CANADIAN ANTI-SLAPP LAWS IN ACTION

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Strategic lawsuits against public participation (SLAPPs) are a pernicious problem affecting freedom of expression and public participation. To help combat this problem, Ontario enacted anti-SLAPP legislation in 2015. British Columbia followed suit in 2019. This article presents results of a qualitative study of lawyers' experience with anti-SLAPP litigation in Ontario and British Columbia. I interviewed 15 litigators familiar with these motions. Most had a positive view of the new legislation. However, they also revealed several reasons for concern, including the motions being slow and expensive, and providing new tools for strategic litigation. This study provides food for thought for parties, litigators, courts and any province considering enacting similar law.

Les poursuites stratégiques contre la participation aux affaires publiques (procédures-bâillons) sont un problème pernicieux qui affecte la liberté d'expression et la participation publique. Pour aider à combattre ce problème, l'Ontario a adopté une loi pour contrer les procédures-bâillons en 2015 et la Colombie-Britannique a emboîté le pas en 2019. Cet article présente les résultats d'une étude qualitative sur l'expérience des avocats en matière de litiges relatifs aux poursuites-bâillons en Ontario et en Colombie-Britannique. L'auteure a interviewé 15 avocats plaidants familiers avec ces motions. La plupart avaient une vision positive des nouvelles lois. Cependant, ils ont également révélé plusieurs raisons de s'inquiéter, notamment la lenteur et le coût des motions, et le fait qu'elles fournissent de nouveaux outils pour les litiges stratégiques. Cette étude donne matière à réflexion aux parties, aux plaideurs, aux tribunaux et à toute province qui envisage de promulguer des lois similaires.

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1. Introducing Anti-Slapp Law

Strategic lawsuits against public participation (SLAPPs) are a pernicious problem affecting freedom of expression and public participation.[1] To help combat this problem, Ontario enacted anti-SLAPP legislation in 2015. British Columbia followed suit in 2019. This article presents results of a qualitative study of lawyers' experience with anti-SLAPP litigation in Ontario and British Columbia. I interviewed 15 litigators familiar with these motions. Most had a positive view of the new legislation. However,

[1] See e.g. Ministry of the Attorney General of Ontario, *Anti-Slapp Advisory Panel Report to the Attorney General* (Report, 28 October 2010) at paras 6–8, online: <www.attorneygeneral.jus.gov.on.ca> [perma.cc/95H5-V63U] [MAG Report]; See Dave Mass, "Video: How the Court System is Abused to Chill Activist Speech" (11 December 2017), online: *Electronic Frontier Foundation* <www.eff.org> [perma.cc/9DAG-SQF3].

they also revealed several reasons for concern, including the motions being slow and expensive, and providing new tools for strategic litigation. This study provides food for thought for parties, litigators, courts and any province considering enacting similar law.

SLAPPs are typically lawsuits, or threats of lawsuits, of dubious merit and that silence or punish people for expressing their views. "SLAPPs use the court system to limit the effectiveness of the opposing party's speech or conduct. SLAPPs can intimidate opponents, deplete their resources, reduce their ability to participate in public affairs, and deter others from participating in discussion on matters of public interest."[2]

A restaurant that receives a bad online review could threaten to sue if the review is not taken down; a mining company subject to protests or boycotts can sue critics, alleging that they are spreading false and defamatory information;[3] or those who are called out for spreading misinformation can respond with a libel action.[4] The ease of filing a statement of claim (and especially of *threatening* to do so) makes it possible to use the justice system strategically.[5] The end result is to suppress public interest speech and deny access to justice.

SLAPPs are a particularly difficult problem to tackle. Since no one will admit their claim lacks merit or is retaliatory, how do we identify SLAPPs so as to stop them before they cause significant harm to defendants? If defendants must defend themselves to prove the claim lacks merit, the pernicious effects of SLAPPs will have crystalized. But denying plaintiffs access to the courts cannot be done lightly either. The problem is particularly acute with defamation, because it requires plaintiffs to prove so little to meet their burden—it is a strict liability tort—and defamation usually turns on defences like justification (truth) which the defendant must prove.[6]

An Advisory Panel to Ontario's Ministry of the Attorney General produced a report recommending that Ontario enact anti-SLAPP

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2 MAG Report, *supra* note 1 at para 1 citing Vincent Pelletier, "Strategic Lawsuits Against Public Participation (SLAPPs) Report 2008" (paper delivered at Uniform Law Conference of Canada, August 2008), at 1, online (pdf): <www.ulcc-chlc.ca> [perma.cc/DA5U-PUMJ] [*ULCC*].

3 See e.g. *McDonald's Corporation v Steel & Morris* [1997] EWHC QB 366; *Taseko Mines Limited v Western Canada Wilderness Committee*, 2016 BCSC 109.

4 See e.g. *Gill v Maciver*, 2022 ONSC 1279.

5 United Kingdom, Ministry of Justice, *Strategic Lawsuits Against Public Participation (SLAPPs): Government Response to the Call for Evidence*, (Report) (20 July 2022) at 4, online (pdf):<www.consult.justice.gov.uk> [perma.cc/DGZ3-3MAS].

6 MAG Report, *supra* note 1 at para 69.

legislation that aims to protect public interest speech rather than focusing on the plaintiff's motives. In 2015, Ontario enacted the *Protection of Public Participation Act*,[7] which amends the *Courts of Justice Act*.[8]

Section 137.1 of the *Courts of Justice Act* sets out Ontario's new anti-SLAPP law. It requires judges to dismiss a proceeding arising from public interest expression unless the plaintiff (responding party) proves first, that there is merit to her claim, and second that proceeding with the matter is in the public interest:

> **137.1** (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.
>
> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> a) there are grounds to believe that,
>
> i) the proceeding has substantial merit, and
>
> ii) the moving party has no valid defence in the proceeding; and
>
> b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

Several other features of the law warrant mentioning. First, it has short timelines. The law states that the motion "shall" be heard within 60 days of the notice of motion being filed.[9]

Second, it brings all steps in the proceeding to a halt until the anti-SLAPP motion is decided.[10]

Third, there are unusual costs consequences. There is a presumption that successful moving parties (defendants) will get full-indemnity costs, while successful responding parties (plaintiffs) are not entitled to costs.[11] These presumptions depart from the usual rule that the losing party pays

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7 *Protection of Public Participation Act, 2015*, SO 2015, c 23, s 3 [*ON PPPA*].

8 *Courts of Justice Act*, RSO 1990, c C.43, s 137.1(1) [*CJA*].

9 *Ibid*, s 137.2(2).

10 *Ibid*, s 137.1(5).

11 *Ibid*, ss 137.1(7), 137.1(8).

(partial indemnity) costs to the winning party. This costs regime makes it riskier to bring an action targeting public interest speech and that was, indeed, its purpose.[12]

While many hailed Ontario's anti-SLAPP law as a tool to even the playing field it was not uncontroversial. Some thought it went too far, requiring plaintiffs to prove their case on affidavit evidence at an early stage or risk having the case dismissed.[13]

British Columbia enacted virtually identical legislation in 2019.[14] It provides for an "application" to dismiss rather than a "motion", as in Ontario. I refer generally to anti-SLAPP "motions".[15]

Ontario's law has been in force for more than six years; British Columbia's more than three. The Supreme Court of Canada has released its first decisions interpreting Ontario's legislative provisions[16] and leave has been granted in a BC case.[17] There has been enough litigation that we can begin to assess whether the law is achieving its aims. Here I focus on what we can learn from anti-SLAPP litigators, who tell a story often not reflected in the jurisprudence.

2. Methodology

The methodology is primarily one of semi-structured interviews with litigators. The approach is socio-legal, and I am mindful of the potential for the results of such interviews to seem anecdotal. As one interviewee put it, "the plural of 'anecdote' is not 'data'".[18] However, there is a tradition of such qualitative research and it can be among the most fascinating

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12 "It is important that the special procedure provide for full indemnification of the successful defendant's costs to reduce the adverse impact on constitutional values of unmeritorious litigation, and to deter the commencement of such actions" MAG Report, *supra* note 1 at para 44.

13 See e.g. Cara Zwibel, "Ontario SLAPP Schtick: Bill 83 levels the playing field", *Financial Post* (10 April 2014), online: <www.financialpost.com> [perma.cc/N5GV-P7U2]; Brian Radnoff, "A 'SLAPP' in the Face to Defamation Plaintiffs", *The Lawyer's Daily* (10 April 2017), online: <www.thelawyersdaily.ca> [perma.cc/K276-HX9V]; Byron Sheldrick, "Balancing Freedom of Expression and Access to the Courts: Assessing Ontario's Anti-SLAPP Legislation" in Emmett Macfarlane, ed, *Dilemmas of Free Expression*, (Toronto: University of Toronto Press, 2022) 168 at 168.

14 *Protection of Public Participation Act*, SBC 2019, c 3 [*BC PPPA*].

15 *Cf CJA, supra* note 8, s 137.1(3) to *ibid,* s 4(1).

16 *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 [*Pointes* SCC]; *Bent v Platnick*, 2020 SCC 23 [*Platnick* SCC].

17 *Glen Hansman v Barry Neufeld*, 2021 BCCA 222, leave to appeal to SCC granted, 2022 CanLII 693.

18 12BCPl. This way of referring to interviewees is explained on page 7.

and revelatory. I was inspired by Tom Baker's scholarship on law "in action", referring to the realities of law as it is practiced, which can differ significantly from the rules on the books.[19] For example, by speaking to litigators, Baker demonstrated ways in which negligence rules in practice differ significantly from those cited by judges. I have also drawn from the methodology in Andrew Kenyon's study of defamation's *Reynolds* defence, grounded in interviews with barristers.[20] Simply put, I sought to learn more about the risks and rewards, successes and failures of anti-SLAPP laws by investigating anti-SLAPP litigation "in action".

I interviewed 15 lawyers who practice in Ontario, BC or both and each of whom has experience with Ontario or British Columbia's anti-SLAPP laws.[21] I attracted participants by sending out a call for research participants to a defamation listserv, to the Canadian Media Lawyers' Association mailing list and on Twitter (where I follow and am followed by numerous media lawyers). I then sometimes asked participants to recommend others with whom I might speak (snowball sampling). My initial call resulted in interviews almost exclusively with Ontario lawyers so I sought out more from BC by contacting counsel of record on reported BC anti-SLAPP cases.

Given this methodology, the interviewees are not a representative sample of anti-SLAPP motion litigators. For example, those who do primarily defamation defence work are over-represented, as are those who specialize in defamation or media law.

That said, the interviewees are reasonably diverse in terms of: province (10 Ontario, 3 BC, 2 both);[22] type of practice (one does mostly plaintiff's work, nine represent mostly defendants and five do significant amounts of both. All are in private practice except one in-house counsel for a media organization); and gender (8 women and 7 men).

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19 See especially Tom Baker, "Liability Insurance as Tort Regulation: Six Ways that Liability Shapes Tort Law in Action" (2005) 12:1 Conn Ins L J 1; Tom Baker, "Blood Money, New Money, and the Moral Economy of Tort Law in Action" (2001) 35:2 Law & Soc'y Rev 275.

20 Andrew T Kenyon, "*Lange* and *Reynolds* Qualified Privilege: Australian and English Defamation Law and Practice" (2004) 28 Melbourne UL Rev 406 [Kenyon].

21 The number 15 was determined in part by the relatively small number of lawyers who litigate anti-SLAPP motions, in part by the time required to interview, code and assess the results, and in part based on the fact that after about 10 interviews, there was significant repetition in the lawyers' responses.

22 While the numbers of Ontario and BC litigators are not equal, this reflects the fact that the BC law is newer and there are many fewer BC cases than Ontario ones.

While the results of this kind of study are not meant to be generalizable, they reveal a great deal. For example, as discussed below, 11/15 interviewees believed the anti-SLAPP law constituted a positive change to the law. The remaining four thought it was worse than nothing. While we cannot therefore conclude that 73% of all anti-SLAPP litigators think the law is a positive development, it is noteworthy that some litigators think the unintended consequences of the law are such that we'd have been better off without it at all. For more on what can be gleaned from this kind of qualitative research, see Kenyon.[23] Ultimately, the study captures what some lawyers think about the law and how it has affected their practice. Though this is just one piece of the anti-SLAPP puzzle, it is, I believe, a valuable piece.

So as to encourage candour, I maintain lawyers' anonymity. I refer to them by a number and either 'On' or 'BC' (or both) referring to the jurisdiction in which they practice. If they solely or predominantly represent either plaintiffs or defendants, I indicate that too with a 'Pl' or 'Def'. No 'Pl' or 'Def' is used if the litigator regularly represents both plaintiffs and defendants. While one shouldn't assume that a lawyer's views of anti-SLAPP law are shaped by who their clients are,[24] I chose to provide this information to promote transparency.

3. Anti-Slapp Motions "In Action"

A) Legislative Provisions

This section sets out lawyers' views of some features of the law, both procedural and substantive.

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[23] Kenyon, *supra* note 20, who used a similar methodology, stated at 421-22:

> In what way can extrapolations be drawn from the material? Does the research have what is often called reliability and validity? … [T]he transcription and coding method aimed to maintain good access to the material—to what people said and the way they described the legal categories … [A]iming at a comprehensive treatment of the interview material and including atypical cases improves validity. It addresses a weakness in some qualitative research—namely, its anecdotalism. For example, a researcher can quote a few comments from interviews, without it being apparent how representative the responses are and without contrary examples being considered. Here, the extensive footnoting allows readers to assess both issues, at least to some degree—that is, a simple counting of responses within the material is made relatively transparent to the reader [footnotes omitted].

I have attempted to make it clear where views were commonly shared or seemed to be outliers and have often included the specific words used.

[24] 15On: "I'm a vigorous opponent of the old school of you've got plaintiff's-side defamation lawyers and defence-side defamation lawyers. I think to be a good lawyer … you have to understand and appreciate the values of both sides of the ledger".

1) Timelines

Ontario's *PPPA* requires motions to be heard ("shall be heard") no later than 60 days after the notice of motion is filed.[25] One of the few ways in which the provinces' laws differ is that s. 9(3) of BC's *PPPA* says that the application "must be heard as soon as practicable" rather than specifying a 60-day limit, though in both jurisdictions the idea is clearly to have motions heard quickly.

In Ontario, the 60-day timeline was considered an important way to ensure that motions were quick and affordable.[26] The MAG Report suggested not only the 60-day limit but other specific timelines, such as the plaintiff having to file responding affidavit evidence within 14 days of the motion being served.[27] These other timelines were not enacted.

Hansard reflects this need for speed too, since plaintiffs bringing SLAPPs often try to drag out proceedings.[28] Jagmeet Singh, at the time an Ontario MPP, stated that the 60-day time limit is "absolutely essential and fundamental … the lawsuit is then dismissed and you can move on with your life".[29] Legislators also noted that an expedited process is part of most US anti-SLAPP laws.[30]

Yet no MPP seems to have questioned whether 60 days was feasible.

The lawyers I spoke to were almost unanimous that 60 days was unrealistic. "It's never 60 days."[31] One said the timeline was not just virtually impossible but "actually impossible".[32] "In both jurisdictions [Ontario and BC] that's just a joke."[33]

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25 *CJA*, *supra* note 8, s 137.2(2).

26 MAG Report, *supra* note 1 at paras 40-41. "[i]t is essential that remedies against inappropriate litigation affecting public participation be available quickly. The defendant may have few resources and little expertise in legal matters … Most importantly, the motion should be required to be heard within 60 days of filing of the notice of motion".

27 *Ibid* at para 41.

28 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41-1, No 58 (23 March 2015) at 2966 (Bill Walker), online: <www.ola.org> [perma.cc/3XGR-7TPF].

29 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41-1, No 53 (5 March 2015) at 2635 (Jagmeet Singh), online: <www.ola.org> [perma.cc/3P5Z-GPK2].

30 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41-1, No 41A (20 December 2014) at 1973 (Lorenzo Berardinetti), online: <www.ola.org> [perma.cc/3QT3-VY2J].

31 8On.

32 4On.

33 6OnBCDef.

There are several reasons why the timeline can't be met. First, you generally can't get a court date that quickly[34] and COVID-19 has exacerbated the problem.[35] Counsel's availability is an issue too. There may be additional logistical barriers such as having to wait for transcripts of cross-examinations.[36]

In addition, the motions are complex, with affidavits, responding affidavits, cross-examination on the affidavits, factums and a hearing. "To compress that into 60 days and get everyone scheduled if there's multiple lawyers on the file, it's impossible."[37]

Uncertainty around the legislation can also lengthen timelines: "obviously timelines are going to be even more at issue because you're figuring it out, and courts are figuring it out."[38] One lawyer suggested that one reason why a recent SLAPP motion was scheduled "lightning fast" may have been that the case law is getting more settled.[39] But that was not everyone's experience.

Thus, even though some litigators said it was *possible* to meet the 60-day timeline,[40] all acknowledged that it can rarely be met.

Some stated that the 60-day timeline "was not drafted by somebody in legal practice".[41] "[W]hoever thought that they should be achieved in 60 days doesn't understand what law practice is like."[42] To be fair, the Anti-SLAPP Advisory Panel included seasoned litigators who understood the timing issues. Yet "there may have been a degree of naïveté in the conception of the legislation including for example that the motions are to be decided within 60 days of being brought".[43]

In Ontario a more realistic timeline is four to six months,[44] or at least six months,[45] though the timing depends on a number of factors. One

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34 8On: "Good luck getting a date in Toronto".

35 10OnDef.

36 4On.

37 4On.

38 10OnDef.

39 4On.

40 10OnDef; 3On.

41 4On.

42 7OnDef; See also 8On: "Whoever drafted this wasn't really clearly aware of what the limitations are".

43 15On.

44 1OnDef: mentioned one that was heard in four months but there were no cross-examinations.

45 8On.

litigator thought getting a particular motion done in nine months was pretty fast given the large number of defendants.[46]

In British Columbia, where "[a]n application for a dismissal order… must be heard as soon as practicable",[47] litigators echoed the difficulties in moving quickly and the advantages of taking a little more time. Some were involved in the Stephen Galloway case, which has so far taken more than three years.[48] Other anti-SLAPP applications proceeded more quickly, ranging from "a couple" to 16 months. My research provides no basis to conclude that the timelines are longer or shorter in Ontario or BC.

The Court of Appeal for Ontario has interpreted the requirement that a motion be heard within 60 days as meaning that a judge must be seized of the matter within that time, without any documents being filed—that it must be "commenced".[49] That is not what the legislation says, but this seems to be a workable solution. According to the Court of Appeal, "[t]he practicalities of litigation in [Ontario] demand that interpretation."[50] Nevertheless, it amounts to a concession that one of the "essential" and "fundamental" provisions for making anti-SLAPP law effective is not feasible.

Other workarounds are for judges to discourage parties from filing the motion until the hearing is 60 days out,[51] and for counsel to agree to a consent order abridging timelines. "[I]n every case it seems to be that the parties agree to abridge them just because most people can't fit a full motion into 60 days."[52] Consenting to later court dates happens in BC as well.[53]

And those I spoke to *wanted* the ability to take more than 60 days.[54] Given what's at stake on these motions, they require considerable preparation. "What's the rush?"[55]

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46 9OnDef; 4On also referred to getting a hearing in nine months as "lightning fast".

47 *BC PPPA*, *supra* note 14, s 9(3).

48 See e.g. *Galloway v AB,* 2020 BCCA 106 [*Galloway*].

49 *Amorosi v Barker*, 2020 ONCA 144 at para 4.

50 *Ibid* at para 5.

51 5OnDef.

52 9OnDef.

53 13BCDef: "… if you bring a motion you pick a court date for a month from then. That's not going to be enough time for the lawyers to do what they need to do so they *will* consent, usually, to choosing a later date".

54 1OnDef; 4On.

55 8On.

Yet several interviewees commented on the "aspirational"[56] importance of the timeline in Ontario. Everyone knows you have to move quickly.[57] "[A]t least it lights a fire under them [and] sends a message that this is designed to be dealt with expeditiously."[58] Although I asked how the law should be changed, only one lawyer suggested lengthening the timelines,[59] presumably because workable compromises have been reached. "We deal with legal fictions all the time and the 60-day rule is literally a legal fiction."[60]

2) Costs

Both Ontario's and BC's anti-SLAPP statutes create a presumption that successful moving parties (defendants) receive full indemnity costs, while unsuccessful ones do not pay the responding parties' (plaintiffs') costs.[61] The Court of Appeal for Ontario recently affirmed that these presumptions should generally be adhered to but there is little jurisprudential guidance on when judges should depart from the presumption.[62] They may do so where the default is "not appropriate" (Ontario) or "inappropriate" (BC), and they should bear in mind the purposes of the costs regime: to "reduce the adverse impact on constitutional values of unmeritorious litigation, and to deter the commencement of such actions."[63]

In the interviews, several issues arose regarding costs. One was uncertainty as to when the full-indemnity costs presumption would be applied or departed from. "I think there's still a lack of clarity with respect to how the judges are going to execute their discretion."[64] One lawyer wanted the costs presumptions rarely to be departed from. "Maybe if the costs … provisions were strictly enforced and maybe there was only like extremely limited discretion that judges could sway from [them] … I think that would help strategically and reduce the risk."[65] Another said the opposite—that judges weren't sufficiently exercising their discretion to depart from the costs presumptions.[66]

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56 11OnBCDef.

57 4On: "most lawyers feel the pressure and even though we ignore the 60 [day limit] we understand, and judges always remind us it's supposed to be fast so don't delay and if you delay it can actually have adverse consequences".

58 10OnDef; 5 OnDef.

59 15On.

60 7OnDef.

61 *CJA*, *supra* note 8, ss 137.1(7), 137.1(8); *BC PPPA*, *supra,* note 14, s 8.

62 *Levant v DeMelle*, 2022 ONCA 79 [*Levant*].

63 *Ibid* at para 78 citing the MAG Report, *supra* note 1 at para 44.

64 14BCDef.

65 9OnDef.

66 15On.

Some noted that, in practice, true full indemnity costs are rarely awarded and even if awarded may not be enforceable. "Recovering full indemnity costs is always a very difficult thing."[67] One lawyer said they'd never seen full indemnity costs awarded: "It can be far greater than costs I've ever seen in any litigation so it's certainly the case that instead of being you know 60 to 70%, it's closer to 90% in some cases but certainly it's almost never 100 cents on the dollar."[68]

Nevertheless, lawyers emphasized the significance of these costs consequences in shifting the litigation risk, though their views on this varied. One lawyer thought the costs regime "even[ed] the playing field".[69] Another said the costs regime made defending a defamation claim "less of a gamble".[70] "[I]t's not quite a no downside proposition, but if you're prepared to fund your own costs to bring the motion, in all likelihood if we do it reasonably and appropriately, you're not going to be hit with that added cost."[71]

Others were convinced that the costs regime goes too far. It "needs to be rethought … I think it's not such a bad thing for people to have a cost consequence of making the decision they're going to inflict that layer of delay and cost into the litigation."[72] It's "completely unfair" and "absurd".[73]

One criticism was that the costs regime creates too great an incentive to bring an anti-SLAPP motion even where the underlying claim isn't a SLAPP. A losing moving party often won't have to pay costs and could succeed on the motion, which incentivizes defendants to use the motions strategically to take a chance or to improve their position in settlement negotiations. "Since anyone can bring such a motion with little risk of paying costs, the process is ripe for abuse."[74] A related criticism is that the costs regime results in over-deterrence; even people with legitimate claims are scared off by the possibility of an anti-SLAPP motion with its potential costs consequences.[75]

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67 5OnDef; 9On: "you don't recover [costs] because it's never worth hiring somebody to enforce it".

68 4On.

69 5OnDef.

70 9OnDef.

71 1OnDef.

72 6OnBCDef.

73 8On.

74 2On.

75 8On: "It has dissuaded legitimate defamation actions from going forward".

Some had mixed views. "[I]f I was on the plaintiff side I would be kind of infuriated that no matter what happens I can't get costs: no matter how stupid the motion is …. I'm not sure why we would give defamation defendants a free pass like this."[76] But that lawyer recognized the advantage to the overall legislative scheme. And recall that the costs presumptions are rebuttable.

3) Public Interest

Turning now to the law's substantive provisions, for a proceeding to be dismissed as a SLAPP, the expression at issue must be on a matter of public interest. For the purposes of Ontario and BC's anti-SLAPP laws, public interest has been defined as in *Grant v Torstar*.[77] While there is "no single 'test'",[78] "it is enough that some segment of the community would have a genuine interest in receiving information on the subject."[79]

What's more, the Supreme Court has clarified that the issue is whether the *subject matter* of the expression relates to a matter of public interest,[80] not whether the expression itself *advances* the public interest. As a result, what counts as a matter of public interest is broad.

Few litigators raised the public interest test as an issue. One thought the emphasis on public interest was an improvement. "From a theoretical perspective I'm glad that this exists. It's like the analogy to a Section 1 defence of a *Charter* infringement. Some things that are defamatory and untrue are nevertheless worth saying …"[81] But it was a source of contention for some. Because the anti-SLAPP regime is so powerful, some see the public interest threshold as setting too low a bar. One noted that "the public interest … determination is … a very easy burden to meet."[82] Another wondered "maybe the definition of public interest needs to be narrowed … [to] make it harder to bring these motions."[83] Yet another agreed: "I would make it more difficult for people to establish that their matter is a matter of public interest … [T]he net is so broad that it just becomes a litigation tool."[84]

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76 7OnDef.

77 *Pointes* SCC, *supra* note 16 at paras 27-31, citing *Grant v Torstar Corp*, 2009 SCC 61 [*Grant*]; For BC see e.g. *Durkin v Marlan*, 2022 BCSC 193 at para 17.

78 *Grant, supra* note 77 at para 103.

79 *Ibid* at para 102.

80 *Pointes* SCC, *supra* note 16 at para 27.

81 7OnDef.

82 6OnBCDef.

83 8On.

84 12BCPl.

4) Substantial Merit/No Defences

An action will not be dismissed if there are "grounds to believe" that the "proceeding has substantial merit" and there are no valid defences. According to the Court of Appeal for Ontario, this is a screening test:

> Motion judges must be careful that s. 137.1 motions do not slide into *de facto* summary judgment motions. If the motion record raises serious questions about the credibility of affiants and the inferences to be drawn from competing primary facts, the motion judge must avoid taking a 'deep dive' into the ultimate merits of the claim.[85]

The Supreme Court of Canada agreed:

> Introducing too high a standard of proof into what is a preliminary assessment under s. 137.1(4)(a) might suggest that the *outcome* has been adjudicated, rather than the *likelihood* of an outcome. To be sure, s. 137.1(4)(a) is not a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence.[86]

And yet some lawyers consider anti-SLAPP motions to be "trials in a box"[87] rather than screening motions. Lawyers put their best foot forward and judges sometimes make findings of fact on these motions, including findings of credibility,[88] effectively assessing the merits of the case.

This is a problem for several reasons: the motion cannot be quick and efficient if there is a deep dive into the merits; judges may get cases wrong because there is insufficient evidence to make findings of fact; and if the motion is denied, these findings taint the record going forward. When this happens, an unsuccessful moving party may feel compelled to appeal.[89]

While several litigators noted the problem, many felt they had no choice but to carefully argue the merits of the underlying proceeding. As a result, anti-SLAPP motions can become like summary trials. Given "the

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85 *1704604 Ontario Ltd v Pointes Protection Association*, 2018 ONCA 685 at para 78 [*Pointes* ONCA].

86 *Pointes SCC*, *supra* note 16 at para 37.

87 15On; On8: "it's not supposed to be like summary judgment but at the end of the day, it always ends up being from a practical perspective. Because you're still putting affidavit material, you're still doing cross-examination … effectively it's a test on the merits of the lawsuit".

88 15On.

89 14BCDef. Where the judge had made what this lawyer viewed as conclusive findings of fact and of malice on the anti-SLAPP motion, the lawyer felt compelled to appeal "because you have findings that scathe the record".

way in which the legislation is set up, how can you not have a summary trial when that's the plaintiff's onus? … A lot of the nuances and technicalities, they just are front and centre in a *PPPA* application, which conflicts with the idea that you can do a weeding out process at an early stage. The area of the law doesn't [fit] well with a quick review."[90]

Another reason to address the merits in detail is what's at stake on the motion:

> We all know [anti-SLAPP is] not really summary judgment but the reality is we go in there strong. This is a one-time potential make-or-break. If you're on the defendant's side you are hoping and praying this all goes away … and if you're on the plaintiff's side you're hoping and praying that your action survives, so it is intensive, intensive work.[91]

"Because anti-SLAPP *is* a form of a summary judgment you really are putting your very best foot forward, you're putting as much information as you can, trying to anticipate everything, trying to actually say that there's no defence."[92] When I noted that the courts say you *don't* have to put your best foot forward on anti-SLAPP, that lawyer continued: "I know that's what the courts say but the reality is that if you are on the plaintiff side and you're staring down a possible dismissal of your case, you're treating it as a summary judgment."

One litigator worried about this approach: "the appellate decisions are in neon that there's no obligation to put your best foot forward. They say that explicitly again and again and I think that message really has to be reinforced and it has to be given teeth, otherwise … the statute is not going to work."[93]

And yet, one lawyer bemoaned the *inability* of judges to make credibility findings. "[S]ometimes those can be decided pretty easily. And as it is right now I think defendants are dissuaded from bringing these motions where there is a credibility problem."[94] This makes sense yet the same lawyer acknowledged the danger: "I mean, I don't want to open up a mini trial."

For anti-SLAPP law to work, the process has to be relatively quick and inexpensive, or else SLAPP suits will continue to deter and punish public

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90 14BCDef.

91 4On.

92 4On; 3On, 8On, and 14BCDef made similar points.

93 15On.

94 5OnDef.

interest speech. Yet litigators noted a fundamental tension: with so much at stake on the motion, they're going to put their best foot forward.

5) Balancing Test/Harm

The responding party/plaintiff must show that "the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression."[95] The Supreme Court of Canada referred to this balancing test as the "crux of the analysis".[96] It was thought that this is where judges would achieve the balance the law seeks to achieve between dismissing unmeritorious lawsuits and allowing legitimate ones to proceed.

As the case law develops there seems to be less uncertainty about what is required at this stage, but lawyers disagree as to whether the right balance is being struck. Some were pleased with the emphasis on the big picture, namely whether the action should be allowed to continue. Defamation law can be incredibly technical and one lawyer noted it was better to ask this big picture question than to focus on technicalities.[97] It's an opportunity for a judge to assess whether the ends justify the means, which otherwise wouldn't be part of defamation litigation. "If you don't bring the anti-SLAPP you never get to kick this can."[98]

But some noted the inherent difficulty of balancing reputation and public interest:

> it's sort of like saying I have almonds to my left and grapefruit to my right and I want to know whether the almonds outweigh the grapefruit. Is the value of the almonds greater or less than the value of the grapefruit? And by the way you don't have to… show us anything about how much almonds are worth or how much grapefruit is worth. I don't know how you're supposed to do this analysis.[99]

Another issue relates to the need for evidence of harm. Defamation law does not require evidence of actual reputational harm: injury is presumed

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95 *CJA*, *supra* note 8, s 137.1(4)(b); the language in *BC PPPA supra* note 14, s 4(2)(b) is identical.

96 *Pointes* SCC, *supra* note 16 at para 61.

97 1OnDef.

98 7OnDef.

99 7OnDef; 11OnBCDef similarly stated: "apart from any descriptive or numerical data about damages or likely damages to be suffered, how do you conduct the value of the expression versus… how do you put in evidence about that?"

from the fact of defamation itself.[100] But the Court of Appeal for Ontario initially interpreted s. 137.1(4)(b) as effectively requiring proof of actual harm that would outweigh the public interest in the expression: "On the s. 137.1 motion, the plaintiff must provide a basis upon which the motion judge can make some assessment of the harm done or likely to be done to it by the impugned expression. This will almost inevitably include material providing some quantification of the monetary damages."[101] While there needn't be *monetary* harm,[102] it was clear that evidence of some harm was required.

However, the Supreme Court of Canada retreated from this position in *Pointes Protection*.[103]

Some have been calling for changes to defamation law to require proof of harm,[104] so to the extent anti-SLAPP law seemed to move the needle in that direction, they considered this an improvement. When the Supreme Court reversed course, these same lawyers thought that was a misstep: "The way the legislature formulated the harm criteria, which is different from presumed damages in regular defamation, I really thought that was something new, … something modernized and unfortunately I think it's slipped a little bit back toward the presumed damages idea and that reputational harm is just inherent."[105] Another lawyer noted that "initially the courts seemed to be taking the need for harm seriously, which was a good thing. But then the courts resiled from that … [S]ince the Court of

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100 *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 164, 126 DLR (4th) 129; See also Law Commission of Ontario, "Defamation Law in the Internet Age: Final Report" (Toronto: March 2020), at 22 online (pdf): <www.lco-cdo.org> [perma.cc/F5J3-HJEN] [LCO Report].

101 *Pointes* ONCA, *supra* note 85 at para 90.

102 *Ibid* at para 88.

103 *Pointes* SCC, *supra* note 16 at para 71:

> "The … plaintiff need not *prove* harm or causation, but must simply provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link … Importantly, though, no definitive determination of harm or causation is required" [emphasis in original].

104 The LCO Final Report states that several stakeholders recommended this change: LCO Report, *supra* note 100 at 22. I was one of them. Harm should have to be proven though it can be inferred from the evidence—too often there is little or no harm in defamation cases other than bruised egos. However, the LCO did not adopt that recommendation—in part because Ontario now has an anti-SLAPP regime.

105 3On.

Appeal has retrenched, I think it's inherently difficult for defendants to win …".[106]

Another issue is the relevance of indicia of SLAPPs, such as a history of the plaintiff using lawsuits to silence critics, to the balancing exercise. The Court of Appeal for Ontario had held that such indicia are relevant.[107] But the Supreme Court of Canada clarified that only where such indicia are relevant to the factors to consider in balancing (actual or potential harm to the plaintiff, public interest in the expression) can they be considered.[108]

Although the Court went on to state that a range of factors may be relevant, several lawyers—and the Court of Appeal for Ontario—have interpreted this as making indicia of a SLAPP less relevant at the balancing stage.[109] "The Supreme Court really narrowing the utility of the indicia of a SLAPP has been quite unhelpful [for defendants] … because we're told, you're supposed to ask the question 'what's really going on here?' and we can't make the best use of some of the indicators."[110]

One final point on the balancing test is the incentive it creates, according to one lawyer, to belittle the speech at issue, though this goes against the purposes of the regime. They said the balancing test "may lead to some of the very harm that the application is designed to avert… by setting up a test that sort of encourages the plaintiffs… to not only say why their rights have value and are more valuable than any issue of freedom of expression, but also to try and belittle the expression of the defendant."[111]

6) Ontario versus BC Law

The BC law is being interpreted in much the same way as the Ontario law. "BC watches Ontario closely and they essentially treat the cases there as, not binding, but as the law."[112]

There may nevertheless be minor differences, especially given differences in other aspects of the provinces' laws and procedures. For

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106 7OnDef. It's unclear whether this lawyer meant the Supreme Court of Canada, or whether the Court of Appeal for Ontario had begun retrenching before the Supreme Court's decision in *Pointes*.

107 *Platnick v Bent*, 2018 ONCA 687 at para 99.

108 *Pointes* SCC, *supra* note 16 at para 79.

109 *Levant, supra* note 62 at para 80: "I appreciate that the decision in *Pointes* narrowed the relevance of the indicia of a SLAPP lawsuit as they relate to the determination of a motion under s. 137.1 …".

110 1OnDef.

111 11OnBCDef.

112 6OnBCDef.

example, whereas it's "almost impossible" to get summary judgment in Ontario,[113] that is not the case in BC, where summary trials are more common and can be based on affidavit evidence. In Ontario the parties will generally have had to undergo discoveries before summary judgment. Anti-SLAPP may therefore be somewhat more attractive to defendants in Ontario who don't have as viable a summary judgment procedure. "I think the attraction to a SLAPP [in Ontario] would be I can take a run at getting rid of this case without going through [discoveries]".[114]

It may also be that in BC, where summary trials are more common, judges would be more willing to grant an anti-SLAPP motion because they're more used to making final determinations on cases based on affidavit evidence than Ontario judges are. "In BC … it's much more common to do summary judgment and trial applications."[115]

Perhaps applications in BC will take longer than motions in Ontario because of a greater ability in BC to book multi-day hearings. According to a litigator who practices in both provinces, in Ontario the scheduling judge might give you two days whereas you can get five in BC.[116] While this isn't specific to anti-SLAPP, "the cases take more time in BC because of less court control over the allocation of time".[117] The consequences of this are unclear, except insofar as it might lead to higher costs for BC litigants.

A further difference between civil litigation in Ontario and BC is the approach to costs generally. One litigator noted that in British Columbia, costs awards tend to represent a smaller percentage of actual costs than in Ontario.[118] Because of this, the statutory presumption of full indemnity costs "is a huge leap" in BC.[119] Again, it is unclear what the consequences

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113 7OnDef; 8On: "There is no summary judgement in Toronto … [I]n Ontario they've gone back to the pre-*Hryniak* case years where summary judgment was almost impossible".

114 6OnBCDef.

115 13BCDef. They were comparing BC to a province other than Ontario, where they practice, but the point holds for Ontario too.

116 11OnBCDef.

117 11OnBCDef.

118 11OnBCDef: "In Ontario it's still a healthy contribution to the actual costs incurred by the victorious party so partial indemnity costs you know, if you're if you're reasonably efficient, cover half the actual legal fees and most of the disbursements. Whereas my sense is in BC … you start with a much tinier entitlement to costs that's much more event-based than grid-based".

119 11OnBCDef. While I cite this lawyer frequently in this section, few lawyers I interviewed had experience practicing in both Ontario and BC, so few could offer this perspective.

of this difference are for anti-SLAPP—for example whether it would make BC judges more likely to depart from the costs presumption than Ontario judges.

B) Cost and Contingency

Having addressed legislative provisions, I now move to the cost of bringing and responding to anti-SLAPP motions. The *PPPA*'s goals cannot be met if defendants cannot afford to bring these motions. Some cases are done *pro bono*,[120] but defendants cannot count on this. Further, the motions cannot be heard in Small Claims Court[121] and they are complex, making a lawyer's assistance virtually necessary.

While the MAG Report indicated that the prospect of full indemnity costs should promote contingency fee arrangements[122] that is not necessarily the case. When asked, only one lawyer said they had done an anti-SLAPP motion on contingency.[123] This is perhaps predictable, since the moving party is the defendant, not a plaintiff seeking damages. There is only the possibility of a full indemnity costs award. While damages are technically available,[124] no litigator raised the issue of damages.

Most lawyers said they didn't do these motions on contingency. "The application is asking for dismissal it's not asking for a pot of money … *There* I think the people who drafted the legislation really didn't talk enough to civil litigators in either Ontario or BC to say 'could this work'? And the answer will be 'no'."[125] (That same lawyer raised the possibility of crowdfunding for cases engaging true matters of public interest.) "I can't

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120 12BCPl: did one of their motions *pro bono* but no other lawyer I spoke to indicated they had done so.

121 *Laurentide Kitchens Inc v Homestars Inc*, 2022 ONCA 48.

122 MAG Report, *supra* note 1 at para 44.

123 4On has done anti-SLAPP on contingency but says "I would say on the whole pretty rare"; 2On, 3On, 5OnDef, 8On, 11OnBCDef, 12BCPl, 13BCDef, 14BCDef all said they did not do these motions on contingency; 9OnDef is in house counsel so the issue doesn't arise. The remaining lawyers weren't asked this question.

124 The anti-SLAPP provisions provide for the possibility of a damages award in addition to costs if the plaintiff "brought the proceeding in bad faith or for an improper purpose". See *CJA*, *supra* note 8, s 137.1(9); *BC PPPA*, *supra* note 14, s 8. However, such damages are rare. In *Mazhar v Farooqi*, 2021 ONCA 355, the Court of Appeal for Ontario upheld a damages award of $10,000, as well as full indemnity costs, where the plaintiff's defamation action was clearly improper. And there have been other cases where damages have been awarded and upheld (e.g. *United Soils Management Ltd v Mohammed,* 2019 ONCA 128). But perhaps since an improper purpose is a factor to be considered in awarding full indemnity costs (per *Levant*, *supra* note 62 at para 81), damages awards are not common.

125 11OnBCDef.

take a percentage of an apology or retraction, which is a common feature of many settlements."[126]

Another lawyer said "I've never heard of anyone taking them on contingency and right now I would say there's next zero chance that I would. Particularly [since in] BC there haven't been a lot of successful anti-SLAPP motions… I just don't see contingency working right now."[127] Another said of contingency: "that seems like a horrible business model given some of the issues with defamation law… Yeah very risky I would think."[128]

As these lawyers allude to, contingency fee arrangements are risky in part because of the complexity, length, and therefore cost of these motions. I asked litigators what these motions cost their clients and not surprisingly they said it varied considerably. But all agreed they were expensive. While estimates started from a low of $10,000 for a simple matter outside Toronto,[129] most litigators cited a lower range of between $10,000 and $50,000. But the sky is the limit at the upper end: "well over $100,000";[130] $200,000.[131] One lawyer, referring to the cost of responding to an unsuccessful anti-SLAPP motion, summed it up depressingly: "one hundred, two hundred, three hundred thousand dollars and you're back at square one."[132] "[T]he range is quite significant … and … the upper range can be as costly as a trial."[133]

This excludes any appeals, which are available as of right. "A plaintiff who's just had their case taken away—the odds of them appealing that? Pretty high."[134] "I always tell the client, … 'just so you know there is a direct right of appeal … and if they lose they may appeal, and if you lose you may appeal and that's another 15-20 thousand dollars, easily.'"[135] This also excludes the cost of proceeding with the underlying action should the motion be dismissed.

According to one Ontario litigator, "you have to think hard about them because they are getting to be quite costly … It's not every client

126 2On.
127 13BCDef.
128 12BCPl.
129 4On.
130 1OnDef.
131 2On; 8On.
132 8On.
133 14BCDef.
134 6OnBCDef.
135 8On.

that can afford … the beast that these motions seem to have become."[136] On the issue of anti-SLAPP law saving defendants money, one litigator summed that up as "nonsense".[137]

Simply put, cost is a barrier to bringing an anti-SLAPP motion, so ultimately, SLAPPs are still an access to justice issue.[138] "People who really can't afford lawyers are having to hire lawyers".[139]

C) Effect on Defamation Practice

While actual SLAPPs are presumably relatively rare and not limited to defamation actions, the laws meant to address the problem have changed the practice of defamation law generally. The lawyers I spoke to were unanimous on this point. "Anybody who's considering a reputation remedy has to consider anti-SLAPP law."[140] "[I]t's been … practice-changing."[141] "[I]t's just essential to being a defamation lawyer on either side".[142] For defendants it's one of the first things to consider.[143] "[C]ases that would otherwise while away for probably years, we're instantly thinking 'Is this a candidate for a s. 137.1 motion?' It's on the immediate checklist of things you think about when you get a statement of claim now."[144]

With plaintiffs too it's "something that you have to talk to clients about when they're considering a defamation claim".[145]

While anti-SLAPP is now an essential part of defamation practice, most lawyers didn't want to overstate its importance. They frequently used

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136 1OnDef.

137 4On.

138 6OnBCDef: "it takes a big leap of courage and finances for a plaintiff to actually take [a defamation action] … I think there's a genuine access to justice issue in some cases"; 4On: "I don't know that you can have access to justice unless there's a willingness [for government] to fund some of this litigation… [O]therwise, you're only protecting public discourse for the select few who can afford a lawyer or who can find a lawyer willing to do it either *pro bono* or on a contingency fee basis".

139 9OnDef.

140 15On.

141 1OnDef.

142 6OnBCDef.

143 5OnDef: "[I]t really does shift the focus to see whether or not you can … be successful in an anti-SLAPP motion first, and then you consider, OK maybe not. Maybe we need to bring a summary judgment motion. Maybe we need more evidence. But certainly it's something you think about before you move on to other strategies".

144 1OnDef.

145 3On; see also 1OnDef and 8On.

the metaphor of a tool: a "tool in the toolbox" or "tool in the arsenal".[146] Other metaphors included an "arrow in the quiver".[147]

Several lawyers said that even before anti-SLAPP laws were enacted they generally or often advised clients against bringing a defamation action. Now, they're even more likely to do so. "[T]o be frank, usually the advice I give to prospective defamation plaintiffs is 'it's not worth it'… The existence of anti-SLAPP has added to that."[148] "[N]ine times out of ten defamation law is a lousy tool for doing what it is that the plaintiff wants to do… Most of my job is talking them off a ledge … the *PPPA* has narrowed the circumstances in which [it makes sense to sue in defamation]."[149]

But there are lawyers with less expertise in defamation who aren't aware of the pitfalls of defamation litigation, let alone anti-SLAPP law. Where that is the case, or when plaintiffs are self-represented, anti-SLAPP is less likely to deter people from starting an action.[150]

Deterrence is notoriously difficult to measure, yet lawyers provided anecdotal evidence that the new anti-SLAPP laws sometimes deter plaintiffs from bringing an action. "I think it's very important to recognize the deterrent effect of the legislation… I really do think as a result there have been cases where players have not proceeded with potential litigation."[151] "[S]ince the anti-SLAPP provisions got implemented I'm not sure I've commenced a single defamation action. I've sent out a few notices, but I don't think I've commenced one."[152]

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146 2On, 3On, 5OnDef, 6OnBCDef, 9OnDef, 12BCPl, and 13BCDef all referred to the law as a "tool".

147 1OnDef; 12BCPl.

148 12BCPl; see also 1OnDef: "The best advice is 'don't do anything' and [the anti-SLAPP law] … enhances our ability to give that advice in a credible way"; 7OnDef: "going ahead with defamation actions is just simply often just not worth it … It's just not worth it, right?".

149 7OnDef; see also 10OnDef.

150 15On: "[F]or clients who seek out advice from people with a relatively high degree of knowledge in the area I'm pretty confident that those clients are going to be getting a pretty clear and consistent message as to the dangers of commencing a lawsuit that may not be compliant with the *PPPA*"; 14BCDef: "[T]here's a lot of actions that … [are] not started by defamation counsel who would be cognizant of the risks that the *PPPA* presents, and often you get your self-rep … in this area of the law… So I see it being a good tool for not just *deterring* someone from filing an action but a very good tool for … getting them to drop it before a hearing".

151 10OnDef.

152 7OnDef; 1OnDef: "[O]nce you kind of bring your motion it is causing them to back off and that's something we didn't always have before… [I]t's … coincided with I think a real uptick with… people feeling that they have been defamed online … this area of my practice has really taken off and if it weren't for the anti-SLAPP regime I think we

One lawyer noted that the delay and expense of responding to a SLAPP motion "makes people think twice in both a good way and a bad way. It might discourage marginal cases…"[153]

That said, sometimes plaintiffs cannot be deterred regardless of the incentives because they're driven by emotion or principle rather than cost.[154] One lawyer explained: "It has increased the costs for plaintiffs. But for some people it's not such a deterrent. People don't sue in defamation for money. Very rarely is that the motivation."[155]

Although specific plaintiffs may be deterred, no lawyers suggested there were fewer people seeking their services. "It's not increasing or decreasing the people that come through the door. So it hasn't had any impact like that".[156]

If an action is commenced, the anti-SLAPP regime can help it settle. "In the cases [I worked on] that resolved, I don't think they would have resolved as quickly as they did if it weren't for the motion."[157] "I have no doubt that without that motion [the plaintiff] … would have taken it all the way to trial … But the fact that she was very likely to lose the anti-SLAPP motion, and very likely to get a costs award against her, was enough to get rid of the case entirely."[158]

According to another: "[my defamation cases on behalf of defendants have] all gone away, I think in some way, shape, or form, as a result of this regime. … I don't think there is a single one… that [anti-SLAPP law] hasn't in some way impacted it going away … I don't have any defamation cases over the last few years that we've gone to discovery or beyond that."[159]

But as with deterring litigation, emotion and principle can sometimes prevent anti-SLAPP law from incentivizing settlement: "It's not an area

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would see a lot of unmeritorious cases clogging up the system … We all know [suing] doesn't always make it better but now torts has a tool to deal with that. … it does have an effect in keeping cases out of the courts where they may have otherwise … dipped their toe"; 8On: "[I]f there is a public interest issue there … I see much less inclination to proceed with litigation because of this".

153 6OnBCDef; see also 8On.

154 12BCPl; see also 5OnDef and 8On.

155 2On; see also *Tamming v Paterson*, 2021 ONSC 8306 at para 11, noting that case management was unlikely to work: "Defamation cases are often about pride and perceived reputation as much or more than money".

156 2On.

157 1OnDef.

158 12BCPl; 5OnDef and 8On made the same point.

159 1OnDef.

that tends to result in settlement. People tend to be pretty dug in."[160] One lawyer felt that if settlement were going to happen, it would happen regardless of anti-SLAPP:

> once you … reach the point that you're going to sue for defamation it's hard to settle because it's really a kind of a zero-sum game. In a lot of situations, it's a business decision … but with defamation it really is "no, I have a right to express my opinion" versus "you don't have a right to disparage my character." So, I don't know that it's really encouraged settlement.[161]

Thus, while it seems that anti-SLAPP law sometimes prevents lawsuits or encourages settlement, the fact that defamation litigation can be driven by emotion or principle can limit the ability of such laws to deter such actions or encourage settlement.

What's more, while disincentivizing certain litigation and encouraging settlement is presumably what the legislatures intended, to the extent that anti-SLAPP has that effect it can go beyond disincentivizing *unmeritorious* and *bullying* lawsuits. "I would say there's some deterrent effect on cases although I would say that's not always a good thing. I mean if it deters somebody who's genuinely been smeared on the Internet … There's already a lot of those things that just go by because the person just hasn't got the stomach or the money to sue and now they need even more stomach and even more money."[162]

The litigators I spoke with provide anecdotal evidence of the law's deterrent effect, which may be the best available evidence of such an effect. After all, cases not brought or that settle early aren't recorded in the case law. However, it remains almost impossible to measure the *extent* of deterrence.[163] Without that information, it's hard to know whether the law's benefits outweigh its detriments.

D) Anti-SLAPP Within the Civil Justice System

Above I set out lawyers' experiences regarding procedural and substantive provisions of anti-SLAPP law, the cost of motions, and their effect on defamation practice, including deterrence. This section addresses ways

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160 6OnBCDef.

161 4On.

162 6OnBCDef.

163 Records are kept of statements of claim filed, but in practice these are difficult to access and not available by cause of action (e.g. one cannot find out how many defamation actions were started in a particular jurisdiction in a particular year.) Even if that information were available, it would be hard to control for other variables affecting rates of litigation.

in which the broader civil justice system affects the effectiveness of anti-SLAPP law.

1) Judges are Conservative

Some lawyers considered judges reluctant to dismiss without a hearing on the merits. "Judges are inherently conservative and protective of the judicial system and people's rights so I can see not wanting to throw out what might be an absolutely valid piece of litigation on the law at an early stage … [Judges are] just … 'give them their day in court.'"[164]

As noted above, anti-SLAPP motions can overlap significantly with summary judgment, in that they can be like mini-trials. Some lawyers analogized to summary judgment in that courts— at least in Ontario—are reluctant to dismiss a case on summary judgment:

> … [summary judgment is] a risky proposition even though it's designed to be a tool to increase access to justice and to allow for matters that shouldn't be going all the way to trial to resolve early. I think unfortunately … [anti-SLAPP is] a bit of a similar proposition … courts, they want to be very certain before they do that type of thing.[165]

Judges are also perhaps disproportionately concerned about reputation. One lawyer noted that given judges' public roles and the fact that free speech is an abstract and general concept, they're inclined to favour the individual before them who has been maligned.[166]

2) Litigators Gonna Litigate

A recurring theme of my conversations with lawyers is that anti-SLAPP law doesn't sufficiently take into account the realities of litigation. Framed positively, lawyers are going to do their very best for their clients, and this isn't necessarily consistent with a quick and speedy resolution. "I could put 50% of the effort into this and probably get the same result, but my colleagues in my firm and my own ego wouldn't let that happen."[167] According to another, "it's almost as though [lawyers] can't resist doing

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[164] 8On; 6OnBCDef similarly considered the perspective of the Court of Appeal: "like, really? …we're going to snuff out somebody's defamation claim on a sniff test? You can sort of see the angst that creates".

[165] 3On; 15On also noted that many Ontario judges are rejecting the Supreme Court of Canada's call in *Hyrniak* for a culture shift regarding summary judgment: "some judges and lawyers are getting the message … But some aren't".

[166] 10OnDef.

[167] 9OnDef.

… what we see as proper preparation—putting our best foot forward".[168] Another noted that the attempt to quickly screen a case "just runs up against everything that lawyers and judges and the justice system is kind of bred to do, and does best, which is a pretty rigorous search for what's going on. The clash is hard to resolve."[169]

Framed more negatively, the civil litigation system encourages the strategic use of whatever tools are available. Lawyers therefore use anti-SLAPP laws to further their clients' positions—not only by getting unmeritorious claims dismissed or settling them, but also in other ways perhaps less compatible with anti-SLAPP law's goals.[170]

"[A] lot of lawyers … they just say 'you want to fight? Okay, let's fight.' And because of that mentality … specifically around Toronto … [the anti-SLAPP law] hasn't decreased the amount of lawsuits. But I think that's more a function of lawyers than the law."[171] Another cited lawyers' behaviour as making it difficult to address problems with anti-SLAPP laws: "even with case management you've got aggressive litigants on both sides who are using every tool they have … they're going to fight the fights and a judge can't say 'no, you can't do that'."[172] "Listen, it's the dance it's … the adversarial system, right, so wherever there's [uncertainty in the law] we're going to try to fill it with uncertainty arguments exploited."[173]

Some ways in which lawyers use the law strategically include delaying plaintiffs' actions, controlling the evidence, and taking advantage of the different laws in different provinces.

a) Delaying Proceedings

Ontario's *CJA* s. 137.1(5) states: "Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of."[174] The MAG Report recommended this and it makes sense, since a plaintiff could avoid the anti-SLAPP regime's effects by bringing other

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168 14BCDef.

169 6OnBCDef.

170 The Uniform Law Conference of Canada noted, with regard to BC's earlier version of an anti-SLAPP law, a concern about such strategic uses. The law's provisions "could be misused by some litigants, and would add another layer of process to the civil litigation process." ULCC *supra* note 2 at para 73.

171 4On.

172 6OnBCDef.

173 2On.

174 *Cf BC PPPA, supra* note 14, s 5(1) states: "Subject to subsection (2), if an applicant serves on a respondent an application for a dismissal order under section 4, no

motions, appeals etc. "The suspension of other interlocutory proceedings is required to ensure that the efficiency of the special procedure is not undermined by extraneous tactical steps pending the motion's disposition."[175]

Yet litigators reveal the strategic power this provides to moving parties/defendants to delay the plaintiff's case. Particularly since anti-SLAPP motions are not heard as quickly as envisaged, filing one can buy the defendant time:

> this notion that we're going to have this nice quick low-cost screening process just completely misread how litigants behave … SLAPP gets gamed for delay … You want to guarantee yourself a year of freezing the case and no discoveries etc. etc.? Well, file your SLAPP motion.[176]

Another lawyer noted the strategic advantage in "just pulling the trigger" because you stop the proceeding for perhaps years. You "take the wind out of the plaintiff's sails".[177]

b) Controlling the Evidence

Some lawyers noted that anti-SLAPP motions bring strategic advantages and risks concerning controlling evidence—specifically disclosures and cross-examination: "you get to control the evidence in the record, even if that means delaying."[178] What's more, litigants can avoid the cost of compiling documents for discovery. "It's a lot of work, even in house, to amass documents in a case."[179]

But proceeding without knowing what discoveries would reveal carries its own risks: "I'm also about to expose my defendant to cross examination without knowing what evidence the other side has… you're giving the other side an early partial discovery."[180] 9OnDef summarizes the pros and cons:

> … you're kind of playing your whole hand early … versus sitting back and seeing how aggressively they'll pursue it, and seeing all of their document disclosure…

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party may take further steps in the proceeding until the application, including any appeals, has been finally resolved".

175 MAG Report, *supra* note 1 at para 42.

176 6OnBCDef.

177 2On; 11OnBCDef made the same point.

178 9OnDef. This quote also shows that moving parties don't *necessarily* want to delay.

179 9OnDef; 6OnBCDef made the same point.

180 6OnBCDef.

> [S]ometimes it feels like you're helping them move the case forward… It is an interesting question of whether you should wait to bring anti-SLAPP motions until after you see their documents … Like if their documents have no evidence whatsoever of harm, that can be I think a powerful tool in the anti-SLAPP motion … But then we have to produce our documents so why would we want to do that?[181]

c) Strategically Selecting a Jurisdiction

My interviews uncovered evidence of libel tourism—of people suing in provinces other than Ontario and British Columbia to avoid anti-SLAPP motions. Most interviewees reported no experience with it themselves, but had heard of cases like the Kielburger brothers' claim against Canadaland being brought in Manitoba, a jurisdiction without anti-SLAPP laws.[182]

However, two lawyers I spoke with had advised potential plaintiffs to bring their action outside Ontario precisely to avoid the anti-SLAPP regime.[183] Others said they would potentially do so where relevant.[184] But another thought there was little point of so blatant a tactic: "the fact that there is no SLAPP motion doesn't mean that there couldn't be other adverse reputational consequences for making that move".[185]

This is made possible by the broad test for jurisdiction in defamation cases. So long as a communication was accessed in a place, that place's courts can hear a defamation action. The Supreme Court of Canada rejected a narrower test for jurisdiction, based on where the most substantial reputational harm occurred.[186]

3) The Civil Justice System is Broken

Another recurring theme was that limited access to civil justice limits anti-SLAPP laws' effectiveness. I noted above that the 60-day timeline cannot be met, in part because of the difficulty in scheduling court time. One lawyer noted that:

> the backlogs in the courts [are] probably discouraging more people from starting a defamation lawsuit than section 137.1… The greater problem is the system, not the anti-SLAPP law… It's the unavailability of just getting in front of a judge… I

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181 9OnDef.

182 See "WE Wants To Sue CANADALAND In Manitoba", *CANADALAND* (18 January 2019) online: <www.canadaland.com> [perma.cc/BG97-DGDB].

183 Both 2On and 8On recommended suing in Alberta to avoid anti-SLAPP.

184 6OnBCDef; 7OnDef.

185 15On.

186 *Haaretz.com v Goldhar*, 2018 SCC 28 see especially at para 91.

> really think the problem isn't so much with the law it's just the resources. We… have these laws on the books and then we're working around with band-aid solutions to try to make it work. … I don't know, I'm at a loss … I think the issue isn't so much the law it's the system that the law is in.[187]

The issue is not just a lack of judges. The system is flawed in many ways, including the cost of access to justice. "[T]he costs are still way too high and that's also the case with any litigation… we in the lawyer's union have made sure of that because we just keep charging more."[188] "Overall I'm just so disheartened by access to justice in this province and lawyers over-lawyering and courts being overly risk averse and all of that culture is present here [in anti-SLAPP law] as well."[189] "[T]he way our court system is set up, it's very inefficient and problematic for so many reasons."[190]

E) Lawyers' Assessment of the Law

This section addresses lawyers' opinions about the law. I asked about its advantages and disadvantages, some of which is addressed above, what kinds of cases the law works best for, and whether lawyers thought the law was a positive development overall.

Lawyers noted several advantages of the anti-SLAPP regime other than the obvious goals of deterrence, encouraging settlement and getting SLAPPs dismissed at an early stage. These included getting into court more often[191] and having a bench more informed about defamation law.[192]

1) Net Positive or Negative

But there were differing views as to whether anti-SLAPP's ends justify its means. While most thought they do, responses ranged from enthusiasm[193] and ambivalence[194] to disappointment.[195] When I asked lawyers whether they thought the law was a "net positive", 11 answered yes[196] (though two

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187 2On.

188 15On.

189 9OnDef.

190 13BCDef.

191 1OnDef: "selfishly they get us into court more often which I love".

192 1OnDef.

193 4On: "I love this piece of legislation"; 5OnDef: "I think it's been really exciting".

194 11OnBCDef.

195 6OnBCDef: "I would consider repealing the legislation. I think it's actually caused a bigger problem than it set out to fix.… I actually feel bad saying it"; see also 8On: "I would repeal it altogether… The costs of it have outweighed its benefits and its use".

196 1OnDef, 3On, 4On, 5OnDef, 7OnDef, 9OnDef, 10OnDef, 11BCDef, 12BCPl, 13BCDef, and 15On.

were very close to the line)[197] and four said no (but one was close to the line).[198]

These four thought that the additional costs and delays made the cure worse than the disease. "I think if you were to look at the cost of actual SLAPP cases over the last five years, ten years, and add up the cost of fighting SLAPP motions, I think the latter would be higher by a landslide".[199] The same lawyer, when thinking of a typical SLAPP case they had defended against before the anti-SLAPP regime, said that if they had to do it over again they'd just take the case to trial and not file an anti-SLAPP motion. Along similar lines, a lawyer who thought anti-SLAPP laws were a net negative characterized the main benefit of the law as making work for lawyers.[200]

2) How to Improve the Law

Regardless of whether they thought the law was a net positive or negative, all lawyers I spoke to recognized problems with the law and most thought change was needed. However, most hadn't given much thought to, or didn't have any great ideas about how to improve the law.[201] They acknowledged that there were no easy solutions to the problem of SLAPPs or problems the anti-SLAPP law itself creates.[202] They recognized that changes to the law risk tipping the balance it is trying to achieve. "[W]e finally got to a stage where we more or less know what the tests are and re-working it just means we go through another round of going up the Court of Appeal and Supreme Court of Canada so we know what the tests are. So there's great hesitancy to do that."[203] The suggestions below are perhaps worth exploring, but are mostly off-the-cuff.

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197 11OnBCDef; 12BCPl.

198 2On, 6OnBCDef, 8On, and 14BCDef. According to 2On: "A net negative. The motions are never heard promptly and just add more delay to an already slow process. Second, since anyone can bring such a motion with little risk of paying costs, the process is ripe for abuse".

199 6OnBCDef.

200 8On; 6OnBC also said: "So yay for lawyers' incomes but it is not benefiting plaintiffs or defendants …"

201 7OnDef: "this isn't something I've given a huge amount of deep thought to".

202 6OnBCDef: "It's a difficult problem … You've got this objective of the search for truth and doing justice and access to justice, and people being able to vindicate actual wrongs, on one hand, and this objective of having a quick screening, which almost necessarily involves ignoring a lot of evidence, and not permitting the discovery, not permitting the search for truth very much, and it just runs up against everything that lawyers and judges and the justice system is kind of bred to do and does best which is a pretty rigorous search for what's going on. The clash is hard to resolve".

203 6OnBCDef.

Three lawyers suggested SLAPP motions be subject to case management. "I might go so far as to say that that every SLAPP motion has to be stuck into case management right from the get go." Though they noted that "even with case management, you've got aggressive litigants on both sides who are using every tool they have".[204] They also noted this would require resources."[205]

Some lawyers suggested a specialized tribunal to hear these matters but again acknowledged the resources that would require : "ideally I think defamation should be pulled out of our system and we have … a specialized forum—a tribunal or what have you … to deal with these … I think there needs to be a specialized way to deal with this that will actually make it accessible for people to go through."[206]

Two litigators noted it was too easy for defendants to raise defences, making the plaintiff address each at the merits stage. While the Court of Appeal for Ontario said that evidence is required to put defences in play,[207] it's not clear that much is actually required of defendants:

> [P]utting a defence in play is just saying "I hereby put the defence of fair comment in play" … In a lot of cases … it's basically a shopping list of every defence known to the law of defamation. … [I]t's really easy to do from a moving party's perspective …. and the consequence of that is now OK, we're going to actually work through all the detailed elements of qualified privilege, and all the detailed elements of fair comment and all the aspects of truth and the body of law that goes with that, responsible communication. … So by the simple act of being able to list out defences you've now turned this motion into a week-long motion instead of a

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204 6OnBCDef; 11OnBCDef analogized to class action certification motions. "*They* were intended to be a fairly quick assessment of whether the case deserved class treatment or not. And they've grown like Topsy into these massive pieces of litigation right? … But I think one thing that would benefit about SLAPP motions … is maybe just more active case management—say *prima facie* these types of cases … have to be case managed not only to ensure that they get heard on a timely basis, but to ensure that that … both sides don't dawdle because often you know lawyers just get busy and for both sides the case sort of becomes a secondary priority"; 9OnDef also mentioned case management.

205 9OnDef.

206 13BCDef; 3On made the same point.

207 *Pointes* ONCA, *supra* note 85 at para 83: "The [no valid defence] section would be unworkable if the plaintiff were required to address all potential defences and demonstrate that none had any validity. I think the section contemplates an evidentiary burden on the defendant to advance any proposed 'valid defence' in the pleadings, and/or in the material filed on the s. 137.1 motion. That material should be sufficiently detailed to allow the motion judge to clearly identify the legal and factual components of the defences advanced".

> one-day motion over the actual defence that everyone knows is actually going to define things …[208]

This lawyer suggested requiring affidavit evidence going to the merits of a defence, or requiring something like *prima facie* evidence of a defence in order to raise defences at the merits stage.

Some lawyers thought that the law would be improved by placing greater emphasis on harm to the plaintiff and on the balancing test more generally, since "the purpose of these anti-SLAPP cases fundamentally is whether the candle is worth the wick".[209] This could take the form of requiring proof of harm at the outset, as a threshold requirement,[210] or just focusing on the balancing test and perhaps relaxing requirements at the merits stage.[211]

Some suggested tightening up procedural aspects of the law, such as "the use of expert reports, how long you can cross examine, little procedural issues like that."[212]

Related to this, one lawyer suggested that the courts need to emphasize the fact that this is a screening motion. "I think there should be a clear judicial re-emphasis that these are summary screening motions and that the courts should send a clear message that if counsel are going to try to turn the cases into … trials of issues … the court should …[take] that into account for example in awards of costs."[213] This lawyer thought the substantive law was fine but that its underlying goals needed to be remembered and reinforced.

Several lawyers noted that until defamation law itself is modernized, anti-SLAPP is "just playing at the margins"[214] or "slapping on band-aids … I mean I would just change defamation law and how it's adjudicated as a whole."[215] "Let's fix the defamation law first."[216]

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208 6OnBCDef; 14BCDef made a similar point, noting that the only way they could think of to make the applications less like summary trial would be not to put defences in play.

209 7OnDef.

210 9OnDef. But that same lawyer noted the difficulty in proving harm, especially if there's no pecuniary loss. "It is hard to quantify harm, generally, like what if I don't have a job .. like what do you do for threshold?"

211 7OnDef.

212 4On.

213 15On.

214 3On.

215 13BCDef.

216 8On.

> [T]hat's the bigger issue we're dealing with is that defamation law is so out-dated and it needs to be modernized… [T]his anti-SLAPP thing is a small tool to try to get at the solution but really, I think the real solution is an overhaul of this entire common law area and maybe codify it in a better way than it currently is, and that's a huge project but I don't think it's impossible, I think it's overdue.[217]

Some lawyers were specific about problems with defamation law. One cited its complexity: "the current system's not working. It's too complex. Most lawyers, unless you specialize in this can't even run a defamation file cause it's so complicated."[218] Another wanted anti-SLAPP's balancing test to be part of defamation law:

> If you decide to bring this motion the court has to do… this balancing test. If you don't bring this motion, you forever give up your opportunity to ask the court to do this and it's weird. Why can't you ask the trial judge to do this calculus and say "look, I shouldn't be liable because the expressive interest that I'm protecting is more important than the reputational interest"? If we're going to allow this on a preliminary motion, why can't it be a substantive defence?[219]

3) Kinds of Cases the Law Works Best/Worst for

I asked lawyers what kinds of cases anti-SLAPP seemed well-suited to and which it didn't. Not surprisingly, the more a case bore the traditional hallmarks of a SLAPP (brought for a malicious or improper purpose, power imbalance between the parties, a clear public interest in the speech at issue) the more likely anti-SLAPP law was thought to work well.[220] The same was noted for frivolous cases.[221]

One lawyer noted that anti-SLAPP works well where the plaintiff has voluntarily engaged in public debate and the relevant expression is related to that debate: "[the plaintiff has] entered the arena, so to speak… And I think anti-SLAPP provides somebody in that circumstance with a tool to get rid of those kind of cases... [where the plaintiff] is engaged in public debate and played a role in *spurring* that public debate."[222] Another made a similar point about a case involving an "outspoken political person".[223]

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217 3On.

218 13BCDef.

219 7OnDef.

220 5OnDef, 8OnDef, 9OnDef, 10OnDef, 13BCDef, 14BCDef all made this point; But 8On also noted that most anti-SLAPP motion cases are not like this.

221 5OnDef.

222 12BCPl.

223 9OnDef.

Some lawyers also noted that anti-SLAPP tends to work well for simple, clear cases;[224] in other words, they work less well for complex cases. "Yeah I think the areas where it's more difficult is where it's going to come down to the nuanced area of the law, like what is the sting? What is comment? What is fact?".[225] Where there are issues of credibility, or other contested issues of fact, some noted that anti-SLAPP doesn't work so well because judges are inclined to want that assessed at trial.[226]

Defamation law often turns on defences and "most of these defences are factual and you don't want motion judges deciding these on the basis of paper records. If we're going to try and prove the defamation to be true, then you'd better get some evidence, get some witnesses and if it's going to turn into a swearing contest then let it. That's why we have trials."[227] Another agreed that "where there's factual issues that kind of call out for some kind of determination", SLAPP is often ill-suited.[228]

A specific kind of case involving both contested facts and serious allegations is where someone accused of sexual assault or gendered violence sues the accuser in defamation. Several lawyers commented on this, perhaps because of the prominence of the *Galloway* case, ongoing at the time of the interviews, but one lawyer also mentioned the Mike Bullard case.[229]

One said they had hoped anti-SLAPP would work well for such cases, but at least with hindsight, they were not surprised that in cases like *Galloway,* anti-SLAPP motions have been dismissed. "I wasn't at all surprised by the outcome of that because I think judges are like 'Oh my God', to not have the chance to defend yourself against a really serious allegation just feels unfair even though it's not clear how a trial would solve it either if it's a he-said-she-said."[230] Another noted: "they're like 'oh,

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224 5OnDef.

225 14BCDef; And 5OnDef stated: "but where you require a very large record I think people are thinking twice about whether or not to pursue a section 137.1 motion or just pursue summary judgment … [Y]ou do need a larger record given the case law as it has emerged. I think that may dissuade some parties from pursuing a section 137.1 motion whereas where it's a simpler case, where it's an obvious case, certainly that that is where people are bringing these motions."

226 5OnDef.

227 7OnDef; 13BCDef: "It's difficult for a court to adjudicate that at in an early stage without, you know, full production of everything and hearing witnesses' credibility and all that."

228 9OnDef.

229 For *Galloway* see e.g. *Galloway, supra* note 48; *Bullard v Rogers Media Inc*, 2020 ONSC 3084; 7OnDef mentioned *Galloway* but also *Bullard*.

230 9OnDef.

sexual assault, we're not touching it, it's got to go to trial.'"[231] When asked about what kinds of cases are not suitable for anti-SLAPP motions, one lawyer raised *Galloway*. "So those are the really hard cases … because you don't know what happened right? … [T]he merits will mean everything in that case … This is a good example of where the civil litigation system does not serve anybody very well."[232]

4. Concluding Thoughts

The fundamental tension in anti-SLAPP law is the need to avoid expensive litigation but to still assess a case well enough to know whether it should be permitted to proceed. Some lawyers think it would be better to leave behind anti-SLAPP law's rigidity and just focus on the main question: whether the action should be brought. The law can only achieve its goals if this approach is taken. Otherwise the motions will always be long and drawn out. But other lawyers are skeptical of the ability to address complicated issues based on a "sniff test". One is particularly concerned by the impression the law gives that these cases can be determined on such a summary procedure. "[I]t's kind of an illusion, you [*i.e.,* the judge] haven't actually seen the case, you've only seen the documents the parties have chosen to put forward none of them have been compelled to actually cough up all their documents … you actually haven't seen the whites of anyone's eyes".[233]

And while it's fair enough to say that if a case is too complex to be subject to a sniff test it should just go to trial, that ignores the fact that litigators will use this tool to their client's advantage, regardless of whether the case is suitable. This can add a layer of cost and delay, contrary to anti-SLAPP laws' goals.

The purpose of this article is not to propose changes to the law. It is to understand how the law is actually working—or not working—on the ground, as opposed to what can be gleaned from the case law. What should be done as a result requires more critical analysis of the kinds of observations made in this article along with doctrinal and policy analysis. Yet a few starting points emerge: the realities of litigation—whether its adversarial nature, its cost or its complexities—cannot be ignored. Anti-SLAPP's access to justice goals cannot fully be achieved in a system that creates so many barriers to access to justice. Defamation law itself is in serious need of reform. And while there isn't much low-hanging anti-

231 8On.

232 11OnBCDef.

233 6OnBCDef.

SLAPP fruit, requiring more of defendants to put defences in play seems like a simple and sensible change.

One difficulty in assessing the value of anti-SLAPP law is the virtual impossibility of measuring its deterrent effect. Without that information, it's hard to know whether the cure is worse than the disease. What does seem clear from speaking to litigators, however, is that when anti-SLAPP law fails to deter, litigating the motions can be messy. "It's almost as though the threat of [an anti-SLAPP motion] is economical but the follow-through is not necessarily economical".[234]

Ultimately, in the absence of significant legislative change, we'll have to wait and see to what extent the legislated "culture shift"[235] toward a summary screening of cases on these motions takes hold, or individuals and the system itself prevent that from happening.

234 14BC.

235 15On.