ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

August 6, 2010

Dean Mayo Moran,
Chair, Advisory Panel on Anti-SLAPP Legislation
720 Bay Street, 7th Floor
Toronto, ON M7A 2S9

By email: SLAPPsuggestions@ontario.ca

Dear Dean Moran:

Please find attached the submission of the Ontario Bar Association (OBA) addressing the terms of reference set out on the website of the Ministry of the Attorney General on the potential content of legislation against SLAPPs.

The OBA is pleased to have the opportunity to provide input on this important issue. Should the Advisory Panel wish clarification or further discussion on any of the commentary offered in our submission, the OBA Working Group will be pleased to meet with the Panel members.

Yours sincerely,

Carole J. Brown
President

Barry Weintraub
Chair, OBA Working Group

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OBA Submission

to the

Advisory Panel on Anti-SLAPP Legislation

Date: August 6, 2010

Submitted to: Dean Mayo Moran, Chair
Advisory Panel on Anti-SLAPP Legislation

Submitted by: Carole J. Brown, President
Ontario Bar Association

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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to comment on the concept of an Ontario statute to combat Strategic litigation against public participation (SLAPP).

Background

The OBA consists of close to 18,000 lawyers from a broad range of sectors, including those working in private practice, government, non-governmental organizations and in-house counsel. Our members have, over the years, analyzed and provided comments to the Ontario government on numerous legislation and policy initiatives. More than 2,350 of these lawyers belong to our very active Environmental, Civil Litigation and International Law Sections. Our members have considerable expertise and experience in how environmental laws and policy are interpreted and applied, and represent many points of view. The views expressed herein are the views of the OBA and its sections as a whole, and are not necessarily the views of each individual member or other organizations with which they may be involved.

Summary

The OBA strongly supports the proposal that the Legislature should take specific action to combat SLAPPs. Effective anti-SLAPP legislation depends on quick, inexpensive and predictable judicial intervention that is triggered by threshold evidence that the case involves protected public interest communications, i.e., communications made to influence actual or possible government action. Citizens should have some measure of protection from civil liability for engaging in public participation. There are many other issues that affect freedom of expression and the high cost of unwarranted litigation, which we hope that the Legislature will consider at a future date. But we agree that focussed action is appropriate now to protect and encourage public participation in government decision-making.

Our comments are organized in terms of the five questions posed on your website:

I .A test for courts to quickly recognize a SLAPP

The primary defining feature of a SLAPP is that the action seeks damages or an injunction against a person for communications made, in good faith, to influence actual or possible government action. Such action should include the adoption, amendment or enforcement of statutes, regulations, policies and instruments,[1] plus their equivalent in any level of government, such as municipal bylaws and resolutions. It should also include decisions by courts and tribunals, by Crown corporations, and by public bodies

[1] such as defined in the Environmental Bill of Rights, but not restricted to instruments etc. prescribed under the EBR.

The second defining feature of a SLAPP is that the lawsuit should lack substantial merit

What should not be required

- The test should not require proving abuse of process. Tinkering with the definition of abuse of process is unlikely to provide any significant benefit, given the repeated emphasis of Ontario courts that abuse of process should be found only in the "clearest of cases". Abuse of process is expensive to establish and rarely results in an economic and efficient remedy.
- Evidence of improper motive should be admissible and probative, but not necessary. Evidence that demonstrates an anti-public participation motive for bringing alleged SLAPP lawsuits would rarely be available, and would be time consuming and expensive to obtain. Requiring such evidence would vitiate most of the benefit of an Anti-SLAPP suit. However, where there is evidence of such motive, this should weigh heavily in the Court's determination.

II. Appropriate remedies for SLAPP lawsuits

1. Early dismissal is a necessary remedy if anti-SLAPP legislation is to be effective.

The chilling effect of SLAPP suits is mainly due to the crushing cost of legal fees and the fact that they drag on for long periods. We agree with the Québec Macdonald Committee that SLAPP defendants should be able to bring an early motion to have the action against them dismissed as a SLAPP. There should be a preliminary evaluation, on the basis of affidavit evidence, as to whether an alleged SLAPP lawsuit has any reasonable prospect of success on the merits. A defendant should be both permitted and required to bring an anti-SLAPP motion to strike out a claim at the commencement of the action (i.e., under Rule 21).

a. Rule 20 relating to summary judgment could also be amended to expressly direct Courts to consider "public participation" issues in determining whether to grant summary judgment. Anti-SLAPP legislation should be an explicit exception to rules of general application.

2. Pending determination of the motion, there should be a moratorium on all other preliminary proceedings, including production of documents and discoveries, unless ordered otherwise by the court. This would limit the cost and intrusiveness of a SLAPP lawsuit.

3. After the SLAPP defendant shows that the action is based on public participation (i.e., communications made in connection with a proposed government action or authorization), the anti-SLAPP law should reverse the onus in summary dismissal proceedings so that the plaintiff must show that the action has substantial merit. Reverse onus provisions are necessary to decrease the burden on SLAPP defendants, who generally have fewer resources and less expertise or ability to establish that the suit does not have merit. We support the reverse onus in section 4 of the *Model Act on Abuse of Process*.

4. There should be a source of public funding available to assist SLAPP defendants to bring this motion, such as the Class Proceedings Fund.

5. The successful defendant in a SLAPP lawsuit should have a presumptive right to full indemnity costs (including a right of subrogation by the Class Proceedings Fund, if it has funded the action), whether at the preliminary motion or at trial. In other words, we would reverse the onus in section 5(1)(a) of the Model Act.

6. Directors and officers of companies who are responsible for a decision to instigate improper proceedings should be personally liable to pay these costs, if the corporation does not.

7. In the Internet age, the Act should clearly define its jurisdiction. Forum-shopping and libel tourism are two criticisms of SLAPP suits. The issues of jurisdiction simpliciter and forum non conveniens relating to online defamation claims involving websites, message boards, and other non-traditional media need to be considered in this draft legislation [particularly since the SCC has granted leave in Van Breda v. Village Resorts Ltd. (Ont. C.A.)}. For example, if Company A (resident in the US) sues Ontario residents in Ontario relating to alleged defamatory postings on a website whose server is in the UK, on what basis does an Ontario court have jurisdiction over the claim? The Libel and Slander Act is unclear whether the defamatory statements were made in Ontario (where the alleged defamers reside) or in another jurisdiction (where the website's server is located). Further, intermediary liability is also an issue (see Crookes v. Newton BCCA) leave to appeal to SCC granted.

8. We do not recommend that punitive damages should be a legislated remedy for a SLAPP lawsuit (see s. 4 of the Bill 138, PPPA). This form of deterrence would only open the floodgates and add additional costs and time, when all that is required is a counterclaim or counter-application within the originating proceedings.

III. Appropriate limits to the protection of anti-SLAPP legislation

The complex and well developed law of qualified privilege sets appropriate limits to protected speech, such as excluding hate speech or other communications prohibited by law, or unfounded allegations of illegal or corrupt behaviour against public officials. We suggest that qualified privilege should apply to an allegedly defamatory statement that meets the definition of "public participation" under the statute. In this way, good faith and reasonable communications will be protected from defamation claims, while extreme and unacceptable communications will not. Qualified privilege would allow meritorious claims to proceed, to protect the reputations and livelihoods of those who are participants in a public process.

A corporate plaintiff wishing to sue for defamation should be permitted to show that their claim has substantial merit. In other words, we support 8B, but not 8A, of the Model Act.

IV. Appropriate parties to benefit from the protection of anti-SLAPP legislation

All entities or individuals engaged in public participation, as defined. Anti-SLAPP legislation must be carefully crafted so as to be neutral as between classes of litigants. However, the actual and perceived financial resources of a party would be a relevant factor in assessing whether a lawsuit is in fact a SLAPP and whether protections should apply.

V. Methods to prevent abuse of anti-SLAPP legislation

If anti-SLAPP legislation is a shield, not a sword, as we propose, there should be few risks of abuse. The protections set out in Ontario's anti-SLAPP law would not apply to citizens who have not been sued or to meritorious claims against activists. Such laws similarly do not promote or support 'not-in-my-backyard' ("NIMBY") advocacy. The Ontario Municipal Board and other municipal and administrative decision-makers in this province have strong procedural powers to control the processes before them, and these processes would not be negatively affected by anti-SLAPP legislation.

Anti-SLAPP legislation should be reviewed after an appropriate period to determine what, if any, impact it has had.

We see little benefit from the Arkansas approach of requiring the plaintiff and his/her legal counsel to certify the bona fides of the claim.

Additional Comments

1. Using the Québec anti-SLAPP legislation as a model is not appropriate. The civil law approach differs from the common law approach to defamation in a number of respects, including jurisdiction, pleading standards, standard of proof, and remedies.
2. Lawsuits devoid of merit plague the civil litigation system, far beyond the scope of SLAPPs. Specific anti-SLAPP legislation can be justified in light of the importance of public participation in decision-making, but strong consideration should also be given to extending some measure of protection from the expense of meritless lawsuits to all cases where there is no reasonable likelihood of success. Under the current costs rules, even if a litigant is entirely successful, he or she or it will still be financially disadvantaged, because legal fees are only partly recoverable, and nothing is paid for the loss of management or personal time and effort. While such costs rules encourage compromise, this is not necessarily appropriate where one party is entirely in the right and another is entirely wrong. There should be provision for complete indemnity for costs in all appropriate cases where an asserted position (whether that of a plaintiff or a defendant) is devoid of any merit.
3. **Purposes and preamble** The legislation should contain express recognition of the benefits of public participation as a source of information, in ensuring that a broad spectrum of societal views and concerns are reflected in the development of laws and policies and the issuance of project-specific

approvals and licenses, and in increasing the perceived legitimacy of government decisions. Similarly, Ontario's anti-SLAPP law should contain express recognition of the public harm caused by SLAPPs in terms of threatening important democratic rights and stifling public participation and dialogue.

Ontario Bar Association Working Group

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