Strategic Lawsuits Against Public Participation (SLAPPs) Report 2008

Proceedings

Upcoming Meeting

CIVIL SECTION

Strategic Lawsuits against Public Participation (SLAPPs)

(and other abusive lawsuits)

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[1] During the discussion of new projects at the annual meeting of the Uniform Law Conference of Canada (ULCC) held in Charlottetown in September 2007, a number of jurisdictions expressed interest in the issue of strategic lawsuits against public

participation (SLAPPs).

[2] In view of that interest, the Civil Section subsequently established a working group to examine the issue. The working group, presided by Vincent Pelletier, Legal Counsel, Ministère de la Justice du Québec, assisted by Russell Getz, Legal Officer, Ministry of the Attorney General of British Columbia, and John Gregory, General Counsel, Ministry of the Attorney General of Ontario, started its work in spring 2008 and drafted this report.

[3] Part 1 presents a brief summary of the origins of SLAPPs and attempts to define the phenomenon. Parts 2 and 3 explore the current common law and civil law remedies in Canada that may be used to respond to an abusive lawsuits such as SLAPPs. Parts 4 and 5 examine in greater detail the remedies that have been implemented in various jurisdictions. It will be noted (at section 4.2) that the solution decided on by the Ministère de la Justice du Québec to address SLAPPs at the presentation stage is to tighten the rules relating to abusive lawsuits.

1.Introduction

[4] A SLAPP [Strategic Lawsuit against Public Participation] can be defined as a lawsuit initiated against one or more individuals or groups that speak out or take a position in a public debate on an issue of public interest. The purpose of SLAPPs is to limit the freedom of expression of the defendants and neutralize their actions by resorting to the courts to intimidate them, deplete their resources and reduce their means of action.

[5] The SLAPP phenomenon, already familiar in the United States, first appeared in Canada as a type of abuse of process, or began to be identified as such, in the 1990s. A number of companies initiated legal proceedings that fit the definition of a SLAPP in order to silence groups or citizens who were speaking out on public issues, especially on environmental, but also municipal or consumer, issues.

[6] The report entitled *Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada*[1] produced by the Public Interest Advocacy Centre summarizes fourteen of the first Canadian lawsuits that can be characterized as SLAPPs. The subjects of the lawsuits cover a wide range and include a report on highway safety, an article criticizing an electronics store, and public mobilization against a hospital closing.

[7] In 2006, the Minister of Justice of Québec created a committee of legal experts to assess the desirability of enacting measures to counter SLAPP suits. Roderick A. Macdonald chaired the committee and was assisted by two other legal experts, Pierre Noreau and Daniel Jutras. Their report, *Les Poursuites stratégiques contre la mobilisation publique – Les poursuites-bâillons (SLAPP*) [Strategic lawsuits against public mobilization – gag lawsuits (SLAPPs)], was made public in June 2007.

[8] The committee concluded that abusive lawsuits are an observable reality and

constitute a serious threat to the participation of citizens and groups in public debate. The committee added that the solution to the SLAPP phenomenon should have defined objectives, such as protecting the right to freedom of expression and opinion, putting a speedy halt to strategic lawsuit proceedings, deterrence of SLAPP lawsuits, safeguarding the integrity and objectives of the judicial institution, and improving access to justice.[2]

[9] The committee's report also describes the current rules in effect in Québec, Canada and the United States to protect the balance between freedom of expression and the protection of reputation and explores approaches to improve Québec law.

1.1 Justification for anti-SLAPP measures[3]

[10] Chapter 2 of the committee's report summarizes, from the perspective of public law, the principal justifications advanced by various jurisdictions for enacting anti-SLAPP measures.

[11] The first is the right of citizens to participate in public affairs, which is recognized under Article 25 of the *International Covenant on Civil and Political Rights*:[4]

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

[12] The comments relating to Article 25 set out in *General Comment No. 25 (57)**[5]*** state that the right to participate in public affairs is an essential condition for the effective exercise of the right to freedom of expression and right of association and implies the free communication of information and freedom of the press.

[13] A further justification is the right to freedom of expression, which must be balanced with the right of reputation, an integral part of the right to privacy. Freedom of expression is also recognized under Article 19 of the *International Covenant on Civil and Political Rights*:[6]

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom

to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[14] The European Court of Human Rights has concluded in a number of decisions[7] applying Article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms**[8]*** (similar to paragraphs 2 and 3 of Article 19 above) that the limits allow for a broad freedom of expression when the target is a politician, an enterprise or an organization with significant involvement within the public space. If the target is a public officer or an individual, however, those limits are much narrower.

[15] A third justification originates in access to justice issues. Access to justice safeguards the principle of equality in the law, which is at the heart of judicial action as a mechanism of democracy and an institutional condition for that equality. [9]

[16] The issue of access to justice exposes the inequities in the material and financial resources of SLAPP litigants, an imbalance which is also at odds with the right to a fair and equitable trial, the fourth justification for anti-SLAPP legislation, recognized under the first paragraph of Article 14 of the *International Covenant on Civil and Political Rights*:[10]

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

[17] That right is also recognized under section 23(1) of the *Charter of Human Rights and Freedoms* (R.S.Q., c. 12):

23. Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.

[18] Accordingly, the committee considered that redressing the imbalance in the financial resources between the parties appears to offer a potential solution to the problems raised by a number of SLAPP suits initiated in the past.

2. Existing remedies for abuse of process in Canadian common law

[19] In the common law jurisdictions, the law appears to offer a number of remedies for abusive litigation. For reasons set out briefly in this part of the paper, these remedies have not been effective in relieving the effects of SLAPP suits.

2.1 Abuse of process

[20] “Vexatious proceedings, that is, proceedings that are an abuse of process, include those brought for an improper purpose, including the harassment and oppression of other parties and proceedings brought for purposes other than the assertion of legitimate rights.”[11]

[21] The common law gives the courts an inherent jurisdiction to control such abuse of process.[12] This power is codified as well, for example in s. 140 of the *Courts of Justice Act*,[13] which provides for the control of vexatious litigants. That section expressly preserves other powers of the court respecting abuse.[14] The Act elsewhere provides a general power to stay proceedings “on such terms as are considered just.”[15] The courts say that this power will be used sparingly.[16]

[22] In addition, the rules of civil procedure provide several potential methods to attack abusive litigation. In Ontario, these involve the power to move for summary judgment (Rule 20), the power to determine an issue before trial (Rule 21), and the power to strike out pleadings on the grounds that they are abusive (Rule 25.11).[17]

[23] The other common law jurisdictions have similar powers, though sometimes located in different legal instruments or called by different names.[18]

[24] While some examples exist of the courts exercising these powers, they seem outnumbered by those in which the courts express their reluctance to deprive a plaintiff of an opportunity to prove his, her or its case in court after a full hearing on the merits. “Thus, the power to dismiss a case as frivolous or vexatious or as an abuse of process is exercised only in the clearest of cases.”[19]

2.2 Summary judgment

[25] Ontario’s Rule 20 permits a motion for summary judgment by either plaintiff or defendant. The court may grant judgment if it is satisfied that there is no genuine issue for trial. The moving party supports the motion by evidence on affidavit. The responding party (whose case is at risk) “may not rest on the mere allegations or denials of the party’s pleadings, but must set out, in affidavit material or otherwise, specific facts showing that there is a genuine issue for trial.”[20] It must “lead trump or risk losing.”[21] Where the only genuine issue is a question of law, the court may determine the question and give judgment accordingly.[22]

[26] In the early days after this rule was adopted in 1984, several cases gave it some

strength, and gave summary judgment accordingly.[23] This approach was supported in the Court of Appeal as well in the early 1990s.[24] However, more recent cases have put this "robust" interpretation in doubt. Courts have become very reluctant to do the work of the trial judge on a motion. "The plenary trial remains the mode for the resolution of disputes and Rule 20 does not represent court reform, or the reform of the adversary system, in disguise."[25] "A strong case is not sufficient. The moving party's case must be unanswerable."[26]

[27] The Superior Court of Ontario declined to issue summary judgment in *Nadvornianski v. Stewart Title Guaranty Company*, saying "In my opinion the issues here are both novel and significant and involve an interpretive analysis, including perhaps policy considerations which are properly beyond a summary judgment motion."[27] The motions court judge is not to find facts, assess credibility or decide questions of law, but only assess whether a genuine issue exists justifying a trial.

[28] As to the ability to dispose of questions of law, those questions must involve the application of known law to clear facts. The Ontario Court of Appeal said this in *R. D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*: "Matters of law which have not been settled fully in our jurisprudence should not be disposed of at this [interlocutory] stage of the proceedings."[28]

[29] It may be noted that the cases in which summary judgment has been granted have not involved allegations of abuse of process but more traditional points like lack of evidence or of a cause of action as a whole. Thus debate has focused on credibility of witnesses but not on motivation of the plaintiff or the value of the lawsuit in achieving legal rather than strategic ends.

[30] In British Columbia, Rule 18 on summary judgment was interpreted as Ontario's Rule 20 has now been. In 1983 Rule 18A was made, to permit summary trials on affidavit evidence. Actions where it has been invoked with success have tended to be debt collections and wrongful dismissals, which present narrow issues. Nevertheless "it would appear that all is not well when it comes to the application of Rule 18A in British Columbia."[29] Judges there too have been reluctant to resolve questions of conflicting affidavits, fearing to some extent that "the skill of the draftsman may be more persuasive than the affidavit."[30] The summary judgment procedure is not considered appropriate to resolve complex disputes. The drafter who can create persuasive affidavits is likely to be capable of drafting complex statements of claim as well, to put an action beyond the willingness of a court to give judgment before trial.

2.3 Determining an issue before trial

[31] Civil rules often permit parties to shorten legal actions by getting a point of law determined authoritatively on a motion without a trial. Ontario's Rule 21(3)(d) says that a defendant may move before a judge to have an action stayed or dismissed on the ground

that (d) the action is frivolous, vexatious or is otherwise an abuse of the process of the court, and a judge may make an order or grant judgment accordingly.

[32] The rule was used to strike out a defamation action by a dentist against someone who had complained about him to the College of Dental Surgeons. The complaint process was a quasi-judicial one in which the complainant had absolute privilege.[31]

[33] Nevertheless the normal use of the rule is to deal with questions of *res judicata* or multiplicity of proceedings. It is extremely rare to see it used to curb abuse in the SLAPP sense, of harassing defendants by the costs and stresses of the legal system. “The court will dismiss or stay an action as being frivolous, vexatious or abusive only in the clearest cases where it is plain and obvious the case cannot succeed.”[32]

[34] In short, the case law on Rule 21 is similar to that on Rule 20, and shows the general disinclination of judges to deprive a plaintiff of a full trial based on an opportunity to adduce evidence and make argument. “Existing rules of civil procedure do little to assist SLAPP targets to secure speedy dismissal of SLAPP claims.”[33]

2.4 Striking out a pleading

[35] Ontario’s Rule 25.11 allows a court to strike out all or part of a pleading or other document, with or without leave to amend, on the ground that the document (b) is scandalous, frivolous or vexatious, or (c) is an abuse of the process of the court. Most of the cases in which this remedy has been granted have expunged parts of pleadings that went beyond the bounds of relevance or propriety.[34] Very few if any struck out pleadings entirely without leave to amend or to begin again.

[36] Once again, novelty of the claim will not work against a plaintiff in such motions. Matters of law that are not fully settled should not be disposed of on a motion to strike. [35]

[37] The tendency in SLAPP suits for plaintiffs to state a number of causes of action, many of them novel or with uncertain characteristics, like interference with economic relations or business opportunities, works to profit from this disinclination. Judges are reluctant to find that a cause of action does not exist or has no hope of success without a full trial. Nevertheless waiting for the trial, and enduring the costs of the procedures in the meantime, produces the costs and stress that are alleged to be the principal motivation of the plaintiffs who bring these actions. Thus these rules are seldom likely to be of use to SLAPP defendants.

2.5 Tort of abuse of process

[38] The common law recognizes a tort of abuse of process. As described by Justice Perell, the elements of this tort are the institution of civil proceedings by the defendant against the plaintiff, the defendant having instituted the proceedings for a collateral and improper purpose. However, “a plaintiff is not liable for abuse of process for employing

regular legal process albeit with bad intentions. The mere fact that the claim or defence intimidates, frustrates or antagonizes the opponent is not a collateral purpose and does not make it an abuse of process."[36]

[39] Thus if the "complaint ultimately amounts to not much more than that he or she will be discomfited simply by being sued in a likely unmeritorious action", the tort of abuse of process will not be made out.[37]

2.6 Conclusion

[40] 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[38].

3. Existing remedies against abuse of procedure in Canadian civil law

3.1 The requirements of good faith and the rule of proportionality

[41] In June 2002, Québec enacted the *Act to reform the Code of Civil Procedure* (S.Q., c. 7) with the purpose of providing speedier, more efficient, and less costly civil justice, designed to improve access to justice and increase public confidence in the justice system.

[42] The reform codified the rule that litigants are masters of their case at article 4.1 of the *Code of Civil Procedure*(R.S.Q., c. C-25) (CCP), but added that the parties "must refrain from acting with the intent of causing prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith."

[43] The Act also introduced the rule of proportionality (article 4.2) which constitutes the cornerstone of the reform: judges, lawyers and clerks are required to keep in mind that the pleadings and means of proof must be proportionate, in terms of cost and time, to the nature and ultimate purpose of the action or application and to the complexity of the matter.[39]

[44] Article 4.2 CCP, which constitutes one of the guiding principles of the Code, provides that judges must also apply the principle of proportionality regarding the process or pleadings they authorize or order. Judges were formerly required to identify the main points at issue and ensure that a trial is conducted with the greatest speed and economy possible.[40] Introducing the proportionality rule into the Code confirms the judge's authority to manage cases and provides guidance for the actions of the litigants and their counsel.[41]

[45] Articles 4.1 and 4.2 CCP have thus widened the court's role in case management

and induced judges to focus arguments on the substance over the incidentals and not give procedural issues precedence over substantive issues.[42]

[46] In addition, the main purposes of those articles are to avoid excessive costs and delays and to seek a fair balance in the use of process by the parties. The aim was not to place the parties on an exactly even footing but to allow the court to attempt to re-establish a fair balance between the parties when a party with greater resources uses court procedure that results in higher costs and longer delays without meeting the test of proportionality.[43]

[47] Articles 4.1 and 4.2 CCP would have a limited application in SLAPP cases, however, since the primary purpose of those articles is to offset an imbalance between the amounts at issue and the costs related to the action. As a reference standard, it is therefore quite incidental to the basic issue of whether it is possible to respond on the merits to court proceedings seeking to limit the possibility for some citizens or groups to exercise their right to freedom of expression on issues of public interest.[44]

[48] Furthermore, during consultations held by the Ministère de la Justice at the end of 2006 during the preparation of the *Rapport d'évaluation de la Loi portant réforme du Code de procédure civile* [Report on the implementation of the Act to reform the Code of Civil Procedure], judiciary and Barreau du Québec representatives pointed out that the proportionality rule has not yet been fully integrated into the legal culture of lawyers. Being accustomed to using all available weapons in the arsenal to competently represent clients, they struggle with this new philosophy and the changes in approach and practices that it requires of them.[45]

[49] It appears nevertheless that since those consultations, articles 4.1 and 4.2 CPC have been increasingly applied by the courts. Litigants are now being required to consider whether their use of a particular procedural rule of the Code is reasonable and proportionate in the circumstances and if the effects or consequences of its use are reasonable.[46]

3.2 Clearly unfounded or frivolous actions and proceedings

[50] The *Code of Civil Procedure* provides for the filing, at the very beginning of proceedings, of a motion for dismissal of an action or proceeding that is clearly unfounded or frivolous. Article 75.1 CPC, for instance, states:

75.1. At any stage of proceedings, the Court, on a motion, may dismiss an action or a proceeding if the examination held pursuant to this Code shows that the action or proceeding is frivolous or clearly unfounded, on a ground other than those provided in article 165, or if the party who instituted the action or filed the proceeding refuses to have such examination.

If the proceeding dismissed under the first paragraph is a defence, the defendant is

foreclosed from pleading.

[51] However, since a dismissal would bar a party from being heard, courts are generally cautious and will dismiss an action or pleading only in the clearest of cases, and only if the proceeding appears futile and dilatory, with no reasonable chance of success.[47] The court will act with even greater caution when deciding a motion seeking the dismissal of an action or application, as opposed to a defence, since the matter is incomplete at that point.[48]

[52] Paragraph 4 of article 165 CPC also allows a defendant to move for the dismissal of an action where it is unfounded in law, even if the facts alleged are true. The courts, however, exercising the same cautious as that applied to article 75.1 CPC motions, will avoid terminating a trial in view of the serious consequences of the dismissal of an action without an examination on its merits.[49]

3.3 Award of extrajudicial fees

[53] Article 477 CPC states that costs are borne by the party incurring them, unless the court reduces them in a reasoned decision. Québec courts have not interpreted the article as authorizing the award of additional costs to punish bad faith or abuse of process.[50]

[54] In *Viel*, the Court of Appeal of Québec emphasized that only abuse of the right of access to the courts may be punished by an award of damages representing extrajudicial fees.[51]

[55] According to the Court of Appeal, abuse of the right of access to the courts, contrary to an abuse of rights cause of action [translation] "is a fault committed in the context of a legal proceeding. It is the case where litigation (claim or defence) is conducted in bad faith. It would also be the case where a litigant acting in bad faith multiplies proceedings and engages in pointless and abusive legal debate."[52]

[56] That situation is acknowledged in article 75.2 CCP, which allows a court that dismisses a proceeding under article 75.1 CCP, on application, to declare it abusive or dilatory and order the losing party to pay damages in compensation for the prejudice caused to the other party. The court may then consider the special circumstances of the matter in deciding costs and award, as damages, the extrajudicial fees paid by the abused party. Article 75.2 does not, however, allow for an award of exemplary damages. [53]

3.4 Conclusion

[57] As stated in the report *Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)*, articles 75.1 and 165 (4) CCP, as they are currently interpreted, are of very limited use if the objective is to frustrate attempts at SLAPPs at

the outset of proceedings.[54] Only very rarely are extrajudicial fees awarded as damages in cases of abuse.

[58] Consequently, as in the common law, although responses to SLAPP suits, and abusive lawsuits in general, exist in theory, the reluctance of courts to intervene to end a lawsuit in its early stages, depriving a litigant from being heard on the merits, seems to make these remedies ineffective.

4. Anti-SLAPP legislation in Canada

[59] One of the main arguments advanced in the other provinces of Canada in support of anti-SLAPP legislation is the absence of constitutional guarantees in private relations; in Québec, freedom of expression, which is specifically protected under the *Charter of Human Rights and Freedoms*, governs the relations between citizens.

[60] Despite that argument, only British Columbia has enacted anti-SLAPP legislation, albeit short-lived. Anti-SLAPP bills were also introduced in New Brunswick in 1997 and in Nova Scotia in 2003, but were never passed.

4.1. British-Columbia's anti-SLAPP legislation

[61] In April 2001, the British Columbia Legislature enacted anti-SLAPP legislation, in an act entitled the *Protection of Public Participation Act,* S.B.C. 2001, c. 19. [55] The Act was subsequently repealed on August 16, 2001 in the next Parliament and session following a general election in May, 2001.

[62] Section 2 provided that the purposes of the Act were to encourage public participation and to dissuade persons from bringing or maintaining legal claims for an improper purpose by providing an opportunity for a defendant to apply to the court before or at trial, alleging that a claim is being brought for an improper purpose; and providing a means for such a claim to be summarily dismissed, with the opportunity for costs, punitive or exemplary damages, and protection from liability in defamation.

[63] The Act defined "public participation" as… "communication or conduct aimed at influencing public opinion, or promoting or furthering lawful action by the public or by any government body, in relation to an issue of public interest"…. The definition of public participation excluded anything subject to prosecution, contravening human rights statutes, a court order, causing property damage, physical injury, trespass to property, or otherwise unlawful or unwarranted interference with a person's rights or property.

[64] A legal claim was defined as being for an "improper purpose" if: (a) the plaintiff could have no reasonable expectation of success, *and* (b) a principal purpose of the claim is:

- to dissuade the defendant or other person from engaging in public participation,
- to divert the defendant's resources from public participation, or
- to penalize the defendant for engaging in public participation.

[65] The Act provided for both substantive and procedural measures for protecting public participation, as defined, against defined improper claims.

[66] The substantive measure was a change to the law of defamation to provide that instances of public participation as defined constitute occasions of qualified privilege.

[67] The procedural measures were provisions allowing a court, upon application by a defendant, summarily to dismiss an action, and to make a number of orders granting other forms of relief to a defendant. The orders available were: payment by the plaintiff of all of the defendant's reasonable costs and expenses relating to the claim or to an application under the Act; punitive or exemplary damages against the plaintiff in the discretion of the court; security of costs to be provided by the plaintiff; court approval of any settlement, discontinuance or abandonment.

[68] Where the court has made previous orders for security of costs or that court approval be obtained for a settlement, discontinuance or abandonment of a claim, then, at trial, a defendant may obtain an order dismissing a plaintiff's claim, with costs, if the claim was discontinued or abandoned.

[69] The minister introducing the Act described its impetus as being the perceived need to counter the possibility of plaintiffs making use of superior financial resources to take advantage of defendants with fewer financial resources by initiating and maintaining legal proceedings for the purpose, not of litigating a legitimate or meritorious legal issue, but rather to discourage or bring to an end protests or other activities or speech that the plaintiff considers contrary to its interests. In particular, it was argued that it is necessary to have a means of dismissing such abusive and unmeritorious lawsuits as early as possible, as even if a matter were eventually to be settled, or if a defendant were to have a likelihood of ultimate success at trial with the prospect of a favourable award of costs, a long and drawn out process of litigation could work an injustice by effectively destroying the financial wherewithal of a defendant to carry on.

[70] The subsequent minister, in bringing forward legislation to repeal the Act, argued that the Act was unnecessary as there are sufficient means of protection against abusive and unmeritorious lawsuits generally: in the power of the court to control abuse of process; and in the Rules of Court, including rules respecting the dismissal of frivolous and vexatious claims, allowing for summary trial, requirements for security for costs, and the ability to award costs against such a plaintiff.

[71] In addition, it was argued that the Act itself was problematic in that the grounds upon which a court could dismiss a claim were vague and inadequate, and would make it difficult for the court to distinguish unmeritorious claims from meritorious ones, and to thereby strike the right balance with another civil justice value: avoiding premature dismissal of meritorious claims and legitimate legal issues.

[72] With respect to the crucial question of whether the Act provided a sufficient or insufficient basis for determining whether a given claim is a SLAPP suit and ought therefore to be dismissed, some commentators, noting the US origins of such legislation, have suggested that such legislation fits better within the US legal system than in Canada's because the constitutional protection available in the US for certain kinds of protest speech that are the subjects of litigation, and the applicable case law, provide a jurisprudential foundation that affords a substantive basis upon which a US court may be guided in deciding whether to dismiss a claim as a SLAPP suit.

[73] An additional concern expressed was that the availability of the provisions in the Act could be misused by some litigants, and would add another layer of process to the civil litigation process.

[74] The other points expressed related to concern with the change to the law of defamation, as provided for in the section making public participation, as defined, an occasion of qualified privilege; and to the disputed question of whether SLAPP lawsuits are actually a real phenomenon, as opposed to a potential or theoretical concern.

4.2 Québec's anti-SLAPP initiative

[75] The committee of legal experts appointed by the Minister of Justice of Québec proposed three alternative solutions to address SLAPP suits in its report *Les poursuites stratégiques contre la mobilisation publique – Les poursuites-bâillons (SLAPP)*.

[76] The first proposal is the enactment of specific anti-SLAPP legislation with the purpose of establishing rights and a special procedure. The second is the amendment of certain articles of the *Code of Civil Procedure* and the creation of a special fund to support SLAPP victims.

[77] The third proposed solution, taking into account that the relevant rights are enshrined in the *Charter of Human Rights and Freedoms*, is to amend certain articles of the *Code of Civil Procedure* and create a special fund, in a specific legislation aimed at protecting the courts against misuse of the judicial system and encouraging citizen participation in public debate and the exercise of their right to freedom of expression and opinion.

[78] Public consultations were held from February 20 to April 8, 2008 for the purpose of obtaining comments on the report and its proposed solutions. More than twenty individuals, associations, and groups spoke on SLAPPs; a number of them claimed to have been the target of a SLAPP suit.

[79] Most of the individuals and groups heard during the public consultation process gave accounts of the enormous difficulties faced by individuals and non-profit organizations in gaining access to justice, especially in the context of a SLAPP suit. They considered it imperative that lawmakers intervene with legislation that would send a clear message to SLAPP targets that in future they will be protected by the law. The law should also allow

SLAPP targets to be compensated for damages.

[80] On June 13, 2008, the Minister of Justice of Québec introduced Bill 99, *An Act to amend the Code of Civil Procedure to prevent abusive use of the courts and promote freedom of expression and citizen participation in public debate*.[56] The Bill substantially implements the third solution proposed by the committee of experts.

[81] The Bill's preamble reinforces the message that it is important to protect freedom of expression, prevent abusive use of the courts and promote access to justice for all citizens:

- AS it is important to promote freedom of expression as affirmed in the Charter of human rights and freedoms;
- AS it is important to prevent abusive use of the courts and discourage judicial proceedings designed to thwart the right of citizens to participate in public debate;
- AS it is important to promote access to justice for all citizens and to strike a fairer balance between the financial strength of the parties to a legal action;

[82] Rather than set out specific rules for SLAPPs, the Bill strengthens existing provisions of the *Code of Civil Procedure*on abuse of process, which should advance access to justice for all. The new rules will be interpreted in the light of principles already set out in the Code, which include the court's duty to ensure the orderly conduct of proceedings and compliance with the proportionality rule and with the requirement that parties act in good faith, avoiding conduct that causes prejudice to another person or that is excessive or unreasonable.

[83] In addition to harmonizing with existing Québec procedural law, this approach has the advantage of avoiding possible narrow interpretations directed at a special procedural law regarded as an exception to the general law.

[84] Bill 99 introduces articles 54.1 to 54.6 into the *Code of Civil Procedure*, replacing articles 75.1 and 75.2, to provide for what may constitute an abusive proceeding and to allow a court, at any time and even on its own initiative, to declare an action or pleading abusive. The abuse may stem from a SLAPP suit, among others.

[85] With the aim of striking a fairer balance between the strengths of the parties, new section 54.2 CPC provides for a reversal of the burden of proof in the principal action where a party establishes that this action or pleading is *prima facie* an abuse of procedure.

[86] The Bill also provides, at article 54.4 CPC, that the court may subject the furtherance of the action or pleading to certain conditions, require undertakings from parties with regard to the orderly conduct of the proceeding, or recommend to the chief judge or justice that special case management be ordered. The judge may also, for serious

reasons, order that a provision for costs be paid to a party whose financial situation would prevent it from properly arguing its case.

[87] To compensate victims of abusive lawsuits for the prejudice suffered and to punish its initiator, article 54.5 CPC gives the courts the power, in addition to dismissing the action or pleading, to order the payment of damages, including extrajudicial fees, and award punitive damages.

[88] Lastly, article 54.6 CPC provides that if the abuse is committed by a legal person, the directors and officers who took part in the decision may be personally ordered to pay damages.

5. Anti-SLAPP legislation in foreign jurisdictions

5.1 In the United States

[89] The phenomenon of SLAPPs has been more clearly identified in the United States than in Canada, such lawsuits having been first defined in the U.S. in the 1980s. SLAPPs violate the American constitutional protection of the right of free speech and the right to petition, the usual grounds for defence against SLAPPs. While those constitutional guarantees are generally sufficient grounds for dismissal, they do not appear to adequately limit their deterrent effect on public participation: defendants still have to bear significant costs and the lawsuits shift the debate from the public scene to the privacy of the court.

[90] For this reason, in the face of a steady increase in SLAPPs there has been widespread enactment of anti-SLAPP legislation in the United States: more than half of the states have legislated against the practice. A wide range of measures have been enacted – specific anti-SLAPP statutes, codes of procedure provisions, rules of court – varying in application according to whether the aim is to address specific issues or more generally restore a balance between the parties while protecting the exercise of constitutionally protected rights, principally the right of free speech and the right of petition.

5.1.1 In California

[91] One of the first American initiatives was the introduction in 1992 of anti-SLAPP provisions in the *California Code of Civil Procedure*. Section 425.16 explicitly states that it is to be construed liberally and clearly expresses the legislature's intent. It sets out the conditions giving rise to, and procedure for, a specific defence against an action likely to constitute a limitation on the exercise of the right of free speech and the right of petition: [57]

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) 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.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.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, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.(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.[…]

[92] It will be noted that the provision places on the plaintiff the burden of establishing a probability that it will prevail on the claim. If it fails to meet the burden, in addition to having its claim dismissed and being ordered to pay costs, the plaintiff will also have to pay the defendant's extra-judicial costs.

[93] Subsequent amendments were made to the provisions. In 1997, following narrow constructions by the courts that limited the application of those provisions to issues of public interest, their objective was clarified to specify that they protect from civil liability

any action related to the exercise of the right of free speech and the right of petition. In 2003, section 425.17 of the *California Code of Civil Procedure* was introduced to restrict the abuse of anti-SLAPP provisions by enterprises, in particular to deter public interest lawsuits or consumer class actions.

5.1.2 In New York

[94] New York State's legislation approaches the issue much more restrictively. Under section 76-A of the *Civil Rights Law* , the application of anti-SLAPP provisions is limited to proceedings brought by persons who have applied for, or have obtained, a permit, lease or certificate from a government body or who are applying for an amendment to a zoning by-law.[58]

[95] As in the California legislation, if a defendant files a motion alleging that its actions were in the exercise of the right of public participation or right of petition, the plaintiff must establish that it has a reasonable chance to prevail.[59] In addition, a plaintiff in an action considered to be a SLAPP cannot prevail unless it clearly shows to the court that the defendant knew that its affirmations were false or made them with disregard for their truthfulness. Section 76-A reads as follows:

> **76-A.** 1. For purposes of this section:(a) An "action involving public petition and participation" is an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.(b) "Public applicant or permittee" shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.(c) "Communication" shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.(d) "Government body" shall mean any municipality, the state, any other political subdivision or agency of such, the federal government, any public benefit corporation, or any public authority, board, or commission.2. In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.3. Nothing in this section shall be construed to limit any constitutional, statutory or common law protections of defendants to actions involving public petition and participation.

[96] In addition to being able to quickly halt the SLAPP, the defendant can sue the plaintiff for damages, including attorney's fees. Compensatory or punitive damages will only be

awarded, however, if the defendant can establish that the purpose of the action was to harass or intimidate the defendant or to maliciously inhibit defendant's public participation or right of petition. The motion for damages or cross-claim to the SLAPP is provided for in section 70-A of the *Civil Rights Law:* [60]

70-A. 1. A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:(a) costs and attorney's fees may be recovered upon a demonstration that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law;(b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; andc) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.2. The right to bring an action under this section can be waived only if it is waived specifically.3. Nothing in this section shall affect or preclude the right of any party to any recovery otherwise authorized by common law, or by statute, law or rule.
[97] Those provisions are narrowly construed by the courts since they depart from the general rules of common law.[61]

5.1.3 Other American measures

[98] As previously mentioned, the scope of the American legislation varies from state to state.

[99] Some statutes are very broad, such as Oregon's, which protects any statement made in a public place or forum on an issue of public interest.[62]

[100] Others have a more limited application, such as Massachusetts' statute whose summary dismissal process protects only the right to petition,[63] and Delaware's,[64] whose provisions mainly target activities related to the issue of permits or applications for amendments to zoning by-laws.

[101] In Florida, contrary to section 425.16 of the *California Code of Civil Procedure* , which cannot be used against an action initiated by the state, the specific purpose of the legislation is to prohibit SLAPP suits by state and municipal government bodies.[65]

5.2 In Australia

[102] Reform of defamation law in Australia resulted in a model statute, the *Defamation Act 2005*[66], proposed by the *Standing Committee of Attorneys-General* (SCAG)[67] to provide uniform laws of defamation; the legislation has been enacted in all states and most territories of Australia.

[103] One of the objectives of the statute is to ensure that legislative provisions on defamation do not impose unreasonable limits on freedom of speech and, more specifically, public participation (section 3). The primary measure aimed at curtailing SLAPP suits and encouraging participation in public debate is the prohibition of defamation lawsuits by for-profit enterprises with 10 or more employees against individuals or groups.

[104] That approach does not however prevent basing lawsuits to silence opponents on other grounds, as seen in *Gunns* [68], which is akin to a SLAPP and received wide media attention in Australia. Gunns Limited, a forest company, brought a $6.3 million dollar lawsuit against 20 individuals and groups, alleging that they had interfered with its commercial and contractual business. The lawsuit was mainly aimed at the defendants' protests against commercial development of the Tasmanian forests by Gunns, among others.

[105] Since 2005, various bills have been introduced in Australian state and territorial legislative assemblies to better protect citizens who participate in public debate. The most recent example is the *Protection of Public Participation Bill 2008* , presented by a member of the Legislative Assembly for the Australian Capital Territory.[69] None of those bills are currently in effect.

Recommendations

[106] The main finding of the working group is that rules to deter abusive lawsuits such as SLAPPs exist in both the common law and civil law jurisdictions of Canada, at least in theory. In practice, the rules appear to be ineffective because the of the courts' reluctance to apply them; they exercise caution in dismissing an action since it would result in the loss of a plaintiffs' rights at a preliminary stage of proceedings.

[107] It is therefore recommended:

That the working group continue its examination of the issue of abusive lawsuits such as SLAPPs, and propose, if possible, a draft uniform law or model rules of court for consideration at the 2009 meeting.

That the working group be expanded to include additional members, including private practice lawyers.

FOOTNOTES

[1] Susan Lott, *Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada*, September 2004, produced by the Public Interest Advocacy Centre. The report is available at:

http://www.piac.ca/consumers/corporate_retaliation_against_consumers.

[2] *Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)* [Strategic lawsuits against public mobilization – gag lawsuits (SLAPPs)], p.76.

[3] This section summarizes Chapter 2 of the report *Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)*, which sets out the justification for anti-SLAPP measures under the title *De la justification des mesures anti-SLAPP* , pp. 9-18.

[4] The *International Covenant on Civil and Political Rights* was adopted on December 16, 1966 and came into force on March 23, 1976. Canada acceded to the Covenant on May 19, 1976. It is available at http://www2.ohchr.org/english/law/ccpr.htm

[5] Available at:

http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb?Opendocument

[6] *Op. cit.* , note 4.

[7] See notes 28 to 34 at page 14 of the report *Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)*.

[8] The *Convention for the Protection of Human Rights and Fundamental Freedoms* is available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.

Article 10 of the Convention reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

[9] *Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)*, p.15.

[10] *Op. cit.* , note 4.

[11] P.Perell, "A Survey of Abuse of Process", [2007] Annual Review of Civil Litigation (Thomson Carswell: Toronto, 2007) 243Perell, above, note 1, at 245. The author cites a number of cases, including *Lang Michener Lash Johnston v Fabian* , (1987), 59 O.R. (2d) 353 (H.Ct.), *Carnegie v Rasmussen Starr Ruddy* , (1994), 19 O.R. (3d) 272 (Gen. Div.), *Warren v Pollitt*, (1999) C.P.C. (4th) 154 (Ont. Gen. Div.), and *Young v Borzoni* , [2007] B.C.J. No. 105 (B.C.C.A.).

[12]*Ibid.*, 244.

[13] *Courts of Justice Act* , R.S.O. 1990 c. C.43, s. 140.

[14] *Ibid.*, s. 140(5).

[15] *Ibid.*, s. 106.

[16] *Canadian Express Ltd. v Blair* , (1992) O.R. (2d) 44 (Gen. Div.) Of 39 cases cited in Watson and McGowan, *Ontario Civil Practice 2008* , (Thomson Carswell: Toronto) 2008, Vol. 1, pp. 160-163, about half granted stays, but none on the ground of abuse of process.

[17] The Rules of Civil Procedure in Ontario are a regulation under the *Courts of Justice Act* cited as R.R.O. 1990 c. 194. They are online at:

http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm.

[18] See for example British Columbia's Rules 18, 18A and 19. B.C.Reg. 221/90 as amended. See also Manitoba's Rule 20, Court of Queen's Bench Rules, Man. Reg. 553, as amended.

[19] *Ibid.*, at 249.

[20] Rules of Civil Procedure, above, note 4, Rule 20.04(1).

[21] *1061590 Ontario Limited v. Ontario Jockey Club* , (1995), 21 O.R. (3d) 547 (C.A.)

[22] *Ibid.*, Rule 20.04(4).

[23] K.J. Kelertas, "The Evolution of Summary Judgment in Ontario", (1999), 21 Advocates' Quarterly 265, 269-270. The article mentions the B.C. and Manitoba rules as well, and the US rules of federal civil procedure.

[24] *Ibid.* at 276 ff.

[25] Watson and McGowan, above, note 16, Vol. 1, p. 536.

[26] *Ibid.*, at 537.

[27] 2006 CanLII 21787 (ON S.C.), (2006), 82 O.R. (3d) 149.

[28] 1991 CanLII 2731 (ON C.A.), (1991), 5 O.R. (3d) 778 at 782.

[29] Kelertas, above, note 23, at 303.

[30] Leggatt J. in *Russell v. Russell* , (1991), 37 R.F.L. (3d) 304, 306.

[31] *Sussman v Eales* , (1985), 1 C.P.C. (2d) 14 (Ont. H.Ct.).

[32] Watson and McGowan, above, note 5, Vol. 1. p. 599, summarizing *Sussman v Ottawa Sun (The)*, (1997), 22 O.T.C. 75 (Ont. Gen. Div.).

[33] C. Tollefson, "Strategic Lawsuits against Public Participation: Developing a Canadian Response", (1994), 73 Can. Bar Rev. 200, 207. Professor Tollefson's notes 26 and 27 also suggest that British Columbia's rules on motions to dismiss and motions for summary judgment are subject to the same limits as their Ontario counterparts discussed above.

[34] Watson and McGowan, above, note 16, Vol. 1 pp. 653-657.

[35] Perell, above, note 11, at 259.

[36] *Ibid.*, at 265.

[37] *Ibid.*, at 266.

[38] In addition to the remedies mentioned, one should note the impact of rules about costs. Costs can themselves have a SLAPP effect, as shown in a recent Ontario controversy about a claim for costs in a proceeding at the Ontario Municipal Board. Special rules about costs appear in Ontario in the *Statutory Powers Procedure Act* , R.S.O. c. S.22, s.17.1(2) and in the *Class Proceedings Act* , 1992, S.O. 1992 c. 6, s. 31.

[39] *Rapport d'évaluation de la Loi portant réforme du Code de procédure civile* [Report on the implementation of the Act to reform the Code of Civil Procedure], Ministère de la Justice du Québec, 2006, p. 9. The report is available (in French) at:

http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/crpc/crcp-rap4.pdf.

[40] *Wrebbit Inc.* c. *Benoît* , A.J.Q./P.C. 1999-887 (C.S.), H. Reid and C. Carrier, *Code de procédure civile du Québec – Jurisprudence et doctrine*, Collection Alter Ego, 2005, Wilson & Lafleur, note 4.212, page 24.

[41] *Rapport d'évaluation de la Loi portant réforme du Code de procédure civile,* p. 63.

[42] *Canada (Procureur général)* c. *Brault*, J.E. 2006-577 (C.S.), para. 19.

[43] L. Chamberland, *La règle de la proportionnalité: à la recherche de l'équilibre entre les parties?* [The proportionality rule: the search for a balance between the parties?], in *La réforme du Code de procédure civile, trois ans plus tard* [Reform of the Code of Civil

Procedure, three years later], Service de la formation continue du Barreau du Québec, Volume 242, Éditions Yvon Blais, 2006, pp. 26-27.

[44] R. Macdonald, P. Noreau, D. Jutras, *Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)*, 2007, p. 55.

[45] *Ibid,* p. 64.

[46] D. Cloutier and C. Briand, *Bonne foi et proportionnalité: les nouvelles balises fondamentales de l'exercice des droits* [Good faith and proportionality: new basic guidelines for exercising rights], Service de la formation continue du Barreau du Québec, Congrès annuel (2008), see in particular page 23.

[47] H. Reid and C. Carrier, *Code de procédure civile du Québec – collection Alter Ego* , 23e Édition,

Montréal, Wilson & Lafleur ltée, 2007, para. 75.1/7.

[48] *Ibid*, para. 75.1/9.

[49] *Châteauguay (Ville de)* c. *Faubert,* (2007) 2007 QCCA 1044 (C.A.), *Cheung* c. *Borsellino* , (2005) J.E. 2005-1865 (C.A.).

[50] *Aubry* v. *Éditions Vice-Versa*, [1998] 1 SCR. 591, para. 77.

[51] *Viel* c. *Entreprises immobilières du Terroir Ltée* , [2002] R.J.Q. 1262 (C.A.).

[52] *Ibid,* p. 1276.

[53] *Brique & pierre Bas-St-Laurent inc.* c. *Garantie (La), compagnie d'assurances de l'Amérique*, (1997) J.E. 97-1492 (C.A.).

[54] *Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)*, p. 57.

[55] The Act is available at:

http://www.leg.bc.ca/36th5th/3rd_read/gov10-3.htm.

[56] Bill 99 is available at

http://www.assnat.qc.ca/eng/38legislature1/Projets-loi/Publics/08-a099.pdf.

[57] Sections 425.16 ff., *California Code of Civil Procedure* , are available at:

http://www.leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=463934338+0+0+0&WAISaction=retrieve.

[58] Section 76-A, *Civil Rights Law* , is available at:

http://law.onecle.com/new-york/civil-rights/CVR076-A_76-A.html.

[59] See Rules 3211 and 3212, *New York Civil Practice Law and Rules*. Rule 3211 is available at:

http://law.onecle.com/new-york/civil-practice-law-and-rules/CVP0R3211_R3211.html.

Rule 3212 is available at:

http://law.onecle.com/new-york/civil-practice-law-and-rules/CVP0R3212_R3212.html.

[60] Section 70-A, *Civil Rights Law*, is available at:

http://law.onecle.com/new-york/civil-rights/CVR070-A_70-A.html.

[61] See *Harfenes* v. *Sea Gate Association*, 167 Misc. 2d 647 (NY Sup Ct. 1995).

[62] See section 31.150, chapter 31, *Oregon Revised Statutes - 2007*, available at:

http://www.leg.state.or.us/ors/031.html.

[63] See section 59H, chapter 231, *Massachusetts General Laws*, available at:

http://www.mass.gov/legis/laws/mgl/231-59h.htm.

[64] See sections 8136 ff., chapter 81, *Delaware Code*, available at:

http://delcode.delaware.gov/title10/c081/index.shtml#TopOfPage.

[65] Section 768.295, chapter 768 Negligence, Florida Statutes, s. 1, ch. 2000-174, also cited as the *Citizen Participation in Government Act,* is available at:

http://law.onecle.com/florida/torts/768.295.html.

[66] For example, see the *Defamation Act 2005*, enacted by the State of Queensland, available at:

http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2005/05AC055.pdf.

[67] The SCAG is a national ministers' council composed of the attorneys general of Australia, Australian states and territories and New Zealand. It is a forum for discussion on issues of common interest and works to harmonize the actions taken by its members, including legislative initiatives.

[68] For a detailed examination of *Gunns*, see the report of Dr. Greg Ogle of the Wilderness Society Inc., *Gunning for Change – The Need for Public Participation Law Reform*, available at:

http://www.wilderness.org.au/pdf/Gunning_for_Change_web.pdf.

[69] The Bill is available at:

http://www.legislation.act.gov.au/b/db_32176/current/pdf/db_32176.pdf.

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