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A. ALAN BOROVY

August 6, 2010

By email

Dean Mayo Moran, Chairperson
Advisory Panel on Anti-SLAPP Legislation
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Dear Dean Moran and members of the Advisory Panel,

The Canadian Civil Liberties Association (CCLA) has been a long-standing advocate of the fundamental right of Canadians to freedom of speech and the value of vigorous debate on issues of public importance. As recently stated by the Supreme Court of Canada, “[f]reedom of expression and respect for vigorous debate on matters of public interest have long been seen as fundamental to Canadian democracy”: *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640 at para. 42.

Canadians should be concerned and exercise vigilance toward practices that stifle such vigorous debate. With this in mind, the CCLA shares the concern of the Attorney-General of Ontario over the potential misuse of Ontario’s civil justice system by powerful litigants as a means to quash meaningful debate and dissent on issues of public importance. Examples of this practice have become more common in the province in recent years. CCLA has been approached by several individuals and groups who, over the last few years, have been threatened by defamation suits after voicing their opinion on matters of public debate. It is our opinion that strategic lawsuits against public participation (‘SLAPPs’) pose a threat to the vitality of freedom of speech, community organizing and political debate in the province.

Regrettably, the established rules of civil procedure have proven ineffective at promptly protecting defendants from abusive lawsuits. As such, we are encouraged by the establishment of the Advisory Panel on Anti-SLAPP Legislation by the Attorney General of Ontario. The adoption of robust anti-SLAPP legislation may provide an effective step towards re-balancing the legitimate rights of plaintiff litigants with the public interest in vibrant debates on issues of public importance. Our comments below aim to ensure that anti-SLAPP legislation in Ontario will help advance this goal.

The CCLA welcomes this opportunity to make written submissions to the Advisory Panel on the need for anti-SLAPP legislation and the form that such legislation should adopt. In our submissions, we wish to address two points: the necessity of an Anti-SLAPP legislation and the effectiveness of the proposed Bill.

A – Necessity of Anti-SLAPP legislation

The CCLA encourages the Advisory Panel to conclude that the practice of SLAPPs is occurring in Ontario. Indeed, CCLA has intervened in a large number of civil cases both inside and outside of the province on the basis that such lawsuits posed an undue chill on the discussion of matters of public importance. See, for example: *WIC Radio Ltd., et al. v. Simpson*, 2008 SCC 40; *Quan, et al. v. Cusson*, 2009 SCC 62; *Farès Bou Malhab v. Diffusion Métromédia CMR inc., et al.*, (2010) SCC File No. 32931 (decision pending); *Prud'homme c. Rawdon (Municipalité de)*, 2010 QCCA 584; *Whitcombe and Wilson v. Manderson*, [2009] O.J. No. 5482 (S.C.J.); *Warman v. Wilkins-Fournier, et. al*, 2010 ONSC 2126; *Montague v. Page* (2006), 79 O.R. (3d) 515 (S.C.J.). These cases all relate to actions for defamation, a cause of action which the Supreme Court has acknowledged can result in an unacceptable chill to meaningful and valued public debate: *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640 at para. 54. Nonetheless, SLAPPs are also common in the context of actions for trademark and copyright infringement, nuisance and trespass.

We further encourage the Panel to conclude that the current rules of civil procedure inadequately protect valuable public debate in the province from this abusive type of litigation intended to quash it. In this respect, we echo the conclusion of Vincent Pelletier in his paper, *Strategic Lawsuits against Public Participation (SLAPPs) (and other abusive lawsuits)* that:

While the common law provides theoretical remedies for abuse of process, in the inherent jurisdiction of the courts, in the court statutes and rules, and in the law of tort, the practical application of these remedies provides small comfort to those being sued by strategic litigation and other persons the plaintiff wishes to intimidate. Either a way must be found to overcome the reluctance of courts to characterize such suits as abusive at early stages, or other remedies must be created for the harm these suits cause.¹

Anti-SLAPP legislation should be seen as a minimum protection to ensure the adequate exercise of the right to freedom of expression in Canada.

B- Effectiveness of Anti-SLAPP legislation

The CCLA supports the interest of the Attorney-General in adopting anti-SLAPP legislation in Ontario. In particular, we support the creation of a new basis for a motion to strike and generous powers to award costs, including punitive costs, as means of thwarting SLAPPs. However, we are concerned that the proposed legislation may be sufficiently clear to ensure the protection of freedom of

expression in the context of an increasing power imbalance between corporate giants and local community groups or individuals engaging in public debates about the protection of the environment, labour policies, consumer protection issues, Aboriginal rights and others.

Although the CCLA recognizes that an Anti-SLAPP legislation alone will not be able to neutralize power imbalances, it is nevertheless concerned that the Anti-SLAPP legislation be as effective a tool as possible. In that context, we suggest that 1) the definition of “claim brought for an improper purpose” be modified and 2) a public body be charged with the purpose of providing help to defendants who are targets or threatened by SLAPP suits.

1) Proposed change to the definition

Bill 138 defines a proceeding brought or maintained for an improper purpose in the following way :

“(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...”

The wording is similar to the wording of the defunct BC legislation and other legislation. Nevertheless, CCLA invites the Committee to consider that such wording may be too restrictive. The requirement that there be “no” reasonable expectation of success, invites the court to consider the merit of the action at a time when traditionally courts have been reluctant to strike prior to trial (*Anger v. Berkshire Investment Group* [2001] O.J. No. 379 (Ont. C.A.) or inquire into a partially improper purpose (*Poulton v. Metropolitan Shingles Association* [2008] OJ No. 2977. In our view, unless the wording of the Anti-SLAPP legislation indicates a clear departure from this jurisprudence, it is unlikely that courts will give prompt relief to a defendant who is the target of a SLAPP suit.

The CCLA suggests that the wording should indicate that even a possibly meritorious proceeding could be struck if it is undertaken for the principal purpose of preventing public participation and is unreasonable in the circumstances, for example, if there is no possibility of enforcement. Although this may appear to deprive some plaintiffs of their meritorious right of action, it does recognize the possibility of abuse of process. It is not difficult to file a novel statement of claim (which could appear potentially meritorious) against an impecunious defendant as a delaying tactic and for the purpose of silencing legitimate opposition. The CCLA invites the Committee to consider language that strikingly departs from Rule 21.01 and moves beyond the issue of potential merit of the action to focus more on the purpose of the lawsuit and its reasonableness in the context. The Committee could consider replacing “and” by “or”, that is, making the conditions alternative as opposed to cumulative to achieve this purpose.

2) Proposed Public Body

Our concern is that even access to Anti-SLAPP remedies may be cost-prohibitive for

some resource-poor defendants. Faced with a powerful and well-resourced plaintiff litigant, many defendants will simply opt to withdraw their speech from the marketplace rather than incur the expense of bringing a motion to strike or awaiting a cost order. Many more potential defendants, fearful of litigation, will simply decline to enter the marketplace at all.


In response to this, the CCLA proposes the creation of an independent public agency dedicated to protecting the freedom of expression and public participation of Ontarians in the civil justice system. We note that the California Anti-SLAPP Project (<http://www.casp.net/intro.html>) has been instrumental in ensuring that the California Anti-SLAPP legislation is used appropriately and yields adequate protection for targets of SLAPP suits.

In our view, an agency dedicated to the protection of public participation and freedom of expression and the monitoring of the Anti-SLAPP legislation is essential. The agency could have the power to intervene early in the case, either at the request of a defendant or even a judge, to bring anti-SLAPP motions to strike on behalf of defendants. Access to the agency's services could be at the discretion of the agency itself, and could consider factors such as the ability and financial status of the defendant, the *bona fides* of the defendant's defence, and the risk to freedom of expression and public debate posed by the law suit. The task of actually bringing anti-SLAPP litigation on behalf of the agency could be parcelled out to private lawyers in a certificate system similar to that employed by Legal Aid Ontario. Lastly, the cost of the agency could be shouldered by a possible surcharge on court filing fees or by a dedicated percentage awarded from any SLAPP costs award. Such a public agency would help to correct the imbalance between parties in SLAPPs and provide a useful watch-dog role.

The Québec Comité Macdonald, Noreau and Jutras made a similar recommendation (p. 75, *Les poursuites stratégiques contre la mobilisation publique – les poursuites - bâillons (SLAPP)* <http://www.justice.gouv.gc.ca/francais/publications/rapports/pdf/slapp.pdf>). In our view, the Comité's proposal could be expanded so that the Public Body is in a position to assume jurisdiction over written threats of lawsuits which are known to have a severe chilling effect on free speech. In other words, the watchdog role of the Public Body should extend to responding to threats of lawsuits which are sent for the purpose of silencing or intimidating opponents, as well as assisting defendants in bringing motions to strike under the Anti-SLAPP legislation.

We thank the Committee for its attention and would appreciate the opportunity to make additional oral submissions to the Panel in support of this letter.

Yours Sincerely,



Nathalie Des Rosiers
General Counsel

ⁱ Vincent Pelletier, *Strategic Lawsuits against Public Participation (SLAPPs) (and other abusive lawsuits)*, Uniform Law Conference of Canada (Québec), August 2008, at para. 40.