UNIFORM LAW CONFERENCE OF CANADA

UNIFORM PROTECTION OF PUBLIC PARTICIPATION ACT (2017)

As adopted – May 1, 2017

UNIFORM PROTECTION OF PUBLIC PARTICIPATION ACT

Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings)

Purposes

1. The purposes of this Act are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

Comment: While the Uniform Drafting Rules do not favour a purpose clause, it has been widely thought in the present context that the need to promote freedom of expression on matters of public interest should be underlined.

Definition, "expression"

2. In this Act,

"**expression**" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. (« *expression* »)

Comment: The protection that the statute gives to expression is not limited to "lawful" or otherwise "appropriate" expression, nor to communication by word, nor to communication to governments or other public bodies. Courts will decide whether the nature of the communication in a particular case give it the weight required to protect it in the light of the harm it is alleged to cause or be likely to cause.

Application

3. This Act applies in respect of proceedings commenced at any time before or after this Act comes into force.

Comment: The purpose of the statute is to encourage expression on matters of public interest by relieving those responsible for the expression of the cost and trouble of a lawsuit, where the harm done by the expression is less important than the ability to

engage in the expression itself. To maximize such expression and to minimize the waste of time of the courts in unimportant lawsuits, the balancing test created by the statute is applied to lawsuits whenever they were commenced. Any existing lawsuit by a plaintiff who has suffered serious harm is likely to pass the test and be allowed to continue, but some of lesser weight can properly be dismissed.

Dismissal of court proceedings that limit debate

Motion to dismiss
4. (1) A person against whom a proceeding is brought in court may make a motion to the court to dismiss the proceeding against the person on the basis that it arises from an expression made by the person that relates to a matter of public interest.

Comment: This is the heart of the statute. The defendant has to show that the lawsuit is about expression on a matter of public interest. Once that is done, the burden shifts to the plaintiff to demonstrate that there are grounds to believe the action should continue.

Dismissal
(2) If the moving party satisfies the court that the proceeding arises from an expression described in subsection (1), the court shall dismiss the proceeding, unless the responding party satisfies the court that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

Comment: The purpose of the statute is to protect expression on matters of public interest. In order to maintain a lawsuit on such a matter, therefore, the plaintiff has to persuade the court that there are grounds to believe that the suit has merit and that the harm suffered or likely to be suffered exceeds the harm of repressing expression on such a matter.

The reason to split out 'substantial merit' and 'no valid defence' is that in defamation actions, which are likely to constitute many of the lawsuits for which the statute will be invoked, the defences are often separate from the grounds for liability. Liability ensues if there is publication of defamatory material about the plaintiff; falsehood and

damages are presumed. Defences relate less to the publication than its circumstances of privilege, or about the truth of the allegation. It makes sense to mention them separately.

Unlike the usual rule for defamation, in cases under this statute, the plaintiff has to demonstrate at least grounds to believe that it will suffer some harm. Harm is not presumed. The court must balance the value of giving a remedy for the harm against the public interest in the expression at issue. The nature of the expression – is it temperate, is it reasonable, is it relevant – will play a role, though polemic is also of value. The Supreme Court has protected 'robust' debate.

The court does this balancing without having to find that the plaintiff was improperly motivated in bringing the action.

It is fair to impose these burdens on the plaintiff in this context. The legal merits, including likely defences, must be canvassed by anyone contemplating launching a lawsuit, if it is a serious one. The balance of harm and expression is a new consideration, the principal innovation of this statute.

No further steps in proceeding
(3) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of.

No amendment to pleadings
(4) Unless a court orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding.

Costs

On dismissal
5. (1) If a court dismisses a proceeding under section 4, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the court determines that such an award is not appropriate in the circumstances.

Comment: The statute presumes that a successful defendant will have its full costs, though the presumption is rebuttable if such an award is not appropriate.

If motion to dismiss denied
(2) If a court does not dismiss a proceeding under section 4, the responding party is not entitled to costs on the motion, unless the court determines that such an award is appropriate in the circumstances.

Comment: The opposite presumption is given for the successful plaintiff, since it will continue the lawsuit and may have costs there if it wins. However, a court can give costs at this stage if appropriate.

Damages
6. If, in dismissing a proceeding under section 4, the court finds that the responding party brought the proceeding in bad faith or for an improper purpose, the court may award the moving party such damages as the court considers appropriate.

Comment: Though bad faith is not an element of the motion to dismiss itself, in some cases the court may be able to determine that it is present. This provision allows the court to sanction it.

Procedural matters

Commencement
7. (1) A motion to dismiss a proceeding under section 4 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced.

Motion to be heard within 60 days
(2) The motion shall be heard no later than 60 days after notice of the motion is filed with the court.

Comment: The Ontario Advisory Panel believed the courts would be able to hear these motions within the stated time, though parties could agree to take more time. Accordingly, the time for preliminary matters will be suitably compressed as well. The provision requires hearing but not decision in that time.

Hearing date to be obtained in advance
(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served.

Limit on cross-examinations
(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs or applicants in the proceeding and seven hours for all defendants or respondents in the proceeding.

Same, extension of time
(5) The court may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice.

Appeal to the Court of Appeal
8. (1) An appeal of an order under section 4 lies directly to the Court of Appeal.

Comment: It is important to get a high-level resolution of the issues as promptly as possible, especially in early cases. Thus intermediate stages of appeal, if any, should be avoided.

Appeal to be heard as soon as practicable
(2) An appeal shall be heard as soon as practicable after the appellant perfects the appeal.

Stay of related administrative proceeding

Definition, "administrative proceeding"
9. (1) In this section,

> **"administrative proceeding"** means an application or other process for bringing a matter before a tribunal, within the meaning of the [administrative procedure law]. (« *instance administrative*»)

Stay
(2) If the responding party has begun an administrative proceeding and the moving party believes that the administrative proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under section 4, the moving party may file with the tribunal a copy of the notice of the motion that was filed with the court and, on its filing, the administrative proceeding is deemed to have been stayed by the tribunal.

Comment: This provision aims to give a prospective plaintiff reason to think carefully before launching a lawsuit against its critics. Often such a party has some other official proceeding going on, such as an application for rezoning or a building permit. If that proceeding will be stayed pending the determination of a motion to dismiss under the present statute, that potential delay may be more important to the plaintiff than getting a remedy for the defendant's expression.

Notice
(3) The tribunal shall give to each party to an administrative proceeding stayed under subsection (2),

(a) notice of the stay; and

(b) a copy of the notice of motion that was filed with the tribunal.

Duration
(4) A stay of an administrative proceeding under subsection (2) remains in effect until the motion under section 4, including any appeal, has been finally disposed of, subject to subsection (5).

Stay may be lifted
(5) A judge may, on motion, order that the stay is lifted at an earlier time if, in his or her opinion,

(a) the stay is causing or would likely cause undue hardship to a party to the administrative proceeding; or

(b) the proceeding that is the subject of the motion under section 4 and the administrative proceeding that was stayed under subsection (2) are not sufficiently related to warrant the stay.

Same
(6) A motion under subsection (5) shall be brought before a judge of the [applicable court] or, if the decision made on the motion under section 4 is under appeal, a judge of the Court of Appeal.

Other rights and remedies unaffected
10. The remedies provided for in this Act are in addition to any other rights or remedies respecting abuse of process under any Act or the rules of court.

Comment: The court statutes and rules of procedure in most if not all Canadian jurisdictions allow for remedies against abusive litigation. Courts have been reluctant to use these remedies without a full hearing of the evidence and legal arguments. This reluctance has subjected defendants to the full financial and other weight of litigation. Thus the present statute. However, any other available remedies are not foreclosed by it.

Defamation Act
11. The *Uniform Defamation Act* is amended by adding the following section:

Communications on Public Interest Matters

Application of qualified privilege
[x] Any qualified privilege that applies in respect of an oral or written communication on a matter of public interest between two or more persons who have a direct interest in the matter applies regardless of whether the

communication is witnessed or reported on by media representatives or other persons.

Comment: One aspect of the defence of qualified privilege in defamation actions is communications by and to persons with an interest in the matter discussed. Current common law provides that the media do not have such an interest, nor do those who receive the communications via the media. This puts speakers at risk if their expression is reported by the media. The provision here relieves them of that risk. It does not, however, affect the liability of the media themselves, who may be able to rely on other heads of privilege.

Submissions must be in writing

12. Submissions for a costs order shall be made by way of written or electronic documents, unless,

(a) a party satisfies the tribunal that to do so is likely to cause the party significant prejudice; or

(b) the parties otherwise consent and the tribunal agrees.

Comment: The provision seeks to avoid the risk that hearings on costs may themselves be an undue burden on parties who have participated in administrative law proceedings to promote the public interest. The provision requires applications for costs be done in writing, unless the tribunal decides that justice requires a hearing on the issue. The parties are also allowed to choose a hearing on consent, if the tribunal also agrees. If the governing statute already allows this option despite the specific rule in this provision, then it would not be necessary to spell it out here as well.

If a jurisdiction has existing legislation relating to administrative law procedures that addressees costs, that legislation ought to be reviewed in light of this provision.

Commencement

13. *[in accordance with the practices of the jurisdiction]*

Comment: The manner by which the Act is brought into force will be in accordance with the legislative practices of the enacting jurisdiction.