effective piece of anti-SLAPP legislation. It was tasked with providing recommendations to the provincial government by the end of September 2010.

The Rise of SLAPPs in Ontario

In the Ontario context, there has been a worrisome trend of SLAPP suits. The following are some recent notable examples:

COMMUNITY AIR: A community group and seven of its directors were sued in defamation by the Toronto Port Authority regarding comments made about the re-industrialization of the Toronto waterfront. The Port Authority sought \$850,000 in damages. In response, the defendants argued that the suit was a SLAPP aimed at chilling legitimate public debate and silencing critics who were opposed to the proposed development. The *Globe and Mail* described the case as a 'hollow and cynical SLAPP'.

ÉDITIONS ÉCOSOCIÉTÉ: Barrick Gold and Banro are suing Éditions Écosociété (a small Quebec-based publisher) and authors Alain Deneault, Delphine Abadie, and William Sacher over the publication of *Noir Canada, Pillage, corruption et criminalité en Afrique*. Altogether they are suing for approximately \$11 million dollars. Barrick Gold and Banro state that the book is libelous and that the defendants have orchestrated an international campaign to harm their reputations. Politicians, academics and civil society groups have labeled these suits as SLAPPs as they appear to be a direct attack on freedom of expression and public debate on matters of public interest.

BIG BAY POINT: SLAPP suits were launched by the developer of a resort in the Town of Innisfil on Lake Simcoe. Approximately \$90 million dollars in damages were claimed against the defendants who opposed the development. The developer also brought a costs motion against parties, local citizens and their lawyers in a related appeal before the Ontario Municipal Board. Although the motion for costs was eventually dismissed, the costs proceedings took seventeen and a half days, requiring the respondents to endure significant legal fees, expenses and stress.

These cases provide a snapshot of recent Ontario SLAPPs that have made it to the courts. However, as noted above, a significant impact of SLAPPs and the threat of SLAPPs is their chilling effect and the impacts that they have on regulatory practices. These aspects are not reflected in the court dockets.

Why Existing Laws are Inadequate

One of the main arguments which have been advanced in Canada in support of anti-SLAPP legislation has been the lack of constitutional protection afforded to citizen participation in government processes.

Given that Canadians already have constitutional rights to freedom of thought and expression as well as legislated protections against frivolous proceedings, why is specific anti-SLAPP legislation needed? And won't an anti-SLAPP law improperly hamper people who have been wrongfully defamed from protecting themselves using defamation law?

Canada's Lack of Constitutional Protection against SLAPPs

One of the main arguments advanced in Canada in support of anti-SLAPP legislation has been the lack of constitutional protection afforded to citizen participation in government processes.²⁶ In contrast, in the United States, the First Amendment has been interpreted by the courts as constitutionally protecting citizen participation in government and a substantial body of American jurisprudence has developed to protect defendants from exposure to SLAPP suits.²⁷ In addition, the U.S. courts have imposed procedural safeguards to respond to the SLAPP phenomena, such as fast-tracking cases to a preliminary hearing for summary judgment, subjecting the SLAPP plaintiffs' pleadings to a heightened standard of review, and shifting the onus of proof on the plaintiff to carry the burden of demonstrating why the suit should not be dismissed.²⁸

Beyond the constitutional guarantee under the First Amendment as well as a substantial body of American jurisprudence which favours protection for SLAPP targets, more than half of the states in the U.S. have taken the additional step of augmenting constitutional protection with anti-SLAPP legislation.

In contrast, there is no constitutional protection in Canada against SLAPPs. While section 2(b) of the *Canadian Charter of Rights and Freedoms*, guarantees 'freedom of thought, belief, opinion, and expression,' the Supreme Court of Canada has held that the *Charter*

does not apply in relation to litigation between private parties.²⁹ This has precluded the development of jurisprudence along the lines that have evolved in the United States to protect individuals and groups from SLAPP suits.³⁰ This factor underscores the need for effective anti-SLAPP law to ensure that citizens who engage in public participation in Ontario receive a comparable level of protection to that provided in other democratic societies.

Remedies offered by the Common Law and Rules of Civil Procedure

The common law and rules of civil procedure seem to offer a number of remedies against abusive litigation and may appear at first instance to provide SLAPP defendants with a potential recourse against SLAPP suits.

The common law gives a court an inherent jurisdiction to control abuses of process. This power is codified in s. 140 of the *Courts of Justice Act*, which provides authority to control vexatious litigants by barring any further proceedings from being instituted or preventing a proceeding previously instituted from being continued.³¹

Ontario's rules of civil procedure also appear to offer a number of remedies to address proceedings which are brought for an improper purpose. However, reports prepared by the Uniform Law Conference of Canada (ULCC) on SLAPPs and for the Attorney General of Ontario on civil justice reform conclude that common law and the existing rules of civil procedure have not been effective in summarily dismissing meritless claims, including SLAPP suits.³²

RULE 20 – SUMMARY JUDGMENT

Ontario's Rule 20 allows a motion for summary judgment by either the plaintiff or the defendant. The court may grant the motion if it is satisfied that there is no 'genuine issue for trial.' This test is a very difficult one to meet and statistics from the Ministry of Attorney General confirm that few summary judgment motions are brought.³³ Moreover, the ULCC notes that cases in which summary judgment have been granted have generally not involved allegations of abuse of process, but have instead been confined to the more 'traditional points like lack of evidence or a cause of action as a whole.' According to the ULCC, 'the debate has focused on credibility of witnesses but not the motivation of the plaintiff or the value of the lawsuit in achieving legal rather than strategic ends.'³⁴

On January 1, 2010, the Ontario Rules of Civil Procedure were amended to expand the powers of a court hearing a motion for summary judgment to weigh evidence, evaluate the credibility of a deponent and to draw inferences.³⁵ While these additional procedural mechanisms enhance the opportunity for early review and dismissal of SLAPPs, these amendments alone are unlikely to sufficiently deter SLAPP plaintiffs. This is because the decision to proceed with a SLAPP is often a tactical one, aimed at retaliating against citizens who have engaged in public participation and at discouraging future opposition.³⁶ Thus, the risk of losing the case on summary judgment may not be a significant concern for a SLAPP plaintiff – especially if he can extend the dismissal proceedings as long as possible.

The common law and rules of civil procedure seem to offer a number of remedies against abusive litigation, but do not provide SLAPP defendants with sufficient recourse against SLAPP suits.



SLAPP plaintiffs are also better able to absorb the high costs of litigation irrespective of the outcome of the case.³⁷

As Professor Tollefson notes on page 206 of his article:

Unlike other plaintiffs, a SLAPP filer's main concern is by definition, not monetary compensation or other legal remedy to correct a wrong or grievance. The decision to proceed with a SLAPP is usually a highly tactical one, forming part of a larger strategy... These goals can be achieved without winning a lawsuit or for that matter, carrying it forward to a determination on the merits.³⁸

As such, an effective anti-SLAPP strategy must include provisions to deter SLAPP filers from initiating these suits in the first place. The amendments to Rule 20 fail to do this.

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RULE 21(3) (D) – DETERMINING AN ISSUE BEFORE TRIAL

Rule 21(3) (d) is another rule that could theoretically provide a remedy against SLAPP suits. The rule provides that the defendant may move before a judge to have an action stayed or dismissed on grounds that the action is frivolous or vexatious, or for a determination of an issue before trial. However, Rule 21(3) (d) has generally been used to deal with the issue of *res judicata* or a multiplicity of proceeding.³⁹ According to the ULCC, it is extremely rare for this rule to be used 'to curb abuse in the SLAPP sense of harassing defendants by the costs and stresses of the legal system.'⁴⁰ This is because '[t]he courts will only dismiss an action as being frivolous, vexatious or abusive only in the clearest of cases where it is plain and obvious that it cannot succeed.'⁴¹

RULE 25.11 – STRIKING OUT A PLEADING

Rule 25.11 allows the court to strike out all or part of a pleading or other document with or without leave to amend, on the ground that the document is scandalous, frivolous or vexatious, or is an abuse of process to the court. The ULCC observes that '[m]ost of the cases in which this remedy has been granted have expunged parts of the pleading that went beyond the bounds of relevance or propriety. Very few if any struck out pleadings entirely without leave to amend or begin again.'⁴² According to the ULCC,

[[j]udges are reluctant to find that a cause of action does not exist or has no hope of success without a full trial. Nevertheless waiting for a trial, and enduring the costs of procedures, in the meantime, produces the costs and stress that are alleged to be the principal motivation of the plaintiffs who bring these actions. Thus, these rules are seldom likely to be of use to SLAPP defendants.⁴³

Consequently, there needs to be stronger reforms beyond those provided under Ontario's *Rules of Civil Procedure* to address SLAPP suits. The Rules offer little explicit direction with regard to the need for special judicial scrutiny of SLAPPs and no clearly defined guidelines with which to deal with cases of this kind. In the absence of a clearly enunciated government affirmation on the importance of public participation and the need to scrutinize cases where it is alleged that a plaintiff is deliberately using the legal system to thwart this value, there is little to deter SLAPP plaintiffs from filing meritless actions in the first place, and



relatively few legal tools at the disposal of SLAPP targets to respond effectively when their rights are put in jeopardy.⁴⁴

RULE 57 – COSTS OF PROCEEDINGS

Under s. 131 of the Ontario *Courts of Justice Act* and Rule 57 of the Rules of Civil Procedure, a court has discretion to determine by whom and to what extent the costs of a proceeding shall be paid. The general practice in Ontario is for courts to award costs to the successful parties in a proceeding.

This practice of awarding costs to the successful party is distinct from the general practices in U.S. jurisdictions where costs awards are not usually made. This distinction has given rise to the argument by some commentators that the situation in the U.S. necessitates anti-SLAPP laws, while the situation in Canada does not.

This argument is faulty for several reasons. Although Canadian courts often award costs, they generally do not order the full costs of a proceeding. A successful litigant often receives only a fraction of the actual costs of retaining counsel and paying for the disbursements involved in litigation. The problem is compounded by the fact that SLAPP plaintiffs generally have the resources to pay costs awards and have taken into account these expenses when launching their SLAPP suits. Moreover, to require innocent defendants to endure months of uncertainty and emotional and financial hardship until an award of costs is given at the end of a long proceeding is unfair and does little to maintain a civic climate of public participation. Moreover, many SLAPPs are abandoned or settled on unfair terms thus avoiding the opportunity for costs to be awarded.

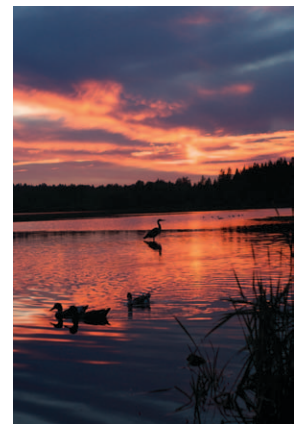
To provide an effective disincentive to launching a SLAPP, the courts must be empowered and guided by the need to award full indemnity costs against SLAPP plaintiffs and to further stigmatize these litigants through the imposition of punitive damages. The *Courts of Justice Act* and the Rules of Civil Procedure do not sufficiently provide courts with this guidance or powers to set the example that SLAPP suits will not be tolerated.

Balancing Public Participation with the Law of Defamation

The traditional law of defamation sought to protect an individual's reputation irrespective of fault and regardless of whether actual injury could be shown. It clearly favoured protection of reputation over freedom of expression. Under the traditional law, once a plaintiff established the publication of the defamatory statement, the plaintiff was entitled to damages, unless the defendant could establish a valid defence of truth, fair comment or privilege.

In the recent Supreme Court of Canada decisions of *Quan v. Cusson*⁴⁵ and *Grant v. Torstar Corp.*,⁴⁶ the Court altered the common law of defamation in Canada to make it more consistent with the law in other Commonwealth jurisdictions by recognizing a new defence of 'responsible communication of matters of public interest.' While these landmark decisions constitute a major victory for media organizations, the new defence articulated by the Court is unlikely to afford protection to ordinary citizens or community groups.

A successful litigant often receives only a fraction of the actual costs of retaining counsel and paying for the disbursements involved in litigation. The problem is compounded by the fact that SLAPP plaintiffs generally have the resources to pay costs awards and have taken into account these expenses when launching their SLAPP suits.



The defence afforded to citizens engaged in public participation has to be more generous than that afforded to journalists.



The test formulated by the Court requires that a number of factors be weighed in order to determine whether a defence of responsible communication has been established. These include whether the publication dealt with a matter of public interest and whether the publisher was diligent. An assessment of the issue of due diligence involves consideration of the public importance of the matter, the urgency of the matter, the status and reliability of the source, whether the plaintiff's side of the story was sought and accurately reported, whether inclusion of the defamatory statement was justifiable, and other relevant aspects.⁴⁷

The application of this defence is uncertain for media organizations given the number of factors that need to be weighed by the court. The extension of this standard to citizens and community groups engaged in public participation, therefore, would be inappropriate, given that they do not possess the level of special skill, knowledge, experience, ready access to legal assistance and the large resources of media organizations in order to be able to verify the accuracy of a story prior to publication. A lay person is thus unlikely to be in a position to be able to undertake the due diligence steps that a journalist would be able to take before making a statement on a matter of public interest. Consequently, an ordinary citizen ought not to be held to the same standards as media defendants who are professionals engaged in the business of reporting news accurately. The defence afforded to citizens engaged in public participation, thus, has to be more generous than that afforded to journalists.⁴⁸

Strong Calls for Action on SLAPPs

In his 2009 annual report, the Environmental Commissioner of Ontario (ECO) called upon the provincial government to enact legislation to halt SLAPPs. The Commissioner stated that

The public's right to participate in decision-making over matters of public interest is a cornerstone of our democratic system... The ECO sees a need for provincial legislation that would put both sides of development disputes on equal footing. Such legislation could serve to halt SLAPP suits in their tracks.

The Association of Municipalities of Ontario has also advocated legislative reform to address the SLAPP problem and more than 65 Ontario municipalities have enacted anti-SLAPP resolutions.

Seventy public interest organizations have petitioned the Premier to take action and the province's leading environmental non-governmental organizations have ranked anti-SLAPP legislation as a top priority that they want the Ontario government to address.

More than 250 university professors across Canada have also signed a petition asking for immediate adoption of an anti-SLAPP law in Ontario.

For the Environmental Commissioner of Ontario's report, see Environmental Commissioner of Ontario, *Building Resilience: Annual Report 2008-2009* (ECO, 2009), at 25;. For the call by the Association of Municipalities of Ontario, see Association of Municipalities of Ontario, Alert No. 09/069 (15 October 2009), found at <www.amo.on.ca/AM/TemplateRedirect.cfm>. The petition from environment groups can be found at <www.greenprosperity.ca/slapp.php>. The petition by the university professors was signed in relation to the lawsuit brought by Barrick Gold and Banro Corporation against Éditions Écosociété and authors Alain Deneault, Delphine Abadie and William Sacher.

Anti-SLAPP legislation in other jurisdictions has sought to address this problem by providing for a qualified privilege for statements made by citizens who are engaged in public participation. A number of U.S. states specifically address defamation claims made in the context of SLAPP suits by providing for qualified privilege where the statement has been made by a person engaging in public participation.⁴⁹ British Columbia's repealed anti-SLAPP legislation also adopted this approach and provided qualified privilege to communications made in the context of public participation.^o

The Australian Capital Territory's (ACT) anti-SLAPP legislation, in contrast, specifically states that it does not apply to actions for defamation. This was presumably done to ensure that the ACT legislation was consistent with the extensive reform to defamation law which had been undertaken by the Australian states and territories to promote a uniform approach.⁵¹ Beyond promoting consistency amongst the Australian states and territories, the new uniform approach in Australia also sought to ensure that defamation law did not place unreasonable limits on freedom of expression, particularly with respect to matters of public interest and importance.

Quebec's *Code of Civil Procedure*, does not expressly address the issue of defamation claims within the SLAPP context. However, the law of defamation in Quebec differs from that of other provinces in that it is governed by the *Civil Code of Quebec* and Quebec's *Charter of Human Rights and Freedoms*. The provisions in the *Civil Code of Quebec*, which govern the rules of civil liability, also govern defamation. Consequently, in an action for defamation, the plaintiff must establish the existence of fault, damage and a causal link between the two. Communicating false information *per se*, under Quebec's civil law, is not necessarily actionable.⁵²

Anti-SLAPP legislation for Ontario will need to specifically address the issue of defamation and modify the common law to provide greater protection for citizens beyond that provided by the recent cases of *Cusson v. Quan* and *Grant v. Torstar Corp.*

Anti-SLAPP legislation for Ontario will need to specifically address the issue of defamation and modify the common law to provide greater protection for citizens beyond that provided by the recent cases of *Cusson v. Quan* and *Grant v. Torstar Corp.*

Are Anti-SLAPP Laws a Sword for NIMBYs and Activists?

A concern that is sometimes heard regarding anti-SLAPP laws is that they would give protestors and anti-development advocates a licence to tarnish the reputations of legitimate business owners and public officials.

This, however, is not the case. Anti-SLAPP legislation is a protective shield to protect citizens from meritless lawsuits. They cannot be used as a sword to fight against developers, businesses or public servants. This is because these anti-SLAPP laws are reactive in nature. It is only when a meritless suit is brought against a citizen or group that anti-SLAPP protections apply. They cannot be initiated by a citizen or group who has not been sued. These protections help to stop abuses of the court system. Proper merited claims against activists are not protected by anti-SLAPP laws. Similarly, anti-SLAPP laws neither promote nor support 'not-in-my-back-yard' (NIMBY) advocacy by local residents opposing projects that are in the public interest. Municipal and administrative decision-makers (including the Ontario Municipal Board) have strong procedural powers to control the processes before them, which would not be negatively affected by anti-SLAPP legislation.

Key Components of an Effective Anti-SLAPP Law

Anti-SLAPP legislation should include a right to public participation, early dismissal mechanisms, and SLAPP disincentives.

Legal experts and academics who have studied the SLAPP phenomena have developed a three-part test to evaluate the effectiveness of anti-SLAPP statutes in protecting public participation.⁵³ According to them, an effective anti-SLAPP statute must include the following three components:

- **RIGHT TO PUBLIC PARTICIPATION** – Anti-SLAPP legislation should include a statutory provision explicitly guaranteeing the right to engage in public participation. This should be framed broadly to cover the many different ways citizens and groups participate. It should protect all forms of public participation and provide broad immunity from civil liability for persons and groups engaging in public participation.
- **EARLY DISMISSAL MECHANISMS** – Anti-SLAPP legislation should include mechanisms to allow for early review and an expeditious process for summarily determining the matter as well as means to simplify and lighten the burden on the defendant to defend against the SLAPP, including the provision of financial assistance. There should be a reverse onus in summary dismissal proceedings so that the initiator of the lawsuit must show that the action is proper and has merit.
- **SLAPP DISINCENTIVES** – Anti-SLAPP legislation should provide for strong disincentives, financial and otherwise, to dissuade potential SLAPP plaintiffs from initiating meritless claims. These include the authority of a court to award full indemnity costs and punitive damages against SLAPP plaintiffs and to require the officers and directors of a corporation which institutes a SLAPP to personally pay damages.

This section of the report elaborates on each of these key components and provides recommendations on how an Ontario anti-SLAPP law should address these aspects.

Substantive Right to Public Participation

The right to public participation is a standard norm of democratic societies. Article 25 of the International Covenant on Civil and Political Rights (to which Canada is a party along with 166 other countries) states:

Every citizen shall have the right and the opportunity ... without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives [...].⁵⁴

Most anti-SLAPP statutes in the United States provide for a substantive right to public participation and define the scope of protected activities.⁵⁵ By providing a straightforward means for identifying SLAPPs, statutory recognition of the right to public participation assists the early identification of SLAPP suits and enhances the prospect of securing their quick and early dismissal. It provides a means of determining how the balance will be struck between the competing public and private interests that may collide in SLAPP litigation by ensuring that only public interest advocacy is protected.

To be effective, the right to public participation must be clearly defined as being restricted to advocacy that is conducted in the public interest. This necessitates a clearly worded definition of ‘public interest’. If the types of advocacy are restricted to only those that are advanced in the public interest, problems of over-deterrence and over-inclusion can be avoided.

Once it is determined that the activity is in the public interest, the forms of that activity should be defined expansively. They should cover both communications and conduct. The right must be framed broadly to cover and protect all forms of public participation and provide broad immunity from civil liability for persons and groups engaging in public participation. In this respect, it should be kept in mind that SLAPPs may arise from a conflict of perceived personal liberty and fundamental democratic rights resulting in an unjustifiable interference with the right to public participation.⁵⁶

The right should encompass the diverse ways in which citizens and groups can engage in public participation to influence public opinion or promote further lawful action by a public body in relation to an issue of public interest. Public participation should be defined to include traditional lobbying, demonstrations, petitions, boycotts and pursuing judicial and administrative remedies.

British Columbia’s *Protection of Public Participation Act* adopted an approach along the lines of several U.S. states by explicitly stating that the purpose of the Act was to encourage public participation. Public participation was defined under the Act as ‘communication or conduct aimed at influencing public opinion, or promoting or furthering lawful action by the public or any government body, in relation to an issue of public interest.’⁵⁷ Australia’s anti-SLAPP law adopts a similar approach and defines public participation as ‘conduct that a reasonable person would consider is intended (in whole or part) to influence public opinion, or promote or further action by the public, a corporation or government entity, in relation to an issue of public interest’.⁵⁸

By providing a straightforward means for identifying SLAPPs, statutory recognition of the right to public participation assists the early identification of SLAPP suits and enhances the prospect of securing their quick and early dismissal.

The Uniform Law Conference of Canada’s Model Act on Abuse of Process (ULCC’s Model Act) also includes a provision defining public participation and provides the court with authority to dismiss a proceeding if a principal purpose for bringing the proceeding was to dissuade the defendants and other persons from engaging in public participation.⁵⁹

In contrast, Quebec’s anti-SLAPP law which amended Quebec’s *Code of Civil Procedure*, does not provide a definition of public participation. Rather than setting out specific rules for SLAPPs, Quebec’s *Code of Civil Procedure* strengthens existing provisions on abusive proceedings and allows the court, at any time and even on its own initiative, to declare an action or pleading abusive.⁶⁰ It should be noted, however, that Quebec law, unlike other provinces, provides for a constitutional guarantee to freedom of expression which extends to the realm of private relations. In Quebec, freedom of expression is protected under the *Charter of Human Rights and Freedoms* and governs the relations between citizens.⁶¹ In contrast, Ontarians who are subject to SLAPPs are not afforded similar constitutional protection. According to Professor Tollefson, ‘[g]iven this constitutional lacuna, the first step in developing Canadian anti-SLAPP legislation is to articulate a statutory right of public participation’.⁶²

RECOMMENDATION # 1: Anti-SLAPP legislation for Ontario should define the purpose of the legislation as intended to encourage public participation and to prevent the use of the courts by persons bringing proceedings or claims that thwart the right of citizens and groups to participate in public debate on matters of public interest.

RECOMMENDATION # 2: Anti-SLAPP legislation for Ontario should provide a statutory right to public participation.

RECOMMENDATION # 3: Anti-SLAPP legislation for Ontario should provide a clear definition of ‘public participation’ that requires a public interest component and includes a broad range of communications or conduct aimed at influencing public opinion, or promoting or furthering action by a public body, in relation to an issue of public interest.

A central problem in drafting anti-SLAPP legislation is how to best strike the appropriate balance between the need to protect the public against SLAPPs and the need to safeguard a person’s reputation from defamatory statements. One possible solution would be to adopt the approach taken by the repealed B.C. legislation and a number of American states and provide for a defence of qualified privilege for defamation claims made against citizens engaged in public participation. This would ensure that citizens or community groups whose conduct does not meet the standards applicable to media and whose conduct may fall short of constituting malice are not held liable. Qualified privilege will protect good faith communications from defamation claims while inappropriate ones will not be protected.

RECOMMENDATION # 4: Anti-SLAPP legislation for Ontario should include a defence of qualified privilege to citizens and community groups who engage in public participation in good faith.



Anti-SLAPP legislation must strike the appropriate balance between the need to protect the public against SLAPPs and the need to safeguard a person’s reputation from defamatory statements.

Early Dismissal Mechanisms

Mechanisms for early review and an expeditious process for summarily determining whether a proceeding is a SLAPP are key elements of anti-SLAPP legislation. Means to simplify and lighten the burden on the defendant to defend against the SLAPP through the provision of financial assistance and the use of reverse onus provisions are needed in any effective anti-SLAPP law.⁶³

Some jurisdictions have elected to use an ‘improper purpose test’ in their SLAPP dismissal mechanisms which requires the court to consider the plaintiff’s motive or purpose for filing the claim. For instance, British Columbia’s anti-SLAPP law required a SLAPP target (defendant) to establish on an application for summary dismissal that the principal purpose for which the proceeding was brought or maintained was an improper purpose.⁶⁴ Australia’s anti-SLAPP law adopted the same approach.⁶⁵ But these types of provision are a mistake if the onus is left with the defendant to show an improper purpose. It is both difficult and time-consuming for the defendant to establish the plaintiff’s intent, making such an enterprise counter-productive when the aims of anti-SLAPP legislation should be to facilitate the expeditious and least costly dismissal of these suits. SLAPPs would be very difficult, if not impossible to establish using this approach. Unless a plaintiff has publicly stated its motive in commencing the lawsuit, a defendant would have a very tough time establishing an evidentiary foundation to satisfy the ‘improper purpose test’.

Means to simplify and lighten the burden on the defendant to defend against the SLAPP through the provision of financial assistance and the use of reverse onus provisions are needed in any effective anti-SLAPP law.

Ontario’s Anti-SLAPP Advisory Panel

In June 2010, the Ontario Government announced that it was convening an expert advisory panel to advise it on how to design an effective piece of anti-SLAPP legislation.

The panel is tasked with advising the Attorney General of Ontario on how to address five key issues relating to SLAPPs:

- A test for courts to quickly recognize a SLAPP suit;
- Appropriate remedies for SLAPP suits;
- Appropriate limits to the protection of anti-SLAPP legislation;
- Appropriate parties to benefit from the protection of anti-SLAPP legislation;
- Methods to prevent abuse of any future anti-SLAPP legislation.

The panel accepted written and oral submissions from the public on these issues over the summer months of 2010 and was asked to respond to the Attorney General with recommendations by September 30, 2010.

For more information on the Anti-SLAPP Advisory Panel, see the Ministry of the Attorney-General of Ontario’s website at < http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/>.

It should therefore be the responsibility of the plaintiff to show that its purpose is not an improper one. This would most effectively be done by including reverse onus provisions in the Act to shift the onus of proof to the plaintiff to show that its purposes for filing a claim are not improper. This technique is not uncommon in anti-SLAPP legislation. Many anti-SLAPP laws include a reverse onus provision, including those adopted by several US states⁶⁶ and Quebec.⁶⁷

However, as one commentator writes, ‘SLAPPs are a problem because of their effect on public speech, and not principally because of the intent of the SLAPP plaintiff.’⁶⁸ Although an improper purpose is still a key determinant in many cases of whether a proceeding is a SLAPP, suits with no substance should also be addressed. Therefore, the test for summary dismissal should be broader than simply determining whether there was an improper purpose. Ontario’s anti-SLAPP law should include a requirement that the plaintiff’s suit have merit as well.



The availability of financial assistance to assist SLAPP defendants without resources to defend their rights is also an important tool to ensure that a lack of adequate financial resources does not preclude a SLAPP target from defending itself.

An effective early dismissal mechanism would work as follows. A defendant would be required to establish that the activities which gave rise to the lawsuit *prima facie* fall within the definition of ‘public participation.’ (A comprehensive definition of ‘public participation’ must be included in the Act as suggested in Recommendation # 3 (above) in order for this step of the test to function effectively.)⁶⁹ The onus would then shift to the plaintiff (SLAPP filer) to demonstrate that the action has a reasonable prospect of success and to prove on the balance of probabilities that the suit was not brought for an improper purpose.

The ULCC’s Model Act has a recommendation similar to this. It recommends that the court should have authority to dismiss a proceeding even if the plaintiff has a reasonable prospect of success, when the court is satisfied that the lawsuit was commenced principally to deplete or exhaust the resources of the defendant or to dissuade the defendant or other persons from engaging in public participation.⁷⁰ Although this test requires the plaintiff to show both no improper purpose and that it has a merited case, this is not an overwhelming burden for cases that are not SLAPPs.

The availability of financial assistance to assist SLAPP defendants without resources to defend their rights is also an important tool to ensure that a lack of adequate financial resources does not preclude a SLAPP target from defending itself. In this regard, the ULCC’s Model Act recommends that the court be authorized to provide advance costs, if justified in the circumstances and if the court finds that without such assistance the party’s financial situation would prevent it from effectively defending itself.⁷¹ The ULCC specifically worded the provision more broadly than the criteria that have been adopted by the Supreme Court of Canada for awarding interim costs. The ULCC is of the view that the ‘party should not have to expend all its financial resources to defend itself in a proceeding that appears to be an abuse of process.’⁷²

A publicly administered fund that provides financial assistance to SLAPP defendants would also be an effective tool for leveling the playing field between SLAPP defendants and plaintiffs and should be considered. A requirement that proposed settlements of dismissal motions must be approved by the Court would be another important component to be included to ensure that SLAPPs are resolved on appropriate terms.

RECOMMENDATION # 5: Anti-SLAPP legislation for Ontario should provide authority to the court to dismiss a proceeding if it finds that the defendant was engaged in public participation and the plaintiff's case has no merit or was motivated by an improper purpose.

This could be achieved through a two-part test in which:

- (1) the defendant must make a *prima facie* case that it was engaged in public participation (as defined in the Act);
- (2) if the defendant is able to satisfy step (1), then the next step is engaged in which the onus is shifted to the plaintiff who must show that the case has a reasonable prospect of success and prove on the balance of probabilities that a principal purpose of bringing the proceeding was not (a) to deplete or exhaust the resources of the defendant so as to deter it from engaging in public participation; or (b) to dissuade the defendant or other person from engaging in public participation.

A definition of 'public participation' must be included in the Act as suggested in Recommendation # 3 above (even if a right to public participation is not used) in order for step (1) of this test to function properly.

RECOMMENDATION # 6: Anti-SLAPP legislation for Ontario should include a provision which allows the court to order the plaintiff to pay to the defendant advance costs if the court determines that without such assistance the defendant's financial situation would prevent it from effectively defending itself.

Anti-SLAPP legislation should provide for strong disincentives, financial and otherwise, to dissuade potential SLAPP plaintiffs from initiating claims. The most effective way to provide protection to potential SLAPP targets is to prevent SLAPPs from ever being filed in the first place.

Disincentives for Bringing SLAPPs

Anti-SLAPP legislation should provide for strong disincentives, financial and otherwise, to dissuade potential SLAPP plaintiffs from initiating claims. The most effective way to provide protection to potential SLAPP targets is to prevent SLAPPs from ever being filed in the first place. Anti-SLAPP legislation for Ontario should therefore include provisions which provide for strong and effective disincentives – financial and otherwise – and give the court authority to award full indemnity costs and punitive damages against SLAPP plaintiffs.

Some opponents of anti-SLAPP legislation have suggested that the Law Society of Upper Canada's *Rules of Professional Conduct* (Rules 4.01(2)(a) and (b) and 4.06(1)) adequately regulate the legal profession and prevent lawyers from making irresponsible allegations and from launching claims that are motivated by malice or with a purpose to injure another party. However, a review of the caselaw shows few, if any, cases in which these Rules have been actually applied. Their effectiveness in this regard is therefore questionable.

As noted above, Ontario costs awards also do not act as a sufficient deterrent against SLAPPs. Although Canadian courts often award costs, a successful litigant often receives only a fraction of the actual costs of defending him or herself and may endure months of uncertainty and emotional and financial hardship until an award of costs is given at the end of a long proceeding.



A number of innovative disincentive provisions have been included in anti-SLAPP laws enacted in B.C. and Quebec. Quebec's *Code of Civil Procedure* allows the court to award not only legal costs but also damages to the defendants, and to penalize directors and officers of companies that took part in decisions to instigate SLAPPs.⁷³ The court can also prohibit a party from instituting further legal proceedings, except with express authorization and subject to conditions to be determined by the chief judge or chief justice.⁷⁴

The ULCC's Model Act also allows the court to not only suspend proceedings, but to also order that any public consultation or approval process that is conducted by a public body that relates to the proceeding be suspended until the application has been heard and decided.⁷⁵ This mechanism provides a strong deterrent to SLAPP plaintiffs as the approval processes for them to proceed with their projects could be halted.

RECOMMENDATION # 7: Anti-SLAPP legislation for Ontario should provide authority to a court to impose an order:

- (a) to require the party who commenced the proceeding to pay full indemnity costs to the defendant, including all reasonable costs and expenses incurred by the defendant in relation to the dismissed proceeding;
- (b) to require the party who commenced the proceeding to pay punitive or exemplary damages;
- (c) to require the directors and officers of the corporation which commenced the proceeding to personally pay damages;
- (d) to prohibit the party that commenced proceedings from instituting further legal proceedings, except with prior authorization by the court and subject to the conditions to be determined by the court; and
- (e) to suspend other proceedings involving the case or closely linked to it, whether or not those proceedings are before a court or some other public forum, for a period of time that the court determines to be appropriate.

Conclusion

There is a need for direct legislative reform to address the growing trend of SLAPP suits against ordinary citizens and community groups who are engaged in good faith in public participation activities. The Environmental Commissioner of Ontario, the Association of Municipalities of Ontario, a number of leading environmental organizations and more than 250 university professors across Canada have called upon the Ontario government to enact anti-SLAPP legislation.

There needs to be an appropriate balance between protecting public participation and preserving the rights of plaintiffs to pursue legitimate claims in court. Currently this balance does not exist. Canada's lack of constitutional protection of freedom of expression in private matters, the courts' reluctance to summarily dismiss even unmerited claims, the law of defamation's strong protection of an individual's reputation, the recent emergence of SLAPP suits, and the significant resources of a SLAPP plaintiff compared to a typical defendant have disrupted any balance that ever existed.

A key challenge in drafting anti-SLAPP legislation is establishing an appropriate balance between protecting public participation and preserving the rights of plaintiffs to pursue legitimate claims in court. A number of other jurisdictions have already addressed this issue through anti-SLAPP laws and Ontario can draw from their experiences in developing a response. The Annex to this report provides a comparative overview of these established anti-SLAPP laws.

The key features of any effective anti-SLAPP law should include (i) a statutory provision explicitly guaranteeing the right to public participation; (ii) early dismissal mechanisms; and (iii) strong and effective disincentives, financial and otherwise, to dissuade potential SLAPP plaintiffs from initiating their claims.

The key features of any effective anti-SLAPP law should include (i) a statutory provision explicitly guaranteeing the right to public participation; (ii) early dismissal mechanisms; and (iii) strong and effective disincentives, financial and otherwise, to dissuade potential SLAPP plaintiffs from initiating their claims.

Recommendations for Ontario Anti-SLAPP Legislation

RECOMMENDATION # 1: Anti-SLAPP legislation for Ontario should define the purpose of the legislation as intended to encourage public participation and to prevent the use of the courts by persons bringing proceedings or claims that thwart the right of citizens and groups to participate in public debate on matters of public interest.

RECOMMENDATION # 2: Anti-SLAPP legislation for Ontario should provide a statutory right to public participation.

RECOMMENDATION # 3: Anti-SLAPP legislation for Ontario should provide a clear definition of ‘public participation’ that requires a public interest component and includes a broad range of communications or conduct aimed at influencing public opinion, or promoting or furthering action by a public body, in relation to an issue of public interest.

RECOMMENDATION # 4: Anti-SLAPP legislation for Ontario should include a defence of qualified privilege to citizens and community groups who engage in public participation in good faith.

RECOMMENDATION # 5: Anti-SLAPP legislation for Ontario should provide authority to the court to dismiss a proceeding if it finds that the defendant was engaged in public participation and the plaintiff’s case has no merit or was motivated by an improper purpose.

This could be achieved through a two-part test in which:

- (1) the defendant must make a *prima facie* case that it was engaged in public participation (as defined in the Act);
- (2) if the defendant is able to satisfy step (1), then the next step is engaging in which the onus is shifted to the plaintiff who must show that the case has a reasonable prospect of success and prove on the balance of probabilities that a principal purpose of bringing the proceeding was not (a) to deplete or exhaust the resources of the defendant so as to deter it from engaging in public participation; or (b) to dissuade the defendant or other person from engaging in public participation.

A definition of ‘public participation’ must included in the Act as set out in Recommendation # 3 above (even if a right to public participation is not used) in order for step (1) of this test to function properly.

RECOMMENDATION # 6: Anti-SLAPP legislation for Ontario should include a provision which allows the court to order the plaintiff to pay to the defendant advance costs if the court determines that without such assistance the defendant’s financial situation would prevent it from effectively defending itself.

RECOMMENDATION # 7: Anti-SLAPP legislation for Ontario should provide authority to a court to impose an order:

- (a) to require the party who commenced the proceeding to pay full indemnity costs to the defendant, including all reasonable costs and expenses incurred by the defendant in relation to the dismissed proceeding;
- (b) to require the party who commenced the proceeding to pay punitive or exemplary damages;
- (c) to require the directors and officers of a corporation which commenced the proceeding to personally pay damages;
- (d) to prohibit the party that commenced proceedings from instituting further legal proceedings, except with prior authorization by the court and subject to the conditions to be determined by the court; and
- (e) to suspend other proceedings involving the case or closely linked to it, whether or not those proceedings are before a court or some other public forum, for a period of time that the court determines to be appropriate.



Inter-jurisdictional Review of Anti-SLAPP Legislation

Comparative Analysis of Existing Anti-SLAPP Laws in the United States, Canada and Australia

More than half of the states in the United States have responded to the SLAPP threat by enacting anti-SLAPP legislation. In 1989, Washington State was the first state to pass such a law. Today, 27 American states and one territory (Guam) have anti-SLAPP legislation on the books; an additional two U.S. states have created anti-SLAPP caselaw (West Virginia and Colorado). Ten more U.S. jurisdictions, including the U.S. federal government, are also presently considering passing anti-SLAPP bills. One jurisdiction in Australia has anti-SLAPP legislation as does Quebec.

These jurisdictions have dealt with anti-SLAPP issues in disparate ways. Australia's anti-SLAPP legislation, for example, states that the Act does not apply in relation to actions for defamation. At the other end of the spectrum, Minnesota anti-SLAPP law provides for broad immunity for 'lawful conduct or speech' aimed in part or in whole at procuring government action.

The following document compares the key aspects of existing anti-SLAPP laws: the creation of a right to public participation; provisions on expedited dismissal; and disincentives to launching SLAPPs. It describes how each of these aspects is addressed in the various jurisdictions.

UNITED STATES

Arizona

CITATION: Arizona Revised Statutes: Title 12: Courts and Civil Proceedings; Chapter 6: Special Actions and Proceedings by Individual Persons; Article 15: Public Participation in Government; §12-751 – §12-752.

RIGHT TO PUBLIC PARTICIPATION: §12-751 defines protected communications as ‘any written or oral statement that falls within the constitutional protection of free speech and that is made as part of an initiative, referendum or recall effort or that is all of the following:

- (a) Made before or submitted to a legislative or executive body or any other governmental proceeding.
- (b) Made in connection with an issue that is under consideration or review by a legislative or executive body or any other governmental proceeding.
- (c) Made for the purpose of influencing a governmental action, decision or result.

‘Governmental proceeding’ means any proceeding, other than a judicial proceeding, by an officer, official or body of this state and any political subdivision of this state, including boards and commissions, or by an officer, official or body of the federal government.’

DISINCENTIVES FOR SLAPPS: Under §12-752B, the moving party may request that a court make a finding that the case was brought for an improper purpose. If a court does, the moving party can pursue additional sanctions as provided by court rule.

EARLY DISMISSAL MECHANISMS: Under §12-752B onus is on plaintiff to show that defendant’s ‘exercise of right of petition’ did not contain any reasonable factual support or any arguable basis in law and that defendant’s acts caused actual compensable injury.

WHAT WORKS IN THE LEGISLATION?

- Motion to dismiss heard on expedited basis.
- Motion to dismiss *shall* be granted unless plaintiff meets onus.
- Court awards reasonable costs of motion and attorney costs to defendant if motion granted.
- If case brought for improper purpose, additional sanctions available.

WHAT DOES NOT WORK?

- While costs of defending main action are minimized due to ability to bring motion, they are not necessarily insignificant and are not provided for in awards to successful mover.

Arkansas

CITATION: Arkansas Code of 1987; Title 16 – Practice, Procedure, and Courts; Chapter 63; Pleadings and Pretrial Proceedings; Subchapter 5 – *Citizen Participation in Government Act*; §16-63-501 – §16-63-508

RIGHT TO PUBLIC PARTICIPATION: §16-63-503 sets out that protected communications include, but are ‘not limited to, any written or oral statement, writing, or petition made: (A) Before or to a legislative, executive, or judicial proceeding, or other proceeding authorized by state, regional, county, or municipal governments; or (B) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or other body authorized by state, regional, county, or municipal government; and ... a communication made: (i) In, to, or about an issue of public concern related to any legislative, executive, or judicial proceeding, or other proceeding authorized by state, regional, county, or municipal governments; (ii) In the proper discharge of an official duty; and (iii) By a fair and true report of any legislative, executive, or judicial proceeding, or other proceeding authorized by state, regional, county, or municipal governments or anything said in the course of the proceeding, ... as well as all expressions of opinion or criticisms in regard to any legislative, executive, or judicial proceeding, or other proceeding authorized by state, regional, county, or municipal governments; and all criticisms of the official acts of any and all public officers.’

However, a statement or report made with knowledge that it was false or with reckless disregard of whether it was false is not protected communication.

DISINCENTIVES FOR SLAPPS: §16-63-506 disincentives exist in the form of compensatory damages (other than reasonable costs) but have a very high threshold.

EARLY DISMISSAL MECHANISMS: There are no specific onus-reversing provisions.

WHAT WORKS IN THE LEGISLATION?

- Motion to dismiss/strike must be heard not more than 30 days after service.
- §16-63-504 ‘privileged communications’ and certain other communications are immune from SLAPP unless made with knowledge they were false or made with reckless disregard for whether they were false.
- Privileged communications include opinions or criticisms of legislative, executive, judicial or other government proceedings.
- Verification requirement from both plaintiff and attorney of record that claim does not attack protected communications and is not meant to silence.
- Discovery halted upon filing of motion to strike/dismiss unless specifically allowed by judge.

WHAT DOES NOT WORK?

- Disincentives only available if case was brought for purpose of harassing, intimidating, punishing, or maliciously inhibiting – high threshold.
- No clear onus reversing provisions.

California

CITATION: *Code of Civil Procedure*: Title 6 – Of the Pleadings in Civil Actions; Chapter 2: Pleadings Demanding Relief; Article 1: General Provisions; §425.16 – §425.18

RIGHT TO PUBLIC PARTICIPATION: Pursuant to §425.16(e), protected communications include

- (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
- (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
- (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;
- (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

DISINCENTIVES FOR SLAPPS: No specific disincentives.

EARLY DISMISSAL MECHANISMS: Once it has been established that the action involves protected communications, the onus is on the plaintiff to establish probability that plaintiff will prevail.

WHAT WORKS IN THE LEGISLATION?

- Broad range of communications protected.
- Discovery stayed upon filing of motion.
- Motion to be heard within 30 days after service.

WHAT DOES NOT WORK?

- No disincentives for bringing suit beyond costs of lost action.

Delaware

CITATION: Delaware Code: Title 10: Courts and Judicial Procedure; Chapter 81: Personal Actions; §8136 – §8138

RIGHT TO PUBLIC PARTICIPATION: According to §8136, protected communications are ‘an action, claim, cross-claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, rule on, challenge or oppose such application or permission. It states:

- (2) ‘Public applicant or permittee’ shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.
- (3) ‘Communication’ shall mean any statement, claim or allegation in a proceeding, decision, protest, writing, argument, contention or other expression.
- (4) ‘Government body’ shall mean the State and any county, city, town, village or any other political subdivision of the State; any public improvement or special district, public authority, commission, agency or public benefit corporation; any other separate corporate instrumentality or unit of State or local government; or the federal government.’

DISINCENTIVES FOR SLAPPS: Under §8138(a)(2), punitive damages are awarded if demonstration is made that purpose of SLAPP was harassing, intimidating, punishing, etc.

EARLY DISMISSAL MECHANISMS: Once motion is filed, onus is on plaintiff to demonstrate SLAPP has substantial basis in law.

WHAT WORKS IN THE LEGISLATION?

- Plaintiff will only get damages if there is clear and convincing evidence that communication was made with knowledge of its falsity or reckless disregard.

WHAT DOES NOT WORK?

- High threshold for disincentive provision.
- No costs provision for a successful motion to dismiss, separate action for costs must be made for action and depends on action having been started without a substantial basis.

Florida

CITATION: Florida Statutes: Title 45 Torts; Chapter 768: Negligence; Part I: General Provisions; *Citizens Participation in Government Act*; §768.295

RIGHT TO PUBLIC PARTICIPATION: Not clearly defined. §768.295 references ‘the right of Florida’s citizens to exercise their rights to peacefully assemble, instruct their representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.’

DISINCENTIVES FOR SLAPPS: §768.295(6) – if government entity found to bring SLAPP, violation must be reported to AG, Cabinet, Senate, House.

In addition, the court may award – subject to certain limitations – ‘the party sued by a governmental entity actual damages arising from the governmental entity’s violation of this act. The court shall award the prevailing party reasonable attorney’s fees and costs incurred in connection with a claim that an action was filed in violation of this section.’ (768.295(5))

EARLY DISMISSAL MECHANISMS: No reverse onus provisions.

WHAT WORKS IN THE LEGISLATION? Statute itself acknowledges that SLAPPs are mostly filed by private entities and individuals, yet addresses primarily/only government initiated SLAPPs.

WHAT DOES NOT WORK? Only applies to government entities, not private entities, regardless of public interest.

Georgia

CITATION: Official Code of Georgia: Title 9. Civil Practice; Chapter 11. Civil Practice Act; Article 3: Pleadings and Motions; §9-11-11.1

RIGHT TO PUBLIC PARTICIPATION: According to §9-11-11.1, protected communication ‘includes any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.’

DISINCENTIVES FOR SLAPPS: No disincentive other than possibility of costs for action if lost.

EARLY DISMISSAL MECHANISMS: No specific provisions addressing onus.

WHAT WORKS IN THE LEGISLATION?

- Actions which could reasonably be understood to target protected communications must be filed with a verification statement affirming that they do not and/or are not meant to harass.
- Improperly verified actions can be dismissed by the court, either on its own initiative or on motion, and costs can be ordered paid to the defendant.
- Motion shall be heard not more than 30 days after service and all discovery is stayed upon filing of a motion.

WHAT DOES NOT WORK?

- Costs are not guaranteed, even when action has been improperly filed, no reverse onus provisions.

Hawaii

CITATION: Hawaii Revised Statutes: Volume 13; Chapter 634F; §634F-1 – §634F-4

RIGHT TO PUBLIC PARTICIPATION: §634F-1 ‘Public participation’ means any oral or written testimony submitted or provided to a governmental body during the course of a governmental proceeding.’

DISINCENTIVES FOR SLAPPS: §634F-2(8) provides that if defendant wins motion, the court shall award the greater

of actual damages or \$5000; costs; costs of the motion, and other sanctions as deemed necessary to deter repetition. Any person damaged by improper SLAPP may seek compensatory or punitive damages.

EARLY DISMISSAL MECHANISMS: §634F-2(4)(B) states that the burden of proof is on the plaintiff.

WHAT WORKS IN THE LEGISLATION? Significant possible damage awards.

WHAT DOES NOT WORK? Public participation is narrow – oral or written testimony provided to government body during government proceeding.

Illinois

CITATION: Illinois Compiled Statutes: Major Title: Rights and Remedies; Chapter 735: Civil Procedure; *Citizen Participation Act*; §735 ILCS 110/1 – §735 ILCS 110/99

RIGHT TO PUBLIC PARTICIPATION: Not clearly defined. §735 ILCS 15 refers to the ‘rights of petition, speech, association, or to otherwise participate in government.’

DISINCENTIVES FOR SLAPPS: No specific disincentives.

EARLY DISMISSAL MECHANISMS: §735 ILCS 110/20(c) – onus on plaintiff to produce clear and convincing evidence that defendant not immune from liability.

§735 ILCS 110/15 – acts in furtherance of constitutional rights are immune from liability regardless of intent or purpose except when not genuinely aimed at obtaining favourable government action, result, and outcome.

WHAT WORKS IN THE LEGISLATION?

- Costs awarded to successful party on motion.
- Discovery stayed upon filing of motion.
- Must be decided within 90 days.

WHAT DOES NOT WORK? No real disincentives.

Indiana

CITATION: Indiana Code: Title 34 Civil Law and Procedure; Article 7 General Provisions; Chapter 7; §IC 34-7-7-1; §IC 34-7-7-10

RIGHT TO PUBLIC PARTICIPATION: §IC 34-7-7-2 defines protected communications as acts ‘in furtherance of a

person’s right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana in connection with a public issue.’

DISINCENTIVES FOR SLAPPS: No disincentives.

EARLY DISMISSAL MECHANISMS: No reverse onus provisions.

WHAT WORKS IN THE LEGISLATION?

- Legislated defence to a SLAPP if act taken in furtherance of constitutional right to petition or free speech and was in good faith with reasonable basis in law and fact.
- 30 day time limit for court’s hearing of motion.
- Simplified evidence to judge motion on.

WHAT DOES NOT WORK? No real disincentives or reverse onus.

Louisiana

CITATION: Code of Civil Procedure: Article 971

RIGHT TO PUBLIC PARTICIPATION: Art. 971.F(1) defines protected communications as acts ‘in furtherance of a person’s right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue’ [which] includes but is not limited to:

- (a) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.
- (b) Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official body authorized by law.
- (c) Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.
- (d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.’

DISINCENTIVES FOR SLAPPS: No specific disincentives.

EARLY DISMISSAL MECHANISMS: Art. 971.A(1) – onus on plaintiff to establish probability of success on SLAPP.

WHAT WORKS IN THE LEGISLATION?

- Broad interpretation of acts which may be protected under constitutional right of petition and free speech
- Discovery stayed upon filing of motion.
- Time limits to encourage speedy hearing of motion.
- Mandatory cost recovery.

WHAT DOES NOT WORK? No specific disincentives.

Maine

CITATION: Maine Revised Statutes: Title 14 Court Procedure – Civil; Part 2: Proceedings Before Trial; Chapter 203 Process; Subchapter 1 General Provisions; §556

RIGHT TO PUBLIC PARTICIPATION: Protected communication is ‘any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.’

DISINCENTIVES FOR SLAPPS: No strong disincentives.

EARLY DISMISSAL MECHANISMS: Once the moving party asserts that the claim is based on their exercise of its rights of petition under the Constitution, the onus shifts to the party against whom the motion is made to show that the moving party’s exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party’s acts caused actual injury to the responding party.

WHAT WORKS IN THE LEGISLATION?

- Once the moving party asserts that the action targets communications that are protected under the statute, the onus shifts to the plaintiff.
- All discovery proceedings are stayed upon the filing of the motion unless the court orders otherwise. The stay remains in effect until an order is made on the motion.
- Costs can (but are not necessarily) awarded.

WHAT DOES NOT WORK? There is no provision regarding punitive damages, and, although costs can be awarded to a successful mover, a cost award is not mandatory.

Maryland

CITATION: Maryland Code: Courts and Judicial Proceedings: Title 5: Limitations, Prohibited Actions, and Immunities; Subtitle 8 Immunities and Prohibited Actions – Miscellaneous; §5-807

RIGHT TO PUBLIC PARTICIPATION: In defining SLAPPs, the legislation says it must involve communication ‘with a federal, State, or local government body or the public at large to report on, comment on, rule on, challenge, oppose, or in any other way exercise rights under the First Amendment of the U.S. Constitution or Article 10, Article 13, or Article 40 of the Maryland Declaration of Rights regarding any matter within the authority of a government body’.

DISINCENTIVES FOR SLAPPS: No real disincentives.

EARLY DISMISSAL MECHANISMS: No reverse onus provisions.

WHAT WORKS IN THE LEGISLATION?

- A good definition of SLAPPs is provided in the legislation.
- The legislation expressly states that the defendant is not civilly liable in some circumstances.

WHAT DOES NOT WORK?

- There are no disincentives built into the legislation.
- The legislation does not address the onus of proof.
- The legislation does not provide for costs or damages as a remedy.

Massachusetts

CITATION: General Laws of Massachusetts: Part III: Courts, Judicial Officers and Proceedings in Civil Cases; Title II: Actions and Proceedings Therein; Chapter 231: Pleading and Practice; §59H

RIGHT TO PUBLIC PARTICIPATION: ‘any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or

judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government’.

DISINCENTIVES FOR SLAPPS: No strong disincentives.

EARLY DISMISSAL MECHANISMS: The moving party must assert that the claim is based on its exercise of its right to petition. The party against whom the motion is made must show that the moving party’s exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party’s acts caused actual injury to the responding party.

WHAT WORKS IN THE LEGISLATION?

- Once the moving party asserts that the action is a ‘SLAPP’, the onus shifts to the defendant.
- All discovery proceedings are stayed upon the filing of the motion under this section unless the court orders otherwise. The stay remains in effect until an order is made on the motion.
- Mandatory cost awards which include costs of discovery and motion for successful mover.

WHAT DOES NOT WORK? No provision regarding punitive damages (although costs can be awarded to a successful party).

Minnesota

CITATION: Minnesota Statutes: Declaratory, Corrective and Administrative Remedies; Chapter 554 – Free Speech, Participation in Government; §554.01 – §554.05

RIGHT TO PUBLIC PARTICIPATION: ‘Speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action’ is protected.

DISINCENTIVES FOR SLAPPS: If the moving party proves that the claim was brought for the purpose of harassment, to inhibit the moving party’s public participation, to interfere with the moving party’s exercise of protected constitutional rights, or otherwise wrongfully injure the moving party, the

court shall award the moving party actual damages. The court may also award punitive damages.

EARLY DISMISSAL MECHANISMS: The responding party must produce clear and convincing evidence that the acts of the moving party are not immunized from liability.

WHAT WORKS IN THE LEGISLATION?

- Discovery must be suspended pending the final disposition of the motion.
- The respondent bears the burden of proof and persuasion of the motion.
- Lawful conduct or speech that is genuinely aimed in whole or in part at procuring favourable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person’s constitutional rights.
- Any governmental body to which the moving party’s acts were directed or the attorney general’s office may intervene in, defend, or otherwise support the moving party.
- Costs are awarded for a successful mover.
- If the moving party is successful, actual damages must be awarded and punitive damages may be awarded.

WHAT DOES NOT WORK? The scope of public participation that is protected could be more clearly defined.

Missouri

CITATION: Missouri Revised Statutes: Title XXXVI Statutory Actions and Torts; Chapter 537 – Torts and Actions for Damages; §537.528

RIGHT TO PUBLIC PARTICIPATION: While public participation is not defined, the motion can be brought with respect to ‘any action seeking money damages against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state’.

DISINCENTIVES FOR SLAPPS: No specific disincentives.

EARLY DISMISSAL MECHANISMS: No specific onus provisions.

WHAT WORKS IN THE LEGISLATION?

- All discovery shall be suspended pending a decision on the motion.

- Costs awarded to successful mover.

WHAT DOES NOT WORK? The legislation is very sparse. There is very little substance.

Nebraska

CITATION: Nebraska Revised Statutes; Chapter 25 – Courts; Civil Procedure; §25-21,241 – §25-21,246

RIGHT TO PUBLIC PARTICIPATION: Pursuant to §25-21,242 protected communications are those made about the application for or granting of ‘a permit, zoning change, lease, license, certificate, or other entitlement for use or permission to act from’ ‘a city, a village, a political subdivision, a state agency, the state, the federal government, or a public authority, board, or commission.’ The statute applies to actions initiated by the person who as obtained/applied for the permission or entitlement, or ‘any person with an interest, connection, or affiliation with such person that is materially related to such application or permission.’

DISINCENTIVES FOR SLAPPS: Provides for additional compensatory damages if demonstration is made that action against public participation was made with intent to harass, silence, etc.

EARLY DISMISSAL MECHANISMS: Plaintiff must demonstrate knowledge of falsity, or reckless disregard of falsity, if falsity is material to action at issue in order to recover damages. Once demonstration has been made that communication is protected in a motion to dismiss/strike, plaintiff must demonstrate that there is a substantial basis for allowing claim to continue.

WHAT WORKS IN THE LEGISLATION?

- Motions to dismiss/strike heard on expedited basis, with plaintiff having to make demonstration of substantial basis for claim to continue.
- The plaintiff cannot recover damages unless it meets the legislated requirements.

WHAT DOES NOT WORK? Damages do not flow from success on a motion to dismiss/strike, but must be claimed in a separate action.

Nevada

CITATION: Nevada Revised Statutes; Chapter 41 – Actions and Proceedings in Particular Cases Concerning Persons; §41.635 – §41.670

RIGHT TO PUBLIC PARTICIPATION: Protected communication includes any:

1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; or
3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law, which is truthful or is made without knowledge of its falsehood.’

DISINCENTIVES FOR SLAPPS: If successful, the moving party can bring an action for compensatory and punitive damages and costs.

EARLY DISMISSAL MECHANISMS: No reverse onus provisions.

WHAT WORKS IN THE LEGISLATION?

- A person who engages in a good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon the communication.
- Discovery is stayed pending a ruling on the motion.
- State may defend or support person whom action is brought against.
- The court shall make a decision within 30 days after the motion is filed, so the issue will be dealt with quickly.
- On its face, the limitation of liability provision is broad.
- The legislation allows for punitive damages.

WHAT DOES NOT WORK?

- The motion to dismiss must be brought within 60 days after service of the complaint, unless court orders otherwise if ‘good cause is shown.’
- The onus is not placed on the defendant to prove that the moving party is not immunized from liability.

New Mexico

CITATION: New Mexico Statutes Annotated 1978; Chapter 38 – Trials; Article 2 – Pleadings and Motions; §38-2-9.1 – §38-2-9.2

RIGHT TO PUBLIC PARTICIPATION: The special motion can be brought regarding ‘Any action seeking money damages against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-judicial proceeding before a tribunal or decision-making body of any political subdivision of the state’.

DISINCENTIVES FOR SLAPPS: No strong disincentives.

EARLY DISMISSAL MECHANISMS: No reverse onus provisions.

WHAT WORKS IN THE LEGISLATION?

- The legislation clearly defines its purpose and discusses the problem of SLAPPs in the United States.
- Costs are awarded to a successful mover.

WHAT DOES NOT WORK?

- The legislation does not address the onus on the parties, and does not place the onus of proof on the plaintiff, and does not set a clear standard.
- The legislation provides no disincentive for the plaintiff to file a SLAPP.

New York

CITATION: Consolidated Laws of New York: Civil Rights – Article 7 – Miscellaneous Rights and Immunities; §70-a and §76-a; AND Civil Practice Law and Rules – Article 32 – Accelerated Judgment; 3211(g) and 3212(h)

RIGHT TO PUBLIC PARTICIPATION

- ‘An action involving public petition and participation is an action, claim, cross claim or counterclaim for damages that is brought by’ ‘any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission’ ‘and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.’

- ‘Government body’ shall mean any municipality, the state, any other political subdivision or agency of such, the federal government, any public benefit corporation, or any public authority, board, or commission.’

DISINCENTIVES FOR SLAPPS: The defendant can recover damages (compensatory and/or punitive) ‘upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.’

EARLY DISMISSAL MECHANISMS

- Plaintiff must demonstrate that the case has a ‘substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law’ for the case to continue once motion made.
- Plaintiff can only recover damages, if in addition to all other necessary elements, it has established by clear and convincing evidence that ‘any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.’

WHAT WORKS IN THE LEGISLATION? The costs provisions are very important – they both allow the defendant to claim damages, and also limit the damages the plaintiff can recover.

WHAT DOES NOT WORK?

- Standard for costs award is high, and discretionary.
- No discovery limiting provisions.

Oklahoma

CITATION: Oklahoma Statutes: Title 12 – Civil Procedure; §12-1443.1

RIGHT TO PUBLIC PARTICIPATION: ‘A privileged publication or communication is one made

- (1) In any legislative or judicial proceeding or any other proceeding authorized by law;
- (2) In the proper discharge of an official duty;

- (3) By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.'

DISINCENTIVES FOR SLAPPS: No disincentives.

EARLY DISMISSAL MECHANISMS: No specific reverse onus provisions.

WHAT WORKS IN THE LEGISLATION? Provides protection from libel for communications that qualify for the privilege (see description of privileged communications).

WHAT DOES NOT WORK? Does not allow for costs, or any other procedural protection. It is merely a statement of privilege.

Oregon

CITATION: Oregon Revised Statutes: Volume 1 – Chapter 31 – Tort Actions; §31.150 – §31.155

RIGHT TO PUBLIC PARTICIPATION

- A motion may be brought regarding '[a]ny oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law; [or] Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law; [or] Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; [or] Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.'

DISINCENTIVES FOR SLAPPS: No strong disincentives.

EARLY DISMISSAL MECHANISMS: Plaintiff must demonstrate a probability of success on the claim in order to defend a motion to strike.

WHAT WORKS IN THE LEGISLATION?

- Broad category of public interest communications covered.
- The hearing must be held within 30 days of the motion being filed.
- All discovery is stayed up filing of the motion.
- Costs awarded to mover on successful motion to strike.

WHAT DOES NOT WORK?

- The motion must be brought within 60 days of service of the complaint, unless permission of the court is granted.
- No possibility of damage awards for compensation and disincentive.

Pennsylvania

CITATION: Pennsylvania Consolidated Statutes: Title 27 – Environmental Resources; Part VI – Sanctions and Remedies; Participation in Environmental Law or Regulation; §7707 and §8301 – §8305

RIGHT TO PUBLIC PARTICIPATION: Protected communication only includes communication that is relevant to the enforcement or implementation of an environmental law or statute.

DISINCENTIVES FOR SLAPPS: No strong disincentives.

EARLY DISMISSAL MECHANISMS: No explicit reverse onus provisions.

WHAT WORKS IN THE LEGISLATION?

- Immunity from civil liability is provided for individuals who file an action in the courts to enforce an environmental law or regulation and for individuals that make communications to a government agency relating to enforcement or implementation of an environmental law or regulation.
- However, immunity does not attach if the individual knew the statement was false and made it recklessly or maliciously, if the statement was made only to interfere with business relationships, or if the communication is an abuse of process.
- Mandatory cost award if successful in defence against action, and ability for proportional awards if partially successful.

WHAT DOES NOT WORK?

- The legislation does not address the need for protection in non-environmental matters.
- The legislation does not address the possibility of punitive damages.
- The legislation does not address who bears the onus of proving that the individual acted maliciously or falls into one of the other exceptions to immunity.

Rhode Island

CITATION: State of Rhode Island General Laws: Title 9 – Courts and Civil Procedure/Procedure Generally; Chapter 9-33 Limits on Strategic Litigation Against Public Participation; §9-33-1 – §9-33-4

RIGHT TO PUBLIC PARTICIPATION: ‘A party’s exercise of its right of petition or of free speech’ shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; or any written or oral statement made in connection with an issue of public concern.’

DISINCENTIVES FOR SLAPPS: If the moving party is successful on the motion or, if the motion is denied, at trial, the court shall award compensatory damages and may award punitive damages.

EARLY DISMISSAL MECHANISMS: No reverse onus provisions.

WHAT WORKS IN THE LEGISLATION?

- Conditional immunity is provided for individual who has exercised his or her right of petition or of free speech in connection with a matter of public concern, unless communication was not genuinely aimed at procuring favourable government action, because it is objectively and subjectively baseless (‘sham’).
- Discovery is stayed until the disposition of the motion.
- Cost awards mandatory for successful mover, and for prevailing party at trial if party was defending communication.

WHAT DOES NOT WORK?

- The legislated definition of ‘sham’ communication leaves a great deal of room for judicial interpretation.
- Unclear whether compensatory and punitive damages are available to both parties.

Tennessee

CITATION: Tennessee Code Annotated: Title 4 – State Government; Chapter 21 – Human Rights; Part 10 – Tennessee Anti-Slapp Act of 1997 – Strategic Lawsuits Against Political Participation; §4-21-1001 – §4-21-1004

RIGHT TO PUBLIC PARTICIPATION: Protected communication includes only communications made to a government agency (state, federal or local) in connection with a public or governmental issue. Such statements are immune from liability unless ‘the person communicating such information:

- (1) Knew the information to be false;
- (2) Communicated information in reckless disregard of its falsity; or
- (3) If such information pertains to a person or entity other than a public figure, whether the communication was made negligently in failing to ascertain the falsity of the information.’

DISINCENTIVES FOR SLAPPS: No disincentives.

EARLY DISMISSAL MECHANISMS: No reverse onus provisions.

WHAT WORKS IN THE LEGISLATION?

- Provides some immunity from civil liability in the case of statements made in furtherance of public participation.
- Costs can be recovered if successful on the motion.
- Government agency can defend action.

WHAT DOES NOT WORK?

- The immunity defence requires complicated proofs to show that the communication was covered, and there are no reverse onus or discovery limiting provisions.
- There is no discussion of the remedies available to the defendant.

Utah

CITATION: Utah Code (Recodification): Title 78B – Judicial Code; Chapter 6 – Particular Proceedings; Citizen Participation in Government Act; §78B-6-1401 – §78B-6-1405

RIGHT TO PUBLIC PARTICIPATION: Public participation is not defined, however, a party can bring a special motion under the Act if ‘the action is primarily based on, relates to, or is in response to an act of the defendant while participating

in the process of government and is done primarily to harass the defendant’.

DISINCENTIVES FOR SLAPPS: The moving party can claim costs and damages if successful.

EARLY DISMISSAL MECHANISMS: No reverse onus provisions. Instead, arguably higher onus on person acting to protect right to participate.

WHAT WORKS IN THE LEGISLATION?

- Discovery is stayed pending the outcome of the motion.
- The legislation stipulates that the court must hear and determine the motion ‘expeditiously’.
- There is a right of appeal if the motion is denied.

WHAT DOES NOT WORK?

- The moving party must prove with clear and convincing evidence that the primary reason for the filing of the complaint was to interfere with the first amendment right of the defendant – this is an anti-reverse onus provision which determines the motion by the intent of the SLAPP initiator.
- Costs must be specifically claimed and do not flow from success on a motion.
- The legislation provides no immunity from civil liability.

Vermont

CITATION: Vermont Statutes: Title 12: Court Procedure; Part 2: Proceedings Before Trial; Chapter 27: Pleading and Practice; §1041

RIGHT TO PUBLIC PARTICIPATION: Protected communication defined as: ‘the exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the United States or Vermont Constitution,’ which includes:

1. any written or oral statement made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
2. any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
3. any written or oral statement concerning an issue of public interest made in a public forum or a place open to the public; or

4. any other statement or conduct concerning a public issue or an issue of public interest which furthers the exercise of the constitutional right of freedom of speech or the constitutional right to petition the government for redress of grievances.’

DISINCENTIVES FOR SLAPPS: Costs to be awarded against party if motion to strike is granted.

EARLY DISMISSAL MECHANISMS: ‘The court shall grant the special motion to strike, unless the plaintiff shows that:

- a. the defendant’s exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law; and
- b. the defendant’s acts caused actual injury to the plaintiff.’

WHAT WORKS IN THE LEGISLATION?

- Clear time deadlines.
- Clear limits to discovery. All discovery proceedings are stayed upon the filing of the motion under this section unless the court orders otherwise. The stay remains in effect until an order is made on the motion.

WHAT DOES NOT WORK? ‘Public issue’ and ‘public interest’ not clearly defined in stated definition – combined with lack of defined criteria for bringing motion to strike, and possibility of costs against mover if motion to strike is deemed frivolous, could dissuade some SLAPP defendants from having recourse to the statute.

Washington

CITATION: Revised Code of Washington: Title 4 Civil procedure; 4.24 Special rights of action and special immunities; §4.24.500 – §4.24.520

RIGHT TO PUBLIC PARTICIPATION: Only protects a ‘person who communicates a complaint or information to any branch or agency of federal, state, or local government regarding any matter reasonably of concern to that agency.’

DISINCENTIVES FOR SLAPPS: A successful defendant of their right to communicate shall receive statutory damages in the amount of \$10,000, in addition to being entitled to costs and reasonable attorney’s fees.

EARLY DISMISSAL MECHANISMS: No reverse onus provisions.

WHAT WORKS IN THE LEGISLATION?

- Strong disincentive in the nature of statutory damages.

- Ability for government agency or AG to intervene to defend suit.

WHAT DOES NOT WORK? The immunity only applies to communications to government.

Guam

CITATION: Guam Code Annotated: Title 7 – Civil Procedure and Judiciary; Division 2 – Civil Actions; Chapter 17 – Citizen Participation in Government Act; §17101 – §17109.

RIGHT TO PUBLIC PARTICIPATION: Pursuant to §17104, protected communication includes ‘seeking relief, influencing action, informing, communicating and otherwise participating in the processes of government,’ where ‘government’ includes a branch, department, agency, instrumentality, official, employee, agent or other person acting under color of law of the United States, a State, a Territory, or a subdivision of a State or Territory, including municipalities and their boards, commissions, and departments, or other public authority, including the electorate.’ [Emphasis added]

DISINCENTIVES FOR SLAPPS

§17106 provides that:

- ‘(g) the court shall award a moving party who is dismissed, without regards to any limit under Guam law:
 - (1) costs of litigation, including reasonable attorney and expert witness fees, incurred in connection with the motion; and
 - (2) such additional sanctions upon the responding party, its attorneys or law firms as it determines will be sufficient to deter repetition of such conduct and comparable conduct by others similarly situated; and
- (h) a person damaged or injured by reason of a claim filed in violation of their rights under §[1710]4 may seek relief in the form of a claim for actual or compensatory damages, as well as punitive damages, attorney’s fees and costs, from the person or persons responsible.’

EARLY DISMISSAL MECHANISMS: §17106 provides that ‘(e) the court shall grant the motion and dismiss the judicial claim, unless the responding party has produced *clear and convincing* evidence that the acts of the moving party are not immunized from liability by §[1710]4.’

WHAT WORKS IN THE LEGISLATION?

- Protected communications carry immunity from liability. (§17104).
- Discovery shall be suspended, pending decision on the motion and appeals (§17106).
- The evidence that the court considers is defined: §17106 ‘(d) the court shall make its determination based on the facts contained in pleadings and affidavits filed.’
- Expedited timelines, and costs provided for (§17106).
- Costs awards for a successful motion are mandatory and there is a high standard to be met for the motion to be dismissed. (§17106).

WHAT DOES NOT WORK? Immunity from liability is broad recourse, especially when covers communications to electorate.

Proposed Federal Anti-SLAPP Legislation

CITATION: U.S. Bill H.R. 4364, *Citizen Participation Act of 2009*, 111th United States Congress, 2009; Introduced and referred to the Committee on the Judiciary – 16 December 2009.

RIGHT TO PUBLIC PARTICIPATION

- Communications include but are not limited to ‘(A) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (B) any written or oral statement made in a place open to the public or a public forum in connection with an issue of public interest; or (C) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with an issue of public interest’.
- For communications which include but are not limited to any written or oral statement ‘(A) made or submitted before a legislative, executive, or judicial body, or any other official proceeding authorized by law; or (B) any written or oral statement encouraging a statement before a legislative, executive, or judicial body, or any other official proceeding authorized by law’; the plaintiff must prove knowledge of falsity or reckless disregard of falsity by clear and convincing evidence.
- ‘The term ‘issue of public interest’ includes an issue related to health or safety; environmental, economic or community well-being; the government; a public figure; or a good, product or service in the market place.’

- “Issue of public interest’ shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker’s business interests rather than toward commenting on or sharing information about a matter of public significance.’

DISINCENTIVES FOR SLAPPS: No specific disincentives.

EARLY DISMISSAL MECHANISMS: Once the mover has demonstrated that the communication is within the scope of protected activity, the plaintiff must prove knowledge of falsity or reckless disregard of falsity by clear and convincing evidence.

- Public interest is defined (see above).
- Discovery is stayed upon filing of the motion.
- Motion shall be heard on an expedited basis.
- Costs and reasonable attorney’s fees shall be awarded to successful mover. (Responding party may be awarded costs if motion made frivolously and is dismissed).
- Fees or costs awarded for a claim dismissed under this act shall not be dischargeable under bankruptcy laws.

WHAT DOES NOT WORK? Lack of disincentives to SLAPPING, and possible complications around jurisdictional application of statute (provided for in draft).

CANADA

Quebec

CITATION: Bill 9, *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*; 1st Sess., 39th Leg., Quebec, 2009 (assented to 4 June 2009), 2009, c.12.

RIGHT TO PUBLIC PARTICIPATION: While the act mentions ‘public participation’ neither it nor the scope of communications to be protected are specified.

DISINCENTIVES FOR SLAPPS: Section 54.5 establishes that punitive damages may be awarded.

EARLY DISMISSAL MECHANISMS

- While, pursuant to s.54.2, there is an onus on the plaintiff to show the action is not excessive or unreasonable and is justified in law, this arises only after the defendant shows that the pleading may be an improper use of procedure.

WHAT WORKS IN THE LEGISLATION?

- Section 54.1 establishes that the court may, of own initiative, find an action or pleading abusive.
- There is the possibility of an order giving a cost provision to the other party if justified by financial circumstances (s.54.3(5)).

WHAT DOES NOT WORK? The usefulness of the provisions depend on the ability to make a summary demonstration that the action is an improper use of procedure, however no guidelines are given for how to do so.

AUSTRALIA

Australian Capital Territory

CITATION: *Protection of Public Participation Act 2008*; www.legislation.act.gov.au/a/2008-48/current/pdf/2008-48.pdf

RIGHT TO PUBLIC PARTICIPATION: Public participation is ‘conduct that a reasonable person would consider is intended (in whole or part) to influence public opinion, or promote or further action by the public, a corporation or government entity in relation to an issue of public interest.’ However, there are a number of exceptions outlined in the legislation, including communication or actions that are discriminatory, cause harm, or constitute trespass.

DISINCENTIVES FOR SLAPPS: The court may order the plaintiff to pay a financial penalty if the action was brought for an improper purpose, however this penalty is payable to the Territory, and not to the defendant.

EARLY DISMISSAL MECHANISMS: No specific reverse onus provisions.

WHAT WORKS IN THE LEGISLATION? The act states that its purpose is to protect public participation, and draws attention to the issue.

WHAT DOES NOT WORK?

- Defendant must establish that the plaintiff’s purpose was ‘improper’, a standard which is onerous to prove and does not grant much procedural protection to an unfairly targeted plaintiff throughout the process.
- The act specifically states that it does not apply in cases of defamation.

Notes

- 1 Chris Tollefson, 'Strategic Lawsuits Against Public Participation: Developing a Canadian Response', 7:3 *Canadian Bar Review* (1994), 201.
- 2 Uniform Law Conference of Canada (ULCC), Civil Section, *Strategic Lawsuits against Public Participation (SLAPPs) (and other abusive lawsuits)* (ULCC, August 2008), at 2, available at <www.ulcc.ca/en/poam2/SLAPP%20Report.pdf>.
- 3 The American academics Penelope Canan and George Pring introduced the term 'SLAPP' in the late 1980s in response to an increasing number of these lawsuits being filed and the resulting silencing of public participation in government decision-making processes. See P. Canan and G. Pring, 'Strategic Lawsuits Against Public Participation', 35 *Soc. Probs.* (1988), 506.
- 4 SLAPPs are generally initiated by corporations with an economic interest in the outcome of a public decision. They are often unmeritorious, and aimed at thwarting or deterring behaviour such as demonstrations, boycotts, advocacy at public meetings, posting information on the Internet, or signing or circulating petitions. See Michaelin Scott and Chris Tollefson, 'Strategic Lawsuits Against Public Participation: The British Columbia Experience', 19:1 *Review of European Community and International Environmental Law* (2010), 45, at 46.
- 5 *Ibid.*, at 45-46.
- 6 Samantha Brown and Mark Goldowitz, 'The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits Against Public Participation', 19:1 *Review of European Community and International Environmental Law* (2010), 3, at 3-4.
- 7 Catherine S. Norman, 'Anti-SLAPP Legislation and Environmental Protection in the USA: An Overview of Direct and Indirect Effects', 19:1 *Review of European Community and International Environmental Law* (2010), 28.
- 8 See Michaelin Scott and Chris Tollefson, n. 4 above.
- 9 Pamela Shapiro, 'SLAPPs: Intent of Content: Anti-SLAPP Legislation Goes International', 19:1 *Review of European Community and International Environmental Law* (2010), 14; George W. Pring, 'SLAPPs: Strategic Lawsuits Against Public Participation' (Paper presented at the Fall Colloquium on 'Strategic Lawsuits Against Public Participation (SLAPPs) – Protecting Property or Intimidating Citizens' at the Pace University School of Law Center for Environmental Legal Studies, (14 October 1989), (1989-1990) 7 *Pace Envtl. L. Rev.* 3, at 12 and n. 32.
- 10 See Pamela Shapiro, *ibid.*
- 11 See Catherine S. Norman, n. 7 above.
- 12 See Chris Tollefson, n. 1 above, at 228.
- 13 *Ibid.*
- 14 G. W. Pring and P. Canan, *SLAPPs Getting Sued for Speaking Out* (Temple University Press, 1996), at 83-84.
- 15 *Ibid.*
- 16 See Catherine S. Norman, n. 7 above.
- 17 Normand Landry, 'From the Streets to the Courtroom: The Legacies of Quebec's anti-SLAPP Movement', 19:1 *Review of European Community and International Environmental Law* (2010), 58.
- 18 [1999] 32 C.E.L.R. (N.S.) 143.
- 19 *Protection of Public Participation Act*, S.B.C. 2001, c. 32.
- 20 Code of Civil Procedure, R.S.Q., c. C.25. A separate anti-SLAPP law was not seen as needed in Quebec as it has existing freedom of expression rights between citizens under its *Charter of Human Rights and Freedoms*, R.S.Q., c. C.12.
- 21 *Revised Code of Washington*, RCW4.24.500 – 4.24.520 (1989).
- 22 US Bill H.R. 4364, *Citizen Participation Act*, 111th Cong. 2009. The intent of the federal bill is to, among other things, prevent forum shopping among US states by SLAPP plaintiffs.
- 23 See the California Anti-SLAPP Project website for an up-to-date list of US states with anti-SLAPP measures in place or pending: <www.casp.net>. See also Pamela Shapiro, n. 9 above, and see S. Brown and M. Goldowitz, n. 6 above.
- 24 *Protection of Public Participation Act*, 2008 (ACT).
- 25 *Gunns v. Marr and Ors* [2005] VSC 251; and *Gunns v. Marr and Ors*, [2006] VSC 329.
- 26 See Chris Tollefson, n. 1 above, at 221-229.
- 27 *Ibid.*, at 229.
- 28 *Ibid.*, at 216.
- 29 *Retail, Wholesale and Department Store Union v. Dolphin Delivery*, [1986] 2 S.C.R. 573. Whether SLAPPs are private or public disputes is a matter of debate. The state is clearly implicated by SLAPPs by virtue of its direct interest in open and unfettered public participation in government decision-making processes. See Chris Tollefson, n. 1 above, at 228.
- 30 *Ibid.*, at 224.
- 31 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s140.
- 32 See Uniform Law Conference of Canada, n. 2 above, at 4 and 6 and Honourable Coulter A. Osborne Q.C., *Civil Justice Reform Project, Findings and Recommendations* (November 2007), available at <www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp>.

- 33 Honourable Coulter A. Osborne *Q.C.*, *Civil Justice Reform Project, Findings and Recommendations*, *ibid.*. According to the report, in 2005-06, summary judgment motions were commenced in only 642 of Ontario's 63,251 Superior Court civil cases (1%).
- 34 See Uniform Law Conference of Canada, n. 2 above, at 5.
- 35 Rules of Civil Procedure, R.R.O. Reg. 194, Rule 20.04 (2.1).
- 36 See Chris Tollefson, n. 1 above, at 206.
- 37 *Ibid.*
- 38 *Ibid.*, at 206.
- 39 See Uniform Law Conference of Canada, n. 2 above, at 6.
- 40 *Ibid.*
- 41 *Ibid.*
- 42 *Ibid.*
- 43 *Ibid.*, at 6-7.
- 44 R. Wilts, *et al.*, 'The West Coast Environmental Law SLAPP Handbook' (WCEL, 2002), at 20, found at <www.wcel.org/wcelpub/2002/13959.pdf>.
- 45 *Quan v. Cusson*, [2009] SCJ No. 62.
- 46 *Grant v. Torstar Corp.*, [2009] SCJ No. 61.
- 47 *Ibid.*, at paras 98-126.
- 48 Ramani Nadarajah and Renee Griffin, 'The Failure of Defamation Law to Safeguard against SLAPPs in Ontario', 19:1 *Review of European Community and International Environmental Law* (2010), 70.
- 49 Ark. Code Ann., §§16-63-501 to 16-63-508 (2005); Ariz. Rev. Stat. §12-751-12-752; Minn. Stat. §554.03 (1994); Cal. Code Civ. Proc. §§426.16-18; Del. Code Ann. §§8136 – 8138 (1992); Neb. Rev. Stat. §§25-21, 242 to 25-21, 246 (1994); 27 Pa. Consol. Stat., §7707, §§8301-8395 (2001); Tenn. Code Ann. §§4-21-10001 to 4-21-1004 (1997).
- 50 See *Protection of Public Participation Act*, n. 19 above, s. 3.
- 51 The most significant reform under the uniform approach was the prohibition against corporations, except for those with fewer than ten employees, commencing defamation proceedings. See also Uniform Law Conference of Canada, n. 2 above, at 9. However, legal commentators such as Greg Ogle have criticized this approach as a 'blunt instrument' as it curtails all defamation actions as opposed to only those involving public participation. See G. Ogle, *Gunning for Change, The Need for Public Participation in Law Reforms* (The Wilderness Society, 2006), at 20.
- 52 *Prud'homme v. Prud'homme*, [2004] 4 S.C.R. 663.
- 53 See G. W. Pring and P. Canan, n. 14 above, at 83-84. See also Chris Tollefson, n. 1 above, at 229-232.
- 54 International Covenant on Civil and Political Rights (New York, 16 December 1966) [emphasis added]. In Ontario, this right and other fundamental rights and freedoms are not protected in relationships between citizens. The Charter of Rights and Freedoms only applies to relations between the State and the person.
- 55 See Ecojustice and Canadian Environmental Law Association (CELA), *Inter-jurisdictional Review of Anti-SLAPP Legislation* (Ecojustice/CELA, 2010), [Annex to this report].
- 56 T. Bover and M. Parnell, 'A Protection of Public Participation Act for South Australia, a Law Reform Proposal' (Environmental Defenders Office (South Australia) Inc., May 2002), available at <www.edo.org.au/edosa/research/public%20participation.htm>. In this regard, the B.C. *PPPA* has been criticised as being overly restrictive. See Michaelin Scott and Chris Tollefson, n. 4 above.
- 57 See *Protection of Public Participation Act*, n. 19 above, s. 1(1).
- 58 See *Protection of Public Participation Act (ACT)*, n. 24 above, s. 7(1).
- 59 Uniform Law Conference of Canada, Civil Law Section, *Model Act on Abuse of Process* (ULCC, August 2009) at 4, s. 2, available at <www.ulcc.ca/en/poam2/2%20MODEL%20ACT%20ON%20ABUSE%20OF%20PROCESS.pdf>.
- 60 See *Code of Civil Procedure*, n. 20 above, Article 54.1.
- 61 See Uniform Law Conference of Canada, n. 2 above.
- 62 See Chris Tollefson, n. 1 above, at 229.
- 63 See Normand Landry, n. 17 above.
- 64 See *Protection of Public Participation Act*, n. 19 above, s. 5(1)(b). Note that BC's law also included a reverse onus aspect to it as well. See *ibid.*, s. 6. The law required the plaintiff to prove at trial that the suit was *not* brought for an improper purpose, if on a pre-trial motion for dismissal the defendant was unable to prove on a balance of probabilities that the suit was brought for an improper purpose, but *was* able to prove there was a 'realistic possibility' that it was.
- 65 *Protection of Public Participation Act*, *ibid.*, s. 9(1)(b)(ii).
- 66 See Ecojustice and Canadian Environmental Law Association, n. 55 above. The chart provides a summary of the US States which impose a reverse onus provision in their anti-SLAPP statutes.
- 67 See *Code of Civil Procedure*, n. 20 above, Art. 54.2.
- 68 See Pamela Shapiro, n. 9 above.
- 69 Such a definition is needed even if a right to public participation is not included in the Act.
- 70 See Uniform Law Conference of Canada, n. 2 above, at 5; and Uniform Law Conference of Canada, n. 59 above.
- 71 See Uniform Law Conference of Canada, *ibid.*, s. 6(d). See also *British Columbia (Minister of Forests v. Okanagan Indian Band*, [2003] 3 S.C.R. 371.
- 72 Uniform Law Conference of Canada, *ibid.*, at 8.
- 73 See *Code of Civil Procedure*, n. 20 above, Articles 54.4 and 54.6.
- 74 *Ibid.*, Article 54.5.
- 75 See Uniform Law Conference of Canada, n. 2 above, at 7, s. 6; and Uniform Law Conference of Canada, n. 59 above.

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