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6 August 2010

VIA E-Mail ONLY

Ms Mayo Moran
Chair
Strategic Litigation Against Public Participation Advisory Panel
c/o SLAPP Suggestions
720 Bay Street, 7th Floor
Toronto, ON
M7A 2S9

Dear Ms Moran:

Re: Potential Strategic Litigation Against Public Participation Legislation

The Anti-SLAPP Advisory Panel requested submissions from organizations, including PIAC, and the public to assist them in successfully discussing what the potential content of Ontario legislation against strategic litigation against public participation (SLAPP) should include. PIAC has extensively studied this subject matter, evidenced by its 2004 report titled "Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada", in which PIAC provided rationale for the passage of Anti-SLAPP legislation.[1]

In this submission, PIAC, after having thoroughly analyzed existing relevant materials on this phenomenon, recommends several elements that effective Anti-SLAPP legislation should contain. Recommendations particularly stem from analysis of merits and pitfalls of the following sources: *the Uniform Prevention of Abuse of Process Act* adopted by the Uniform Law Conference of Canada, *Model Act on Abuse of Process* discussed at the Uniform Law Conference of Canada, Ontario Bill 138, and Quebec Bill 9.

Ontario Bill 138 Provides Framework for Anti-SLAPP Legislation

PIAC believes that Ontario Bill 138 is a suitable model for potential provincial Anti-SLAPP legislation as it is applicable both to court and administrative proceedings and, most importantly, because in addition to other useful provisions, it contains the "improper purpose" test that would facilitate quick dismissal of a proceeding containing elements of a SLAPP.

[1] Lott, Susan, "Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada" (PDF) (2004) Public Interest Advocacy Centre, Ottawa.

However, PIAC also believes that legislation, in addition to containing provisions delineated in Bill 138, should include a provision on defamation actions launched by a corporation, which was proposed in the *Model Act on Abuse of Process*, particularly section 8B, which created a legal presumption that a defamation action is not open to a corporation.

Moreover, PIAC believes that Anti-SLAPP legislation should be accompanied by provisions that effectively provide victims of a SLAPP their full legal costs. Therefore, PIAC suggests that provisions in Bill 138 on legal costs to be modified to guarantee full indemnification to a party that has proven to the court or administrative tribunal the existence of a SLAPP. Furthermore, PIAC, as it has proposed in its 2004 report, recommends the establishment of a fund or access to legal aid that would help parties believed to be victims of a SLAPP to meet their legal costs once the lawsuit has been launched against them.

Finally, PIAC argues that sections 6 and 7 described in the *Uniform Prevention of Abuse of Process Act* should be included in legislation that would primarily be modeled after Bill 138. Notably, sections 6 and 7 of the Uniform Act provide the court or tribunal with discretion to prevent the party bringing a SLAPP suit from using its financial leverage to silence opponents by securing a settlement, pursuing mediation or arbitration or appealing a proceeding where it has been proven that the proceeding contain elements of a SLAPP.

PIAC believes that by taking into account recommendations proposed in this submission, Ontario Anti-SLAPP legislation would be effective in preventing proceedings launched to silence those engaged in public participation and in permitting only meritorious lawsuits to proceed.

PIAC's Specific Reasons for Adopting Ontario Bill 138, Subject to Some Proposed Modifications and Additions

The Statutory Right to Public Participation

It is essential for Anti-SLAPP legislation to contain definition of public participation, especially since Canadians, unlike their U.S. counterparts, do not enjoy constitutionally protected right of free speech. This right is explicitly guaranteed, however, in the *Uniform Prevention of Abuse of Process Act*. Specifically, the Act contains a broad definition of "public participation" described as "lawful communication or conduct".[1] Moreover, the definition does not list specific exceptions to communication that would qualify as public participation; such a broad definition provides real protection to Canadians when they exercise their right to public participation. PIAC believes that definition of public participation delineated in the *Uniform Prevention of Abuse of Process Act* should replace the one outlined in Bill 138,

[1] *Uniform Prevention of Abuse of Process Act*, 2010, s.2.

which does contain specific exceptions to public participation.[1]

Qualified Privilege

Bill 138 contains an important explanatory note which underscores that public participation qualifies as an "occasion of qualified privilege".[2] Such provision should be included in Ontario Anti-SLAPP legislation as it would provide those that engage in public participation with an appropriate defence to defamation actions. In other words, the defendant would not be found liable if he or she establishes that the communication was not accompanied by malice and fell under the definition of public participation delineated in the Act.

Dismissal of a Proceeding through the Use of "Improper Purpose" Test

Section 4(1)(a) of the *Uniform Prevention of Abuse of Process Act* states the following:

> 4(1) On receipt of an application alleging an abuse of process, or on its own motion, if the court is satisfied that there has been an abuse of process, it may do one or more of the following:
>
> (a) dismiss or stay the proceeding;

It should be noted that the section also enables the court and tribunal to undertake other actions in addition to dismissing or staying the proceeding.

The Act states that the definition of "abuse of process" includes the following:

> (a) a claim or pleading that is clearly unfounded in fact or in law;
> (b) conduct that is frivolous, vexatious or intended to delay;
> (c) a claim made, or a proceeding brought or conducted, in bad faith;
> (d) the use of procedure that is excessive or unreasonable or that causes undue prejudice to another person or attempts to defeat the ends of justice; and
> (e) an attempt to restrict public participation by any person.[3]

It is clear that the aforementioned definition of "abuse of process" does not provide the court or tribunal with a helpful test that can be used to quickly recognize and dismiss a SLAPP suit. Moreover, what is absent is the definition or explanation of such terms as "bad faith" and "defeat [of] the ends of justice". PIAC instead recommends the adoption of "improper purpose" test, which was proposed in Ontario Bill 138. Under this test, a defendant requesting the dismissal of the case, on the balance of probabilities, has to convince the court or tribunal that:

> a) the communication or conduct in respect of which the proceeding or claim was brought constitutes public participation; and
>
> b) a principal purpose for which the proceeding or claim was brought or maintained is an improper purpose.[4]

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[1] Bill 138, *Protection of Public Participation Act*, 1st Sess., 39th Parl., 2008, cl. 1(1).

[2] Bill 138, *supra* note 3, explanatory note.

[3] *Uniform Prevention of Abuse of Process Act*, *supra* note 2, s. 2.

[4] Bill 138, *supra* note 3, cl.5(1).

The Bill contains guidelines as to when the proceeding or claim could be brought for an improper purpose, which is reproduced below:

a) the plaintiff could have no reasonable expectation that the proceeding or claim will succeed; and

b) a principal purpose for bringing the proceeding or claim is,

   i. to dissuade the defendant from engaging in public participation,
   ii. to dissuade other persons from engaging in public participation,
   iii. to divert the defendant's resources from public participation to the proceeding, or
   iv. to penalize the defendant for engaging in public participation.[1]

In other words, the defendant would succeed only on the condition that he or she would be able to prove the two elements of the "improper purpose" test. If the defendant fails to prove one element, then the main lawsuit would proceed. Thus, the "improper purpose" test does not give leverage to any of the parties involved in the proceeding but in fact takes into account interests of those that do believe that the proceeding is a SLAPP suit and interests of those that have reasonable expectation that their claim would succeed and that the principal purpose of the claim is not improper.

Moreover, Bill 138 contains a provision which requires the court or tribunal to hear such application "not more than 60 days after the date on which the application is brought, and not less than 120 days before the date scheduled for the trial or hearing of the proceeding" in order to avoid further process, such as mandatory mediation or other procedural steps, or indeed to avoid delay of the main trial or hearing of the proceeding, should it be permitted to proceed. Such a time limitation is important to avoid the spectre of an action hanging over the head of a defendant while encouraging timely bringing of an application for dismissal of a SLAPP.

Mandatory Full Indemnification After Dismissal of the SLAPP Proceeding

The *Uniform Prevention of Abuse of Process Act* as well as Bill 138 state that once the defendant has succeeded in convincing the court or tribunal that the proceeding constitutes a SLAPP suit, the court or tribunal *may* order the plaintiff to pay "all reasonable costs and expenses incurred by the applicant." What this provision suggests is that it is up to the discretion of the court or tribunal to grant "solicitor and client" costs to the defendant and that there could still be a possibility that the defendant would end up with being awarded "party and party" costs.

[1] *Ibid.* cl. 1(2).

It is recommended that Anti-SLAPP legislation should include a provision that would guarantee the defendant "full indemnification" once he or she has proven the existence of a SLAPP suit. Needless to say, the financial burden of bearing such onus is immense and should be fully alleviated for a defendant that is lawfully engaged in public participation.

Proposal for an Establishment of a Fund

In PIAC's 2004 report on the SLAPP phenomenon, it was emphasized that one of the main negative consequences of a SLAPP is the looming financial pressure that it imposes upon defendants to a proceeding. As it was stated in the report,

> the implication of cost awards for SLAPP targets is that the financial pressure brought to bear on defendants is more relevant at the beginning of the SLAPP action, not at the end, when cost determinations are typically made. Finding the resources to mount a defence can be insurmountable for many defendants. Filing an interlocutory injunction to set aside the chilling effect of a lawsuit and seek anti-SLAPP relief requires legal resources that would be beyond the reach of most citizens' fiscal means.[1]

The report recommended the establishment of a fund or access to legal aid for someone subjected to a SLAPP. To be eligible for resources of such fund, the person would have to show that there is a realistic possibility that the proceeding contains elements of a SLAAP suit. As the report further recommended, any cost awards to the defendant of a SLAPP suit who received funding to defend the suit could be returned to the Anti-SLAPP fund.

Other Remedies

Security for Costs

Both *Uniform Prevention of Abuse of Process Act* and Bill 138 give the court or tribunal discretion to order the plaintiff to provide security for costs if the court is satisfied that a proceeding is accompanied by an abuse of process or if there is "a reasonable concern of abuse of process."[2] Ontario Anti-SLAPP legislation should contain such provision to permit the court to ensure responsible pursuit of lawsuits that may have aspects of a SLAPP suit, in particular where the corporate plaintiff may be a corporation created solely for the purpose of a particular development and may be devoid of any real assets to satisfy a costs order made against it.

Personal Liability of Directors and Officers

Quebec's *Uniform Prevention of Abuse of Process Act* includes a section on personal liability of directors and officers who authorized the corporation to launch an action which was proven to contain elements of a SLAPP suit. The Act also emphasizes that those directors and officers who did not formally authorize such action would not be ordered to pay damages. It is recommended for such provision to be included in

[1] Susan Lott, *supra* note 1, at 57.

[2] *Uniform Prevention of Abuse of Process Act*, *supra* note 2 s. 4(2). See also Bill 138, *supra* note 3, cl. 5(3) and (4).

Anti-SLAPP legislation in Ontario to dissuade the use of SLAPP suits for the quelling of legitimate public participation and to encourage that only well-considered lawsuits are put forward by corporate entities.

Other Recommendations

Defamation Action Initiated by a Corporation

The *Model Act on Abuse of Process* contained two provisions on liability of corporations engaged in a SLAPP suit. Specifically, section 8A states that "a for-profit corporation with 10 or more employees has no cause of action for defamation in relation to the publication of defamatory matter about the corporation." An alternative to such provision, 8B, states the following:

> 8B. (1) The presumption that an action lies for defamation does not apply to a corporation [legal person].
> (2) When defamation is proved, a corporation [legal person] must prove damages.

PIAC recommends the inclusion of a modified version of section 8B to Anti-SLAPP legislation, since the approach suggested in 8A does not successfully prevent lawsuits intended to silence opponents by a corporation that employs fewer than 10 employees but whose defamation claims contain elements of a SLAPP suit.

However, Section 8B does have some imperfections as drafted. We note that the proposed subsection (2) directing that actual damages must be proven to be recovered is not applicable to a situation where a corporation is simply barred from maintaining a defamation action.[1] As a result, we recommend a redrafting of this provision to bar corporate defamation actions outright where the defamation defendant can show on the above test that there is an element of a SLAPP suit in the defamation action. This means that an individual defendant (a real, not legal person) could still maintain a defamation suit, but would have to navigate the anti-SLAPP defences detailed above.

Settlement or Discontinuance Effective only on Approval

Section 6 of the *Uniform Prevention of Abuse of Process Act* states the following:

> 6. Once an application to dismiss a proceeding has been initiated on the ground of an abuse of process, and until the court has made a final order with respect to that application, any settlement or discontinuance of that proceeding is effective only on approval by the court.

This section is intended to prevent the plaintiff from potentially silencing the defendant who has engaged in public participation by securing a settlement upon unfair terms, which may include settlement terms that negate the effect of the Anti-SLAPP legislation, or otherwise has been obtained by misrepresentation

[1] If we have misconstrued the proposed intent of this section, and the intent is to place a requirement for a corporation to seek special permission to proceed from the court with a defamation action, then the limitation of damages to actual damages makes sense. We suggest contacting the drafters of the Model Act to discern their intent with section 8B.

or improper pressure. PIAC views this safeguard as necessary to preserve the intent of the Anti-SLAPP legislation and to protect public interest defendants..

Enforcement not stayed by appeal

PIAC also believes a similar function is achieved in section 7 of the *Uniform Prevention of Abuse of Process Act*, which ensures that even in the case of an appeal filed by the party against "enforcement of a judgment by the court with regard to an abuse of process", the party awarded damages may still be permitted to execute the judgment, subject to discretion of the court or tribunal. Such provision would dissuade the plaintiff who has launched a SLAPP to delay fulfilling orders of the ruling by simply appealing the Anti-SLAPP application order or by initiating further proceedings.

Conclusion

PIAC concludes that there is a real need for the passage of Ontario Anti-SLAPP legislation. PIAC also believes that potential Anti-SLAPP legislation should be modeled after Ontario Bill 138, subject to some changes. Bill 138 pertains both to court and administrative tribunal proceedings. Furthermore, it contains an effective "improper purpose" test to facilitate quick dismissal of a SLAPP suit and appropriately provides defendants engaged in public participation with qualified privilege defence against a SLAPP. PIAC, however, suggests some important additions and modifications to Ontario Bill 138. Specifically, PIAC believes that provisions which would ensure both mandatory full indemnification after dismissal of a SLAPP proceeding and establishment of a fund for persons who believe that they are victims of a SLAPP to be included in Anti-SLAPP legislation. Furthermore, provisions which would prevent corporations from launching a SLAPP suit while permitting those that are meritorious to proceed should also be part of Anti-SLAPP legislation.

PIAC wishes to participate further in oral consultations. PIAC would also like to remind the government of Ontario that since this was an unfunded consultation, PIAC has found it to be challenging to solely rely on its limited resources to provide its submission to the Anti-SLAPP advisory panel. PIAC was fortunate to rely upon its previously researched materials, principally upon its 2004 report on this subject matter, to produce this submission. However, in the future, the government should consider providing funding for organizations with the mandate similar to PIAC's when requesting their participation in public interest consultations.

Sincerely,

Original signed

John Lawford