ANTI-SLAPP ADVISORY PANEL

REPORT TO THE ATTORNEY GENERAL

October 28, 2010

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Anti-SLAPP Advisory Panel

SUMMARY OF RECOMMENDATIONS

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Issue 1: A test for courts to quickly recognize a SLAPP

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8. A motion for a remedy for a suit against public participation should be heard within 60 days of filing. [41]
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9. If a suit fails to meet the test, the case should be dismissed. [44]
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award of costs should await the outcome of the proceeding, or whether there should be no award of costs. [44]

b. If the case is dismissed, there should be a presumption that the pleadings may not be amended. [45]

11. If the court finds bad faith or improper motive on the part of the plaintiff, the court should award damages to the defendant in such amount as is just. [46]
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18. There should be no prescribed statutory limitations on the expression on matters of public interest protected by the legislation. The limits of freedom of expression on matters of public interest are already the subject of extensive Canadian jurisprudence. The specific limits of expression on matters of public interest should continue to be a matter for the courts, to be determined on a case by case basis. [57, 59]

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20. There should be no special safeguards to prevent abuse. The balancing of interests at the heart of the remedy will allow appropriate disposition of cases. Cost sanctions against parties who bring frivolous motions for protection will be available to provide a remedy against any such abuse, and to deter it. [67]

Other related matters

21. Qualified privilege should be extended to persons with a direct interest in a matter of public interest communicating to others with a direct interest, even if media are present or report on it. [75]
22. Although there is a wide variety of administrative tribunals, the general cost rules in the Statutory Powers Procedure Act already reflect appropriate principles. [82]
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25. Corporations' right to sue for defamation should not be limited at this time. [90]
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INTRODUCTION

The Anti-SLAPP Panel

[1] Strategic litigation against public participation (SLAPP) [1] has been defined as a lawsuit initiated against one or more individuals or groups that speak out or take a position on an issue of public interest. SLAPPs use the court system to limit the effectiveness of the opposing party's speech or conduct. SLAPPs can intimidate opponents, deplete their resources, reduce their ability to participate in public affairs, and deter others from participating in discussion on matters of public interest.[2]

[2] The Attorney General created an Advisory Panel on Anti-SLAPP legislation to advise him as to how the Ontario justice system may prevent the misuse of our courts and other agencies of justice, without depriving anyone of appropriate remedies for expression that actually causes significant harm.[3] The Panel was chaired by Dean Mayo Moran of the Faculty of Law, University of Toronto, and was also composed of Peter Downard, a partner of the Fasken Martineau law firm, and Brian MacLeod Rogers, a media lawyer in Toronto. This document is the report of the Advisory Panel.

[3] At the outset of its work, the Panel considered a collection of material assembled by the Ministry of the Attorney General, consisting of legal articles, relevant statutes from other jurisdictions and advocacy documents.[4] The creation of the Panel was announced by a press release and background document[5] that invited the public to make submissions to the Panel. In addition, the Panel created a list of individuals and organizations likely to have views on the topic and invited them to make submissions. The Panel received written submissions from 31 groups and individuals. It heard oral presentations from eight groups or individuals. A list of those who expressed their views appears at the end of this Report.

[4] Participation by members of the community in matters of public interest is fundamental for democratic society. The very fabric of democracy is woven daily from the acts of citizens who engage in public discussion and contribute in countless ways to creating a civil society alive to the interests and rights of its members. It will always be important to recognize and protect these activities, but more than ever it seems crucial to encourage public participation as voter turnouts decline, society's needs become ever more complex and individuals feel increasingly powerless to effect meaningful change. If anything, public activities by individuals and groups within the community are even more essential in the face of such realities, and yet undertaking them has never been more challenging.

[5] The issues the Panel was asked to consider raise important concerns about the impact of law and procedure on those engaged in public participation. Free expression on matters of public interest is key to such participation, as repeatedly recognized by the Supreme Court of Canada. The principal goal must be to encourage such activities and expression as far as possible within the appropriate confines of our laws and legal system. Our efforts represent only one small but important aspect in which such encouragement can be offered.

The need for legislation

[6] Most of the submissions (27 out of 31) supported the introduction of special legislation against SLAPPs. Many of the submitters had been sued themselves for their activities speaking out on matters of public interest. Many also knew of others who had been sued, or who had refrained from participating in public questions either because they had received a warning that they risked being sued if they did speak out, or because they were afraid of being sued in any event.

[7] Besides the lawsuits and other actions, including threatening letters, within the personal knowledge of the submitters, the Panel was referred to the 2008 report of the Environmental Commissioner of Ontario, which stressed the need for legislation to end strategic litigation against public participation.[6] One submission in favour of anti-SLAPP legislation was signed by some 46 organizations and individuals involved in a wide variety of community matters and referred to resolutions in favour of such legislation by some sixty- four Ontario municipalities.

[8] Most recently, a bulletin from the Lawyer's Professional Indemnity Company (LawPRO) cautioned lawyers engaged in public advocacy work that they might need supplementary liability insurance because of the increasing risk of SLAPP litigation.[7] The Panel found it noteworthy that the organization devoted to reducing negligence claims against Ontario lawyers considered SLAPP suits sufficiently significant as to require additional insurance.

[9] Those who opposed special legislation against SLAPP suits made five main points:

- There is no firm evidence that there is a problem with abusive lawsuits in the province;
- Current law offers satisfactory remedies against abusive lawsuits that may be brought;

- The law already offers many opportunities to make submissions to government on matters of public interest, so additional protection for public participation is not needed;
- Legislation to curb alleged abuse would deprive plaintiffs of legitimate remedies for real harm caused by advocates purporting to act in the public interest;
- In particular, the law of defamation represents a careful balance between freedom of expression and protection of reputation, and legislation protecting more 'expression' under the name of 'public participation' would distort that balance and create undue harm to reputation.

[10] On consideration, the Panel has concluded that it is desirable for Ontario to enact legislation against the use of legal processes that affect people's ability or willingness to express views or take action on matters of public interest. While the value of freedom of expression is the principal one at stake, it is also important that the public resources of the court system not be expended on litigation that is not of substantial merit and is contrary to the public interest.

[11] There is no question that, in principle, the current law offers remedies against abuses of process, including protection from frivolous or vexatious lawsuits and those brought for an improper motive. Such remedies are found in the common law, the *Courts of Justice Act*[8] and the Rules of Civil Procedure.[9] However, the Panel agreed with the analysis of the Uniform Law Conference that, in practice, these remedies are not effective.[10] Courts are often reluctant to dismiss cases on preliminary motions based on affidavit evidence and oral argument. Traditionally, a trial with *viva voce* evidence has been the preferred procedure for determining questions of law or fact which are complex or novel. If it is necessary to decide a disputed issue as to the motive or intent of a party, a court may appropriately consider the issue to require the hearing of *viva voce* evidence. Going on to discovery and trial can be very expensive and time-consuming. Imposing the expense and time of a lawsuit on a defendant, quite apart from whether the claim is successful, has been identified as a central purpose of a SLAPP.

[12] The Rules of Civil Procedure have been amended as of January 1, 2010, to give judges more power to hear evidence at a preliminary stage, in order to preserve court resources for cases that need trials. The Panel is concerned that these changes may not make a significant difference to the fate of abusive suits relating to expression on matters of public interest. In particular, the provision for the conduct of 'mini-trials' has been adopted in Ontario, following rules in British Columbia. Evidence from that province provided to the Uniform Law Conference indicated that these rules, while useful in ordinary cases, were not helpful in combating abuse in the SLAPP context.

[13] The 2010 Rules amendments also stressed the principle of 'proportionality' in civil litigation: the means devoted to a case should be proportional to the stakes for the parties. It is not clear that this principle will operate as an effective shield against abuse in the cases of interest to the Panel. Although it provides a useful direction for use of the courts' resources in abusive litigation, the Panel believes that a more focused remedy is needed to protect public participation than this general principle, however desirable it may be for other purposes.

[14] For these reasons, it is important that the new legislation should be distinct from the existing rules. This will help to encourage courts to apply its remedies in the spirit of the statute.

[15] The Land Use Council and the Building Industry and Land Development Association (BILD) pointed out the number of opportunities that the land planning process offers for community input to development decisions. Nevertheless when citizens' groups are sued or threatened with suits for organizing or speaking out on such occasions, it is not clear that such procedures provide a genuine opportunity for public participation. Anti-SLAPP legislation can help make these processes more useful for their intended purpose.

[16] As a result of these considerations, the Panel was persuaded that threats of lawsuits for speaking out on matters of public interest, combined with a number of actual lawsuits, deter significant numbers of people from participating in discussions on such matters. The Panel believes that the value of public participation, as mentioned in its opening comments, is sufficiently weighty that the government should take active steps to promote it by enacting targeted legislation. The characteristics of the legislation fall within the Panel's terms of reference and are dealt with in detail in the next sections of this Report.

Content of protective legislation

[17] It is important to the effective functioning of the legislation that its purpose be expressly stated in the text. This statement will give notice to potential and actual litigants, as well as to the courts. Clear identification of the key elements of legal actions that may require an expedited review should help to discourage the commencement of actions that would not meet the applicable standard. It may also help distinguish these actions from the traditional range of civil actions which have been subject to relatively limited remedies in their early stages.

[18] The legislation should therefore state that the purpose of the statute is to expand the democratic benefits of broad participation in public affairs and to

reduce the risk that such participation will be unduly hampered by fear of legal action. It would seek to accomplish these purposes by encouraging the responsible exercise of free expression by members of the public on matters of public interest and by discouraging litigation and related legal conduct that interferes unduly with such expression.

[19] How should the legislation be designed to achieve this purpose? Advocates of legislation who made submissions to the Panel tended to agree on its main characteristics:

- It should provide a speedy and cheap method to stop lawsuits if those suits were brought for an improper purpose, namely to harass or intimidate the defendants;
- It should put the onus on plaintiffs to prove that their lawsuits were not improper;
- It should help rebalance an inequality of financial resources between the parties, possibly by an order that the plaintiff should pay the defendants' costs at the outset of the litigation;
- It should provide stronger legal protection for citizens engaged in public participation, such as through special defences;
- It should deter people from bringing such suits in the first place, by exposing plaintiffs, and possibly their directors and officers, and lawyers, to awards of damages or even punitive damages.
- Its principles should apply to the actions of administrative tribunals as well as to lawsuits in court. The recent application to the Ontario Municipal Board for a very large costs award in a planning matter was frequently cited as having had an intimidating effect well beyond that one case, even though the Board ultimately declined to award costs after a lengthy hearing.

[20] Some of the more technical aspects of the various submissions and the Panel's response to them are described later in this Report as part of the discussion of the specific Terms of Reference.

[21] The Panel was referred to the Uniform Prevention of Abuse of Process Act adopted by the Uniform Law Conference of Canada in 2010, the British Columbia *Protection of Public Participation Act* of 2001 and the Ontario private member's Bill 138 that drew on the B.C. Act, as well as Quebec's amendments to its Code of Civil Procedure of 2009.[11] The Panel also reviewed relevant American and Australian legislation, which showed quite varied approaches to the subject, rather than a clear path to a 'right' solution.

[22] The Panel intends that the new legislation will be effective and balanced. It recognizes that persons may properly seek legal protection from harm to reputations and to economic and other personal interests that may result from wrongful communications. As a consequence, the Panel is inclined to avoid using the acronym "SLAPP" in the new statute, as its pejorative tone may seem to prejudge the merits of cases subject to review under it. This is especially the case because the Panel recommends, below, that the key evaluation should be the effect, and not the purpose, of the legal action under review. The value of public participation, however, and the early disposition of litigation which inappropriately hampers it, remain essential to the discussion.

[23] The Panel believes that the importance of the legislative message in favour of public participation supports a free-standing statute, with a title such as the "Protection of Public Participation Act". It may be, however, that the content of that statute consists of amendments to the *Courts of Justice Act*, the *Statutory Powers Procedure Act* and the *Libel and Slander Act* to make the changes proposed in this Report.

[24] With this background in mind, the Report now turns to the terms of reference that the Panel received from the Attorney General.

Issue 1: A test for courts to quickly recognize a SLAPP suit

[25] Devising a test for identifying litigation that will unduly hamper public participation for which the protection of the statute may be invoked raises two issues. First, it must be right in principle. Second, it must be easy to recognize, both for the parties who are considering launching, or who are faced with defending, such a suit (i.e. potential plaintiffs and actual defendants), and for the judges who are called on to decide if the statutory remedy applies.

A new right?

[26] Some groups proposed to the Panel that the law should create a new legal right to public participation that would be protected by the new statute. Some of the impetus for this submission lay in the structure of several American anti-SLAPP laws that expressly protect the exercise of the (U.S.) constitutional right of citizens to petition government. Since Canadian law has no direct equivalent to this right, it is said that the new statute should create a counterpart.

[27] The Panel firmly supports the right of public participation, subject to limits of responsible behaviour. However, the Panel does not recommend the creation of a new legal right. In the Panel's view, Canadians' constitutional freedom of expression, and the recognized importance of constitutional values for

the development of the law applicable in civil litigation, provide a firm foundation for the procedural remedy recommended in this Report. The Panel proposes a new procedure to better enforce a body of existing rights, which will better protect and promote freedom of expression on matters of public interest while having regard to the values at stake on both sides of cases involving such expression.

A narrow or a broad definition?

[28] Even without creating a new 'right', it is necessary to decide how much activity and what kinds of activity should be protected by the new remedy. As mentioned, some American statutes limit their protection to petitions to government. Some of the submissions to the Panel, such as that of the Ontario Bar Association, recommended creating a relatively narrow right such as 'communications made, in good faith, to influence actual or possible government action', in order to assist the speedy disposition of the appropriate cases. In contrast, other submissions, such as that of the Canadian Civil Liberties Association, recommended a very broad definition of the protected activity.

[29] The Panel prefers a broad scope of protection. It does not consider it wise to distinguish between 'public' and 'private' forums of discussion. A conversation among neighbours about a new development and a communication made to influence government both involve expression on matters of public interest. Protecting only communication that targets government is likely to be too narrow. A better test, in the Panel's view, is whether expression is on a matter of public interest. The law has many rules that depend on an evaluation of the public interest, and therefore, the term has a meaning that is traditionally ascertainable in law. This scope of protection is also consistent with recent Supreme Court of Canada case law. For instance, in 2009, the Supreme Court created a defence against defamation actions that applies to 'responsible communication on matters of public interest'.[12] In 2008, the Supreme Court clarified the defence of fair comment, so as to protect comment on a matter of public interest where a person could honestly express the comment in the circumstances. [13]

[30] It seems likely that these particular defences may not apply to all situations in which the new remedy should be available. The communications that need protection from a SLAPP suit may be in the nature of advocacy, which is by definition one-sided. The defence of 'responsible communication' most clearly applies to balanced and verified factual accounts. Similarly, not all suits alleged to be SLAPPs involve comment, fair or otherwise. Further, not all such suits are based on defamation.

[31] While a narrower test may be easier to apply, it could also create significant problems in deciding where to draw the line. Further, the broader test

will ensure that the full scope of legitimate participation in public matters is made subject to the special procedure the Panel recommends. In the light of the variety of instances in which legitimate public participation may arise, an appropriate protection of public participation should be established on a broad foundation.

Purpose or effect?

[32] Many submissions to the Panel focused on improper motives a plaintiff may have for bringing an action. These may include attempts to punish the defendant for speaking out, to make the defendant stop its criticism, to intimidate others into silence, to give credibility to threats of suit against critics and, more broadly, to silence public debate on matters of public interest.

[33] For example, the British Columbia statute provided for a remedy "if a principal purpose for which the proceeding or claim was brought or maintained is an improper purpose."[14] The stated purpose of the British Columbia statute is to encourage public participation and to discourage persons from bringing or maintaining proceedings or claims for an improper purpose.[15] It contains a number of indicators of an improper purpose. The Uniform Prevention of Abuse of Process Act includes in its notion of abuse of process "an attempt to restrict public participation by any person."[16] Quebec's *Code of Civil Procedure* provides a power to impose sanctions for improper use of procedure, which includes "an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate."[17]

[34] The Panel does not believe that the special procedure it recommends should focus on the purpose of the litigation. Judging the motive of a plaintiff is likely to be difficult, and often impossible, in an expedited proceeding. In the Panel's view, a finding of bad faith or improper motive should not be necessary to dismiss an action without substantive merit brought against expression on a matter of public interest. In addition, the need for expedited review of such actions has led the Panel to recommend (in the next section of this Report) that the review be conducted on the basis of a paper record and oral argument. In the Panel's view, a focus upon the presence or absence of bad faith or an improper motive, in addition to being unnecessary, is not well suited to expedited adjudication.

[35] The Panel prefers to make the threshold test for application of the special procedure a consideration of the effect that the action is likely to have on expression on matters of public interest. If the action is likely to have an adverse effect on the ability of the defendant or others to participate in discussions on matters of public interest, the special procedure should apply. This question does

not require the judge to read anyone's mind; it is more readily supported by evidence.

Balancing interests

[36] The fact that a legal action may have an adverse effect on the ability of persons to participate in discussion on matters of public interest should not be sufficient to prevent the plaintiff's action from proceeding. The protection and promotion of such expression should not be a cover for expression that wrongfully harms reputational, business or personal interests of others.

[37] Conversely, the fact that a plaintiff's claim may have only technical validity should not be sufficient to allow the action to proceed. If an action against expression on a matter of public interest is based on a technically valid cause of action but seeks a remedy for only insignificant harm to reputation, business or personal interests, the action's negative impact on freedom of expression may be clearly disproportionate to any valid purpose the litigation might serve. The value of public participation would make any remedy granted to the plaintiff an unwarranted incursion into the domain of protected expression. In such circumstances, the action may also be properly regarded as seeking an inappropriate expenditure of the public resources of the court system. Where these considerations clearly apply, the court should have the power to dismiss the action on this basis.

[38] As a result, the Panel proposes a test with several steps:

> i) Does the expression that is the subject of the lawsuit involve a communication on a matter of public interest? The defendant should have the burden of proving this to the court on the balance of probabilities, failing which the special procedure will have no application.
>
> ii) If the subject matter of the action is shown by the defendant on a balance of probabilities to be communication on a matter of public interest, the onus should shift to the plaintiff to show that:
>
> a. On the factual record before the court, the plaintiff's claim has substantial merit; and
>
> b. There are substantial grounds to believe that the defendant has no valid defence.

iii) If the plaintiff meets these tests, the court should also consider whether, in all the circumstances, the action seeks a remedy for only insignificant harm to reputation, business or personal interests. Where this is so in the court's view, and permitting the action to proceed would have a clearly disproportionate impact on freedom of expression on a matter of public interest, the court should dismiss the action.

Issue 2: Appropriate remedies for SLAPP suits

[39] Two questions arise in considering remedies for litigation that has an inappropriate adverse effect on public participation: the process by which a remedy may be obtained, and the substance of the remedies that should be available. The Panel repeats its recommendation that the remedial scheme should be distinct from that now available under the Rules of Civil Procedure, in order to ensure that effective recourse is made to the new scheme.

Procedure

[40] It is essential that remedies against inappropriate litigation affecting public participation be available quickly. The defendant may have few resources and little expertise in legal matters. The intimidation effect of a lawsuit for a large amount and the actual costs of fighting it should be minimized.

[41] The defendant should be able to serve on the plaintiff notice of a motion for relief under the special procedure, together with affidavit evidence, at any time after service of a statement of claim. The plaintiff should be required to file responding affidavit evidence within 14 days. Subject to the filing of any additional affidavits within seven days after the delivery of the plaintiff's affidavit evidence, the parties should be entitled to conduct cross-examinations out of court on the affidavit material. The cross-examinations should not exceed more than one day for each side. The parties should be required to deliver factums at least three days prior to the hearing of the motion. Most importantly, the motion should be required to be heard within 60 days of filing of the notice of motion.

[42] Until the motion for a remedy is decided, no other step in the action may be taken except possibly an injunction in the discretion of the court where the plaintiff can establish the fact or serious threat of irreparable harm, and the established special tests for injunctions restraining communicative activity are met.[18] The suspension of other interlocutory proceedings is required to ensure that the efficiency of the special procedure is not undermined by extraneous tactical steps pending the motion's disposition.

[43] After disposition of the motion, the unsuccessful party should have a right to appeal directly to the Court of Appeal. The Court of Appeal is the most appropriate forum in which to resolve any legal issues arising in the special procedure. The appeal process should also be expedited. The efficient adjudication of matters to which the special procedure may apply remains as important at the appellate level as at first instance. An expedited appeal procedure will minimize the burden on the defendant in the litigation pending the disposition of the appeal, while also minimizing the adverse impact a defendant's unmeritorious appeal may have on the plaintiff's prosecution of a legitimate claim.

*Remedie*s

[44] If the plaintiff fails to satisfy the court as to the substantive merit of the plaintiff's case, the action should be dismissed with costs on a full indemnity basis. It is important that the special procedure provide for full indemnification of the successful defendant's costs to reduce the adverse impact on constitutional values of unmeritorious litigation, and to deter the commencement of such actions. The prospect of a full indemnity award should also encourage counsel to represent defendants on a contingency fee basis, where the defendants may otherwise not have sufficient means to retain counsel. Where the defendant's motion is dismissed, the usual rule of costs following the event should not automatically apply, but the court should exercise discretion to make an award of costs that it considers just in the circumstances.

[45] In the normal course, the order to dismiss should be with prejudice. As a general rule, a plaintiff who has brought an unmeritorious civil action against expression on a matter of public interest should not be allowed to amend its statement of claim in order to try again. The court should have the discretion to allow an amendment only if in the court's view the interests of justice require it in the circumstances.

[46] As stated above, the court should not be required to make findings as to bad faith or improper motive on the part of the plaintiff in deciding a motion under the special procedure. If in a particular case, however, the court is satisfied on the record before it that an action has been brought in bad faith or for an improper motive, such as punishing, silencing or intimidating the defendant rather than any legitimate pursuit of a legal remedy, an additional remedy should be available for this improper conduct. In such circumstances, the court should have the power to award damages to the defendant in such amount as is just.

[47] If the plaintiff is engaged in any administrative or policy proceeding in which it is seeking permission to do something, and that proceeding is connected

with the defendant's expressive activity, the proceeding should be suspended from the time the motion is filed until the motion is finally decided (however it is decided.) A delay in achieving a potential plaintiff's other goals should help ensure that an action having an adverse impact on public participation will only be commenced where it is important to do so to protect the plaintiff's legitimate interests. A provision to this effect appears in the private member's Bill 138 in Ontario,[19] and also in the Uniform Act. A copy of the defendant's notice of motion could be served on the tribunal to trigger this suspension.

[48] If the suspension of other proceedings causes undue hardship the court should have the power to lift the suspension. The prospect of undue hardship should be limited, however, by the creation of the expedited procedure recommended by the Panel. Under that expedited procedure the suspension would last only sixty days, plus the time required by the court to decide the motion. In the event of an appeal, the appellate court should be empowered to decide on motion whether the suspension should continue pending the disposition of the appeal.

Discussion of Additional Proposals

[49] A number of the submissions to the Panel proposed additional remedies for inappropriate litigation. While the Panel does not recommend their adoption at this time, it does consider it useful to set out some of these proposals.

[50] It was suggested that the Panel should recommend a fund to help defendants pay the costs of fighting actions brought against public participation. Such a recommendation was made by the Macdonald Committee that reported to the Quebec government in 2007, though the Quebec changes to the *Code of Civil Procedure* that flowed from that report did not create such a fund. The Panel finds the idea of resources for impecunious defendants attractive, but recognizes that public money is scarce. The government can decide better than the Panel if it wishes to devote resources to such a fund. The Panel hopes that the expedited determination of the nature of the case and the remedies proposed above (notably the full indemnity for costs that may attract *pro bono* lawyers who can seek compensation for their efforts and expenses) will reduce the need for such special financing. Ontario's Class Proceedings Fund might be made available for fighting lawsuits about public participation, but the Panel does not have enough information about its operation or source of funds to know if that would be possible. Legal Aid Ontario does not currently fund defamation actions, and other demands on its resources make the Panel wary of recommending any expansion of Legal Aid's mandate in this respect.

[51] A number of submissions suggested that the defendants should be entitled to advance orders for costs, so that plaintiffs would have to fund all or part of the defendants' legal costs while the action is proceeding. This would help alleviate any punitive element of such proceedings in which there is a significant imbalance in financial resources between the parties. The Panel notes that advance cost orders are available now in matters of public interest, though admittedly they are very rare. The Panel is of the view that the most effective remedy for the imbalance of resources is the speed with which the motion to dismiss must be heard, combined with the full indemnity for costs if the defendant succeeds.

[52] The Panel was also asked to provide special case management rules for actions that are allowed to continue after the motion. The Panel believes that the current powers of the court to control its processes provide all the protection necessary. The judge hearing the motion may make any order specific to that case if he or she thinks it appropriate.

[53] Some submissions suggested that the Panel should make directors and officers of a plaintiff corporation personally liable for the defendant's costs, and possibly for damages, if any. The Uniform Act has such a provision.[20] Presumably such a rule would also have to prohibit the corporation from indemnifying the directors and officers, unless it applied only where the corporation was judgment-proof. Some method might have to be found to record directors' dissent from the decision to sue, to avoid penalizing those who have opposed the commencement of the action found to have been unmeritorious. The Panel considers these calculations unduly complex and unnecessary to provide a full remedy for the defendant. If problems arise over judgment-proof corporations, then some such approach may be worth considering, but this was not raised as an issue in submissions to the Panel. It is worth noting that Rule 56.01(1)(d) provides that security for costs can be ordered against a corporation without sufficient assets in Ontario to pay costs.

[54] It was also suggested that the Panel should recommend making lawyers for plaintiffs personally liable for their clients' costs of bringing an action that is dismissed. Lawyers can already be held personally liable for costs if their conduct is improper. No separate rule is needed.

[55] Similarly, it was suggested that the Panel should subject lawyers who assist their clients to bring abusive lawsuits to professional discipline, or encourage the court to bring their conduct to the attention of the Law Society. Lawyers already have a duty under the Rules of Professional Conduct not to abuse the processes of the court. A complaint to the Law Society can be made if a lawyer has acted improperly. No special rule is required to enforce that duty. The

attention of the Law Society could be drawn to the lawyers' conduct now. It must also be appreciated that lawyers have a professional duty to be fearless advocates for their clients' interests. That is not a role that should be lightly interfered with. The mere dismissal of an action should not in itself be sufficient to trigger adverse professional consequences for a lawyer.

Issue 3: Appropriate limits to the protection of anti-SLAPP legislation

[56] As noted earlier, the Panel recommends a balanced remedy for responsible public participation. The limits are essentially that the expressive activity must be directed to a matter of public interest and must not cause the plaintiff substantial harm that outweighs the public interest in free expression on such matters.

[57] The Panel does not favour setting out other limits on protected expression. The Uniform Act refers to 'lawful communication or conduct'.[21] The Panel notes that the existence of the lawsuit itself suggests that the communication or conduct may not be lawful because it is a civil wrong (tort). Presumably the Uniform Act means to say 'otherwise lawful', apart from the allegations of the action.

[58] The B.C. Act excluded from protection communication or conduct that was considered undesirable for a number of reasons.[22] It did not apply to communication:

- in respect of which an information has been laid or an indictment has been preferred in a public prosecution;
- that constitutes a breach of the *Human Rights Code*;
- that contravenes any order of any court;
- that cause damage to or destruction of real property or personal property;
- that constitutes trespass to real or personal property;
- that is otherwise considered by the court to be unlawful or an unwarranted interference by the defendant with the rights or property of a person.

[59] The Panel prefers a more flexible approach to the harm that may be caused by the communication. Its test requires the plaintiff to show that it has suffered significant harm from the communication. A technical trespass or even nominal property damage may not require a halt to public participation. The technical lawfulness of the activity is not the key point. It should be up to the court in each case to weigh the competing interests of the parties and the public interest, as courts are often called to do in other cases. Courts by definition are devoted to the rule of law, and can be trusted to ensure that truly harmful lawless behaviour is not encouraged in the name of public participation.

Issue 4: Appropriate parties to benefit from the protection of anti-SLAPP legislation

[60] The standard image of a lawsuit directed against public participation in the literature, and among most of the submissions to the Panel, involved a small group of concerned citizens wishing to express views on a land development project that would affect their interests, and finding themselves sued by a rich developer. Other scenarios of similar imbalance of resources and sophistication were mentioned as well. The question is whether the new legislation could apply only to such situations, or whether the remedies would also apply more broadly.

[61] This question has come up under the American statutes. For example, can media organizations already protected by special defences against defamation actions also fight a lawsuit by using a law protecting public participation rights? Can business competitors of a company applying for a land development permit criticize the application and defend against a suit for interference with economic interests on the basis of the anti-SLAPP law? For that matter, can well-off individuals maintain a not-in-my-backyard (NIMBY) opposition to a development proposal (which may itself involve the public interest, such as the construction of new power transmission lines to serve the public) and defend their own attacks on the development by use of the anti-SLAPP law?

[62] The Panel is of the view that the proposed scheme should apply to anyone in any civil litigation. The value of public participation is not restricted to the poor or to individuals. The courts have held that commercial speech is entitled to Charter protection. It will be up to the defendant in each case to show that its expressive activity was conducted in respect of a matter of public interest, failing which the special procedure will not be available. It will also be open to the plaintiff to show that it has substantial grounds upon which to proceed with the action. Costs orders against unsuccessful defendants will be available where appropriate. It should be recalled that many of these doubtful suits have arisen in the United States, where an unsuccessful litigant does not usually run the risk of a costs order. In our system, the exposure to costs may deter more speculative use of the proposed mechanism, notwithstanding that the courts may have regard to the position of impecunious public interest groups in appropriate cases.

[63] In particular, media defendants may be channels for public communications by interest groups that otherwise would have trouble getting public attention or even communicating with others in the community. Thus it may be undesirable to exclude the media from access to the new remedies simply because they may have other defences some of the time. The Panel considered whether small or local media should have opportunities for the proposed remedy

that larger, more sophisticated (or better legally advised) media would not. In the Panel's view this distinction is untenable. In principle, the size of an organization should not be determinative of its access to a legal procedure intended to protect legal values important to all. The practical significance of providing special protection to smaller or local media outlets may also in many instances be modest, given the widespread ownership of such Ontario media outlets by large corporate conglomerates.

[64] A defendant media organization may have difficulty in arguing that a plaintiff's action should be dismissed on the basis that the action involves insignificant harm to the plaintiff, where the plaintiff's claim is based on a publication that the media organization has disseminated widely. Nonetheless the Panel believes that if the media defendant's publication relates to a matter of public interest, it should have the opportunity of pursuing a remedy through the proposed special procedure where appropriate.

Issue 5: Methods to prevent abuse of anti-SLAPP legislation

[65] A number of the anti-SLAPP statutes in the United States have been used in cases that were not anticipated by their drafters. For example, corporations sued by public interest organizations for violating privacy rules have defended on the ground that their right to communicate was being infringed, and thus that the suit was subject to the statutory remedies. Even governments have tried to use such laws to defeat lawsuits aimed at making them comply with other legislation, on the ground that they (the governments) were acting in the public interest.

[66] As a result, some legislation has had to be amended over time, in a kind of contest between the legislatures trying to protect public interest groups on one side, and on the other, counsel for corporate and other institutional interests seeking loopholes or opportunities in the statutes. California's statute has been amended four times in the past decade.[23]

[67] Here too the Panel does not recommend special measures to prevent abuse. As under Issue 4 above, it believes that the limits to the application of the new remedies – that the defendant has to prove that it is communicating on a matter of public interest, and that the action may continue after review – will suffice to keep abuse to a minimum. The legislation will include a clear statement of its purpose, and latitude will be provided to the sound judgement of the courts, including the costs regime discussed above.

Additional Issues

[68] The submissions made to the Panel and the reading material provided to it raised several issues that do not fall neatly within the terms of reference but that also merit some attention here. Most focused on reforms to the law of defamation. One dealt with proceedings before administrative tribunals.

Qualified privilege for certain aspects of public participation

[69] At the heart of many lawsuits brought against those involved in public participation is the tort of defamation, which is the key civil cause of action over harmful expression. It may be argued that this tort is uniquely suited to SLAPPs since it imposes strict liability. Once the plaintiff establishes that defamatory words were published by the defendant to others, both falsity and damage are presumed; the plaintiff is not required to prove an intention to harm or even negligence. The onus then shifts to the defendant to establish a defence in order to escape liability.[24] The scope of defences thus lies at the heart of defamation law. They draw the actual boundaries between lawful and unlawful speech, and have evolved over time.

[70] The defence of fair comment, as recently clarified by the Supreme Court of Canada,[25] provides significant protection for vigorous public debate on matters of public interest. However, this defence is only available for statements of opinion, or inherently debatable inferences from facts. In addition, the underlying facts have to be proven true in court. The difficulty of proving such facts at trial has been acknowledged by the Supreme Court.[26] In its recent decision in *Grant v. Torstar Corp.*,[27] the Supreme Court has also recognized a defence of "responsible communication" for defamatory statements of fact published in mass media, by professional journalists or others, on matters of public interest. Although this decision has also broadened the scope of defences available in civil litigation involving communications on matters of public interest, this new defence may also involve complicated factual inquiries into whether a defendant has acted 'responsibly' in a particular case.

[71] The common law has long recognized the need for an even more robust defence in certain situations. For the "common convenience and welfare of society",[28] the common law has recognized the need to protect defamatory statements made pursuant to some form of duty or interest – social, moral or legal – at least when made, without malice, to others who have a legitimate interest in receiving them. This defence of qualified privilege is not limited to certain categories but is based on principles applicable to a range of circumstances that may evolve over time. The defence focuses on the overall benefit to society of

candid communication, safe from civil liability, where these principles apply. Such communications have been protected in cases involving, for example, condominium owners, company shareholders, ratepayers, electors and union members.

[72] An absolute privilege is given to those participating in proceedings in various public institutions, such as legislatures and courts, to encourage candid communication without any fear of liability; the rules of those bodies help constrain what can be said in the course of their proceedings. Where the defence of qualified privilege applies, the defence is lost if it can be shown that the speaker acted with malice – that is, for an improper or dishonest purpose, abusing the protection for some other, undesirable end.

[73] In contemporary Ontario, democratic discourse is not limited to legislative institutions, courts and mass media, nor to those who most readily have access to them. Democratic discourse is something very visceral and real to many of those who appeared before the Panel. It can take place over the fence, in living rooms and at public meetings or other gatherings, wherever and whenever people are addressing matters important to the community.

[74] In this Report, the Panel recommends that civil actions based on communications on matters of public interest should generally be subject to a special procedure providing for an expedited preliminary review. In addition, in the Panel's view, a subset of such communications should be provided with additional substantive protection in recognition of the importance of public participation and the need to encourage it in our society. In particular, the Panel recommends that there be statutory protection where a person with a direct interest in a subject of public interest makes statements on that subject to persons who also have a direct interest in that subject. In those circumstances such statements should be privileged in the absence of proof of malice in the legal sense.

[75] This is consistent with the long-established principles underlying the defence of qualified privilege at common law. The scope for freedom of expression recognized by the proposed defence would be balanced by the fact that it would only be available to persons with a direct interest in a matter of public interest when speaking to others with a direct interest in that matter. As stated above, the defence would also be defeated by proof of malice.

[76] In the Panel's view, this defence should not be automatically lost for participants legitimately communicating with others with a direct interest in the public matters at hand merely because the media may be present to cover the event. In modern life, mass media in their various forms are ubiquitous. If the

proposed privilege may be lost on the sole basis that media representatives are present, the result could be that the defence may be available only when persons are speaking on matters of insufficient public significance to attract media attention, or when media are specifically excluded.[29]

[77] Again, the Panel seeks a balanced approach. On the one hand, the defence should continue to apply even if the media are present or if what is said is reported in the mass media. On the other hand, the defence should not be available to persons who do not have a direct interest in the subject matter or who are speaking directly to the media or, in some other fashion, to the public at large. It is only available to persons speaking without malice on a matter in which they have a direct interest, to persons who also have a direct interest in the subject. Thus the rule should exclude persons or groups whose interest in the issue is only policy-based: for example, an Environmental Non-Governmental Organization (NGO) speaking about a project in Town X not because it is particularly involved in what happens in Town X but because Town X has an environmental issue and the NGO is interested in environmental issues generally; or, similarly, a Business NGO speaking about the levying of a municipal tax in Town X when the Business NGO or its members would not pay the tax but it does not like the precedent the Town is setting for the purpose of the possible future enactment of similar taxes in other municipalities.

[78] Further balance is provided by considering factors bearing on any media reports of these communications. Under Ontario law, media reports in such circumstances will only have the benefit of a statutory defence of privilege if the media report is fair and accurate; the report must accurately report the impugned statement and also include other qualifying or contradictory statements made by the speaker or by others on the occasion. Where a statutory privilege is inapplicable, the common law defence of "responsible communication" will require the media to show they acted responsibly in publishing the statement. "Responsibility" in this sense will often require considerations of verification and balance on the part of the media.

Application to administrative proceedings

[79] A number of submissions to the Panel expressly referred to administrative tribunals and the need for an expeditious remedy to proceedings before such bodies. Particular reference was frequently made to an application for costs of the hearing of the Ontario Municipal Board (OMB) in the case of a development at Big Bay Point at Innisfil. While the OMB ultimately dismissed the application for costs, argument on that point alone lasted some seventeen days of hearing. The application for costs took more time than that spent on the substantive request for a permit and zoning exemption. [30]

[80] The Panel notes the wide variety of such agencies: in Ontario there are perhaps between 250 and 350 of them, depending on one's definition. They have as well very diverse mandates: some of them adjudicate among competing private interests; others give permissions that will affect the environment, built or natural; others oversee members of a regulated occupation. The Panel does not believe that tribunals willingly lend themselves to proceedings that have the effect of suppressing public participation. The issue arises primarily with respect to applications for cost awards against public interest intervenors.

[81] The *Statutory Powers Procedure Act* (SPPA) provides a rule on costs for all bodies with statutory powers of decision in Ontario: powers to decide that are given by statute and that affect the rights and obligations of people in the province. That provision says that a tribunal (the generic term in the SPPA) may set costs rules or order a party to pay another party's costs. However, this power is limited as follows:

> 17.1 (2) A tribunal shall not make an order to pay costs under this section unless,
>
> (a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and
>
> (b) the tribunal has made rules under subsection (4) [respecting costs].

There is an exception to this provision for cost rules made before the limit was legislated in 2000. For example, most professional regulatory bodies have rules to allow the imposition of costs of discipline proceedings on members who are the subject of discipline.

[82] In addition, the SPPA yields to specific provisions in other statutes if the other statute expressly claims priority. Section 97 of the *Ontario Municipal Board Act* confers a general power to make costs awards, although the OMB Act does not override the SPPA on this point. The OMB has rules on costs that comply with the SPPA's limits. [31]

[83] The OMB made remarks to the Standing Committee on Government Agencies in September 2009 that are consistent with these principles:

> "costs" awards are very rare. The board has made that clear: A proponent that's successful should not expect their costs. The board has written a number of decisions in that regard over the years that have stated over and over again that parties with legitimate points of view should be welcome to come to the board and present their case. A successful party, simply because they were successful in the end, should not expect a cost award.

> Costs are based on conduct, and the conduct has to be unreasonable. The board, through its *Ontario Municipal Board Act*, has broad discretion to award costs, but through its rules and practices has really limited that discretion for the members that are presiding at these hearings.[32]

[84] Two options for a rule on public participation before administrative tribunals were discussed with some submitters to the Panel.

- First, an application might be brought to a court, resembling the motion to be made in a lawsuit begun in the court, for an order that the cost application not proceed, or that the parties go through a process similar to that demanded of parties to a lawsuit, to allow for a judgment based on the public interest.

- Second, a power might be given to administrative bodies, in the SPPA or otherwise, to receive such applications directly as part of their proceeding. Some tailoring to special cases might be necessary as has been done about the costs power generally.[33]

[85] The Panel has reservations about both these approaches. A court may not be in a position to apply the expertise that a specialized tribunal may have for the purpose of estimating the merits of the costs application. The Panel also believes that the general SPPA rule on costs is motivated by the same considerations as the Panel's views on litigation against public participation. The standards of abuse of process are spelled out in s. 17.1(2) of the SPPA. In other words, most of the second option above already appears in the SPPA. The OMB considered those factors in the Big Bay Point case and made its decision accordingly. The question in that context is whether there is a way to ensure that these decisions do not take so much time, and cost so much money.

[86] The Panel makes two recommendations, both constituting amendments to the SPPA:

- Require that applications for an order for costs under s. 17.1 be made in writing, unless such a procedure would cause significant prejudice to a party. The tribunal has after all already heard the debate on the merits. It should have a good idea whether any of the participants were acting inappropriately. Their attention can be fully directed at the relevant considerations by written submissions. Making written submissions would be considerably less costly than oral proceedings spread over many days.

- Provide that an unsuccessful applicant for an order for costs should provide a full indemnity to those against whom the cost order was sought, for their costs in the application (not in the proceeding on the merits). Again, the tribunal might be given a power to relieve against that rule if it were likely to cause significant prejudice to the applicant.

[87] The Panel believes that these changes would help ensure that the trying experience of so many groups that made submissions to it would not be repeated.

Corporations' right to sue for defamation

[88] Australian defamation law prohibits for-profit corporations with more than ten employees from suing in defamation.[34] Such corporations may be able to sue to recover for harm done to them, but not with the usual procedural advantages of a defamation action, such as that defamatory statements are presumed to be false and the plaintiff is assumed to have suffered damages, which can be assessed at large. The result of this law is to narrow the field of possible litigation against public participation, or to make the terms of combat more even.

[89] The Panel does not recommend a similar rule in Ontario at this time. Its implications are too broad to be part of a focused measure to address litigation based on communications on matters of public interest. The extent of corporations' rights to pursue remedies in the law of defamation may appropriately be the subject of a broader study of the law of defamation generally.

Corporations' right to deduct litigation costs as a business expense

[90] It was pointed out to the Panel that the financial imbalance between plaintiffs and defendants can be exacerbated because corporations may write off the costs of their litigation as a business expense, while defendants, notably ratepayer groups or individuals, are unable to get such tax relief. However, some not-for-profit advocacy groups may not pay taxes and thus have no reason to write off anything. The impact of this difference may be open to greater scrutiny. The Panel regards this issue as calling for appropriate study by experts on tax policy, having regard to the constitutional limits of provincial jurisdiction to legislate on the subject of taxation.

Politicians' right to sue in defamation

[91] In Ontario, municipal governments do not have the right to sue in defamation.[35] However, there are several recent cases in which municipal councillors have sued someone for criticisms aimed at the municipality or municipal interests generally.[36] Sometimes municipalities pay the expenses of

these suits. The question arises whether this is a way of avoiding the general prohibition against municipal libel actions. The cases almost by definition involve matters of public interest, and the resources of an individual or ratepayers' group against a municipal government funding an individual politician's lawsuit are likely to be unequal.

[92] The Panel is not prepared to recommend a blanket prohibition on such suits as part of the law of defamation, however. It is prepared to leave such suits to its general remedy for public participation.

Conclusion

[93] The Panel believes that its recommendations can provide a useful and economical way to reduce the incidence of lawsuits which have an undue adverse impact on public participation. The measures the Panel proposes should encourage freedom of expression on matters of public interest, and discourage use of the courts in ways that unduly limit that freedom. The recommendations are straightforward and are readily applicable to many different situations involving a variety of parties.

[94] The Panel thanks the Attorney General for the opportunity to engage with this fascinating and important topic. It especially thanks the many individuals and groups that took the time to make submissions on all sides of the issues. They took an opportunity to engage in public participation and did so constructively and very helpfully.

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[1] An overview of the phenomenon, with case examples, along with a legal analysis, was published by the Public Interest Advocacy Centre in 2004: "Corporate Retaliation Against Consumers", http://www.piac.ca/consumers/corporate_retaliation_against_consumers.

[2] Uniform Law Conference of Canada, "Strategic Lawsuits against Public Participation (SLAPPs) (and other abusive lawsuits)" (2008) at 1, online: http://www.ulcc.ca/en/poam2/SLAPP%20Report.pdf. ("ULCC Report")

[3] Ministry of the Attorney General, *Anti-SLAPP Advisory Panel*, online: http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/ ("Ministry web site")

[4] Ministry web site, note 3. See the background material and the terms of reference.

[5] Ministry web site, note 3. See the Ministry's backgrounder document for terms of reference and information about Panel members.

[6] Environmental Commissioner of Ontario, "Building Resilience: Annual Report 2008 – 2009," 2009, http://www.eco.on.ca/eng/uploads/eng_pdfs/2009/ar2008.pdf at 24.

[7] Lawyers' Professional Indemnity Company (LawPRO), "Risky business: Pitfalls in practice today" (2010) 9:2 LawPRO Magazine 1 at 3-4, online: http://www.practicepro.ca/LAWPROMag/LawPROmagazine9_2_Sep2010.pdf.

[8] *Courts of Justice Act*, R.S.O. 1990, c. C.43 s. 33.1(2), enacted by S.O. 1994, c. 12, s. 13; s. 140(1), enacted by S. O. 1990, c. C.43, s. 140 (1); s. 140(5), enacted by S. O 1990, c. C.43, s. 140 (4, 5); s. 106, enacted by S. O 1990, c. C.43, s. 106.

[9] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 20, enacted by R.O. 284/01, s. 6; Rule 21, enacted by R.O. 1990, Reg. 194, r. 21.01 (3); Rule 25, enacted by R. O. 1990, Reg. 194, r. 25.11. Rule 20.04 provides that the court shall grant summary judgment if "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." Rule 21.01(3)(d) provides that a defendant may move to have an action stayed or dismissed on the ground that "the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly." Rule 25.11 provides that the court may strike out a pleading or other document if the pleading or other document is "scandalous, frivolous, or vexatious" or "an abuse of the process of the court."

[10] ULCC Report, note 2, at 4.

[11] Ministry web site, note 3. Citations of and links to these statutes appear on the site.

[12] *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII); *Quan v. Cusson*, 2009 SCC 62 (CanLII).

[13] *WIC Radio v Simpson*, 2008 SCC 40 (CanLII). The Court here underlined the need for the common law to respect Charter values of freedom of expression, but also of reputation.

[14] *Protection of Public Participation Act*, S.B.C. 2001, c. 19, s. 5(1)(b) ("the B.C. Act") , repealed by the *Miscellaneous Statutes Amendment Act, 2001*, S.B.C. 2001, c. 32, s. 28 on August 16, 2001.

[15] The B.C. Act, subsections 1(2) (definition) and 2(a) (purpose).

[16] Uniform Law Conference of Canada, *Uniform Prevention of Abuse of Process Act*, 2010, s. 2, definition, clause (e), online: http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/uniform_abuse_of_process_act.asp ("Uniform Act").

[17] *Code of Civil Procedure*, R.S.Q. c. C-25 s. 54.1, enacted by S.Q. 2009 c. 12, s.2.

[18] See, for example, *Bonnard v. Perryman*, [1891-94] All E.R. Rep. 965 at 968 (C.A.), *per* Lord Coleridge C.J.; *Canada Metal Co. Ltd. v. Canadian Broadcasting Corp.*, [1975] O.J. No. 539, 7 O.R. (2d) 261 at 261-262 (Ont. Div. Ct.), *per* Stark J.; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] S.C.J. No. 31, [1998] 1 S.C.R. 626 at paras. 48-49 (S.C.C.), *per* Bastarache J.; *Rapp. v. McClelland & Stewart Ltd.*, [1981] O.J. No. 3145, 34 O.R. (2d) 452 at 456 (Ont. H.C.J.), *per* Griffiths J.; *Chevalier Chrysler v. Hastings-James*, [2003] O.J. No. 5049, 2003 CanLII 27672 (Ont. S.C.J.).

[19] Bill 138, *Protection of Public Participation Act*, 1st session, 39th Leg, Ontario, 2008.

[20] Uniform Act, s. 5(2)(3).

[21] Uniform Act, s. 2 (definition of 'public participation').

[22] B.C. Act s. 1(1) (definition of 'public participation').

[23] *Code of Civil Procedure*, California, s. 425.16-18. See Jerome I. Braun, "California's Anti-SLAPP Remedy After Eleven Years" (2002) 34 McGeorge L. Rev. 731 at 735.

[24] *Grant v. Torstar Corporation*, above, note 12 at paras. 28-29, per McLachlin C.J.C.

[25] See *WIC Radio Ltd. v. Simpson*, 2008 SCC 40.

[26] Above, note 12, at para. 33, per McLachlin C.J.C

[27] Above, note 12.

[28] See *Grant v. Torstar Corp.*, above, note 12, at para. 30, per McLachlin C.J.C.: "Both statements of opinion and statements of fact may attract the defence of privilege, depending on the occasion on which they were made. Some 'occasions', like Parliamentary and legal proceedings, are absolutely privileged. Others, like reference letters or credit reports, enjoy 'qualified' privilege, meaning that the privilege can be defeated by proof that the defendant acted with malice…. The defences of absolute and qualified privilege reflect the fact that 'common convenience and welfare of society' sometimes requires untrammelled communications…. The law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends."

[29] In a series of decisions made some 50 years ago, however, the Supreme Court of Canada held that publication in the media was "publication to the world" that would invalidate any defence of qualified

privilege. As observed in *Grant v. Torstar Corp*., supra fn. 23, this approach reflected "the conservative stance of early decisions, which struck a balance that preferred reputation over freedom of expression" (per McLachlin C.J.C., at para. 34).

[30] See the decision of the OMB in the Big Bay Point case: *In the matter of s. 97(1) of the* Ontario Municipal Board Act … *in respect to applications for costs…*, Order PL050290, January 30, 2009, online: http://www.omb.gov.on.ca/e-decisions/pl050290-Jan-30-2009.pdf. ("OMB Decision")

[31] OMB decision, note 24, at 4.

[32] See http://www.ontla.on.ca, Committees, Committee Transcripts, Standing Committee on Government Agencies, 2009. Agency Review: Ontario Municipal Board. 2009-Sep-08. Response to question by Mr Stan Floras at approximately 10:20 a.m.

[33] For example, it might not be appropriate to allow the subject of a professional discipline decision to resist a costs award on the ground that his or her public participation might be affected.

[34] *Defamation Act*, 2005, Australia (Qld.), Act No. 55. This Act is a version of a Uniform Act that is in force widely in Australia.

[35] *Halton Hills (Town) v. Kerouac*, (2006), 80 O.R. (3d) 577 and *Montague (Township) v. Page*, (2006), 79 O.R. (3d) 515.

[36] For example, "Maybe You Heard About The Lawsuit", Aurora Citizen, October 15, 2010: http://auroracitizen.ca/2010/10/15/maybe-you-heard-about-the-lawsuit/.

Submissions

Environmental Groups

- Ecojustice and the Canadian Environmental Law Association
- Greenpeace
- Environmental Defence and multiple groups
- Environmental Defence
- Environmental Commissioner of Ontario

Development Groups

- Building Industry and Land Development Association
- Land Use Council
- Durham Region Federation of Agriculture

Community Associations

- Hintonburg Community Association
- Non-Smokers' Rights Association
- Stoneybrook Heights/Uplands Residents Association
- Federation of North Toronto Residents' Association
- One other residents association

Public Interest Groups

- Canadian Civil Liberties Association
- Public Interest Advocacy Centre
- Registered Nurses' Association of Ontario

- Institute of Canadian Justice

Legal Groups and Law Firms
- Ontario Bar Association
- Ontario Trial Lawyers Association
- ADR Institute of Ontario
- Davies Ward Phillips & Vineberg LLP

Individuals
- Andrea Horwarth. MPP (re Protection of Public Participation Act, 2010)
- Richard Delaney – Delaney and Associates Inc.
- Henry Freitag
- 9 other individuals

Petition
- University professors