November 2002

The West Coast Environmental Law SLAPP Handbook

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This handbook is intended to be an initial reference and provide general information for citizens and community groups. It contains legal information, but does not substitute for legal advice from a lawyer. If in doubt whether an activity would attract legal action, contact a lawyer before proceeding. If you feel you have been SLAPPed, or are in danger of being SLAPPed contact a lawyer. See chapter 2, and chapter 6 for information on getting legal advice.

ACKNOWLEDGMENTS:

This handbook grew out of a project started at the Environmental Law Centre (ELC) at the University of Victoria. The authors were all involved in the ELC in various capacities including serving on the executive, and decided to use their time with the Centre to create a SLAPP resource for citizens and community groups. Along with the assistance of ELC volunteers and faculty an initial draft of the handbook was created. With the announcement of upcoming anti-SLAPP legislation the handbook was shelved. Two years later, with the legislation having come and gone, the handbook was resuscitated, this time as a West Coast Environmental Law project. The Handbook has been rewritten and updated with the assistance of West Coast Environmental Law staff. There were many contributors to this project who lent time and expertise in reviewing and commenting. We would like to thank Ken Wu, Western Canada Wilderness Committee; Don Caswell, University of Victoria; Andrew Petter, University of Victoria; Chris Tollefson, University of Victoria; Carly Hyman; Graham Reed; Sue Blanchet, Henning Faust, Mark Underhill, Arvay Finlay; Cathy Parker, Arvay Finlay, Angela McCue, Sierra Legal Defence Fund, and the West Coast Environmental Law staff for their valuable input into the Handbook.

EXECUTIVE SUMMARY

WHAT ARE SLAPPS?

Strategic lawsuits against public participation (SLAPPs) are civil actions with little merit advanced with the intent of stifling participation in public policy and decision-making. Most SLAPPs succeed in silencing opposition because public interest groups and ordinary citizens do not have the money to fight the claim in court.

A lawsuit against someone practicing civil disobedience is not a SLAPP. SLAPPs are lawsuits aimed at silencing lawful forms of public participation, such as starting a petition, or posting information on the Internet.

HOW DO THEY OPERATE?

Typically a SLAPP filer will attempt to bring a range of torts against members of a public interest group, or even the group itself. Some of the more common torts include: interference with economic interests, defamation, interference with contractual relations, conspiracy, trespass, and nuisance.

HOW SHOULD I RESPOND?

Being sued is always a serious matter, even if you feel the claim has no merit. Consult with a lawyer to gain a full understanding of your legal position and options. Free legal information can be obtained through West Coast Environmental Law, the Environmental Law Centre, Sierra Legal Defence Fund and a half-hour consultation with a lawyer can be arranged through the BC Branch of the Canadian Bar Association for $10.

WON'T THE LAW PROTECT ME?

As the law stands now, there are certain protections that exist, though they are far from being perfect. The Rules of Court allow for dismissal of claims before they get to trial under Rule 19(24) on the grounds that:

a. It discloses no reasonable claim or defence;
b. It is unnecessary, scandalous, frivolous or vexatious;
c. It may prejudice, embarrass or delay the fair trial or hearing of the proceeding; and
d. It is otherwise an abuse of the process of the court.

Unfortunately the courts have been very reluctant to use this Rule to dismiss cases outright, reserving it only for the most extreme cases. Judges are likely to consider all other options before considering a stay of proceedings.

There has been significant debate as to whether the Charter provides any protection for SLAPP targets. Generally the Charter does not apply to disputes between private parties. However, recent case law states that the common law must develop in line with Charter values, including freedom of expression. Debate continues, on what protection the Charter might offer to SLAPP targets.

There is some recognition that the Courts are moving in the direction of addressing the issue of SLAPPs. The case of *Fraser v. Saanich* was the first time that a judge in Canada explicitly recognized a case as bearing the hallmarks of a SLAPP.

THERE OUGHT TO BE A LAW

The most effective way to reduce the chilling effects of SLAPPs can be accomplished through legislative reform. Twenty US states have already passed legislation addressing SLAPPs. BC had passed the *Protection of Public Participation Act*, an Act that provided some protection for SLAPP targets. Unfortunately the current Liberal government, upon taking office, immediately repealed the *Act*. For citizens and community groups to be fully protected from the chilling effects of SLAPPs, strong legislation needs to be passed.

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The concept of Strategic Lawsuits Against Public Participation, or SLAPPs, has emerged to describe civil actions with little or no substantial basis or merit advanced with the intent of stifling participation in public policy and decision-making.

CHAPTER 1: INTRODUCTION[1]

A small grass-roots conservancy organization wants their local government to pass by-laws to protect areas from industrial forestry. A group of citizens sign and sends a petition to government officials to protest a planned real estate development. Loosely organized volunteers start a boycott of a company that is infringing Aboriginal rights and title. These types of activities, while all lawful, have still led to expensive and intimidating lawsuits. These suits have become popular enough to garner their own acronym: SLAPP.

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SLAPP stands for Strategic Lawsuit Against Public Participation. Although SLAPPs have been on the Canadian scene for almost a decade, it was not until the spring of 1999 that a Canadian court formally recognized the phenomenon in the case of *Fraser* v. *District of Saanich* (see appendix B).

SLAPP filers assume that public interest groups and individual citizens will not have the money to fight the claim in court. Instead of going through the trial, some SLAPP targets settle, agree to retract earlier statements and refrain from further participation on the issue. Other citizens and community groups, not directly involved in the SLAPP, can be intimidated into limiting their opposition to a project for fear they might be sued.

SLAPPs are still relatively uncommon in Canada, but they have been spreading, and the effects are starting to be felt. The detrimental impact of SLAPPs on the democratic process in the United States has been recognized and addressed in many US states. It is time for Canadian lawmakers to take similar steps towards combating the SLAPP phenomenon.

The impetus for this handbook was the proliferation of SLAPPs in Canada. Its purposes are fivefold:

1. To enable citizens and community groups to recognize a potential SLAPP and understand the possible consequences of lawful participation.

2. To outline steps to be taken in response to a potential SLAPP.

3. To educate both the legal community and the broader public about the nature, existence and repercussions of SLAPPs, including the chilling effect on public participation.

4. To help demystify the legal process used by SLAPP filers[2] to intimidate and silence citizens and community groups.

5. To stress the need for law reform in this area, and to advocate for the re-enactment of a strengthened version of the recently repealed *Protection of Public Participation Act*.[3]

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[2] A SLAPP filer is the plaintiff who files the suit in the first place. A SLAPP target is the defendant, typically an individual or community group who has opposed the actions of the plaintiff.

[3] [SBC 2001] Chapter 19. Repealed under the *Miscellaneous Statutes Amendment Act, 2001* [SBC, 2001] Chapter 32.

1.1 WHY ARE SLAPPS SO DANGEROUS, AND WHY HAVEN'T I HEARD OF THEM BEFORE?

In order for democracy to be truly effective it is crucial that citizens have the right to participate in public debate. There are simply too many issues for government officials to be fully abreast of all of the implications of their decisions – they rely on the public to comment on on-the-ground decisions that could have unintended consequences. Furthermore, there is an established role for the public to comment on flaws in legislation or policy that could ultimately be harmful to our society, our health, or our environment.

SLAPPs are often threatened or filed with the intent of silencing participation and stifling public debate. SLAPPs function by harassing and intimidating individuals, in essence creating a "chill" in public participation. Defending a SLAPP involves a substantial drain of resources (namely money, energy and time) even if victory on the legal front is assured. The end result is that the suit may not be successful in court, but it has served to delay, silence and harass protestors. Whole communities can often become silenced out of fear of being dragged into a lawsuit.

The reason SLAPPs have largely remained off the radar screen in Canada is two-fold. First, the legal profession as a whole is conservative and slow to change. The Courts have been extremely reluctant to name a lawsuit a SLAPP. Secondly, most SLAPPs do not proceed to judgment. Often citizens and community groups will be successfully silenced by a letter from a lawyer threatening to sue. If a suit is actually filed community groups often feel pressure to settle because they cannot afford to defend the court action.

1.2 WHAT'S THE DIFFERENCE BETWEEN LAWFUL PARTICIPATION AND CIVIL DISOBEDIENCE?

Although the line is often blurred between lawful participation and civil disobedience, the latter involves a deliberate disobedience of the law that originates from ethical or moral reasons. Despite the appeal to higher morality, there should be no doubt that civil disobedience is unlawful, and that legal consequences will likely follow.[4]

On the other hand, there are certain activities that are generally recognized as lawful forms of public participation. It is in this realm that SLAPP suits exist. SLAPPs are attempts to silence or terminate these democratic forms of expression.

[4] For a discussion of the legal issues surrounding civil disobedience see the Environmental Law Centre's *Civil Disobedience Handbook* available online at: http://arakni.com/elc/.

Some of the activities that have been used in the past as examples of lawful participation include:

- Letter writing to government and businesses
- Reporting violations of environmental laws or filing complaints with government agencies
- Starting a private prosecution
- Collecting signatures on petitions
- Lobbying for new legislation or changes to the existing legislation
- Peaceful demonstrations such as picketing or public meetings
- Boycotting consumer goods and distributors
- Public information campaigns
- Providing information to the media
- Use of the Internet: setting up websites to provide accurate information, collect signatures, fundraise, etc.
- Speaking out at community meetings

Even these activities can be considered unlawful if they cross certain boundaries. It is extremely important that facts and claims are accurate, as many SLAPP suits begin based on communication of a slightly erroneous fact, which is then portrayed as libel or slander.[5] The dissemination of inaccurate information helps legitimize the lawsuit in the eyes of the court, making it unlikely that the action will be dismissed on the grounds that it is 'vexatious or frivolous.' Also, word choices must be made with caution. For example, in the case of *Daishowa Inc.* v. *Friends of the Lubicon*[6], the court held that the use of the word "genocide" to describe the effect of logging practices was unacceptable, even if it expressed the legitimate feelings of the protesters.

It should thus be remembered that a fine line exists between lawful and unlawful activities. A SLAPP suit defence will only be available to protect abuses against legitimate and lawful participation. If in doubt as to whether conduct is lawful contact a lawyer, or err on the side of caution.

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[5] Libel and slander are two categories of defamation. Libel is usually associated with the written word, but also extends to pictures, statues, films and defamatory conduct. It is actionable even without proof of damage. Slander is conveyed by the spoken word, and is only actionable if special damages are pleaded and proven.

[6] 158 D.L.R. (4th) 699 (Ont. Div.) paras 130-145. For further discussion of the *Daishowa* case see: Tollefson, Chris and Pollard, Matt, *Multinational Pulp Company SLAPPs suit Against Activist Group,* Alternatives, 22.3 1996, pg.4.

1.3 WHAT ARE TORTS, AND HOW ARE THEY INVOLVED IN SLAPPS?

SLAPP suits generally involve claims known as torts. A tort involves one party taking another party to court to attempt to recover damages resulting from 'wrongful behaviour.' The tort most familiar to the general public is that of negligence. Tort law differs from criminal law in several respects. In a criminal case, the State prosecutes an accused person who has been charged with committing a criminal offence. There is a range of penalties available if someone is convicted of a crime, including potentially imprisonment.

In tort law, the dispute is between private individuals, corporations or occasionally the Government. The disputants are considered parties to the action. Typically in tort cases the plaintiff is seeking an award of money (damages) from the defendant as compensation for some loss. In tort cases the plaintiff only needs to prove the elements of the cause of action on a balance of probabilities, as opposed to the criminal standard of 'beyond a reasonable doubt.'

Generally, a SLAPP filer will allege a range of torts against members of a public interest group, or even the group itself. Included in this section is a list and description of some of the most common torts brought in a SLAPP. The two most popular grounds for SLAPPs are intentional interference with economic interests, a claim that compensates for economic loss, and defamation, which compensates for harm to reputation and includes libel or slander.

SLAPPs are framed as ordinary tort lawsuits and are not usually frivolous on their face. Their success depends upon maintaining this external appearance. SLAPP claims attempt to relegate constitutionally protected forms of expression into the realm of unlawful activity. Any number of torts can be alleged, as long as the SLAPP filer can allege some factual basis for their claim.

The torts most often alleged in SLAPPs are discussed below:[7]

INTERFERENCE WITH ECONOMIC INTERESTS

In *Daishowa Inc. v. Friends of the Lubicon*[8] the Court held that there are three elements of the tort of interference with economic interests: the defendant must have had an intention to injure the plaintiff; the plaintiff must have suffered economic loss or related injury as a result

[7] This list is only a very brief introduction to various torts. It is intended only to give a general sense of what some of the more commonly alleged torts are.

[8] 158 D.L.R. (4th) 699 (Ont. Div.).

of the defendant's conduct; and the means employed by the defendant must have been unlawful.

If the defendants do not engage in any unlawful behaviour – if, for example, their behaviour consists merely of peaceful picketing, or leafleting – the allegation will be unsuccessful. It may also be difficult for filers to show damage suffered as a direct result of the unlawful conduct. Even though "the tort is seldom pleaded as a sole or even central cause of action, and successful trial claims are rare" it has still "taken its place as one of the most prevalent intentional business torts."[9]

The *Daishowa* case provides us with an example of how this tort has been used. In that case the Friends of the Lubicon (a small public interest advocacy group) organized a boycott of Daishowa (a multinational paper company carrying on logging on traditional lands of the Lubicon Cree). This boycott also included picketing of Daishowa customers who did not participate in the boycott. Daishowa applied for an interlocutory injunction to prevent the picketing of their customers. The Court granted the interim injunction until the case could be heard. Ultimately at trial Daishowa's claim of interference with economic interests was unsuccessful.

DEFAMATION

The tort of defamation involves intentional false communication – either published or publicly spoken – that injures another's reputation or good name. It exists primarily to protect individuals' reputations against unfounded and unjustified attacks. Spoken or public communications are not defamatory if they are truthful.

Given that much advocacy is centred on providing the public with critical information, it is not surprising that defamation is so frequently alleged. In order to have a valid cause in defamation the plaintiff must prove both:

1. That the information is untrue, and
2. That its communication would damage the plaintiff's reputation.

In most SLAPPs, defamation is first in a long line of alleged torts, as it is easy to claim that other points of view are false and damaging. Since much of the information brought to light by citizens and community groups is often damaging to reputation, the validity of an action in defamation rests on the accuracy of the information.

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[9] Matheson, Wendy, *Interference with Economic Relations: A Useful Tool or a Sign of Desperation?*, http://www.torytory.ca/publications/pdf/AR2001-18T.pdf, pg.1.

Daishowa[10] provides a good example of how strictly 'false' communication is interpreted by the courts, and presents a caution to public interest groups to ensure that their information is accurate. The defendants in *Daishowa* alleged that Daishowa Inc. was complicit in genocide. The defendants' apparent reliance on a colloquial meaning of the term was no defence. Because such an allegation would clearly result in damage to the plaintiff's reputation and, since there was no evidence to suggest that Daishowa engaged in a "deliberate and systematic extermination," of the Lubicon, the tort of defamation was proved.

INTERFERENCE WITH CONTRACTUAL RELATIONS

There are two varieties of the tort of interference with contractual relations. The first involves inducing a breach of contract, the second does not.

To prove that a breach of contract was induced, the plaintiff must prove five elements: the existence of a valid and enforceable contract; awareness by the defendant of the contract's existence; breach of contract procured by the defendant; wrongful interference, and damage suffered by the plaintiff.

While interference with economic interests implies damage as a direct result of the defendant's behaviour, damage resulting from interference with contractual relations can be either direct or indirect. If, for example, a defendant creates a situation that would make performance of the contract impracticable or impossible, but does not directly induce a breach, she or he may still be liable. This is frequently alleged in SLAPPs, in a situation where non-defamatory information distributed about the plaintiff results in a contracted party's heightened awareness, and indirectly, in a subsequent breach of contract. An example of when direct interference might be *alleged* is if protestors picket outside a pizza box manufacturer for using cardboard from old-growth trees; if the picketing is causing problems for the pre-existing business relationships of a 3rd party, that may be enough to sustain a lawsuit.

The second variety – where breach of contract is not a required element – arises from a third party who *intentionally* hinders the ability of a contract from being performed. Such an act may also invite liability, even though a breach doesn't actually occur. This form of the tort bears a resemblance to the tort of interference with economic interests.

[10] *Supra* note 8.

CONSPIRACY

Conspiracy is an agreement between two or more persons to perform either an unlawful act, or a lawful act by unlawful means. The first action is a conspiracy to injure, whereby two or more persons combine for the unlawful purpose of causing injury. The second is a conspiracy to use unlawful means, which when directed at the plaintiff, causes injury. Notably, this second variety of conspiracy may not give rise to a tort claim if done by a single party; it is the combination of persons that turns this act into the tort of conspiracy.

Conspiracy is frequently alleged in SLAPPs. By definition, most public interest activity involves organization of, and communication among, citizens. Conspiracy is therefore an easy tort to allege. Plaintiffs merely point to the usually obvious fact that more than one defendant is involved, and assert that the defendants' intention is to injure. This scenario implies that most public interest activity involves conspiracy. If, however, the plaintiff suffers injury but it was not the defendants' primary intention to cause it, nothing unlawful has occurred. In most instances, the defendants successfully claim that their primary motive is their own self-interests.

More importantly in the context of SLAPPs, however, is when the intention is neither to injure the plaintiff, nor to promote self-interest. When the primary intention is to promote the interests of a third party (in environmental cases presumably the intent is to promote the public interest), and injury to the plaintiff is incidental, the tort of conspiracy is not established.

TRESPASS

The tort of trespass can be made out when a person intentionally goes onto another's land without justification or right. It means that the person was wilfully and consciously in that particular location. Trespass does not require any proof of damage or loss in order to be actionable. Once trespass is proven, the defendant has the onus of disproving that it was committed wrongfully. An intentional trespass to land occurs when the defendant desires to interfere with the possession of land, or in circumstances in which this interference was substantially certain to occur.

Trespass is often alleged in SLAPP cases where there has been picketing, protesting, or an active boycott. Whether trespass actually occurred is a question of geography – the SLAPP targets will claim they were on public sidewalks, or public roads, while the SLAPP filer will allege that protestors were on private property. A question also arises when protestors are on private property with a public purpose, such as at a mall.

Generally it is permissible for citizens and community groups to voice dissent on government property, provided no other laws are broken. Justice LaForest summarized the right to free expression on government property by stating that right "does not encompass the right to use any and all government property for purposes of disseminating one's views on public matters, but I have no doubt that it does include the right to use for that purpose streets and parks which are dedicated to the use of the public, subject no doubt to reasonable regulations to ensure their continued use for the purposes to which they are dedicated."[11]

NUISANCE

A nuisance is defined as an unreasonable interference with the public interest, and involves weighing the individual right to conduct an activity without impediment against the public's right to have its interests protected. The tort of nuisance comprises two distinct causes of action: public nuisance, which involves an injury to the public at large, and private nuisance, which is used to regulate conflicting uses of land. Individuals do not usually have a cause of action in public nuisance, with one exception: a private action for public nuisance may be claimed if the plaintiff has suffered a substantial injury beyond that suffered by the general public. Courts are generally reluctant to recognize private actions in public nuisance.

The tort of nuisance is intended to cover those situations in which interference with someone else's land has been indirect or inadvertent. In order to be considered nuisance, an activity has to involve an unusual use of the land. An example in the SLAPP context is if protestors were engaging in street theatre on the sidewalk outside of a filer's office; the SLAPP filer could allege they were blocking access to his business and therefore their conduct constituted a nuisance.

A NOTE ABOUT MALICIOUS PROSECUTION

Malicious prosecution is a civil action brought by a person, against whom a civil suit or criminal prosecution has been brought maliciously and without probable cause. This tort can be a double-edged sword for SLAPP targets. People who have tried to use the courts to gain redress for environmental wrongs have been SLAPPed with the tort of malicious prosecution in the past. However, SLAPP targets in some US jurisdictions have also been able to use the tort to be able to sue SLAPP filers. An example is the California case of *Leonardini v. Shell Oil*,[12] This case revolved around a public clash over the use of polybutylene pipe in California for

[11] *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139 at pg.166.

[12] 216 Cal. App 3d 547, 264 Cal Rptr. 883, (Court of Appeals, 3rd District, 1989).

drinking water. Shell sought approval of the unrestricted use of the pipe without an environmental impact report (Shell manufactured polybutylene resin, a main component in the manufacturing of the pipes). Leonardini, an attorney, advocated that the public officials charged with the responsibility for health and safety independently test the pipe system before exposing Californians to potential health risks.

To silence Leonardini from raising opposition, Shell SLAPPed, claiming libel. Leonardini in response counterclaimed using the tort of malicious prosecution. The courts ultimately found in his favour. Raymond Leonardini was awarded five million dollars in punitive damages.

In Canada the tort of malicious prosecution has been much less of a factor in SLAPP litigation. That is because the tort has been restricted to criminal and quasi-criminal (as opposed to tort) proceedings, and has not generally been applied to civil litigation. The reason it has not been applied is because of differences in the way costs are awarded in the US versus Canada. Even if the tort was available in tort claims, to be successful one must still prove that the lawsuit was inspired by malice. This has been notoriously difficult to establish in the criminal context, yet the courts have not demonstrated a willingness to relax the criteria and widen the scope of liability.[13] Due to the unique nature of SLAPPs, and the chilling effect they have on public participation it may be possible to claim malicious prosecution. However, it has not yet been tried in Canada, and it is very much uncertain as to whether it would be successful.

CHAPTER 2: SLAPPS IN PRACTICE

Part of the intimidation associated with SLAPPs is the mystery of the court system. This chapter seeks to help demystify the legal process. Included in this chapter is a breakdown of the litigation process and a description of legal concerns that could arise during the process.[14]

2.1 DO I NEED A LAWYER?

Being sued is a serious matter. You should always consult with a lawyer to gain a full understanding of your legal position and options.

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[13] Osborne, Philip H., The Law of Torts, Toronto: Irwin Law, 2000. A more thorough discussion of the law surrounding the tort of malicious prosecution in Canada can be found at pages 223-227.

[14] For a description of the steps of a lawsuit see: http://www.duhaime.org/Duhaime&co/steps.htm

There are strict rules of procedure and timelines that must be followed in defending yourself against any lawsuit. A lawyer will be able to inform you of these rules, including what actions must be taken and when. Even if you ultimately decide to undertake your own defence, it is best to consult with a lawyer to ensure that you proceed correctly and make informed decisions.

While lawyers are expensive, they can provide expertise that may end up saving you substantial amounts of time and expense during litigation - or make the difference between success and failure. When you meet with a lawyer do not be afraid to discuss costs and ask for an estimate. Some lawyers will be flexible on their rates or terms of payment and may even work on a pro bono (free) basis. Note that you will still be responsible for your court costs regardless of the arrangements you make with your lawyer. The 'Lawyer Referral Service' provided by the BC Branch of the Canadian Bar Association offers a half hour consultation with a lawyer for $10.[15]

Free legal information can also be obtained through organizations such as West Coast Environmental Law, Sierra Legal Defence Fund and the Environmental Law Centre (see section 4.6 for resources available). The Environmental Dispute Resolution Fund, administered by West Coast Environmental Law, can provide funding for citizens and community groups to hire a lawyer to resolve environmental disputes through litigation or alternative dispute resolution.

2.2 WHO SHOULD I CHOSE AS MY LAWYER?

SLAPPs are not a new phenomenon. Look for lawyers who have experience in defending against other SLAPP cases in general, and against the particular complaints that you are facing.

While it is important that your lawyer is understanding of your politics, motivations and goals, it is even more important that they be competent in the areas of law required. It may also be useful to work with a lawyer who is comfortable and experienced in dealing with the press. Media attention may play an important role in your case - it may well have been the reason for the SLAPP in the first place.

Although West Coast Environmental Law cannot represent SLAPP targets, they may be able to recommend lawyers who have expertise in this area, or potentially provide funding for a lawyer through the Environmental Dispute Resolution Fund.

[15] For more information see http://www.bccba.org/Guest_Lounge/lawyer_referral.asp.

2.3 PREPARING YOUR CASE

To make an informed decision on how to proceed, you should take the time to meet with a lawyer to discuss your situation. To help yourself prepare and gain the most from these interviews it is useful to gather and organize relevant information beforehand. Prepare a brief summary of your situation including:

- A brief cover letter summarizing the main issues of the case, your concerns and your goals;
- A copy of the complaint and other correspondence or documents from the plaintiffs;
- Relevant background information about the situation, and of your relationship with the plaintiffs; and
- Questions for the lawyer regarding his/her experience in SLAPP cases, knowledge of the issues, etc.

The legal resources listed in this handbook have substantial expertise in SLAPP suits and should serve as a good starting point. There are both lawyers and legal organizations with the know-how and desire to help in this area of the law. It is important not to get discouraged, and not to be intimidated by the complexity of the process.

CHAPTER 3: WHAT CAN I CURRENTLY DO TO RESPOND TO A SLAPP?

There is currently no legislation in place to protect against SLAPPs. However, some potential defences do exist. In addition to refuting the elements of the alleged tort claims, two potential protections are the Rules of Court dealing with abuse of process, and the Canadian Charter of Rights and Freedoms. Unfortunately, these defenses have often been ineffective for previous SLAPP targets.

3.1 WILL THE RULES OF COURT PROTECT ME?

The rule against abuse of process is a mechanism for courts to dismiss claims before a full trial has commenced. The traditional focus of the rule has been on maintaining the integrity of the court's process and of the administration of justice. The court uses abuse of process to eliminate lawsuits that are inappropriate, trivial, or unjustified. Proving abuse of process is extremely difficult, and is rarely applied by the courts. Rule 19(24) of the British Columbia Rules of Court allows the court to strike down a claim on the grounds that:

a. It discloses no reasonable claim or defence;
b. It is unnecessary, scandalous, frivolous or vexatious;
c. It may prejudice, embarrass or delay the fair trial or hearing of the proceeding; and
d. It is otherwise an abuse of the process of the court

There is a subtle, but important, distinction to be made between 19(24)(a) and subsections (b), (c) and (d). Subsection (a) is intended to catch failures to plead essential elements of a cause of action. For example, one of the essential elements of a negligence claim is proving damages. If the filer failed to allege any damage incurred the case could be dismissed under 19(24)(a). Subsections (b), (c) and (d) deal more generally with an abuse of the court, where a case, or part of a case, is being brought for ulterior motives.

The courts have been extremely reluctant to dismiss cases on the basis of Rule 19(24), reserving it only for the clearest of cases. For a case to be dismissed, it must be plain and obvious' that there is no reasonable cause of action.[16] To get past 19(24)(a) a filer only needs to allege enough facts to support a cause of action; the court will allow the case to proceed on the premise that the allegations of fact are true.

To have the case dismissed under 19(24)(b), (c) or (d), it is not sufficient for defendant's counsel to convince a judge that the plaintiff's claims in tort will be unlikely to succeed. Rather, a defendant must demonstrate conduct on the part of the plaintiff that is so oppressive, vexatious or unfair as to contravene our fundamental notions of justice and thus undermine the integrity of our judicial process.

To add further difficulty to using this Rule to have SLAPPs dismissed, the court must proceed on the assumption that all the facts as alleged are true.[17] This means that as long as some facts are alleged that would support the claim, and the case is not obviously an abuse of process the court should allow it to proceed.

The stringent criteria for establishing abuse of process presents a significant hurdle for SLAPP targets wishing to avoid the lengthy and expensive trial process.

The person who claims an abuse of process has the onus of proving it on a balance of probabilities. If a party could establish that the lawsuit was commenced in order to intimidate and harass members of the public, they would likely be successful in asserting the misuse or perversion of the court's process for a vexatious or ulterior purpose.

[16] Carey Canada Inc. et al v. Hunt, [1990] 2S.C.R. 959.

[17] Berscheid v. Ensign, [1999] B.C.J. No.1172 (B.C.S.C.), para.34.

Abuse of process seems like it should be a natural defense for SLAPP targets. However, the high threshold makes courts hesitant to come to such a conclusion in all but the most extreme situations. Judges are also likely to consider all alternate remedies before considering a stay of proceedings.

If a court does agree that the behaviour of the plaintiff fits within the rule against abuse of process, remedies include granting judgment for the defendant, ordering a stay of proceedings (the case is technically dead), and awarding special costs.

3.2 WILL THE CHARTER PROTECT ME?

The Canadian Constitution recognizes and protects our national values. Because it is the supreme law of Canada, generally speaking no other laws may be inconsistent with the Constitution. Of special interest to individuals and citizen groups, is the fact that the Canadian Charter of Rights and Freedoms, which is part of the Constitution, guarantees a set of civil liberties that receive special protection from state action.

Despite strong policy reasons for courts to apply the Charter to dismiss SLAPPs, the courts have never done so. Given the basic assumption that the Charter does not apply to actions between private parties, the Charter is of little assistance for targets of SLAPPs. However, there does not exist case law that specifically deals with SLAPPs and the Charter, and Charter jurisprudence continues to evolve in a positive manner.

Two fundamental freedoms in the Charter are often raised in the context of public participation through protest and other activities. They are freedom of thought, belief, opinion and expression, including freedom of the press and other media or communications guaranteed by Section 2(b) and freedom of peaceful assembly found in section 2(c).

Could the targets of a SLAPP hold up these Charter-protected freedoms as a shield? Section 32(1) of the Charter states:

> This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon territory and the Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province (emphasis added).

Application of the Charter is limited to federal and provincial levels of government. In essence this means state action is needed to 'trigger' the Charter. For this reason, the courts do not apply the Charter in purely private litigation.

It has been suggested that the Charter should be applicable in dismissing SLAPPs, based on the assertion that the courts are an arm of government, and therefore the courts hearing the litigation constitutes state action. Since the sole purpose of the litigation is to suppress a Charter-protected freedom, the case should be dismissed from court at the earliest possible time.

The case law on whether the Charter applies to courts is somewhat conflicting. In *Retail, Wholesale and Department Store Union v. Dolphin Delivery*[18], the Supreme Court of Canada stated proceedings involving private parties, even if they are asserting a common law claim against one another, will not attract Charter scrutiny.

The *Dolphin* decision has been somewhat modified by subsequent decisions. In particular Justice Dickson in *B.C.G.E.U. v. B.C. (A.G.)*[19] implied that the Charter could apply to the common law where the dispute, although private, had a "public" dimension. In this case the court held that the Charter applied to a decision of the Chief Justice of B.C. to grant an injunction. The premise established in this case could be incorporated into the SLAPP discussion. Although the origin of SLAPPs are ostensibly private, the issues surrounding the suit and the political process, which is the true target of the harm, are certainly public.

More recently the Supreme Court has softened its stance on the Charter even further and has suggested that in certain instances judicial action can constitute a government action and therefore trigger the Charter.[20] The latest Supreme Court of Canada case on the topic, *R.W.D.S.U., Local 558 v. Pepsi Cola*[21], was a case involving striking workers involved in picketing. The Court stressed that fundamental Canadian values, as laid out in the Charter such as freedom of expression, must be reflected in the development of the common law.[22] Academics have also suggested, using this line of case law, the application of the Rules of Court could themselves trigger Charter scrutiny in SLAPP cases.[23]

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[18] [1986] 2 S.C.R. 573.

[19] [1988] 2 S.C.R. 214.

[20] *R. v. Bernard* [1988] 2 S.C.R. 833, and *R. v. Swain* [1991] 1 S.C.R. 933.

[21] [2002] S.C.J. No.7.

[22] Gannon, Michael, Protecting Public Interest Expression in the Private Realm, Unpublished (2002).

[23] Personal communication with Andrew Petter, Dean of University of Victoria Law School.

It is important to keep in mind that all past cases on the issue dealt with the question of whether the Charter should be applied to a court order resolving a dispute between private parties. In the aforementioned cases, the court proceedings had run their course. In the SLAPP situation, the argument is that the court proceedings themselves must be stopped because they violate the Charter. This is a novel argument and has been the source of much lively debate in academic and legal circles.

While the disputes typically found in the SLAPP arena involve private combatants, the issues surrounding the litigation are ones of great public importance. The argument may therefore be made that to the extent that a SLAPP affects public participation, the absence of a direct government actor may not necessarily be a bar to a Charter-based defence. In addition, it has been suggested that while the Charter may not be directly relevant, the courts must nonetheless make decisions in a manner consistent with the values of the Charter.[24]

The reluctance to entertain Charter arguments seems contrary to the spirit of freedom of expression and assembly protections. Protecting the rights of citizens to participate in the democratic process presents a viable justification for courts to expand Charter jurisprudence into the realm of SLAPP litigation.

3.3 THE *FRASER* DECISION – SLAPPS AND THE COURTS

Canadian courts have seen the rise of actions that closely fit the description of SLAPPs. Some of the best publicized of these legal battles include *MacMillan Bloedel* v. *The Galiano Island Trust Committee*[25] and *Daishowa Inc.* v. *Friends of the Lubicon*[26]. Both of these cases involve a lawsuit response to citizens and community groups protesting against the companies' controversial plans. While judges have exhibited distaste for such suits, they have stopped short of taking measures to combat the trend.

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[24] Professor Chris Tollefson, at the University of Victoria, has done extensive work in the area of Charter analysis and SLAPPs. For example, see: Tollefson, Chris, *Strategic Lawsuits Against Public Participation: Developing a Canadian Response,* The Canadian Bar Review, 73, 1994, pg.207. For anyone interested in further information in this area he can be reached via the Environmental Law Centre.

[25] (1995), 10 BCLR (3d) 121.

[26] (1998), 39 O.R. (3d) 620.

However a more recent British Columbia Supreme Court decision, *Fraser* v. *Saanich*,[27] may foreshadow future development concerning the role of the judiciary in SLAPPs. The *Fraser* case involved a group of Victoria-area residents who expressed their concern over a development proposal by drafting a petition and lobbying local council. When council blocked the proposal, the developer sued eight residents, alleging that the citizens had conspired to injure business by opposing the development plans. In his decision, Justice Singh reprimanded the developer for attempting to "stifle the democratic activities of the defendants", conduct which he determined to be "reprehensible and deserving of censure." He then stated that the plaintiff's claim bore the hallmarks of a SLAPP suit, the first time a Canadian court has reached such a conclusion.

The reasons for decision of Justice Singh in *Fraser* were an important step in the development of a response toward SLAPPs. The recognition by the judge that the SLAPP phenomenon exists, and that it harmfully impacts on lawful behaviour, illustrates the ability of the court to help combat the trend. However, it is important to add the qualifier that Justice Singh only discussed SLAPPs after deciding that the plaintiff's claim of conspiracy had no factual basis. The case was decided based on the application of the abuse of process doctrine discussed earlier; Fraser's lawsuit was not dismissed on the basis that it was a SLAPP. The Fraser decision is therefore of questionable use as a legal precedent to allow the SLAPP doctrine to act as a defence to a lawsuit. While its utility is limited somewhat by this reality, the decision will be memorable for advancing the dialogue about SLAPPs, and raising awareness about the issue among the judiciary and the legal community.

3.4 BEHIND THE SCENES IN FRASER

Counsel for the local residents in *Fraser* succeeded in their application to dismiss the claims based on the lack of a reasonable cause of action (as discussed in the section on **Abuse of Process**). They also convinced the court both to award special costs to the defendants, and to characterize the suit as a SLAPP.

SLAPP targets may gain valuable insight from the *Fraser* experience. However, it is important to note that the defendants in *Fraser* have not been able to enforce their costs award, demonstrating an inadequacy in the current system.

[27] [1999] B.C.J. 3100 (BCSC).

1. TAKE THE OFFENSIVE

As soon as counsel recognized the potential for dismissal under Rule 19(24), they immediately filed a Notice of Motion. Accompanying the notice was a letter to the opposing lawyer, stating clearly that if they were forced to argue the issue, they would be seeking special costs and a complete indemnification for the motion. A forceful message from the outset sets the foundation for the defence, and makes it clear to the filer that the action will be defended vigorously.

2. PLAN STRATEGICALLY

SLAPPs are a delicate subject in the courts; it is important not to pressure a judge into uncomfortable territory. Counsel in *Fraser* argued for dismissal based on a lack of reasonable basis behind the plaintiff's assertions. They described to the court how the allegations, even with the pleaded facts assumed to be true, were entirely without merit. Only once the judge had received these submissions did counsel suggest, in arguing for special costs, the appropriateness of a SLAPP characterization.

3. BE PREPARED FOR SLAPP TACTICS

One of the purposes for filing a SLAPP is to place an economic burden on the target. Delays in the court process play into the filer's hands by further draining the resources of the defendant. Counsel for the plaintiff will often attempt to extend the process for as long as possible. Counsel for the residents convinced the court to speed up the process by accepting written arguments submitted in a timely manner.

Courts are becoming increasingly sensitive to the problem of undue delays. Hardships resulting from these delays become magnified when dealing with the gross disparity of resources between SLAPP filer and target.

The procedures employed by the defendants in *Fraser* provide useful guidelines for the future. In addition, Justice Singh's comments provide precedent for other courts to follow, and lend considerable legitimacy to the anti-SLAPP campaign. However, as the next section will demonstrate, significant procedural roadblocks lie in the path of a SLAPP target.

3.6 SHOULD I USE THE MEDIA?

The media has become a powerful weapon to defend against SLAPPs. Large corporations are often fiercely protective of their reputation, and therefore may not be willing

to follow through with a SLAPP if they think it will generate negative publicity. Citizens and community groups can use the media and public sympathy as a lever against the SLAPP filer. Using the media can have serious repercussions, such as leading to new tort claims or provoking the SLAPP filer. Deciding to use the media should only be pursued in conjunction with a legal strategy, and after discussions with your lawyer.

If you do choose to use the media ensure that all of your information is accurate. Inaccurate or provocative communication to the media has served in the past to give weight to SLAPPs, as opposed to leading to resolution. Tips on successfully using the media is beyond the scope of this handbook, however here are several Internet resources to give you some background on using the media:

The Institute for Media, Policy and Civil Society (IMPACS) - a good resource for media and communications strategy and can be found online at www.impacs.org.

Managing the Media: A Guide for Activists - published by the non-profit Community for Creative Non-violence, available at http://www.tenant.net/Organize/media.html.

Basic Press Outreach for Not-for-Profit and Public Sector Organizations – a tip-sheet published by Coyote Communications (a media service for non-profits) with a focus on using the internet to publicize your cause. Available at www.coyotecom.com.

CHAPTER 4: WHY DO WE NEED LAW REFORM?

The most effective means to reduce the chilling effects of SLAPPs can be accomplished through legislative reform. This chapter asserts the need for legislative change, discusses the American experience with SLAPPS, contains a discussion of the short-lived B.C. *Protection of Public Participation Act*, and provides a catalogue of SLAPP resources.

There are good public policy reasons why corporations have legal recourse against people who have no regard for the truth and wish to slander them. SLAPP legislation isn't about defeating this public policy goal; instead, it is directed towards corporations who do not respect legitimate public participation and wish to unfairly use the legal system to suppress legitimate dialogue and dissent.

4.1 WHAT ARE THE BARRIERS IN THE LEGAL SYSTEM

Obviously the impact of SLAPPs can be devastating for those groups and individuals targeted. The power wielded by SLAPP filers with substantial resources at their disposal against public interest groups is overwhelming and frequently intimidates targets into silence.

Unfortunately, Canada's legal system offers little protection for targets. In fact, at most stages of the litigation process, our judicial system seems designed to work in favour of SLAPP filers rather than for the protection of innocent targets.

At the outset of the court process, targets of SLAPPs meet substantial barriers. Since frivolous claims are a waste of time, money and scarce judicial resources, applications by SLAPP targets for summary dismissal should be well received by judges. Current rules of procedure, however, require that SLAPP targets meet onerous standards in proving that the suit is frivolous, while filers are not similarly obliged to detail their allegation until well into the lawsuit.

If a request for summary dismissal is denied, targets are obliged to expend more time, energy and funds to continue defending themselves. At this stage, SLAPP targets encounter two very significant additional challenges. The first is that no Canadian province or territory provides statutory protection against SLAPPs, with the result that targets are left to defend their democratic activity without legal authority to assist them in defining it as valid political participation. The second is that courts have been very reluctant to extend Charter protection to targets of SLAPPs (see Chapter 3.2). Despite the public values at stake, the Charter offers questionable protection due to the characterization of SLAPPs as merely private in nature.

Finally, after spending significant time and money to successfully defend themselves against groundless allegations, targets are then informed that, although legal costs may be awarded to them, the award will rarely come close to compensation for actual costs incurred. Even in a situation where special costs are awarded, as in *Fraser*, defendants will still exit the process in worse financial shape than they were in when they began.

Chief among the concerns in the area of law reform is in instituting mechanisms to level the playing field between SLAPP filers and targets. Lawmakers keen on effecting change will be able to draw on the experiences of their American colleagues.

4.2 THE AMERICAN EXPERIENCE

The SLAPP phenomenon has had a much higher profile in the US over the last decade than in Canada. By the early 1990's, academics, judges and law makers had recognized the chilling affect of SLAPP litigation.

Americans quickly realized that the breadth of lawsuits resembling SLAPPs demanded an active response. Unlike the Canadian experience, protection for SLAPP targets was offered by the First Amendment to the U.S. Constitution, the right to petition government. Because they served to intimidate those engaged in public debates, strategic lawsuits were found to violate constitutionally guaranteed rights. Courts then instituted mechanisms to facilitate the early dismissal of such frivolous claims. In U.S. courtrooms, it became common practice to dismiss an action with SLAPP characteristics, unless the filer could convince the court otherwise.

Anti-SLAPP legislation has also been passed in 20 American states.[28] The most powerful version of such protection may be found in California. The *California Code of Civil Procedure* Section 425.16 begins with the assertion that:

> 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, this section shall be construed broadly.

The Section codifies a special motion to strike (dismiss) any cause of action that concerns a citizen's right to speech or petition, unless the plaintiff establishes a probability of success. It entitles a prevailing defendant to recover lawyer's fees and costs, and in a recent amendment, provides an appeal mechanism for motions that have been denied. It also clearly defines protected types of expression that will trigger the legislation.

4.3 ANTI-SLAPP LEGISLATION

In the early 1990's the Committee for Public Participation made an initial attempt to lobby British Columbia's legislature for a Public Participation Act. When it began to seek support, the Committee met substantial resistance - people had never heard of SLAPPs. First on their agenda was education of the public; people and organizations had to know what

[28] For an up to date list of American States with anti-SLAPP legislation see the California anti-SLAPP project at: http://www.casp.net/menstate.html.

Anti-SLAPP Legislation entailed in order to endorse it. By 1994, several BC unions, municipalities, the BC Federation of Labour, the BC Civil Liberties Association, various ENGO's and half a dozen city councils had expressed support for anti-SLAPP legislation. Over forty groups signed onto the proposed Public Participation Act by the time it was taken to the Attorney General. The committee had a backbencher, Ujjal Dossanjh (BC's former Premier) support the bill and help with the efforts to introduce it to cabinet. The bill was endorsed by caucus and supported by the then Attorney General, Colin Gabelman, who requested Cabinet's permission to develop and introduce anti-SLAPP legislation. Because of competing priorities an Act was not passed into law at this time.

Public pressure generated by several high-profile SLAPPs, and led by organizations such as West Coast Environmental Law, The Environmental Law Centre, and Sierra Legal Defence Fund caused the NDP government to take a second look at enacting anti-SLAPP legislation.

Finally, after years of advocacy, consultations, and public pressure, the legislature passed the *Protection of Public Participation Act* in 2001. This legislation struck a careful balance between protecting the rights of those who feel aggrieved to bring an action in court and the need to foster public participation in decision-making. The purpose of the legislation, in the words of former Attorney General Graeme Bowbrick, was "to encourage public participation and to dissuade people from bringing or maintaining SLAPP suits. The legislation provided an opportunity at or before trial for a defendant to allege that a lawsuit is being brought for an improper purpose and is therefore a strategic lawsuit against public participation."[29]

Under the *Protection of Public Participation Act* the court could dismiss a SLAPP and order the filer to reimburse the defendant for all reasonable costs and expenses they have incurred. Alternatively the court could allow the proceeding to continue, but require the plaintiff to post security for all the costs and damages that may be awarded to the defendant should the plaintiff lose at trial.

Before the anti-SLAPP legislation was ever successfully used, the BC Liberals replaced the NDP in government. Geoff Plant, the new Attorney General, had long been a vociferous critic of the legislation, claiming the Rules of Court were sufficient to deal with SLAPPs. The *Protection of Public Participation Act* was quickly repealed, once again leaving citizens and community groups little or no protection against SLAPPs.

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[29] British Columbia Legislature, Debates of the Legislative Assembly (Hansard), April 3rd, 2001 at 17636.

Repealing the legislation certainly will not make the issue disappear. If there is anything positive to be taken from the *Protection of Public Participation Act* experience, it is that it further raised awareness of the issue and demonstrated that law reform in this area is possible with a concerted effort from citizens and community groups.[30]

4.4 THE PROTECTION OF PUBLIC PARTICIPATION ACT

Although the *Protection of Public Participation Act* was not perfect, it was certainly a significant improvement over the existing Rules of Court. It had been carefully drafted, going through a series of revisions, incorporating comments and suggestions from rounds of consultations. Section 2 of the Act summarized its' purpose, and how it functioned.

> **2** The purposes of this Act are to
>
> (a) encourage public participation, and dissuade persons from bringing or maintaining proceedings or claims for an improper purpose, by providing
>
> (i) an opportunity, at or before the trial of a proceeding, for a defendant to allege that, and for the court to consider whether, the proceeding or a claim within the proceeding is brought or maintained for an improper purpose,
>
> (ii) a means by which a proceeding or claim that is brought or maintained for an improper purpose can be summarily dismissed,
>
> (iii) a means by which persons who are subjected to a proceeding or a claim that is brought or maintained for an improper purpose may obtain reimbursement for all reasonable costs and expenses that they incur as a result,
>
> (iv) a means by which punitive or exemplary damages may be imposed in respect of a proceeding or claim that is brought or maintained for an improper purpose, and
>
> (v) protection from liability for defamation if the defamatory communication or conduct constitutes public participation, and
>
> (b) preserve the right of access to the courts for all proceedings and claims that are not brought or maintained for an improper purpose.

The Act allowed for prompt dismissal of claims, and provided a range of options for costs awards for SLAPP defendants. Additionally the Act provided a defence against claims of

[30] For more information on what anti-SLAPP legislation should look like, see West Coast Environmental Law Research Foundation's publication "Developing a Response to Strategic Lawsuits in Public Participation in BC", available online at: http://www.wcel.org/wcelpub/2000/13299.htm.

defamation for those who speak out in the public interest. The need for similar legislative protections against SLAPPs is clear. It is vital that an Act resembling the pre-existing *Protection of Public Participation Act* be enacted.

Although the Act was quickly repealed, the courts did have one chance to consider the legislation in *Home Equity v. Crow et al.*[31] Unfortunately a key piece of the legislation was not tested. Section 3 of the *Act* sets out a defence of qualified privilege in cases involving public participation. A leading text on libel and slander provides the following discussion on qualified privilege:

> There are occasions upon which, on grounds of public policy and convenience, a person, may, without incurring legal liability, make statements about another which are defamatory and in fact untrue. On such occasions a man, stating what he believes to be the truth about another, is protected in so doing, provided he makes the statement honestly and without any indirect or improper motive. These occasions are called occasions of qualified privilege, for the protection which the law, on grounds of public policy, affords is not absolute but depends on the honesty of purpose with which the defamatory statement is made.[32]

The defendants were not able to use the statutory defence as the communications that were allegedly defamatory were made before the *Act* was passed.[33]

The facts of the case are straightforward. Home Equity Development intended to develop an ecologically sensitive parcel of land adjacent to a wilderness park. Local residents banded together, and many wrote letters published in the local paper. As well they wrote letters to neighbours, and distributed a 'trivia test' about the development and the developer. The developer claimed the communications were defamatory and sued.

Without being able to rely on the defence of qualified privilege, the defendants had to prove there was no reasonable prospect of success in order to receive protection under the *Act.* Unfortunately for the defendants they were unable to convince the judge on a balance of probabilities that the plaintiffs' claims against them had no reasonable chance of succeeding. As a result the case is continuing on to trial. It is impossible to predict with any certainty whether section 3 and the defence of qualified privilege would have covered them.

Lessons to be learned from the *Home Equity* case include: it is important to try to speak the truth; if you learn subsequently that statements you have made are false do not hesitate

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[31] 2002 BCSC 1138.

[32] *Gatley on Libel and Slander, 8th edition, para. 441* by Philip Lewis, London: Maxwell & Sweet, 1981.

[33] *Supra* note 27 at para.9.

to retract them; getting personal is a dangerous approach – try to focus on the project and issues as opposed to the people.

4.5 WHAT NEXT?

With the advent of the *Protection of Public Participation Act* there was a sense of optimism that protection was finally available to those who express themselves publicly on environmental issues. With the legislation now gone, citizens and community groups find themselves at risk for trying to participate in the democratic process.

The judicial and legislative branches of government have shown in the past a willingness to confront the SLAPP phenomenon. Unfortunately the current government seems oblivious to the need to pursue protection for people wanting to participate in political discourse. This is no time for people to be silenced. Protect your right to participate in public decision-making, and demand the re-enactment of a strengthened *Protection of Public Participation Act*. Each and every citizen has the opportunity to be instrumental in protecting our right to participation and our freedom of expression.

CHAPTER 5: FINAL WORDS FOR CITIZENS AND COMMUNITY GROUPS

While there is no way to fully protect yourself from being SLAPPed, there are some simple things you can do to lessen the chances of a lawsuit being brought against you. First and foremost always speak the truth. Be wary in accepting second-hand information without checking the source. Try to ensure you are acting within the law when voicing your opinion. If in doubt about any of your activities contact a lawyer. Keep notes of all your activities and your communications, just in case you need them as evidence to defend yourself.

To those citizens who are being SLAPPed, don't be intimidated. There are proactive means to protect yourself and to fight back. We hope that this handbook provides some guidance and encouragement for the struggle ahead.

To the reader, don't wait until you have been SLAPPed. Make your voice heard in the campaign for Anti-SLAPP legislation. Let us join together in demonstrating the power of free expression and public participation.

Above all, do not let the spectre of a lawsuit silence you from participating in decision-making. It is your right to speak up, to protest injustice, and to protect your environment.

CHAPTER 6:
SLAPP RESOURCES

ORGANIZATIONS

West Coast Environmental Law (Canada): West Coast Environmental Law empowers citizens to participate in forming policy for, and making decisions about, protecting our environment. From the local to international level, WCEL supports the right of the public to have a voice in how we share our earth. Since 1974, WCEL has been providing free legal advice, advocacy, research and law reform services. A valuable resource provided by West Coast Environmental Law is the Environmental Dispute Resolution Fund. The Fund provides financial assistance for concerned citizens and community groups to help settle legal disputes. For application forms and more information on the Fund please see West Coast Environmental Law's website. www.wcel.org.

Sierra Legal Defence Fund (Canada): An excellent resource, providing lawyers, and legal research with experience in the area of SLAPP litigation. www.sierralegal.org

Environmental Law Centre (Canada): Based out of the University of Victoria law school, featuring some of Canada's leading experts on SLAPP suits, they also offer some information on a variety of environmental law topics. www.elc.uvic.ca

Political Litigation Project (US): Based out of the University of Denver law school, featuring two of the premier scholars on the subject of SLAPP suits. www.du.edu/sociology/SLAPPs

California Anti-SLAPP Project (US): An excellent website includes a survival guide for SLAPP targets, as well as SLAPP information. www.casp.net

First Amendment Project (US): They produce a manual for SLAPP targets as well as being a public interest law firm. www.thefirstamendment.org

Libel Defence Resource Center (US): They create a bulletin, which often touches on the subject of SLAPPs. www.ldrc.com

PUBLICATIONS/ARTICLES ON SLAPPS

West Coast Environmental Law Research Foundation, “Developing a Response to Strategic Lawsuits Against Public Participation in British Columbia”, (2000), http://www.wcel.org/wcelpub/2000/13299.htm.

George W. Pring and Penelope Canan, SLAPPs – Getting Sued for Speaking Out (Temple Univ. Press 1996)

George W. Pring and Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders" (1992) University of Bridgeport Law Review, Vol. 12, No. 4 937.

SLAPPs – A Guide for Community Residents and Environmental Justice Activists (Environmental Law Institute and the Southwest Network for Environmental and Economic Justice 1997)

Chris Tollefson, "Strategic Lawsuits against Public Participation: Developing a Canadian Response" (1994) The Canadian Bar Review 201.

Chris Tollefson, "Strategic Lawsuits and Environmental Politics: Daishowa Inc. v. Friends of the Lubicon" (1996) Journal of Canadian Studies 123.

Bram Rogachevsky, "Strategic Lawsuits Against Public Participation – Combating an Assault on the Democratic Process" (2000) Appeal – Review of Current Law and Law Reform.

Sharon Beder, “SLAPPs – Strategic Lawsuits Against Public Participation: Coming to a Controversy Near You” (1995) Current Affairs Bulletin, vol.72, no.3. Available at http://www.uow.edu.au/arts/stssbeder/SLAPPS.html

Carl Cavanagh, "The Cedar Hill Eight" Islander – Victoria Times Colonist, Feb 27, 2000.

APPENDICES

APPENDIX A - SLAPPS COME NORTH

MacMillan Bloedel v. *Galiano Conservation Association*

(1995), 10 BCLR (3d) 121 (BCCA.).

In 1992, forestry giant MacMillan Bloedel Limited filed an action against a citizen's group on Galiano Island known as the Galiano Conservancy Association. The claim for damages alleged that the Conservancy had conspired by unlawful means to manipulate the corporation's development plan for the island. No evidence was presented, however, to suggest that the Conservancy's campaign against the large-scale residential plan had consisted of anything other than traditional lobbying activities. Relying on the charitable work of the Sierra Legal Defence Fund, Conservancy members engaged in a year of complex legal struggles, culminating in MacMillan Bloedel's consent to a judicial dismissal of its claims. The court suggested that punishment for abuse of process could arise by way of cost awards.

Daishowa Inc. v. *Friends of the Lubicon*

(1998), 39 O.R. (3d) 620 (Ont. General Court).

In 1991, a group known as Friends of the Lubicon initiated a boycott of paper products produced by Daishowa Inc. in the hopes of persuading the company to commit to a moratorium on logging an area of land in Alberta claimed by the Lubicon Cree Nation. Daishowa mounted a lawsuit against the Friends, naming a variety of unlawful activities, and seeking a permanent injunction restraining boycott activities.

Nearly four years and two lower court decisions after the lawsuit had been initiated, the application for injunction was denied by Justice MacPherson of the Ontario Court of Justice. The boycott and picketing of the Friends was deemed not only lawful, but important in spreading a public message about the plight of the Lubicon, which deserved a forum and protection of freedom of expression.

Justice MacPherson did recognize that the Friends were to be held liable for disseminating false statements that tarnished Daishowa's reputation; however MacPherson only ordered nominal damages of $1 for defamation.

APPENDIX B - THE *FRASER* DECISION

FRASER V. *SAANICH (DISTRICT)*

[1999] B.C.J. No. 3100 (BCSC).

The case involved an application by the plaintiff to the Ministry of Health for funding to redevelop and enlarge an assisted care facility. The Ministry called on the defendant to approve the project, a decision that was determined largely by the position of the neighbourhood residents. The residents, since dubbed the Cedar Hill Eight, appealed to the District, requesting that the property be down-zoned into an appropriate single family residential zone. The District complied with the recommendations, and rejected the plaintiff's application.

The plaintiff then commenced an action against both the Corporation of the District of Saanich and the eight neighbourhood residents. The writ and statement of claim included negligence, breach of fiduciary duty, interference with lawful contractual relations, conspiracy, collusion and bad faith. The neighbourhood residents applied to use Rule 19 (24)(a) of the British Columbia Supreme Court Rules to strike down the writ and statement of claim on the grounds that it disclosed no reasonable claim. They also applied for special costs to cover their expenses.

Justice Singh of the British Columbia Supreme Court dismissed all the allegations against the neighbourhood residents. He found a lack of factual basis to support each of the alleged torts, and found it "plain and obvious" that the plaintiff's "bald assertions" disclosed no reasonable claim. Justice Singh's response to the allegation of conspiracy is worth repeating:

> While neighbourhood participation in municipal politics often places an 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 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 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.

In addressing the defendant's claim for special costs, Justice Singh dealt explicitly with SLAPP phenomenon by defining it, acknowledging its importance, and relating it to the facts of the case. He commented that in addition to being unreasonable and without merit, the

claim had been used to stifle the democratic activities of the defendants. In closing, he found the plaintiff's conduct "reprehensible and deserving of censure." He then awarded special costs to the defendants in the amount of $2500.

APPENDIX C – KEY WORDS AND PHRASES

The legal system can be mysterious, and intimidating. To make the process a little more accessible, we have compiled a list of common legal terms and have described the common stages of litigation. These descriptions are simplified. Be sure to get your lawyer to describe any terms you do not understand. The descriptions have been listed in the order that they might arise in the legal process.

Plaintiff: A person who brings an action. The party who complains or sues in a civil action.

Defendant: The person defending/being sued. The party from whom relief or recovery is sought in a civil action.

Writ of Summons: A document served upon the defendant and filed in court by the plaintiff. It is the means by which most actions are commenced.

Appearance: A form indicating that the defendant intends to contest the claim. Filed in court and delivered to the plaintiff in answer to the Writ of Summons. In British Columbia, a defendant must file and deliver an Appearance within seven days of being served.

Default Judgment: Where an Appearance has not been filed the plaintiff may file for default judgment. A default judgment deems the defendant to have admitted the facts as stated in the Writ of Summons or Statement of Claim. The plaintiff may then pursue a remedy. Mechanisms exist to overturn a default judgment and to contest the remedy sought.

Statement of Claim: Form in which the plaintiff lists the facts claimed and the remedy sought. Usually a narrative of the defendant's actions that caused the plaintiff either physical or financial harm and the means of preferred compensation. In British Columbia, a plaintiff must file and deliver a Statement of Claim either along with the Writ of Summons, or within 21 days after Appearance.

Statement of Defence: Form in which the defendant formally denies or admits the facts as listed in the Statement of Claim. May be filed in answer to the Writ of Summons but not required until the Statement of Claim is delivered upon the defendant. Includes the remedy sought, which is usually a dismissal of the claim.

Counterclaim: An independent action filed by the defendant to defeat or diminish the plaintiff's claim. May be included in the same document as the Statement of Defence. In British Columbia, a defendant must file and deliver a Statement of Defence or Counterclaim within 14 days from the delivery of the Statement of Claim.

Notice of Motion: A notice in writing stating that on a certain day designated, a motion will be made to the court for the purpose or object stated. Must be served on all parties to the action at least 48 hours prior to hearing. It is an application for an Order and will be accompanied by Affidavits as support for the relief sought. Motions will be heard by a judge or master in Chambers.

Affidavit: A written or printed declaration or statement of facts, made voluntarily, and confirmed by oath or affirmation by the party making the affidavit. Must be sworn before a Notary Public or lawyer. If accepted, it is regarded by the court as evidence.

Order: The result of a Notice of Motion. The order will list the judgment of the court upon hearing the arguments of both parties and reading the Affidavits with respect to the Motion. Both parties will sign the order.

Injunction: A remedy issued or granted by a court that prohibits the party named in the application from performing some act or restraining them from continuing some act. Ignoring an injunction is punishable by Contempt of Court.

Contempt of Court: An criminal offense that predates the Criminal Code. Committed by one who, being under the court's authority as a party to a proceeding therein, willfully disobeys its lawful orders. Punished by fine or imprisonment.

Discovery: Pre-trial devices used by one party to obtain facts and information about the other party's case. Usually an oral examination under oath, also referred to as a deposition. Can also be delivered in the form of Interrogatories, which require written answers under oath.

List of Documents: A form of pre-trial disclosure. A party to a proceeding is required to produce a List of Documents in their possession relevant to the action upon demand. Request is made in the form of a Demand for Discovery of Documents.

Mediation: A third party intermediating between two contending parties with a view to persuading them to adjust or settle their disputes. It is a non-binding process.

Settlement Conference: A meeting before a judge in which he/she hears a summary of the evidence and provides a judicial opinion about the probable outcome of a trial in the matter. The opinion is not binding on the parties.

Offer to Settle: A formal document by one party in which they propose to end the proceedings in the manner as stated on the offer. An Offer to Settle is valid until revoked by the other party. If a party refuses to accept a reasonable Offer, there may be implications later on with respect to the court awarding costs.

Discontinuance: At any time before an action is set down to trial, a plaintiff may file a notice of discontinuance ceasing the action against the defendant. After an action has been set for trial, a plaintiff may discontinue with the consent of all parties.

Withdrawal: A defendant may withdraw his/her defence at any time by filing a notice of withdrawal and delivering it to each party.

Evidence: Any kind of proof, or probative matter, legally presented at the trial through the witnesses, records, documents, exhibits, concrete objects, etc.

Judgment: The decision of a court of justice with respect to the rights and claims of the parties to an action that has been litigated to a conclusion. It is a formal conclusion to the matter pending appeal.

Damages: Monetary compensation which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.

Costs: A monetary allowance made to the successful party. Costs are usually dependent upon the final result of the litigation. Calculated according to a checklist of work completed called a Bill of Costs. Costs will amount to only a part of actual legal fees paid out.

Special Costs: Costs awarded to successful party due to the outrageous or malicious conduct of the losing party during litigation. Special Costs are substantially higher than regular Costs, but typically will still only be a portion of the actual amount expended to defend the case.

APPENDIX D - LEGISLATIVE RESPONSE

California Code of Civil Procedure Sec. 425.16. Claim Arising from Person's Exercise of Constitutional Right of Petition or Free Speech -- Special Motion to Strike.

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, this 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 or 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. (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(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.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

(j) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

PROTECTION OF PUBLIC PARTICIPATION ACT – REPEALED

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Definitions

1 (1) In this Act:

"**claim**" means any claim for relief within a proceeding;

"**defendant**" means a person against whom a proceeding is brought or maintained;

"**government body**" means any level of government, and includes

(a) any government body, within the meaning of the *Financial Administration Act*,

(b) any body appointed or established by, or from which advice is requested by, the Provincial government, and any equivalent body of any other level of government, and

(c) any local government body within the meaning of the *Freedom of Information and Protection of Privacy Act;*

"**improper purpose**" has the meaning set out in subsection (2);

"**level of government**" includes

(a) the federal government,

(b) the Provincial government,

(c) the government of any other province or territory of Canada, and

(d) the government of any municipality or regional district;

"**plaintiff**" means a person who initiates or maintains a proceeding against a defendant;

"**proceeding**" means any action, suit, matter, cause, counterclaim, appeal or originating application that is brought in the Supreme Court or the Provincial Court, but does not include a prosecution for an offence or a crime;

"**public participation**" means 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 Attorney General or the Attorney General of Canada or in which the Attorney General or the Attorney General 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;

"**reasonable costs and expenses",** in relation to a proceeding or claim, means costs and expenses that

(a) have been agreed on between the plaintiff and the defendant, or

(b) if no agreement has been reached, consist of the following:

(i) the amount of legal fees and disbursements that are, in a review conducted under section 70 of the *Legal Profession Act* after the conclusion of the proceeding, determined to be owing by the defendant to the defendant's lawyers for all matters related to the proceeding or claim, as the case may be, including all of the reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding or claim, and for the purposes of the review under this subparagraph, the plaintiff is deemed to be, and to have standing to appear at the review as, a person charged within the meaning of the *Legal Profession Act;*

(ii) any other costs and expenses that the registrar conducting the review considers to be reasonably incurred by the defendant in relation to the proceeding or claim.

(2) A proceeding or claim is brought or maintained for an improper purpose if

(a) the plaintiff could have no reasonable expectation that the proceeding or claim will succeed at trial, and

(b) a principal purpose for bringing the proceeding or claim is

(i) to dissuade the defendant from engaging in public participation,

(ii) to dissuade other persons from engaging in public participation,

(iii) to divert the defendant's resources from public participation to the proceeding, or

(iv) to penalize the defendant for engaging in public participation.

Purposes of this Act

2 The purposes of this Act are to

(a) encourage public participation, and dissuade persons from bringing or maintaining proceedings or claims for an improper purpose, by providing

(i) an opportunity, at or before the trial of a proceeding, for a defendant to allege that, and for the court to consider whether, the proceeding or a claim within the proceeding is brought or maintained for an improper purpose,

(ii) a means by which a proceeding or claim that is brought or maintained for an improper purpose can be summarily dismissed,

(iii) a means by which persons who are subjected to a proceeding or a claim that is brought or maintained for an improper purpose may obtain reimbursement for all reasonable costs and expenses that they incur as a result,

(iv) a means by which punitive or exemplary damages may be imposed in respect of a proceeding or claim that is brought or maintained for an improper purpose, and

(v) protection from liability for defamation if the defamatory communication or conduct constitutes public participation, and

(b) preserve the right of access to the courts for all proceedings and claims that are not brought or maintained for an improper purpose.

Defamation

3 Public participation constitutes an occasion of qualified privilege and, for that purpose, the communication or conduct that constitutes the public participation is deemed to be of interest to all persons who, directly or indirectly,

(a) receive the communication, or

(b) witness the conduct.

Application for summary dismissal

4 (1) If a defendant against whom a proceeding is brought or maintained considers that the whole of the proceeding or any claim within the proceeding has been brought or is being maintained for an improper purpose, the defendant may, subject to subsection (2), bring an application for one or more of the following orders:

(a) to dismiss the proceeding or claim, as the case may be;

(b) for reasonable costs and expenses;

(c) for punitive or exemplary damages against the plaintiff.

(2) If an application is brought under subsection (1),

(a) the applicant must set, as the date for the hearing of the application, a date that is

(i) not more than 60 days after the date on which the application is brought, and

(ii) not less than 120 days before the date scheduled for the trial of the proceeding, and

(b) all further applications, procedures or other steps in the proceeding are, unless the court otherwise orders, suspended until the application has been heard and decided.

(3) Nothing in subsection (2) (b) prevents the court from granting an injunction pending a determination of the rights under this Act of the parties to a proceeding.

Orders available to defendant

5 (1) On an application brought by a defendant under section 4 (1), the defendant may obtain an order under subsection (2) of this section if the defendant satisfies 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.

(2) If, on an application brought by a defendant under section 4 (1), the defendant satisfies the court under subsection (1) of this section in relation to the proceeding or in relation to a claim within the proceeding,

(a) the defendant may obtain one or both of the following orders:

(i) an order dismissing the proceeding or claim, as the case may be;

(ii) an order that the plaintiff pay all of the reasonable costs and expenses incurred by the defendant in relation to the proceeding or claim, as the case may be, including all of the

reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding or claim, and

(b) the court may, in addition to the orders referred to in paragraph (a), on its own motion or on the application of the defendant, award punitive or exemplary damages against the plaintiff.

(3) If, on an application brought by a defendant under section 4 (1), the defendant is unable to satisfy the court under subsection (1) of this section, the defendant may obtain an order under subsection (4) if the defendant satisfies the court that there is a realistic possibility 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.

(4) If, on an application brought by a defendant under section 4 (1), the defendant satisfies the court as required in subsection (3) of this section in relation to the proceeding or a claim within the proceeding, the court may make the following orders:

(a) an order, on the terms and conditions that the court considers appropriate, that the plaintiff provide as security an amount that, in the court's opinion, will be sufficient to provide payment to the defendant of the full amounts of the reasonable costs and expenses and punitive or exemplary damages to which the defendant may become entitled under section 6;

(b) an order that any settlement, discontinuance or abandonment of the proceeding be effected with the approval of the court and on the terms the court considers appropriate.

(5) On an application for the settlement, discontinuance or abandonment of a proceeding or claim in respect of which an order was made under subsection (4) (b), the court may, despite any agreement to the contrary between the defendant and the plaintiff, order the plaintiff to pay all of the reasonable costs and expenses incurred by the defendant in relation to the proceeding or claim, as the case may be, including all of the reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding or claim.

(6) If, in a proceeding in which the defendant has obtained an order under subsection (4), the defendant makes an application to dismiss the proceeding for want of prosecution, the defendant may obtain an order under subsection (7) of this section if

(a) the proceeding is dismissed for want of prosecution, and

(b) the plaintiff is unable to satisfy the court on the application that, when viewed on an objective basis,

(i) the communication or conduct in respect of which the proceeding was brought does not constitute public participation, or

(ii) none of the principal purposes for which the proceeding was brought or maintained were improper purposes.

(7) If, under subsection (6), the defendant is entitled to obtain an order under this subsection, the defendant may obtain an order that the plaintiff pay all of the reasonable costs and expenses incurred by the defendant in relation to the proceeding, including all of the reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding.

Onus on plaintiff at trial

6 (1) A defendant who has obtained an order under section 5 (4) in respect of a proceeding or claim may, at the trial of the proceeding, obtain one or more of the orders referred to in section 5 (2) if

(a) the defendant alleges at trial that

(i) the communication or conduct in respect of which the proceeding or claim was brought constitutes public participation, and

(ii) the proceeding or claim was brought or maintained for an improper purpose,

(b) the proceeding or claim is discontinued or abandoned by the plaintiff or is dismissed, and

(c) the plaintiff is unable to satisfy the court at trial that, when viewed on an objective basis,

(i) the communication or conduct in respect of which the proceeding or claim was brought does not constitute public participation, or

(ii) none of the principal purposes for which the proceeding or claim was brought or maintained were improper purposes.

(2) A defendant who has not obtained an order under section 5 (4) may, at the trial of the proceeding, obtain one or more of the orders referred to in section 5 (2) if

(a) the defendant gives notice to the plaintiff, at least 120 days before the date scheduled for the trial of the proceeding, that the defendant intends at trial to seek an order under this section in respect of a proceeding or claim,

(b) the defendant satisfies the court at trial that there is a realistic possibility that, when viewed on an objective basis,

(i) the communication or conduct in respect of which the proceeding or claim was brought constitutes public participation, and

(ii) a principal purpose for which the proceeding or claim was brought or maintained is an improper purpose,

(c) the proceeding or claim is discontinued or abandoned by the plaintiff or is dismissed, and

(d) the plaintiff is unable to satisfy the court at trial that, when viewed on an objective basis,

(i) the communication or conduct in respect of which the proceeding or claim was brought does not constitute public participation, or

(ii) none of the principal purposes for which the proceeding or claim was brought or maintained were improper purposes.

Court may hear any evidence and argument

7 (1) Without limiting any other rights the parties may have to present evidence and make arguments in an application brought under section 4 (1) or at a trial under section 6 (1) or (2), the parties may present evidence and make arguments as follows:

(a) as to whether the communication or conduct in relation to which the proceeding was brought constituted public participation;

(b) as to whether the proceeding was brought or is being maintained for an improper purpose.

(2) The parties may present the evidence or make the arguments referred to in subsection (1) (a) and (b) whether or not the evidence or arguments relate to the particulars of the claim or claims raised by the plaintiff.

Disposition of security

8 (1) If a defendant succeeds under section 5 (7) in respect of a proceeding, the defendant may obtain an order that the reasonable costs and expenses to which the defendant is entitled under the order made under section 5 (7) be paid to the defendant out of any security provided by the plaintiff under section 5 (4).

(2) If a defendant succeeds under section 6 (1) in respect of the whole of a proceeding, the defendant may obtain an order that the following amounts be paid to the defendant out of any security provided by the plaintiff under section 5 (4):

(a) the reasonable costs and expenses to which the defendant is entitled under the order made under section 6 (1);

(b) any punitive or exemplary damages awarded to the defendant by the court.

(3) If a defendant succeeds under section 6 (1) in respect of a claim brought as part of a proceeding, the defendant may obtain an order that the following amounts be paid to the defendant out of any security provided by the plaintiff under section 5 (4):

(a) whichever of the following the court considers best gives effect to the purposes of this Act:

(i) the proportion of the reasonable costs and expenses referred to in subparagraph (ii) of this paragraph that the claim bears to the proceeding as a whole;

(ii) the reasonable costs and expenses incurred by the defendant in relation to the proceeding, including all of the reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding;

(b) any punitive or exemplary damages awarded to the defendant by the court.

(4) After the defendant receives payment of the money to which the defendant is entitled out of any security provided by the plaintiff under section 5 (4), any portion of that security that is not provided to the defendant under this section, including any interest that has accrued on that money, must be returned to the plaintiff.

Relief under this Act is in addition to other available relief

9 Nothing in this Act limits or restricts the rights available to a plaintiff or defendant under any Act or any rule of any court.

Offence Act

10 Section 5 of the *Offence Act* does not apply to this Act.

ABSTRACT:

Strategic Lawsuits Against Public Participation (SLAPPs) are a disconcerting phenomenon on the Canadian legal landscape. Typically, a developer or corporation uses a SLAPP against a public interest group or private citizen who has been protesting to silence dissent. The purpose of the lawsuit is not necessarily to win the case, but rather to intimidate protestors and potential protestors into silence.

This Handbook defines SLAPPs, and describes why they are a danger to a democratic society. Practical tips are given for citizens and community groups to help inform them of legally dangerous situations. It goes on to try to demystify the legal process for those who have been SLAPPed, or feel they are in danger of being the target of a SLAPP. As well the Handbook gives practical information for those who have been sued, such as how to find an appropriate lawyer, and tips for using the media to your advantage.

The second half of the Handbook focuses on flaws in the legal system that makes it difficult for SLAPPs to be dismissed at an early stage in the litigation (thereby increasing expenses and stress for defendants in SLAPPs). The Handbook makes the case for law reform in BC, encouraging the BC government to pass anti-SLAPP legislation.