

**The 2<sup>nd</sup> Annual Ontario Bar Association's  
Maintaining Professionalism in the  
Municipal Law Context Program:**

Legal Ethics – Getting SLAPPed by Costs?

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## Legal Ethics - Getting SLAPPed by Costs?

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### OVERVIEW

- This paper will consider the advocates' dual professional obligations, to the client on the one hand, and to the profession and to the administration of justice on the other in dealing with costs
- This paper will consider the Rules of Professional Conduct including Rules 2, 4 and 6 and such matters as: lawyer as advocate; the lawyer and the administration of justice; encouraging respect for the administration of justice; responsibility to the profession generally and to others; courtesy and good faith.
- Are lawyers' professional obligations impacted by Strategic Litigation Against Public Participation ("SLAPP") legislation? Do those professional obligations impose limits on the costs which can legitimately be sought against individual litigants or groups?

### OUTLINE

- Rules of Professional Conduct
- What is a SLAPP?
- Overview of Case Law
- Other Legislation
- Anti-SLAPP Advisory Panel
- Bill 132 – *An Act to Protect Public Participation*
- The Rules Post Anti-SLAPP Legislation

### RULES OF PROFESSIONAL CONDUCT

Codes of conduct have been adopted by lawyers, as members of a self-governing profession, at least in part, to preserve public confidence in the profession, and in turn, the profession's ability to self-govern. A code of ethics can be defined as:

The formal statement of standards which the professional consults to guide his or her behaviour. It represents a statement of the roles professionals ought to assume in

specific situations. To that extent, a code is a formalized statement of role morality, a unitary professional “conscience”.<sup>1</sup>

A “good” professional code of conduct should, it is argued, strike a balance between the need to have general principles, to provide lawyers with specific guidance, and to protect the public by having measurable criteria against which to judge the conduct of lawyers.<sup>2</sup>

## 2.02 QUALITY OF SERVICE

Dishonesty, Fraud etc. by Client or Others

(5) A lawyer shall not

(a) knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct;

(b) advise a client or any other person on how to violate the law and avoid punishment.

(5.0.1) A lawyer shall not act or do anything or omit to do anything in circumstances where he or she ought to know that, by acting, doing the thing or omitting to do the thing, he or she is being used by a client, by a person associated with a client or by any other person to facilitate dishonesty, fraud, crime or illegal conduct.

(5.0.2) When retained by a client, a lawyer shall make reasonable efforts to ascertain the purpose and objectives of the retainer and to obtain information about the client necessary to fulfill this obligation.

Commentary:

Once a lawyer acting for an organization learns that the organization has acted, is acting, or intends to act in a wrongful manner, then the lawyer may advise the chief executive officer and shall advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, then the lawyer reports the matter “up the ladder” of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer’s advice, continues with the wrongful conduct, then the lawyer shall withdraw from acting in the particular matter in accordance with rule 2.09. In some but not all cases, withdrawal would mean resigning from his or her position or

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<sup>1</sup> *Ibid* at p. 647 quoting R.E. Loder, “Tighter Rules of Professional Conduct: Saltwater for Thirst” (1987-1988) 1 Ga. J. Leg. Ethics 311 at 318

<sup>2</sup> *Ibid* at p. 652.

relationship with the organization and not simply withdrawing from acting in the particular matter.

These rules recognize that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organizations' and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization not only about the technicalities of the law but about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization's responsibilities to its constituents and to the public.

#### **4.01 THE LAWYER AS ADVOCATE**

##### **Advocacy**

4.01 (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

##### **Commentary:**

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where justice can be done.

(2) When acting as an advocate, a lawyer shall not

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,

(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,

#### **6.01 RESPONSIBILITY TO THE PROFESSION GENERALLY**

##### **Integrity**

6.01 (1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.

Commentary:

Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect credit on the legal profession, inspire the confidence, respect and trust of clients and the community, and avoid even the appearance of impropriety.

## WHAT IS A SLAPP?

SLAPP suits were first identified and discussed in the US in the 1970's. In Canada, the Uniform Law Conference of Canada (ULCC)<sup>3</sup> saw SLAPPs in the Canadian context as "an observable reality [which] constitute a threat to the participation of citizens and groups in public debate" by 2008, though they were noted and commented on in the decade and a half prior.<sup>4</sup>

The goal of a SLAPP is achieved, often, without winning a lawsuit, or even carrying it forward to a determination on the merits.<sup>5</sup>

Accordingly, a definition of SLAPPs has been put forward as follows:

Strategic litigation against public participation (SLAPP) as been defined as a lawsuit initiated against one or more individuals or groups that speak out or take a position on an issue of public interest. SLAPPs use the court system to limit the effectiveness of the opposing party's speech or conduct. SLAPPs intimidate opponents, deplete their resources, reduce their ability to participate in public affairs, and deter others from participating in discussion on matters of public interest.<sup>6</sup>

"The conceptual thread that binds [SLAPPs] is that they are suits without substantial merit that are brought by private interests to stop citizens from exercising their political rights or to punish them for having done so. SLAPP suits function by forcing the target into the judicial arena where

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<sup>3</sup> 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](http://www.ulcc.ca/en/poam2/SLAPP%20Report.pdf)>

<sup>4</sup> Chris Tollefson, *Strategic Lawsuits Against Public Participation: Developing a Canadian Response*, 7:3 Canadian Bar Review (1994), 201.

<sup>5</sup> *Ibid* at p. 206. On this basis, Rule 20 summary judgment motions, 21(3)(d) determinations of issues before trial and 25.11 motions to strike all or part of a pleading are generally considered an inadequate protection against SLAPPs.

<sup>6</sup> Ministry of the Attorney General, *Anti-SLAPP Advisory Panel*, online: [http://www.attorneygeneral.jus.gov.on.ca/English/anti\\_slapp/](http://www.attorneygeneral.jus.gov.on.ca/English/anti_slapp/) ["Panel Report"] at p. 1.

the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation can be churned, the greater the expense that is inflicted, the closer the SLAPP filer moves to success... The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent.”<sup>7</sup>

Research indicates that SLAPP plaintiffs fail to win their cases 77-82 percent of the time.<sup>8</sup> This is arguably relevant to lawyers asked to bring a suit or costs motion that bears the hallmarks of a SLAPP (Rule 57.07(1)).

SLAPPs have specifically been acknowledged to include costs motions before the OMB, in certain circumstances, including the Big Bay Point case, discussed later in this paper.<sup>9</sup>

## CASE LAW

### *Fraser v. Saanich (District)*<sup>10</sup>

This case was one of the first in Canada to recognize SLAPP suits, and to attach cost consequences to the plaintiff. The issue came to the court’s attention by way of an application by several defendants, neighbourhood residents in the District of Saanich (the “District”), to strike a statement of claim as disclosing no reasonable claim against them. They were supported by the District in their application. The plaintiff operated a nursing home, and her application to the District to redevelop the building was refused in part because of the position of neighbourhood residents. She then commenced an action against the neighbourhood residents and the District for negligent interference with contractual relations and the tort of conspiracy.

The Court struck out the statement of claim. It stated:

While neighbourhood participation in municipal politics often places an almost adversarial atmosphere into land use questions, this participation is a key element to the democratic involvement of said citizens in community decision making. Signing petitions, making submissions to municipal councils and even the organization of community action groups are sometimes the only avenues for community residents to express their views on land use issues. The solicitation of public opinion is specifically mandated in the *Municipal Act*. This type of activity often produces unfavourable results for some parties involved. However, an unfavourable action by local government does not, in the

<sup>7</sup> *Gordon v. Marrone*, 590 N.Y.S. 2d 649 (1992) at 656, cited in Tollefson, *supra* note 1 at 203.

<sup>8</sup> Canadian Environmental Law Association, *Breaking the silence: The urgent need for anti-SLAPP legislation in Ontario*, online: <http://www.cela.ca/publications/breaking-silence-urgent-need-anti-slapp-legislation-ontario> at p. 7 quoting Pamela Shapiro, *SLAPPs: Intent of Content: Anti-SLAPP Legislation Goes International*, 19:1 RECIEL (2010), 14.

<sup>9</sup> Panel Report, *supra* note 6 at p. 11.

<sup>10</sup> [1999] B.C.J. No. 3100, 94 A.C.W.S. (3d) 637 (QL).

absence of some other wrongdoing, open the doors to seek redress on those who spoke out in favour of that action. To do so would place a chilling effect on the public's participation in local government.

If the process itself here was flawed, or disclosed bad faith on the part of the District of Saanich, the plaintiffs can take appropriate action against the District of Saanich. However, to place blame on the community group involved is doomed to failure where there has been no, and I repeat, no pleading of any material facts that could support any such claim of wrongdoing. If the plaintiffs wish to support such a claim surrounding the democratic activities of others, it would be necessary to provide at least some factual underpinning. The plaintiffs have not done so, as yet, at all.<sup>11</sup>

The Court went on to award special costs of \$2,500, on the basis that the action was in the nature of a SLAPP, or an attempt to stifle the democratic activities of the neighbourhood residents.<sup>12</sup> The Court described a SLAPP as:

...a claim for monetary damages against individuals who have dealt with a government body on an issue of public interest or concern. It is a meritless action filed by a plaintiff whose primary goal is not to win the case but rather to silence or intimidate citizens who have participated in proceedings regarding public policy or public decision making.<sup>13</sup>

***Ford v. Hoffmann-Laroche Ltd.***<sup>14</sup>

In this Divisional Court decision, we see a rare instance of costs being awarded against counsel. In this case, a solicitor counselled his client to make unfounded allegations of fraud. The client, Mr. Curran, was represented by the lawyer in question, on a motion for leave to commence a class proceeding, where they were unsuccessful. Curran switched representation through the appeal process. His lawyer on appeal, settled the matter, and obtained a consent order. The first lawyer told his former client that the consent order was obtained through the second lawyer's fraud, which Curran accepted, so he re-hired the first lawyer to bring a motion to set aside the consent order.

The Court ruled that where allegations of fraud are made, and declared to be totally unfounded, substantial indemnity awards may be awarded, and did so as against Curran.<sup>15</sup> The Court next turned to the lawyer, and Rule 57.07(1) – that where a solicitor has caused costs to be incurred

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<sup>11</sup> *Ibid* at p. 8, paras. 43-44

<sup>12</sup> *Ibid* at p. 9, para. 52.

<sup>13</sup> *Ibid* at p. 9, para. 49.

<sup>14</sup> [2005] O.J. No. 5427, 206 O.A.C. 135, 24 C.P.C. (6<sup>th</sup>) 247, 144 A.C.W.S. (3d) 226, 2005 CarswellOnt 7599 (Div. Ct.) (QL)

<sup>15</sup> *Ibid* at p. 7, para. 36.

without reasonable cause, the court may make an order requiring the solicitor to pay the costs of any party.<sup>16</sup>

The basic principle on which costs are awarded is compensation for the successful party, not punishment of lawyers. Courts must be extremely cautious in awarding costs personally against a lawyer, given the duties of the lawyer to his or her client, as fear of an adverse order of costs may conflict with these fundamental duties. *Young v. Young*, [1993] 4 S.C.R. 3.

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An order under this rule should only be made in rare circumstances and such orders should not discourage lawyers from pursuing unpopular or difficult cases. It is only when a lawyer pursues a goal which is clearly unattainable or is clearly derelict in his or her duties as an officer of the court that resort should be had to this rule.<sup>17</sup>

The Court set out the test for 57.07(1) as in *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (1998), 16 C.P.C. (4<sup>th</sup>) 201 (Gen. Div.):

...the court must first determine whether the particular conduct complained of falls within the purview of the rule and, secondly, whether the circumstances are such that the provisions of the rules should be invoked.<sup>18</sup>

The Court distinctly placed weight on the lawyer's active counseling of Curran to make the allegations of fraud, and to continue on with the motion to set aside the consent order. He *caused* costs to be incurred although he knew, or ought to have known, that there was no merit in the cause. This decision was made under Rule 57.07(1) of the Rules of Civil Procedure, not the OMB Rules, but it bears an interesting similarity to the "real litigant" exception discussed in the OMB context below.

### ***Forsyth v. Li*<sup>19</sup>**

The plaintiff Forsyth claimed damages of \$50,000 against Li, her neighbour, who complained to the City of cars parked illegally outside his home, and asked the City by-law officer to determine whether Ms. Forsyth's massage therapy clinic complied with the City's by-law relating to home occupations. The action brought by Forsyth was for malicious prosecution, harassment, nuisance, interference with the quiet enjoyment of her property and in the alternative, damages of \$40,000 for intentional interference with her right to contract. The court dismissed Forsyth's

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<sup>16</sup> *Ibid* at p. 7, para. 39.

<sup>17</sup> *Ibid* at pp. 7-8, paras. 40 and 41.

<sup>18</sup> *Ibid* at p. 8, para. 41.

<sup>19</sup> [2009] O.J. No. 389, 56 M.P.L.R. (4<sup>th</sup>) 103 (S.C.J.) (QL). Decision on costs decided separately: [2009] O.J. No. 2008 (S.C.J.) (QL)



claims summarily and, after receiving written submissions on costs, elected to award partial indemnity costs at the “high end” of the range to:

...indicate the court’s disapproval of the tactic of pursuing an unmeritorious claim for a substantial amount of money against an elderly neighbour who sought to exercise his legitimate rights as a citizen to inquire whether Forsyth’s use complied with the City’s By-law and making inappropriate allegations against counsel for Mr. Li.

The Court cites the decision of the Divisional Court in *Ford*, noting that while counsel for Forsyth did not allege fraud he did use inappropriate language that was not consistent with the rules of civility. The Court’s specific findings with respect to Ms. Forsyth’s counsel are very interesting:

While I find that Mr. McMahon made several inappropriate criticisms of the competence and conduct of counsel for Mr. Li in his factum and attributed improper motives to opposing counsel in his submissions, his inappropriate allegations against opposing counsel did not cause costs to be incurred without reasonable cause as they were made in response to Mr. Li’s motion for summary judgment. [Emphasis added]

I am not satisfied on a balance of probabilities that the costs should be paid by the solicitor personally and not solely by his client as I am unaware of the instructions given by Ms. Forsyth and the advice given by Mr. McMahon. While Mr. McMahon’s allegations against Li’s counsel did not comply with the rules of civility, I find that they were not of the most egregious type which would require a solicitor to pay costs personally.<sup>20</sup>

The only reason cited for *not* awarding costs against counsel for Ms. Forsyth was that his allegations did not cause costs to be incurred. If Mr. Li had not brought a motion for summary judgement, and the matter had instead progressed to trial, the Court may, on the reasons above, have ultimately awarded costs against the solicitor personally. Again, there is, though in the Rules of Civil Procedure context, the flavour of the “real litigant” test, discussed below.

That being said, failure to comply with the rules of civility, even in the context of what is essentially found to be a SLAPP, was not specifically censured by the Court at the time.

### ***Morris v. Johnson***<sup>21</sup>

The defendants brought a motion for an order for costs of defending an action. The action in question was brought by the former Mayor of the Town of Aurora, who the defendants criticized on the defendants’ website. The plaintiff had brought a defamation action, with financial support from the Town of Aurora, seeking injunctive relief and \$6 million in damages just prior to the election, and discontinued the action one year later. In that time, the plaintiff served a notice of

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<sup>20</sup> *Ibid* at p. 6, paras. 23-24.

<sup>21</sup> [2012] O.J. No. 4956, 2012 ONSC 5824 (S.C.J.) (QL)

action, but no statement of claim, in contravention of subrule 14.03(4). Further, the prior notice provisions of the *Libel and Slander Act* were not met.

Master Hawkins allowed the motion and granted special enhanced costs. He inferred from the facts that:

... Mayor Morris was not prepared to wait and see if a demand letter would have the desired effect of silencing Johnson, Hogg and Bishenden, and not prepared to wait until her lawyers prepared a statement of claim. In my view, Mayor Morris wanted to hit Johnson, Hogg and Bishenden quickly and hard, in order to silence them as her critics sooner rather than later...

I have therefore come to the conclusion that this action is indeed SLAPP litigation.<sup>22</sup>

The Master made no mention of counsel's role in the litigation.

***Kimvar Enterprises Inc. v. Innisfil (Town)*<sup>23</sup>**

In a decision issued in late 2007, Kimvar's appeals regarding a major residential resort development, including a large marina on Lake Simcoe, were allowed and planning instruments approved, subject to numerous conditions. The hearing process that resulted in that decision lasted approximately 2.5 years, with the hearing itself lasting approximately thirty hearing days spread over four months.

Costs of approximately \$3,200,000 were sought on a substantial indemnity basis for legal and experts' costs incurred by and on behalf of Kimvar, the County and the Town against Nextnine Limited, 2025890 Ontario Inc., Innisfil District Association Inc. (collectively referred to as "Nextnine") and their lawyers on a joint and several basis with apportionment to be determined by the Board. Kimvar was supported in its costs motion by the Town of Innisfil, and two residents' associations, which were parties at the hearing. The County of Simcoe was a party at the hearing but did not participate in the motion for costs. MMAH attended the main and costs hearings but did not take a position on the application for costs. Environmental Defence Canada (EDC) obtained intervenor status on the motion for costs to oppose an award on public policy grounds.

In the Board's costs decision, which wasn't issued until January 2009, it considered whether, as a matter of law, it could award costs against the law firm that represented Nextnine during the hearing. Second, it considered whether the conduct of Nextnine (and Gilberts, if the answer to the first issue was positive) was unreasonable, frivolous or vexatious or in bad faith such that an

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<sup>22</sup> *Ibid* at p. 5, paras 28-29. Special enhanced costs were fixed at \$21,275.

<sup>23</sup> *Kimvar Enterprises Inc. v. Innisfil (Town)*, [2009] O.M.B.D. No. 33, 55 M.P.L.R. (4<sup>th</sup>) 305, 41 C.E.L.R. (3d) 93, 61 O.M.B.R. 293. The costs hearing took approximately 17 days.

award of costs should be made in favour of Kimvar. Third, it considered whether an award of costs should be denied on the basis that Kimvar's application has been brought for improper purposes and, as a matter of public policy, whether costs should be awarded.

The Board first referenced the relevant provisions of the *Statutory Powers and Procedure Act* ("SPPA"), the *Ontario Municipal Board Act* (the "OMBA") and the OMB Rules. It then went on to summarize the body of case law on costs. As its starting point, the Board noted:

...applications for costs are not routine, and cost awards are rare. In short, a successful party appearing before the Board should have no expectation that it will recover its costs. The Board "does not award costs lightly and it does not award costs automatically. In decision after decision, the Board has expressed a sensitivity to the right of appellants to bring matters before this Board" (*Westfield Place Inc. v. Blandford Blenheim (Township)* Pit Application, [1996] O.M.B.D. No. 1252 at p. 19). Nevertheless, the Board has also concluded that parties must be accountable for their conduct and if that conduct or course of conduct has been unreasonable, frivolous or vexatious, or if the party has acted in bad faith, then the Board may order costs.

The Board went on to cite and apply the test for clearly unreasonable conduct: "would a reasonable person, having looked at all of the circumstances of the case, conclude the conduct was not right, the conduct was not fair and that person ought to be obligated to another in some way for that kind of conduct." It found that Nextnine did not unnecessarily extend the hearing or exhibit conduct that should attract an award of costs.

With respect to the Board's jurisdiction to award costs against non-parties, specifically legal counsel for Nextnine, the Board heard argument that because legal counsel were not parties to the hearing no award of costs can be made against them.

The Board declared the issue moot, because it had already found that the conduct complained of by Kimvar did not attract costs, but elected to comment given the novelty of the claim. The Board found that it has a limited jurisdiction under the OMBA, the *Courts of Justice Act* ("CJA") and the SPPA to order a non-party to pay costs. In particular, the Board referenced section 131 of the CJA (which is worded almost identically to section 97(2) of the OMBA), that the court may determine "by whom and to what extent costs shall be paid". Judicial consideration of that section of the CJA interpreted that to mean the parties to the proceedings, but also allowed for costs against a non-party where the non-party was found to be the "real litigant".<sup>24</sup> This caveat has been applied in Board decisions.<sup>25</sup> The Board in Kimvar consequently concluded that it could only award costs against a non-party on that basis, or (in an un-elaborated statement that likely referred to section 23 of the SPPA) where there is an abuse of process. Neither case was

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<sup>24</sup> *Ibid* at p. 15, citing *Television Real Estate Limited v. Rogers Cable Limited et al*, 1997 CanLII 999.

<sup>25</sup> *Ibid* at pp. 15-16.

made out, or even alleged, against legal counsel.<sup>26</sup> The Board also concluded that Rule 57.07 of the Rules of Civil Procedure did not apply to augment the Board's Rules on costs.

As noted above, the real litigant test is analogous to findings in *Curran* and *Forsyth*.

The Board also considered the argument, brought forward by Nextnine and also spoken to by EDC, that the Board should consider the underlying motivation for Kimvar's claim, especially in light of the amount sought and the fact that the claim was advanced against counsel. The suggestion was made that the cost claim was brought for the purpose of silencing public opposition, and accordingly constituted an improper purpose.<sup>27</sup> If costs were awarded, it would have the effect of a SLAPP suit, and would create a chilling effect.

The Environmental Commissioner of Ontario, Gord Miller, was called to give evidence. His testimony reinforced the message that "awards of costs are rare and costs are not intended to be used as indemnification to a successful party."<sup>28</sup> The Board ultimately declined to find that this costs proceeding was brought for an improper purpose, but did conclude in its decision that:

...an award of costs anywhere near the amount requested would create a chilling effect. In this regard, the Board adopts Mr. Ruby's submission that the public interest impact of a costs award is a relevant factor for the Board to consider in exercising its discretion. It is for this reason that the Board has restricted awards of costs to the clearest of cases, where the conduct complained of is unreasonable and improper.<sup>29</sup>

## OTHER LEGISLATION

BC became the first province to enact anti-SLAPP legislation following *Fraser v. Saanich*<sup>30</sup> but the *Protection of Public Participation Act* was repealed six months after it was enacted, following a change in government. Quebec has amended its Code of Civil Procedure to dismiss an action if it is found to be a SLAPP.<sup>31</sup> Twenty-seven US states and one US territory have enacted anti-SLAPP legislation, and Australia passed anti-SLAPP legislation in 2008.<sup>32</sup>

## ANTI-SLAPP ADVISORY PANEL

The AG of Ontario set up an Anti-SLAPP Advisory Panel to advise him how the Ontario justice system might prevent the misuse of its courts and other agencies of justice without depriving

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<sup>26</sup> *Ibid* at p. 17.

<sup>27</sup> *Ibid* at p. 18.

<sup>28</sup> *Ibid* at p. 18.

<sup>29</sup> *Ibid* at p. 19.

<sup>30</sup> [1999] B.C.J. No. 3100, 32 C.E.L.R. (N.S.) 143, 94 A.C.W.S. (3d) 637.

<sup>31</sup> *Supra* note 8 at p. 10.

<sup>32</sup> *Ibid* at pp. 10-11.

anyone of appropriate remedies for expression that actually causes significant harm.<sup>33</sup> That Panel generated a report in 2010.

The Panel concluded, in agreement with the Uniform Law Conference, that the common law, the *Courts of Justice Act*, and the Rules of Civil Procedure were not effective remedies against abuses of process, including frivolous, vexatious lawsuits, and those brought for an improper motive.<sup>34</sup>

The Panel recognized that the 2010 Rules amendments, which stressed proportionality in civil litigation, were a useful direction, but concluded that a more focused remedy was required.<sup>35</sup>

The Panel proceeded in its report to set out the content it saw as necessary protective legislation. It specifically recommended that the legislation apply to the actions of administrative tribunals, given that “[t]he recent application to the Ontario Municipal Board for a very large costs award in a planning matter was frequently cited as having had an intimidating effect well beyond that one case, even though the Board ultimately declined to award costs after a lengthy hearing.”

The threshold test for application of the special procedure under protective legislation should be, according to the Panel, a consideration of the effect that the action is likely to have on expression on matters of public interest. Focusing on the purpose of litigation, in the alternative, was deemed difficult and often impossible in an expedited proceeding.<sup>36</sup>

The Panel was sensitive to the need to maintain that balance. On the one side, protection of expression should not be a cover for expression results in a wrongful harm to economic, personal interests. On the other, technical validity of a plaintiff’s claim should not be sufficient to allow an action to proceed.<sup>37</sup> The Panel proposed a series of steps to preserve this balance (carried into Bill 132 next discussed).

The Panel goes on to recommend, and Bill 132 purports to implement, an expedited process and full indemnity cost awards in cases where a plaintiff fails to persuade the court as to the substantive merit of the plaintiff’s case. The court would also have the power to award such damages to the defendant as are just, for example in cases where an action was shown to have been brought in bad faith, or for an improper motive. Any other proceedings in relation to the action are suspended, although the court has the power to lift the suspension if it creates hardship,

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<sup>33</sup> Panel Report, *supra* note 6.

<sup>34</sup> *Ibid* at p. 3, para. 11.

<sup>35</sup> *Ibid* at p. 4, para. 13.

<sup>36</sup> *Ibid* at p. 8, paras 34-35.

<sup>37</sup> *Ibid* at p. 9, paras 36-37.

The Panel dealt with a specific request that lawyers be made personally liable for their client's costs of bringing an action that is dismissed. Citing the existing mechanisms by which lawyers can be held personally liable when their conduct is improper, the Panel declined to make such a recommendation.<sup>38</sup>

On a similar request, that lawyers who assist in abusive lawsuits be subjected to professional discipline, the Panel referenced the existing duty under the Rules of Professional Conduct not to abuse the processes of court, and that a complaint to the Law Society can be made if a lawyer has acted improperly. The Panel went on to note:

It must also be appreciated that lawyers have a professional duty to be fearless advocates for their clients' interests. That is not a role that should be lightly interfered with. The mere dismissal of an action should not in itself be sufficient to trigger adverse professional consequences for a lawyer.<sup>39</sup>

### **BILL 132 - PROTECTION OF PUBLIC PARTICIPATION ACT, 2012**

On October 15, 2012 a Private Members Bill was brought forward by Yasir Naqvi, MPP for Ottawa Centre, Parliamentary Assistant to the Minister of Finance and President of the Ontario Liberal Party. Bill 132, An Act to encourage participation on matters of public interest and to dissuade persons from bringing legal proceedings that interfere with such participation, or the Protection of Public Participation Act, 2012, received first reading and shortly thereafter died on the Order Paper when the Premier prorogued parliament last month.

Mr. Naqvi described the bill as follows on its first reading: The bill enacts the *Protection of Public Participation Act, 2012*. The new act authorizes a defendant in a proceeding to bring a motion for dismissal if the proceeding is in respect of a communication or conduct that involves a matter of public interest. The act sets out the test to be considered by a court or tribunal when considering whether to dismiss the proceeding, rules regarding the payment of costs, the procedure to be followed when such a motion is brought, and a right to appeal. In addition, the act includes rules relating to the suspension of related proceedings and qualified privilege.

The bill also amends the *Statutory Powers Procedure Act* to provide that, except in specified circumstances, applications for orders to pay costs must be made in writing.

A comparison of Bill 132 and the Panel Report indicates that most, if not all, of the Bill's content comes directly from the Panel Report.

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<sup>38</sup> *Ibid* at p.p. 13-14, para 54.

<sup>39</sup> *Ibid* at p. 13-14, para. 55.

For example, as suggested by the Panel, the proposed Act extends to tribunals, with “proceedings” defined as “any action, suit, hearing, matter, cause, claim, counterclaim, appeal or originating application that is brought in a court or a tribunal, but does not include a prosecution for an offence or a crime.”

A defendant (which includes a respondent in a tribunal hearing) can bring a motion to dismiss a proceeding which is in respect of communication or conduct that involves a matter of public interest.<sup>40</sup> If the defendant can satisfy the court or tribunal accordingly,<sup>41</sup> the onus flips to the plaintiff to demonstrate (i) substantial merit, (ii) substantial grounds to believe the defendant has no valid defence and (iii) that the harm the plaintiff suffers outweighs the harm done to freedom of expression on a matter of public interest if the proceeding is allowed to proceed.<sup>42</sup>

The process for such a motion is set on an expedited basis<sup>43</sup> and the SPPA is amended to generally require costs submissions in writing, and to specifically provide for costs to be awarded in full against the unsuccessful applicant (the plaintiff under the proposed Act). There are no special remedies against the lawyers of the plaintiffs.

## THE RULES POST ANTI-SLAPP LEGISLATION, AND KIMVAR

The Panel’s comments indicate that, in their view, the professional responsibility of lawyers was already playing a role in the SLAPP context. Arguably, reading Rules 2, 4 and 6 together, without any form of SLAPP legislation in place, there is a strong directive to lawyers not to proceed with actions, applications, motions, etc. that bear the hallmarks of a SLAPP. Even Rule 4.01, which is often referenced, including by the Anti-SLAPP Panel, in respect of the onus on a lawyer to advocate vigorously for his or her client, includes the caveat at subsection (2):

When acting as an advocate, a lawyer shall not

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,

This directive in facts ties neatly to the Board’s finding in *Kimvar* – lawyers cannot be held personally liable at the OMB unless they were the real litigant, or there is evidence of abuse of process. As noted above, this also parallels neatly with judicial decisions on costs against lawyers in SLAPP or SLAPP-like cases.

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<sup>40</sup> Section 3.

<sup>41</sup> Section 4(a).

<sup>42</sup> Section 4(b).

<sup>43</sup> Section 7.



If SLAPP legislation similar to Bill 132 is passed, it would give new jurisdiction to the OMB to award costs against a developer. At a minimum, this alters the advice a lawyer gives to a client who/which wants to bring a proceeding that has shades of a SLAPP, given that they face full liability costs should the defendant bring a motion under SLAPP legislation, and even damages. But what impact does such legislation have on lawyers' professional responsibility?

Rules 2.02(5) and 6.01 would arguably apply differently in the SLAPP context. The legislature would, in passing SLAPP legislation, target a specific type of procedure as essentially an abuse of process. This would shift the scales, when assessing the duty to one's client against the public interest and responsibilities to the profession, towards the latter. The caveat at Rule 4.01(2)(a) will, arguably, become explicitly engaged by a SLAPP proceeding if legislation such as Bill 132 is enacted.

In summary, there can be a fine balance between, on the one side, advising a client as to the likelihood of success and potential adverse costs consequences in seeking costs and, on the other, the ethical obligations of counsel, the potential personal liability and professional conduct consequences.