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CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

ENVIRONMENTAL DEFENCE CANADA

July 8, 2009

Mr. Brent McCurdy
Senior Policy Advisor
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, Ontario
M5G 2K1

Dear Mr. McCurdy:

Re: Strategic Law Suits against Public Participation (SLAPP)

Thank you for meeting with the Canadian Environmental Law Association ("CELA"), Ecojustice Canada ("Ecojustice"), and Environmental Defence ("ED") to discuss the issue of the need for anti-SLAPP legislation in Ontario. At the meeting we provided you with a briefing memo which provides recent examples of civil suits in Ontario which have strong SLAPP overtones. We believe that SLAPP suits are likely to increase in Ontario unless the government passes anti-SLAPP legislation to counteract this trend. At the conclusion of our meeting you had asked us to address the following two issues:

1) Whether the proposed amendments to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 were adequate to address the concerns for SLAPP targets; and
2) How other jurisdictions have struck the balance between the right of individuals to pursue tort lawsuits, in particular, defamation actions and protecting SLAPP targets?

I – PROPOSED AMENDMENT TO RULE 20

We have reviewed the proposed amendments to Rule 20 of the *Rules of Civil Procedure* which are to come into effect in January 1, 2010. It is our view that the proposed amendments will not adequately address the growing phenomena of SLAPP suits in Ontario. The proposed amendments to Rule 20 have expanded the powers of the court in hearing a motion for summary judgment by allowing it to weigh the evidence, evaluate the credibility of a deponent and draw inferences. In addition, the proposed amendments will allow the court to hold a mini-trial. While the amendments significantly improve the current summary judgement regime in Ontario, the legal test which has to be met for summary judgments under Rule 20 remains onerous. In his article, "Strategic Law Suits against Public Participation: Developing a Canadian Response," Professor Chris Tollefson, writes:

> Unfortunately, existing rules of civil procedure do little to assist SLAPP targets to secure speedy dismissal of SLAPP claims. Under the civil rules in most jurisdictions, unless the defendant can

> establish that the claim is "frivolous or vexatious," courts will ordinarily allow the claim to proceed to trial, particularly if the parties disagree on material factual issues. This is a very difficult burden for a defendant to meet, especially prior to having discoveries take place. [Chris Tollefson, "Strategic Law Suits Against Public Participation" (1994) 73 Can. Bar. Rev. 200 at 207-208.]

Despite the proposed amendments, the test for summary judgment under Rule 20 remains the same, namely whether the applicant has established that there is no genuine issue of material fact requiring a trial. This test has been regarded as onerous and one that has been regarded as limiting the effectiveness of Rule 20. In his *Civil Justice Reform Project* report, the Honourable Coulter A. Osborne made the following comments regarding Rule 20:

> The bar reported and ministry statistics confirm that few summary judgments are brought today. A submit committee of the Civil Rules Committee has proposed to replace the current "no genuine issue for trial" test to expand the application of Rule 20. Several have suggested that it is not the test itself but the court's interpretation of it that has limited Rule 20 effectiveness. [Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* (November 2007), online: Ministry of the Attorney General < http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>]

In our view the amendments to Rule 20, alone, are not sufficient to deter the launching of SLAPP suits in Ontario. As Professor Tollefson notes on page 206 of his article,

> Unlike other plaintiffs, a SLAPP filer's main concern is by definition, not monetary compensation or other legal remedy to correct a wrong or grievance. The decision to proceed with a SLAPP is usually a highly tactical one, forming part of a larger strategy… These goals can be achieved without winning a lawsuit or for that matter, carrying it forward to a determination on the merits. [Chris Tollefson, "Strategic Law Suits Against Public Participation" (1994) 73 Can. Bar. Rev. 200 at 206]

SLAPP suits are generally brought by powerful interests against citizens or non-governmental organizations that do not have the financial resources to defend themselves. Consequently, an effective anti-SLAPP strategy must include provisions to deter a party from launching a SLAPP suit and must also provide a mechanism to ensure that SLAPP targets are able to effectively defend the suit.

In this regard, we note that Québec's anti-SLAPP legislation, Bill 9, which was assented to on June 4, 2009, provides that the court can order the SLAPP filer to pay for the costs of the proceeding if a party's financial situation would prevent it from effectively arguing the case. A target of a SLAPP action can also be awarded damages, in addition to costs and in appropriate circumstances the court can award punitive damages. Québec's anti-SLAPP law also gives the Court the power to prohibit the SLAPP filer from instituting legal proceedings without the authorization of the chief judge or chief justice and to hold officers and directors personally liable to pay damages in the event the proceedings are determined to an abuse of process. [TAB 1, Bill 9, *An Act to amend the Code of Civil Procedure to Prevent Abusive use of the Courts and Promote Freedom of Expression and Citizen Participation*, 1st Sess., 39th Leg., Quebec, 2009 (as passed by the Legislature on June 3, 2009) at s. 54.3(5), s.54.4,s. 54.5 and s.54.6]

For the reasons set out above, we are of the view that while the amendments to Rule 20 are a significant improvement of the current summary judgment regime in Ontario, the amendments by themselves will not adequately protect Ontarians against the threat of SLAPP suits. Rather, we need additional

legislative reforms and disincentives in Ontario comparable to those discussed above to discourage SLAPPs from being filed.

II – THE EXPERIENCE IN OTHER JURISIDICTIONS WITH BALANCING DEFAMATION ACTIONS WITH ANTI-SLAPP LEGISLATION

Other jurisdictions have dealt with the conflict between protecting the public from SLAPPs and maintaining the right of individuals to pursue legitimate defamation suits in a variety of ways. Australia's anti-SLAPP legislation, for example, states that the Act does not apply in relation to actions for defamation. At the other end of the spectrum, Minnesota anti-SLAPP law provides for broad immunity for "lawful conduct or speech" aimed in part or in whole at procuring government action. British Columbia's anti-SLAPP legislation provided for a qualified privilege for defamation actions. A number of US states sought to balance these competing rights by requiring the plaintiff to prove that the communication was made with the knowledge that it was false or with reckless disregard that it was false. However, most of the state anti-SLAPP legislation in the US, as well as Québec's Bill 9, does not specifically address actions for defamation.

(a) *Protection of Public Participation Act, 2008* (Australia)

Section 8 of the Act outlines the application of the legislation. It clearly states that Act does not apply in relation to a cause of action for defamation (s.8 (2) (a)). In this way, the Australian legislation severely limits the protection the Act can provide to the public from the threat of SLAPP suits.

[TAB 2, *Protection of Public Participation Act 2008* (S.A.).

(b) *Protection of Public Participation Act,* S.B.C. 2001, c.32 (British Columbia)

British Columbia's *Protection of Public Participation Act*, S.B.C. 2001, c.32 ("*PPPA*") which was repealed on August 16, 2001 dealt directly with the issue of defamation. In describing the purposes of the Act, s.2 (a)(v) stated that in order to encourage public participation, the Act provides "protection from liability for defamation if the defamatory communication or conduct constitutes public participation." Further, under the heading defamation, s.3 states:

> Public participation constitutes an occasion of qualified privilege and, for that purpose, the communication or conduct that constitutes the public participation is deemed to be of interest to all persons who, directly or indirectly,
> (a) receive the communication, or
> (b) witness the conduct

The Act created a new category of qualified privilege for defamation claims and allowed a defendant to bring an application for summary dismissal on grounds that the proceeding was brought for an improper purpose. In order to establish an improper purpose the defendant had to establish that the plaintiff could not have had a reasonable expectation that the proceeding or claim would succeed at trial and that the principle purpose for bringing the proceeding or claim was to dissuade the defendant from engaging in public participation, to dissuade other persons from engaging in public participation, to divert the defendant's resources from public participation to the proceeding or to penalize the defendant from

engaging in public participation. [See Attachment 5, *Protection of Public Participation Act*, S.B.C. 2001, c.32, s.1 (2).

The only case which considered the *PPPA* is *Home Equity Development Inc. v. Crow* in which the British Columbia Supreme Court considered the applicability of the *PPPA*, but for which the court determined that the Act was not in force at the relevant time and its statutory privilege did not apply to the statements at issue. The Court also found that the Plaintiffs had not brought their action for an improper purpose and that the suit did not inhibit the defendants in their comments.

[TAB 3, *Protection of Public Participation Act*, S.B.C. 2001, c.32; TAB 4, *Home Equity Development v. Crow*, [2002] B.C.J. No. 1805].

(c) Minn. Stat. Ann. §554.03 (1994)

Minnesota Anti-SLAPP immunizes "lawful conduct or speech" that is "genuinely aimed" in whole or in part at procuring favourable government actions. Section 554.03 defines public participation as

> Lawful conduct or speech that is genuinely aimed in whole or in part at procuring favourable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of person's constitutional rights.

[TAB 5, Minn. Stat. Ann. §554.03 (1994).]

(d) *Citizens Participation in Government Act,* Ark. Code. Ann., §§ 16-63-501 to 16-63- 508 (2005)

Section 16-503(2) of the Act defines privileged communication as follows:

> 2(a) "Privileged communication" means a communication made:
> (i) In, to, or about an issue of public concern related to any legislative, executive, or judicial proceeding, or other proceeding authorized by state, regional, county, or municipal governments;
> (ii) In the proper discharge of an official duty; and
> (iii) By a fair and true report of any legislative, executive, or judicial proceeding, or other proceeding authorized by state, regional, county, or municipal governments or anything said in the course of the proceeding.
> (2)(b) "Privileged communication" also includes:
> (i) All expressions of opinion or criticisms in regard to any legislative, executive, or judicial proceeding, or other proceeding authorized by state, regional, county, or municipal governments; and
> (ii) All criticisms of the official acts of any and all public officers.
> (2)(c) "Privileged communication" does not include a statement or report made with knowledge that it was false or with reckless disregard of whether it was false.

Section 16-504 further states:

> Any person making a privileged communication or performing an act in furtherance of the right of free speech or the right to petition government for a

> redress of grievances under the Constitution of the United States or the Constitution of the State of Arkansas in connection with an issue of public interest or concern shall be immune from civil liability, unless a statement or report was made with knowledge that it was false or with reckless disregard of whether it was false.

[TAB 6, *Citizens Participation in Government Act,* Ark. Code. Ann., §§ 16-63-501 to 16-63- 508 (2005)]

(e) Del. Code Ann. §§ 8136 - 8138 (1992)

Section 8136(b) of Delaware's Code provides:

> 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.

[Tab 7, Del. Code Ann. §§ 8136 - 8138 (1992)]

(f) Neb. Rev. Stat. §§ 25-21, 242 to 25-21, 246 (1994)

Nebraska's anti-SLAPP statute is markedly similar to Delaware's legislation with respect to defamation. Once again, the onus is on the plaintiff to establish that the communications was made with the knowledge that it was false or with reckless disregard whether it was false. Section 25-21, 244 states:

> (1) In an action involving public petition and participation, the plaintiff may recover damages, including costs and attorney's fees, only if he or she, in addition to all other necessary elements, has 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, if the truth or falsity of such communication is material to the cause of action at issue.

[TAB 8, Neb. Rev. Stat. §§ 25-21, 242 to 25-21, 246 (1994)]

(g) 27 Pa. Consol. Stat., § 7707, §§ 8301-8395 (2001)

In a similar vein, Pennsylvania's anti-SLAPP law provides that immunity from liability is not provided to defendants who have knowingly made false statements. Section 8302 states:

> (a) General rule.--Except as provided in subsection (b), a person that, pursuant to federal or state law, files an action in the courts of this commonwealth to enforce an environmental law or regulation or that makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation shall be immune from civil liability in any resulting legal proceeding for damages where the action or communication is aimed at procuring favourable governmental action.

> (b) Exceptions.--A person shall not be immune under this section if the allegation in the action or any communication to the government is not relevant or material to the enforcement or implementation of an environmental law or regulation and:
> 1) the allegation in the action or communication is knowingly false, deliberately misleading or made with malicious and reckless disregard for the truth or falsity;
> 2) the allegation in the action or communication is made for the sole purpose of interfering with existing or proposed business relationships; or
> 3) the oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation is later determined to be a wrongful use or an abuse or process.

[TAB 9, 27 Pa. Consol. Stat., § 7707, §§ 8301-8395 (2001)]

(h) Tenn. Code Ann. §§ 4-21-10001 to 4- 21- 1004 (1997)

Once again, in Tennessee's legislation, the immunity provided for public participation does not attach if the defendant has knowingly made false or misleading statements. Section 4-21-1003 states:

> (a) Any person who in furtherance of such person's right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency.
>
> (b) The immunity conferred by this subsection shall not attach if the person communicating such information:
> (1) Knew the information to be false;
> (2) Communicated information in reckless disregard of its falsity; or
> (3) If such information pertains to a person or entity other than a public figure, whether the communication was made negligently in failing to ascertain the falsity of the information.

[TAB 10, Tenn. Code Ann. §§ 4-21-10001 to 4- 21- 1004 (1997)]

(i) Other States

A number of other states, including Arizona, California, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Mexico, New York, Rhode Island, and Washington, have some form of legislative protection from SLAPP suits. However, these states do not address defamation in their legislation. Instead, much like Québec's Bill 9, the test for public participation and improper purpose are applied uniformly, despite the nature of the civil action.

As the above examples demonstrate, many US states have directly addressed in their anti-SLAPP legislation the need to balance the individual's right to pursue legitimate defamation actions and the need to protect the public from SLAPP suits. We would caution, however, that anti-SLAPP legislation should not limit itself to only providing for protection against defamation actions but rather should provide protection against all tort claims. The failure to do so will result in SLAPP filers simply commencing a proceeding alleging a variety of other torts as opposed to defamation.

III – CONCLUSION

In Ontario, SLAPPs remain a legally permissible way for private interest to intimidate individuals and stifle citizen participation in the public policy and decision-making process. In order to counteract the growing trend of SLAPP suits in Ontario, the courts need to receive support and direction from the legislature through anti-SLAPP legislation protecting the rights of citizens and groups to engage in public participation.

We note that numerous governments have enacted anti-SLAPP legislation to counter the growing phenomena of SLAPP suits and this has been the case even in jurisdictions where there are strong legal precedents against SLAPP suits. We believe that anti-SLAPP legislation is thus essential to provide a necessary and added level of protection for citizen participation. We, therefore, strongly urge the provincial government to expeditiously enact anti-SLAPP legislation to address the SLAPP phenomenon and take measures to protect Ontarians right to participate in the democratic process.

Yours truly,

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