CANADIAN CIVIL LIBERTIES ASSOCIATION

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FACT SHEET: Bill 52 – *Protection of Public Participation Act*

The Ontario government recently introduced Bill 52, the *Protection of Public Participation Act.* The Bill is designed to create a new procedure in civil litigation to help ensure that our courts are not used for bringing lawsuits to silence or deter people from speaking out on matters of public interest.

There is a fair bit of misinformation about what the Act will and what it will not do. However, Bill 52 largely reflects the recommendations of an expert panel appointed by the Attorney General of Ontario. The panel, which solicited public feedback and reported to the Attorney General in the Fall of 2010, was established to advise the Attorney General as to "how the Ontario justice system may prevent the misuse of our courts and other agencies of justice, without depriving anyone of appropriate remedies for expression that actually causes significant harm."[1] This fact sheet is intended to provide clarification and to answer outstanding questions about the effect of Bill 52.

What is a SLAPP suit?

SLAPP stands for "Strategic Lawsuit Against Public Participation." In essence, SLAPPs are lawsuits, or the threat of a lawsuit, directed against individuals or organizations, in order to silence and deter their public criticisms or advocacy for change. Although SLAPPs can take a variety of forms, many come in the form of a legal action for defamation or for other civil claims including interference with contractual relations. SLAPPs generally lack merit and are not likely to succeed in court. The term is used in part to describe a case where the goal of the party bringing the lawsuit is generally not to win, but to silence critics.

The lawsuit is started by a plaintiff, which may be an individual or corporation, in order to intimidate those who criticize or question the plaintiff's behavior or stance with respect to certain public interest issues. In response, the critics (defendants in the lawsuit) have to redirect all of their energies to defending the lawsuit. In light of the time, resources and stress that can accompany being sued, the defendants may be encouraged to simply stop expressing their views and critical assessments of the plaintiff. The lawsuit may also have the effect of dissuading others from speaking out and exercising their own rights to express themselves and participate in the democratic process. This is sometimes referred to as the "chilling effect."

[1] Ministry of the Attorney General, *Anti-SLAPP Advisory Panel,* online: https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/. The Advisory Panel's full report is available at: http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.pdf.

How would Bill 52 change the civil litigation process?

- If Bill 52 becomes law, there would be a new procedure available in Ontario's civil courts. In particular, a defendant in a lawsuit could bring a **special motion** asking for the claim against them to be dismissed because of its impact on the freedom of expression in a matter of public interest.
- The **motion could be brought at any time** after the claim is filed. In practice, a defendant would probably bring this motion soon after being served with a statement of claim, and thus forego having to file a statement of defence and proceed with many of the other time-consuming and costly steps in civil litigation, until a Court has decided whether the lawsuit may or may not continue.
- The Bill also proposes **cost consequences** that are designed to discourage SLAPP lawsuits from being started and to encourage the targets of such lawsuits to have them disposed of promptly. If the defendant succeeds in having the proceeding dismissed, there is a presumption that they can recover costs (i.e. the person who brought the lawsuit will have to pay all of the legal costs). Conversely, if the defendant is unsuccessful in having the lawsuit dismissed, and it proceeds, there is no presumption they would be liable for costs. Damages could also be awarded in cases where a judge determines that a proceeding was started in bad faith or for an improper purpose.

When would a case be dismissed?

- It has been suggested that Bill 52 would prevent individuals and corporations from protecting themselves against an unfair and untrue "smear campaign". This is not accurate. **The proposed legislation does not change the law of defamation, it only creates a new procedure** to help ensure the Court's resources and powers are not being used to shut down legitimate public debate and discussion.
- **If a judge determines that the lawsuit was started based on an expression made by the defendant that relates to a matter of public interest, it should be dismissed. However, if the party bringing the lawsuit can demonstrate that:**
    - **the case has substantial merit;**
    - **the defendant has no valid defence; and**
    - **the harm it has suffered outweighs the harm that could be done to the public interest (particularly freedom of expression) by allowing the action to continue**

  THEN: the case will not be dismissed and the action will be allowed to proceed.

What Bill 52 will and won't do:

- It will **save time and money**.
    - How? By making sure that an early determination is made about whether a lawsuit can proceed where it appears to be aimed at silencing public participation.
- It will **ensure a fairer process** in our courts.
    - How? The targets of SLAPPs often have limited financial resources and many are not able to cover the cost of defending themselves in a lawsuit, even if they have a strong defence or did nothing unlawful in the first place. The special motion will help make sure these people have an opportunity to defend themselves and not simply bow out because of a lack of resources.

- It will help to **protect freedom of expression**.
  - How? Lawsuits and threats of lawsuits that target expression create a "chill" and discourage people from speaking their minds. The procedure created by Bill 52 will help to guard against this chilling effect.
- It will be available to ***any*** civil litigant in Ontario (involved in a lawsuit started after December 1, 2014) who feels the suit is targeting their public participation and **will not limit who can bring a special motion to dismiss**.
  - Why not? The proposed scheme should apply to anyone in any civil litigation. The value of public participation is not restricted to specific individuals.
- It will **not create a new legal right** (unlike several American anti-SLAPP laws that expressly protect the right of citizens to petition government).
  - Why not? Canadians' freedom of expression is already protected by our Constitution. An anti-SLAPP law would merely act as a new procedure to better enforce an existing body of rights.
- It will **not limit protection to communication that targets governments**.
  - Why not? Protection should be based on whether the expression is on a matter of public interest. This may include commentary on government actions and actors, as well as non-government actors.
- It will **not focus on the purpose of the lawsuit**.
  - Why not? Judging the motive of a plaintiff is difficult, and often impossible, especially in an accelerated proceeding such as a motion. Consideration should be given to the effect the lawsuit may have on expression on matters of public interest, not on why the plaintiff decided to sue.