

# Strategic Lawsuits Against Public Participation: The British Columbia Experience

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*In 2001, the province of British Columbia (BC) became the first Canadian jurisdiction to enact anti-SLAPP legislation. While this legislation proved to be short lived, the BC experience around the issue of SLAPPs is instructive for law reformers both in Canada and beyond. In this article, the authors describe the legal and political processes that set the stage for the passage of the 2001 law, and its subsequent repeal. They also provide a detailed analysis and critique of key aspects of the debate surrounding the design of the law, and consider its efficacy in identifying, dismissing and deterring SLAPP lawsuits. They conclude with some observations with respect to the current status of the SLAPP issue in BC.*

## INTRODUCTION

The term 'SLAPP' (Strategic Lawsuit Against Public Participation) was first coined by American academics Penelope Canan and George Pring in the late 1980s in response to what they contended was a rising tide of lawsuits filed in an effort to silence public participation in government decision-making processes.<sup>1</sup> Since then, numerous US States have responded to the phenomenon by enacting anti-SLAPP legislation. The first such law was passed by Washington state in 1989;<sup>2</sup> currently, 28 US States have anti-SLAPP legislation on the books, with many more US jurisdictions, including the Federal government, considering anti-SLAPP bills.<sup>3</sup>

The SLAPP issue emerged in Canada shortly after SLAPPs were first recognized in the USA,<sup>4</sup> although it was not until 1999 that the phenomenon was explicitly recognized by the Canadian judiciary.<sup>5</sup> Currently, Quebec is the only jurisdiction in Canada with anti-

SLAPP legislation in force,<sup>6</sup> although there have been various efforts to introduce such measures in other provinces.<sup>7</sup> Many of these initiatives have drawn upon or been inspired by the experience of the province of British Columbia which, in 2001, became the first Canadian jurisdiction to enact anti-SLAPP legislation. While this legislation – known as the Protection of Public Participation Act (PPPA)<sup>8</sup> – was repealed by a new government only a few months after it was enacted, it remains important as a pioneering and instructive attempt to respond to the SLAPP phenomenon in the Canadian context.

This paper is in four Parts. The first part provides an overview of the SLAPP phenomenon, exploring competing conceptions and definitions of SLAPPs, how SLAPPs thwart public participation, and the reasons why many believe they require a legislative response. The second part examines the political and legal climate in BC that set the stage both for the 2001 passage of Canada's first anti-SLAPP law and for its subsequent repeal. The third evaluates the principal criticisms of the BC anti-SLAPP law, and considers its efficacy in identifying, dismissing and discouraging SLAPP lawsuits. Finally, we discuss the current status of the SLAPP issue and related legal developments in British Columbia in the years since the PPPA was repealed.

## AN OVERVIEW OF THE SLAPP PHENOMENON

SLAPPs are civil law suits that target citizens or citizen groups with a view to deterring their participation in public decision-making or policymaking processes, or undermining their efforts to influence public opinion. SLAPPs are often brought by corporations with an economic interest in the outcome of the issue at stake. Such suits are generally unmeritorious, and are aimed at

<sup>1</sup> P. Canan and G.W. Pring, 'Strategic Lawsuits Against Public Participation', 35:5 *Social Problems* (1988), 506.

<sup>2</sup> Revised Code of Washington, RCW4.24.500 – 4.24.520 (1989).

<sup>3</sup> See the California Anti-SLAPP Project website for an up-to-date list of States with anti-SLAPP measures in place or pending, found at <<http://www.casp.net/index.html>>.

<sup>4</sup> See for example, *MacMillan Bloedel v. Galiano Trust Committee*, (BCSC) (30 July 1993), Vancouver Docket No. A920930, first filed in BC Supreme Court in 1992.

<sup>5</sup> See *Fraser v. Saanich (District)*, [1999] BCJ 3100 BCSC, at paras 48–52.

<sup>6</sup> Quebec Code of Civil Procedure, Sections 54.1–54.6.

<sup>7</sup> See Bill 138, Ontario, Protection of Public Participation Act, [1<sup>st</sup> Sess, 39<sup>th</sup> Legislature, 2008]; Bill 23, Nova Scotia, Protection of Public Participation Act, [1<sup>st</sup> Sess, 59<sup>th</sup> General Assembly, 2003] etc.

<sup>8</sup> Protection of Public Participation Act (2001) SBC. c. 32.

thwarting or deterring otherwise legal behaviour such as demonstrating, boycotting, advocacy at public meetings, posting information on the Internet, signing or circulating petitions and so forth.

The power of a SLAPP comes not from the strength of the filer's legal position, but through the strategic use of the legal arena to intimidate the target and to exhaust its often limited resources. Eventually, despite being within their legal rights, SLAPP targets are often forced to abandon the advocacy work that has triggered the suit. Sometimes, the mere threat of being sued is sufficient to intimidate a target of a suit into submission.

While SLAPPs squander judicial resources and often represent an abuse of the judicial process, arguably their most detrimental impact is on democratic participation and dialogue. In many cases, winning the lawsuit is not the filer's principal goal. Instead, unlike typical plaintiffs, they use such suits for a variety of tangential purposes including silencing the target and draining its resources, discouraging future opposition, and offering a highly visible warning to others who might wish to express an opinion. As such, the harm associated with such suits is not only visited on their targets but also on the public at large.

In order to prevent SLAPPs, they first must be recognized and distinguished from conventional, *bona fide* tort lawsuits. Defining what constitutes a SLAPP is essential to developing a legislative fix. This can be surprisingly difficult. Among other things, determining which activities should be protected from legal action, and which should not, can involve complicated and competing policy priorities and considerations.

SLAPPs are usually framed using a wide variety of tort claims including defamation, conspiracy, trespass, interference with contractual relations, inducing breach of contract and nuisance. Given that SLAPPs will often closely resemble an ordinary tort lawsuit, identifying SLAPPs can be difficult. These definitional difficulties also present challenges for those who seek to quantify the pervasiveness of the SLAPP phenomenon; including the frequency with which such suits have been filed, and the magnitude of their impact in terms of squandered public and private resources.

Contributing to this quantification challenge is the fact that, much of the time, SLAPP cases do not proceed to trial. Given their limited resources, many targets are unable to mount a vigorous defence of their rights. As noted above, in many cases, victory over a potential SLAPP target is achieved without a suit being filed, with the mere threat of litigation dissuading the target from pursuing the battle any further.

In defining the scope of lawful democratic participation deserving of protection from SLAPPs, it is crucial to

balance the right of the filer to access the justice system in order to protect its economic interests against the interest of the target in securing protection from suits brought for an improper purpose. As will be discussed, this is one of the most complex and contentious issues when developing a legislative response to SLAPPs.

Legal context is also important. In crafting a legislative response, reformers must be mindful of the context in which antecedent legislative anti-SLAPP responses have emerged. This is particularly true with respect to the US experience where, under American constitutional law, the right to petition government has been interpreted to lend broad constitutional protection to a wide variety of communications directed at government.<sup>9</sup> This 'right to petition' is grounded in the First Amendment. Over time, this constitutional right has been relied on with considerable success by American SLAPP targets even in jurisdictions where there is no anti-SLAPP legislation. Because of the constitutionally protected right to petition, many US anti-SLAPP statutes do not incorporate a requirement that the suit be unmeritorious since, by definition, a lawsuit that targets constitutionally protected petitioning behaviour cannot succeed.

Currently, Canadian law does not extend protection to 'petitioning' activity that could be threatened by SLAPPs. Although the Canadian Charter of Rights and Freedoms (the Charter) guarantees the right to freedom of thought, belief, opinion and expression including freedom of the press,<sup>10</sup> and freedom of peaceful assembly,<sup>11</sup> it does not afford a constitutional defence to Canadians facing a SLAPP. This is because Canadian courts have interpreted the Charter to only apply to government action; as such, they have declined to extend Charter protection in disputes between private parties. This means that in Canada, SLAPP targets cannot invoke the protection of the Charter where they are being sued by another private party.

Despite this, there are compelling policy reasons for revisiting the bright line Canadian courts have drawn between State action and private litigation. An indication of an emerging judicial appetite to inject Charter values into the realm of tort law, with a view to promoting the public interest, is a recent decision of the Supreme Court of Canada that recognizes a new defence of 'responsible journalism' in defamation cases.<sup>12</sup> This said, identifying and responding to

<sup>9</sup> C. Tollefson, 'Strategic Lawsuits Against Public Participation: Developing a Canadian Response', 73:2 *The Canadian Bar Review* (1994), 205.

<sup>10</sup> Canadian Charter of Rights and Freedoms, Section 2(b), Part I of the Constitution Act (1982), being Schedule B to the Canada Act (1982) (UK), c. 11.

<sup>11</sup> See Canadian Charter of Rights and Freedoms, n. 10 above, Section 2(c).

<sup>12</sup> *Grant v. Torstar Corp.*, [2009] SCJ No. 61.

SLAPPs remains a more complex and challenging task in Canadian jurisdictions than in the USA.

It must also be borne in mind that legal recognition of the rights of SLAPP targets – whether under a constitutional guise or some other legislative regime – is not a panacea. This is due to the chilling effect often associated with litigation of this kind. This chilling effect is, in turn, closely related to what is often a gross imbalance of economic power as between the parties, particularly once their dispute moves from the realm of politics into the courtroom. To be effective, therefore, a SLAPP remedy must be alive to and address this economic imbalance in ways that level the legal playing field; to do so requires reforming the law governing how legal ‘costs’ are allocated during and after the litigation. Achieving this goal will usually require either significant reforms to the rules governing civil procedure or the enactment of a stand-alone anti-SLAPP statute. As will be discussed, in recognition of the need for a comprehensive response to the phenomenon, after much debate in BC, it was ultimately decided that purpose-built, stand-alone anti-SLAPP legislation was necessary.

## THE BC SLAPP EXPERIENCE

### SLAPPS IN BC BEFORE LEGISLATION

Although SLAPPs can arise in a broad range of commercial or political settings, they often arise in the realm of environmental or municipal planning disputes. This is due to the conflux of commercial interests, grass-roots activism and governmental decision-making powers that characterize this arena.

In Canada, the SLAPP issue first gained public attention as the result of a 1992 lawsuit filed in BC Supreme Court by MacMillan Bloedel Limited, a large multinational forestry corporation that was then based in British Columbia. The lawsuit targeted a local conservancy group known as the Galiano Conservancy Association (the Conservancy), a local elected governing council (the Council), and three sitting councillors. Prior to the lawsuit, the Conservancy had successfully lobbied the Council to enact zoning by-laws that restricted MacMillan Bloedel’s ability to develop its extensive land holdings on Galiano Island for non-forestry purposes. The proposed by-laws were a response to the company’s plans to use these land holdings for a large-scale residential and commercial development.

The suit alleged, among other things, the existence of illegal conspiracy between the Conservancy, the

Council and three elected councillors; it sought substantial money damages and a declaration quashing the by-laws. The Conservancy denied involvement in a conspiracy, claiming that its work around the issue consisted of entirely legal efforts at public education and lobbying.<sup>13</sup> It was represented on a *pro bono* basis by the Sierra Legal Defence Fund, a non-profit public interest environmental law firm. MacMillan Bloedel pursued the claims against the Conservancy and the councillors for about a year, forcing the defendants to engage in pre-trial discoveries and other preparatory work. Ultimately, the company decided to drop these claims only a few weeks before the scheduled trial date.

In issuing the consent dismissal order, Justice Tysoe of the BC Supreme Court responded to the Conservancy’s contention that the case had been brought for improper strategic purposes and was therefore a SLAPP, by ordering that the Conservancy be allowed to pursue examinations for discovery of company officials with a view to establishing grounds for an award of special costs. MacMillan Bloedel unsuccessfully appealed this ruling to the BC Court of Appeal.<sup>14</sup> Following an initial discovery of a senior company official, the case was settled out of court.<sup>15</sup>

Although the Conservancy was ultimately successful in defending the lawsuit, the case took a toll on the organization, diverting its time and efforts away from the real dispute. These costs would have been substantially higher had they not received *pro bono* representation by the Sierra Legal Defence Fund.

Sierra Legal Defence Fund (now Ecojustice Canada) also provided *pro bono* legal representation over the course of several years in the mid 1990s to defendants targeted in what is perhaps Canada’s best known ‘SLAPP-style’ lawsuit: an action brought by Japanese pulp and paper giant Daishowa Inc. against a small Toronto-based advocacy group known as the Friends of the Lubicon (FOL). While the case was brought in Ontario, its profile caused reverberations across Canada, including in BC where Sierra Legal was headquartered.

For some years prior to the lawsuit, FOL had been active in providing assistance to the Lubicon Cree in northern Alberta who were facing significant resource development pressures on their traditional territory and had been unsuccessful in their efforts to negotiate a treaty settlement with the Federal and provincial governments. To persuade Daishowa not to log on Lubicon territory until a treaty had been signed, FOL initiated a

<sup>13</sup> C. Tollefson, n. 9 above, at 219.

<sup>14</sup> The original order was handed down in chambers on 13 May 1993. The appeal of the order was dismissed in *MacMillan Bloedel v. Galiano Conservancy Association et al.*, [1994] BCJ 2477 (BCCA).

<sup>15</sup> J. Wells, ‘Exporting SLAPPs: International Use of the US “SLAPP” to Suppress Dissent and Critical Speech’, 12:2 *Temple International and Comparative Law Journal* (1998), 470.

consumer boycott against the company's paper products. The boycott succeeded in persuading nearly 50 companies to cease purchasing Daishowa products. As the costs of the boycott mounted, Daishowa filed a claim in Ontario in 1995 against FOL alleging a number of economic torts. The suit sought CAD\$5 million in damages and a permanent injunction on FOL's boycotting activities.<sup>16</sup> It alleged various torts including wrongful interference with economic interests, inducing breach of contract, and conspiracy.<sup>17</sup>

After a lengthy trial, Justice MacPherson of the Ontario Superior Court concluded that FOL's boycott and picketing activities were lawful and indeed provided a salutary model for how to inform consumers and other interested parties about activities of public concern.<sup>18</sup> He also dismissed Daishowa's claim for a permanent injunction against FOL's advocacy work. He did, however, find that FOL had defamed the plaintiff by using the term 'genocide' in relation to Daishowa's operations for which he awarded Daishowa damages in the amount of CAD\$1.

Despite the resources spent defending the case and the success that FOL enjoyed in the result, Justice MacPherson declined to order that Daishowa reimburse FOL for its legal costs; capping the costs payable by Daishowa to FOL at the nominal amount of CAD\$1. Ultimately, despite investing close to CAD\$400,000 in legal time and disbursements, Sierra Legal thus footed most of the bill for defending the case.<sup>19</sup>

While the Lubicon case was getting national attention, various other SLAPP-style lawsuits filed in BC were also generating significant attention. In 1993, for example, a local development company filed suit against three community residents who had spoken out against the company's application to open a liquor store in their neighbourhood.<sup>20</sup> The claim was for damages for defamation in regards to a leaflet the residents had distributed to the community, encouraging them to vote against the store in an upcoming community referendum. After the referendum passed with 55% of the community voting against the opening of the store, the company dropped the claim against the residents.

In the wake of the Galiano litigation, and as the Lubicon case wound its way through the courts, it became increasingly common for activists and local elected officials to fight back against lawsuits brought in connection with their activities by alleging that they had been

SLAPPED. In many instances, developers brought this upon themselves by suing activists, city councillors and other public officials personally when they were in danger of losing the battle over public opinion.<sup>21</sup> The most notorious of these cases was *Fraser v. Saanich*,<sup>22</sup> the first Canadian case in which a court explicitly characterized litigation before it as a SLAPP.

In this case, Ellen Fraser, the sole shareholder and director of the corporation that owned a recently closed hospital, sought permission to redevelop the property, located in a residential neighbourhood. Concerned citizens in the neighbourhood petitioned the District of Saanich (the District) to rezone the property or have the building designated a heritage building. As a result, in 1998, the District enacted by-laws changing the zoning of the building, halting the possibility of redevelopment. Fraser responded by suing the District as well as eight neighbourhood residents, claiming, amongst other things, negligence, interference with contractual relations, and the torts of conspiracy and collusion.

Justice Singh of the BC Supreme Court dismissed all the allegations against the neighbourhood residents, finding that not only was it 'plain and obvious'<sup>23</sup> that the statement of claim disclosed no reasonable cause of action, but that the action was being 'used as an attempt to stifle the democratic activities of the defendants'.<sup>24</sup> His reasons for judgment underscored the importance of democratic expression at the local level:

While neighbourhood participation in municipal politics often places an almost adversarial atmosphere into land use questions, this participation is a key element to the democratic involvement of said citizens in community decision-making. 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.<sup>25</sup>

Concluding that Fraser's action constituted a SLAPP, Justice Singh found the plaintiff's conduct 'reprehensible and deserving of censure',<sup>26</sup> ordering that the defendants be awarded \$2500 (plus disbursements) in special costs.

<sup>16</sup> *Daishowa Inc. v. Friends of the Lubicon*, [1995] OJ 1536.

<sup>17</sup> *Daishowa Inc. v. Friends of the Lubicon*, [1998] OJ 1429 (ONGD).

<sup>18</sup> *Ibid.*, at para. 71.

<sup>19</sup> D Guerette, 'Daishowa Off the Hook for Court Costs', *Record-Gazette* (10 November 1998), found at <<http://sisis.nativeweb.org/lubicon/nov1098.html>>.

<sup>20</sup> *Lougheed Ventures Ltd. v. White*, Vancouver C935224 (17 September 1993).

<sup>21</sup> See C. Tollefson, n. 9 above, at 202, footnote 6, for examples.

<sup>22</sup> See *Fraser v. Saanich (District)*, [1999] BCJ 3100 (BCSC).

<sup>23</sup> *Ibid.*, at para. 46.

<sup>24</sup> *Ibid.*, at para. 52.

<sup>25</sup> *Ibid.*, at para. 43.

<sup>26</sup> *Ibid.*, at para. 52.

## THE PASSAGE OF THE BC ANTI-SLAPP LEGISLATION

It was against this backdrop that a grass-roots campaign for anti-SLAPP legislation in BC began to gather force. Enactment of BC's anti-SLAPP law in 2001 owes much to the early efforts of a citizens group formed in the early 1990s known as the Committee for Public Participation (CPP), a small grass-roots organization comprised of individuals with firsthand experience in SLAPP litigation, as well as public interest lawyers, a former Federal MP and legal academics. The CPP's goal was to educate the public about SLAPPs and the need for a legislative response. To this end, it crafted a model anti-SLAPP law to serve as a basis for discussions around the need for law reform. Over the next few years, the CPP approached a variety of organizations with a view to securing their support in principle for the model law. By 1994, over 40 groups had expressed their support for the passage of anti-SLAPP legislation, including the Union of BC Municipalities, numerous municipal councils, numerous environmental organizations, the BC Federation of Labour and the BC Civil Liberties Association.

During this period, the BC government, led by New Democratic Party (NDP) Premier Mike Harcourt, was somewhat receptive to the idea of enacting anti-SLAPP legislation and ongoing discussions occurred between the CPP and then-Attorney-General Colin Gabelmann. However, by the mid-1990s, when Harcourt stepped down and was replaced by Glen Clark, the government's appetite for legislative action on the SLAPP front dwindled. It was only when Clark was forced to resign under a cloud of controversy that a new window of opportunity for advancing the issue presented itself. This came early in 2000 with the election of Ujjal Dosanjh as NDP leader and 'caretaker' Premier. With swirling political scandals and ongoing budget problems, and after 10 years in power, public support for the NDP was waning rapidly. Dosanjh wanted to regain the support of the traditional allies of the NDP and therefore put environmental and community interests high on the priority list. Andrew Petter, the newly appointed Attorney-General, who was aware of the work of the CPP and sympathetic to need for anti-SLAPP legislation, introduced Bill 29 entitled the Protection of Public Participation Act (PPPA) based on the model law, in 2000.<sup>27</sup>

Bill 29 was introduced as an 'exposure bill', a vehicle intended to 'promote public discussion and input on the best way to frame a legislative response to strategic lawsuits against public participation'.<sup>28</sup> Input was solicited from various interest groups including local govern-

ments and the legal community. Within government, there were concerns that the legislation would be viewed as interfering with the inherent jurisdiction of courts to deal with abuse of process issues. Consequently, special consultation sessions were undertaken with the Supreme Court Rules Committee to get its input on how the law could be crafted to ensure consistency with existing rules and principles of civil procedure.

Knowing that a provincial election was fast approaching, and with their popularity at an all-time low, the NDP government was anxious to move on the SLAPP front and decided to fast-track the legislation. In the meantime, Andrew Petter, who by this time had announced he would not run in the next election, was replaced by Graeme Bowbrick as Attorney-General. Bowbrick tabled Bill 10, a substantially altered version of the PPPA. Bill 10 passed Third Reading on 5 April 2001 and was enacted later that month.<sup>29</sup> It created a procedural framework to enable quick identification and dismissal of SLAPPs, as well as various mechanisms to reduce the economic burdens associated with defending SLAPPs, which are discussed in detail below.

## THE PROTECTION OF PUBLIC PARTICIPATION ACT

### CRITICISM OF THE ACT

Given the highly charged political context in which the legislation was enacted, it is perhaps not surprising that the PPPA encountered significant resistance from the opposition Liberals. Indeed its most vociferous critic, Liberal Geoff Plant (who served as the AG shadow critic during the waning days of the Dossanjh government) later became the Liberal Government's Attorney-General following the election, overseeing repeal of the legislation only 5 months after it was enacted.<sup>30</sup>

### No SLAPP Problem

The Liberals were opposed to the proposed legislation for several reasons. First and foremost, they disputed

<sup>27</sup> Bill 29, British Columbia, Protection of Public Participation Act, [4<sup>th</sup> Sess, 36<sup>th</sup> Parliament., BC, 2000].

<sup>28</sup> British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 20 (5 July 2000) at 1419 (Hon. Andrew Petter).

<sup>29</sup> Protection of Public Participation Act (2001), SBC, c. 19. The most significant difference between Bill 10 and its predecessor (Bill 29) lay in their differing approaches to the protection of public participation. Bill 29 enshrined a statutory right to public participation that entitled a defendant to have a suit dismissed upon establishing that the actions complained of in the suit fell within the statutory definition of public participation. Bill 10 abandoned this approach in favour of a more complex procedural framework providing protection to defendants who could, among other things, establish that a claim against them pertained to 'communication or conduct' that constituted public participation *and* that the claim was being advanced for an 'improper purpose'. See discussion in text accompanying footnotes 52–56, below.

<sup>30</sup> Repealed by the Miscellaneous Statutes Amendment Act, SBC 2001, c. 32, Section 28.

the contention that SLAPPs were a pervasive and urgent enough problem in BC to require immediate legislative action. During the debates on Second Reading of the PPPA, Plant argued that, although at times meritless lawsuits were filed for improper purposes, there was insufficient evidence to suggest that the problem was so widespread that it constituted a threat to the justice system or to democracy in general.<sup>31</sup> According to Plant, there had only been one documented SLAPP in BC legal history,<sup>32</sup> referring to *Fraser v. Saanich*. As he put it, anecdotal evidence was not sufficient to show that SLAPP litigation was being used as 'a tool to paralyze public debate'.<sup>33</sup> Without that proof, in his view, anti-SLAPP legislation was unnecessary.

Proponents of anti-SLAPP legislation had several responses to Plant's concerns. First of all, they argued that limited judicial recognition of the SLAPP phenomenon did not support the conclusion that SLAPPs were not a problem. Part of the difficulty, they argued, arose from a lack of judicial familiarity with the concept of SLAPPs. Moreover, they contended that the success of a SLAPP often turns on its ability to mask itself as a legitimate tort claim, thereby making it difficult to identify cases that are brought for legitimate if unmeritorious reasons from those brought for the improper purpose of silencing the targets.

Proponents of anti-SLAPP legislation also pointed out that most SLAPPs did not proceed to a judicial decision on their merits, since, in many cases, SLAPP targets were forced to capitulate to the filer's demands long before the matter got to court. As well, they argued it was important to be mindful that the chilling effect of SLAPPs extended far beyond the parties directly involved in any particular suit. Finally, they argued that since the targets of these suits were often legally unsophisticated parties, with fewer resources or than their filers, this diminished the potential that such suits would be vigorously and effectively litigated in the judicial arena.

Therefore, they claimed, the number of judicial decisions referencing the SLAPP phenomenon should in no way be relied on as measure of the pervasiveness of the SLAPP problem.

### Adequate Mechanisms Already in Place

Plant also argued that there were adequate judicial mechanisms under the current rules of court to deal with the problem of abusive or frivolous litigation. As such, in his view, the proposed legislation was

redundant.<sup>34</sup> In particular, he referred to the BC Supreme Court Rules, which contain several provisions relating to the summary (early) dismissal of lawsuits in certain circumstances. Rule 19(24) allows for a litigant to seek summary dismissal of a claim made against them upon establishing that the lawsuit:

- (a) discloses no reasonable claim;
- (b) is unnecessary, scandalous, frivolous or vexatious;
- (c) may prejudice, embarrass or delay the fair trial or hearing or the proceeding; or
- (d) is otherwise an abuse of the process of the court.<sup>35</sup>

According to Plant, these provisions provided courts and litigants with fully adequate tools, in most cases, to deal with SLAPPs. In addition, he noted that where a defendant succeeded in persuading a judge to dismiss a claim under Rule 19(24), as in the *Fraser v. Saanich* case, they could recover special costs.

This provision for special costs was deemed significant because ordinarily, in BC, when a party is successful in litigation they are awarded 'party and party costs'. Party and party costs typically only cover about half of the successful party's actual legal costs in bringing or defending the case. As such, even if a SLAPP target succeeded in defending the case and secured the 'usual' order for costs, they could still end up with a substantial legal bill. An order for special costs, on the other hand, allowed for recovery of compensation that was much closer to the actual cost of defending the action.

In his critique of Bill 10, Plant also relied on Rules 18 and 18A which give courts the power to dismiss claims on a summary basis without the necessity of a full trial on the merits. Employing these Rules, a court is empowered to decide the matter on the basis of affidavit evidence reducing significantly the cost and time normally associated with the trial process.

Although the Rules of Court do provide some important avenues for relief from SLAPPs, supporters of the anti-SLAPP legislation contended that they were insufficient. For one, dismissal under Rule 19(24) is considered extraordinary relief and is rarely ordered.<sup>36</sup> Rule 19(24)(a) is intended to apply in those unusual cases where the pleadings are fundamentally defective in that they fail to contain sufficient material facts to make out a tenable claim. When a party seeks dismissal of a claim based on this Rule, the judge must assume that all the material facts alleged are true.<sup>37</sup> To avoid

<sup>31</sup> British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 20 (5 April 2001) at 1055 (Geoff Plant).

<sup>32</sup> British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 18 (3 April 2001) at 1446 (Geoff Plant).

<sup>33</sup> *Ibid.*, at 1449.

<sup>34</sup> *Ibid.*, at 1450.

<sup>35</sup> British Columbia, Supreme Court Rules, r. 19(24).

<sup>36</sup> R. Wilts *et al.*, 'The West Coast Environmental Law SLAPP Handbook', (WCEL, 2002), at 12, available at <<http://www.wcel.org/wcelpub/2002/13959.pdf>>.

<sup>37</sup> See, e.g., *Bercheid v. Ensign*, [1999] BCJ 1172 (BCSC).

dismissal of its claim, a plaintiff need only establish that its pleadings allege sufficient facts that, if they were true, they would constitute a reasonable claim. This is not a difficult burden to meet.

Rule 18 provides somewhat analogous rights and remedies to those available under Rule 19(24). Under Rule 18(6) the defendant can apply for dismissal of a claim on the basis that it is without merit or that there are no facts that could substantiate the claim. Relief under this provision is likewise difficult to secure in many cases, particularly those where the relevant facts are in dispute. Once again, the standard is a high one: it must be obvious that the claim is 'bound to fail'.<sup>38</sup> The putative SLAPP filer need only advance enough evidence in the affidavits to demonstrate that there is a triable issue for an application under Rule 18 to be denied.

Applicants may also rely on Rule 19(24) to secure summary dismissal of an action if they can establish that it is 'plain and obvious' that the action is vexatious or an abuse of process. It is rare, however, for this onerous test to be met. Courts are reticent to dismiss a case under Rule 19(24) in anything but the most obvious and extreme situations, and will often resort to alternative remedies, such as striking or amending the offending portions of the pleadings.<sup>39</sup> As SLAPPs are often well-disguised as *bona fide* tort claims, the potential for securing relief under Rule 19(24) is therefore quite limited.

Rule 18A provides that a claim be heard through a summary trial. Summary trials are a more abbreviated form of litigation, whereby evidence is normally presented in court by way of affidavits. Although Rule 18A applications provide swifter determinations than traditional trials where evidence is presented by way of oral testimony, and are therefore less costly, they can still be quite expensive, and do little to respond to the chilling effect of a SLAPP.

Perhaps the most fundamental problem with the Rules of Court is that they offer no explicit legislative direction with regard to the need for special judicial scrutiny of SLAPPs, and no clearly defined guidelines with which to deal with cases of this kind. In the absence of a clearly enunciated government affirmation of the importance of public participation and the need to scrutinize cases where it is alleged that a filer is deliberately using the legal system to thwart this value, there is little to deter SLAPPers from filing them in the first place, and relatively few legal tools at the disposal of SLAPP targets to respond effectively when their rights are put in jeopardy.<sup>40</sup>

<sup>38</sup> See, e.g., *Serup v. School District No. 57*, [1989] BCJ 353 (BCCA).

<sup>39</sup> See, e.g., *Wayneroy Holdings Ltd. v. Sideen*, [2002] BCJ 2472 (BCSC), at paras 17–25.

<sup>40</sup> R. Wilts *et al.*, n. 36 above, at 20.

## The Plaintiff's Rights

The final criticism advanced by Plant against the PPPA was that it could impede a plaintiff's right to access the justice system and be misused by defendants to delay or dismiss legitimate suits brought by plaintiffs with genuine complaints.<sup>41</sup> In his words, passage of the PPPA would encourage a 'protest culture in which tortious harm to economic interests [would] be sanctioned by judicial order'.<sup>42</sup> The PPPA, he argued, shifted the onus onto the plaintiff to demonstrate that the claim had not been brought for an improper purpose. Plant feared that this put the plaintiff in the difficult if not untenable position of having to disprove a negative as opposed to proving a positive, undermining the traditions of civil litigation. As a result, Plant argued that the defendant in such cases, who could be a well-funded corporation (or government) just as easily as a well-meaning public interest advocate, would be in a position to stop a legitimate lawsuit in its tracks without having to defend anything.

Maintaining a claimant's legitimate right to access the justice system while at the same time ensuring that the system is not manipulated to obtain an unjust result is undoubtedly one of the most daunting challenges in designing anti-SLAPP legislation. In the Canadian context, there is a dearth of constitutional principles or doctrines upon which to base or model a legislative response. This contrasts with the US experience where, as we have discussed, lawmakers have at their disposal a variety of interpretive principles and doctrine emerging from judicial consideration of the First Amendment (particularly in relation to the right to petition) that supply guidance in drafting and applying legislation. The absence of this jurisprudence in Canada creates some unique challenges for drafting anti-SLAPP legislation.

Mindful of these contextual differences, there are several provisions within the PPPA that directly respond to the concerns voiced by Plant in regard to protecting plaintiffs' rights. First, in an application to dismiss a claim, even if the defendant is able to prove that its actions fall within the definition of public participation under the PPPA, the Court shall not dismiss the plaintiff's claim unless the defendant also establishes that the action was brought or maintained 'for an improper purpose'.<sup>43</sup> What constitutes an improper purpose is defined under the PPPA and discussed later in this paper.<sup>44</sup>

If the defendant is unable to prove that, on a balance of probabilities, the suit was brought for an improper

<sup>41</sup> See *Official Report of Debates (Hansard)*, n. 31 above, at 1100 (Geoff Plant).

<sup>42</sup> See *Official Report of Debates (Hansard)*, n. 32 above, at 1505 (Geoff Plant).

<sup>43</sup> Protection of Public Participation Act, n. 8 above, Section 5.

<sup>44</sup> *Ibid.*, Section 1(2).

purpose, but is able to prove there is a 'realistic possibility' that it was, then at trial the onus shifts to the plaintiff to prove that the suit was *not* brought for an improper purpose.<sup>45</sup> It should, however, be noted that 'disproving a negative', as Plant put it, is not a completely novel idea. For example, in tort cases that rely on a theory of strict liability, the party need only prove that the impugned conduct occurred. The onus then shifts to the other party to prove an absence of fault.<sup>46</sup>

A second response to Plant's concerns about plaintiff rights under the PPPA is that the legislation specifically excludes from protection a broad range of participatory activity due to the many exceptions contained in the way that 'public participation' is defined.<sup>47</sup> These exclusions, which led many anti-SLAPP activists to be highly critical of the definition that was ultimately enacted, preclude the law from applying in any case:

- where the matter in issue is before the courts by way of an ongoing criminal prosecution;
- where the matter in issue constitutes a breach of human rights law;
- where physical damage or trespass to persons or property has occurred;
- where the subject matter involves a contravention of a court order; or
- 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.

As such, it seems clear that the PPPA had no application where a plaintiff could characterize the defendant's behaviour as being 'unlawful'. Likewise, it seems clear that where a defendant's behaviour could be considered

<sup>45</sup> *Ibid.*, Section 5(4).

<sup>46</sup> Strict liability is also a key feature of regulatory offences: See *Regina v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154, for a discussion of the history of strict liability in the regulatory context and related issues concerning the onus of proof.

<sup>47</sup> The definition of public participation is found in Section 1 of the PPPA and reads as follows:

'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.

an 'unwarranted interference' with a plaintiff's rights (i.e. tortious), the PPPA had no application; a feature of the legislation that would seem clearly to be at odds with Plant's fears about tortious harm being sanctioned by judicial order.

In the end, as with most new legislation, in our view, one must repose some confidence in the ability of the judiciary to interpret the legislation in the spirit in which it was enacted.

To guide them in this task, the PPPA contained an extensive elaboration of the purposes of the legislation that was intended to serve as a guide for judicial interpretation.<sup>48</sup> Furthermore, it afforded broad judicial discretion with respect to determining when, if at all, a judicial remedy should be granted to a defendant. Nowhere in the PPPA was it mandatory for a court to make a remedial order. Indeed, the highly discretionary nature of the judicial powers set out in the PPPA combined with various onuses imposed on a defendant as a prerequisite to qualifying for relief raise some serious questions as to whether the PPPA, on balance, provided a robust enough framework for the protection of public participation. It is to this question that we now turn.

## **THE EFFICACY OF THE BC PROTECTION OF PUBLIC PARTICIPATION ACT**

In the first Canadian academic consideration of the SLAPP phenomenon, it was argued that since SLAPPs depend fundamentally on the unequal access to legal resources as between the filer and the target, effective anti-SLAPP legislation must contain three essential *procedural* components:

<sup>48</sup> The Protection of Public Participation Act, Section 2, reads as follows:

'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.'



1. provisions that expedite identification and dismissal of SLAPPs;
2. provisions that reduce the economic burden of defending against SLAPPs; and
3. provisions that create economic disincentives to the filing of SLAPPs.<sup>49</sup>

The author of this early work argued further that these procedural protections must, in turn, be founded on a *substantive* recognition of a statutory right to public participation.<sup>50</sup> In the balance of this section, we consider how the PPPA fares when assessed against these four metrics.

### Statutory Right to Public Participation

As previously discussed, Canadians do not enjoy the same constitutional protection as Americans in relation to the right to petition government. A clear and robust definition of the sphere of public participation activities to be protected is thus critical in anti-SLAPP legislation. This definition should include the right to communicate with all levels of government and the judiciary, as well as the right to communicate with the public at large in connection with matters of public concern.

The point of articulating a statutory right is, first, to reflect the value placed on democratic activity. In the words of a former Justice of the Supreme Court of Canada, protection of political expression is ‘an indispensable component of a “free and democratic society”’.<sup>51</sup> This should be so, regardless of whether a dispute is between two private parties or between a public and a private party.

Second, statutory recognition of the right to public participation provides a means of determining how the balance will be struck between the competing public and private interests that typically collide in SLAPP litigation. By clearly defining what public participation entails, granting a statutory right to that activity, and then pairing it with a prohibition on bringing or maintaining an action against another person for engaging in that activity, such legislation can give SLAPP targets an immediate statutory defence to a SLAPP. Not only does this enhance the prospect of securing early dismissal of SLAPPs, it also aids the earlier identification of such suits.

The initial version of the Bill (Bill 29) that became the PPPA contained a statutory right to public participation. Section 2 read as follows:

- (1) Subject to subsection 2, a person may make any communication or engage in any conduct if the

communication or conduct is genuinely aimed at promoting or furthering lawful action by the public or by any government body in relation to an issue of public interest.

- (2) Communication or conduct is not protected under subsection (1) if the communication or conduct
  - (a) Resulted in damage to or destruction of property,
  - (b) Resulted in physical injury,
  - (c) Was in breach of any law or any order of any court, or
  - (d) Is considered by a court to be an unwarranted interference with the rights or property of any person.
- (3) No proceeding lies, for damages or otherwise against any person for any communication or conduct protected under this section.<sup>52</sup>

The statutory right enshrined in this provision provided a complete defence to a SLAPP-style lawsuit unless the impugned behaviour was considered by the court to be unlawful or unwarranted. This provision sought to put legitimate public participation ahead of private economic interests, while maintaining the court’s discretion to refuse protection to behaviour that overstepped the bounds of what would be considered reasonable in a democratic society.

During the consultation process, for reasons that are unclear, the government decided to abandon this approach.<sup>53</sup> It is likely that the creation of a substantive right provoked opposition from business interests that perceived they would be adversely affected by the creation of the statutory right to public participation. It is also likely there was concern that the legislation might be deemed unconstitutionally over-broad and vague, particularly with regard to what constituted ‘an issue of public interest’. For example, would communication that involved the advertising of goods and services for a commercial purpose be protected? This was a legitimate concern, and one that was not addressed by the original definition.

The second version of the PPPA, tabled as Bill 10 and redrafted as the result of concerns expressed during the consultation process, abandoned the notion of articulating a statutory right to public participation. Instead, it adopted an approach that created a procedural framework for defending against lawsuits that were brought by the plaintiff for an ‘improper purpose’.<sup>54</sup> As discussed above, under the PPPA as it was ultimately enacted, before a case could be dismissed, a defendant was required to prove on a balance of probabilities that its activities fell within the definition of ‘public participation’ and that a principal purpose for which the claim

<sup>49</sup> C. Tollefson, n. 9 above, at 229.

<sup>50</sup> *Ibid.*, at 229–230.

<sup>51</sup> *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139, at 407, Justice L’Heureux Dube.

<sup>52</sup> Bill 29, n. 27 above, Section 2.

<sup>53</sup> *Hansard*, n. 32 above, at 1430 (G. Bowbrick).

<sup>54</sup> *Ibid.*

was brought was 'improper' as defined under Section 1(2). The term 'improper purpose' was further defined as arising where the plaintiff had no reasonable expectation that its claim would succeed at trial, and it could be shown that the claim was intended to dissuade persons from engaging in public participation (or to otherwise deter or penalize them in relation to such activity).

This meant that under the PPPA as enacted, the right to engage in public participation was by no means unconditional. The defendant would only enjoy the protection of the PPPA if it could prove that it was being sued in relation to statutorily protected participatory activities *and* that a principal purpose for which the claim was brought was to silence or punish public participation. The approach adopted in the PPPA in this regard has given rise to criticism. For example, commentators who reviewed the potential of the PPPA to provide a template for law reform in Australia have criticized its provisions as overly restrictive:

... a number of lawsuits brought in response to public participation are not brought for calculated or malicious purposes, but simply arise from a conflict of perceived personal liberty and fundamental democratic rights, and therefore represent only an unjustifiable (rather than a deliberate and malicious) interference with the right to public participation. The British Columbian approach might, therefore, be ineffective because it is not sufficiently broad.<sup>55</sup>

One way, of course, to remedy this problem would have been for BC to have retained the statutory right to public participation contained in Bill 29. It is perhaps unfortunate that the government shied away from this approach. Still, it is worth noting that the PPPA did mitigate against some of the concerns raised by critics by introducing a new statutory defence in defamation cases. In this regard, the PPPA statutorily deemed 'public participation' to constitute an occasion of 'qualified privilege'.<sup>56</sup> The defence of qualified privilege attaches to the occasion and circumstances in which a communication was made, and not to the content of the communication itself. When available as a defence, it allows an individual to engage in behaviour that might otherwise be considered defamatory as long as the communication was not made with malicious intent.<sup>57</sup> In the context of the PPPA, the defence meant that a person could not be sued for defamation if they were able to establish that their conduct fell within the definition of public participation. This provided important protection to targets of SLAPPs because defama-

tion is one of the preferred torts of SLAPP filers. However, as SLAPP filers can still rely on other torts to achieve their goals, the concerns noted above about the relative narrowness of the PPPA's protections remain.

### Expedited Identification and Dismissal

SLAPPs depend heavily on the high cost of litigation and the differential ability of the parties to bear these as the litigation proceeds. In many cases, the costs of litigation can become significant months or even years before the matter goes to trial. Early identification and dismissal of SLAPPs is thus essential to level the legal playing field. A clearly articulated and enforceable statutory right to engage in public participation is the most straightforward and effective way to ensure this goal. While the PPPA does not adopt this approach, it does contain some procedural provisions that aid the early identification and dismissal of SLAPPs.

Under the PPPA, a defendant is entitled to apply for summary dismissal of a suit where it establishes, on a balance of probabilities, that:

the communication or conduct in respect of which the claim was brought constituted 'public participation' as defined in the PPPA; and

a principal purpose for which the claim was brought was improper.<sup>58</sup>

To guard against delay, the PPPA required that such applications be heard not more than 60 days after the application was filed and not less than 120 days before trial.<sup>59</sup> Furthermore, the PPPA provided that all further steps in the proceedings shall be suspended until the application to dismiss is decided, minimizing the legal costs incurred with regard to the main action while the application to dismiss was pending.

However, the expenses incurred in defending a SLAPP are not the only challenge faced by SLAPP targets. Another important factor is the plaintiff's ability to seek an interim injunction to restrict the defendant from continuing to engage in the disputed behaviour while the matter is before the courts. By securing an injunction of this kind, SLAPP filers can preclude targets from exercising their democratic rights even if the case they have filed is without merit. Frequently, these injunctions are sought on an *ex-parte* basis shortly after or at the same time as the underlying action is filed.<sup>60</sup> The PPPA did little to guard against this outcome. In fact, it specifically affirmed that courts retained the discretion to grant an

<sup>55</sup> T. Bover and M Parnell, 'A Protection of Public Participation Act for South Australia, a Law Reform Proposal', prepared for the Environmental Defenders Office (South Australia) Inc. (May 2002), available at <<http://www.edo.org.au/edosa/research/public%20participation.htm>>.

<sup>56</sup> See Protection of Public Participation Act, n. 8 above, Section 3.

<sup>57</sup> See *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, for a discussion of the common law defence of qualified privilege.

<sup>58</sup> See Protection of Public Participation Act, n. 8 above, Section 4.

<sup>59</sup> *Ibid.*, Section 4(2).

<sup>60</sup> Developing a Response to Strategic Lawsuits Against Public Participation in British Columbia: Submissions on the Ministry of the Attorney-General's Consultation Document (WCEL, June 2000), at 5, available at <<http://www.wcel.org/wcelpub/2000/13299.pdf>>.

injunction to a plaintiff pending determination of rights under the Act.<sup>61</sup> This provision, in our view, could have led to the efficacy of the PPPA's early identification and dismissal provisions being undermined.

### Reducing the Cost of Defending a SLAPP

Much of the chilling effect of SLAPPs comes simply from anxiety surrounding the financial burden that defending a SLAPP almost inevitably entails. Reducing some of these costs by accelerating the hearing of a summary dismissal application is an important step towards reducing this burden. However, preparing for such an application requires a considerable amount of legal work, particularly because the defendant still bears the onus of proof.

Therefore, the PPPA also contained other mechanisms for decreasing the economic burden on the defendant of a SLAPP, particularly in relation to costs. As discussed above, in a typical BC law suit, the successful party is only awarded its 'party and party' costs, meaning that the unsuccessful party is obliged to pay an amount of money that typically represents approximately one half of its opponent's actual legal fees.<sup>62</sup> In contrast, under the PPPA, if the defendant succeeded in her application for summary dismissal of the action, the court had discretion to order that the plaintiff pay 'all reasonable costs and expenses' incurred by the defendant.<sup>63</sup> It should, however, be noted that such orders for full indemnification were not mandatory and, as such, whether and to what extent they would have relieved the financial burden on SLAPP targets remains somewhat speculative.

Thus, while this provision was a step in the right direction, many considered that it did not go far enough. This is because costs awards, both in ordinary civil litigation and under the PPPA, typically come at the end of trial. And because legal proceedings can take months, if not years, to be resolved, a target's legal bill can grow exponentially. SLAPP filers rely on this fact in the hopes of winning a war of attrition. As such, the prospect of an award of costs in the future may do little to 'relieve the more immediate day-to-day hardship felt by SLAPP targets'.<sup>64</sup>

### Disincentives to SLAPP Filers

The most effective way to provide protection to SLAPP targets is to prevent SLAPPs from being filed in the first place. If this goal is achieved, potential targets avoid expending their scarce funds defending meritless claims. Moreover, the chilling effect of such suits on

public participation is prevented. Building disincentives against the filing of SLAPPs into a statutory regime is thus a key challenge for anti-SLAPP law drafters, and an area in which the PPPA deserves significant credit for innovation.

One area of innovation in this regard under the PPPA has already been discussed: the availability of cost awards to cover all 'reasonable costs and expenses' of the defendant. This represents an important financial deterrent to prospective SLAPP filers. Moreover, the PPPA broadened the discretion of courts to award punitive damages against a filer, either on its own motion or on the application of the defendant.<sup>65</sup> The awarding of punitive or exemplary damages in a typical tort lawsuit is very rare; normally they are granted in only the most egregious of circumstances, where a party's actions offend community standards. By recognizing a broader judicial discretion to award punitive damages in SLAPP cases, the PPPA clearly underscored that the high-handed use of non-meritorious litigation to threaten and intimidate individuals exercising their democratic rights is unacceptable and not to be tolerated.

Another significant disincentive under the PPPA aimed at deterring SLAPP filers were its provisions relating to interim costs awards. If a defendant, on an application for dismissal, was unable to satisfy the court on a *balance of probabilities* that the action filed against them was a SLAPP (i.e. that the impugned conduct constituted public participation and that the proceeding was brought for an improper purpose), but was nonetheless able to prove that there was a *realistic possibility* that it was, the court could order that the plaintiff provide security in an amount considered sufficient to indemnify the defendant, and also an amount for punitive or exemplary damages to which the defendant may become entitled.<sup>66</sup> This amount would be paid into court until the proceedings were completed, thus ensuring that these monies remained under judicial control for the duration of the trial process. This innovative provision created a powerful disincentive against delaying the case and against maintaining an action that had little prospect of succeeding.

Of course, there are some SLAPP filers whose economic power is so immense that this upfront expense would have little or no effect on their conduct of the case. Therefore, the PPPA empowered a court, where there was a realistic possibility that the suit was a SLAPP, to order that any settlement, discontinuance or abandonment of the action be approved by the court, on terms the court considered appropriate.<sup>67</sup> This unusual form of judicial oversight afforded significant protection for a

<sup>61</sup> See Protection of Public Participation Act, n. 8 above, Section 4(3).

<sup>62</sup> British Columbia, Supreme Court Rules, r. 57(2).

<sup>63</sup> See Protection of Public Participation Act, n. 8 above, Section 5(2)(a)(ii).

<sup>64</sup> C. Tollefson, n. 9 above, at 231.

<sup>65</sup> See Protection of Public Participation Act, n. 8 above, Section 5(2)(b).

<sup>66</sup> *Ibid.*, Section 5(4)(a).

<sup>67</sup> *Ibid.*, Section 5(4)(b).

target who felt compelled to settle for terms inconsistent with the merits of their legal case. Under this provision, a court could examine the proposed settlement and make any changes that it felt necessary to ensure fairness in the circumstances. Furthermore, if the plaintiff decided to discontinue the action, perhaps because it had achieved its intended purpose of silencing the target, the court could impose terms on the plaintiff as a rebuke for its behaviour, despite not being able to render a decision on the actual case. This ongoing judicial supervision was intended to serve as a disincentive to those filers who did not have an honest belief that the action was necessary to enforce their legitimate rights. While an important innovation, this provision is by no means unique and indeed bears some resemblance to the broad supervisory powers given to courts in the oversight of class actions.<sup>68</sup>

A final disincentive to SLAPP filers were provisions, discussed earlier, that shifted the onus of disproving improper purpose to a plaintiff once the defendant showed that there was a realistic possibility that the suit was a SLAPP.<sup>69</sup> This onus-shifting provision was aimed at ensuring that a plaintiff could not file a tort claim and then bide its time while the defendant incurred the expenses associated with gathering the evidence necessary to refute its claim.

Although there were certainly some weaknesses and gaps in the PPPA, on balance, had it remained on the books, it would have significantly enhanced protection from SLAPPs in BC, and, in our view, measurably diminished their prevalence within the province.

## THE BC SLAPP EXPERIENCE SINCE THE REPEAL OF THE PROTECTION OF PUBLIC PARTICIPATION ACT

In the years following the repeal of the PPPA, SLAPPs have continued to be an issue of concern, particularly at the grass-roots level. The West Coast Environmental Law Association (West Coast), a non-profit, public-interest, environmental law firm based in Vancouver, works closely with dozens of community-based environmental groups across the province. It reports that many such groups have faced threats of legal action where their campaigns have collided with the interests

of developers and resource companies. According to West Coast, recent illustrations include a lawsuit brought by a company that operated a quarry near Nanaimo, BC, as the result of content contained in a pamphlet distributed by a local citizens group. The defendants were forced to settle with the company.<sup>70</sup> Moreover, West Coast has itself been the target of threatened SLAPPs. In 2003, it helped to organize a community forum to debate the potential impacts of a plan to develop coal-bed methane resources in the northern part of Vancouver Island. Prior to the forum, the company promoting the development threatened to sue one of the local organizers and West Coast for defamation. Although no lawsuit was ultimately filed, West Coast expended considerable resources responding to the company's threats including informing and reassuring funders, fact checking, and liaising with its board, colleagues and the media.<sup>71</sup> The company later confirmed in an email that while the action would probably not have succeeded its interest in litigating the matter 'still holds'.<sup>72</sup>

A more recent SLAPP-related controversy has arisen in connection with a lawsuit filed in 2009 by CanWest Media Works Publications, Inc. against a Vancouver based indie-media group and several of its officers for trademark infringement arising from a mock edition of the Vancouver Sun produced by the group. The mock publication was intended to demonstrate a perceived pro-Israel bias in the newspaper's coverage of issues in the Middle East.<sup>73</sup> As part of the same lawsuit, CanWest brought a claim against a retired UBC professor, who was not involved in producing the mock paper, for distributing copies of the paper at a Vancouver Skytrain terminal. The BC Civil Liberties Association considered seeking intervenor status in the suit with a view to arguing that the suit should be dismissed as a SLAPP. Ultimately, CanWest abandoned the suit against the professor and the media group although it is still pursuing its claim against two authors of the paper.<sup>74</sup>

One of the most interesting developments in recent years is a case in which a local government has employed SLAPP-style tactics against its critics.<sup>75</sup> In this case, the City of Powell River (the City) threatened to sue three local residents who had objected to the

<sup>68</sup> See, e.g., *Smith v. Canadian Tire Acceptance Ltd.*, [1995] OJ 327 (ONC-GD), at para. 41. These powers include the ability to discontinue or stay a class action (Class Proceedings Act 1996, RSBC, c. 50, Section 13), the power to approve any settlement agreement reached between the parties, even before certification (Section 35), the requirement to approve any abandonment or discontinuance of the action, and the power to make any other order it considers just and appropriate in the context of certification (Section 10).

<sup>69</sup> See Protection of Public Participation Act, n. 8 above, Section 6.

<sup>70</sup> Personal correspondence with Andrew Gage, Staff Counsel, West Coast Environmental Law (18 December 2009).

<sup>71</sup> S. Lott, *Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada* (Public Interest Advocacy Centre (PIAC), 2004), at 30, available at: <[http://www.piac.ca/consumers/corporate\\_retaliation\\_against\\_consumers/](http://www.piac.ca/consumers/corporate_retaliation_against_consumers/)>.

<sup>72</sup> S. Lott, n. 71, above.

<sup>73</sup> *Canwest Mediaworks Publications Inc. v. Horizon Publications, Inc. et al.*, Vancouver Docket No, S078309 (BCSC) (7 December 2007).

<sup>74</sup> 'Looks like a SLAPP suit, smells like a SLAPP suit, walks like a SLAPP suit . . .', 43:3 *The Democratic Commitment: BCCLA Newsletter* (Fall 2009), at 9.

<sup>75</sup> *Dixon v. Powell River (City)*, [2009] BCSC 406 (26 March 2009).

City's decision to support a local harbour development. The City sent letters to the residents alleging that their public comments about the project were defamatory, and demanded a retraction and apology.<sup>76</sup> One of the residents went to a city council meeting and, after stating that he could not afford a lawsuit with the city, read out a public apology withdrawing his statements. He then asked if that was sufficient to satisfy the City and whether the matter was over. The mayor gave no such reassurance.<sup>77</sup>

As a result, John Dixon, a Powell River area resident but not one of the three recipients of the threatening letter, sought a declaration from the BC Supreme Court that the City had no legal authority to threaten or institute civil proceedings for defamation of its reputation *qua* municipal government. The court held that the Dixon not only had standing to bring the application but that it would be contrary to the Charter of Rights and Freedoms to allow a public body to bring a suit in these circumstances. According to Justice Garson, it would be

'... antithetical to the notion of freedom of speech and a citizen's rights to criticize his or her government concerning its governing functions, that such criticism should be chilled by the threat of a suit in defamation'.<sup>78</sup>

One of the questions that emerge from the Powell River litigation is whether the strategy of seeking a declaratory order in response to a threatened or pending SLAPP could be employed more broadly in situations where the filer is an emanation of or associated in some way with government. Indeed, the decision may be suggestive of the potential to employ declaratory actions as a means of responding to SLAPPs even in conventional 'private' litigation. It would appear that lawmakers in Australian Capital Territory were contemplating this option in an early version of an anti-SLAPP law introduced in 2008.<sup>79</sup> Ultimately, the law that was enacted did not contain a mechanism that formally instituted this novel approach.<sup>80</sup> However, it remains an option that, in our view, future law reformers should consider.

## CONCLUSION

The growing experience and familiarity in Canada both with SLAPPs and the legal options for responding to them sets the stage, in our view, for a renewed effort at

securing legislative protection against the ills that SLAPPs visit upon public life in this country. While SLAPPs in Canada have not become the epidemic that they have in the USA, they remain a very real problem and indeed one that, due to their often oblique and well-disguised form, may well be more pervasive and harmful than is conventionally assumed. The short-lived BC Protection of Public Participation Act was a concerted and sophisticated attempt to craft a made-in-Canada response to a problem confronting many liberal democracies in an era in which the virtues and values of public participation are highly prized. In attempting to balance private and public rights, arguably the PPPA tilted towards more conservative solutions than are ultimately necessary to protect public participation in a truly robust fashion. Nevertheless, it is hoped that the legacy of the law and of the work and experiences of the activists and citizens that helped to bring it into force, however briefly, will provide important lessons and encouragement for future anti-SLAPP law reformers both in Canada and beyond.

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<sup>76</sup> *Ibid.*, at para. 12.

<sup>77</sup> *Ibid.*, at para. 13.

<sup>78</sup> *Ibid.*, at para. 47.

<sup>79</sup> See the Protection of Public Participation Bill 2008, Australian Capital Territory, 6<sup>th</sup> Assembly (as introduced by Deb Foskey), available at <<http://www.austlii.edu.au/au/legis/act/bill/poppb2008370/>>.

<sup>80</sup> See Protection of Public Participation Act 2008 (ACT), A2008–48 (effective 12 September 2008).