Recommended Legislative Measures to Counter Strategic Lawsuits Against Public Participation

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INTRODUCTION

On January 17, 2011, I presented a research memorandum entitled *Legislative Action to Counter Strategic Lawsuits Against Public Participation* at the BCCLA Board of Directors meeting. The impetus for this project was two-fold. First, in May 2010 the Ontario Ministry of the Attorney General appointed a 'blue ribbon' panel of legal experts to "to help suggest content for legislation to target Strategic Litigation Against Public Participation (SLAPP) lawsuits."[1] I suggested in January that if the panel recommended some form of remedial legislative action British Columbia could soon be left as the most populous province without anti-SLAPP protections. Second, in the nearly 10 years since the BC Liberal government repealed the *PPPA*,[2] less than six months after it was enacted, citizens and organisations have been subjected to highly questionable lawsuits (or threats of litigation) bearing the telltale signs of a SLAPP.

In light of these developments I concluded that a new anti-SLAPP statute was needed in this province. During my presentation I recommended that the BCCLA support the re-enactment of such legislation.

The Board has expressed cautious support for such a policy but has requested further details on how the law would work. In particular, the Board would like to know what test the legislation should employ to effectively and reliably distinguish abusive litigation from legitimate claims. I

[1] Ontario Ministry of the Attorney General, *Strategic Litigation Against Public Participation* [Backgrounder], May 28, 2010, online: < http://www.attorneygeneral.jus.gov.on.ca/english/news/2010/20100528-slapp-bg-en.pdf>
[2] *Protection of Public Participation Act,* S.B.C. 2001, c. 19, s. 5(1)(b) [*PPPA*], repealed by the *Miscellaneous Statutes Amendment Act, 2001,* S.B.C. 2001, c. 32, s. 28 on August 16, 2001.

have also been asked to consider whether a future act should codify an express right to public participation.

In late 2010 the Ontario Anti-SLAPP Advisory Panel ('Morin Panel') released its final report to the public.[3] After considering the available evidence and research, including 31 submissions from individuals and organisations, "the Panel was persuaded that threats of lawsuits for speaking out on matters of public interest, combined with a number of actual lawsuits, deter significant numbers of people from participating in discussions on such matters."[4] As a consequence, the authors concluded that there was a need "for Ontario to enact legislation against the use of legal processes that affect people's ability or willingness to express views or take action on matters of public interest."[5]

For the reasons that follow I am in general agreement with the recommendations of the Morin Panel and feel that they should be adopted by the legislature in this province. I shall first briefly review the Ontario report's key findings and recommendations, comparing and contrasting these with the approach utilised by the ill-fated *PPPA.* I shall then identify the minimum content for any future anti-SLAPP statute in British Columbia. My hope is that the Board will accept my recommendations as official BCCLA policy and advocate for their legislative implementation.

1. Ontario Anti-SLAPP Advisory Panel Recommendations

In one of the first scholarly treatments of the SLAPP phenomenon in Canada, University of Victoria Law Professor Chris Tollefson, after reviewing the legislative strategies employed by various American states, identified three categories of procedural mechanisms that, in his view,

[3] Anti-SLAPP Advisory Panel, *Report to the Attorney General*, October 28, 2010, online: <http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.pdf > [*Panel Report*].
[4] *Ibid*. at para. 16.
[5] *Ibid*. at para. 10.

were essential for the effectiveness of any future anti-SLAPP legislation in this country.[6] He called for provisions that a) expedite identification and dismissal of SLAPPs, b) reduce the economic burden that SLAPPs place on defendants, and c) create economic disincentives to the filing of SLAPPs in the first place.[7] Although the Morin Panel did not expressly follow Professor Tollefson's framework, one can easily characterise its authors' recommendations using his scheme. Before doing so, I should briefly advert to the Ontario report's discussion of legislative purpose.

The authors advanced the view that any future Ontario anti-SLAPP statute must expressly state its own objective, which they indicated should be "to expand the democratic benefits of broad participation in public affairs and to reduce the risk that such participation will be unduly hampered by fear of legal action."[8] This statement is similar to but noticeably more rights-oriented than the purpose of the *PPPA*, which was to "(a) encourage public participation, and dissuade persons from bringing or maintaining proceedings or claims for an improper purpose … 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."[9]

Provisions that expedite identification and dismissal of SLAPPs

Following the example of the *PPPA* and several American statutes,[10] the Morin Panel recommended that the acronym SLAPP be omitted from Ontario's future law.[11] The authors adopted this course in part because of the acronym's "pejorative tone", but also because its

[6] Chris Tollefson, "Strategic Lawsuits Against Public Participation: Developing a Canadian Response" (1994) 72 Can. Bar Rev. 200 [*Tollefson*].
[7] *Ibid*. at 229. See also Michaelin Scott and Chris Tollefson, "Strategic Lawsuits Against Public Participation: The British Columbia Experience" (2010) 19 *RECIEL* 45 [*Scott and Tollefson*] at 52-53.
[8] *Panel Report, supra* note 3 at para. 18.
[9] *PPPA, supra* note 2, s. 2(a).
[10] See e.g. *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.
[11] *Panel Report, supra* note 3 at para. 22.

inclusion was unnecessary given their choice of threshold test for easy identification of abusive litigation. They recommended that the basic procedural mechanism for realising the objective of the new legislation ought to evaluate "the effect, and not the purpose, of the legal action under review."[12] The *PPPA*, in contrast, required a defendant who sought summary dismissal of the case against him to satisfy the court that 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.[13]

The Morin Panel preferred to organise the 'special procedure' for the identification and summary dismissal of an alleged SLAPP around "the effect that the action is likely to have on expression on matters of public interest";[14] accordingly, the threshold test would be, quite simply, **whether the expression giving rise to the underlying action was on a matter of public interest**.[15] This is similar to the approach enacted in Quebec, where the "*Code of Civil Procedure* provides a power to impose sanctions for improper use of procedure, which includes "an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate."[16]

To trigger the proposed procedural remedy a defendant would have to demonstrate merely that the expressive activity impugned by the plaintiff "was conducted in respect of a matter of public interest".[17] If he were able to show that the case against him was "likely to have an adverse effect on the ability of the defendant or others to participate in discussions on matters of

[12] *Ibid* [emphasis added].
[13] *PPPA*, *supra* note 2, s. 5(1).
[14] *Ibid*. at para. 35.
[15] *Ibid*. at para. 29.
[16] *Panel Report*, *supra* note 3 at para. 33, citing *Code of Civil Procedure*, R.S.Q. c. C-25 s. 54.1, enacted by S.Q. 2009 c. 12, s.2.
[17] *Ibid*. at para. 62.

public interest",[18] he would have discharged his burden of establishing a *prima facie* basis for its summary dismissal. Using this analytical framework there would be no need to determine the plaintiff's objective in suing the defendant, thereby obviating the need to reference the concept of a SLAPP (a lawsuit brought specifically to restrain public participation on an issue) in the legislation.

The authors of the Ontario report recommended this approach with a view to creating a "broad scope of protection"[19] consistent with recent Supreme Court of Canada decisions that have added further safeguards to expression on 'matters of public interest' in the context of defamation suits.[20] In doing so the Morin Panel recognised the difficulties inherent in predicating access to the proposed procedural remedy on the plaintiff's alleged objective in bringing the underlying action. They observed that "[j]udging the motive of a plaintiff is likely to be difficult, and often impossible, in an expedited proceeding",[21] and that crafting the threshold test to consider "the effect that the action is likely to have on expression on matters of public interest… does not require the judge to read anyone's mind [and] is more readily supported by evidence."[22]

In order to balance the interests of both parties, the authors proposed the following special procedure for easy identification and summary dismissal of SLAPPs:

> i) Does the expression that is the subject of the lawsuit involve a communication on a matter of public interest? The defendant should have the burden of proving this to the court on the balance of probabilities, failing which the special procedure will have no application.

[18] *Ibid*. at para. 35.
[19] *Ibid*. at para. 29.
[20] *Ibid*., citing *Grant v. Torstar Corp*., 2009 SCC 61 [*Grant*]*; Quan v. Cusson*, 2009 SCC 62; *WIC Radio v Simpson*, 2008 SCC 40.
[21] *Ibid*. at para. 34.
[22] *Ibid*. at para. 35.

ii) If the subject matter of the action is shown by the defendant on a balance of probabilities to be communication on a matter of public interest, the onus should shift to the plaintiff to show that:

a. On the factual record before the court, the plaintiff's claim has substantial merit; and

b. There are substantial grounds to believe that the defendant has no valid defence.

iii) If the plaintiff meets these tests, the court should also consider whether, in all the circumstances, the action seeks a remedy for only insignificant harm to reputation, business or personal interests. Where this is so in the court's view, and permitting the action to proceed would have a clearly disproportionate impact on freedom of expression on a matter of public interest, the court should dismiss the action.[23]

This procedural remedy is notable, first, because, as noted above, all it would require of the defendant would be to demonstrate that the case against him arose from a communication made on a matter of public interest. This is much less onerous that the threshold test under the *PPPA*, which compelled a defendant to show that "his activities fell within the definition of 'public participation' *and* that a principal purpose for which the claim was brought was 'improper' as defined under Section 1(2)."[24]

Second, the Morin Panel's flexible scheme, which would trust the judiciary to ensure "that truly harmful [or] lawless behaviour is not encouraged in the name of public participation",[25] would avoid express statutory limitations on the sphere of protected expression, such as those that qualified the legal definition of 'public participation' under s. 1(1) of the *PPPA*.

Third, notwithstanding that the plaintiff had shown his claim to be of substantial merit, step three would confer on the courts a reserve discretion to dismiss the case on the basis that the "negative impact on freedom of expression may be clearly disproportionate to any valid purpose the litigation might serve."[26] This provision reflects recent efforts of provincial legislatures to

[23] *Ibid.* at para. 38.
[24] *Scott and Tollefson, supra* note 7 at 53-54 [emphasis in original].
[25] *Panel Report, supra* note 3 at para. 59.
[26] *Ibid*. at para. 37.

incorporate the principle of proportionality into the statutory rules for the conduct of civil litigation.[27] It is also somewhat analogous to ss. 5(3-4) of the *PPPA*, which provided for a discretionary order requiring a plaintiff to, *inter alia*, advance security for costs, expenses or damages if the defendant were able to satisfy the court that "there is a realistic possibility" the underlying action was a SLAPP .

Provisions that reduce the economic burden of defending against SLAPPs

As Scott and Tollefson noted in their thorough review of the *PPPA* and this province's experience with SLAPPs:

> Much of the chilling effect of SLAPPs comes simply from anxiety surrounding the financial burden that defending a SLAPP almost inevitably entails. Reducing some of these costs by accelerating the hearing of a summary dismissal application is an important step towards reducing this burden." [28]

To achieve this end, the Morin Panel recommended several procedural mechanisms, including short deadlines for the plaintiff's reply and affidavits, an expedited hearing, and the suspension of steps in the underlying action, e.g., examinations for discovery.[29] I would note that the *PPPA* contained similar provisions.

Provisions that create economic disincentives to the filing of SLAPPs

The Morin Panel made several recommendations that fall under this heading. Four are particularly noteworthy:

- Full indemnification of the defendant's costs upon dismissal of the case against him.

  As the Ontario report notes, such a rule, which would appear to apply as a matter of

[27] See *ibid*. at para. 13;and *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1-3(2).
[28] *Scott and Tollefson, supra* note 7 at 55. See also, *Panel Report, ibid.* ("It is essential that remedies against inappropriate litigation affecting public participation be available quickly. The defendant may have few resources and little expertise in legal matters. The intimidation effect of a lawsuit for a large amount and the actual costs of fighting it should be minimized" at para. 40).
[29] See *Panel Report, supra* note 3 at para. 41-43.

course, should "reduce the adverse impact on constitutional values of unmeritorious litigation… deter the commencement of such actions" and encourage counsel to represent SLAPP defendants on a contingency basis.[30] For comparison purposes, s. 5(2)(a)(ii) of the *PPPA* granted the courts discretion to award the defendant "all reasonable costs and expenses". Although this provision presumably would have enabled the awarding of actual costs, Scott and Tollefson criticised its non-mandatory nature and, to that end, questioned its putative salutary effects.[31]

- Discretion in the awarding of costs to successful defendants. In order not to dissuade weaker parties, such as "impecunious public interest groups",[32] from relying on legislation that seeks to protect freedom of expression, the court should use discretion when considering a costs award to a successful plaintiff, i.e., one who defeated the defendant's attempt to have the case against him dismissed. The *PPPA* did not have an equivalent provision.
- Dismissal with prejudice. Simply put, if a defendant were to have the case against him dismissed, the act would prevent the plaintiff from amending its statement of claim, unless the interests of justice required the court to do so. In other words, dismissals under the act would ordinarily be final. The *PPPA* did not have an equivalent provision.
- Damages to the defendant in particularly egregious circumstances. If the court were satisfied that the plaintiff had been actuated by bad faith or improper motive (i.e., brought the suit to punish, silence or intimidate the defendant "rather than any legitimate pursuit of a legal remedy"), notwithstanding that these factors would not be

[30] *Ibid*. at para. 44.
[31] *Scott and Tollefson, supra* note 7 at 55.
[32] *Panel Report, supra* note 3 at para. 62

germane to the operation of the special procedure, "the court should have the power to award damages to the defendant in such amount as is just."[33] This provision mirrors s. 5(2)(b) of the *PPPA* which authorised the court to "award punitive or exemplary damages against the plaintiff"

I should note one final recommendation that could be characterised as a disincentive to the filing of SLAPPs – albeit, not an economic one. The Morin Panel, after recognising that many SLAPPs are brought under the tort of defamation, which is a plaintiff-friendly cause of action,[34] concluded that Ontario's future statute should provide a further substantive protection to a subset of communications made in the public interest. The authors recommended that "where a person with a direct interest in a subject of public interest makes statements on that subject to persons who also have a direct interest in that subject", his statements should be prospectively immunised from a possible finding of liability in defamation.[35] Or to put it another way, his statement should be protected by the defence of qualified privilege.[36] This recommendation follows s. 3 of the *PPPA,* which determined that public participation, as that term was understood for the purposes of the act, constituted "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."

2. Required Provisions of a New BC Anti-SLAPP Statue

Having considered the legislative approaches adopted by a number of jurisdictions in North America, the recommendations of the Morin Panel and the views of several learned

[33] *Ibid*. at para. 46.
[34] *Ibid*. at para. 69.
[35] *Ibid*. at para. 74.
[36] *Ibid*. at para. 75.

commentators,[37] I am of the opinion that the following provisions represent the minimum procedural content for any future anti-SLAPP statute in British Columbia.

1. An express statutory right to communicate on matters of public interest.
2. A procedural mechanism for the rapid identification and summary dismissal, with prejudice, of any lawsuit that improperly interferes with freedom of expression made on a matter of public interest (i.e., a SLAPP).[38]
3. Procedural mechanisms to deter the filing of lawsuits that improperly interfere with freedom of expression made on matters of public interest, including, but not limited to,
    a. an automatic award of full indemnity costs to a successful defendant;
    b. an automatic award of compensatory damages in such amount as the court determines to be suitable for the breach of the expressive right(s); and
    c. discretion to award exemplary or punitive damages to a successful applicant (defendant) in cases where the court is satisfied that the plaintiff has attempted to punish, silence or intimidate the defendant, up to three times the amount that plaintiff claimed as damages.
4. A substantive measure that deems communications made in the public interest to be occasions of qualified privilege for the purposes of the tort of defamation.

This is not to say, however, that other provisions, in particular those that would further disincentivise the filing of SLAPPs, could not be included. For example, where there was a realistic possibility that the underlying action was a SLAPP[39] the *PPPA* provided for judicial

[37] See *Scott and Tollefson, supra* note 7; Tollefson, supra note 6; Vincent Pelletier, *Strategic Lawsuits against Public Participation (SLAPPs) (and other abusive lawsuits)* (Quebec: Uniform Law Conference of Canada, 2008)
[38] For an alternative rendering see *ibid*. ("litigation that will unduly hamper public participation" at para. 25).
[39] *PPPA*, *supra* note 2, s. 5(3)

oversight of any settlement, discontinuance or abandonment of the proceeding;[40] furthermore, in such supervised cases the act conferred reserve discretion on the court to order costs or damages or both to the defendant "despite any agreement to the contrary between the defendant and the plaintiff".[41]

Aside from the availability of treble damages in particularly egregious cases of plaintiff misfeasance (in order to deter particularly unmeritorious plaintiffs with deep pockets),[42] there is really only one material point of departure between the Morin Panel's recommendations and my own. This is in relation to the statutory right to communicate on matters of public interest.

Scott and Tollefson took the position that the inclusion of a clear statement of the substantive right to be protected by anti-SLAPP legislation is "critical" as it reflects "the value placed on democratic activity" and gives "SLAPP targets an immediate statutory defence"; this, in turn, enhances "the prospect of securing early dismissal of SLAPPs... [and] aids the earlier identification of such suits."[43] I agree. The authors of the Ontario report, however, rejected the creation of a new statutory right because they preferred to ground the recommended procedural and substantive protections in "Canadians' constitutional freedom of expression, and the recognized importance of constitutional values for the development of the law applicable in civil litigation".[44]

From my perspective, with respect, this is an unpersuasive basis upon which to dispense with the suggested new right. First, I would argue that the procedural remedy fashioned by the Morin Panel creates an *implicit* right to communicate on matters of public interest. As noted above, the

[40] *Ibid.* s. 5(4)(b)
[41] *Ibid*. s. 5(5). For a review of the value of these judicial oversight provisions see *Scott and Tollefson, supra* note 7 at 55-56.
[42] See *Scott and Tollefson, supra* note 7 at 55.
[43] *Ibid.* at 53.
[44] *Panel Report, supra* note 3 at para. 27.

authors specifically recommended that no express limits be placed on the sphere of protected expression[45] – save, perhaps, for the judicially established parameters of what constitutes a 'matter of public interest'.[46] The comprehensive privileging of an activity through legislation is, in my view, tantamount to creating and protecting a substantive right to undertake that activity; consequently, it would be disingenuous for an anti-SLAPP statute to not expressly articulate the right to communicate on matters of public interest.[47]

Second, although the special procedure would not require express recognition of this right to be effective, such a statement would clearly speak to the fundamental freedoms protected by the law. Here I would reiterate Scott and Tollefson's observation that, "[t]he point of articulating a statutory right is, first, to reflect the value placed on democratic activity."[48] A clear understanding of this value would, if nothing else, assist the judiciary in interpreting the statute in an appropriately broad and purposive manner.

Finally, in light of the foregoing I would suggest a reformulation of the overarching purpose of any anti-SLAPP legislation based on the Morin Panel recommendation: 'to expand the democratic benefits of broad participation in public affairs by protecting the right to communicate on matters of public interest'.

3. Summary

Strategic Lawsuits Against Public Participation represent a real and present danger to the exercise of free expression in this province. In the decade since the BC Liberal government

[45] *Ibid*. ("The limits are essentially that the expressive activity must be directed to a matter of public interest and must not cause the plaintiff substantial harm that outweighs the public interest in free expression on such matters" at para 56).
[46] See *Grant, supra* note 21 at para. 102-106.
[47] At the very least the statute must include language adverting to the s. 2(b) *Charter* guarantee. This would help justify the law's extraordinary interference with the conduct of otherwise legitimate civil litigation.
[48] *Scott and Tollefson, supra* note 7 at 53.

repealed Canada's first anti-SLAPP statute, mere months after it was proclaimed into law, citizens and organisations alike in this province have been harassed, intimidated and litigated into silence by stronger parties with spurious – and in some cases outrageous – causes of action. I would respectfully submit that it is incumbent on the BCCLA to adopt a pragmatic yet assertive policy on the ideal legislative response to this problem. To this end, I recommend that the Board adopt the following as the *minimum* content for any future anti-SLAPP statute in British Columbia:

Purpose of Legislation	To expand the democratic benefits of broad participation in public affairs by protecting the right to communicate on matters of public interest.
Definition of SLAPPs/Public Participation	Omit
Definition of Matter of Public Interest	Leave to the judiciary on the basis of decided authorities.
Express Statutory Right to be Protected	The right to communicate on matters of public interest.
Threshold Test for Early Identification and Summary Dismissal	Does the expression that is the subject of the lawsuit involve a communication on a matter of public interest?
Special Procedure for for Early Identification and Summary Dismissal	Adopt framework recommended by Morin Panel.[49]
Provisions that reduce the economic burden of defending against SLAPPs	Including but not limited to: • Automatic award of full indemnity costs to a successful defendant; and • An automatic award of compensatory damages in such amount as the court determines to be suitable for the breach of the expressive right(s); and • Discretion to award exemplary or punitive damages to a successful applicant (defendant) in cases where the court is satisfied that the plaintiff has attempted to punish, silence or intimidate the defendant, up to three

[49] See *Panel Report*, *supra* note 3 at para. 38.

	times the amount that plaintiff claimed as damages.
Substantive Protections	Deem any communication made on a matter of public interest an occasion of qualified privilege.