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## A Brief on SLAPPs

### Strategic Lawsuits Against Public Participation (SLAPP): Legislation Urgently Needed in Ontario

In May 2010, the Attorney-General of Ontario established an expert advisory panel to recommend content for anti-SLAPP legislation in Ontario. In its December 2010 report, the Anti-SLAPP Advisory Panel strongly recommended that Ontario:

*... enact legislation against the use of legal processes that affect people's ability or willingness to express views or take actions on matters of public interest.*

We urge Premier Dalton McGuinty to adopt the Attorney-General's Anti-SLAPP Advisory Panel's recommendations. Now is the time for anti-SLAPP legislation in Ontario.

Why? SLAPPs are more common than you think in Ontario, and are getting worse.

The Environmental Commissioner of Ontario has called for SLAPP suit protection in Ontario. In his 2008/2009 Annual Report, ECO Gord Miller wrote:

The public's right to participate in decision-making over matters of public interest is a cornerstone of our democratic system. Efforts aimed at suppressing this right should be discouraged by the Ontario Legislature and other public agencies. The ECO sees a need for provincial legislation that would put both sides of development disputes on equal footing. Such legislation could serve to halt SLAPP suits in their tracks.<sup>1</sup>

Strategic Lawsuits against Public Participation ('SLAPPs') are lawsuits brought to silence individuals and citizen groups. They are generally meritless lawsuits aimed at citizens who – due to the stress and cost of defending themselves – are coerced into curtailing their engagement in public advocacy. They threaten the public's participation in democratic processes. Activities that attract SLAPPs include citizens reporting of

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<sup>1</sup> Environmental Commissioner of Ontario. 2009. "Reforming Land Use Planning." *Building Resilience, ECO Annual Report, 2008-09*. Toronto, ON : Environmental Commissioner of Ontario. 23-25.

environmental violations, filing complaints with government agencies, contacting the media, speaking at public meetings, participating at hearings before administrative tribunals or engaging in public campaigns.

The power of a SLAPP comes from the use of the court system or administrative tribunals like the Ontario Municipal Board (“OMB”) to intimidate the target and to exhaust its often-limited resources. It is not the strength of the case, but the threat of onerous and expensive legal proceedings which makes SLAPPs so harmfully effective. They often require enormous resources to defend against and can exhaust the resources of a defendant.

A key aspect of SLAPPs is the significant emotional and financial stress they cause to citizens who may find themselves embroiled in lengthy litigation proceedings and facing the resulting difficulties of keeping a job, maintaining family stability or even obtaining financial credit (with a significant legal claim pending against them).

A good example of the effects of a SLAPP is the case of Geranium Corporation vs. the Innisfil District Association (IDA). Geranium is the developer behind the proposed Big Bay Point mega-marina and resort on Lake Simcoe. In responding to multiple lawsuits and an unprecedented claim for \$3.2 million in OMB costs against the Innisfil District Association and its lawyers, one defendant swore in an affidavit to the OMB:

“I feel threatened, harassed, and intimidated by Geranium’s legal claims, and fear exposure to lawsuits and the costs associated with defending them.

I do not write letters to the Town, County, Province or local papers in fear of repercussions from the Big Bay Point developers, Kimvar Enterprises Inc., and Mr. Earl Rumm. From fear of being implicated in a lawsuit myself, I would not write a letter or voice my personal opinions about the project in any way whatsoever.

I do not have the funds or means to defend myself in a lawsuit, which increases my fear of publicly speaking out as an individual. I would not testify at an OMB hearing with the lawsuits pending and the threat of new legal actions. I would not be able to defend myself financially from such a wealthy developer.”

Residents were sued for damages totaling over \$100 million for defamation e.g. speaking out against the development, and the Town’s lawyer was sued for conspiracy, after recommending Council oppose the project. Not one of these lawsuits made it to trial – all were either dismissed by the court, or withdrawn.

The Toronto Star has also called for SLAPP suit protection. It has stressed that such legislation must include protection from claims brought to the OMB:

In the Ontario context, such legislation would also have to apply to the Ontario Municipal Board. That's where most of our development battles are fought, not in the courts.

In one recent case, a group of residents lost their fight at the OMB against the proposed Big Bay Point resort on the shores of Lake Simcoe. They then faced a \$3.2 million claim for costs from the developer.

Rightly noting that to award such costs would create "a chilling effect" on public participation, the OMB denied that claim. But the knowledge that the decision could go the other way the next time may well discourage future OMB challenges by resident groups.<sup>2</sup>

Although most SLAPPs have little merit and would lose in court, they succeed by diverting defendants' time, money and resources away from the public issue and into responding to the SLAPP. The mere threat of being sued is generally sufficient to intimidate and silence those who are being targeted. Due to the fear of being SLAPPED, others are also likely to be deterred from participating on the same or other issues of public interest, resulting in a chilling effect. The power of a SLAPP, thus, comes not from the strength of the filer's legal position, but through the strategic use of the legal arena to intimidate citizen groups and exhaust their limited resources.

In Ontario, there is a continually increasing number of SLAPP suits being brought. Recent notable examples include:

- A community group and seven of its directors were sued in defamation by the Toronto Port Authority regarding comments made about the re-industrialization of the Toronto waterfront. The Port Authority sought \$850,000 in damages. In response, the defendants argued that the suit was a SLAPP aimed at chilling legitimate public debate and silencing critics who were opposed to the proposed development. The *Globe and Mail* described the case as a 'hollow and cynical SLAPP'.
- The Concerned Residents of Hillsdale (CROH) is a citizens' group that saw a proposal for 473 new homes in the community northwest of Barrie as too big and out of place. But the group's President Ms. Tanya Mullens withdrew the group's opposition before the OMB, telling the Board, "CROH felt intimidated by the Hillsdale Land Corporation. CROH felt it had to soften its position to protect residents from litigation."
- The Creemore Area Residents Association (CARA), which for months led a well-organized and well-funded battle to reduce by half the size of a development, suddenly agreed to the proposal, with only slight modifications to the plan. John Crispo, a Clearview Township councillor in Simcoe

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<sup>2</sup> <http://www.thestar.com/opinion/editorials/article/706428--protect-residents-in-omb-battles>

County, insists the threat of costs played a role in CARAs "caving" into the plan to double the size of Creemore, a rural community of 500 homes.

- Barrick Gold and Banro sued Éditions Écosociété (a small Quebec-based publisher) and authors Alain Deneault, Delphine Abadie, and William Sacher for roughly \$11 million over the publication of *Noir Canada, Pillage, corruption et criminalité en Afrique*. Barrick Gold and Banro stated that the book was libelous and that the defendants had orchestrated an international campaign to harm their reputations. Politicians, academics and civil society groups have labeled these suits as SLAPPs as they appear to be a direct attack on freedom of expression and public debate on matters of public interest.

The Association of Municipalities of Ontario has advocated legislative reform to address the SLAPP problem and more than 65 Ontario municipalities have enacted anti-SLAPP resolutions.<sup>3</sup> Moreover, in 2009, 70 public interest organizations petitioned the Premier to take action and the province's leading environmental non-governmental organizations have ranked anti-SLAPP legislation as a top priority that they want the Ontario government to address.<sup>4</sup> Also, more than 250 university professors across Canada have signed a petition asking for immediate adoption of an anti-SLAPP law in Ontario.<sup>5</sup>

Momentum is growing for the enactment of anti-SLAPP laws. Nova Scotia, New Brunswick and Ontario have each had an anti-SLAPP law proposed legislatively, while 28 U.S. States and Quebec have passed anti-SLAPP laws.

The Ontario Anti-SLAPP Advisory Panel strongly recommended legislation that:

- **Covers a broad range of public participation activities** - protecting all forms of public participation including cases at the OMB, and providing broad immunity from civil liability for persons and groups engaging in public participation.
- **Includes an early dismissal mechanism** - allowing for early review and an expeditious process for summarily determining the matter as well as means to simplify and lighten the burden on the defendant to defend against the SLAPP
- **Incorporates SLAPP disincentives** - providing strong penalties, financial and otherwise, to dissuade potential SLAPP plaintiffs from initiating meritless claims.

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<sup>3</sup> For the call by the Association of Municipalities of Ontario, see Association of Municipalities of Ontario, Alert No. 09/069 (15 October 2009), found at <<http://www.amo.on.ca/AM/TemplateRedirect.cfm?>>.

<sup>4</sup> The petition from environment groups can be found at <<http://www.greenprosperity.ca/slapp.php>>.

<sup>5</sup> The petition by the university professors was signed in relation to the lawsuit brought by Barrick Gold and Banro Corporation against Éditions Écosociété and authors Alain Deneault, Delphine Abadie and William Sacher.

We urge Premier Dalton McGuinty to adhere to the Attorney-General's Anti-SLAPP Advisory Panel's recommendations. The time for anti-SLAPP legislation in Ontario is now.

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