STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION: DEVELOPING A CANADIAN RESPONSE

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This article chronicles the emergence of the phenomenon of SLAPP suits (Strategic Lawsuits Against Public Participation) in the Canadian context.

The article discusses the defining features of these suits, and analyzes how and why they threaten lawful participation in the democratic process. It also considers whether, and to what extent, defendants targeted in such suits should be entitled to Chartes protection akin to that available to defendants in American courts under the Bill of Rights.

After reviewing anti-SLAPP legislation recently enacted in several American states, the author concludes by offering some law reform principles and proposals for Canada.

Cet article relate l'émergence du phénomène des actions stratégiques pour contrer les interventions de citoyens dans le contexte canadien.

L'article examine les traits distinctifs de ces actions et il analyse comment et pourquoi elles menacent la participation légitime des citoyens dans le processus démocratique. Il discute aussi de la question de savoir si, et dans quelle mesure, les défendeurs visés par ces actions devraient avoir droit à une protection de la Charte équivalente à celle dont peuvent se prévaloir les défendeurs devant les cours américaines en vertu du Bill of Rights.

Après avoir passé en revue des lois récemment adoptées aux États-Unis à l'encontre de telles actions, l'auteur conclut en suggérant quelques principes et propositions pour une réforme du droit au Canada sur ce sujet.

Introduction

One of the most troubling developments in American public law over the last decade has been the emergence of the SLAPP ("Strategic Lawsuits Against Public Participation") phenomenon. Rapid proliferation of suits of this kind has had a chilling effect on citizen participation in decision-making processes, particularly those relating to the environment. The phenomenon has prompted

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a considerable outpouring of academic[1] and popular writing.[2] A substantial body of SLAPP jurisprudence has also developed, and several American states have now enacted anti-SLAPP legislation.[3]

SLAPPs directly threaten one of the core values of modern environmental law and policy: the right of citizens to participate in decision-making. Indeed, many would argue that SLAPPs must be understood as a response to the drive for and exercise of citizen participation rights. Canadians enjoy few of these rights.[4] In this respect, as in others, our environmental laws lag far behind those which have been in force in the United States for close to a quarter-century. Perhaps the only positive consequence of this state of affairs is that to date SLAPPs have been, for the most part, an American phenomenon.

This seems likely to change. One reason is that, both at the federal and provincial levels, there have been legislative initiatives which confer new rights of participation analogous to those common in American regimes.[5] As public participation is enhanced both quantitatively and qualitatively so will the incentive increase for powerful interests to respond by bringing "strategic lawsuits". Developments in British Columbia also suggest that SLAPPs will soon become a significant feature of the Canadian environmental law scene. Over the past two years, several actions have been launched in B.C. courts with

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[1] Although, to my knowledge, this is the first academic article to be written on the subject in Canada, the academic literature in the United States is extensive and growing. Useful American sources include: P. Canan & G.W. Pring, "Strategic Lawsuits Against Public Participation" (1988) 35 Soc. Probs. 506; J. Sills, "Eliminating the Appeal of SLAPPs" (1993) 25 Conn. L.R. 533; V.J. Cosentino "Strategic lawsuits against public participation: an analysis of the solutions" (1991) 27 California Western Law Review 399; and T.A. Waldman, "SLAPP suits: weakness in First Amendment Law and in the courts' responses to frivolous litigation" (1992) 39 U.C.L.A. Law Rev. 979.

[2] Coverage of the SLAPP suit phenomenon in American print media is comprehensively summarized in G. Pring and P. Canan, "Strategic Lawsuits Against Public Participation: An Introduction for Bench, Bar and Bystanders" (1992) 12 Bridgeport L.R. 937 at 938.

[3] Currently there is anti-SLAPP legislation in force in the states of Washington, New York and California. Similar initiatives have been pursued in several other states: see footnotes 72 to 84, *infra*.

[4] During the 1970s, the U.S. Congress enacted a number of statutes which expanded opportunities for public participation by establishing mandatory public consultation processes and by allowing for private enforcement of environmental laws by way of "citizen suits". These include the *National Environmental Policy Act*, 42 U.S.C. ss. 4321-61 (1970); the *Clean Air Act*, 42 U.S.C. ss. 7401-642 (1970); *Clean Water Act*, 33 U.S.C. ss. 1251-376 (1972); and the *Endangered Species Act*, 16 U.S.C. ss. 1531-43 (1973). Currently, participation rights of this kind are almost non-existent in Canada although there is a clear trend toward expansion both in terms of consultation and enforcement activities. Notable illustrations include environmental Bill of Rights legislation recently enacted in the Yukon, North West Territories and Ontario: see S. Elgie, "Environmental Groups and the Courts: 1970-1992" in G. Thompson et. al. (eds) *Environmental Law and Business in Canada* (Aurora, Ont.: Canada Law Book, 1993) 185 at 198-99, 209-10; R. Cotton and N. Johnson, "Avenues for Citizen Participation in the Environmental Arena: Some Thoughts on the Road Ahead" (1992) 41 U.N.B.L.J. 131.

[5] For references to these initiatives see Elgie, *ibid.*

strong SLAPP overtones.[6] The most notable of these is a suit by MacMillan Bloedel Limited, the province's largest forest company, against a small environmental group on Galiano Island alleging that the group unlawfully injured the company's business interests by lobbying for local zoning bylaws which would have restricted its ability to develop its extensive island property holdings for purposes other than forestry.[7]

Moreover, although SLAPPs have generally been deployed in the context of environmental and land use disputes, they also pose a threat to public participation in a variety of other policy settings. A compelling illustration is a suit recently filed by the owners of a Vancouver hotel against three community activists during a neighbourhood referendum on the hotel's application to open a retail beer and wine outlet. The suit alleged that a pamphlet produced by the activists encouraging loc

al residents to vote against the proposal, on the basis that the outlet would exacerbate social problems in the neighbourhood, was defamatory.[8]

This article considers the SLAPP phenomenon from a Canadian perspective. It is in three parts. Part I considers SLAPPs as a legal and political phenomenon, reflecting on the problems associated with measuring and defining SLAPPs and on the manner in which they threaten public participation.

Part II examines judicial and legislative responses to SLAPPs in the United States. Central to this examination is an analysis of the role played by the First Amendment in the development of American SLAPP jurisprudence - in

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[6] In addition to the *Galiano* case, the SLAPP designation has been applied to a trio of suits brought by forest companies against environmentalists in connection with protests against logging in the Clayoquot, the Tsitika and the Walbran Valleys (for citations and discussion see *infra* footnote 89). Many of the other suits which have been characterized as SLAPPs have arisen in the context of municipal land use controversies. They include a defamation claim brought by a developer against a retired Nanaimo resident who complained about it's treecutting practices at a City Hall meeting. [See *Holly Hill Holdings Ltd.* v. *Carter* (26 August 1993), Victoria 932857 (B.C.S.C.); a $500 million suit by another developer against a municipality, five councillors and the city planner alleging that a Council decision not to rezone certain lands, was part of a "conspiracy to injure" its business: see *Century Holdings Ltd.* v. *Corporation of Delta*, Vancouver A932429 (B.C.S.C.); and a similar suit brought by a developer against a municipality, it's mayor and three counsellors for failing to pass enabling bylaws relating to a proposed housing development: see *Harwood Industries* v. *Corporation of District of Surrey*, Vancouver A921247 (B.C.S.C.). See, generally, Lidstone and Potvin, "Strategic Lawsuits Against Municipal Officials" [unpublished] (on file with author).

[7] The case is discussed *infra* in the text accompanying footnotes 85 to 87. Ultimately, after protracted discoveries, MacMillan Bloedel consented to a judicial dismissal of its claim against the group and three municipal politicians against whom it had also proceeded: see G. Hamilton, "MacBlo Drops Lawsuit SLAPP at Island Opposition" *Vancouver Sun* (8 April 1993) D1.

[8] See K. Bolan "Hotel takes SLAPPsuit at activists" *Vancouver Sun* (28 September 1993) A3; *Lougheed Ventures Ltd.* v. *White*, Vancouver C935224 (B.C.S.C.). After the referendum failed, the hotel dropped the suit: see Bolan, "Biltmore Hotel `respects' community's vote by dropping lawsuit against activists" *Vancouver Sun* (18 November 1993) B4.

particular, the way in which the First Amendment right to petition has provided a doctrinal vehicle for defendants to resist SLAPPs. Recent anti-SLAPP legislation enacted at the state level in several American jurisdictions is also examined.

Finally, Part III reflects on the future of SLAPPs in the Canadian context. To this end, it analyzes the potential for mounting a *Charter*-based constitutional defence to SLAPPs and discusses the key elements of legislative response to the SLAPP problem.

Part I: *Understanding the SLAPP phenomenon*

A. *The SLAPP phenomenon*

> The conceptual thread that binds [SLAPPs] is that they are suits without substantial merit that are brought by private interests to stop citizens from exercising their political rights or to punish them for having done so. SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation can be churned, the greater the expense that is inflicted, the closer the SLAPP filer moves to success...The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent.[9]

i. *The Rise of SLAPPs in the United States*

Over the past decade, political participation in the United States has become an increasingly risky business. During this period, SLAPPs have been brought against citizens for taking part in lawful demonstrations and boycotts; for filing complaints with government agencies; for reporting health violations to the authorities; for circulating petitions; and even for attending public meetings.[10]

According to research conducted at the University of Denver by Canan and Pring, SLAPPs are typically filed by large, economically powerful organizations and are targeted at private citizens or citizen's groups whose activities have interfered with the filer's economic interests.[11] Frequently, they are aimed at political activists involved in environmental or land use disputes. In many cases, the citizen organizations which are sued are relatively small and operate at a local or regional level. However, this is by no means invariably the case. The National Organization of Women, the National Association for the Advancement of Coloured People and the Sierra Club have all, at one time or another, been SLAPPed.[12]

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

[10] Pring and Canan, *supra* at footnote 2 at 938.

[11] While a large majority of SLAPPs in the U.S. have been sponsored by private business interests, filers have also included municipalities, government agencies, state Attorneys General, and police departments: see Cosentino, *supra* footnote 1 at 402.

[12] *Ibid.*

The rise of the strategic lawsuits in the United States is closely related to changes in the role played by citizen participation within American environmental law and policy. Over the last quarter century - as a result of the enactment of statutory regimes contemplating or requiring public input, as well as judicial liberalization of the rules of standing - the American public gained unprecedented access to government and the courts with respect to decisions affecting the environment. As concerned citizens and environmental groups grew more adept and aggressive in deploying these opportunities for access, those affected by their efforts - most often pro-development business interests - began to look for new ways to fight back.[13] A key tactic in this response has been the SLAPP.

SLAPPs are a highly destructive phenomenon. In economic terms, they are wasteful. SLAPPs squander scarce judicial and other resources in litigation which is almost invariably dismissed or otherwise resolved in favour of the target of the suit. Moreover, they tend to nullify democratic reforms intended to include individuals and interests in decision-making processes from which they have been traditionally excluded. Ultimately, however, what is perhaps most troubling about SLAPPs is their chilling effect on democratic dialogue and debate.

ii. *Measuring and Defining the SLAPP Phenomenon*

The magnitude of the SLAPP phenomenon is difficult to assess. Pring and Canan estimate that every year in the United States "hundreds, perhaps thousands" of SLAPPs are filed.[14] A number of factors complicate the task of quantifying the phenomenon more precisely. On their face, SLAPPs closely resemble ordinary tort lawsuits; indeed their success depends upon maintaining this external appearance. Even more problematic, for obvious reasons, is determining with what frequency and results the mere threat of a SLAPP is being deployed. Finally, while there is some agreement as to the basic hallmarks of a SLAPP[15] there remains considerable uncertainty as to how SLAPPs should be defined in legal terms.[16]

One of the key reasons for this lack of definitional consensus is that, in the American context, there is a broad agreement that SLAPPs should be subjected to special common law and statutory procedures to minimize their detrimental effects. Consequently, much hinges on whether or not a suit is deemed to be a SLAPP. Canan and Pring advocate a fourfold SLAPP identification test. To qualify as a SLAPP, a law suit must be:

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[13] S. Goetz, "Note: SLAPP Suits: A Problem for Public Interest Advocates and Connecticut Courts" (1992) 12 Bridgeport L.R. 1005 at 1009-1010.

[14] Canan and Pring, "Strategic Lawsuits Against Public Participation" (1988) 35 Soc. Probs. 506.

[15] Research done by Canan and Pring suggests that SLAPPs are typically brought against "politically active" defendants and allege torts such as defamation, conspiracy, abuse of process, interference with business relations and nuisance: *supra* footnote 2 at 947.

[16] *Ibid.* at 946-47.

(1) a civil complaint or counterclaim for damages or injunctive relief;
(2) filed against a non-governmental individual or group;
(3) because of their communications to a government body, official or the electorate;
(4) on an issue of public interest or concern.[17]

The third requirement of this definition implicitly incorporates First Amendment jurisprudence dealing with the right to petition clause; a provision which American courts have interpreted to immunize from civil liability a wide variety of communications to government.[18] Only those forms of communication which this jurisprudence recognizes as being protected, according to Canan and Pring, constitute "communications" for the purposes of this requirement. As will be discussed in Part II, this term has been judicially construed to embrace a broad range of lawful, non-violent communicative activities including lobbying, letter writing, demonstrations, economic boycotts and litigation.[19]

Some commentators have criticized Canan and Pring's definition as being too open-ended. Others have contended it is too narrow. Waldman has recently argued that the third "public interest or concern" arm of the definition is unworkably vague.[20] Moreover, he claims that the definition fails to exclude certain types of petitioning activity which in his view should not be shielded from civil liability: namely, petitioning which is pursued for purely self-interested or malicious reasons.[21]

The "public interest or concern" arm of the Canan and Pring definition has also been criticized by Cosentino, but for reasons diametrically opposed to those of Waldman.[22] Cosentino contends that this terminology implies that the defendant's motives in petitioning the government are relevant in determining whether a lawsuit is a SLAPP. This, in his view, is dangerous in that it is capable of being interpreted as requiring a defendant to show that she was acting out of an altruistic concern for the public good. He fears that a requirement of this type would exclude from anti-SLAPP protection many deserving cases involving what might be characterized as "self-interested" petitioning, such as NIMBY-based opposition to land development proposals.[23]

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[17] *Ibid.*

[18] The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to *petition the Government* for a redress of grievances." (emphasis added)

[19] American jurisprudence with respect to what constitutes communications to government protected by the First Amendment right to petition is discussed in Part II: see *infra* in text accompanying footnotes 31-63.

[20] T. Waldman, "SLAPP Suits: Weaknesses in First Amendment Law and the Courts' Responses to Frivolous Litigation" (1992) 39 U.C.L.A. Law Rev. 979 at 1044.

[21] *Ibid.*

[22] See Cosentino, *supra* footnote 1 at 400-401.

[23] Of course, not all petitioners who assert "Not In My Backyard" are acting purely, or even primarily, out of self-interest. Cosentino's point is that, one way or the other, it should not affect their right to invoke anti-SLAPP protection. See *ibid* at 401.

These criticisms of Canan and Pring's definition highlight one of the most daunting challenges for anti-SLAPP law reform: deciding how far it is necessary to go to protect public participation in government from litigation chill. The Canan and Pring definition contemplates that not all public participation will qualify for special anti-SLAPP protection; only participation with respect to issues of "public interest or concern". Leaving aside the obvious indeterminacy of this principle (about which Waldman is rightly concerned), there remains the question of whether petitioning activity is any less deserving of protection merely because of the public profile of the issue or the motives of the petitioner. However, there are also problems with taking a more expansive approach which protects, in a more absolute way, the right to participate in government. This latter approach is controversial in that it ultimately leads to the proposition that all forms of participation in government - even acts which harm or defame others - should be immunized from civil law consequences.

How far (significantly not whether) to protect citizen participation has been a central issue for American courts and legislatures. The results of their respective efforts will be considered in Part II.

B. *Why SLAPPs hurt: The Political Economy of SLAPPs*

Before considering these developments, it is useful to explore further why SLAPPs are such an effective means of chilling public participation. In some ways, this inquiry relates to how and why SLAPPs can be said to differ qualitatively from other civil lawsuits. Two related propositions form a convenient starting point for considering these issues: (1) to the SLAPP filer, winning the lawsuit doesn't matter; (2) to the SLAPP target, winning the lawsuit is not enough.[24]

i. *Why winning doesn't matter to the SLAPP filer*

Unlike other plaintiffs, a SLAPP filer's main concern is, by definition, not monetary compensation or other legal remedy to correct a wrong or grievance. The decision to proceed with a SLAPP is usually a highly tactical one, forming part of a larger strategy. Often SLAPPs are filed as a means of retaliating against citizens who have been engaged in successful opposition to the filer's activities. They are also commonly filed as a means of deterring or discouraging future opposition.

These goals can be achieved without winning the lawsuit or, for that matter, carrying it forward to a determination on the merits. This is because by moving

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[24] In the balance of the article, I refer to a party filing a potential or actual SLAPP as a *"filer"* and to the party against whom the suit is directed as the *"putative target"* or the *"target"* depending upon whether the suit has been judicially identified as a SLAPP. This usage is employed in order to avoid confusion associated with terms "plaintiff" and "defendant", since a citizen "plaintiff" seeking legal recourse can also be a SLAPP "defendant" by counterclaim.

the dispute into the legal arena, the filer derives immediate and continuing advantages wholly unrelated to the suit's ultimate result. Many of these advantages arise from the imbalance of economic power between SLAPP filers and SLAPP targets.

A SLAPP gives its filer an opportunity to regain the upper hand in a dispute which it is losing in the political arena. It can also recast the terms of the dispute. Whereas in the political realm the filer is typically on the defensive, in the legal realm the filer can go on the offensive, putting the targets' actions under scrutiny.

Commencing suit can also benefit a SLAPP filer in other ways. The need to defend a suit adds enormously to the burden - financial and personal - shouldered by individual defendants and their organizations. Quite apart from the cost of mounting a legal defence, the prospect of incurring personal liability, even if extremely remote as is usually the case, can exact a heavy toll on SLAPP targets.

In addition, the existence of an ongoing suit can divert attention (of the targets and of the public at large) from the original issue giving rise to the dispute. As a result, by prolonging the litigation without ever taking it to a conclusion, the filer may, through sheer delay, achieve its goal: community acquiescence.

ii. *Why Winning isn't enough for the SLAPP Target*

While a SLAPP target cannot afford to lose the suit, rarely is that a real prospect.[25] Nor is it enough for a SLAPP target ultimately to win the suit on the merits. Unless the target can have the suit dismissed summarily, there is a strong possibility it will win a legal battle only to lose the political war. In these respects, the situation confronted by SLAPP defendants differs qualitatively from that faced by defendants in ordinary litigation.

Unfortunately, existing rules of civil procedure do little to assist SLAPP targets to secure speedy dismissal of SLAPP claims. Under the civil rules in most jurisdictions, unless a defendant can establish that the claim is "frivolous or vexatious",[26] courts will ordinarily allow the claim to proceed to trial, particularly if the parties disagree on any material factual issues.[27] This is a very difficult burden for a defendant to meet, especially prior to discoveries having

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[25] In over three-quarters (77%) of the SLAPP suits examined by Canan and Pring, the claim was ultimately resolved in favour of the target. See Pring, "SLAPPs: Strategic Lawsuits Against Public Participation" (1989) 7 Pace Environmental L.R. 3 at 12.

[26] See, for example, B.C. Supreme Court Rules, r. 19(24). Courts will only strike out an action under provisions of this kind in extreme or unusual scenarios such as where the pleadings do not support a cause of action.

[27] Most jurisdictions have created summary judgment procedures to reduce the docket of civil cases but these are not suited to dealing with cases involving disputed facts or complex legal and factual issues. See, for example, B.C. Supreme Court Rules, r. 18 and r. 18A.

taken place. A further obstacle to obtaining summary dismissal is the absence of an affirmative obligation requiring a plaintiff to detail the particulars of the allegations upon which it intends to rely in support of its claim. Even where a plaintiff is ordered to provide particulars, the defendant is typically left speculating as to the precise nature of the case it must defend.[28]

The civil rules are equally ineffectual when it comes to deterring SLAPPs from being filed in the first place. This is attributable, in large measure, to the rules governing "costs". Ordinarily at the conclusion of a lawsuit, the successful party recovers "party and party" costs from its opponent.[29] Usually this award represents approximately one-third of the actual expenses incurred by the prevailing party in the course of the lawsuit. In cases involving particularly egregious conduct on the part of the losing party, courts will award "solicitor and client costs" which will come close to covering the full expenses of the victorious party. But awards of this kind are rare.[30] Consequently, since in ordinary litigation the victor is left with out-of-pocket legal expenses even after being awarded "costs", for many litigants the costs award has come to be regarded as something of an afterthought. The "main event" is the outcome on the merits.

Because SLAPP filers are almost invariably better financed than their opponents and characteristically pursue litigation for reasons other than prevailing on the merits, adverse cost awards - even if awarded on a more generous solicitor and client basis - represent, in economic terms, a relatively minor cost of doing business. For a SLAPP target, on the other hand, these cost rules can be extremely onerous. Not only is it likely that a target, regardless of the outcome of the suit, will never be fully compensated for litigation expenses but, to the extent that these expenses are recovered, this takes place only after all litigation is finally concluded.

Part II: *Responding to SLAPPs: The American Experience*

To appreciate fully the remedial issues which arise when attempting to grapple with SLAPPs, it is instructive to consider in some detail how the American legal system has responded to the problem. There the response has taken place on two fronts: in the courtroom and in state legislatures.

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[28] See, for example, B.C. Supreme Court Rules, r. 19 which allows a party to seek particulars from the opposing party.

[29] See, for example, B.C. Supreme Court Rules, r. 57(1). Cost rules are even less generous to successful parties in the United States. There, as a general principle, a prevailing party is not entitled to an award of attorney's fees or other litigation related expenses unless such an award is provided for by statute. This principle is known as the "American rule". See *Alyeska Pipeline Service* v. *Wilderness Society*, 421 U.S. 240 (1975) and Cosentino, *supra* footnote 1 at 415.

[30] In British Columbia, "solicitor and client" costs are now referred to "special costs" as the result of changes to the Rules brought into force in 1990. See, in this regard, B.C. Supreme Court Rules, r. 57 and G. Turriff, "Party and Party Costs in 1991: Assessing Assessments" (1991) 49 Advocate 561.

A. *Doctrinal Developments*

In the American context, the most potent weapon to defend against SLAPPs has been the First Amendment. The process by which this constitutional guarantee has been interpreted so as to protect defendants from exposure to suits of this kind has entailed an impressive degree of judicial innovation. A prime illustration is *Sierra Club* v. *Butz*, one of the earliest and best known SLAPP cases.[31]

i. *The Origins of a Doctrinal Response: Sierra Club v. Butz*

The case arose as a result of efforts by the Sierra Club and several of its members to halt logging activity being carried out by the defendant and others on national forest land pending a Congressional decision as to whether the land should be preserved as a wilderness area. In the course of these efforts, the Sierra Club applied for injunctive relief. At this juncture, the defendants counterclaimed for damages alleging that the plaintiffs had deliberately sought, "by asserting administrative appeals, by filing of the complaint herein and other complaints, and by other acts", to induce the federal government to breach the contract under which timber was being harvested.[32]

The Sierra Club and the other plaintiffs successfully applied to have this counterclaim dismissed summarily on the basis that it infringed their First Amendment right to petition government.[33] In reaching this result, District Court Judge Zirpoli wove together two lines of U.S. Supreme Court authority which had previously remained distinct.

The first of these, originating with *New York Times* v. *Sullivan*, related to the availability of the First Amendment as a defence to an action in defamation.[34] The second, arising out of *Eastern Railroad President's Conference* v. *Noerr Motor Freight Inc.* ("Noerr"), concerned the availability of the First Amendment right to petition as a defence to antitrust liability under the *Sherman Act*.[35] This doctrinal merger was borne of necessity. No previous Supreme Court decision had considered the impact, as Zirpoli J. put it, of "the right to petition the government...upon common law tort actions that might be brought against those who damage the interests of others in the exercise of that right".[36]

In his view, there was no doubt that the Sierra Club and the other plaintiffs "intended to and did petition government".[37] The threshold issue, therefore, was whether they could raise the First Amendment right to petition as a defence in

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[31] 349 F.Supp. 934 (N.D. Cal 1972).

[32] *Ibid.* at 936.

[33] *Ibid.*

[34] 376 U.S. 254 (1964).

[35] 365 U.S. 127 (1961).

[36] *Supra* footnote 31 at 936.

[37] *Ibid.* at 939.

a private lawsuit. On this issue, Zirpoli J. based his analysis on the U.S. Supreme Court's decision in *New York Times*.

In *New York Times*, an Alabama police commissioner sued the defendant newspaper for defamation for publishing an advertisement sponsored by a southern civil rights organization. On appeal, the newspaper argued that the common law tort of defamation violated the First Amendment by restricting it to a single defence: proving the truth of the advertisement. The Supreme Court accepted this argument, holding that where allegedly defamatory statements represented a genuine attempt to communicate with others concerning matters of public interest, the First Amendment required that a plaintiff establish "actual" malice.[38] Without this requirement, in its view, criticism of public officials would be unconstitutionally chilled.

In his reasons in *Sierra Club*, Zirpoli J. endorsed this expansion of First Amendment protection. In his view, however, First Amendment protection of *bona fide* petitioning activity should be absolute and thus not be subject to an actual malice standard of the type enunciated in *New York Times*. To protect the right to petition - "to supply it with the breathing space that First Amendment freedoms need to survive" - it was essential, in his view, that all petitioning activity be constitutionally protected without regard to the motives of the petitioning party.[39]

In support of this conclusion, he relied on Supreme Court First Amendment right to petition jurisprudence arising in the anti-trust context: *Noerr*[40] and *California Motor Transport* v. *Trucking Unlimited*.[41]

In *Noerr*, trucking interests brought an action against a railroad organization under the *Sherman Act* for damages arising from a railroad-sponsored publicity campaign aimed at defeating proposed legislation to de-regulate the cargo transport market. The Supreme Court held that, to the extent that the campaign was directed at influencing government policy, it was not subject to antitrust law even if it were established that the campaign had been motivated by an anti-competitive purpose. To hold otherwise would undermine the right to petition:

> ...the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so.[42]

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[38] Under the applicable Alabama statute, a plaintiff alleging defamation only had to prove that the defendant had made the false statement in question; having done so, malice was "presumed". The U.S. Supreme Court concluded that this approach violated the First Amendment. To comply with the First Amendment, it held that a plaintiff had to prove "actual malice". This meant that a plaintiff would have to establish that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false": see *supra* footnote 34 at 279 *per* Brennan J.

[39] *Supra* footnote 31 at 938-39.

[40] *Supra* footnote 35.

[41] 404 U.S. 508 (1972).

[42] *Supra* footnote 35 at 139.

According to the Supreme Court, petitioning activity only lost its constitutional immunity from antitrust law if it was "a mere sham to cover what [was] actually nothing more than an attempt to interfere directly with the business relationships of a competitor".[43] It elaborated on the nature of this "sham exception" in a later decision, *California Motor Transport.* There it held that concerted efforts to thwart a competitor's access to government permit-issuing agencies by bringing "baseless, repetitive claims" did not constitute true petitioning and was not protected by *Noerr.*[44] The doctrine emerging from this line of cases came to known as the *Noerr-Pennington* doctrine.[45]

Applying *Noerr* and extending its principles beyond the antitrust context, Zirpoli J. held that the right to petition embraced the right "...regardless of motive...to seek to influence government or its officials to adopt a new policy" without incurring an obligation to compensate those adversely affected by a change in policy should the petitioning succeed.[46] Only if the activity complained of was a "sham", if its "real purpose" was not to influence government but rather "to otherwise injure the plaintiff", would protection from common law tort liability be denied.[47] However, proof alone that the defendant had acted "with malice" was not sufficient to trigger this sham exception. In his words: "...it is for the purpose of personal gain or injury to those with opposing interests that most citizens will exercise their right to petition government".[48]

Zirpoli J.'s decision in *Sierra Club* broke important new ground in two distinct respects. First of all, it established that the right to petition could be raised as a defence in any common law tort action. In this regard, it built upon *New York Times* which had held that there was sufficient "state action" in a civil action for defamation to allow a defendant to invoke First Amendment free speech and press protection. This was so, according to the Supreme Court in *New York Times*, because even though the defendant's potential liability was founded on the common law rather than statute, the determination of liability depended on an exercise of "state power".[49] Where *Sierra Club* went beyond *New York Times* was in holding that not only did this analysis apply equally to the related First Amendment right to petition but also that it extended beyond actions in defamation to encompass any tort claim.

The *Sierra Club* decision also went a considerable distance beyond the principles enunciated in *Noerr. Noerr* created a broad constitutional immunity

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[43] *Ibid.* at 144.

[44] *Supra* footnote 41 at 513.

[45] The companion case to *Noerr*, with which it is typically associated and cited, is *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965).

[46] *Supra* footnote 31 at 938.

[47] *Ibid.* at 939.

[48] *Ibid.* at 938.

[49] See *New York Times*, *supra* footnote 34 at 697. This analysis of the availability of constitutional protections to actions based on common law causes of action in private litigation is directly contrary to Supreme Court of Canada authority on this issue: see *R.W.D.S.U.* v. *Dolphin Delivery* considered *infra* in text accompanying footnotes 104-107.

from statutory liability under federal antitrust law for petitioning activity, subject only to a limited sham petitioning exception. Since the potential liability of the petitioner in *Noerr* was statute-based (unlike that faced by the defendant in *New York Times*) the petitioner's right to invoke First Amendment protection was never in doubt: the presence of the statute supplied the requisite "state action" for constitutional protection to apply. *Sierra Club* broadened this constitutional immunity beyond the antitrust context to provide protection to defendants facing any form of civil liability - whether statutory or common law - arising from petitioning activity.

ii. *The Right to Petition after Sierra Club* v. *Butz*

While subsequent cases have not challenged the conclusion reached in *Sierra Club* that the First Amendment provides protection for defendants sued in tort as the result of petitioning activity, there has been considerable uncertainty as to the scope and limits of that protection.

a. *The Scope of Protected Activity*

There is now a substantial body of caselaw which has applied the *Noerr-Pennington* doctrine outside the antitrust context. A striking illustration is the U.S. Supreme Court's decision in *NAACP* v. *Claiborne Hardware*.[50] In this case, white merchants, who had been the subject of an economic boycott which was part of a lengthy campaign for racial equality, sued for damages in tort and under a Mississippi antitrust statute. The Court held that the suit was barred by a variety of First Amendment protections including the right to petition.

American courts have also adopted a broad notion of what qualifies as petitioning activity. As one eminent jurist has put it, the right to petition "is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor."[51] It is now generally recognized that protected petitioning activity includes communications to all three branches of government (judicial, legislative and executive) and to administrative and regulatory agencies. Protection has also been extended to demonstrative forms of communication including sit-ins and public protests.[52]

One of the most common contexts in which courts have been called upon to extend *Noerr-Pennington* protection is in litigation involving environmental

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[50] 458 U.S. 886 (1982).

[51] See *Adderly* v. *Florida*, 385 U.S. 39 (1966) at 49-50 per Douglas J. cited by R. Zauzmer, "The Misapplication of the *Noerr-Pennington* Doctrine in Non-Antitrust Right to Petition Cases"(1984) 36 Stan. L.R. 1243 at 1247.

[52] See cases cited in *Missouri* v. *National Organization of Women*, 467 F.Supp. 289 (8th Cir. 1979) [Attorney General of Missouri sues NOW on behalf of businesses boycotted as part of strategy to pressure state to ratify ERA]. See also discussion of cases in *Re IBP Confidential Business Documents*, 755 F.2d 1300 (U.S.C.A., 8th Cir. 1985) at 1312.

and land use matters. The doctrine has been invoked with particular frequency and success to bar suits brought by developers against citizen activists in connection with municipal zoning disputes.[53]

While American courts have only begun to define the outer limits of the doctrine, it is nonetheless possible to identify two classes of activity which fall outside First Amendment protection.[54] The first is activity which is overtly illegal or involves some dimension of illegality. In this category are acts of violence as well as acts of a non-violent, criminal nature such as the dispensing of a bribe in connection with a lobbying effort. What is less clear is the status of non-violent, non-criminal petitioning activity which is "illegal" in the sense that it violates private as opposed to public rights. It is uncertain, for example, whether a defendant sued as a result of protests with respect to a public issue, which were carried out by trespassing on private land or by causing a private nuisance, would be able to invoke First Amendment protection.[55]

The other class of activity which courts have consistently held falls outside the protection of the right to petition is activity which superficially resembles petitioning but which, in reality, is a purely self-interested attempt to do harm to another. It is to this rather convoluted "sham petitioning" caselaw which I will now turn.

b. *Limits on the Right to Petition: The Sham Petitioning Exception*

The most controversial proposition advanced by Zirpoli J. in *Sierra Club* is that petitioning activity should be fully immunized from tort liability, regardless of the motives of the petitioner, subject only to the sham petitioning exception. The conflicting judicial approaches to this issue are crystallized in another well known landmark in American SLAPP jurisprudence, the 1981 decision of the West Virginia Court of Appeal in *Webb* v. *Fury*.[56]

In this case, the plaintiff coal company brought a defamation claim against an environmental activist and an environmental organization of which he was

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[53] See, for example, *Westfield Partners Ltd.* v. *Hogan*, 740 F.Supp. 523 (N.D.Ill. 1990) and the authorities cited at 526.

[54] The two classes of activity discussed in this paragraph, which American courts have tended to hold fall outside the scope of protected petitioning activity are identified and discussed in *Re IBP Confidential Business Documents*, *supra* footnote 52 at 1313.

[55] This is an issue which presents itself in lawsuits currently being pursued in B.C. courts by forest companies against individuals involved in protests on logging roads leading to harvesting operations: see *infra* footnote 89 for citations to the various cases. A number of the defendants in these actions participated in road blockades contrary to court injunctions and were subsequently charged and convicted of criminal contempt of court. However, many of those sued (including two environmental organizations) did not physically participate in the blockades nor were they charged with or convicted of any criminal or quasi-criminal offences in connection with their activities. Under U.S. law, it is unlikely that defendants in the former category could raise a successful constitutional defence; the prospect of a constitutional defence succeeding on behalf of defendants in the latter category, while uncertain, is considerably better.

[56] 282 S.E.2d 28 (1981).

the principal. The suit concerned complaints made by the defendants to a government agency with respect to the plaintiff's operations and a request for a hearing before the Environmental Protection Agency. The plaintiff alleged that these communications with government were maliciously intended and based on information that defendants knew to be false. The defendants applied for a writ of prohibition claiming that the suit infringed their rights under the First Amendment.

By a two to one majority, the Court of Appeal held that prohibition should issue. According to the majority, the defendants' communications were "classic examples of absolutely privileged petitioning activity".[57] As such, applying the *Noerr-Pennington* doctrine it held that, "as a matter of constitutional law", litigation arising from injuries received as a result of petitioning activity of this kind was barred, regardless of the cause of action asserted by the plaintiff.[58] Moreover, the majority held that, the sole limitation on this bar - the sham petitioning exception - had no application. Proof that a party communicated information to government with malicious intent or knowing it to be false did not mean that the communication should be denied constitutional protection. Citing the U.S. Supreme Court's decision in *California Motor Transport*, the majority suggested that the protection should only be denied where there was evidence that the putative target's supposed petitioning activity was in fact part of a design to thwart the filer's input into the political process.[59]

In a well known dissenting judgment, Neely J. adopted a much more expansive interpretation of the ambit of the sham exception. Sham petitioning not only occurred, in his view, when a party sought to deny another access to government; it also took place when a party knowingly communicated false information to a government agency, whatever the motives. To confer First Amendment protection in the latter context would amount to giving legal immunity to genuine torts "masquerading as an act of petitioning the government".[60] While, unlike the majority, Neely J. would have remitted the case for a trial on the merits, he did propose that special procedures be instituted to protect legitimate First Amendment petitioning activity from meritless lawsuits.[61]

After some equivocation,[62] it now seems clear that the U.S. Supreme Court has come to view the "sham" exception very narrowly, adopting a position close to that originally articulated by Zirpoli J. in *Sierra Club*. In the *City of Columbus*

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[57] *Ibid.* at 37.

[58] *Ibid.*

[59] *Ibid.* at 39.

[60] *Ibid.*, *per* Neely J. at 43.

[61] *Ibid.* at 46. These procedural reforms are discussed *infra* in text accompanying footnotes 65-67.

[62] See *McDonald* v. *Smith*, 472 U.S. 479 (1985) where the Court denied, in the context of a defamation suit, First Amendment protection to communications made by the defendant to government on the footing that he knew or ought to have known them to be false.

v. *Omni Outdoor Advertising*, Inc.,[63] the Court was asked to consider the ambit of the exception in the context of anti-trust suit brought by the respondent Omni against the City of Columbus and a competitor company. Omni alleged the competitor had exerted improper influence over City Hall in gaining favourable zoning ordinances which undermined Omni's ability to compete in the local billboard market.

Holding that Omni's suit was properly dismissed as violating the First Amendment right to petition, the Court concluded that a petitioner's motives or intentions in lobbying government were irrelevant in assessing whether its political activities should be given constitutional protection. According to the Court, the sham petitioning exception had no application insofar as a petitioner was genuinely seeking "favourable government action". The only context in which the exception had relevance, in its view, was where a party could be said simply to have abused governmental or judicial processes as a means of denying another access to government citing, in this regard, its own decision in *California Motor Transport.*

c. *Judicially-Initiated Procedural Reform*

As has been discussed, one of the reasons SLAPPs pose such a serious threat to public participation is that there is little in the traditional panoply of civil rules and principles capable of deterring SLAPP filers. Increasingly, the American judiciary has begun to appreciate this with the result that some courts have proposed procedural innovations which attempt to respond to the SLAPP phenomenon. Two of the best known illustrations of this kind of judicial law-making are Neely J.'s dissenting reasons in *Webb* v. *Fury* and the unanimous reasons of the Colorado Supreme Court in *Protect Our Mountain Environment* v. *District Court* ("*POME*").[64]

In *Webb* v. *Fury*, as noted earlier, Neely J. dissented from the majority's conclusion that a writ of prohibition should issue to prevent the suit against the defendants from proceeding. Despite this, he was strongly persuaded of the need to modify the operation of state rules of civil procedure to provide more effective protection for "legitimate First Amendment activity".[65] As a result, he proposed a number of reforms which would apply to suits seeking damages with respect to conduct that was prima facie protected by the First Amendment.

His first proposal was that, in such cases, the filer's pleadings be held to a heightened level of scrutiny. It was not sufficient, in his view, for the filer merely to give notice of the claim being advanced; "specific allegations" being relied on in support of the claim should be required.[66] Secondly, he advocated that, in all cases of this kind, a mandatory preliminary hearing should be

[63] 499 U.S. 365 (1991).

[64] 677 P.2d 1361 (Colo. 1984).

[65] *Supra* footnote 56 at 47.

[66] *Ibid.*

convened at an early stage of the litigation. At this hearing, the filer of the suit would be obliged to satisfy the court that the suit was being pursued in good faith and was adequately supported by factual grounds.

Finally, he recommended several innovative reforms relating to costs. One was a suggestion that a putative target be entitled to apply for a court ordered "costs advance" to cover expenses leading up to the preliminary hearing. This advance would only be refunded if the filer's suit was successful on the merits. Another recommendation was that a target who prevailed on the merits following a full trial should be automatically compensated on a "full cost" basis; with provision for an additional costs award to be made if it were shown that the filer had intentionally abused the target's First Amendment rights.[67]

There are two key aspects to Neely J.'s proposals. By requiring stricter judicial scrutiny of potential SLAPP suit pleadings and exposing such suits to a mandatory fast-tracking procedure, his model facilitates early identification and dismissal of SLAPPs. At the same time, his model begins to confront and redress the economic imbalances which underlie SLAPP suits by reforming the principles governing the allocation of costs both following and, most innovatively, during litigation. The principal weakness of Neely J.'s model is that it provides few specifics with respect to the nature of the summary dismissal procedure. In particular, he does not clarify on what grounds a filer should be entitled to avoid summary dismissal.

An even better-known illustration of judicial law reform in this area are the reasons of the Colorado Supreme Court in *POME*. This decision arose out of a countersuit filed against an environmental group by a developer whose attempts to proceed with a large development in a wilderness area near Denver were impeded when the group appealed an initial approval which the project had been granted by the county. The developer's countersuit alleged that the group's appeal and continuing efforts to block the project constituted an unlawful conspiracy and an abuse of process. Asserting that the developer's suit violated the right to petition, the group sought unsuccessfully to have the counterclaim dismissed summarily by the trial court. The group appealed this decision to the state Supreme Court.

In the course of allowing the appeal, the Court elaborated a detailed procedural regime for dealing with motions for dismissal which allege an infringement of the right to petition. In many respects, this regime resembles that envisaged by Neely J. several years earlier in *Webb* v. *Fury*. According to the Court, suits of this kind should be fast-tracked to a preliminary hearing for summary judgment and, for the purposes of this determination, be exposed to a "heightened standard" of review.[68] In addition, the Court held that the onus of proof should be shifted so that the filer would carry the burden of showing why the suit should not be dismissed.

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[67] *Ibid.*

[68] *Supra* footnote 64 at 1369.

The novel aspect of the *POME* decision is its attempt to articulate a legal test for determining whether a putative target, who is engaging in protected petitioning activity, should succeed on a motion to dismiss. According to the Court, where a suit is filed which seeks to impose liability with respect to the advancing of "administrative or judicial claims", a motion to dismiss should succeed unless the filer establishes that the sham petitioning exception applies.[69] To show sham petitioning, the filer would be required to establish that the petitioning activity:

1. was "devoid of reasonable factual support" or "lacked any cognizable basis in law";
2. had as its "primary purpose" "harass[ment]" or "some other improper purpose"; and
3. had an adverse affect on a "legal interest" of the filer.[70]

This first arm of the test clearly seems to contemplate a scenario, as in the *POME* case itself, where the putative target is being sued for initiating or maintaining judicial or administrative proceedings. In this context, the filer must initially show that the litigation was "baseless" as, for example, was alleged in *California Motor Transport.* In addition, under the second arm of the test, a filer must show that the petitioning activity was not a *bona fide* attempt to communicate with government but rather was engaged in for some improper purpose such as retaliation against a competitor. Finally, the filer must also show that it was actually or potentially adversely affected by the petitioning activity.

The *POME* approach is vulnerable to criticism in at least two respects. First of all, it is limited to SLAPPs arising in response to "administrative or judicial claims" advanced by a putative target. Consequently, where a target is sued in connection with legislative petitioning, boycotting or other forms of "extra-legal" protest, procedural regime contemplated by the decision does not apply.[71] Another criticism of *POME* is its failure to deal directly with the economic dynamics underlying SLAPPs through cost rule reforms of the type proposed by Neely J. in *Webb* v. *Fury*.

B. *Legislative Developments*

The SLAPP phenomenon has also prompted considerable activity on the legislative front. Over the last five years, anti-SLAPP legislation has been introduced in eight American states. Three of these jurisdictions - Washington,[72] California[73] and New York[74] - now have anti-SLAPP measures on the books.

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[69] *Ibid.* at 1368.

[70] *Ibid.* at 1369.

[71] Waldman, *supra* footnote 1 at 1045.

[72] Chapter 70 of 1991; *RCW* 4.24.500-.520 (in force 1989, ch. 234 *RCW*).

[73] *California Code of Civil Procedure* at 425.16 (received Governor's approval September 16, 1992).

[74] See *New York Civil Rights Law* at 70-a and 76-a and *New York Civil Practice Law and Rules*, Rules 3211 and 3212 (effective January 1, 1993).

Legislation is also under consideration in Rhode Island, Maryland, Virginia and New Jersey.[75] The central thrust of these law reform initiatives is twofold: facilitating the early identification and dismissal of SLAPPs and increasing the economic cost to SLAPP filers of bringing and maintaining such suits.

The first anti-SLAPP law was enacted in 1989 by the state of Washington.[76] The main effect of the law was to amend the state's rules of civil procedure, creating a statutory defence to lawsuits arising out of good faith communications to "federal, state or municipal government".[77] The legislation also authorized the government agency, to whom the communication in question was made, to "intervene in and defend" (and, if successful, recover its costs) in such litigation.[78] The main deficiency of the Washington law was that it failed to create a procedural mechanism to permit its statutory SLAPP defence to be raised and adjudicated on a summary basis.

Legislation which has subsequently been enacted in California and New York differs significantly in this regard. Under anti-SLAPP laws now in force in these jurisdictions, where a party shows that he or she is being sued in connection with specified "protected activities",[79] the onus then shifts to the filer of the suit to show why dismissal ought not to be ordered. At this juncture, the suit will be dismissed unless the filer establishes that its claim has substantial merit or is likely to succeed.

The California law stipulates, in some detail, the procedures which are to govern these summary dismissal applications. Among other things, it provides that such applications must be heard within thirty days after filing, pending disposition of which discoveries are to be stayed.[80] The New York legislation does not contain provisions specifically designed to expedite dismissal motions, although courts are directed to grant such motions "preference".[81]

Another key component of American anti-SLAPP legislation is reforms intended to make litigation less economically attractive to potential SLAPP filers. Illustrative in this regard are the Washington and California statutes which confer upon a party who successfully defends a SLAPP suit the right to an automatic award of attorney's fees and costs.[82]

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[75] See Sills, *supra* footnote 1 at 578.

[76] *Supra* footnote 72, *RCW* 4.24.510.

[77] *Ibid.* at RCW 4.24.510.

[78] *Ibid.* at RCW 4.24.520.

[79] As to what constitutes what is here termed "protected activities", the California and New York legislation differ. The California law protects any "acts...in furtherance of [the target's] right to petition or free speech" including communications directed to the legislative, executive or judicial branches of government, or to the public at large: see *Cal. Code of Civ. Pro.* at 425.16(b). The New York law is framed more narrowly. It protects actions taken in connection with public "application or permitting" procedures, including "reporting, commenting, challenging, opposing or ruling on" application or permitting decisions: see *N.Y. Civil Rights Law* at 76-a.

[80] *Supra* footnote 73 at 425.16(g).

[81] *N.Y. Civil Practice Law and Rules*, Rule 3211.

[82] See *RCW* at 4.24.510; *Cal. Code of Civ. Pro.* at 425.16(c).

While the New York legislation leaves cost awards to judicial discretion, it alters the existing law in another significant respect by making it easier for a putative target to pursue a simultaneous counterclaim (sometimes called a "SLAPPBack") without waiting for the alleged SLAPP to be adjudicated on the merits, as would otherwise be required.[83] Under the New York law, a target can recover compensatory or punitive damages from a filer upon establishing that the SLAPP was intentionally pursued to inhibit exercise of the target's constitutional rights.[84]

PART III: *SLAPPS come North*

A. *Introduction*

During the past two years, the SLAPP phenomenon has arrived in British Columbia. In a province riven by deep-seated conflicts over land use issues, with high levels of public concern and participation in decision-making processes affecting the environment, this was perhaps inevitable.

The most well known illustration of the phenomenon to date is an action which was filed in the Spring of 1992 by MacMillan Bloedel Limited ("MacBlo") against a small citizen's group, known as the Galiano Conservancy Association ("the Conservancy").[85] MacBlo sought damages from the Conservancy in connection with lobbying efforts engaged in by the group aimed at having local bylaws passed restricting MacBlo's ability to use its land holdings on the island for purposes other than forestry. The issue came to a head when MacBlo, the biggest landowner on the small island, revealed plans for a large-scale residential development on its holdings which historically it had been harvesting for timber. Ultimately, the island's local government, the Galiano Island Trust Committee (the "Council") enacted zoning bylaws which imposed limits on the proposed development. At this point, MacBlo sued the Conservancy, the Council and three individual trustees of the Council.

The suit alleged that the Conservancy had conspired to manipulate the planning process through unlawful means. At no time, however, did it particularize this allegation nor did it provide any evidence that the Conservancy had done anything other than engage in traditional lobbying activities such as publicizing the issue, convening public meetings and circulating petitions.

With a minuscule budget and fewer than four hundred members, the Conservancy could not afford to pay for a legal defence. As a result, it relied on the services of the Sierra Legal Defence Fund, a charitable organization which provides free legal advice and representation to environmental

[83] Ordinarily, an action claiming damages for abuse of process or malicious prosecution must await the outcome of the suit in respect of which the allegations are made: see Cosentino, *supra* footnote 1 at 420-21.

[84] *N.Y. Civil Rights Law* at 70-a(1)(b) and (c).

[85] *MacMillan Bloedel* v. *The Galiano Island Trust Committee*, Vancouver A920930 (B.C.S.C.) [the "Galiano action"].

organizations. After a year of protracted and complex pre-trial discoveries and proceedings, MacBlo consented to a judicial dismissal of its claims against the Conservancy and the individual trustees.[86] In ordering these claims dismissed, Tysoe J. made specific reference to the SLAPP phenomenon. He also granted the Conservancy special leave to continue discoveries of MacBlo's Chairman with a view to establishing grounds for an award of special costs against the company for abuse of process.[87]

There are over half a dozen other lawsuits currently pending in British Columbia courts which raise significant SLAPP issues. Three of these suits have been filed by forest companies against environmentalists (and, in two instances, against environmental organizations) in connection with protests conducted on logging roads leading to timber harvesting areas.[88] Some of the individual defendants in these suits have previously been found guilty of contempt of court for participating in road blockades in violation of court injunctions. Many of the defendants, however, have neither been charged with, nor convicted of, any illegal acts but were merely present at the scene publicly voicing their opposition to the logging which was taking place in the area. Currently, only one of these three suits - the claim of Fletcher Challenge of Canada against Walbran protesters - is being actively pursued.[89]

The other suits which have attracted attention as manifestations of the SLAPP phenomenon are more varied. In one instance, community activists were sued for defamation in connection with their opposition to a hotel's application for a retail wine and beer licence.[90] Two other involve claims brought by developers against municipal councillors in their personal capacity with respect to local zoning decisions.[91] Another seeks damages in defamation

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[86] It also consented to dismissal of its action against the trustees personally. It continued to trial with its action challenging the bylaws. On July 30, 1993 Paris J. upheld MacBlo's claim in this respect concluding that the bylaws were illegal: see (1993), 103 D.L.R. (4th) 651. This decision is under appeal.

[87] See SLDF Newsletter July 1993 (No.4), at 5 (on file with the author).

[88] See *MacMillan Bloedel* v. *Derek Young*, Vancouver C906868 (B.C.S.C.) [the "Tsitika action"]; *MacMillan Bloedel* v. *Sheila Simpson*, Vancouver C9166306 (B.C.S.C.) [the "Clayoquot action"]; *Fletcher Challenge of Canada* v. *Jason Miller*, Vancouver C9155008 (B.C.S.C.); and [the "Walbran action"].

[89] Both of the cases which are presently in abeyance were filed by MacBlo. In the Tsitika action, MacBlo's interest in pursuing its claim diminished after the defendants filed a counterclaim alleging that MacBlo supported pro-logging groups whose members assaulted and intimidated various of the defendants during the course of the protests: see Goldberg, "SLAPPs Surge North" New Catalyst (Winter 1992-1993) at 3 (quoting Alan McDonell, lawyer for the Tsitika defendants). Similarly, MacBlo has taken no action on its civil claim against protesters with respect to blockades in the Bolson Creek area of Clayoquot Sound during the summer of 1991. Despite MacBlo's failure to proceed with this claim, the injunction, which was issued to enjoin the blockades pending the hearing of the claim, was recently extended for a further year. See the reasons of Hall J. (26 August 1993), Vancouver C916306 (B.C.S.C.). This decision is under appeal.

[90] See K. Bolan, "Hotel takes SLAPPsuit at activists", *supra* footnote 8.

[91] *Supra* footnote 6.

against a homeowner who complained about a developer's tree-cutting practices, on behalf of a community group, at a City Hall meeting.[92]

As a result of these developments, public awareness within the province of the SLAPP phenomenon has grown rapidly. The cases have garnered considerable coverage in the media. Recently, a coalition of environmental, labour and community organizations has formed to press for the enactment of anti-SLAPP legislation.[93] In response, the Attorney-General has announced that he is studying the issue.[94] Meanwhile, a government M.L.A. has introduced an anti-SLAPP initiative as a private member's bill.[95]

Procedural reforms which should be incorporated into Canadian anti-SLAPP legislation will be discussed later in this article. Before doing so, however, it is useful to consider the potential for Canadian courts to develop a doctrinal *Charter*-based response to the spectre of SLAPPs.

B. *Potential for a Charter-Based Response*

i. *Scope of Potentially Applicable Charter Rights*

In the United States, as has been discussed in Part II, courts have responded to the SLAPP phenomenon by interpreting the First Amendment as constitutionally protecting citizen participation in government. Two First Amendment guarantees have been relied upon as the basis for this jurisprudence: freedom of speech and the right to petition.[96]

The closest analogue to the First Amendment in the *Canadian Charter of Rights and Freedoms* (the "Charter") is section 2. While neither in s. 2, nor elsewhere in the *Charter*, is the right to petition (or an equivalent right) enshrined, s. 2(b) does guarantee "freedom of thought, belief and expression".

It is under the rubric of protection of "freedom of expression" that the greatest potential for a judicial *Charter*-based response to the SLAPP phenomenon exists. While other section 2 rights - most notably s. 2(c) "freedom of assembly" and s. 2(d) "freedom of association" - conceptually encompass some forms of participation in government, no other right or freedom offers such potentially all-embracing protection. Moreover, to date Canadian courts have interpreted freedom of expression in a broad, generous fashion. In contrast, the jurisprudence with respect to assembly and association rights

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[92] *Ibid.*

[93] See K. Bolan, "Attorney-General considering Anti-SLAPP law", *Vancouver Sun* (29 September 1993) B4. The coalition, known as the "Committee for Public Participation", has garnered the support of a wide variety of organisations including several municipal councils, the B.C. Federation of Labour and the B.C. Civil Liberties Association.

[94] *Ibid.*

[95] This bill was tabled on March 16, 1994 by M.L.A. Margaret Lord and is titled the *Public Participation Act* ("Bill M-204").

[96] The language of the First Amendment is set out, *infra* at footnote 18.

remains relatively narrow and undeveloped.[97] Finally, freedom of expression offers the best opportunities for building upon favourable American constitutional jurisprudence in this area as discussed above in Part II.

ii. *Public Participation in Government as Protected Expression* under s. 2(b)

In a manner that, in many ways, parallels the treatment of free speech by the U.S. Supreme Court, the Supreme Court of Canada has accorded freedom of expression a particularly high degree of constitutional protection. In large measure this has been due to the Court's stated commitment to values which, in its view, are advanced by rigorous protection of expressive activity: the promotion and maintenance of "democratic self-government", "personal autonomy" and a "competitive marketplace of ideas".[98]

As a result, the Court has come to adopt an expansive approach to what is capable of constituting *Charter*-protected "expression". During the early years of the *Charter*, it extended constitutional protection to political and commercial speech. More recently, in a well-known hate literature case, it has gone even further by adopting the principle of "content neutrality". Under this principle, the "content" of an activity cannot deprive it of constitutional protection. What matters is whether the activity seeks "to convey meaning".[99]

Consistent with this analysis, even expression which is engaged in for criminal purposes or which is itself illegal has been held by the Court to be protected by s. 2(b). In the *Prostitution Reference*, for example, the Court held that "communicating for the purpose of prostitution", an offence under the *Criminal Code*, was a *Charter*-protected form of expression.[100] Only where the expressive activity actually takes the form of violence has the Court held the protection of s. 2(b) is unavailable.[101]

Because political expression - protests, demonstrations, collecting signatures for a petition and so on - almost invariably represents an attempt to convey meaning, it is therefore entitled to constitutional protection under s. 2(b).[102]

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[97] See P. Hogg, *Constitutional Law of Canada* (3rd) (Toronto: Carswell, 1992) chapter 41.

[98] The Court elaborated these three rationales for protecting expression in *Ford* v. *AG (Que)*, [1988] 2 S.C.R. 712. They are affirmed in *Irwin Toy* v. *AG (Que)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 at 612. See also the Court's recent decision to strike down a municipal bylaw prohibiting postering of utility poles: *City of Peterborough* v. *Ramsden*, [1993] 2 S.C.R. 1084.

[99] *R* v. *Keegstra*, [1990] 3 S.C.R. 697 at 828.

[100] [1990] 1 S.C.R. 1123.

[101] See Hogg, *supra* footnote 97 at 40-10 for a comprehensive analysis of the Court's jurisprudence in this area.

[102] The solicitude of the Court to political expression is nicely captured by a hypothetical employed by the majority in *Irwin Toy*, *supra* footnote 98 at 607 (D.L.R.) involving a single person who participates in a public protest against a government parking policy, which reserved spaces to spouses of government employees, by parking in a reserved space. According to the majority, this action constitutes Charter-protected "political expression".

Indeed, one member of the Court has recently argued that the various rationales which can be advanced for protecting free expression are particularly persuasive where political expression is concerned:

> Any grounds, perhaps otherwise legitimate, put forward for restricting freedom of expression are least compelling when advanced in the political context. Here the various theories [justifying expression protection] merge to ensure that political participation is concretized through our ability to pronounce upon issues that define the political process governing our lives...The liberty to comment on and criticize existing institutions and structures is an indispensable component of a "free and democratic society".[103]

By itself, the preceding discussion of the Court's freedom of expression jurisprudence might leave the misleading impression that virtually all conceivable forms of public participation in government - petitioning, lobbying, communications of various kinds with government agencies and departments, demonstrations and protests - are entitled to constitutional protection under s. 2(b). Indeed, one might well conclude that these various "expressive activities" are entitled to *Charter* protection even if they entail the commission of illegal acts (for example, blockading a road contrary to a court injunction to protest government logging policies) insofar as the activity in question is non-violent.

At this juncture, however, it is necessary to add a complicating feature to the *Charter* analysis: the question of whether the *Charter* even applies where, as is the case with SLAPP suits, the protected expression (public participation) is being undermined as the result of the actions of a private party.

iii. *RWDSU v. Dolphin Delivery: The Charter's Reach in Civil Litigation*

The most formidable obstacle to the development of a *Charter*-based response to SLAPPs are the Supreme Court of Canada's reasons in *Retail, Wholesale and Department Store Union* v. *Dolphin Delivery*,[104] which many regard as deciding that the *Charter* does not apply to civil disputes between private parties.

In this case, the union (RWDSU) argued that a court injunction, prohibiting union members from picketing at the premises of a firm (Dolphin) which the RWDSU believed was cooperating with a lawfully struck employer, infringed the expression rights of its members contrary to s. 2(b) of the *Charter*. The federal *Labour Code*, which governed the dispute, was silent with respect to the picketing of third party premises. Accordingly, the sole legal basis for issuing the injunction was to prevent commission of the common law tort of inducing breach of contract.

The case forced the Court to grapple with three fundamental questions. The first was whether the *Charter* applied to the activities of private actors. The

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[103] *Committee for the Commonwealth of Canada* v. *Canada* [1991] 1 S.C.R. 139, 77 D.L.R. (4th) 385 at 407, (S.C.R.) *per* L'Heureux-Dubé J.

[104] [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

Court's conclusion was that the *Charter* only governed the activities of "government". A broader application would, in its view, be inconsistent with the language of s. 32 of the *Constitution Act, 1982* which stipulates that the *Charter* applies "to the Parliament and the government of Canada" and to "the legislature and government of each province". According to the Court, in the absence of "government action", where purely private action is involved, constitutional norms are not, and should not be, judicially enforceable.

The second question was whether the *Charter* applied to the activities of courts. The Court held it did not, for reasons which were closely related to those it offered in support of its preceding conclusion. In its view, "courts" were not an arm or a branch of "government": they stood apart from government as "neutral arbiters".[105] Moreover, to hold that a judicial orders or decisions could trigger application of the *Charter* would, in its view, undermine the principle that the *Charter* should not regulate private relationships.

The third question was whether the *Charter* applied to the common law. On this question, the Court hedged somewhat. In general, it asserted, the *Charter* did not apply to the common law in the context of private disputes. Consequently, a private party could not invoke the *Charter* as a means of resisting liability in a common law action brought by another private party. The Court went on, however, to observe that the *Charter* did apply to the common law to the extent that the common law provided the authority for some act by government.[106] And, more cryptically, it opined that "the judiciary ought to apply and develop the principles of the common law" in a manner consistent with the values of the *Charter*.[107]

iv. *The Implications of Dolphin Delivery*

As will now be apparent, by far the most significant doctrinal constraint to developing a *Charter*-based response to SLAPPs is the threshold issue of *Charter* application. On the basis of the reasoning in *Dolphin Delivery*, for the *Charter* to apply to a legal proceeding, that proceeding must entail some element of "governmental action". This requirement is met, the decision suggests, if government is a party to the proceeding or, alternatively, if the proceeding involves application of a statute. It is not satisfied, however, where the proceeding is one in which one private party asserts a common law claim against another.

Strictly applied, this last principle - that the *Charter* is off-limits in private common law litigation - effectively precludes use of the *Charter* as a means of developing a jurisprudence, of the type which has evolved in the United States,

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[105] *Ibid.* at 196 (D.L.R.).

[106] Professor Hogg has suggested that this is likely intended as a reference to actions by government pursuant to the Crown prerogative and under its common law powers as landowner or as a contracting party: see "Case Comment: *Dolphin Delivery*" (1987) 51 Sask. L.Rev. 273 at 278.

[107] *Supra* footnote 104 at 198 (D.L.R.).

capable of protecting political expression and petitioning activity from SLAPP suits.

In the United States, the First Amendment has been allowed to perform this role because American courts have adopted a more expansive vision of the role of courts in upholding constitutional values in litigation between private parties. This is attributable, in large measure, to the U.S. Supreme Court's decision in *New York Times* v. *Sullivan*.[108] There the Court held, as has been discussed earlier, that the fact that the newspaper's potential tort liability flowed from the common law (rather than a statute) did not affect its ability to rely on the First Amendment as a defence to the plaintiff's defamation action.[109] According to the Court, there was requisite "state action" to justify allowing the newspaper to invoke the Bill of Rights because the alleged constitutional violation - imposing civil liability for First Amendment protected activity - would occur at the hands of the courts: the judicial arm of the state.

One implication of the S.C.C.'s departure in *Dolphin Delivery* from this American approach is that a defendant who is sued at common law for defamation by another private litigant may well be unable to invoke the protection of the *Charter*. To date, whether and to what extent the common law of defamation will be altered by the *Charter* remains uncertain.[110] Recent authority suggests that while the courts are reluctant to "constitutionalize" the law of defamation, they may be prepared to recognize "freedom of expression" as a relevant factor in the assessment of damages in defamation cases.[111] Such an approach, needless to say, offers little consolation to defendants "SLAPPed" by defamation suits arising out of their lawful participation in the democratic process.

The conclusions reached by the Court in *Dolphin Delivery* with respect to the *Charter's* application to the courts and to the common law have been roundly criticized.[112] Critics have been particularly troubled by the proposition that the *Charter* does not apply to courts because they are not part of the state (or "government" to use the terminology employed in s. 32 of the *Charter*). The idea that courts are not exercising state power when passing judgment and making orders, whether applying a statute or a common law rule, has been attacked as unrealistic and inconsistent with basic tenets of liberal democratic theory.[113]

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[108] *Supra* footnote 34.

[109] *Ibid.* at 265.

[110] See, generally, D. Alderson, "The Constitutionalization of Defamation: American and Canadian Approaches to the Constitutional Regulation of Speech" (1993) 15 Advocates' Q. 385.

[111] See *Derrickson* v. *Tomat* (1992), 88 D.L.R. (4th) 401 at 411 *per* Wood J.A. (B.C.C.A.) and discussion in Alderson, *ibid.* at 415-419.

[112] See P. Hogg, *supra* footnote 106 and B. Slattery, "The Charter's Relevance to Private Litigation: Does *Dolphin* Deliver?" (1987) 32 McGill L.J. 905.

[113] It has also been argued that the court's analysis is inconsistent with the structural features of the *Charter* document: see Elliot *infra* footnote 121 at 210.

Subsequent cases indicate that the Supreme Court may be resiling somewhat from *Dolphin Delivery* in terms of the application of the *Charter* to the common law. This is most evident in the criminal law area where the Court has subjected common law principles to *Charter* scrutiny. One example is *R* v. *Bernard* where the Court narrowly rejected a *Charter* challenge to a common law principle which restricted the ability of a jury to take into account an accused's drunkenness when considering its verdict with respect to a general intent crime.[114] Another illustration is *R* v. *Swain* where the Court upheld a challenge to the common law procedures relating to the Crown's right to adduce evidence of insanity over the objections of the accused.[115] In this latter decision, the Chief Justice, writing for the Court on this issue, unequivocally stated that judicially applied common law rules are subject to *Charter* challenge: in his words, "...if a common law rule is inconsistent with the provisions of the Constitution, it is, to the extent of the inconsistency, of no force and effect".[116]

But while *Bernard* and *Swain* suggest that the Court is prepared to adopt a highly "flexible" interpretation of the principles in *Dolphin Delivery* within the realm of the criminal law, it is not at all certain that this flexibility will extend into other areas. A revealing decision in this regard is *B.C.G.E.U.* v. *B.C.(A.G.)*.[117]

In this case, a union argued that an injunction, which prohibited lawful picketing from taking place at courthouses around the province, infringed s. 2(b). The injunction had been issued by the Chief Justice of the British Columbia *ex parte* and on his own motion on the basis that the picketing constituted the common law crime of contempt of court. When the matter reached the Supreme Court of Canada, Dickson C.J.C. addressed, as a preliminary issue, whether the injunction was capable of being challenged under the *Charter*. What is particularly intriguing about this analysis is the extent to which it emphasizes the nature of the dispute as being decisive in determining whether the *Charter* ought to apply.

According to Dickson C.J.C., the *Charter* did not apply to the common law where the common law was being "invoked with reference to a **purely private dispute**"(my emphasis).[118] However, he implied that the corollary of this principle was that the *Charter* did apply to the common law where the dispute had a "public" dimension. According to Dickson C.J.C., this public element was one of the central characteristics of the realm of criminal law and was a strong presence in the case at bar. In this case at stake was, in his words,

> ...the validity of a common law breach of criminal law and ultimately the authority of the court to punish for breaches of that law. The motivation [of the court issuing the injunction] was entirely 'public' in nature rather than 'private'.[119]

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[114] [1988] 2 S.C.R. 833, 45 C.C.C. (3d) 1.

[115] [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481.

[116] *Ibid.* at 968 (S.C.R.).

[117] [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1.

[118] *Ibid.* at 22 (D.L.R.).

[119] *Ibid.*

As such, he concluded, the union's constitutional challenge should be allowed to proceed to ensure compliance "with the fundamental standards established by the *Charter*".[120]

The *B.C.G.E.U.* decision, particularly when read alongside *Bernard* and *Swain*, clearly indicates a departure by the Court from the proposition enunciated in *Dolphin Delivery* that "government", for the purposes of s. 32 of the *Constitution Act, 1982*, does not include the courts. In certain circumstances, it would appear that "judicial action", including application of the common law, does constitute "government action" for the purposes of triggering *Charter* scrutiny. So far, however, every case in which judicial application of the common law has triggered *Charter* scrutiny has arisen either squarely within the realm of the criminal law (*Bernard* and *Swain*) or on its periphery (*B.C.G.E.U.*). What remains unclear, therefore, is whether the *Charter* applies to cases which are outside this realm, arising in the context of disputes which are ostensibly between private parties and do not involve the state as a party of record.

In a recent article, Professor Elliot has argued that the stage is now set for the Court to reconsider the, as yet, unassailed principle in *Dolphin Delivery* that private litigation should not be subject to the *Charter*.[121] In his view, the legal analysis in *Dolphin Delivery* has been "seriously undercut" by cases such as *Bernard*, *Swain* and *B.C.G.E.U.* which have applied the *Charter* to the courts in the criminal law field.[122] Whether in this field or in the context of a private dispute, Elliot finds it "difficult to accept" that an individual, whose *Charter* rights are violated as a result of the actions of a court, should be excluded from *Charter* protection.[123] He contends that the *Charter* should apply to all judicial action, wherever individual rights are being adjudicated upon. He concludes by predicting that the Supreme Court may well reconsider, in the not too distant future, "...its ruling in *Dolphin Delivery* regarding the applicability of the *Charter* to the courts in the field of private law."[124]

This prediction must come to pass before the *Charter* can be relied on as a means of responding to the SLAPP phenomenon. But even if the Supreme Court does revisit *Dolphin Delivery* in the near future, it will undoubtedly be reluctant to reverse its original decision, particularly to the extent that Professor Elliot proposes it should. A reversal of this magnitude may not, however, be necessary to make the *Charter* useful in the SLAPP context.

A more direct route to making the *Charter* applicable to SLAPPs can be mapped out from comments made by the Court in *B.C.G.E.U.* In this case, the Court held that the *Charter* applied to the decision of the Chief Justice of British Columbia to grant the original injunction; an opposite result to that reached in *Dolphin Delivery* which had also involved a judicial injunction. Dickson, C.J.C. in

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[120] *Ibid.*

[121] Elliot, "Scope of Charter's Application" [1993] 15 Advocates' Q. 204.

[122] *Ibid.* at 214.

[123] *Ibid.* at 213-14.

[124] *Ibid.* at 214.

B.C.G.E.U. explained this distinction on the basis that *Dolphin Delivery* involved "a purely private dispute" whereas the dispute giving rise to the litigation before him had a strong "public" aspect.

It should immediately be conceded that, for the former Chief Justice, what made this dispute public was its criminal law aura and, in particular, the penal consequences which potentially attended defiance of the order in question. But while the typical SLAPP suit does not have this aura of criminal law, neither can it accurately be characterized as "a purely private dispute".

On the contrary, to the extent that the terms "public" and "private" retain meaning in contemporary political discourse,[125] the typical SLAPP is highly "public" in nature. SLAPPs, by definition, imperil important public rights central to the functioning of our democratic system. That they are typically undermined in the context of what is commonly regarded as "private" litigation does not affect their public character. While the source of the harm may be "private", the harm itself is visited directly on the democratic process and, in this sense, is decidedly "public".

To the extent, therefore, that a SLAPP adversely affects the exercise of public rights of participation in government, the fact that government is not a party to the litigation should not bar a target from raising a *Charter*-based defence. While the state may be formally absent from such litigation, it is clearly implicated by virtue of its direct and compelling interest in maintaining and encouraging open and unfettered participation in the processes of government.

There is another reason why courts should be reluctant to deny SLAPP targets access to the *Charter*. Denying recourse to the *Charter* in such cases, dramatically narrows the judicial field of view. SLAPP litigation typically arises in the context of hotly contested issues of public policy. In dealing with cases of this type, courts must strive to appreciate the social and political context from which they emerge. To do this a broad notion of relevance must be maintained. This is particularly so if the judiciary is, as McIntyre J. urges in *Dolphin Delivery*, "to apply and develop the principles of the common law" in a manner consistent with the values of the *Charter*.[126]

To allow putative targets to invoke the *Charter* does not, of course, bind or in any way commit the courts to providing *Charter* relief even where it is shown that a defendant's participation rights are infringed as a result of such litigation. These are matters which would continue to be governed by broad judicial discretion. Accordingly, courts could employ a more rigorous onus of proof, or adopt a more conservative remedial approach, where the direct cause of the right infringed is the action of a private as opposed to a government party.

In summary, the principal doctrinal barrier to extending constitutional protection to SLAPP targets is a threshold one: *Charter* application. Strong

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[125] A proposition that is itself not uncontroversial: see, for example, H. Lessard, "The Idea of the Private: A Discussion of State Action Doctrine and Separate Sphere Ideology" (1986) 10 Dal L.J. 107.

[126] *Supra* footnote 113 at 198 (D.L.R.).

arguments can be made that current doctrinal restrictions on the availability of the *Charter* in private litigation can and should be relaxed in the context of SLAPP litigation. To do so would promote vigourous public participation in the processes of government without exposing matters of a purely private nature to *Charter* scrutiny.

C. *Potential for a Legislative Response*

While the potential for a *Charter*-based response to the SLAPP phenomenon should not be discounted, a more direct and comprehensive remedial approach is enactment of anti-SLAPP legislation. This is because judicial recognition of the right of those targeted in SLAPPs to defend themselves on *Charter* grounds does nothing to alter the imbalance of economic power which underlies SLAPP litigation. To be meaningful, statutory reform must proceed from a recognition that SLAPPs characteristically represent an attempt to translate economic power into legal advantage at the expense of democratic participation.

The overarching goal of such reform must therefore be to promote and protect unfettered participation in the processes of government by equalizing the terms on which these legal battles are fought. Reforms which are capable of advancing this goal fall into three broad categories: (1) reforms which expedite identification and dismissal of SLAPPs; (2) reforms which reduce the economic burden of defending against SLAPPs; and (3) reforms which create economic disincentives to the filing of SLAPPs.

The American judicial and legislative responses to the SLAPP phenomenon described earlier all initiate, to widely varying degrees, reforms in these areas. What follows is a preliminary attempt to identify and briefly discuss the essential elements of a Canadian legislative response to the SLAPP phenomenon, which builds upon these American precursors.

i. *Early Identification and Dismissal of SLAPPs*

One of the key reasons that SLAPP filers are able to use the legal system to punish and deter public participation is the high cost of civil litigation which, win or lose, they are better able to absorb. To be effective, therefore, anti-SLAPP legislation must facilitate early dismissal of SLAPPs. To do this requires, initially, a means of identifying suits which will be vetted under this expedited process.

In the United States, the task of identifying what cases should be subject to such a regime is simplified considerably by the existence of caselaw defining what activities are constitutionally protected under the First Amendment right to petition. As discussed earlier, in Canada the right to petition is not explicitly afforded constitutional protection; although, as I have argued, such a right likely falls within the general protection of s. 2(b). Given this constitutional lacuna, the first step in developing Canadian anti-SLAPP legislation is to articulate a statutory right of public participation.

To provide optimal anti-SLAPP protection, the right should be framed as broadly as possible so as to encompass the diverse ways in which citizens participate directly or indirectly in the processes of government. The right should therefore include, but not be limited to, the right to communicate with all levels and arms of government (including the judiciary) on matters of public policy. Communication should be defined to include traditional lobbying activities, as well as other forms of participation including demonstrations, boycotts and the pursuit of judicial and administrative remedies. Communications directed at the public at large should also be specifically protected, as is the case under the California amendments.[127]

As American First Amendment caselaw recognizes, not all forms of what might conceivably be regarded as citizen participation are equally deserving of protection; indeed our Supreme Court has said precisely this about freedom of expression under s. 2(b). Anti-SLAPP legislation must therefore stipulate that some forms of "public participation" are outside its protection. Consequently, acts which are manifestly criminal or are contrary to quasi-criminal legislation should be excluded. So too should acts calculated to cause harm to persons or property.

Having defined the right to be protected, the next task is to elaborate the procedural means by which it is to be enforced. The preferable approach in this regard is to allow a putative target to bring on a special pre-trial motion to dismiss. This motion would ordinarily be decided on the basis of the pleadings and any discoveries which have taken place.

On the hearing of the motion, the putative target would be required to establish that the activities giving rise to the suit fall *prima facie* within terms of the right to participate under the legislation. The onus would then shift to the filer to establish on the balance of probabilities that the suit is not a SLAPP. In assessing whether the filer has met this burden, the pleadings filed by the filer should be exposed to a heightened level of scrutiny as proposed in *POME* and by Neely J. in *Webb* v. *Fury*.[128]

American judicial and legislative models differ in terms of how a filer might meet this burden. Under virtually all of these models, a filer is permitted to proceed with its suit if it can establish that the putative target has engaged in the activity giving rise to the suit not as a genuine means of participating in government but in order to harass or injure the filer. As problematic as it is to define and apply this "sham petitioning" concept, in my view, it is a necessary feature of anti-SLAPP legislation. To avoid fruitless and protracted inquiry into the motives of the putative target, the exception should be narrow, objective and effects-based; of the type which the U.S. Supreme Court has decisively approved in its recent *Omni* decision.[129]

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[127] *Supra* footnote 79.

[128] See *infra* text accompanying footnotes 64-70.

[129] *Supra* footnote 63.

ii. *Reducing the Burden of Defending SLAPPs*

The burden of defending SLAPPs will be considerably less onerous if reforms of the type just described, which expedite summary disposition of SLAPPs, are implemented. However, the legal work necessary to preparing a summary dismissal application is considerable. Almost invariably the legal and factual issues will be complex and highly time consuming to address. As a result, the financial cost borne by a putative target simply to get to this stage of the litigation will typically be quite onerous.

Moreover, not all SLAPPs can be disposed of on a summary dismissal basis. Courts will be wary of foreclosing a plaintiff from pursuing a claim, that may have many of the hallmarks of a SLAPP, in the absence of compelling evidence that this characterization is appropriate, preferring to see what emerges through the discovery and trial process. Evidence which reinforces the accuracy of this conclusion may well come to light in the course of the litigation; but not before the suit has sapped the financial resources of its target.

In these circumstances, the prospect of an award of costs at the end of the proceeding does little to relieve the more immediate day to day hardship felt by SLAPP targets. The complexity of SLAPP cases is likely to discourage most lawyers in the private bar from taking on a target's case in the absence of a healthy retainer. For those of modest means hoping to secure competent legal representation on a *pro bono* or reduced fee basis, the outlook is even more gloomy.

To date, American responses to the SLAPP phenomenon have, for the most part, offered little in the way of constructive proposals to alleviate the burden borne by targets during the litigation process. An exception is Neely J.'s proposal in *Webb* v. *Fury* that putative targets be entitled to apply for an order requiring the filer to provide a "costs advance" to be refunded only if the suit ultimately succeeds. A reform of this kind is highly desirable not only because of its potential to enhance "access to justice" but because of its deterrent effect on potential filers.

Because of the important public values imperilled by SLAPPs, there is also a strong argument that state-funded legal representation should be available to applicants who are able to satisfy legal aid administrators that they may be a SLAPP target. Undoubtedly, in these difficult budgetary times, concerns will be raised about the cost of implementing such a proposal.

These concerns, while legitimate, should not be overstated. The very existence of a legal aid program of this type would serve as a significant disincentive to the filing of SLAPPs with the result that, in all likelihood, the number of cases funded by the program would be relatively small. Moreover, the program might well be able financially to sustain itself to a large degree by requiring applicants to indemnify it out of any costs awards or settlements arising out the litigation. To determine the feasibility of the program, funding might initially be limited to those involved in preparing a summary motion to dismiss under the applicable anti-SLAPP legislation.

iii. *Discouraging SLAPP Filers*

By reducing the legal advantages which accrue to filers by virtue of their superior economic resources, the reforms discussed above simultaneously advance the goal of discouraging SLAPPs from being filed. In addition, however, there are several reforms which would create direct disincentives to the filing of SLAPPs. Most of these relate to cost rules.

Cost rule reform plays a central role in American anti-SLAPP legislation. As has been discussed, anti-SLAPP legislation in Washington and California requires a mandatory award of full attorney's fees where a target prevails on a summary motion to dismiss. The obvious advantage of a provision of this kind is the financial accountability it imposes on SLAPP filers. However, the blanket nature of the sanction might well give rise to some reluctance on the part of the judiciary to grant applications to dismiss which might well be lessened if judicial discretion with respect to cost awards were preserved.[130]

Whether or not costs are awarded on a mandatory basis, Canadian anti-SLAPP legislation must clearly prescribe that the purpose of cost awards - where a SLAPP has been summarily dismissed or dismissed following a trial on the merits - is to compensate the target fully for all necessary litigation-related expenses.

While these reforms would cause most potential SLAPP filers to reflect carefully before proceeding, they are an inadequate response in a scenario where a filer has acted in bad faith or otherwise abused the legal process. In this situation, an award of costs which merely compensates the target for his or her legal expenses does not go far enough. To relieve a target in this situation from the necessity of pursuing a separate claim for abuse of process, therefore, anti-SLAPP legislation should incorporate a SLAPP-back provision akin to that recently enacted in New York State. A provision of this kind would allow a target not only to be awarded costs from a filer, but also to recover actual and punitive damages where the evidence establishes that the SLAPP was filed in bad faith or otherwise represents an abuse of the legal process.

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[130] Reform in this area should also deal with a problem arising in the Galiano Island litigation. There, Tysoe J. ordered dismissal of MacBlo's claim on the basis that the Conservancy be entitled to continue its discovery of MacBlo's Chairman with a view to establishing grounds for an award of special costs. MacBlo was recently granted leave to appeal on the basis of an argument that the trial judge had no jurisdiction to preserve this right to discovery after the plaintiff's claim had been dismissed: see (1993), 81 B.C.L.R. (2d) 307 (C.A.). Regardless of the outcome on appeal, the case highlights the need clearly to vest trial courts with the right to dismiss an action without losing jurisdiction to deal with associated cost-related issues. Unless courts possess this discretion, defendants who find themselves in the position of the Conservancy will be forced to commence a separate action for abuse of process in order to be compensated for their legal costs.

[131] Academic ruminations on this theme include N. Bobbio, *The Future of Democracy* (Minneapolis: Univ. of Minn. Press, 1987); D. Held & C. Pollitt (eds.) *New Forms of Democracy* (London: Sage, 1986); P. Resnick, *The Masks of Proteus: Canadian Reflections on the State* (Montreal: McGill-Queen's Press, 1990).

Conclusion

For some years now, there has been a growing sense that the institutions and processes by which we govern ourselves are in dire need of repair. What is needed, many have argued, is a reinvigorated democracy which values, promotes and protects citizen participation in all aspects of public life.[131] One of the healthiest and most vibrant realms of citizen participation in public life is environmental policy.[132]

But merely valuing and promoting citizen participation in government is not enough. It must also be affirmatively protected when threatened. Currently, SLAPPs are a legally condoned way for a private interest to intimidate its political opponents into submission, in the process impoverishing democratic discussion and debate. The purpose of anti-SLAPP legislation is to remedy this situation by providing the courts with the means to balance competing private and public rights and interests. This balancing process will necessarily be highly fact-specific in nature. There is nothing unusual in this; judicial discretion is typically exercised in this fashion. What will be different is that the courts will be expected, when exercising this discretion, to uphold the social interest in public participation insofar as this can be accomplished within the terms of the legislation.

As yet, in this country SLAPPs are not the epidemic they have become in the United States, although the contagion appears to be spreading at an alarming rate. This means that we have an opportunity to diagnose the problem and develop a proactive response appropriate to the Canadian context in a careful, considered fashion. It is an opportunity which should not be missed.

[132] See, for example, R. Paehlke "Democracy and Environmentalism: Opening a Door to the Administrative State" in R. Paehlke and D. Torgerson (eds.) *Managing Leviatham: Environmental Politics and the Administrative State* (Toronto: Broadview Press, 1990).