ABUSE OF PROCESS

Public Interest Litigation: Do Not Get Slapped

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On June 4, 2013, the Attorney-General of Ontario introduced new legislation with the purpose of better protecting freedom of speech by discouraging dubious lawsuits aimed at silencing citizens, organizations, or lobby groups critical of development projects.

What Is a SLAPP?

A strategic lawsuit against public participation ("SLAPP") is a lawsuit initiated against one or more individuals or groups that speak out or take a position on an issue of public interest. This type of lawsuit uses the court system to limit the effectiveness of the opposing party's speech or conduct, 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.[1]

SLAPP suits were first identified and discussed in the United States in the 1970s. In 2008, the Uniform Law Conference of Canada ("ULCC") saw SLAPPs in the Canadian context as "an observable reality [which] constitute a threat to the participation of citizens and groups in public debate,"[2] though they were noted and commented on in the decade and a half prior.[3]

The goal of a SLAPP is often achieved without winning a lawsuit or even carrying it forward to a determination on the merits.[4] In fact, research indicates that SLAPP plaintiffs fail to win their cases 77-82% of the time.[5] They are often brought forward, without substantial merit, to stop citizens from exercising their rights, or to punish them for having done so, by forcing them into the judicial arena where they must now handle the expenses of a defense. The longer the litigation is stretched out, the greater the expense inflicted, and the closer the SLAPP filer moves to success. These suits cause a ripple effect such that people who have been outspoken on issues of public importance, or who have witnessed SLAPP suits, will choose to remain silent in the future to avoid the expenses of such suits.

Other Legislation

British Columbia became the first province to enact anti-SLAPP legislation following *Fraser v. Saanich*[6] but the *Protection of Public Participation Act* was repealed six months after it was enacted, following a change in government.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.[7] Twenty-eight U.S. states, the District of Columbia, and even Guam have enacted anti-SLAPP legislation, and Australia passed anti-SLAPP legislation in 2008.[8]

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[1] Ministry of the Attorney General, *Anti-SLAPP Advisory Panel*, online at http:www.attorneygeneral.jus.gov.on.ca/English/anti_slapp/ at 1 ["Panel Report"].

[2] 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] Chris Tollefson, "Strategic Lawsuits Against Public Participation: Developing a Canadian Response" (1994) 7:3 *Can. Bar Rev*. 201.

[4] Ibid at 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.

[5] Canadian Environmental Law Association, *Breaking the silence: The urgent need for anti-SLAPP legislation in Ontario*, online at http://www.cela.ca/publications/breaking-silence-urgent-need-anti-slapp-legislation-ontario at 7 quoting Pamela Shapiro, "SLAPPs: Intent of Content: Anti-SLAPP Legislation Goes International" (2010) 19:1 *Review of European Community & International Environmental Law* 14.

[6] [1999] BCJ No. 3100, 32 CELR (NS) 143, 94 ACWS (3d) 637.

[7] *Kimvar Enterprises Inc. v. Innisfil (Town)*, [2009] OMBD No 33, 55 MPLR (4th) 305, 41 CELR (3d) 93, 61 OMBR 293 at 10 ["*Kimvar*"].

[8] Ibid. at 10-11. In addition to these 28 states, Colorado and West Virginia have recognized anti-SLAPP-like protection as a matter of case law.

Anti-Slapp Advisory Panel

The Attorney-General of Ontario set up an Anti-SLAPP Advisory Panel to advise him on how the Ontario justice system might prevent the misuse of its courts and other agencies of justice without depriving anyone of appropriate remedies for expression that actually causes significant harm.[9]

The Panel, in its 2010 Report, concluded 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.[10] While the 2010 Rules amendments, which stressed proportionality in civil litigation, were a useful direction, a more focused remedy was required.[11]

The Panel proceeded in its report to set out the content it saw as necessary to protective legislation. Their recommendations included the following:

1. The legislation should 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."
2. Rather than focus on the purpose of litigation, the threshold test for application of the special procedure under protective legislation should consider the effect that the action is likely to have on expression in matters of public interest.
3. An expedited process and full indemnity cost awards should be implemented in cases where a plaintiff fails to persuade the court as to the substantive merit of the plaintiff's case.
4. The court should 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.

The Panel was sensitive to the need to maintain a balance. On the one side, protection of expression should not be a cover for expression that results in a wrongful harm to economic or personal interests. On the other side, the technical validity of a plaintiff's claim should not be sufficient to allow an action to proceed.[12]

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.[13] 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.[14]

Bill 83 – Protection of Public Participation Act, 2013

On October 15, 2012, a Private Members Bill was brought forward by Yasir Naqvi, MPP, now Minister of Labour. Bill 132 (Protection of Public Participation Act, 2012) was titled "*An Act to encourage participation on matters of public interest and to dissuade persons from bringing legal proceedings that interfere with such participation*." The Act received first reading and shortly thereafter died on the Order Paper when the Premier prorogued Parliament. A comparison of Bill 132 and the Panel Report indicates that most, if not all, of the Bill's content came directly from the Panel Report, with little regard for implementation – for example, it purported to apply equally to tribunals and courts without

[9] Panel Report, supra note 1.
[10] Ibid. at 3, paragraph 11.
[11] Ibid. at 4, paragraph 13.
[12] Ibid. at 9, paragraphs 36-37.
[13] Ibid. at 13-14, paragraph 54.
[14] Ibid. at 13-14, paragraph 55.

speaking to the rules or legislation that already governed.

Attorney-General John Gerretsen has now introduced Bill 83, "*An Act to amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act in order to protect expression on matters of public interest*," or the *Protection of Public Participation Act, 2013*.[15] As the title indicates, the Bill contemplates specific amendments to legislation.

Two of the stated purposes of the Bill are "to discourage the use of litigation as a means of unduly limiting expression on matters of public interest"[16] and "to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action."[17]

If Bill 83 is enacted, the *Courts of Justice Act* would see the addition of new sections protecting citizens and organizations from SLAPP suits. The centrepiece of the Bill is a fast-track review process for lawsuits alleged to be "strategic." The Bill provides that if the defendant to a lawsuit believes that they have been sued in a strategic lawsuit, they can file a motion to have the suit dismissed, and the motion must be heard by a court within sixty days.[18] Any appeal from the motion must be heard as soon as practicable.[19]

The procedure itself closely follows what was proposed in the Anti-SLAPP Advisory Panel Report. Once a motion under the new section is made, neither party can take any steps in the original lawsuit until the motion – and any appeal of the motion – has been disposed of.[20] This prevents the plaintiff from amending their pleadings in the original proceeding to circumvent the motion.[21] The stay of proceedings also applies to related proceedings in administrative tribunals.[22] After a motion to dismiss an allegedly abusive lawsuit has been brought in court, the defendant can file it with the tribunal and have that proceeding stayed until the motion is determined.

The test applied by the court in evaluating a complaint would be composed of three steps. First, the defendant in the original lawsuit would have to demonstrate that the lawsuit against them only arose because of the defendant's expressions on a matter of public interest. Second, if the defendant is successful in the first step, then the original plaintiff would have to show that it (a) has a substantial chance of success, and (b) that the defendant has no valid defence in the proceeding. Third, if the plaintiff can satisfy the court on step two, then the court must consider whether the harm suffered – or potentially suffered – by the plaintiff is more important than the furtherance of public discourse on the matter involved in the case.[23]

In applying the test, courts must attempt to balance the interests of the parties while considering both the technical merits of the plaintiff's case and the value of free expression on matters of public interest. Where the plaintiff has (or would) suffer little harm, then the technical merits of the case would yield to the value of public discourse and the lawsuit would be dismissed, but where the harm is more serious, the motion would be dismissed and the lawsuit allowed to continue.[24]

The issue of costs is front and centre in the new Bill. If a judge dismisses a proceeding under the new Bill, then the moving party is entitled to costs on the motion and in the proceedings on a full indemnity basis, unless the judge determines that such an award would be unfair in the circumstances.[25] However, if the motion to dismiss is denied under the section, then the responding party is not entitled to costs on the motion unless the judge determines that such an award would be appropriate.[26]

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[15] Bill 83, *An Act to amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act in order to protect expression on matters of public interest*, 2nd Sess, 40th Leg, Ontario, 2013.

[16] Bill 83, proposed section 137.1(1)(*c*).

[17] Bill 83, proposed section 137.1(1)(*d*).

[18] Bill 83, proposed section 137.2(2)

[19] Bill 83, proposed section 137.3.

[20] Bill 83, proposed section 137.1(5).

[21] Bill 83, proposed section 137.1(6).

[22] Bill 83, proposed section 137.4(1).

[23] Bill 83, proposed section 137.1(4).

[24] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 40th Parl., 2nd Sess., No. 49 (4 June 2013) at 2500 (Honourable John Gerretsen).

[25] Bill 83, proposed section 137.1(7).

[26] Bill 83, proposed section 137.1(8).

Moreover, if the court dismisses a proceeding under the section and the judge finds that the plaintiff brought the lawsuit in bad faith or for an improper purpose, then the judge can award the defendant "such damages as the judge considers appropriate."[27]

In addition to the *Courts of Justice Act*, the *Libel and Slander Act* would also be amended by Bill 83 to extend the protection of qualified privilege to oral or written communication on a matter of public interest between two or more persons who have a direct interest in the matter. This would apply regardless of whether the communication is witnessed or reported on by media.[28] To directly address the tribunal context (and likely *Kimvar)*, the *Statutory Powers and Procedures Act* would also be amended to generally require costs submissions in writing,[29] though no special remedies against the lawyers of the plaintiffs are proposed.

[27] Bill 83, proposed section 137.1(9).

[28] Bill 83, proposed section 17.1(7) replacing 17.1(7), (8) and (9).

[29] Bill 83, proposed section 25. Given that costs motions are often dealt with expeditiously by way of oral submissions, this amendment, without responsive changes to tribunal rules such as length limits, may not achieve the Bill's goals.

It is important to note that the amendments to the various pieces of legislation contemplated by the Bill are retroactive, and will apply to proceedings commenced before the day the new section comes into force.[30]

Nevertheless, these amendments do not directly target tribunal procedures, beyond the mode of costs motions, but the door might open in the near future. Rules 4 and 6 of the Ontario Municipal Board Rules, and analogous rules of other tribunals, already reference the Rules of Civil Procedure and provide decision-makers with flexibility to manage the tribunal's procedures as they deem necessary and appropriate.[31]

While as of this writing, Bill 83 has only been given First Reading in the Ontario legislature, it appears likely that it will find its way into law in a relatively similar form sooner than later. Both opposition parties have spoken in favour of such legislative changes. Once it comes into force, developers (and their lawyers) should be aware of the changes and the potential costs of involvement in SLAPP or even SLAPP-like litigation.

[30] Bill 83, proposed section 137.5.

[31] Bill 83, proposed section 137.1(7).

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