June 2000

DEVELOPING A RESPONSE TO STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION IN BRITISH COLUMBIA

Submissions on The Ministry of
the Attorney-General's
Consultation Document

West Coast Environmental Law

INTRODUCTION

The purpose of these submissions is to respond to the Consultation Document dated May 15, 2000, entitled "Developing a Response to Strategic Lawsuits Against Public Participation in British Columbia." The West Coast Environmental Law Association (WCELA) has long been concerned about the harmful effects of non-meritorious litigation on the right of citizens to debate important public issues and has advocated an anti-SLAPP law for British Columbia for some time. Accordingly, WCELA congratulates the Ministry of the Attorney General for its attention to the serious concerns raised by the use of litigation to limit public participation in decision-making processes, and for embarking on the current public consultation process.

WCELA is a non-profit environmental law association. We provide free legal advice and representation to individuals and organizations on environmental matters, and work for progressive policy and law reform that will protect the environment and ensure public involvement in environmental decision-making. For more than 25 years we have been steadfast in our commitment to ensuring the participatory rights of citizens in making the decisions that will determine the future of our communities and our environment.

Over the years, WCELA has witnessed first hand the chilling effect of Strategic Lawsuits Against Public Participation (SLAPPs). Every year we respond to hundreds of requests for summary advice on issues of public participation, an increasing number of which relate to SLAPPs. In our experience, fear of being the target of a SLAPP has a far reaching silencing effect on public participation. The fear and anxiety produced by SLAPPs affects not only members of the public who have actually had to face losing everything as a result of their efforts to speak out about a matter of public interest, but also citizens who think twice about engaging in public debate because of the perceived risk that they will face a SLAPP. For example, we have received advice calls from participants in government sponsored land use planning processes who express a genuine fear that their lawful participation in these processes could expose them to a SLAPP suit.

WCELA also operates the Environmental Dispute Resolution Fund (EDRF). Among the fund's recipients have been groups who, in our opinion, were the victims of SLAPPs. Each of these groups has expended much of its time and energy in reacting to the SLAPP litigation. Their resources, as well as those of the EDRF, WCELA and the legal system, are better spent on other matters. Effective anti-SLAPP legislation would help bring about this efficient allocation of resources.

RECOMMENDATIONS

West Coast Environmental Law strongly supports the introduction of anti-SLAPP legislation, with the following aspects:

- In order to be effective, anti-SLAPP legislation must legally establish protected rights and activities, reduce the financial burden of defending SLAPPs, provide mechanisms for early dismissal of SLAPPs, and provide financial disincentives for commencing SLAPP suits.

- The preferred mechanism for establishing protected rights and activities is through a statutory right to public participation, coupled with a prohibition on bringing or maintaining an action in relation to protected rights and activities.

- The protected rights and activities should be broad enough to include written or oral statements, and actions, including lobbying, boycotting, petitioning, and demonstrating.

- The protected rights and activities should include not only communications and actions directed at government and the judiciary, but also communications and actions on matters of public concern generally.

- Once the defendant has established a prima facie case that a proceeding involves rights or activities protected by the anti-SLAPP legislation, the burden should shift to the plaintiff to show that the legislation does not apply, or that the proceeding has a substantial probability of success.

- Where anti-SLAPP legislation applies, at a minimum it should provide the court with the discretion to order the plaintiff to indemnify the defendant for all his or her legal fees and disbursements, and to award punitive damages.

- Mechanisms should be put in place to alleviate the financial burden of SLAPP targets in taking the legal steps necessary to exercise their rights under anti-SLAPP legislation.

PROTECTED ACTIVITIES

The first issue to be considered is the definition of the sphere of activities which should be protected by anti-SLAPP rules. In the opinion of WCELA, there is a need for legislation to set forth a statutory right of public participation, which should include not only the right to make written and oral statements to all levels and branches of government and the judiciary, but also the right to communicate, by word and action, in connection with matters of public concern, including the rights to lobby, boycott, petition and demonstrate. One important reason for the creation of a statutory right is the uncertainty over the boundary between the right to freedom of expression and the interests protected by developing economic torts such as unlawful interference with economic interests, conspiracy, and inducing breach of contract. A clear definition of protected activities would help to prevent powerful private interests from alleging the commission of such torts in an effort to stifle protest and debate.

The example for discussion provided in the Consultation Document attempts to prohibit certain legal actions without creating a new right. However, WCELA submits that the prohibition necessarily implies the existence of a right to public participation, and that an anti-SLAPP law should address this right directly. The right to public participation should be coupled with a prohibition on bringing or maintaining an action against another person for the exercise of that right or any act done in furtherance of the right. The sample prohibition does not go far enough because, with respect, it can be interpreted

as excluding important communications and actions designed to influence public opinion and debate on matters of public concern.

Freedom of speech and association, regardless of where that speech is being directed or how the freedom of association is being exercised, is a critical part of living in a democratic society. Communications or actions designed to influence the media, neighbours, businesses, or others on matters of public concern, need to be protected. Nor should the ambit of protection be confined in any way to matters that might be before a legislature or other government body. As the Friends of the Lubicon case demonstrated, anti-SLAPP protection should extend to those who provide information that assists consumers to make informed choices in the marketplace.

The concern about the interaction of a statutory right of public participation with existing legislation could be dealt with by making the new right subject to existing equality seeking laws such as the *Human Rights Code*, or the *Access to Abortion Services Act*. Finally, in WCELA's view, a right to public participation would be more appropriately created by statute rather than by an amendment to the Rules of Court because it is a substantive legal right and, as such, should not simply be inserted into a code of civil procedure.

PUBLIC OFFICIALS

Anti-SLAPP provisions should also be clearly worded so as to protect public officials from personal liability in a SLAPP case. While citizens should have a right to hold public officials personally liable in appropriate cases, this right should not be open to abuse. MacMillan Bloedel's suit in the early 1990s against members of the Galiano Island Trust Committee in their personal capacity could be seen as an example of a private party using the courts to intimidate members of a public body from acting lawfully in the public interest.[1] Another example was an action by Cominco, ultimately discontinued, against all of the Lower Stikine Management Committee's government-appointed representatives after the Committee asked the federal Department of Fisheries and Oceans to respond to Cominco's violations of the *Fisheries Act*. While the *Municipal Act*, s. 287 excludes local government officials from personal liability for actions taken as part of their official duties, an exception in the legislation makes it possible for SLAPP filers to allege that the "official has been guilty of dishonesty, gross negligence, or malicious or wilful misconduct," and thus open the individual to personal liability.

The wording of the discussion paper's example may be broad enough that it could extend protection to public officials, but it would be preferable to make this explicit. The reality is that public officials can be intimidated by a SLAPP in the same way that private individuals and groups are, and in either case the effect is to remove political issues from the public forum.

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[1] WCELA also notes that, contrary to the summary given in the Consultation Document, the Islands Trust Committee was ultimately successful on appeal, where the court held that the by-laws enacted were within the legislative powers of the Committee and were not enacted in bad faith.

LIMITATIONS ON DEFENDANTS

WCELA agrees that a statutory right to petition should exclude criminal acts; federal, provincial or municipal offences; and acts that cause harm to persons or property. There could also be a limitation relating to so-called sham activities, which could be identified as activities which are predominantly intended to advance the business or financial interests of a defendant, as opposed to activities predominantly intended to advance the public interest. However, the primary focus of the court's analysis on an application to dismiss a SLAPP suit should be on whether an action relates to protected rights and activities, not the intentions of the defendant.

Great care will have to be taken in crafting these limitations, to ensure that merely pleading unlawful conduct, especially common SLAPP causes of action such as trespass, interference with economic relations, and inducing breach of contract, does not prevent the application of the new anti-SLAPP legislation.

Use of the word "action" should be clarified. It is unclear if the authors of the Consultation Document intended only to refer to civil actions (as opposed to applications or criminal or quasi-criminal prosecutions).

MECHANISM FOR DISMISSAL

The Consultation Document correctly points out that one of the main challenges of an anti-SLAPP law is to identify and dismiss such lawsuits quickly and inexpensively. WCELA submits that the rules of court are inadequate to achieve this goal because section 19(24) is useful only in the rare case in which it is plain and obvious that an action is frivolous or vexatious. The case of *Fraser v. The Corporation of the District of Saanich et al*. (31 May 1999) Victoria No. 99-1793 (B.C.S.C.) is the exception that proves the rule. In that case, Singh J. dismissed an action which he identified as a SLAPP suit pursuant to rule 19(24) because the plaintiff failed to plead any material facts that could support a claim of wrongdoing. If the plaintiff simply had pled the necessary allegations, it presumably would have been much more difficult for the defendants to have had the action dismissed at an early stage, even though the proceeding was unmeritorious.

WCELA suggests the following procedure for the early dismissal of SLAPP suits. First, a defendant should have the right under the rules of court to bring an interlocutory application to dismiss an action at any time in the proceeding. At the hearing of the application, the defendant would need to show that its activities were *prima facie* within a protected sphere of activities, as set forth in a statutory right to public participation. The plaintiff would then be required to prove on a balance of probabilities either that the legislation does not apply, or that the action has a substantial probability of success. The application could also be dismissed if the plaintiff established that a limitation on the applicability of the SLAPP procedure existed.

The anti-SLAPP legislation should not only address dismissal of the underlying action, but also contain mechanisms to ensure that courts to do not grant interim injunctions on the basis of proceedings arising from protected rights and activities. It is very common for

those who bring SLAPP suits against citizens to seek interim injunctive relief preventing the communications and activities set out in the SLAPP suit. Such injunctions are sometimes sought on an ex-parte basis and almost simultaneously with the filing of the underlying action. Where injunctions have been granted before a defendant can exercise his or her rights under anti-SLAPP legislation, and an injunction is later set aside because it is found to be a SLAPP, the anti-SLAPP legislation should preclude subsequent contempt proceedings against those who violated the injunction by carrying out protected activities.

COSTS

The current rules on costs are ineffective to deter SLAPPs. The expense of filing and maintaining a lawsuit is often minor for the large private interests which have been known to use this tactic, whereas the costs to a SLAPP target can be ruinous. It is therefore necessary to increase the cost of bringing and pursuing such actions.

First, there should be special funding to provide financial assistance to SLAPP defendants. Funding is an important part of a strategy to combat SLAPPs, as the most commonly suggested remedies of costs and punitive damages against SLAPP filers come at the end of an unsuccessful claim, while many SLAPPs are launched with the purpose of forcing an immediate out-of-court settlement by a defendant who cannot raise the funds to file a defence. In addition, the cost of preparing for an initial interlocutory application to dismiss the action may be beyond the means of most defendants. The money could come from the current legal aid program, so long as administrators were directed to provide legal aid funds to SLAPP defendants. Alternatively, a special fund could be established for the specific purpose of combating SLAPPs. Funding could be provided for the cost of bringing the initial application to dismiss the SLAPP, and for the cost of the defence of an action which is not dismissed at an early stage but which still possesses the characteristics of a SLAPP suit. In any case, the SLAPP defendant should be required to indemnify the fund out of any cost awards or settlement proceeds in its favour arising out of the litigation.

Second, WCELA welcomes the strong language of the costs example for discussion provided in the Consultation Document. It is highly appropriate that anti-SLAPP legislation provide mechanisms to ensure that SLAPP targets are fully indemnified for their legal fees and disbursements by the plaintiff. At a minimum, costs rules could be amended to allow the court to exercise its discretion by awarding costs on an indemnity basis. We would like to see the legislation go even further and provide clear direction to judges with respect to costs. Innovative mechanisms, such as a “cost advance” procedure, deserve further exploration, but are not outlined in sufficient detail in the Consultation Document to comment on.

WCELA agrees that an additional disincentive to the use of a SLAPP suit would be the availability of punitive damages. The purpose of punitive damages is to punish actions which exhibit a high-handed disregard for another's rights and which offend community standards of appropriate behaviour. The use of non-meritorious litigation to threaten and intimidate individuals who lawfully participate in matters of public interest is an obvious violation of acceptable community standards, and the court should have the authority to award punitive damages in such cases.

CONCLUSION

West Coast Environmental Law applauds the Ministry of the Attorney General for its commitment to law reform to deal with the persistent problem of Strategic Law Suits Against Public Participation. We stress again that legislation is the most appropriate mechanism to implement the reforms suggested in the Consultation Document and in these submissions. While the Rules of Court may be an appropriate place to deal with technical matters related to the administration of justice, law reforms addressing substantive rights as important as this should be implemented through the legislative process where they will receive full public scrutiny and debate. Furthermore, it is vital to the political health of the province that this legislation be comprehensive and effective, and that it be passed in the current legislative sitting.