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Strategic Lawsuits Against Public Participation:

Combating an Assault on the Democratic Process

On June 27th, 1999, ten residents of Denman Island, British Columbia, set up an information table at the entrance to a road used by development company 4064 Investments Ltd. in carrying out its logging practices. The action was a culmination of more than two years of community effort to promote sustainable forestry on ecologically sensitive land.

In May, the Denman Island Local Trust Committee received approval to enact five new bylaws aimed at ensuring responsible logging operations. By early June, the Islands Trust, the body responsible for bylaw enforcement, had received several complaints concerning 4064's non-compliance with bylaw stipulations.¹ The Trust's Investigations Officer attempted to correspond with the developer to notify him of the complaints and to request that all activity resulting in violations cease immediately.

Affidavit evidence sworn by island residents and company employees suggested that logging practices on the site continued unabated, despite the notice of non-compliance.² The Committee responded by filing an application for an interlocutory injunction against 4064 in the hopes of suspending the alleged illegal activity. Local residents also staffed a table on one of the two roads leading to the site, where information on the bylaws was disseminated.

On July 7th, two days before the injunction application against 4064 was to be heard, ten local residents were served with a Writ of Summons. The plaintiff's claim for damages, injunctive relief and costs was based on the allegation that "the defendants' blocking of the road and other protest activities have unlawfully obstructed the plaintiff... to use of the plaintiff's property, and in particular have unlawfully interfered with the plaintiff's logging activities on the property."³

These allegations, along with the causes of action relied on by the plaintiff for support, triggered an association no longer unfamiliar to the Canadian environmental and legal community. The concept of Strategic Lawsuits Against Public Participation, or SLAPPs, has emerged to describe civil actions with no reasonable basis or merit advanced with the intent of stifling participation in public policy and decision making. This paper will trace the emergence of the SLAPP phenomenon in Canada and analyze the myriad of challenges that confront the

¹ Letter from Watson Smith, Bylaw Investigations Officer, to 4064 Investments Ltd. c/o Mike Jenks (June 11, 1999).

The complaints alleged two violations within the company's Development Permit Area: one with regard to excess logging on steep terrain, and the other based on exceeding the maximum permitted cut in the area.

² Affidavit No.A991804, Victoria Registry (July 2, 1999).

³ Writ of Summons No.C993489, Victoria Registry (July 6, 1999).

development of a judicially based response. It will focus on the recent trends in the judiciary towards recognizing the impact of SLAPPs and accepting a prominent role in discouraging SLAPP litigation. Finally, it will argue that judicial activism in the SLAPP arena requires support from legislatures in order to protect the role of public participation in the democratic process.

I. Background - The American Experience

While relatively new to the Canadian legal scene, the SLAPP phenomenon has become an integral development in American public law over the last decade, and has resulted in the creation of a substantial body of jurisprudence.⁴ In addition, anti-SLAPP legislation has been extensively enacted across the United States, including major initiatives in California, New York, and Washington.⁵

American courts have attempted to come to terms with the potentially chilling effect of SLAPP suits on the right of citizens to participate in decision-making. In the early 1990's the phenomenon was recognized by a New York court as relating to "suits without substantial merit that are brought by private interests to stop citizens from exercising their political rights or to punish them from having done so."⁶ The Court went on to describe the implications of such a suit:

SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation can be churned, the greater the expense that is inflicted, the closer the SLAPP filer moves to success... The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent.⁷

4 Chris Tollefson, "Strategic Lawsuits Against Public Participation: Developing A Canadian Response" (1994) *The Canadian Bar Review* 200 at 201.

5 See above.

6 *Gordon v. Marrone*, 590 New York Supplement Reporter 2d 649 (1992) at 656.

7 See above.

8 G.Pring & P.Canam, "Strategic Lawsuits Against Public Participation: An Introduction for Bench, Bar and Bystanders" (1992) 12 Bridgeport Law Review 937 at 938. Frequently, SLAPPs are aimed at political activists involved in environmental or land use disputes. These targets are often small grassroots organizations with limited financial resources.

9 See note 4 at 204.

Increased access was a result of the enactment of statutory regimes requiring public input as well as judicial liberalization of the rules on standing. As citizens and groups began more aggressively and ably to pursue various avenues of participation, their efforts were met with increased resistance, often under the guise of SLAPP litigation.

10 Chris Tollefson and Janet Promislow, "A Primer on SLAPP Suits" (1997) *Taiga News* No.21 at 2. The scope of protection covered by the First Amendment has been interpreted broadly, encompassing communications to all three branches of government, as well as to administrative agencies. Different forms of expression have also been protected, ranging from letter writing and public meetings to sit-ins and public protests.

11 *Sierra Club v. Buttz*, 349 Federal Supplement 934 (US District Court for the Northern District of California 1972).

12 *Protect Our Mountain v. District Court*, 677 Pacific Reporter 2d 1361 (Colorado 1984). The Court suggested a reverse onus, whereby the filer would need to establish that the suit should not be dismissed.

13 See note 4 at 221.

14 See above at 223.

15 [1986] 2 Supreme Court Reports 573.

16 See note 4 at 224.

17 *R v. Bernard*, [1988] 2 Supreme Court Reports 833, *R v. Swain*, [1991] 1 Supreme Court Reports 933, and *B.C.G.E.U. v. B.C. (A.G.)*, [1988] 2 Supreme Court Reports 214. While these cases have focused primarily on criminal law, many have postulated that the Supreme Court will soon be asked to revisit its decision in *Dolphin* and may well consider using the Charter to protect an individual whose rights are violated as a result of a court action.

American research has revealed that SLAPPs are typically filed by large, economically powerful organizations and are targeted at private citizens or groups whose activities have interfered with the filer's economic interests.⁸ Their proliferation has been tied to increased public access to government and courts with respect to decisions affecting the environment.⁹

In the United States, the most potent protection for SLAPP targets has been offered by the First Amendment to the U.S. Constitution.¹⁰ Strategic lawsuits have been found to violate the right to petition government guaranteed by the Constitution by intimidating those engaged in public debates.¹¹ Courts have provided precedent to protect public expression by articulating legal tests for granting early dismissal of such claims.¹²

II. SLAPPs in Canada - A Charter-based response

Over the last decade, several Canadian lawsuits, especially in British Columbia, have raised significant SLAPP issues. There has been increased pressure on courts to develop a response similar to the one formulated by their American counterparts. The greatest impediment to this movement has been the reluctance of courts to rely on protections afforded by the Canadian Charter of Rights and Freedoms as the focus of a judicially based response.

Like the First Amendment in the United States, Section 2(b) of the Charter purports to protect public participation under the rubric of "freedom of expression."¹³ Canadian courts have chosen to interpret this protection in a broad, generous fashion, thereby reinforcing a commitment to the principles of personal autonomy and the marketplace of ideas. The promotion of these values provides a seemingly natural progression towards a Charter-based response to SLAPP litigation.¹⁴

However, judicial action in this regard has been effectively blocked by the notion that the Charter does not apply to civil disputes between private parties. The decision handed down by the Supreme Court of Canada in *Retail, Wholesale and Department Store Union v. Dolphin Delivery*¹⁵ held that for the Charter to apply to a legal proceeding, that proceeding must contain some element of government action. This principle, strictly applied, effectively precludes the use of the Charter as a means of protecting political expression in the ostensibly private arena of SLAPP litigation.¹⁶

Since *Dolphin Delivery*, case law suggests a less rigid stance by the Supreme Court on the application of the Charter to the common law. Some post-*Dolphin* decisions have supported the notion that in certain circumstances, judicial action, including application of the common law, does constitute a government action for the purposes of triggering Charter scrutiny.¹⁷

More significantly, the comments of Chief Justice Dickson in *B.C.G.E.U. v. B.C.(A.G.)*¹⁸ suggest a distinction between a purely private dispute and one with a strong public aspect.¹⁹ To the extent that a SLAPP affects public participation, the absence of a government actor may not necessarily be a bar to a Charter-based defence. In addition, judgments that reflect sensitivity to the social and political issues inherent in SLAPP litigation would be consistent with the notion, expounded in *Dolphin*, that the judiciary is to apply and develop the

principles of the common law in a manner consistent with the values of the Charter.²⁰

III. The Common Law - Trends in the Judiciary

While the debate over Charter application to the common law rages on, Canadian courts have begun to recognize the dangers of the SLAPP phenomenon and to take measures to combat the trend. The most widely publicized manifestation of this process has been the ongoing saga of *Daishowa Inc. v. Friends of the Lubicon*.²¹ In 1988, Daishowa received logging rights over a large area of disputed Alberta land claimed by the Lubicon Cree Nation. The company built a pulp mill and began to exercise its logging rights under the agreement. In 1991, a small, unincorporated group known as the Friends of the Lubicon initiated a boycott of Daishowa paper products in the hopes of persuading the company to commit to a moratorium on logging until a land claim settlement was achieved.²² The boycott took the form of petitioning Daishowa customers and informational picketing, and soon spread to tremendous proportions.²³

In late 1994, Daishowa mounted a lawsuit against the Friends naming a variety of economic torts and seeking a permanent injunction restraining boycott activities. The facts of the case, parties involved, nature of the charges, and inferred motives for the company's actions classified the case as a paradigmatic SLAPP suit.²⁴ In the first of a series of legal battles, the General Division of the Ontario Court rejected Daishowa's bid for an interim injunction. The reasons, handed down in 1995, held that Daishowa had not brought forth evidence sufficient to justify a pre-trial injunction, particularly where the targeted activity entailed political expression.²⁵

In January 1996, the Ontario Divisional Court overturned Justice Kiteley's decision to deny Daishowa's application for an injunction against the Friends' activities.²⁶ The stage was set for a court to make a resounding statement on the future of the boycott and, implicitly, on the future of SLAPP litigation.

In April 1998, Justice MacPherson of the Ontario Court of Justice made such a statement in the course of refusing Daishowa's claim for a permanent injunction restraining boycott activities. The decision held that Daishowa failed on its claims for interference with economic and contractual relations, inducing breach of contract, intimidation, and conspiracy.²⁷ The boycott and picketing of the Friends was held not only to be lawful but to having sent an important public message about the plight of the Lubicon, which deserved a forum and protection of freedom of expression.²⁸

Justice MacPherson did recognize that the Friends were to be held liable for disseminating false statements that tarnished Daishowa's reputation;²⁹ however, in the clearest indication of the Court's distaste for the lawsuit against the Friends, MacPherson ordered nominal damages of \$1 for defamation. The decision amounted to a reprimand of Daishowa's actions but stopped short of using the term SLAPP to describe the suit.

Justice Singh of the Supreme Court of British Columbia took the next step in May,

18 [1988] 2 Supreme Court Reports 214. The Court held that the Charter applied to a decision of the Chief Justice of British Columbia to grant an injunction.

19 See above. It has been advanced that while the source of harm in a typical SLAPP suit might be private, the issues at hand and the target of the harm, the political process, are undeniably public in nature.

20 See note 15 at 198.

21 (1998), 39 Ontario Reports (3d) 620.

22 Chris Tollefson, "Strategic Lawsuits and Environmental Politics: *Daishowa Inc. v. Friends of the Lubicon*" (1996) *Journal of Canadian Studies* at 123.

23 See above. By the fall of 1994, close to 50 companies representing some 4,300 retail outlets had joined the boycott.

24 See above at 124.

25 *Daishowa Inc. v. Friends of the Lubicon*, (1995), 30 Canadian Rights Reporter (2d) 26. Justice Kiteley cited the American protection of peaceful boycotting and picketing and noted that the Charter protects such activities, which should not be considered illegal for the purposes of private tort litigation insofar as they are undertaken with the purpose of influencing government policy and informing the public.

26 See note 22 at 129. The Court also took exception with the conclusion that the Charter affords protection for developments in the common law.

27 See note 21 at 665.

28 See above at 648.

29 See above at 665.

1999 while delivering his reasons in the unreported case of *Fraser et al v. Corp. of District of Saanich et al.*³⁰ The case involved an application by the plaintiff to the Ministry of Health for funding to redevelop and enlarge an assisted care facility. The Ministry called on the defendant to approve the project, a decision that was to be determined largely by the position of the neighbourhood residents. The application for funding was denied by the District, and the hospital responded by preparing to go ahead with the project.³¹

The residents then expressed their views by demanding that the property be down-zoned into an appropriate single family residential zone and attempting to have the property re-designated as a heritage building. The District complied with the re-zoning recommendations, leading the plaintiff to commence an action against both the District and a group of neighbourhood residents.³² The residents responded with an application to strike out the writ and statements of claim, and sought special costs.

The Court's analysis relied on the interpretation of Rule 19(24)(a) of the British Columbia Rules of Court³³ set out by the Supreme Court of Canada in *Carey Canada Inc. v. Hunt*.³⁴ Justice Singh proceeded to work through the list of alleged torts, in each instance finding a lack of factual basis needed to support the claim. Instead, he found what amounted to "bald assertions"³⁵ by the plaintiff, and described the action as without merit. The claim fell within *Carey Canada's* "plain and obvious" test and was duly dismissed.

In addressing the defendants' claim for special costs, Justice Singh dealt explicitly with the SLAPP phenomenon by defining it, acknowledging its importance, and relating it to the facts of the case. He commented that in addition to being unreasonable and without merit, the claim had been used to stifle the democratic activities of the defendants. In closing, he found the plaintiff's conduct "reprehensible and deserving of censure by an award of special costs."³⁶

The most recent manifestation of the SLAPP phenomenon concerns the controversial Silver Spray development plan in East Sooke, British Columbia. Members of the Rural Association of East Sooke are attempting to protect a local area plan governing development. They have been met by an action claiming that statements made by Association members are defamatory of the Silver Spray developer. In preparing its motion to dismiss the charges, the Sierra Legal Defence Fund has noted that the statements referred to by the filer were innocuous and largely verifiable comments concerning logging practices in the area.³⁷ The developer has also been accused of engaging in tactics tantamount to intimidation and harassment in an attempt to silence opposition from area residents. The result of the action, set to be heard in the spring of 2000, will add another important component to the developing judicial response to SLAPP litigation.

IV. Implications for SLAPP Targets

The decision of the Supreme Court of British Columbia in *Fraser* has the opportunity to be of groundbreaking importance. An analysis of the Denman Island dispute, for instance, reveals a similar attempt to stifle public participation in community decision making. The

30 (1999) Victoria Registry [99-1793].

31 See above at 4. All patients were transferred out of the hospital.

32 See above at 1. The statement of claim against the residents alleged negligence, conspiracy, bad faith, breach of fiduciary duty, and interference with contractual relations, and also demanded special, punitive, and aggravated damages in connection with the loss, economic harm, and injury suffered by the plaintiff.

33 See above at 2. The rule entitles a court to strike out a claim at any time during the proceeding on the ground that it discloses no reasonable claim or defence.

34 [1990] 2 Supreme Court Reports 959. The test to be applied is whether it is plain and obvious that a plaintiff's statement of claim discloses no reasonable claim.

35 See note 30 at 13.

36 See above at 16.

37 Conversation with Karen Wristen, Executive Director of the Sierra Legal Defence Fund (January, 2000).

endorsement on the Writ of Summons against the ten residents cites claims for general, special, aggravated, and punitive damages for conspiracy, trespass to property, nuisance, intentional interference with economic and contractual relations, and intentionally causing harm through unlawful means.³⁸ Each one of these claims may reasonably be refuted not only for holding little chance of success, but also for containing no factual basis or merit.

The conduct of the residents was lawful throughout the process, from the enactment of the bylaw through to the application for injunction. The information table set up by the summoned resulted in no damage to property, as sworn to by an RCMP officer on the scene, and was dismantled pending the decision on interlocutory relief. As for the assertions regarding economic interference, there seems to be no indication that the volume of business done by the developer was impeded by the defendants. Along with the traffic that passed by the table unabated, an alternate route leading to the site was also utilized by 4064's loggers.

The decisions in *Daishowa* and *Fraser* suggest that courts are becoming more receptive to the implications of SLAPP suits, and more willing to chastise litigants for launching unreasonable actions. Win or lose, defending SLAPPs helps root the phenomenon more deeply in the public consciousness and spreads awareness of the assault on public participation.

However, most targets of SLAPPs lack the resources and expertise needed to carry a defence or counterclaim to fruition. Settling claims out of court amounts to a victory for the filer, who cares not about winning a trial, but aims at deterring future opposition and achieving community acquiescence.³⁹ The lack of formal guidelines for courts to identify SLAPPs and dismiss them summarily means that targets must often bow to the pressure to settle. At the time of writing, lawyers for the Denman Island residents and 4064 Investments are working on a settlement that will save the residents the expenses inherent in a lengthy trial process but will fail to promote awareness or to address the fundamental issues raised by SLAPP litigation.

V. Help on the Way? - A Legislative Response

In order to confront the multitude of challenges raised by the SLAPP phenomenon, a judicially based response must receive support and direction from the legislatures. Statutory initiatives must attempt to promote participation in the political process by addressing the imbalance of power that underlies SLAPP litigation.⁴⁰ Practical measures taken to meet this goal would require substantial reform but would be justified as prudent public policy decisions by virtue of the benefits to the democratic process that such legislative action would procure.

The main theories of reform that have been advanced primarily target the mitigation of gross inequalities in financial resources commonly found between the filer and the target of a SLAPP. One proposal focuses on a means of expediting the early identification and dismissal of SLAPPs. A procedural avenue for a target to file a pre-trial motion to dismiss an action without merit⁴¹ would alleviate the overwhelming costs inherent in a prolonged court process. Through this initiative, the legislature might arm the courts with a set of criteria by which to assess the motion for early dismissal. Such guidelines would force the filer of a suit to rely only

38 See note 3.

39 See note 4 at 206.

40 See above at 229.

41 See above.

on reasonable claims of action, while eliminating the uncertainty often cited as a consequence of unfettered judicial discretion.

Another impetus for reform is reducing the economic burden of defending against SLAPPs.⁴² While a pre-trial mechanism would help address this concern, and government sponsored legal aid programs would prove invaluable, most of the initiatives in this area have focused on cost reform. The most progressive notion would allow the target of an action which has been dismissed, either summarily or following a trial, to full compensation for all expenses incurred during the process.⁴³ This proposal allies itself with the movement towards an exception to the general rule on costs for public interest litigants.⁴⁴ Reforming the allocation of costs would help equalize the playing field between combatants and ensure that important issues of common interest are brought to the forefront of the public agenda.

A further disincentive to the filing of unsubstantiated claims would be the effect of legislative involvement on the public image of SLAPP filers. A clear message from the legislature would increase public awareness of the issue and rally support for individuals and grassroots public interest groups against tactics of intimidation. Corporations wary of the implications of a negative public image on their financial success will be forced to weigh the costs and benefits of proceeding with SLAPP actions.

A major movement towards a legislative response has come in the form of a proposed Public Participation Act.⁴⁵ The foundation of such an enactment would be a clear statutory declaration of the right of public participation as an essential component of democracy. Other important features of the Act involve mechanisms for the early dismissal of SLAPPs, the award of lawyer fees and court costs, and a SLAPP-back provision which would create a specific cause of action against a plaintiff who institutes a SLAPP and would allow the court to award damages to any person injured by such a suit.⁴⁶

An examination of legislative initiatives in the United States has demonstrated the viability of anti-SLAPP legislation, and will provide valuable procedural guidance towards the entrenchment of a Public Participation Act in Canada. In an unprecedented step, the Attorney General of British Columbia has publicly announced his commitment to facilitating a legislative response to SLAPP litigation. Such an active approach by policy makers towards burgeoning legislation will have a profound impact on the future of the SLAPP phenomenon in Canada.

VI. Conclusion

The experience of the past decade has indicated that SLAPPs have established themselves in the Canadian legal system. SLAPP litigation has a profoundly detrimental impact on principles of democracy and public policy. The serious implications of the phenomenon demand an active response. Despite the lack of direct Charter involvement, trends in the judiciary suggest that courts are prepared to address and confront the challenges raised by

42 See above at 231.

43 See above at 232.

44 The current "two-way" approach requires an unsuccessful litigant to pay costs to the victorious party.

45 A proposed Act for British Columbia has been formulated by the Committee for Public Participation in Nanaimo, B.C., and has been submitted to the Provincial Government for review.

46 See Committee for Public Participation, "A Proposed Public Participation Act for British Columbia" (1999).

SLAPP litigation. Legislative initiatives are required to secure support for judicial action, and to assist courts in assuming a meaningful role in the proliferation of public involvement in the democratic process.