

Protecting Freedom of Expression in Public Debate: Anti-SLAPP legislation

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Background

A strategic lawsuit against public participation (SLAPP) is generally defined as a lawsuit that is intended to censor, intimidate, or silence people or a group of people who speak out about or take a position on an issue of public interest. Traditionally it has been seen as a suppression of those who seek to speak out on matters of governmental action. However, particularly in certain jurisdictions of the U.S., this concept has expanded to apply to situations outside of governmental based criticism and has a more general application to matters of public interest or importance.

The general purpose of a SLAPP is to silence those individuals or groups that seek to speak out by redirecting their energies and finances to defending a lawsuit and away from the original public criticism. A SLAPP may also be intended to discourage others from taking a similar position and is intended to create a form of libel chill.

Canadian Experience

In Canada there has been limited caselaw and legislation directly addressing the issue of SLAPPs. For the most part, the notion of SLAPPs has been an American concept as the phrase was first coined in the 1980's by professors from the University of Denver – Penelope Canan and George Ping.

British Columbia

The British Columbia experience with anti-SLAPP laws began with a 1993 case involving MacMillan Bloedel and the Galiano Conservatory Group. The Galiano Conservatory group was lobbying for zoning by-laws against MacMillan Bloedel alleging

a conspiracy to harm. The claim had little merit and was ultimately dropped but not until a few weeks before trial.

This eventually led to the short-lived legislation in B.C. known as the *Protection of Public Participation Act*, S.B.C. 2001, c.19 (“PPPA”) which was enacted in April 2001 by the NDP government and was quickly repealed in the next legislative session in August 2001 by Gordon Campbell’s Liberal government.

The PPPA explained its purpose as encouraging public participation and dissuading persons from bringing or maintaining legal claims for an improper purpose.

The PPPA permitted a defendant to obtain a summary dismissal of a claim, reasonable costs and expenses to defend the claim, and punitive or exemplary damages, if the defendant satisfied the court, on a balance of probabilities, that, when viewed on an objective basis,

- a) “the communication or conduct in respect of which the proceeding or claim was brought constitutes public participation, **and**
- b) a principal purpose for which the proceeding or claim was brought or maintained is an improper purpose.”

The Act defined “public participation” as

“... communication or conduct aimed at influencing public opinion, or promoting or furthering lawful action by the public or by any government body, in relation to an issue of public interest, but does not include communication or conduct

- a) in respect of which an information has been laid or an indictment has been preferred in a prosecution conducted by the A.G. or the A.G. of Canada or in which the A.G. or the A.G. of Canada intervenes,
- b) that constitutes a breach of the *Human Rights Code* or any equivalent enactment of any other level of government,
- c) that contravenes any order of any court,
- d) that causes damage to or destruction of real property or personal property,
- e) that causes physical injury,

- f) that constitutes trespass to real or personal property, or
- g) that is otherwise considered by a court to be unlawful or an unwarranted interference by the defendant with the rights or property of a person.

The Act further defined a claim as being for an “improper purpose” if

- (a) the plaintiff could have no reasonable expectation of success, **and**
 - (b) a principal purpose of the claim is:
 - i) to dissuade the defendant or other person from engaging in public participation,
 - ii) to divert the defendant’s resources from public participation, or
 - iii) to penalize the defendant for engaging in public participation.

Therefore, the legislation required the moving party (defendant) to prove both elements, namely that the claim fell under the definition of public participation and that it was brought for an improper purpose, in order to invoke the possible remedies.

Quebec

Anti-SLAPP concerns in Quebec also arose from an environmental matter involving a lawsuit by American Iron and Metal Co. Inc. against certain environmental groups that were alleging pollution of a river in Quebec.

After much discussion and review, in June 2009, the Quebec National Assembly assented to *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*.

This legislation does not set out specific rules for SLAPPs, but rather strengthens existing provisions of the *Code of Civil Procedure* on abuse of process. Given the language of the amendments, it permits SLAPP suits to be considered an abuse of the court’s process and permits certain remedies that flow from a finding that a claim is an abuse of process. It is presently the only form of anti-SLAPP legislation in Canada.

The language of the legislation includes:

“A Court may ... declare an action or other pleading improper and impose a sanction on the party concerned. The procedural impropriety may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.”

Ontario

Ontario has been considering Anti-SLAPP legislation and has struck an Advisory Panel on the matter.

Canadian Judicial Experience

The Canadian judicial experience in dealing with SLAPPs is obviously limited given the lack of legislation. However, a few cases in Canada related to the subject have emerged over the years and are referenced below.

Fraser v. Saanich [1999] B.C.J. No. 3100 (S.C.)

Home Equity Development v. Crow [2002] B.C.J. No. 1805 (S.C.)

Daishow v. Friends of the Lubicon [1996] 27 O.R. (3d) 215 (Div. Ct.)

The *Fraser v. Saanich* decision concerned the striking of a claim by a hospital director against a municipal government and a group of individuals described as residents opposed to the plaintiff's plan to redevelop certain hospital facilities. The claim was struck under the traditional court rules on the basis that it failed to disclose a reasonable cause of action. However, special costs were awarded as the Court described and characterized the suit as a SLAPP.

The *Home Equity Development* decision was an application under the short-lived B.C. legislation. The defendants' application was dismissed on the basis that they failed to demonstrate that the plaintiffs' claim had no reasonable prospect of success.

In Ontario, the Japanese pulp and paper giant Daishowa commenced a claim, alleging a number of economic torts, against the Friends of the Lubicon, a small Toronto based advocacy group. After a lengthy trial, the majority of Daishowa's claims were dismissed, except for a defamation claim in relation to the use of the word "genocide". Damages of \$1 were awarded. However, the Court refused to order that Daishowa pay the defendant's costs, which were reported in excess of \$400,000.

The International Experience

Particularly in the United States, where the concept was defined and origination, there has been greater enactment and use of specific anti-SLAPP legislation. The U.S. experience stems from the First Amendment provisions which, particularly the right to petition, have been interpreted to lend broad constitutional protection to a wide variety of communications directed at government or governmental action.

Various states have enacted anti-SLAPP legislation in the U.S. The scope of such legislation can vary tremendously from state to state.

For instance, in New York, section 76-A of the *Civil Rights Law* takes a more restrictive definition for the application of SLAPP claims. It provides for the application of anti-SLAPP legislation to proceedings brought by persons who have applied for, or have obtained, a permit, lease or certificate from a government body or who are applying for an amendment to a zoning by-law.

Conversely, in California, its legislation, s. 425.16 of the *California Code of Civil Procedure* has much broader application. It is intended to apply to "a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech".

The relevant sections of the California anti-SLAPP legislation, contained in their Code of Civil Procedure, states as follows:

425.16 (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, the section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

...

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes:

(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.

Australian Experience

In Australia, after experience with a high profile SLAPP action that was commenced in 2004 against 20 Tasmanian environmentalists by *Gunns* (one of Australia's largest forestry companies), and after much government debate, the Australian Capital Territory passed the *Protection of Public Participation Act 2008*.

This legislation is in many respects similar to the B.C. PPPA. It reads as follows:

(5) The purpose of this Act is to protect public participation, and discourage certain civil proceedings that a reasonable person would consider interfere with engagement in public participation.

(6) For the Act, a proceeding is stated or maintained against a person for an improper purpose if a reasonable person would consider that the main purpose for starting or maintaining the proceeding is –

(a) to discourage the defendant (or anyone else) from engaging in public participation; or

(b) to divert the defendant's resources away from engagement in public participation to the proceeding; or

(c) to punish or disadvantage the defendant for engaging in public participation.

(7) (1) In this Act, public participation means 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.

(2) However, public participation does not include conduct

(a) that contravenes a court order or constitutes contempt of court

(b) that constitutes unlawful vilification under the *Discrimination Act 1991*; or

(c) that causes, or is reasonably likely to cause, physical injury or damage to property; or

(d) that constitutes unlawful entry at residential premises; or

(e) that constitutes an offence punishable by imprisonment for longer than 12 months; or

(f) if (i) the conduct is communication by a party to an industrial dispute between an employer and employee, former employee, contractor or agent; and

(ii) the communication relates to the subject matter of the dispute; or

(g) that constitutes the advertising of goods or services for commercial purposes; or

(h) that incites others to engage in conduct mentioned in paragraphs (a), (b), (c), (d) or (e).

Issues for developing a model for Canada

There are a number of issues that Canadian legislators will have to consider for development of anti-SLAPP legislation. Different jurisdictions have taken different approaches to each of these issues and there does not appear to be one clear approach to anti-SLAPP laws.

An initial hurdle to be addressed in any discussion of anti-SLAPP legislation for Canada, is whether there are adequate remedies and mechanisms already in place to deal with SLAPP suits. This was a basis advanced for repealing the legislation in B.C. in 2001.

Generally, if a defendant were to proceed to address a SLAPP suit in a summary fashion under most provincial rules of civil procedure, a party would be looking to bring a motion to strike or a motion for summary judgment to dismiss the claim. However, there is currently no clear precedent in Canada for such a remedy on a summary basis, solely on the basis that the claim could be defined as a SLAPP. The tests for a motion to strike or for summary judgment place a high onus on the moving party and traditionally courts are reluctant to dismiss claims summarily except in the clearest of circumstances.

A possible argument would exist under the doctrine of abuse of process. Either at common law or under most provincial rules of court, a claim can be struck if it is demonstrated to be an abuse of process, for an improper purpose, or is frivolous and vexatious.

Arguably, a claim commenced predominately for the purpose of intimidating, censoring or silencing individuals or groups that wish to speak out publicly on matters of public interest or importance would fall under these headings and form a basis for summarily dismissing or striking a claim. However, such a mechanism is less than ideal and certainly places the full onus on the moving party in relation to the application. As well, present summary proceedings generally do not contain any extraordinary cost remedies or damage remedies to act as a disincentive for future SLAPP litigants.

The Supreme Court has recently alluded to concerns over libel chill in the context of developing defences to defamation claims. These comments are found in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 (see para. 15) and *Grant v. Torstar Corp.*, 2009 SCC 61 (see paras 2 and 39).

Further issues for consideration in developing anti-SLAPP legislation would also include:

1) How should the legislation define a SLAPP suit? There is clearly a tension between protecting citizens from improper intimidation when exercising their rights to freedom of expression, and the need to ensure that a litigant's right to access the courts is protected.

Identifying a SLAPP suit can be tricky in that it is often camouflaged under various causes of action such as defamation, breach of privacy, interference with economic interests, interference with contractual relations, nuisance or conspiracy. There is no

one form of action, but rather it is the characteristics and intent of the action that are important.

An example of the broad application of anti-SLAPP legislation is found in the California (detailed above). There is authority from California, that an interview by an individual to the media falls under the protected provisions of their Code. Specifically the section of the Code that states – “when the statement is made either in a place open to the public or a public forum” and “in connection with an issue of public interest”.

In that authority, *Nygård, Inc. v. Timo Uusi-Kerttula*, (2008), 159 Cal. App. 4th 1027, a former employee gave an interview to a Finnish magazine concerning his experiences with his former employer and both he and the magazine were sued for breach of confidentiality, interference with economic relations, and defamation. The claim was considered a SLAPP suit and was summarily dismissed.

A related issue concerns proof that the claim is unmeritorious or for an improper purpose. As identified previously in this paper, in B.C. and Australia, the legislation requires the moving party to establish an improper purpose in relation to the claim. Some have criticized placing such a heavy onus on the moving party and particularly one that essentially requires the party to prove the motive or intent of the party that initiated the claim.

In California, this issue is addressed by requiring the responding party to the motion (i.e. the plaintiff to the claim) to prove ...” that there is a probability that the plaintiff will prevail on the claim.” This occurs after the defendant is able to establish that the claim is a protected activity, namely an activity on public participation. This may be a more sensible approach than placing the onus on the defendant for this issue.

2) A second issue to consider, is what parties should benefit from the protection of anti-SLAPP laws. Most legislation would seem to extend its protections to citizens, or groups of citizens that are publically participating in government or public interest

matters. Most do not specifically define the protections as applying directly to the media although there is some authority for application to the media from Massachusetts and California.

In any event, the media could indirectly benefit from anti-SLAPP legislation by providing greater protection for sources of information or those willing to speak out on issues of government concern or more generally on matters of public interest.

3) A third concern with anti-SLAPP legislation, is what remedies should be available for parties moving to dismiss. Clearly, there is a need for a summary procedure to deal with dismissing the claim. In that regard, the legislation would have to consider a process of establishing that the claim fell within the parameters of a SLAPP suit (however that is defined).

As part of this expedited process, the legislation should ensure that injunctive issues are addressed and a stay on discovery occurs pending the resolution of the motion. The legislation should fulfill the need to address such claims in an expeditious manner and before substantial costs have been incurred.

A usual consequence of a finding of a SLAPP suit is for additional costs and even exemplary and punitive damages to be awarded against the party that initiated the claim. This is the “SLAPP back” portion of the legislation. It should be designed to assist in acting as a disincentive for future initiators of SLAPP suits. In Quebec, the Civil Procedure amendments allowed for such costs to be pursued personally against directors or officers of a corporation found to have filed a claim that constitutes an abuse of process.

A unique feature of the PPPA from B.C., was that if the moving party could not prove on a balance of probabilities that the claim was initiated for an improper purpose, but could prove “a realistic possibility” that the claim was initiated for an improper purpose,

the Court could order that the plaintiff post security for costs, in the event that it turned out at trial the claim was in fact a SLAPP.

Conclusions

It is quite possible that the use of SLAPP suits may increase in Canada, particularly concerning issues relating to entities with considerable wealth or resources.

This use of SLAPP litigation could have further implications on the media as sources of information and opinions become reluctant or intimidated in coming forward and sharing this information publically.

It will be important for legislators to carefully consider these issues and address the potential misuse of litigation to infringe on freedom of expression in Canada.