



Canadian  
Environmental Law  
Association  
EQUITY. JUSTICE. HEALTH.

**SUBMISSIONS  
TO THE  
STANDING COMMITTEE  
ON JUSTICE POLICY**

**BILL 52**

***PROTECTION OF PUBLIC PARTICIPATION ACT, 2014***

**SUBMITTED  
BY**

**Ramani Nadarajah  
Counsel**

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**

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**T 416 960-2284 • F 416 960-9392 • 130 Spadina Avenue, Suite 301 Toronto, Ontario M5V 2L4 • [cela.ca](http://cela.ca)**

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## I. INTRODUCTION

The Canadian Environmental Law Association (“CELA”) is filing the following comments with the Standing Committee on Justice Policy with respect to Bill 52, the *Protection of Public Participation Act, 2014 (PPPA, 2014)*. After a brief introduction to CELA and an analysis of Bill 52, our comments will focus on amendments that we submit should be considered by the Standing Committee to strengthen the Bill.

CELA is a public interest law group founded in 1970 for the purposes of using and improving laws to protect public health and the environment. Funded as an Ontario Legal Aid Clinic, CELA represents individuals and citizen groups in the Courts and before administrative tribunals on a wide variety of environmental matters. As a legal aid clinic, CELA also engages in various law reform, public legal education, and community outreach initiatives.

CELA has a long history of involvement with the issue of strategic lawsuits against public participation (SLAPPs). CELA called for the enactment of anti-SLAPP legislation over twenty years ago.<sup>1</sup> Some years later, CELA counsel published an article entitled “The Failure of Defamation Law to Safeguard Against SLAPPs” in the *Review of European Community and International Law*, which examined the evolution of defamation law in Canada and its interplay with SLAPP lawsuits and provided some law reform recommendations for Ontario.<sup>2</sup> CELA counsel co-authored a report with Ecojustice entitled “Breaking the Silence: The urgent need for anti-SLAPP legislation in Ontario” which examined the inadequacy of existing laws to address SLAPPs and analyzed the key components of effective anti-SLAPP legislation. CELA counsel also provided written submissions and made an oral submission to the Anti-SLAPP Advisory Panel which produced a report to the Attorney General dated October 28, 2010, upon which Bill 52 is largely based. In addition, CELA counsel has represented a client who was the subject of a SLAPP in a civil litigation case.

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<sup>1</sup>Kevin Hawthorne “SLAPPs: The Need for Legislative Reform,” *Intervenor* (July/August 1994) 1

<sup>2</sup>Ramani Nadarajah & Renne Griffen, “The Failure of Defamation Law to Safeguard Against SLAPPs in Ontario” (2010) 19:1 *Rev. Eur. Community & Int’l Envtl. L.* 70.

## II. GENERAL COMMENTS

A SLAPP is a specific type of lawsuit in which the plaintiff deploys the justice system as part of a broader political strategy to curtail public engagement (by both individuals and groups) on matters of public interest.<sup>3</sup> This goal can be achieved without winning the lawsuit or even carrying it forward to a determination on its merits.”<sup>4</sup> As one legal commentator observed, “[u]nlike other plaintiffs, a SLAPP filer’s main concern is, by definition, not monetary compensation or other legal remedies to correct a wrong or grievance. The decision to proceed with a SLAPP is usually a highly tactical one, forming part of a larger strategy.”<sup>5</sup> Thus, while a SLAPP lawsuit will be founded on allegations of a civil claim in the common law, the objective, in many instances, is not to secure a legal victory.<sup>6</sup> Instead the purposes of a SLAPP are to transform “issues of public debate into private issues subject to civil litigation” and prevent individuals and groups from engaging in public discourse.<sup>7</sup> Given that the mere threat of a SLAPP and the potential for incurring significant legal fees defending the lawsuit will often dissuade individuals or groups from participating in the public process, a SLAPP lawsuit can be a highly effective strategy in discouraging citizen participation in decision making processes.<sup>8</sup> Moreover, a SLAPP not only deters the intended target but also has a chilling impact on the willingness of others to engage in the same or a similar matter in the future.<sup>9</sup> By stifling the public’s willingness to engage in public participation, SLAPP lawsuits fundamentally threaten our democratic process.<sup>10</sup>

In 2008, the Uniform Law Conference of Canada identified SLAPPs in Canada as an observable reality which constituted a serious threat to the participation by citizens and groups in public

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<sup>3</sup> Byron Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression*, (Waterloo, Ontario, Canada: Wilfrid Laurier University Press, 2014) at p. 1.

<sup>4</sup> Chris Tollefson, “Strategic Lawsuits Against Public Participation: Developing a Canadian Response (1994) 73:2 Can Bar Rev 201 at 206.

<sup>5</sup> *Ibid.*

<sup>6</sup> Sheldrick, *supra* note 3 at 2.

<sup>7</sup> *Ibid* at 11.

<sup>8</sup> *Supra* note 2 at 70.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

debate.<sup>11</sup> Since the Uniform Law Conference of Canada's observation, SLAPPs have continued to increase both here in Ontario and in other Canadian provinces.<sup>12</sup>

On May 28<sup>th</sup>, 2010, the Advisory Panel on Anti-SLAPP legislation ("Advisory Panel or Panel") was established to advise the Attorney General on how the Ontario justice system could prevent the misuse of the Courts and other agencies of justice without depriving anyone of the appropriate remedies for expression that actually causes significant harm.<sup>13</sup>

In its report, the Advisory Panel noted that the "threats of lawsuits for speaking out on matters of public interest, combined with a number of actual lawsuits, deter significant numbers of people from participating in discussion on such matters."<sup>14</sup> Consequently, the Panel concluded that "the value of public participation" is sufficiently weighty that the government should take active steps to promote it by enacting targeted legislation.<sup>15</sup>

Bill 52 is a significant development which largely adopts the Panel's recommendations. If the Bill is enacted, Ontario will become the third province in Canada to enact legislation to address SLAPPs. In 2001 British Columbia became the first province to pass anti-SLAPP legislation. However, the legislation was repealed six months later following a change in government in the provincial election.<sup>16</sup> Quebec has addressed SLAPPs by strengthening the provisions of its *Code of Civil Procedure* to allow a Court at any time and even on its own initiative to declare an action or pleading to be abusive.<sup>17</sup>

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<sup>11</sup> Uniform Law Conference of Canada, Civil Section, *Strategic Lawsuits against Public Participation (SLAPPs) (and other abusive lawsuits)*, online: Uniform Law Conference of Canada < <http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/641-abuse-of-process-prevention/1418-strategic-lawsuits-against-public-participation-slapps-report-2008,para> 8.

<sup>12</sup> Anti-SLAPP Advisory Panel, *Report to the Attorney General*, (hereinafter referred to as the Panel's Report) (Toronto: Ministry of the Attorney General, 2008) at 4 para 16.

<sup>13</sup> *Ibid* at 1 para. 2.

<sup>14</sup> *Ibid* at 4, para. 16.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Protection of Public Participation Act*, S.B.C 2001, c 32.

<sup>17</sup> *Code of Civil Procedure*, RSQ., c. C. 25, s 54.1.

On the international front, at least twenty-seven U.S. states and one territory (Guam) have enacted anti-SLAPP legislation. In 2008, the Australian Capital Territory Parliament became the first Australian jurisdiction to enact anti-SLAPP legislation.

The Environmental Commissioner of Ontario in his 2009 Annual Report called on the provincial government to enact legislation to address SLAPPs.<sup>18</sup> The enactment of anti-SLAPP legislation in Ontario has received wide support from public interest organizations, the Ontario Bar Association, the Ontario Trial Lawyers Association as well as environmental organizations which ranked anti-SLAPP legislation as a top priority for the Ontario government to address. In addition, at least sixty-five municipalities in Ontario have passed anti-SLAPP resolutions.<sup>19</sup>

### III. SPECIFIC COMMENTS ON BILL 52

CELA has undertaken a comparison of Bill 52 with the Panel's report. The Bill, in our view, largely adopts the recommendations of the Panel's Report and will be effective in addressing the growing problem of SLAPPs in Ontario.

Legal experts and academics who have examined the SLAPP phenomenon in the United States and Canada have identified the key principles of an effective anti-SLAPP regulatory framework.<sup>20</sup> We discuss these principles below and assess whether Bill 52 meets them. In addition, we provide recommendations for a number of amendments which, we believe, will strengthen the Bill to ensure that it is effective in protecting the right of Ontarians to engage in public participation without fear of being sued.

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<sup>18</sup> Environmental Commissioner of Ontario, *Building Resilience: Annual Report (2008-2009)*, (Toronto: ECO, 2009) at 25.

<sup>19</sup> Hugh Wilkins, Ramani Nadarajah & Pamela Shapiro, "Breaking the Silence; The urgent need for anti-SLAPP legislation in Ontario, (Toronto: Ecojustice November 2010) 16.

<sup>20</sup> G.W. Pring & P. Canan, *SLAPPs Getting Sued for Speaking Out* (Philadelphia: Temple University Press, 1996) at 83 and 84. See also *Supra* note 4 at 201 and 229-232.

## THE COMPONENTS OF AN EFFECTIVE ANTI-SLAPP REGULATORY FRAMEWORK

Effective anti-SLAPP legislation should satisfy the following three-part test:

1) **A broad definition of the protected activity:** The Anti-SLAPP Advisory Panel supported a broad scope of protection and stated that it did not “consider it wise to distinguish between ‘public’ and ‘private’ forums of discussion.”<sup>21</sup> The Panel expressly rejected the approach taken by some U.S. states which have limited the protection afforded by anti-SLAPP legislation to only communications made to influence actual or possible government action.<sup>22</sup> The Panel noted that, “conversation among neighbors about a new development and a communication made to influence government both involve expression on matters of public interest. Protecting only communication that targets government is likely to be too narrow.”<sup>23</sup> According to the Panel, the “better test is whether an expression is on a matter of public interest.”<sup>24</sup>

2) **A mechanism for a preliminary review of the merits of the action:** To be effective, anti-SLAPP legislation should provide a mechanism for the courts to undertake an early review of unmeritorious lawsuits which seek to stifle public participation on matters of public interest.<sup>25</sup> The test for dismissal of these actions must shift the burden to the plaintiff who commenced an action to establish that the case has substantial merit. The Anti-SLAPP Advisory Panel recognized that the test of dismissal must carefully balance competing interests: protecting the right of the public to engage in public participation while also ensuring that the legislation does not serve as “a cover to protect expression which harms reputational, business or personal interests of others.”<sup>26</sup> The Advisory Panel also cautioned that the fact that the plaintiff’s claim may have technical validity was not sufficient to allow the action to proceed. If the alleged harm is insignificant and permitting the action to proceed would have clearly disproportionate impact

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<sup>21</sup> *Supra* note 12 at 7, para. 29.

<sup>22</sup> *Ibid* at 7, para 28.

<sup>23</sup> *Ibid* at 7, para 29.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid* at 10 para 40.

<sup>26</sup> *Ibid* at 9, para 36.

on freedom of expression on a matter of public interest, the Panel recommended that courts should have the authority to dismiss the action.<sup>27</sup>

3) **Effective Remedies:** Anti-SLAPP legislation should provide effective remedies to reduce the adverse impacts caused by unmeritorious litigation against public participation and deter plaintiffs from commencing SLAPPs.<sup>28</sup> It is essential that these remedies be readily available without causing the defendant to bear significant legal expenses. As one legal commentator observed, it is the “generally superior resource capacity of plaintiffs in SLAPP lawsuits that enables them to use the very costly litigation process as a strategic or tactical tool in a broader political campaign.”<sup>29</sup> The Panel reiterated these concerns and noted that the defendant who is the target of a SLAPP may have few resources and little expertise in legal matters.<sup>30</sup> The Advisory Panel, therefore, recommended that a defendant who was successful in having an action dismissed should be awarded full indemnification in order to minimize the intimidation effect of a lawsuit for a large dollar amount and the actual cost of fighting it.<sup>31</sup> The Panel also recommended that if a Court is satisfied that the action was brought in bad faith or for an improper motive – such as to punish, silence or intimidate the defendant – the Court, in such circumstances, should have the power to award damages.<sup>32</sup> In cases where the plaintiff is also engaged in an administrative or policy proceeding in which the plaintiff is seeking permission to do something, and the SLAPP is connected with the plaintiff’s action, the Advisory Panel recommended that the court should have authority to suspend the administrative proceeding pending the determination of the motion and any appeals.

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<sup>27</sup> *Ibid* at 10, para 37.

<sup>28</sup> *Ibid* at 11, para 44.

<sup>29</sup> Sheldrick, *supra* note 2 at 32.

<sup>30</sup> Panel Report, *supra* at 10, para 40.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid*.

## **APPLICATION OF THE THREE-PART TEST TO BILL 52**

### **1) Definition of Protected Activity**

Bill 52 passes the first criteria by providing for a broad definition of the protected activity. Section 137.2 of the Bill defines “expression” as “any communication regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately and whether or not it is directed at a person or entity.”

### **2) Test for Dismissal**

Bill 52 also passes the second test fairly well by setting a clear test for dismissal which balances the right of the public to make statements on matters of public interest with the need to ensure that a person’s reputation, economic or other personal interests are not wrongfully harmed. Under the Bill, once a defendant has established the lawsuit arises from an expression made by the defendant which relates to a matter of public interest, the Court is required to dismiss the action unless the plaintiff satisfies the three-part test set out in s. 137.1 (4):

s. 137.1

(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.

The test for dismissal is the core element of the Bill and has been characterized as a “preliminary review of the merits of litigation.”<sup>33</sup> The use of the term “grounds to believe” in s. 137. 1(4)(a)

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<sup>33</sup> Peter A. Downard, “The Balance Shifts: The Ontario Protection of Public Participation Act, Free Speech and Reputation Protection”, online: Fasken Marineau DuMoulin LLP <[http:// http://www.fasken.com/](http://www.fasken.com/)> available online at <http://www.fasken.com/en/anti-slapp-legislation-ontario-protection-of-public-participation-act/>, p. 3.

imposes a lower evidentiary threshold on the plaintiff than that established by anti-SLAPP legislation in other jurisdictions. Minnesota’s anti-SLAPP law, for example, requires the plaintiff to produce clear and convincing evidence that the acts of the moving party are not immunized from liability.<sup>34</sup> Similarly, the Illinois law also places an onus on the plaintiff to produce clear and convincing evidence that the defendant is not immune from liability.<sup>35</sup> Although the threshold in Bill 52 is lower than that of some of the U.S. states, it is CELA’s view that the test is an appropriate one given that the review can be invoked at an early stage of the proceedings and is intended to be a preliminary review of the merits of the action.

If the plaintiff meets the “grounds to believe” test, the court will move to the second part of the analysis and determine whether the lawsuit, although technically valid, is seeking a remedy for insignificant harm to reputation, business or personal interests. It is expected that the courts will not readily dismiss an action on the second part of the analysis but rather will only do so where the harm complained of is insignificant.<sup>36</sup>

In the second part of the analysis, the Court will need to consider whether the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. Although the term “public interest” has been defined broadly in Canadian jurisprudence, the concept is subject to certain limits. In *Grant v Torstar Corp*, a landmark defamation case, the Supreme Court of Canada cautioned that public interest is not synonymous with what interests the public.<sup>37</sup> “The public appetite for information on a given subject,” the Court indicated, “is not sufficient on its own to render an essentially private matter public for purposes of defamation law. Conversely, the fact that the public would not be riveted by a given subject matter does not remove the subject from public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject.”<sup>38</sup> Furthermore, the Court added,

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<sup>34</sup> Minnesota Statutes: Declaratory, Corrective and Administrative Remedies, Chapter 554 – Free Speech Participation in Government: §554. 02(3)

<sup>35</sup> Illinois Compiled Statutes: Major Title: Rights and Remedies, Chapter 735 Civil Procedure; *Citizen Participation Act*, §735 ILCS 110/ 20 (c).

<sup>36</sup> Supra note 33 at 9.

<sup>37</sup> *Grant v. Torstar Corporation*, 2009 SCC 61, at para 102.

<sup>38</sup> *Ibid.*

“public interest” is not confined to publications on government and political matters”.<sup>39</sup> The Supreme Court noted the public has a “genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.”<sup>40</sup>

The second part of the analysis in the test for dismissal serves an important balancing function between freedom of expression and the need to protect an individual’s reputation, economic or other personal interests. The Advisory Panel was of the view that where allowing the action to proceed would have a clearly disproportionate impact on freedom of expression on a matter of public interest, the court should dismiss the action. According to the Panel, granting the plaintiff a remedy in these circumstances would be an “unwarranted incursion into the domain of protected expression.”<sup>41</sup> The Panel stated that in such circumstances the action may be regarded as seeking an inappropriate expenditure of the public resources of the court system.

CELA regards the inclusion of the second part of the analysis as an integral element of the test of dismissal and would not support any amendment that would modify the test with the intent of undermining the objectives of the *PPPA*.

### 3) Remedies

Bill 52 provides for a number of remedies such as providing the Court with authority to award full indemnification to a successful defendant as well as the power to award damages against a plaintiff who brought an action in bad faith or for an improper motive. In addition, the Court has authority to suspend other proceedings closely linked to the SLAPP lawsuit until the motion for dismissal and any appeals have been determined. These are important measures to address SLAPPs. However, the Bill could be significantly improved by the inclusion of additional disincentives such as those found in Quebec’s *Code of Civil Procedure*, which are discussed in more detail below.

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<sup>39</sup> *Ibid* at para 106.

<sup>40</sup> *Ibid*.

<sup>41</sup> Panel Report, *supra* note 12 at 9, para 37.

## PROPOSED AMENDMENTS

### **(A) Date of Applicability**

Section 137.5 of Bill 52 specifies that s. 137.1 to s. 137.14 (purposes and the test for dismissal) apply to proceedings commenced on or after the day the Bill received first reading. Consequently, the protection afforded by the Bill would only protect defendants who were the target of a SLAPP commenced after December 1<sup>st</sup>, 2014, when the Bill was introduced. In our view, section 137.5 establishes an arbitrary time limit for defendants who are seeking the benefit of the protection afforded by the Bill and should, therefore, be deleted. There is no valid rationale to justify restricting Bill 52 to lawsuits commenced on or after December 1<sup>st</sup>, 2014. We note that Bill 83, *Protection of Public Participation Act, 2013*, which was introduced in a previous legislative session, expressly provided that it applied to proceedings commenced before the day that the Act was to come into force. CELA recommends that Bill 52 include a similar provision.

It should be noted that the Advisory Panel, which was established to provide advice on the content of anti-SLAPP legislation to the Attorney General, released its report with recommendations on October 28<sup>th</sup>, 2010, almost four years prior to the introduction of Bill 52. Ontarians who are the subject of a SLAPP suit should not be precluded from benefitting from the procedural safeguards provided by the Bill simply because there has been a significant lapse of time from the release of the Advisory Panel's report to the introduction of the Bill.

**CELA Recommendation No. 1: CELA recommends that s. 137.5 of Bill 52, which restricts the applicability of Bill 52 to lawsuits that were commenced on or after the day the Bill received first reading, be deleted.**

**CELA Recommendation No. 2: CELA recommends that a section be added to Bill 52 which expressly states that it applies to proceedings commenced before the Bill came into force.**

## **(B) Directors and Officers Liability**

Bill 52 provides a number of remedies to address the problem of SLAPPs in Ontario. These range from the dismissal of an action with costs on a full indemnification basis to a stay of administrative proceedings where the proceedings are connected with the defendant's expressive activity which gave rise to the SLAPP lawsuit. Both these remedies will be effective in countering the incidence of SLAPPs. However, the Bill would benefit from the inclusion of additional remedies similar to those in Quebec's *Code of Civil Procedure*, including the imposition of liability on directors and officers who participated in the decision to initiate a SLAPP, and providing for judicial oversight of future proceedings by the plaintiff. Both these remedies are discussed in more detail below.

CELA recommends that Bill 52 be amended by adding a section similar to the relevant section of Quebec's *Code of Civil Procedure*, which gives the Court authority to require directors and officers of a corporation who took part in the decision to commence a SLAPP to personally pay damages. The Uniform Law Conference of Canada's *Model Act on Abuse of Process* had previously recommended such a provision be included in anti-SLAPP legislation.<sup>42</sup>

The potential for personal liability of directors and officers can serve as an important factor to deter corporations from commencing SLAPP lawsuits. It is important to note that the decision to commence a SLAPP lawsuit can be initiated by an individual not on his or her own behalf but rather as an agent with the intent of serving broader interests.<sup>43</sup> A corporate president, for example, may initiate a SLAPP with support and resources from the broader corporation to silence criticism.<sup>44</sup> In these instances it may be appropriate not only to penalize the individual who commenced the action but also those supporting actors who participated in the decision to commence the SLAPP lawsuit.

Directors and officers liability has been a primary instrument used by policy makers to improve corporate decision-making and promote good governance. There are numerous federal and

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<sup>42</sup> Uniform Law Conference, Civil Section, *Model Act on Abuse of Process* (August 2009) at S. 5. (2), online: <[http://www.ulcc.ca/images/stories/2009\\_en\\_pdfs/2009ulcc0015.pdf](http://www.ulcc.ca/images/stories/2009_en_pdfs/2009ulcc0015.pdf)>.

<sup>43</sup> Sheldrick, *supra* note 2 at 32.

<sup>44</sup> *Ibid.*

provincial laws in Canada which impose personal liability for directors and officers of a corporation.<sup>45</sup> These include federal statutes such as the *Canadian Environmental Protection Act*, the *Business Corporation Acts* and the *Income Tax Act*, and provincial statutes like the *Oak Ridges Moraine Conservation Act* and the *Pesticide Act*. Given that the most common filers of SLAPP lawsuits are corporations or industry associations,<sup>46</sup> the imposition of directors' and officers' liability can serve as an effective mechanism to deter against abusive lawsuits intended to block public participation. In order to ensure that the personal liability provisions are not undermined, the Bill should also include a section providing that the corporation shall not reimburse a director or officer who has been ordered to pay damages.

**Recommendation No. 3: CELA recommends that Bill 52 be amended to include a section which gives the Court authority to issue an order requiring that a director or officer of a corporation who took part in the decision to commence a SLAPP to personally pay for damages.**

**Recommendation No. 4: CELA recommends that Bill 52 include a section which provides that a director or officer of a corporation who has been ordered to pay damages shall not be reimbursed by the corporation.**

### **(C) Restricting further SLAPPS**

In cases where a corporation or individual has demonstrated a pattern of initiating SLAPPS, it would be useful to include a provision which safeguards against the commencement of further unmeritorious proceedings. Quebec's *Code of Civil Procedure* addresses this problem by including a provision giving the Court authority to prohibit further legal proceedings except with express authority and subject to conditions to be determined by the chief judge or chief justice.

Bill 52 should be amended to include a provision that gives the court authority to prohibit a party from instituting future legal proceedings, except with express authorization and subject to express conditions to be determined by a judge.

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<sup>45</sup> Dianne Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability*, (Aurora, Ontario: Canada Law Book, 1990) at 131.

<sup>46</sup> Sheldrick, *supra* note 2 at 32.

**Recommendation No. 5: CELA recommends that Bill 52 include a section that gives the court authority to prohibit a party from instituting further legal proceedings, except with express authorization and subject to conditions to be determined by a judge.**

**(D) Application for Costs Awards at Administrative Hearings**

Bill 52 also does not fully address the problem of an application for significant cost awards at administrative hearings, which can also suppress public participation. Under the *Statutory Powers and Procedure Act (SPPA)* a tribunal is limited to making an order for costs in circumstances where the conduct of the party has been frivolous or vexatious or a party has acted in bad faith.

The Advisory Panel concluded that the limits on the discretion to award costs in the *SPPA* were likely motivated to safeguard public participation and to ensure that parties with legitimate points of view were able to fully participate in tribunal hearings. Despite the infrequent imposition of costs awards at the Ontario Municipal Board, the Panel regarded it important to ensure that costs applications did not become financially costly and time consuming. The Advisory Panel, for example, indicated that an application for costs before the Ontario Municipal Board in relation to a development at Big Bay Point in Innisfil had lasted some seventeen days and took more time than the substantive request for a permit and zoning exemption. Consequently, the Panel recommended an application for costs under s. 17.1(2) of the *Statutory Powers and Procedure Act* be made in writing, unless such a procedure would cause significant prejudice to a party. We are pleased to see that this recommendation was adopted in Bill 52.

The Panel also recommended that an unsuccessful applicant for a costs order should provide full indemnity to those against whom the order was sought for their costs in the application (but not in the proceeding on the merits.) Unfortunately, Bill 52 does not adopt this recommendation.

CELA supports the recommendation of the Advisory Panel intended to address the negative impacts that an application for costs awards can have on public participation. Therefore, CELA recommends that Bill 52 be amended to require that an unsuccessful applicant for an order for costs should provide full indemnity to those against whom the cost award was sought. The

Tribunal should have authority to relieve against this rule if it would cause significant prejudice to the applicant.

**Recommendation No. 6: CELA recommends Bill 52 be amended to include a provision that the *SPPA* is amended by adding a section that an unsuccessful applicant for an order for costs should provide for full indemnity to those against whom the cost order was sought for their costs in the application.**

**Recommendation No. 7: CELA recommends that Bill 52 be amended to include a provision that the *SPPA* is amended by adding a section granting the tribunal power to relieve an unsuccessful applicant for an order of costs from providing full indemnity if it would likely cause significant prejudice to the applicant.**

#### **IV. CONCLUSION**

Bill 52 largely reflects the Advisory Panel's recommendations regarding the content for anti-SLAPP legislation. The Bill includes the three main components of an effective regulatory framework for anti-SLAPP legislation: a broad definition of the protected activity, a mechanism for a preliminary review of the merits of the action, and effective remedies.

The core feature of the Bill is sections 137.1 (3) and (4), which set out the test for dismissal. The test devised by the Panel seeks to carefully balance the need to protect and promote freedom of expression in matters of public interest with the need to safeguard a person's reputational, business or personal interests. CELA, therefore, would not support any amendment to the test which would weaken it and undermine the objectives of the Bill.

It is unfortunate that the Bill limits the applicability of the *PPPA 2014* to proceedings that were commenced on or after December 1<sup>st</sup>, 2014, the date the Bill received first reading. In contrast, Bill 83 expressly provided that it applied to proceedings even if they were commenced before the Act came into force. There is no valid rationale to justify restricting the Bill's applicability to proceedings commenced on or after December 1<sup>st</sup>, 2014. Bill 52 therefore should be amended to

ensure that it applies to proceedings commenced prior to the introduction of the Bill. This will ensure that Ontarians who are currently the subject of SLAPP lawsuits can seek the benefit of the procedural safeguards provided by the Bill.

In addition, Bill 52 would benefit from incorporating some of the features found in Quebec's *Code of Civil Procedure*. These include giving the Court authority to impose personal liability on officers and directors who take part in a decision to commence a SLAPP and providing the court with authority to exercise oversight over the commencement of any further proceedings by a plaintiff.

Bill 52 does not include the Advisory Panel's recommendations that an unsuccessful applicant for costs before a tribunal should provide full indemnity. The Panel noted that an application for costs award can hinder public participation on matters of public interests just as effectively as a SLAPP lawsuit. CELA recommends that Bill 52 be amended in accordance with the Panel's recommendation that an unsuccessful applicant for an order for costs should provide full indemnity to those against whom the costs order was sought for their costs in the application (not in the proceeding on the merits). The *SPPA* should also provide the tribunal with the power to relieve against this rule if it is likely to cause significant prejudice to the applicant.

CELA remains strongly supportive of Bill 52 and believes that, if enacted, it will provide a focused remedy to address the increasing problem of SLAPPs in the province. The Bill will protect Ontarians from meritless lawsuits intended to silence them from engaging in democratic debate and participation on matters of public interest. CELA, therefore, urges the Bill be enacted into law with the amendments proposed above.

## **V. SUMMARY OF RECOMMENDATIONS**

**CELA Recommendation No. 1: CELA recommends that s. 137.5 of Bill 52, which restricts the applicability of Bill 52 to lawsuits that were commenced on or after the day the Bill received first reading, be deleted.**

**Recommendation No. 2:** CELA recommends that a section be added to Bill 52 which expressly states that the Act applies to proceedings commenced before the Act came into force.

**Recommendation No. 3:** CELA recommends that Bill 52 be amended to include a section which gives the Court authority to issue an order requiring that a director or officer of a corporation who took part in the decision to commence a SLAPP to personally pay for damages.

**Recommendation No. 4:** CELA recommends that Bill 52 include a section which provides that a director or officer of a corporation who has been ordered to pay damages shall not be reimbursed by the corporation.

**Recommendation No. 5:** CELA recommends that Bill 52 include a section that gives the court authority to prohibit a party from instituting further legal proceedings, except with express authorization and subject to conditions to be determined by a judge.

**Recommendation No. 6:** CELA recommends Bill 52 be amended to include a provision that the *SPPA* is amended by adding a section that an unsuccessful applicant for an order for costs should provide for full indemnity to those against whom the cost order was sought for their costs in the application.

**Recommendation No. 7:** CELA recommends that Bill 52 be amended to include a provision that the *SPPA* is amended by adding a section granting the tribunal power to relieve an unsuccessful applicant for an order of costs from providing full indemnity if it would likely cause significant prejudice to the applicant.