

Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada

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Executive Summary

This report examines the phenomenon of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada. SLAPPs are lawsuits or the threat of a lawsuit, directed against consumers or individual citizens when they publicly criticize products or services or advocate for change. The lawsuit usually takes the form of an action for defamation.

The purpose of a SLAPP is to intimidate the target of the lawsuit into silence. By moving a dispute into the legal arena, the consumer is immediately placed on the defensive for exercising a right to complain and faced with the prospect of legal costs as well as potential liability if the suit is lost. As a result, many SLAPPs may fly under the public radar, as the threat of a SLAPP may intimidate its target into withdrawing the public complaint or criticism.

The report describes a number of lawsuits or threats of a lawsuit in Canada that fit the definition of a SLAPP. This evidence suggests that SLAPPs are very much a Canadian phenomenon and have been initiated against consumers for public criticism of products or services as well as against individuals for advocating on environmental issues.

The report briefly analyses the constitutional questions raised by SLAPPs and draws comparisons to the constitutional and judicial treatment of SLAPPs in the United States. Targets of SLAPPs and some legal analysts have suggested that SLAPPs infringe on the freedom of expression rights outlined in the Canadian *Charter of Rights and Freedoms*. Unlike the United States, legal actions between non-governmental parties (which is the form of most SLAPPs) have not had the protection of the *Charter*. The report examines two cases that have made strong statements about the consumer's right of free speech, suggesting that there may be a widening of the application of the *Charter* to cases involving consumer free speech.

Finally the report examines legislative responses to SLAPPs in Canada and the United States. A number of U.S. states have enacted anti-SLAPP legislation. Canada has a much more limited experience with anti-SLAPP legislation. British Columbia is the only province to have enacted anti-SLAPP legislation, which is was in force only for a short period before repeal by an incoming provincial government.

The report concludes by suggesting that SLAPPs require a legislative response. The evidence suggests that the SLAPP phenomenon is very much alive in Canada. An understanding of the purpose behind SLAPPs and the nature of the legal process indicate that judicial responses are not adequate to protect consumers from the damaging effects of SLAPPs. Because SLAPPs ultimately engage the critically important right of freedom of expression, a legislative response is warranted.

The report offers some analysis of what the components of anti-SLAPP legislation in Canada should contain. Such components would include: mechanisms for early dismissal of a SLAPP, a mandatory cost provision for successful defendants of SLAPP suits on a solicitor and client basis, providing a defence to defamation actions and defining a right of public participation.

Introduction

What happens to consumers or individual citizens when they publicly criticize corporations and/or their products or services or advocate for change? One development that PIAC has recently become aware of is a lawsuit or threat of a lawsuit by the subject of the complaint or criticism. These actions are called Strategic Lawsuits Against Public Participation, (SLAPPs) and were first described by two American legal theorists in the late 1980s.

SLAPPs are an explicitly political use of defamation and other tort actions for political or economic purposes. SLAPPs are defined as:

...suits without substantial merit that are brought by private interests to stop citizens from exercising their political rights or to punish them for having done so. SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defence.¹

The key aspect of the SLAPP, to force individuals into costly litigation, suggests that overall success of a SLAPP does not necessarily require a legal victory but a political one: to intimidate and to suppress criticism.

Corporate and institutional interests derive immediate benefits by moving the dispute into the legal arena, because of the economic imbalance between those who bring the suits and their targets. It immediately puts the consumer (or public interest organization) on the defensive and places their actions under scrutiny, even where they have merely exercised their right to complain. The consumer is faced with the prospect of legal costs and potential liability if the suit is lost and legal costs even if they prevail in the lawsuit. The legal suit diverts attention from the issue that originally gave rise to the dispute and, through legal delay, allows the initiator of the suit to achieve the larger goal of silence around the disputed issue.

¹ *Gordon v. Marrone*, 590 N.Y.S. 2d 649 (1992) at 656.

A key element of the proper functioning of the marketplace is the ability of consumers to freely exercise their rights to choose between products and services and to express their satisfaction or dissatisfaction with those same products or services through consumer complaint mechanisms. This is one major way in which products or services succeed or fail in the market. SLAPPs effectively undermine the marketplace by strangling or silencing the consumer's ability to properly participate in the market.

The Supreme Court has recently affirmed rights of freedom of expression of consumers "to criticize a product or make negative comments about the services supplied" and has further affirmed that this right may take the form of "counter-advertising" by the consumer in *Roger Guignard v. City of Saint-Hyacinthe*.²

This decision considered the important principle of freedom of expression, which is usually not available for consideration in most SLAPP suits. *Guignard* involved a government actor as a party to the dispute, which meant that the freedom of expression provisions of the *Canadian Charter of Rights and Freedoms*³ could be considered in this case. However, most SLAPPs involve common law litigation between private parties, where the *Charter* has been deemed not to apply.⁴

Unfortunately this decision does not appear to have had any influence on corporate retaliation against consumers exercising their right to complain, as some of the Canadian SLAPP examples indicate.

² *Roger Guignard v. City of Saint-Hyacinthe*, [2002] SCC 14 [*Guignard*].

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

⁴ See *R.W.D.S.U. v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573 and see discussion *infra* this report re Canadian constitutional protections and SLAPPs.

There is currently no federal or provincial legislation that protects consumers against SLAPPs. Furthermore, the defendants are often unable to afford the costs of legal representation in the face of such litigation.

This report will assess the status of SLAPPs in Canada and evaluate the need for the development and advocacy of legislative reforms that would facilitate early identification and dismissal of SLAPPs, reduce the economic burden of defending against SLAPPs and create economic disincentives to the filing of SLAPPs. Such legislation would require recognizing a statutory right of public participation on matters of 'public policy', broadly defined, that has legal force in dealings both with government and 'private' parties. It would also prescribe remedies available to persons who believe their statutory right to participate is being threatened by a SLAPP suit, such as a special pre-trial motion to have the suit dismissed

This report will begin assessing the nature of a SLAPP suit. It will also look at examples of SLAPPs in Canada, in an attempt to assess the extent to which SLAPPs are a Canadian phenomenon. The report also briefly examines SLAPPs in the United States and legal and legislative responses in various U.S. jurisdictions. Finally, the report will look at Canadian legislative responses to SLAPPs and recommend what a legislative regime in Canada, if any, should contain.

What is a SLAPP?

There are some defining characteristics of SLAPPs that distinguish them from business-related litigation. The American theorists who initially defined the phenomenon, Canan and Pring, set out four defining factors of a SLAPP suit:

- 1) It is a civil claim for monetary damages;
- 2) It is filed against nongovernmental individuals or organizations;

- 3) It is based on advocacy before a government branch official or the electorate;
and
- 4) The advocacy is about a substantive issue of some public or societal
significance.⁵

There is debate about how broadly or narrowly the definition of SLAPPS should be construed. One commentator suggests that this definition is too broad and therefore risks including lawsuits where the plaintiff may be genuinely motivated by legitimate reasons, which would not fit the definition of a SLAPP suit. The plaintiff's objective may not be to directly silence the defendant, although the result of the activity may have this effect. A definition that is too broad may also wrongly include situations where the defendant is motivated by malicious reasons.⁶

Another commentator suggests that Canan and Pring's model is too narrowly defined by its focus on describing the defendant's objectives in petitioning the government. A definition of a SLAPP requiring a public interest motive on the part of the defendant excludes lawsuits where the motive might be construed as self-interest, but still would meet the definition of a SLAPP. This commentator argues that the definition of a SLAPP should instead focus on the plaintiff's motives for initiating the lawsuit. This argument asserts that the critical aspect of a SLAPP is the element of surprise by the SLAPP filer whose motive is to intimidate the target of the SLAPP suit.⁷

The issue of how to define SLAPPS is an important one, because it determines what expressive activities by citizens should be afforded protection from litigation

⁵ Penelope Canan & George W. Pring, "Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches" 22 *Law & Soc'y Rev.* (1988) 385 at 387.

⁶ Thomas A. Waldman, "SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation" 39 *UCLA Law Rev.* 979 at 1044.

⁷ Victor J. Cosentino, "Strategic Lawsuits Against Public Participation: An Analysis of the Solutions: (1991) *Cal. W.L. Rev.* 399 at 400-401.

by the courts or by legislation. Examination of the U.S. judicial treatment of SLAPPs, which has mainly centered on the determination of what constitutes a SLAPP, provides some guidance as to how other jurisdictions have drawn the line.

It is important to note at the outset, that measuring the existence of the SLAPP phenomenon in any jurisdiction is very difficult because the purpose of threatening a SLAPP suit will generally be to silence the critic. The result is that many SLAPP threats may be effective and do not necessarily develop into lawsuits. As a result, the focus only on SLAPPs that proceed to litigation or threatened SLAPPs that are reported in some kind of public forum (such as the Internet) may represent a significant underreporting of the phenomenon.

Canadian SLAPPs

SLAPPs as a Canadian phenomenon were first recognized and discussed in the environmental context in the early 1990s, when corporations involved in economic activities in British Columbia, viewed as having important environmental impacts sued or threatened to individuals and groups advocating on behalf of environmental issues.⁸

However, the SLAPP phenomenon has not been confined to environmental matters in Canada. The first judicial recognition of a SLAPP was made in the context of citizens advocating about a municipal zoning issue. There are also cases, described below, involving lawsuits or the threat of lawsuits initiated against consumers. Courts have also considered the constitutionality of consumer boycotts and lawsuits have been threatened against consumers who have made public their complaints about products or services.

⁸ Chris Tollefson, "Strategic Lawsuits against public participation: developing a Canadian response" (1994) 73 Can. Bar Rev. 200 at 201-02

The following summaries of SLAPPs or threatened SLAPPs in Canada (in no particular order) are not meant to be nor do they represent an exhaustive account of Canadian SLAPPs. They are merely an attempt to determine and describe the nature of the SLAPP phenomenon in Canada.

Norampac

Individual citizens publicly expressing concerns about a company's use of a toxic chemical were threatened with a libel suit, the characteristics of which fit the purposes of a SLAPP. In the late 90's, a number of Eastern Ontario townships were using a chemical called Dombind on their dirt roads as a dust suppressant. Dombind is made from pulp mill waste and contains chemicals such as dioxin. Dioxin has been stated to be a serious public health threat by the U.S. Environmental Protection Agency. Exposure to this chemical has the potential to produce a range of harm to human life, from adverse effects on reproduction, to suppression of the immune system, to cancer.

Some local residents learning of this use became concerned about the effect of the chemical on human and wildlife reproductive health. These individuals and organizations such as the World Wildlife Federation, organized a massive publicity campaign to ban the use of Dombind in Eastern Ontario.

As a result of their involvement in these activities, five individuals were threatened with a libel suit. The individuals involved received letters from Norampac's (the manufacturer of Dombind) lawyers. The letters stated that if they did not retract the negative statements they had made about Dombind in every paper in Southern Ontario, *and* refrain from mentioning Norampac's name publicly in the future, they would be sued for defamation.⁹

⁹ Tom Spears, "Pulp mill 'intimidating' opponents with libel suit" *Ottawa Citizen* (23 March 1999) A5 and interview with Pat Potter, July 14th 2003.

Norampac's threats had the desired impact of a SLAPP suit. It silenced all but one of the targeted individuals. Four of the recipients of the letters ceased their involvement in the campaign against Dombind, fearing the risk of losing all of their assets in a battle against a Norampac. These four individuals did not, however, print the requested retractions.

One of the five, Pat Potter, who indicated that she couldn't afford a lawyer, refused to back down. Ms. Potter estimated that it would have cost her \$30,000 to \$40,000 to print the retractions, and was confident that her allegedly defamatory statements were true. Thus she elected to confront Norampac's lawyer directly.¹⁰

Ultimately Ms. Potter did not print the retractions, and continued her campaign against the use of Dombind. With respect to the other four individuals, Ms. Potter stated, "We were all safe...they just weren't confident about taking on a major corporation". This statement proved correct. After receiving the initial letter from Norampac, none of the would-be defendants received any further communication from them.

Ultimately, the government vindicated the position taken by local residents and environmental advocacy groups on Dombind. The Ontario Ministry of Environment ordered the elimination of the use of Dombind by October 31, 2002. The Ontario Court of Appeal ultimately upheld this decision, which had been challenged by Norampac in the courts five times, on February 22, 2002.¹¹

This case illustrates one of the important features of SLAPPs, to target those without the financial and political resources to counter a lawsuit. Norampac did not target three former Ontario Environment Ministers who had sent an open letter calling for a ban on Dombind, nor did they threaten to sue the World

¹⁰ Interview with Pat Potter, July 14th 2003

Wildlife Fund, despite the fact that this organization was leading the anti-Dombind campaign.¹² This conforms to the intent of a SLAPP suit, which is not about the merits of the claim and therefore a determination of all relevant defendants, but about a larger political purpose to effectively silence those without the political or financial means to counter the threatened action.

Fraser v. Saanich

A British Columbia case involving the public's response to a hospital closure is notable for the identification by the judge who decided the case that the lawsuit was a SLAPP. This case is very important because it is the first time that a Canadian court has addressed and decided on the issue of what constitutes a SLAPP suit.¹³

In 1997, funding for a long-term care facility was cut in a municipality in British Columbia, and all of its patients were moved to neighboring hospitals. The sole shareholder and director of the hospital, Fraser, then sought to sell the building. In response, a number of concerned citizens requested that the District of Saanich downzone the property or have the hospital be designated a heritage building. Although the District of Saanich did not comply with their latter request, they agreed to downzone the property.

Fraser then initiated a claim against the Saanich residents and the Corporation of the District of Saanich for interference with lawful contractual relations, conspiracy, collusion and bad faith. Fraser claimed that residents' communications with the District of Saanich had interfered with her ability to sell her hospital.

¹¹ Ministry of the Environment, News Release, "Court of Appeal Upholds Ministry's Decision to End Dombind Spreading this Year" (22 February 2002).

¹² Tom Spears, *supra* note 9.

¹³ Brad Daisley, "B.C. 'Slapp' ruling a landmark case, expert says" *The Lawyers Weekly* (11 February 2000).

At trial the judge dismissed the statement of claim, stating that it was “plain and obvious” that it disclosed no reasonable claim. He also affirmed that the suit was a SLAPP suit and noted the importance of the community being able to express their views on matters of public concern:

Signing petitions, making submissions to municipal councils and even the organization of community action groups are sometimes the only avenues for community residents to express their views on land use issues... This type of activity often produces unfavourable results for some parties involved. However, an unfavourable action by local government does not, in the absence of some other wrongdoing, open the doors to seek redress on those who spoke out in favour of that action. To do so would place a chilling effect on the public’s participation in local government.¹⁴

In finding that the lawsuit was a SLAPP suit, the judge awarded special costs against the plaintiff:

A SLAPP suit is a claim for monetary damages against individuals who have dealt with a government body on an issue of public interest or concern. It is a meritless action filed by a plaintiff whose primary goal is not to win the case but rather to silence or intimidate citizens who have participated in proceedings regarding public policy or public decision making... I find, therefore, finally, that this action not only contains an unreasonable claim, is meritless and devoid of any factual foundation, but also has been used as an attempt to stifle the democratic activities of the defendants, the neighborhood residents. I find the plaintiffs' conduct reprehensible and deserving of censure by an award of special costs.¹⁵

New Brunswick Power Defamation Suit

In 1996, the Atlantic Institute for Market Studies (AIMS), a Canadian think tank, published a critical analysis of New Brunswick (NB) Power’s performance before a legislative committee. Tom Adams, the executive director of an Ontario-based utility watchdog called Energy Probe, wrote the analysis. In response, NB Power initiated a court action against AIMS board members, Energy Probe and Tom Adams. NB Power claimed that the article was “maliciously calculated” to damage the public reputation of the utility and its president, James Hankinson.¹⁶

¹⁴ *Fraser v. Saanich (District)*, [1999] B.C.J. No. 3100 (QL) at para. 43.

¹⁵ *Ibid.* at para. 49, 52.

¹⁶ “Sharp words don’t warrant a harsh SLAPP” *Telegraph Journal* (10 April 1997) online: <http://www.energyprobe.org/energyprobe/print.cfm?ContentID=392>

The lawsuit, which was described by the media as a SLAPP suit¹⁷, had the intended effect of such a suit, by silencing some of the public criticism. AIMS responded by standing by the substance of the article but agreed to retract all apparent references to Mr. Hankinson's personal capabilities. They also printed a three-paragraph apology to Mr. Hankinson. NB Power then dropped their suit against AIMS.

Tom Adams and Energy Probe, on the other hand, decided to fight the lawsuit. Mr. Adams stated, "Our organization is a tiny little consumer environmental charitable foundation. We're going to defend ourselves, but having full weight of a controlled utility's unlimited legal budget against us cause some serious concern here."¹⁸

After Mr. Adams filed a defence NB Power did not pursue their suit against Mr. Adams and Energy Probe, suggesting that the purpose of the lawsuit had effectively been intimidation, not legal redress.

Inter.net Canada

As a result of problems concerning payments with her Internet service provider (ISP), Nancy Carter decided to cancel her account over the phone. She later discovered that during the period of the dispute over payment, her email account had been placed under suspension but that ISP had kept the account open, absorbing all email directed to her personal account onto their server. In order to get access to this email, Carter was told that she would have to pay the disputed account amount. She was also told that if she cancelled her account, the email

¹⁷ *Ibid.* The article states: "This publicly-owned utility was not seeking legal redress or the righting of some profound wrong. It's purpose here was to frighten and intimidate an agency critical of its policies by applying pressure at its most vulnerable point...The tactic has been given a name in legal circles – a SLAPP (Strategic Litigation Against Public Participation) suit."

¹⁸ Interview with Tom Adams, May 6th 2003.

absorbed into the account would be destroyed after 30 days. Carter then sent a letter to the ISP canceling her contract but asking them to hold her account in suspension in order to avoid the 30-day time limit coming into play. She was then informed that her account would be opened for her to retrieve all outstanding email and then would be shut down permanently. In retrieving the email, Carter discover that she had missed an email informing her of an upcoming job opening, and missed an opportunity to apply for the job.

Carter then filed a complaint with the Privacy Commissioner that the ISP's actions concerning her personal email account violated the *Personal Information Protection and Electronic Documents Act*.¹⁹ Ultimately the commissioner found that the ISP's policy of withholding email for suspended accounts was not clear enough to obtain informed consent for use of personal information and that her complaint was well founded.²⁰

The ISP threatened Carter with a lawsuit as a result of having contacted a number of organizations to inform them of the dispute and the Privacy Commissioner's findings. Carter indicates on her website what the letter from the ISP's lawyers stated:

[B]ecause I had brought my complaint "to the attention of various associations or governmental bodies such as the Canadian Association of Internet Providers, Industry Canada, the federal Privacy Commissioner and the federal Department of Justice" and that these actions are "clearly abusive and constitute harassment of our client". He goes on to tell me that Inter.net Canada Ltd. "will take action against you to recover any and all damages that it will suffer as a result of your actions."²¹

Carter indicated that she viewed making her complaint public as the right of a consumer to bring a matter of public interest to the public and to inform other consumers:

¹⁹ *Personal Information Protection and Electronics Document Act*, 2000 c.5.

²⁰ Office of the Privacy Commissioner of Canada, *PIPED Act Case Summary #66* (28 August 2002) online: <http://www.privcom.gc.ca/cf-dc/cf-dc_020828_e.asp>

²¹ Online: <<http://www.efc.ca/carter.html>>

While I certainly understand why Inter.net Canada Ltd. would want to have the circumstances of my dispute withheld from the public eye, nevertheless it is my right to bring this issue to both government and public attention (through media). This is one of the key ways effective marketplace discipline is achieved: by informing other consumers of my experience and by bringing gaps in legislation to the attention of appropriate branches of government. Defamation and libel law prohibit use from harming another by lying, not from bringing forward facts.²²

In 2002 Carter filed an application in Federal Court for compensatory and punitive damages against the ISP. In June of 2003 the case was discontinued; Carter settled out of court with the ISP and received compensation for the damages she had sustained as a result of their withholding her emails. Inter.net also agreed to not to pursue their threats of litigation.

Future Shop™

A consumer, who had had a negative experience with a retail electronics store, publicized his and other consumer's complaints on the Internet and was threatened with a series of lawsuits by the company.

Mark Prince had initially posted his complaint about his experience shopping at Future Shop™, to an electronic newsgroup and received a large volume of feedback from other consumers detailing their own shopping experiences with the store. As a result, Mr. Prince decided to design and host a web site inviting consumers to submit their shopping experiences, both positive and negative, in Future Shop stores. The site quickly came to Future Shop's attention and their lawyers threatened to sue Mr. Prince for defamation.

On the advice of lawyers, Mr. Prince decided to shut down the site:

The advice generally all around was to pull the site, unless I wanted a huge rack of legal bills on my hands. It would all be a matter of proving not only did I not make up these stories, but proving that third parties who wrote

²² *Ibid.*

them were typing the 100% truth.²³

After pulling the site, Mr. Prince received a large number of emails asking him what had happened to the site, so he decided to put up a web page on his personal web site, explaining that Future Shop's legal threats had caused him to shut down the website. Some months later, Future Shop's lawyers wrote him a letter stating "... if the defamatory and malicious falsehoods contained in the article are not removed by 3:00pm (today) Future Shop will commence legal proceedings against Mark Prince."

This second threat caused Mr. Prince to disable the web page:

I didn't have any falsehoods in that solitary web page. It was my experience with the company, my experience with the website, and the legal threats I received.

But I didn't have a choice. They also contacted my site host and included them in the legal threat...Meantime, I couldn't get legal advice by 3pm, so I pulled the page (again).

I was extremely angered by this action. But I felt helpless. I didn't have the money to mount a big legal case, and I didn't have much support from the "contributors" to the Futile Shop web page. The company knew it could bully me into pulling the page – I make this assumption based on the early morning fax, on a Friday, and the less than 9 hour time limit on removing the web page.²⁴

Two years later, the Canadian Broadcasting Corporation (CBC) contacted Mr. Prince about doing a story on his web site experience with Future Shop. Mr. Prince stated that he was prompted to the story because the CBC reporter had indicated to him that Future Shop management had claimed no knowledge as to why Mr. Prince's web site had been pulled.²⁵ The story aired on the CBC television show, *Marketplace*, on October 26, 1999.

²³ Mark Prince, "The Story of the Futile Shop Web Page" (27 October 1999) online:

<http://www.spiffle.com/rants/10-27-1999_08-55am>

²⁴ *Ibid.*

²⁵ *Ibid.*

Mr. Prince indicates that he has decided to place this account of his experience with his web page and Future Shop permanently on his personal web site because he does not want to be silenced again by legal threats:

As a final note, I've gone over this piece about a dozen times...re editing it each time. Why? Because I don't plan to ever remove this from my personal site – legal threats or not. The above is all factual, all true, and much of it is in the public arena now, thanks to Marketplace's broadcast of this information. I stand behind every work I've typed. I'm not going to let the company bully me again.²⁶

The Doral Inn v. Zussman

In August 2001, Shirley Zussman reserved a room at the Doral Inn in Ottawa based on the Inn's own advertisement that it was a four-star establishment and various tourist web site descriptions. However, when Zussman arrived at the Inn, she found that the room did not match its description. Zussman immediately requested a refund; however, the desk clerk refused to grant her one.

Upon her return to Toronto, Ms. Zussman conveyed her dissatisfaction to the Better Business Bureau (BBB) of Eastern Ontario's online complaint system as well emailing the City of Ottawa, who forwarded her complaint to the Ottawa Tourism and Convention Bureau Authority. The Better Business Bureau forwarded Zussman's email to the Doral Inn.²⁷

On the basis of Zussman's complaint to the BBB and the City of Ottawa, the Doral Inn initiated an action in Small Claims Court against Zussman for defamation. Zussman defended her statements on the basis that it was the BBB who had published the allegedly defamatory statements by forwarding her email to the Doral Inn.

²⁶ *Ibid.*

²⁷ The comments by Ms. Zussman cited by the Doral Inn in their Statement of Claim included: "We were astonished at the poor quality of the furnishings and general appearance of the room...unattractive and substandard...looked like cast-offs from a garage sale or something one might have picked up from the Salvation Army." Source: *The Doral Inn v. Zussman* (6 June 2002), Ottawa 01-SC-073434 (Sup. Ct. (Sm. Cl. Div.)).

Ultimately the court determined that it did not view Zussman's comments as libelous but that even if it had, Zussman could invoke the defense of qualified privilege. The privilege arose because it was in the public interest that the BBB receive her comments as part of its service in providing an outlet for consumer complaints and the court found the complaint had been made without malice. The court thus dismissed the claim for defamation. Ms. Zussman was awarded costs of \$150 for counsel fee and an unspecified amount for disbursements to be determined by the Registrar.²⁸

Repap New Brunswick lawsuit

In 1996 a number of New Brunswick residents initiated a campaign to protect the last large tract of old-growth forest in New Brunswick. The area in question, called Christmas Mountains, is provincially owned land, licensed to a pulp and paper company called Repap New Brunswick. Their efforts included a three-month information picket in the woods, and a blockade of a logging road, which stopped the operations of the pulp and paper company for a week, until Repap obtained an injunction to open the road.

Repap then initiated a lawsuit against seven individuals, members of First Nations, and a New Brunswick-based conservation group in the amount \$200,000. It alleged that these activities constituted interference with economic relations.²⁹

This lawsuit was viewed as a SLAPP suit by observers:

It's a classic SLAPP suit – a “strategic lawsuit against public participation.” Repap found many of its victims by gleaning names from local newspapers; most weren't even involved with or present at the blockade.”³⁰

In 1997, I introduced a private members' bill, - the Public Participation act –

²⁸ *Ibid.*

²⁹ Amelia Clarke, “REPEP is logging New Brunswick's last old growth forests” *Taiga-News* (November 1996).

³⁰ B. J. Bergman, “SLAPPING back” *Sierra Magazine* (July/August 1997) online: <http://www.sierraclub.org/sierra/199707/lol.asp>

to guard against SLAPP suits. That bill was introduced after the pulp and paper company Repap sued student protesters and activists in a debate about logging practices for old growth forests in the area of the Christmas Mountains near Mount Carleton in Central New Brunswick.³¹

Repap sustained the suit for some time, forcing the defendants to go to court twice, and then dropped the case.

One of the individuals who had been the subject of the lawsuit elaborated on the silencing effect of the SLAPP suit:

...they were successful in diverting our attention from the forest to the courts. All fundraising efforts after being sued went to the court related costs (transportation, legal costs, etc) instead of the forest protection campaign. Also, our lawyer advised us that the seven of us should no longer talk to the media, so the SLAPP lowered our media presence too.³²

Home Equity Development v. Crow

In this reported case³³, residents were not successful in persuading the court that the lawsuit they were subject to was a SLAPP suit. The court found that many of the comments made in the course of this dispute over a proposed development were defamatory and not saved by public interest defences.

A development company purchased property in East Sooke, British Columbia, for the purpose of building a multi-use development. Some residents became concerned about the effect of a potential development on land they viewed as environmentally important and therefore should be maintained as a wilderness area.

After receiving a newsletter from the developer indicating his plans for development of the property, one resident, Crow, wrote a letter to all the

³¹ Elizabeth Weir, "Public criticism of a corporation can land you in court" *Rabble News* (7 April 2004) online: http://www.rabble.ca/everyones_a_critic.shtml?x=31486

³² Correspondence with Amelia Clarke (June 12th and July 15th 2003).

³³ *Home Equity Development Inc. v. Crow*, [2004] B.C.J. No. 177 (B.C. S.C.) (QL).

residents of East Sooke describing what he viewed was taking place on the property and setting out his concerns about the development. In response, the developer's lawyer contacted Crow and another resident stating that many of the statements in the letter were false and demanding an apology.

Residents began to organize their opposition to the proposed development and publicize their opposition in the local newspaper. The developer's lawyer wrote again to Crow, demanding either proof of statements made about the proposed development or a retraction or legal action would be pursued.

Over the next year, the debate between the residents' advocacy group and the developer continued in the local paper. The residents participated in a CBC current affairs program that examined the controversy.³⁴ They also sent out three newsletters to the residents of East Sooke, one of which suggested campaign contributions had been made by the developer to a former regional elected official.

The developer then initiated a lawsuit against the residents for defamation based on various letters sent to the residents of East Sooke, to the local paper and a newsletter sent to all residents of East Sooke.

The residents, during the course of this action, attempted to have the developer's action dismissed as a SLAPP suit, in an application under the province's anti-SLAPP legislation (since repealed). This application was dismissed. The court found that some of the statements that had been the subject of the alleged SLAPP action, had been made before the legislation was in force, so could not be considered under the statute. The court also found that the residents had not established one of the requirements under the statute to show that the developer's claims against them had no reasonable prospect of success.³⁵

³⁴ Online: <http://www.cbc.ca/disclosure/archives/030114.html> - silver

³⁵ *Home Equity Development Inc. v. Crow*, [2002] B.C.J. No. 1805 (B.C.S.C.) (QL).

The court found that all the letters named in the lawsuit were defamatory, with the exception of one letter sent to the editor of the local paper.³⁶ It rejected the defence of fair comment raised in the alternative by the defendants,³⁷ having found that the residents' expressions were not based on true facts.

The court also rejected the alternative defence of qualified privilege³⁸ with this assertion:

I have concluded that none of the publications complained of were made in exigent circumstances, none of the defendants had a duty or an obligation to make the impugned statements he or she published nor did the recipients have a corresponding interest in receiving that information.

This conclusion does not infringe the defendants' freedom of speech but merely confirms what previous authority has more eloquently described: 'That freedom of speech cannot be so completely unfettered as to give a person the absolute right to defame another.'³⁹

The court also awarded aggravated and punitive damages, in addition to general damages, against some of the defendants.

Canadians for Responsible and Safe Highways

In May 2003, an non-profit advocacy group committed to highway safety issues on behalf of the Canadian public, called Canadians for Responsible and Safe Highways (CRASH), submitted a report to Transport Canada which was also posted on the organization's website, that resulted in the threat of a defamation lawsuit.

The report followed public hearings held on proposed regulations that would make significant changes in the maximum driving hours for commercial vehicle

³⁶ *Home Equity Development Inc. v. Crow*, *supra* note 33.

³⁷ To succeed as a defence, the expression must be proved to be comment made honestly and fairly, without malice, based on facts that are true and on a matter of public interest.

³⁸ This defence attaches to an occasion (not to the expression itself) in which the defendant has an interest or duty (legal, social or moral), to communicate the expression and the recipients have a corresponding duty or interest to receive it.

³⁹ *Home Equity Development v. Crow*, *supra* note 33 at paras.131-32.

(bus and truck) drivers. The report highlighted many of the organization's safety concerns with the proposed amendments, including the calculation that, despite the claims of those proposing the changes, Canadian truckers would work longer driving hours than any of their counterparts in the regulated world, under the proposed changes. CRASH was extremely concerned about effect of truck driver fatigue on public highway safety.

The CRASH report also expressed concerns about the influence of a lobby group representing the trucking industry (owners of commercial vehicles), the Canadian Trucker's Alliance (CTA), which was had initially sought the changes to the regulations. It noted that a Canadian Automobile Association (CAA) spokesperson at a public hearing, who had endorsed the increased hours, left the CAA for the employ of the CTA "very shortly" after the hearing. The spokesperson's change in position occurred three months after the hearing. CRASH had not named the CAA spokesperson in the report.

The report also made some allegations of secret dealings between the CTA and the union representing some commercial drivers (mostly local commercial vehicle drivers) Teamsters Canada, who had initially opposed the proposed changes. The two organizations had come to a public agreement endorsing the proposed regulations. This allegation was not based on any known facts.

The CTA sent a letter to CRASH threatening action for defamation with respect to the named CTA official and the CTA itself. It demanded that the alleged defamatory statements be deleted from the website and an apology delivered personally to the spokesperson of the organization, posted on the CRASH website and sent to Transport Canada officials, the Minister of Transport and representatives of the Standing Committee on Transport.

Faced with costly legal fees that the organization could not afford to incur, CRASH complied with all requests and retracted their comments.⁴⁰

Living Oceans Society

In 2002, the Living Ocean Society, a non-profit research and public education organization devoted to Canada's Pacific coast, purchased newspaper advertising discouraging the consumption of farmed salmon. The ad featured promotional tools used by a salmon-farming business, consisting of colour samples arranged in a "fan" – similar to those used by manufacturers of house paint. The ad focused on the option of buying whichever hue of salmon customers desired.

Lawyers representing industry groups called the Society and threatened defamation action despite not having seen the ad and not being able to provide accurate grounds for a case. The Society had vetted the campaign with Canadian lawyers beforehand, but had neglected to obtain American legal opinion. Rather than incur further expense in responding to the American legal challenge, they were forced to remove some imagery from campaign materials.⁴¹

VWVulcan Energy of Canada Ltd. and West Coast Environmental Law

In 2003, a non-profit legal environmental organization, West Coast Environmental Law (West Coast) helped to organize a community forum jointly hosted by the Comox Valley Watershed Association and West Coast, to consider the potential impacts of a plan to develop coalbed methane resources in the Comox Valley on Vancouver Island. The evening forum included experts with first hand experience dealing with coalbed methane development in the U.S., and a lawyer who described the evolving regulatory regime for this form of gas development.

⁴⁰ Interview with Bob Evans, Executive Director of CRASH (6 October 2003).

⁴¹ Interview with Jennifer Lash, Executive Director, Living Oceans Society (31 October 31 2003).

Coal bed methane drilling had been proposed by VV Vulcan Energy of Canada Ltd., an exploration company formed specifically to develop coal bed methane on Vancouver Island.

Coal methane development has had extensive water and land impacts in the U.S. One of the purposes of the forum was to make British Columbians aware of the negative impacts this development has had in the U.S., in an effort to ensure that it is not repeated in B.C. Key issues are the concentrated land use required for drilling, the disposal of potentially vast quantities of waste water that results from the drilling process and the risk of methane migrating into water supplies and soil.⁴²

Prior to the meeting, via an email message to staff at West Coast, one of VV Vulcan Energy's principals, Spiro Vassilopoulos, threatened to sue Heather Johnstone of the Comox Valley Watershed Association and West Coast for defamation.⁴³

The threatened lawsuit did not materialize. Indeed, it appears that the threat of litigation was primarily intended to dissuade the organizers from holding the public forum in the first place. Mr. Vassilopoulos admitted in another email that such litigation would probably not succeed:

As for the promise of litigation – it still holds. It is doubtful that we prevail in BC against this West Coast Environmental Law operation and suing them would be a waste of time and money. However my resolve to sue in US District Court any American that comes up misrepresenting facts and engages in libel or slander still holds. Remember, juries have been very generous with their awards in previous tortious interference lawsuits brought in Texas Federal or State courts.⁴⁴

⁴² West Coast Environmental Law, *Coalbed Methane: What is it? What could it mean for BC?* (September 2003).

⁴³ Interview with Karen Campbell, West Coast Environmental Law, (12 November 2003).

⁴⁴ Email correspondence from Spiro Vassilopoulos to Bryan Allen, copied to Karen Campbell, WCEL and others (2 March 2003) [forwarded by WCEL].

As part of the threat, Mr. Vassilopoulos arrived at the forum with a court reporter and a videographer, which the groups negotiated with him to remove, as the presence of these individuals may well have deterred attendees from asking questions about coalbed methane development in their community.

The proposed development has not yet proceeded as of this date. If and when the proposal goes ahead, another company will likely carry it forward.

It is important to note the significant impact that the threat of legal action had on West Coast. It forced the organization to undergo an enormous amount of work in face of the threatened lawsuit and the actions of Mr. Vassilopoulos. Time was spent meeting with and reassuring funders, (the company had contacted West Coast's funders to convince them not to support West Coast's work), fact checking and informing the board of the organization, colleagues and the media.⁴⁵

Bernard Haldane Associates

Doug Hembruff posted his resume on a job web site, agreeing to let it be seen by prospective employers or employment agencies only. A career-counseling agency called Bernard Haldane Associates inappropriately culled the information and contacted him by email. He then filled out an information form online and was contacted for an interview. At the end of the interview, Hembruff was told that the company was not an employment agency but a career advisory service, for which fees would be charged, but specifics were not given. Hembruff was pressured into setting up a second, longer meeting with the company representative. It was implied that it would concern information about a job market that wasn't advertised, that the company had an inside track to knowing

⁴⁵ Email correspondence from Karen Campbell, West Coast Environmental Law (16 August 2004).

about these jobs and was able to steer their clients towards prospective employers.⁴⁶

Hembruff became suspicious, did an online search and discovered that there were several web sites registering large numbers of complaints about the company, similar to his. In many cases, prospective clients had gone to a second meeting where they were pressured to make credit card payments of \$4000-\$9000 for minimal job search services such as resume preparation, with no actual access to the promised 'hidden job markets'. Hembruff also discovered that a number of U.S. states were prosecuting or had judgments against the company for deceptive business practices and that Alberta had laid charges against the company in 2002 under the province's *Fair Trading Act*.⁴⁷

In February 2003 Hembruff decided to post a website outlining his experience with the company in order to warn other consumers. Six months later he received a letter from lawyers for Bernard Haldane Associates demanding that he immediately take down the website which they asserted was a violation of trademark and service marks, or legal action would be taken.⁴⁸

Hembruff met with company representatives on July 15, 2004. The company indicated to him that they have changed their company name and are implementing changes to remedy the problems. Hembruff negotiated a settlement with the company on behalf of 10 individuals who had paid for

⁴⁶ Interview with Doug Hembruff (13 July 2004).

⁴⁷ The Illinois Attorney General filed suit against Bernard Haldane and Associates for deceptive practices under the Consumer Fraud Act on October 7, 2003. The Minnesota Attorney General filed suit on May 18, 2004 for misrepresentation. In Kansas, a former client filed a lawsuit on January 9, 2003 in the wake of a two-year investigation by the Kansas Attorney General's office that resulted in the company paying \$300,000 to settle allegations of fraud. Source: CTV.ca, "Bernard Haldane Associates' company history" (19 March 2004) online: http://www.ctv.ca/servlet/ArticleNews/print/CTVNews/1079718342881_75127542/?hub=WFive&subhub=

⁴⁸ Letter from Victor C. Johnson, Fish & Richardson P.C. to Doug Hembruff (22 July 2003).

services never received from the company and agreed to take down the website.⁴⁹

Conestoga-Rovers & Associates Ltd. v. Richard Bendall

In 1996, the then Regional Municipality of Ottawa Carleton (RMOC) (now the City of Ottawa) commissioned an environmental study to address the problems at the wastewater treatment facility it owned and operated in Munster Hamlet, a small community in the former Goulbourn Township. The study recommended specific upgrades at the existing facility. The treatment plant was deemed not to meet contemporary standards, although there was no present health danger posed by the system.⁵⁰

The City also received unsolicited private sector proposals regarding innovative approaches to wastewater treatment, so it directed its staff to prepare an addendum to the report to explore alternative approaches. An engineering firm called Conestoga-Rovers & Associates Ltd. (CRA) was retained by the City to evaluate alternative approaches, make a recommendation and prepare the addendum to the report.

CRA solicited alternative proposals through an advertised Request for Proposals and received five proposals (including a sixth proposal of keeping the status quo). CRA then evaluated the proposals using specific evaluation methodologies and recommended a proposal that would involve building a pipeline to enable the Village of Munster Hamlet to connect to the Regional wastewater collection system. This proposal required an amendment to the City's Official Plan, since it had not been contemplated in the original plan.

⁴⁹ Telephone interview with Doug Hembruff (23 July 2004).

⁵⁰ The Regional Official Plan specifically stated that the hook up of a rural community to a central sewage collection system (i.e.: pipeline), is only allowed in the event of an existing "health problem".

The alternative proposed by CRA became the subject of much dispute. Proponents of alternative proposals expressed their concerns about CRA and its evaluation process. Local residents of Goulbourn Township such as Richard Bendall and others spoke out against the proposal at a public meeting of the Planning and Environment Committee of the RMOC. Richard Bendall was a member of a public liaison committee that had been established as part of the public consultation process for the project. Mr. Bendall had also expressed his concerns about CRA's recommendation in letters published in the local township newspapers.

The members of the community opposed the pipeline alternative were concerned about a number of issues: 1) the pipeline was never part of the City's original request for proposals for treatment alternatives, 2) a pipeline was viewed as the more costly alternative and 3) it was believed the community would take longer to implement, because of environmental and safety concerns, and 4) the 5,000 Richmond and rural residents along the proposed route feared that sewage leakage and potential dangers to their shallow wells would pose a serious "built-in" health threat.

A number of legal actions were initiated. One of the failed proponents issued a claim against CRA and the Regional government. CRA responded by initiating their own claim against the proponent and a claim against Richard Bendall for defamation. CRA claimed total damages in the amount of over \$4 million against Mr. Bendall for comments he made at a meeting of the Regional Government's Planning and Environment Committee and in letters to the editor of local newspapers.⁵¹

Of note is that the civil litigation was taking place while the some of these parties were awaiting the hearing of an Ontario Municipal Board (OMB) appeal of the

⁵¹ *Conestoga-Rovers & Associates Ltd. v. CMS Group and Richard Bendall*, Court File No.: 99-CV-172557CM (Ont. Sup. Ct.)

Region's decision to approve an amendment to its Official Plan. Individuals, which included Richard Bendall, opposed the Regional Government's approval of an amendment to the Official Plan to allow for the pipeline proposal and had appealed the decision to the OMB.

The Board heard the matter in 2000 and found that the evaluation process had been flawed. The Board found that the evaluation methodology used was incomplete and that the decision to choose the pipeline alternative had not been based on complete evidence. It ordered the City to hire a different professional group to conduct a re-evaluation of three of the six alternatives proposed in order to "perfect its case".⁵²

The professional engineering firm selected by the City completed its re-evaluation, and on December 16, 2002, recommended elimination of the pipeline option in favour of a communal wastewater treatment option.

Despite the independent engineer's report recommending a communal solution, the City of Ottawa (formerly RMOC) proceeded with a pipeline, which is currently being constructed. The litigation is still pending.

Mr. Bendall feels that this lawsuit is a SLAPP and has put up a website detailing the history of the issue and the legal action against him.⁵³

Automobile Protection Association

The Automobile Protection Association (APA) is a membership-based non-profit association dedicated to promoting consumer interests in the marketplace with respect to automobiles. As part of its work, the APA regularly conducts

⁵² OMB Decision No. 0926 (8 June 2001).

⁵³ Online: <http://www.ottawasewergatefiasco.com/>

undercover probes to ensure that it remains effective as an automobile industry watchdog.

In one of its undercover Mystery Shopper investigations of auto dealer sales practices in 1999, the APA reported that a local Ontario dealership had increased the manufacturer's suggested retail price, then reduced the cost by the same amount by claiming this as a dealer's "gift". This claim was erroneous, but had been published as part of a national newspaper article about the mystery shopper survey.

The day following the publication of the article, the dealership's lawyer wrote to the APA, pointing out the error and indicating that they would be pursuing legal action under the *Libel and Slander Act* of Ontario. The APA investigated the allegation of the error, discovered that they were in error in their own calculations and immediately issued a press release admitting to the error, and in language accepted by the dealership. (It is important to note that the error in the calculations made by the APA had been partly attributable to an omission by the salesperson that had provided detailed purchasing information to the Mystery Shoppers.) The APA also apologized to the dealership.

The Toronto Star reported this admission and retraction of the APA's findings about the dealer as well as the change in the APA's rating of the dealer from bad to very good. The Toronto Star also separately printed its own retraction and apology.

Two days before the limitation period elapsed, the dealership issued a statement of claim for defamation against the Executive Director of the APA, the APA and the Toronto Star, claiming ten million dollars in damages (five of those million is for malice)

The APA filed a defence in April 2000, arguing that they hadn't defamed the dealership and in the alternative, relying on the defence of fair comment and qualified privilege. They also relied on the *Charter*, asserting that the dealership was seeking to limit their right of free expression under the *Charter*.

This brief summary of SLAPPs in Canada shows that SLAPPs as a Canadian phenomenon are real. The range of targets of SLAPPs or threatened SLAPPs suggests that SLAPPs are not just occurring in the environmental context, but affecting consumers who publicly criticize products and services. The courts have also made some important statements linking consumer expression to constitutional freedom of expression protections.

Canadian Constitutional Protections for SLAPPs

Two cases have made important statements about the constitutionality of the consumer's right to publicly criticize products or services and communicate to other consumers: *Daishowa v. Friends of the Lubicon*⁵⁴ and *Roger Guignard v. City of St. Hyacinthe*.

Daishowa Inc. v. Friends of the Lubicon involved a SLAPP suit but is particularly important for the court's statement about consumer free speech. The Ontario Court of Appeal very strongly stated that constitutional protections for free speech apply to consumers expressing their views publicly on economic and public policy issues.

A pulp and paper company, Daishowa, initiated a lawsuit for defamation and sought a permanent injunction against a consumer boycott organized by a public interest group called Friends of the Lubicon. Friends of the Lubicon focuses on

⁵⁴ *Daishowa Inc. v. Friends of the Lubicon* (1998) 39 O.R. (3d) 620 [*Daishowa*].

issues confronting a First Nations band, the Lubicon Cree. The consumer boycott was rooted in events that had taken place in Alberta, ten years earlier. Daishowa Canada Company Ltd. had logged lands claimed by the Lubicon Cree.

In 1991, the Friends of the Lubicon set up a public boycott of paper products made by Daishowa, when the company did not agree to refrain from logging in the disputed area. The initiation of the boycott had followed an exchange of correspondence and notice by the group of their intention to boycott businesses that purchased paper products from Daishowa. Their purpose was to force Daishowa to agree to stop logging until a land settlement agreement had been reached between the Lubicon Cree and the federal and provincial governments.

The boycott began with an information letter to urge businesses already purchasing products, not to purchase paper products from Daishowa. It also indicated an intention to have information picketing in front of these businesses, if the businesses refused to refrain from purchasing from Daishowa.

The campaign continued for three years and was very effective in persuading each of the 50 companies approached to join in the Daishowa boycott.

In 1995, Daishowa sued the Friends and was granted an interlocutory injunction restraining the group from engaging in the boycott. They followed this with a claim seeking a permanent injunction and claiming a number of economic torts, including defamation against the group and named individuals within the group.

The claims for the economic torts, which included interference with economic interests, inducing breach of contract, intimidation, and conspiracy to injure were all dismissed. The court upheld some of the claims for defamation, but only awarded damages in the amount of one dollar against the Friends. The request for a permanent injunction was dismissed.

The court also considered the applicability of the *Charter's* freedom of expression protections. It looked at jurisprudence regarding constitutional protections for commercial speech⁵⁵ and noted that they outlined protection for a corporation's expression in the context of promoting its economic interests. The court concluded that correspondingly, consumers should also be protected where their speech has an economic dimension:

[I]f the Canadian Constitution protects a corporation's expression where the context is largely economic, and where one of the consequences of the expression, if accepted by the listener, might well be economic harm to competitors, then the common law should not erect barriers to expression by consumers, where the purpose and effect of the expression is to persuade the listener to use his or her economic power to challenge a corporation's position on an important economic and public policy issue.⁵⁶

The court analyzed the consumer picketing activities of the Friends at the business locations of Daishowa's consumers and concluded that it was also a form of commercial speech, protected by the *Charter*:

If the great principle of freedom of expression protects a corporation, say Daishowa, whose simple message is: "Here is why you should buy our products", then is there any reason why the same principle should not protect a small group of consumers of Daishowa products, say the Friends, from saying to fellow consumers: "Here is why you should not buy Daishowa's products"? In my view, the answer is clear: there is no reason, in logic or policy, for restraining a consumer boycott.

Indeed, the argument for protection of the expression of the consumers is perhaps even a better one. The corporation's expression is almost always entirely economic; it is designed to promote its own economic interests and, inevitably, to harm the economic interests of competitors...

The Friends' message has a similar starting point. It is, as Daishowa asserts, a message with a negative economic content; it says bluntly to the public, "Do not buy Daishowa's bags." However, there is no economic self-interest in the Friends' message; they do not add as a reason "because we have better or less expensive bags to sell". Rather, the economic component of the Friends' message is anchored in the same foundation as all of its activities, namely an attempt to focus public attention on a public issue, the plight of

⁵⁵ See *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 and *Irwin toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

⁵⁶ *Daishowa*, *supra* note 54 at 649.

the Lubicon, and Daishowa's alleged connection to that issue.⁵⁷

The court noted that there were procedural and substantive limitations concerning how a consumer picketing and boycotts may be carried out. They cannot be violent or destroy property and cannot intrude into legitimate privacy interests i.e. picketing a private residence. Substantively, consumers cannot induce people to breach contracts with the business in question and they cannot tell lies about that business.⁵⁸

An important qualification to this case is that the commercial expression at issue in the two Supreme Court cases cited by the court in *Daishowa* concerned speech in relation to government policies, thus allowing for the application of the *Charter*. However, the matter in *Daishowa* involved the common law being invoked with reference to a dispute between two private parties. Is there an opening being created for the application of the *Charter* to disputes arising from consumer expression?

One commentator suggests that a potential for the application of the *Charter* to SLAPPs has been created by the Supreme Court in *B.C.G.E.U. v. B.C. (A.G.)*.⁵⁹ The Court had been asked to consider whether the *Charter* applied to an injunction issued against a union for picketing courthouses around the province. Although the Court affirmed that the *Charter* did not apply to the common law where it was being invoked with reference to a purely private dispute, it held that the *Charter* was applicable in this case because the dispute had a strong "public" element. The commentator notes that what may have strongly influenced the Court to reach this conclusion was that the context was the criminal law, but argues that this expansion of application of the *Charter* could arguably be made with reference to SLAPPs given their significant "public" character:

⁵⁷ *Ibid.* at 648-49.

⁵⁸ *Ibid.* at 649.

⁵⁹ *B.C.G.E.U. v. B.C. (A.G.)*, [1988] 2 S.C.R. 214.

SLAPPs, by definition, imperil important public rights central to the functioning of our democratic system. That they are typically undermined in the context of what is commonly regarded as “private” litigation does not affect their public character. While the source of the harm may be “private”, the harm itself is visited directly on the democratic process and, in this sense, is decidedly “public”.⁶⁰

Roger Guignard v. City of Saint-Hyacinthe is also important for delineating strong consumer freedom of expression rights. In this case the Supreme Court affirmed the consumer’s right to criticize products or services and complain to other consumers, within the limits of existing legal principles such as defamation:

On the other hand, consumers also have freedom of expression... Within limits prescribed by the legal principles relating to defamation, every consumer enjoys this right. Consumers may express their frustration or disappointment with a product or service. Their freedom of expression in this respect is not limited to private communications intended solely for the vendor or supplier of the service. Consumers may share their concerns, worries or even anger with other consumers and try to warn them against the practices of a business. Given the tremendous importance of economic activity in our society, a consumer’s “counter-advertising” assists in circulating information and protecting the interests of society just as much as does advertising or certain forms of political expression. This type of communication may be of considerable social importance, even beyond the merely commercial sphere.⁶¹

It is important to note that this case was decided in the context of a government by-law, leaving no question about the applicability of the *Charter*. As discussed above, the *Charter* has been deemed not to apply to common law in the context of private litigation, so it is unclear as to the significance of these cases for consumers in terms of being targeted by SLAPPs. However, it can be argued that the courts are broadening the case for the *Charter*’s applicability to the common law and potentially to SLAPP litigation. The courts are also making strong statements about the importance of the consumer’s right of free expression.

⁶⁰ Tollefson, *supra* note 8 at 226-228.

⁶¹ *R. v. Guignard*, *supra* note 2 at para. 23.

Creating a Legislative Response to SLAPPs

There is some debate over whether there is a need for a legislative response to SLAPPs. Some suggest that existing court rules are adequate to protect against frivolous lawsuits:

“This is a tempest in a teapot,” insists John Hunter of Vancouver’s Davis & Co., who has represented forestry giant MacMillan Bloedel in some high-profile injunction applications...[Anti-SLAPP legislation] seems to me an attempt to bring an American concept into an area which doesn’t have a need for it,” he maintains. “Some of the lawsuits that have taken place down there have been quite outrageous. Our system has within it all sorts of mechanisms to weed out cases that have no merit.”⁶²

When the newly elected Liberal provincial government in British Columbia repealed the former NDP government’s anti-SLAPP legislation, the explanation was that existing rules of court were sufficient to deal with such lawsuits:

The *Protection of Public Participation Act (ACT)* would have caused delays in the court system, as it would have provided a mechanism for any defendant in a lawsuit dealing with any issue, to make an application under the *Act*. The *Act* was not intended for that purpose. The potential for delay and overloading on the court system was too great, so the *Act* was repealed in the Summer 2001 Legislative Session.

The Province believes in the right of citizens to participate in government, and the law already protects the rights of people against frivolous and vexatious litigation through the Rules of the Supreme Court. Included in those rules of court are provisions for special costs and for the posting of security for costs to ensure costs are paid when the court makes an award. Thus the rule of court governing how litigation is conducted protects litigants.⁶³

Others suggest that existing court rules are not sufficient to prevent SLAPPs from occurring, because the purposes behind SLAPPs are primarily political:

Existing protections, however, do not in practice deter SLAPPs. Because SLAPPs are not brought to win, remedies that prevent frivolous claims from winning, such as SLAP-back damages, will not discourage SLAPPs. Delay is a prime goal of SLAPP plaintiffs, and existing remedies are usually slow,

⁶² Marc Edge, “SLAPPED Down” *National* (June – July 2000) at 14, 16.

⁶³ B.C. Ministry of Attorney General response to Union of B.C. Municipalities 2001 Resolution online: http://www.mcaws.gov.bc.ca/lgd/pol_research/ubcm/2001/lr2.htm

ranging from summary judgment after discovery, to SLAPP-backs after trial. Only accelerating judicial review of a potential SLAPP's merits will provide a real disincentive. Furthermore, existing remedies do not prevent the chilling effect of SLAPPs on the exercise of constitutional speech and petitioning rights, which are vital to preserving participatory democracy.⁶⁴

The lack of constitutional protection for those subject to a SLAPP suit in Canada also supports an argument for the need for specific legislative protections against SLAPPs. Because SLAPPs are usually private actions, not involving government actors, defendants of SLAPPs cannot invoke the free expression rights found in the *Canadian Charter of Rights and Freedoms*,⁶⁵ because it does not apply to private actions.⁶⁶

Proponents of anti-SLAPP legislation also argue that most judges are disposed, particularly where there are conflicting affidavits (sworn written statement containing the evidence of a witness) in a legal action, to let the parties fight it out in court.⁶⁷

The form that SLAPP lawsuits take also makes it difficult for them to be dismissed. Many SLAPP suits are characterized as defamation, a strict liability tort. The significance of a strict liability tort is that the focus in the action is not the determination of whether an action is defamatory, but whether there is a defence to defamation. This means that such lawsuits have the effect of automatically drawing the defendant into the lawsuit because it shifts the burden of proof to the defendant to show that their actions were not defamatory. This is further assured by the fact that the determination of whether words are defamatory is easily made. The threshold of defamation may vary, depending

⁶⁴ John C. Barker, "Common-Law and Statutory Solutions to the Problem of SLAPPs" (1993) 26 *Loy. L.A. L. Rev.* 395 at 448-449.

⁶⁵ *Canadian Charter of Rights and Freedoms*, *supra* note 3.

⁶⁶ Craig Jones & Chris Tollefson, "New Law takes the Starch out of attempts to suppress critics" *British Columbia Civil Liberties Association Newsflash* (26 April 2001).

⁶⁷ Brad Daisley, "B.C. 'Slappin' ruling a landmark case, expert says" *The Lawyers Weekly* (11 February 2000).

upon the exact definition adopted, but the case law shows that the threshold of Canadian courts is very low.⁶⁸

The rules of civil litigation are also of no assistance in insulating the defendants of SLAPP suits from the fact of and the costs of litigating. Under the rules, the successful party usually recovers “party and party” costs from the losing party. This cost award represents approximately one-third of the true costs of litigation for the party. In a minority of cases, the successful party may recover “solicitor and client costs,” which approximate the true costs of the litigation. For the SLAPP filer, who usually has much greater financial resources than the target of a SLAPP suit, even losing a case and having to pay for the target’s “solicitor and client costs” is not an onerous burden. It is often viewed as the cost of doing business.⁶⁹

The burden of the costs of litigation on the target of a SLAPP suit is extremely significant, regardless of the outcome. Researchers who studied 100 lawsuits in the U.S. that fit the definition of a SLAPP found that the amount of litigation involved was considerable for those cases that proceeded through the legal system. Targets of SLAPPs ultimately prevailed in 83% of the cases studied, but not before an average of 32 months of litigation had passed involving of a number of court levels.⁷⁰

It is also significant to note that the target will never be fully compensated for all the costs incurred and the fact that recovery happens only after the case is decided, creates a further difficulty for the target of a SLAPP suit.⁷¹

⁶⁸ See *Cherneskey v. Armadale Publishers Ltd.* (1978), 7 C.C.L.T. at 94-95. (S.C.C.)

⁶⁹ Tollefson, *supra* note 8 at 208.

⁷⁰ Penelope Canan & George W. Pring, “Strategic Lawsuits Against Public Participation” (December 1988) 35 *Social Problems* 506 at 514.

⁷¹ *Ibid.*

The U.S. has a much longer history identifying, judicially considering and creating a legislative response to the SLAPP phenomenon. An analysis of SLAPP suits and the response in some U.S. jurisdictions provides a useful comparison as well as potential models for a Canadian legislative response.

The U.S. SLAPP Experience

SLAPPs are a phenomenon that has a much longer history of identification and response in the U.S. than in Canada. SLAPP suits have been recognized by American courts since the early 80s and addressed by state legislatures, beginning in Washington State in 1989. The California Anti-SLAPP project, which assists the public and legal community in preventing and defending against SLAPPs, indicates on their website that 22 states currently have anti-SLAPP laws and that anti-SLAPP bills are currently (or were previously) before 9 states.⁷²

There are important distinctions between Canadian and American constitutional law and political foundations, which account for the difference in approach to this issue by the courts in the United States. The U.S. political and legal system is founded upon the central notion of the rights of citizens as a protection against the centralizing power of the federal government. These rights are embodied in the amendments to the U.S. Constitution. In contrast to Canada's political foundations as a parliamentary state, the American Revolution represented the overthrow of parliamentary supremacy of the British.

In line with this "constitutional suspicion of government", the U.S. Constitution specifically provides protection for the right to petition government under the First Amendment⁷³. Related jurisprudence has considered communications to all

⁷² Online: <<http://www.casp.net/menstate.html>> (Accessed July 23, 2004).

⁷³ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

three branches of government and administrative and regulatory agencies as protected petitioning – public protest and other demonstrative communication included. This right becomes relevant to SLAPPS where there is a perceived threat of governments pursuing SLAPP-like action in silencing detractors. In the examination of consumer’s rights and SLAPP actions, however, the relevance is more tenuous.

Another key difference between U.S. and Canadian constitutional law concerns the differing protection of the right to expression in a private context between the two jurisdictions. As noted above, the Supreme Court has held that the *Canadian Charter of Rights and Freedoms* does not apply to civil litigation between private parties nor does it apply to the common law in the context of private disputes.⁷⁴ In contrast, a defendant in a U.S. civil action for defamation may invoke First Amendment freedom of expression protection by virtue of the “state involvement” of the judiciary in deciding the case.⁷⁵

The essential protection against SLAPPs that may be invoked by the First Amendment has had a critical effect on the development of the judicial and legislative treatment of SLAPPs in the U.S. It is viewed as the most effective defence to a SLAPP.⁷⁶

The First Amendment jurisprudence relevant to SLAPPS is based on two branches of authority that came together in a case called *Sierra Club v. Butz*.⁷⁷ *Sierra Club* has been described as one of the earliest SLAPP cases.⁷⁸ It involved the filing of a lawsuit by an environmental organization, the Sierra Club,

peaceably to assemble, and to petition the government for a redress of grievances.” U.S. Const. amend. I

⁷⁴ See *R.W.D.S.U. v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573.

⁷⁵ *New York Times v. Sullivan*, 376 U.S. 254 (1964)

⁷⁶ See John C. Barker, *supra* note 64 at 426 and Penelope Canan & George W. Pring, *supra* note 70 at 514.

⁷⁷ *Sierra Club v. Butz* 349 F. Supp. 934 (N.D. Cal. 1972) [*Sierra Club*].

⁷⁸ Chris Tollefson, *supra* note 8 at 209.

to block logging in a California forest. The defendant lumber company counterclaimed, asserting the tort of interference with economic relations.

The two lines of authority for the way in which the First Amendment protections may be applied to SLAPPs are the cases of *New York Times v. Sullivan*⁷⁹ and *Eastern Railroad President's Conference v. Noerr Motor Freight Inc.*⁸⁰ In *New York Times* the Supreme Court held that the First Amendment guarantees of free speech and press applied as a defence to the common law tort of defamation. The only limitation was that the plaintiff had to establish "actual malice" in order for the First Amendment protections *not* to apply.

In *Noerr* the Supreme Court considered the availability of the First Amendment right to petition as a defence to antitrust liability under the antitrust statute, the *Sherman Act*. The Court held that the freedom to petition government is not defeated even if the petitioner acts with malice.

In *Sierra Club*, a U.S. court was asked, for the first time, to directly consider the effect of the right to petition government upon common law tort actions. The court applied both *New York Times* and *Noerr* in its decision. It determined that *New York Times* provided the threshold of applicability of the First Amendment to this case and *Noerr* allowed the expansion of that principle to actions where actual malice might be involved.

The court applied *New York Times* with this analysis:

In a series of decisions beginning with *New York Times Co. v. Sullivan*...the Supreme Court has determined that to a large extent the First Amendment guarantees of free speech and press constitute a constitutional defense to the common law torts of defamation...and invasion of privacy.⁸¹

⁷⁹ *New York Times v. Sullivan* 376 U.S. 254 (1964) [*New York Times*].

⁸⁰ *Eastern Railroad President's Conference v. Noerr Motor Freight Inc.* 365 U.S. 127 (1961) [*Eastern Railroad Presidents' Conference*].

⁸¹ *Ibid.* at 936-37.

The court then determined that the actual malice standard imposed in *New York Times* should not apply, based on the reasoning the Supreme Court applied in *Noerr*:

The Court went on to note that the freedom to petition government cannot reasonably be allowed to disappear whenever the petitioner acts with “malice”. It is for the purpose of personal gain or injury to those with opposing interests that most citizens will exercise their right to petition the government. Therefore, “[t]he right of the people to inform their representative in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so.”⁸²

The court affirmed that the same principles applied to the case before it:

For the reasons give by the Supreme Court in *Noerr*, this court is persuaded that all persons, regardless of motive, are guaranteed by the First Amendment the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful.”⁸³

Ultimately, the targets of the SLAPP suits in *Sierra Club* were successful in having the claim dismissed. They were held to be exercising their constitutional right to petition government.⁸⁴

The case law suggests that defendants invoking their right under the First Amendment to petition government can ultimately defeat many SLAPP-like actions in the U.S.⁸⁵ This, however, is not a solution to the problem of SLAPPs. Having strong constitutional protections to defend against SLAPPs cannot resolve the chilling effect on public participation posed by SLAPPs in imposing costs on defendants and shifting the conflict from the public domain to a private legal dispute between individuals concerning their private rights (e.g. defamation).

⁸² *Ibid.* at 938.

⁸³ *Ibid.*

⁸⁴ *Ibid.* at 939.

⁸⁵ Analysis of 100 SLAPP suits by researchers showed that invoking the petition clause of the First Amendment by targets of SLAPP suits almost doubled the target’s chances of a ruling in their favour. (Canan & Pring, *supra* note 70 at 514.)

The result has been the development of other responses in the U.S. to combat SLAPPs. Some jurisdictions have focused on adapting the rules of civil procedure to provide for ways of dismissing SLAPP suits at the outset. Other jurisdictions have focused on anti-SLAPP legislation to provide a method of early determination and dismissal of SLAPPs. Such legislation may also involve compensation for costs incurred by SLAPP victims and penalties for the instigators.

U.S. Anti-SLAPP Legislation

During the early 1990's, 13 U.S. states passed anti-SLAPP legislation, including California, New York and Washington State.⁸⁶ Given the approximately 14-year history of legislation in these three jurisdictions, it is useful to see how the legislation has been interpreted by the courts and/or amended as a result of SLAPP lawsuits filed under these laws.

Washington State

Despite its longer history, Washington State's anti-SLAPP legislation⁸⁷ has limited application and as a result, has not been widely tested in the courts. It consists of changes to procedural rules and only applies when citizens are reporting information "reasonably of concern" to governmental bodies. The statute provides an affirmative defence to such individuals. If an individual is successful in applying the defence they are entitled to recover expenses and attorneys' fees as well as statutory damages of \$10,000.

Governments who receive the information also have the ability to intervene and defend against any SLAPP precipitated by the communication, but the statute

⁸⁶ Christopher Tollefson and Bram Rogachevsky "Grassroots Cedar Hill Eight SLAPP Back" *Victoria Times Colonist* (5 February 2000) For these states' anti-SLAPP laws see appendices B, C & D of this report.

⁸⁷ California Anti-SLAPP Project, Online: <http://www.casp.net/statewa.html> and see Appendix D.

offers little incentive for government agencies to risk such an intervention. If the government agency fails in their defence, it is liable to the plaintiff who initiated the SLAPP for its costs and attorneys' fees.

The statute was amended in March 2002, with the following explanation:

“Although Washington State adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States Supreme Court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. This bill amends Washington law to bring it in line with these court decisions...”⁸⁸

Some have suggested that the statute has not been widely used because it is very limited in its application.⁸⁹ The small number of cases that have considered the statute makes it difficult to generalize about its effectiveness. Two of the cases that have considered the statute have produced decisions in favour of SLAPP targets. Despite this, these cases do not echo the expansive constitutional protection for defendants of SLAPP suits that were outlined in *Sierra Club v. Butz*.

In *Gilman v. Macdonald*⁹⁰, the court adopted an “actual malice” standard in assessing the statute’s requirements for “good-faith” reporting:

It follows, and we so hold, that where a defendant in a defamation action claims immunity under RCW 4.24.510 on the ground his or her communications to a public officer were made in good faith, the burden is on the defamed party to show by clear and convincing evidence that the defendant did not act in good faith. That is, the defamed party must show, by clear and convincing evidence that the defendant knew of the falsity of the communications or acted with reckless disregard as to their falsity.⁹¹

⁸⁸ House Bill 2699, Sec. 1 quoted in California Anti-SLAPP Project website online:

<http://www.casp.net/statewa.html>

⁸⁹ Catherine Maxson, “United States: The State of Anti-SLAPP Laws” (20 July 2001) Mondaq Ltd.

⁹⁰ *Gilman v. MacDonald*, 74 Wash. App. 733, 875 P.2d 697 (1994).

⁹¹ *Ibid.*

This test was been adopted in a subsequent case that considered the legislation, despite a finding in favour of the SLAPP targets.⁹²

The third case involved a citizens' group being sued by a local government for challenging the way in which the county government processed absentee ballots for elections. A lower court finding in favour of the SLAPP targets was reversed because the subject matter was found to be outside the reach of the statute.⁹³

In addition to the limited reach of the statute and the narrow way that the courts have interpreted it in terms of First Amendment protections, the statute has been criticized for the lack of procedural protections. The statute does not have any procedural mechanism to allow for the raising and adjudication of the SLAPP defence on a summary basis.⁹⁴

New York

New York anti-SLAPP legislation consists of both independent legislation and specific rules of civil procedure. The legislation was established in 1992 and like the Washington State legislation, has limited application. It applies to an action “involving public petition and participation”. This is defined as a legal action arising from the activity of someone 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”.⁹⁵

The important difference in the New York law compared to the Washington State law is that the rules of civil practice can be brought in to expedite a dismissal of the SLAPP suit. After the defendant shows that the action comes within the

⁹² *Right-Price Recreation v. Connels Prairie Community Council et al.*, 146 Wn. 2d 370; 46 P. 3d 789 (Wash. Sup. Ct. 2002).

⁹³ *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now*, Wn.App., 82 P.3d 1199 (2004).

⁹⁴ Tollefson, *supra* note 8 at 218.

⁹⁵ *New York State, Civil Rights Law*, c. 6, Article 7, s. 76-a and see Appendix C.

protected activity defined by the statute, the rules can be applied which require the filer of the SLAPP to show why a motion to dismiss the action should not be granted.⁹⁶

These rules provide some very important protections for the target of a SLAPP suit. Shifting of the onus to the SLAPP filer places the burden of proof on the SLAPP filer rather than the target of the SLAPP. The expedited process also allows for quick dismissal of lawsuits found to be SLAPPs, saving the targets from expensive and drawn-out legal actions.

The statute allows for recovery of costs, attorney's fees and special damages, but only at the discretion of the court.

Analysis of case law arising from the statute demonstrates some of its limitations. In *West Branch Conservation Assoc. v. Town of Clarkstown*,⁹⁷ at issue was an appeal of a lower court's denial of costs and attorney's fees claimed by a conservation organization under the anti-SLAPP legislation. The appeal court affirmed that the legislation is discretionary not mandatory on this matter.

In *Harfenes v. Sea Gate Association*, an action was dismissed for falling outside the ambit of the anti-SLAPP law. The court pronounced a narrow application of the statute, interpreting a new right of action as being more restrictive on public applicants seeking redress from the courts:

The new anti-SLAPP law creates a new right of action for victims of SLAPP suits. It places new restrictions on the ability of public applicants to seek redress from the courts by requiring them to demonstrate their claims contain a substantial, rather than merely a reasonable, basis in fact or law. As such, the new anti-SLAPP law is in derogation of the common law. It is well established that statutes in derogation of the common law are to be construed narrowly.⁹⁸

⁹⁶ *New York Civil Practice law and Rules*, Rules 3211 and 3212. See Appendix C.

⁹⁷ *West Branch Conservation Assoc. v. Town of Clarkstown*, 222 A.D. 2d 513, 636 N.Y.S. 2d 61 (NY Sup. Ct. 1995).

⁹⁸ *Harfenes v. Sea Gate Association*, 167 Misc.2d 647, 647 N.Y.S.2d 329 (NY Sup Ct. 1995).

Analysts have pointed to other cases illustrating the narrow application of the statute:

In *Gill Farms Inc. v. Darrow*, the defendant had vigorously protested the plaintiff's use of aerial insecticides, including filing complaints with governmental officials, prompting the plaintiff to sue the defendant for a variety of torts. The court denied the defendant's motion to dismiss under the anti-SLAPP statute since the plaintiff did not possess a permit for aerial spraying – the plaintiff was not a “permittee.”⁹⁹

California

California has perhaps the most expansive anti-SLAPP legislation in the United States. It creates a broad protection by defining the activities covered under the legislation as any “act in furtherance of a person's right of petition or free speech under the United State or California Constitution in connection with a public issue”. It then lists included activities, which are very broadly written.¹⁰⁰

The legislation also contains important features that alleviate the potential for legal delays that harm targets of SLAPP suits. A lawsuit initiated against someone's actions that meets the definition of protected activities is subject to a special motion to strike unless the plaintiff has established the probability that they will prevail on their claim. This is similar to the New York legislation in shifting the onus of proof on the initiator of the lawsuit. The legislation also establishes a 30-day time line in which the special motion must be heard and a stay of all discovery proceedings until the motion is decided upon. If the defendant is successful on the motion, he/she is also entitled to recovery of attorneys' fees and costs.¹⁰¹

SLAPPs have also been extensively litigated in California, with a number of decided cases at all levels of court. The statute has been used to protect a wide

⁹⁹ Catherine Maxson, *supra* note 89.

¹⁰⁰ *California Code of Civil Procedure*, Sec. 425.16 and see Appendix B of this report.

¹⁰¹ *Ibid.*

range of defendants, including citizen activists, consumers, media, an insurance company, a pharmaceutical company, a law firm and numerous individuals.

California courts have affirmed the statute's broad construction. In a recent opinion, the issue before the court concerned statements made by staff of a tenant counseling organization alleging racially motivated treatment of certain tenants by a landlord while the issue was being investigated by a federal housing agency. The court considered whether the statute could be applied to a statement made in connection with issues under consideration by a public proceeding, or whether it would also have to be shown that the statement was made in connection with a public issue. The court held that the statute should be construed broadly:

Any matter pending before an official proceeding possesses some measure of "public significance" owing solely to the public nature of the proceeding, and free discussion of such matters furthers effective exercise of the petition rights section 425.16 was intended to protect. The Legislature's stated intent is best served, therefore, by a construction of section 425.16 that broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on "public" issues.¹⁰²

The case law shows that the broad reach of the statute created problems, as courts increasingly had to consider business attempts to use anti-SLAPP motions to discourage any consumer litigation initiated against them. Businesses were framing their motions in the form of claims that their advertising statements concerning commercial products qualified as free speech in connection with a public issue. For example, a credit card corporation attempted to use the anti-SLAPP statutes to counter a class action lawsuit initiated against it by consumers alleging deceptive business practices concerning credit card solicitations. The trial court had affirmed the company's motion fell under the anti-SLAPP statute, but this was reversed on appeal. The court found that the solicitations did not

¹⁰² *Briggs v. ECHO* (1999) 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471.

implicate matters of public interest and that to give them such protection would effectively eradicate unfair business practices laws.¹⁰³

In January 2004, California amended its anti-SLAPP legislation.¹⁰⁴ The amendment prohibits anti-SLAPP motions filed in response to (1) public interest and class actions when certain conditions are met, and (2) actions against a business that arise from commercial statements or conduct of the business under certain conditions.¹⁰⁵

What appears to be a consistent pattern in U.S. case law decided under anti-SLAPP legislation is a focus on determining whether the lawsuit may be defined as a SLAPP.

Canadian Anti-SLAPP Legislation

The only anti-SLAPP legislation enacted in Canada appeared very briefly in British Columbia in 2001 and was therefore essentially untested in the courts.¹⁰⁶ The New Democratic Party (NDP) government enacted the *Protection of Public Participation Act* in April 2001 just before an election call in the summer of 2001.¹⁰⁷

The provincial government consulted widely before introducing anti-SLAPP legislation. In their consultation document, they outlined the goals of a response to SLAPPs:

1. legal establishment of protected rights and activities
2. early identification and dismissal of SLAPPs

¹⁰³ *Jewett v. Capital One Bank* 113 Cal. App. 4th 805, 810, 6 Cal. Rptr. 3d 675 (2003). See also *Nagel v. Twin Laboratories, Inc.* 109 Cal. App. 4th 39, 46-51, 134 Cal. Rptr. 2d 420 (2003) which concerned a class action claim for false advertising about the ingredients listed on a nutritional and diet supplement product.

¹⁰⁴ *California Code of Civil Procedure*, Sec. 425.17 and see Appendix B.

¹⁰⁵ *Ibid.*

¹⁰⁶ The only reported case under the legislation is *Home Equity v. Crow*, *supra* note 35.

¹⁰⁷ *Protection of Public Participation Act*, S.B.C. 2001, c. 32 (See Appendix A for full document).

3. reduction of the economic burden of defending SLAPPs
4. discouraging SLAPPs with economic deterrents¹⁰⁸

While the B.C. government ultimately decided to address the issue with a legislative response, it also considered a change to the rules of court under the *Court Rules Act*. A change to the rules could, for example, provide courts with a new mechanism with which to allow a preliminary hearing to determine whether a proceeding fell into the definition of a SLAPP suit – i.e. an action without merit designed to interfere with a party's right of public participation.

The rules of court, however, are mainly concerned with the technical and practical operation of courts and their associated proceedings. To properly address the concerns raised by SLAPP actions, a clear indication of the policy rationale and creation of protected rights and activities is better stated by the legislature directly, through legislative enactment.

After introducing an initial bill in July 2000 to provoke public discussion, the government re-introduced an altered bill the following year, which changed as a result of the public input received:

So the approach taken in this bill is a very different approach to drafting such a law. This bill shifts from creating a new substantive right [of public participation] to establishing a procedural framework for defending against an improper lawsuit. It sets up a scheme for application for a dismissal of a civil action or those parts of that action, which are deemed improper.

It attempts to balance two very important things. First, it has to protect the plaintiff's right to access the justice system. This is critical, and we can't have a bill that goes too far in one direction and removes that right or unfairly curtails that right. On the other hand, that has to be balanced against protecting defendants against SLAPP suits by providing for security for costs and ultimately damages, if necessary.¹⁰⁹

¹⁰⁸ B.C. Ministry of Attorney General, *Developing a Response to Strategic Lawsuits Against Public Participation (SLAPP) in British Columbia*, (17 July 2000).

¹⁰⁹ British Columbia, Legislative Assembly, *Hansard*, 22. (3 April 2001) at 1435.

The legislation contained an important section protecting statements from defamation claims, which is the way many SLAPP actions in Canada are framed. Under the legislation, communications and conduct that qualify as public participation are considered occasions of qualified privilege, thus providing a complete defence to a defamation claim.¹¹⁰

This kind of provision should be a key feature of Canadian anti-SLAPP legislation. As discussed above, Canadians cannot rely on the *Charter's* free expression protections when they are sued for defamation. This is in direct contrast to the similar protections provided in the U.S. by the First Amendment that has been broadly applied by the courts to SLAPPs.

This legislation, despite its modest approach in refraining from defining a right of public participation, was repealed by the new elected Liberal government in the summer of 2001.

There have been other attempts to introduce anti-SLAPP legislation, but they haven't yet succeeded in being passed by the legislatures in which they have been introduced. In 1997, a New Brunswick private member's bill, the *Public Participation Act*¹¹¹ was introduced by the provincial New Democratic Party. The bill did not make it past first reading.

In October 2003 an NDP member of the Legislative Assembly of Nova Scotia introduced a private member's bill, the *Protection of Public Participation Act*.¹¹² The bill has received first reading, and it is not known whether it will make it past second reading.

¹¹⁰ *Protection of Public Participation Act*, *supra* note 107, s. 3.

¹¹¹ Bill 102, *Public Participation Act*, 2d Sess., 53rd Leg., New Brunswick, (1997).

¹¹² Bill 25, *An Act to Encourage Public Participation and Dissuade Persons from Bringing or Maintaining Legal Proceedings or Claims for an Improper Purpose and to Preserve Access to the Courts*, 1st Sess., 59th Leg., Nova Scotia, 2003.

Components of a Legislative Response to SLAPPs

The extensive U.S. experience with SLAPPs and the evidence in Canadian case law and publications about threatened lawsuits, suggests that the SLAPP phenomenon is a very real one. Despite some promising statements by the judiciary upholding the importance of the consumer right to publicly criticize products or services and stating that consumer speech is a form of commercial speech protected by Section 2 of the Charter, it can be argued that there is still a need for legislation. Businesses are still initiating SLAPPs against consumers. As well, constitutional protections after litigation has been initiated can't address the strategic purposes behind SLAPPs, to exploit the economic imbalance created by the initiation of the litigation.

The U.S. and Canadian experience with SLAPPs suggests that there are key components that need to be in anti-SLAPP legislation to protect those who are targeted in a SLAPP: clear identification of a SLAPP, dismissal mechanisms, granting of costs to defendants, and establishing qualified privilege with respect to defamation actions that are SLAPPs.

Dismissal Mechanisms

One of the main issues for SLAPP defendants is the legal costs, time and resources required to defend a case to the point where a court will dismiss it. Often the discovery process and other legal requirements of civil procedure must occur *before* the court undertakes a serious consideration of the case on its merits. This puts pressure on SLAPP defendants to respond to plaintiff demands and pulls them into potentially high legal costs and complex litigation as well as interrupting any public participation concerning the issue. The early identification and dismissal of SLAPP actions is therefore an essential part of a legislative response. The obvious difficulty in drafting such a provision is ensuring that legitimate plaintiffs continue to have fair and appropriate recourse to the legal system.

Many court rules and rules of civil procedure will allow for dismissal of a claim where it is deemed frivolous or vexatious. The difficulty is that this is typically limited as a speedy option to dismiss in circumstances that it is “plain and obvious” and the court can be easily satisfied beyond a doubt that the claim has no merit. Since many SLAPP actions may *prima facie* have many of the characteristics of a bone fide tort action, this form of relief is limited.

Many of the U.S. solutions feature a motion filed by the defendant, showing that they are being sued in connection with activities specifically protected by an anti-SLAPP law. The onus is then on the plaintiff to establish that the suit has merit or is likely to succeed. Other laws feature provisions to expedite the anti-SLAPP motion, suspending discovery during consideration of the motion. In the latter case, courts must make a decision on the basis of whatever pleadings, affidavits and existing discoveries are already on the record. This would clearly be a more welcome solution midway through the legal process.

Granting Costs to Defendants and Making SLAPP Plaintiffs Pay

The normal rules for awarding costs in civil litigation have a significant impact on those who are targets of SLAPPs. The awarding of party-and-party costs is the norm in Canadian civil procedure; if judgment is found against a party, they must pay the other party’s costs assessed according to a court-determined tariff. Often these do not fully indemnify the successful party and only 30-40% of expenses are recovered. Additionally, traditional court rules allow courts, in rare cases of “scandalous” conduct, to award special costs in excess of party-and-party costs.

Some U.S. anti-SLAPP laws allow for a defendant who is successful in having a case dismissed as a SLAPP to be completely indemnified for legal expenses by the plaintiff. In some cases punitive damages may also apply. Legislation that provides for the awarding of costs and attorney fees on a mandatory basis, if the

defendant is successful, as in the California example, provides a model that best protects the SLAPP target.

In terms of a Canadian common law equivalent to full indemnity, Ontario courts have taken the view that “party-and-party costs as between solicitor and client” would result in the same effect. SLAPP legislation should, therefore, contain a mandatory cost provision for successful defendants of SLAPP suits on a solicitor and client basis.

The difficulty with focusing exclusively on cost awards is that they can only provide economic restoration; they have little or no impact on deterring SLAPP suits. As discussed above, the goal of a SLAPP is not monetary compensation to correct an alleged wrong. SLAPPs are usually part of a larger political or tactical decision to deter or discourage opposition to the SLAPP filer’s activities. SLAPP filers are not usually concerned with winning a lawsuit or even carrying it forward to completion.¹¹³

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.¹¹⁴ 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.

A possible solution would be to offer legal aid specifically targeted at those who have been SLAPP-ed or establish a separate fund for this purpose. Any cost

¹¹³ Tollefson, *supra* note 8 at 206.

¹¹⁴ West Coast Environmental Law “Developing a Response to Strategic Lawsuits Against Public Participation in British Columbia” June 2000. Online: <http://www.wcel.org/wcelpub/2000/13299.htm>

awards or settlement proceeds received by a successful defendant could be returned to the fund.

Establishing Qualified Privilege for Defamation Actions

Defamation is often cited in a SLAPP suit. As discussed above, defamation actions are particularly difficult for the targets of SLAPPs because defamation is a strict liability tort. This means that the focus in the action is not the determination of whether an action is defamatory, but whether there is a defence to defamation. These actions have the effect of automatically drawing the defendant into the lawsuit because it shifts the burden of proof to the defendant to show that their actions were not defamatory.

Effective SLAPP legislation should therefore specifically address the issue of defamation. A good example is provided by the B.C. anti- SLAPP statute, which incorporated a defence to defamation. If an action met the definition of “public participation” under the statute it was also defined as an occasion of qualified privilege, which is a complete defence to defamation.¹¹⁵

Defining a Right of Public Participation

The procedural and penalty considerations described above are important components of any proposed Canadian legislation, but these components can only work if the legislation clearly establishes a way to identify a SLAPP. To enable this, the legislation should establish a right of public participation at stake in a SLAPP. This is critical because Canada, unlike the U.S. does not have a constitutionally protected right to petition. As discussed above, the *Charter's* free expression rights have been interpreted not to apply to the common law in the context of private disputes.¹¹⁶

¹¹⁵ *Protection of Public Participation Act*, *supra* note 107, s. 3.

¹¹⁶ One commentator offers an interesting argument for defendants being able to invoke the *Charter* as a defence against a SLAPP, see Tollefson, *supra* note 8 at 223-229.

Examining U.S. responses to the SLAPP phenomenon reveals how significant raising the First Amendment right to petition is for defendants of SLAPPs. As researchers of specific SLAPP suits concluded:

It [the Petition Clause] was invoked in a majority of SLAPPs that reached each court level and its invocation meant, as it did in *Warembourg v. Louisville*, that the judge ruled for the targets. Indeed, raising the Petition Clause defense almost doubled targets' chances of ultimately winning: targets won 57% of the cases in which the Petition Clause was never invoked, but 92% of those SLAPPs in which it was.¹¹⁷

Canadian legislation should define a right of public participation, given that a SLAPP suit invariably involves issues of public concern and the right to publicly comment about such issues. This would provide courts with direction to assess the facts of the case in the context of determining the impact of the lawsuit on the defendant's right to express and exercise their democratic rights. It is also necessary in identifying protected expression and activity in general, in the absence of the *Charter* being interpreted to provide this broad protection.

Conclusion

Providing an effective protection to the public in response to SLAPPs through reform in the legal system is challenging, but earlier efforts show that it can be accomplished. An important precedent lies in the B.C. *Protection of Public Participation Act*. Although it was short-lived and not granted the opportunity to be effectively tried in the courts, it is a model for reforms to be initiated in other Canadian jurisdictions.

Balancing the pressing need to protect the rights of citizens as full participants in our democratic society and preserving the rights of legitimate plaintiffs to access to justice is not an easy task. However, the only way to find a viable, fair solution is to create legislation that draws on the experience of other jurisdictions and yet

¹¹⁷ Canan & Pring, *supra* note 70 at 514.

integrates Canadian constitutional and legal practice. Over time, judicial treatment can then fine-tune the law's application to produce a balanced outcome. The sooner this action is taken, the sooner the critical principles of democratic participation in society can be protected from SLAPPs.

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Appendix A – B.C. Anti-SLAPP Legislation

Protection of Public Participation Act, S.B.C. 2001, c.32

- repealed August 16, 2001

Definitions

1 (1) In this Act:

"**claim**" means any claim for relief within a proceeding;

"**defendant**" means a person against whom a proceeding is brought or maintained;

"**government body**" means any level of government, and includes

- (a) any government body, within the meaning of the *Financial Administration Act*,
- (b) any body appointed or established by, or from which advice is requested by, the Provincial government, and any equivalent body of any other level of government, and
- (c) any local government body within the meaning of the *Freedom of Information and Protection of Privacy Act*;

"**improper purpose**" has the meaning set out in subsection (2);

"level of government" includes

- (a) the federal government,
- (b) the Provincial government,
- (c) the government of any other province or territory of Canada, and
- (d) the government of any municipality or regional district;

"**plaintiff**" means a person who initiates or maintains a proceeding against a defendant;

"**proceeding**" means any action, suit, matter, cause, counterclaim, appeal or originating application that is brought in the Supreme Court or the Provincial Court, but does not include a prosecution for an offence or a crime;

"**public participation**" means 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, but does not include communication or conduct

- (a) in respect of which an information has been laid or an indictment has been preferred in a prosecution conducted by the Attorney General or the Attorney General of Canada or in which the Attorney General or the Attorney General of Canada intervenes,

- (b) that constitutes a breach of the *Human Rights Code* or any equivalent enactment of any other level of government,
- (c) that contravenes any order of any court,
- (d) that causes damage to or destruction of real property or personal property,
- (e) that causes physical injury,
- (f) that constitutes trespass to real or personal property, or
- (g) that is otherwise considered by a court to be unlawful or an unwarranted interference by the defendant with the rights or property of a person;

"reasonable costs and expenses", in relation to a proceeding or claim, means costs and expenses that

- (a) have been agreed on between the plaintiff and the defendant, or
- (b) if no agreement has been reached, consist of the following:
 - (i) the amount of legal fees and disbursements that are, in a review conducted under section 70 of the *Legal Profession Act* after the conclusion of the proceeding, determined to be owing by the defendant to the defendant's lawyers for all matters related to the proceeding or claim, as the case may be, including all of the reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding or claim, and for the purposes of the review under this subparagraph, the plaintiff is deemed to be, and to have standing to appear at the review as, a person charged within the meaning of the *Legal Profession Act*;
 - (ii) any other costs and expenses that the registrar conducting the review considers to be reasonably incurred by the defendant in relation to the proceeding or claim.

(2) A proceeding or claim is brought or maintained for an improper purpose if

- (a) the plaintiff could have no reasonable expectation that the proceeding or claim will succeed at trial, 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.

Purposes of this Act

2 The purposes of this Act are to

(a) encourage public participation, and dissuade persons from bringing or maintaining proceedings or claims for an improper purpose, by providing

(i) an opportunity, at or before the trial of a proceeding, for a defendant to allege that, and for the court to consider whether, the proceeding or a claim within the proceeding is brought or maintained for an improper purpose,

(ii) a means by which a proceeding or claim that is brought or maintained for an improper purpose can be summarily dismissed,

(iii) a means by which persons who are subjected to a proceeding or a claim that is brought or maintained for an improper purpose may obtain reimbursement for all reasonable costs and expenses that they incur as a result,

(iv) a means by which punitive or exemplary damages may be imposed in respect of a proceeding or claim that is brought or maintained for an improper purpose, and

(v) protection from liability for defamation if the defamatory communication or conduct constitutes public participation, and

(b) preserve the right of access to the courts for all proceedings and claims that are not brought or maintained for an improper purpose.

Defamation

3 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.

Application for summary dismissal

4 (1) If a defendant against whom a proceeding is brought or maintained considers that the whole of the proceeding or any claim within the proceeding has been brought or is being maintained for an improper purpose, the defendant may, subject to subsection (2), bring an application for one or more of the following orders:

(a) to dismiss the proceeding or claim, as the case may be;

- (b) for reasonable costs and expenses;
 - (c) for punitive or exemplary damages against the plaintiff.
- (2) If an application is brought under subsection (1),
- (a) the applicant must set, as the date for the hearing of the application, a date that is
 - (i) not more than 60 days after the date on which the application is brought, and
 - (ii) not less than 120 days before the date scheduled for the trial of the proceeding, and
 - (b) all further applications, procedures or other steps in the proceeding are, unless the court otherwise orders, suspended until the application has been heard and decided.
- (3) Nothing in subsection (2) (b) prevents the court from granting an injunction pending a determination of the rights under this Act of the parties to a proceeding.

Orders available to defendant

- 5 (1) On an application brought by a defendant under section 4 (1), the defendant may obtain an order under subsection (2) of this section if the defendant satisfies the court, on a balance of probabilities, that, when viewed on an objective basis,
- (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.
- (2) If, on an application brought by a defendant under section 4 (1), the defendant satisfies the court under subsection (1) of this section in relation to the proceeding or in relation to a claim within the proceeding,
- (a) the defendant may obtain one or both of the following orders:
 - (i) an order dismissing the proceeding or claim, as the case may be;
 - (ii) an order that the plaintiff pay all of the reasonable costs and expenses incurred by the defendant in relation to the proceeding or claim, as the case may be, including all of the reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding or claim, and

(b) the court may, in addition to the orders referred to in paragraph (a), on its own motion or on the application of the defendant, award punitive or exemplary damages against the plaintiff.

(3) If, on an application brought by a defendant under section 4 (1), the defendant is unable to satisfy the court under subsection (1) of this section, the defendant may obtain an order under subsection (4) if the defendant satisfies the court that there is a realistic possibility that, when viewed on an objective basis,

(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) If, on an application brought by a defendant under section 4 (1), the defendant satisfies the court as required in subsection (3) of this section in relation to the proceeding or a claim within the proceeding, the court may make the following orders:

(a) an order, on the terms and conditions that the court considers appropriate, that the plaintiff provide as security an amount that, in the court's opinion, will be sufficient to provide payment to the defendant of the full amounts of the reasonable costs and expenses and punitive or exemplary damages to which the defendant may become entitled under section 6;

(b) an order that any settlement, discontinuance or abandonment of the proceeding be effected with the approval of the court and on the terms the court considers appropriate.

(5) On an application for the settlement, discontinuance or abandonment of a proceeding or claim in respect of which an order was made under subsection (4) (b), the court may, despite any agreement to the contrary between the defendant and the plaintiff, order the plaintiff to pay all of the reasonable costs and expenses incurred by the defendant in relation to the proceeding or claim, as the case may be, including all of the reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding or claim.

(6) If, in a proceeding in which the defendant has obtained an order under subsection (4), the defendant makes an application to dismiss the proceeding for want of prosecution, the defendant may obtain an order under subsection (7) of this section if

(a) the proceeding is dismissed for want of prosecution, and

(b) the plaintiff is unable to satisfy the court on the application that, when viewed on an objective basis,

(i) the communication or conduct in respect of which the proceeding was brought does not constitute public participation, or

(ii) none of the principal purposes for which the proceeding was brought or maintained were improper purposes.

(7) If, under subsection (6), the defendant is entitled to obtain an order under this subsection, the defendant may obtain an order that the plaintiff pay all of the reasonable costs and expenses incurred by the defendant in relation to the proceeding, including all of the reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding.

Onus on plaintiff at trial

6 (1) A defendant who has obtained an order under section 5 (4) in respect of a proceeding or claim may, at the trial of the proceeding, obtain one or more of the orders referred to in section 5 (2) if

(a) the defendant alleges at trial that

(i) the communication or conduct in respect of which the proceeding or claim was brought constitutes public participation, and

(ii) the proceeding or claim was brought or maintained for an improper purpose,

(b) the proceeding or claim is discontinued or abandoned by the plaintiff or is dismissed, and

(c) the plaintiff is unable to satisfy the court at trial that, when viewed on an objective basis,

(i) the communication or conduct in respect of which the proceeding or claim was brought does not constitute public participation, or

(ii) none of the principal purposes for which the proceeding or claim was brought or maintained were improper purposes.

(2) A defendant who has not obtained an order under section 5 (4) may, at the trial of the proceeding, obtain one or more of the orders referred to in section 5 (2) if

(a) the defendant gives notice to the plaintiff, at least 120 days before the date scheduled for the trial of the proceeding, that the defendant intends at trial to seek an order under this section in respect of a proceeding or claim,

(b) the defendant satisfies the court at trial that there is a realistic possibility that, when viewed on an objective basis,

(i) the communication or conduct in respect of which the proceeding or claim was brought constitutes public participation, and

(ii) a principal purpose for which the proceeding or claim was brought or maintained is an improper purpose,

(c) the proceeding or claim is discontinued or abandoned by the plaintiff or is dismissed, and

(d) the plaintiff is unable to satisfy the court at trial that, when viewed on an objective basis,

(i) the communication or conduct in respect of which the proceeding or claim was brought does not constitute public participation, or

(ii) none of the principal purposes for which the proceeding or claim was brought or maintained were improper purposes.

Court may hear any evidence and argument

7 (1) Without limiting any other rights the parties may have to present evidence and make arguments in an application brought under section 4 (1) or at a trial under section 6 (1) or (2), the parties may present evidence and make arguments as follows:

(a) as to whether the communication or conduct in relation to which the proceeding was brought constituted public participation;

(b) as to whether the proceeding was brought or is being maintained for an improper purpose.

(2) The parties may present the evidence or make the arguments referred to in subsection (1) (a) and (b) whether or not the evidence or arguments relate to the particulars of the claim or claims raised by the plaintiff.

Disposition of security

8 (1) If a defendant succeeds under section 5 (7) in respect of a proceeding, the defendant may obtain an order that the reasonable costs and expenses to which the defendant is entitled under the order made under section 5 (7) be paid to the defendant out of any security provided by the plaintiff under section 5 (4).

(2) If a defendant succeeds under section 6 (1) in respect of the whole of a proceeding, the defendant may obtain an order that the following amounts be paid to the defendant out of any security provided by the plaintiff under section 5 (4):

- (a) the reasonable costs and expenses to which the defendant is entitled under the order made under section 6 (1);
 - (b) any punitive or exemplary damages awarded to the defendant by the court.
- (3) If a defendant succeeds under section 6 (1) in respect of a claim brought as part of a proceeding, the defendant may obtain an order that the following amounts be paid to the defendant out of any security provided by the plaintiff under section 5 (4):
- (a) whichever of the following the court considers best gives effect to the purposes of this Act:
 - (i) the proportion of the reasonable costs and expenses referred to in subparagraph (ii) of this paragraph that the claim bears to the proceeding as a whole;
 - (ii) the reasonable costs and expenses incurred by the defendant in relation to the proceeding, including all of the reasonable costs and expenses incurred by the defendant in pursuing rights or remedies available under or contemplated by this Act in relation to the proceeding;
 - (b) any punitive or exemplary damages awarded to the defendant by the court.
- (4) After the defendant receives payment of the money to which the defendant is entitled out of any security provided by the plaintiff under section 5 (4), any portion of that security that is not provided to the defendant under this section, including any interest that has accrued on that money, must be returned to the plaintiff.

Relief under this Act is in addition to other available relief

9 Nothing in this Act limits or restricts the rights available to a plaintiff or defendant under any Act or any rule of any court.

Offence Act

10 Section 5 of the *Offence Act* does not apply to this Act.

Appendix B – California Anti-SLAPP Legislation

California Code of Civil Procedure Sec. 425.16.

[California's anti-SLAPP statute was first enacted in 1992.]

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)(1) 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. (2) 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. (3) 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, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(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.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

(j) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(k)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

California Code of Civil Procedure Sec. 425.17 [Effective January 1, 2004]

[This statute was enacted to correct the abuse of the anti-SLAPP statute by business.]

Section 425.17

(a) The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. 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 or Section 425.16.

(b) Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:

(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.

(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.

(3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

(c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:

(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.

(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

(d) Subdivisions (b) and (c) do not apply to any of the following:

(1) Any person enumerated in subdivision (b) of Section 2 of Article I of the California Constitution or Section 1070 of the Evidence Code, or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public.

(2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

(3) Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.

(e) If any trial court denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to this section, the appeal provisions in subdivision (j) of Section 425.16 and paragraph (13) of subdivision (a) of Section 904.1 do not apply to that action or cause of action.

Appendix C – New York Anti-SLAPP Legislation

New York State, Civil Rights Law, c. 6, Article 7, ss.70-a, 76-a

[New York State's anti-SLAPP legislation was enacted in 1992]

Article 7 -- Miscellaneous Rights and Immunities

s 70-a. Actions involving public petition and participation; recovery of damages

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; and

(c) 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.

s 76-a. Actions involving public petition and participation; when actual malice to be proven

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.

N.Y. Civil Practice Law and Rules N.Y. Civil Practice Law and Rules, Rules 3211 and 3212

[These two rules establish standards for motions for dismissal and summary judgment in SLAPP cases.]

Rule 3211

[Paragraphs (a) through (f) omitted here]

(g) Standards for motions to dismiss in certain cases involving public petition and participation. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a [sec. 76-a(1)(a)] of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

Rule 3212

[Paragraphs (a) through (g) omitted here]

(h) Standards for summary judgment in certain cases involving public petition and participation. A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

Appendix D – Washington State Anti-SLAPP Legislation

Revised Code of Washington

Title 4. Civil Procedure

Chapter 4.24. Special Rights of Action and Special Immunities

[This legislation was first enacted in 1989 and amended in 2002]

4.24.500. Good faith communication to government agency--Legislative findings--

Purpose

Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

4.24.510. Good faith communication to government agency--Immunity

A person who communicates a complaint or information to any branch or agency of federal, state, or local government regarding any matter reasonably of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

4.24.520. Good faith communication to government agency--When agency or attorney general may defend against lawsuit--Costs and fees

In order to protect the free flow of information from citizens to their government, an agency receiving a complaint or information under RCW 4.24.510 may intervene in and defend against any suit precipitated by the communication to the agency. In the event that a local governmental agency does not intervene in and defend against a suit arising from any communication protected under this act, [FN 1] the office of the attorney general may intervene in and defend against the suit. An agency prevailing upon the

defense provided for in RCW 4.24.510 shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense. If the agency fails to establish the defense provided for in RCW 4.24.510, the party bringing the action shall be entitled to recover from the agency costs and reasonable attorney's fees incurred in proving the defense inapplicable or invalid.

Notes

1. Enacted by Laws 1989, c. 234, sections 1 - 4. "This act" in Laws 1989 c. 234 consists of the enactment of RCW 4.24.500, 4.24.510, and 4.24.520, and a vetoed section.