UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

MODEL ACT ON ABUSE OF PROCESS

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Ottawa, Ontario
August, 2009

Introduction

[1] The working group[1] concluded in its report last year that rules to deter abusive lawsuits, including Strategic Lawsuit Against Public Participation [SLAPP], exist in both the common law and civil law jurisdictions of Canada but that, in practice, they appear to be ineffective because of the courts' reluctance to apply them. The Model Act therefore proposes different measures to reinforce existing remedies, including sanctioning the conduct of a party, which should encourage the courts to intervene more often to deter abuse of the judicial process.

[2] However, the Model Act can be adapted to apply only to SLAPP if a jurisdiction prefers to address this particular problem and does not want to target all abuse.

[3] The rule of proportionality is an important tool to help limit abuse of process, which requires all participants in the judicial process to keep in mind that the pleadings and means of proof must be proportionate, in terms of cost and time, to the nature and ultimate purpose of the action or application, to the complexity of the matter and to the financial position of each party. The rule also strengthens the authority of the court to manage cases and guide the parties.

[4] Therefore, it is recommended that the rule of proportionality be added to the rules of procedure of jurisdictions that do not currently have such a rule.

[5] For example, in the United Kingdom, new rules of procedures were introduced in 1999 and expressly stated that they constituted a new procedural code with the overriding objective of enabling the court to deal with a case justly[2]. In doing so, the court can, as long as it is practicable, not only deal with the case in ways which are proportionate, but also ensure that the parties are on an equal footing and that the case is dealt with expeditiously and fairly. The court may also take into account the need to allot resources to other cases.

[6] A similar rule of proportionality has been in effect in Quebec since 2003[3] and one will come into effect in Ontario on January 1st, 2010[4], and British Columbia on July 1st, 2010[5].

[7] In enacting the Model Act, the working group believes it is preferable to modify existing remedies instead of creating a new one. A new remedy might create another layer of procedure to the civil process, as was feared by some opponents of the British Columbia anti-SLAPP legislation.

[8] For example, the Quebec Act on abusive lawsuits provides that a motion to have an action dismissed on the grounds of its improper nature be brought as a preliminary exception[6]. Those exceptions currently include, amongst others, the following:

- Redirect the suit to the proper court.
- Ask for the dismissal of the action if the suit is unfounded in law, even if the facts alleged are true.
- Delay the suit when the motion to institute proceedings is affected by some irregularity which the defendant has an interest to have corrected.

[9] That choice resulted in sections 75.1 and 75.2 of Quebec's CCP, being repealed, since they were encompassed in the new sections and were no longer necessary. Those sections allow the court to dismiss a proceeding if it is frivolous or clearly unfounded and, if it is also excessive or dilatory, to order the unsuccessful party to pay damages. Likewise, in enacting the Model Act, a jurisdiction may choose to harmonize or repeal existing rules, such as Rule 25.11 of the Ontario *Rules of Civil Procedure* which allows a court to strike out or expunge all or part of a pleading if it may prejudice or delay the fair trial of the action, is scandalous, frivolous or vexatious or is an abuse of the process of the court.

[10] The Modal Act is inspired primarily by three sources:

- The *Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*, Q.S. 2009, c. 12[7] [Quebec Act], which introduced a new section to *Code of Civil Procedure*, R.S.Q., c. C-25[8] [Quebec CCP], entitled *Power to impose sanctions for improper use of procedure* (sections 54.1 to 54.6).
- The *Protection of Public Participation Act* of British Columbia, S.B.C. 2001, c. 19[9] [BC Act]. This Act was promulgated in April 2001 but repealed in August of the same year.
- Bill 138, an *Act to encourage participation in public debate, and to dissuade persons from bringing legal proceedings or claims for an improper purpose*[10] [Ontario Bill], a private member's bill, presented at the Legislative Assembly of Ontario on December 9th, 2008.

UNIFORM LAW CONFERENCE OF CANADA

MODEL ACT ON ABUSE OF PROCESS

1. The purposes of this act are to promote access to justice for all citizens and to prevent improper use of the courts and discourage judicial proceedings designed to thwart the right of citizens to participate in public debate.

Sources: Preamble Quebec Act; sec. 2 BC Act; sec. 2 Ontario Bill.

Comments:

This section sets out the purposes of the Act. Even if the Act aims to limit abusive lawsuits in general, it clearly states that SLAPP are an important part of abuse, not necessarily in numbers but in the chilling effect it has on freedom of speech and particularly the right of citizens to participate in public debate.

To achieve those purposes, the Act also helps to strike a fairer balance between the financial strength of the parties to a legal action, not only by allowing the court to order, in a context of abuse, a provision for cost in favour of a defendant with limited financial resources but also by promoting the rule of proportionality and increasing the powers of the court to manage the proceedings by subjecting the furtherance of the case to certain conditions or by requiring undertakings.

2. In this Act, "public participation" means communication or conduct aimed at influencing public opinion, or promoting or furthering lawful action by the public or by any public body, in relation to an issue of public interest, but does not include communication or conduct prohibited by law.

Sources: sec. 1 BC Act; sec. 1 Ontario Bill.

Comments:

This section provides the definition of "public participation", without explicitly listing exclusions.

3. (1) The court may dismiss a proceeding, strike out or expunge all or part of a pleading or other document, with or without leave to amend, or terminate or refuse to allow an examination, or annul a subpoena served on a witness on the ground that the proceeding, pleading or other document, examination, subpoena or the conduct of a party is an abuse of process.

(2) The abuse of process may consist in, but is not limited to:

(a) a claim or pleading that is clearly unfounded frivolous or dilatory,
(b) conduct that is vexatious,
(c) bad faith, the use of procedure that is excessive or unreasonable or causes prejudice to another person, or
(d) an attempt to defeat the ends of justice, in particular if it restricts freedom of expression.

The court may find a party to be in bad faith or to be attempting to defeat the ends of justice if it finds that:

(a) the plaintiff could have no reasonable expectation that the proceeding will succeed; or
(b) the principal purpose for bringing the proceeding is,
(i) to deplete or exhaust the resources of the defendant, or
(ii) to dissuade the defendant or other persons from engaging in public participation.

(3) Once a motion to dismiss a proceeding has been initiated on the ground of an abuse of process and until the court has rendered a definitive ruling on that motion, any settlement of that proceeding is effective only if it is approved by the court.

Sources: sec. 54.1 & 54.3 Quebec CCP; Rule 25.11 Ontario Rules of Civil Procedure, sec. 1(1), 5(4) & (5) BC Act; sec. 1(1) and 5(4) & (5) Ontario Bill.

Comments:

Subsection 3(1) expresses the power of the court to dismiss any proceedings that are an abuse of process.

Subsection 3(2) defines, without limiting, what can be construed as an abuse of process, giving the courts a broader scope of intervention compared to the one they currently have.

It also states that a proceeding may be abusive even if the plaintiff has a reasonable expectation that its proceeding will succeed when the court believes the proceeding was principally brought to deplete or exhaust the resources of the defendant or to dissuade the defendant or other persons from engaging in public participation. In determining why the action was brought, the court may consider the conduct of the defendant. The likelihood that an action was brought to dissuade the defendant from engaging in public participation would be reduced if he acted illegally to express its views[11].

Subsection 3(3) is included to ensure that, once a motion to dismiss an abusive lawsuit is brought, a party with more resources does not use its financial leverage to secure a settlement on the principal lawsuit or proceeding that would be abusive, for example, in limiting the freedom of speech of a party[12]. For example, in the *Protection of Public*

Participation Act of British Columbia, once the defendant had established that there was a realistic possibility that the proceeding was brought in a context of public participation and that the principal purpose for which it was brought was improper, the court was given the power to order that any settlement be effected only by the approval of the court.

4. If a party provides evidence that a proceeding may be an improper use of procedure, the onus is on the initiator of the proceeding to show that it is not excessive or unreasonable and is justified in law.

Source: sec. 54.2 Quebec CCP.

Comments:

This section provides that the defendant will have to present evidence and not just arguments or allegations, but will not have to present conclusive evidence, that it may be targeted by an abusive lawsuit. If the court is satisfied that such a threshold is met, the party who introduced the proceeding will have to demonstrate that the basis of its action is legitimate and justified in law and therefore that it is not exercised in a excessive or unreasonable manner. Such a procedure should allow a quick resolution of the motion to dismiss.

Enacting jurisdictions should consider whether special provisions are needed to complement section 4, in order to let the court get access to the evidence necessary to decide the motion, but without requiring a full trial.

5. (1) When the court dismisses a proceeding because of its abusive character, it can order:

(a) that the party who initiates the abusive proceeding pay damages to the defendant, including all of the reasonable costs and expenses incurred by the defendant in relation to the dismissed proceeding;

(b) that the party who introduces the abusive proceeding pay punitive or exemplary damages, on the motion of the court or on the application of the defendant;

(2) When the court awards damages under paragraph (1) and the abuse emanates from a corporation, the directors and officers of the corporation who took part in the decision may be ordered personally to pay damages.

(3) If the amount of the damages is not admitted or may not be established easily at the time the proceeding is declared abusive, the court shall devise and adopt the simplest, least expensive and most expeditious process for fixing them.

Sources: 54.4 & 54.6 Quebec CCP; sec. 4(1) & 5(2) BC Act; sec. 4(1) & 5(2) Ontario Bill, Rule 57.01 (7) Ontario Rules of Civil Procedures.

Comments:

The measures that a court can order when ruling that a lawsuit is abusive have both dissuasive and punitive elements.

Subsection 5(2) is inspired by provision 54.6 of Quebec's CCP. It provides an important dissuasive element to the Model Act by allowed the court, when the abuse of process is caused by a corporation, to hold a director or an officer of that legal person personally liable for the damages awarded under subsection 5(1).

Subsection 5(3) provides flexibility to the court in devising an efficient mechanism, in regards to time and costs, to determine damages when it is not possible to do so at the time the proceeding is declared improper. For example, the court could fix costs after receiving written submissions, without the attendance of the parties. In Ontario, the court could certainly adapt the current rules regarding cost (Rules 57 & 58 Ontario *Rules of Civil Procedure*[13]).

6. If the court finds that a proceeding, excluding the bringing of the lawsuit itself, or conduct in the course of a proceeding is abusive or where there appears to have been an abuse of process, the court may:

(a) subject the furtherance of the action or the pleading to conditions;

(b) require undertakings from the party concerned with regard to the orderly conduct of the proceeding;

(c) recommend that the rules of case management apply to the proceeding;

(d) order the initiator of the action or pleading to pay to the other party, under pain of dismissal of the action or pleading, an advance in costs, if justified by the circumstances and if the court finds that without such assistance the party's financial situation would prevent it from effectively conducting its case; or

(e) suspend for the period it determines other proceedings involving the case or closely linked to it, whether or not those proceedings are before a court or some other public forum for the period it determines.

Sources: 54.3 Quebec CCP; sec. 5 BC Act; sec. 5 Ontario Bill.

Comments:

The powers of intervention of the courts would be available, if not already available under general legislation or powers of the courts of a jurisdiction, when a tribunal cannot conclude summarily that a lawsuit is abusive but still has reason to consider that it might be. They can also be applied in a case if the tribunal has already thrown out a proceeding or a claim because of its abusive character.

By giving these powers to the court, the Model Act aims to give a broader oversight to the judge in the conduct of the proceedings. In exercising these powers, the court should not be limited to ordering periodic meetings to see if the timetable is respected. In all of its actions, the court should make sure the rule of proportionality is respected not only in relation to the complexity and value of the case but also in relation to the resources of the parties. For an example of the latter, a judge could limit the number and the length of examinations of witnesses before trial.

An order made in accordance of paragraph (d) can be an important measure to limit the disparity in financial resources between parties and make sure that a defendant is able to properly present its case. The Supreme court of Canada, in *British Columbia (Minister of Forests)* v. *Okanagan Indian Band*, [2003] 3 S.C.R. 371, developed the following guidelines to decide if an award for interim costs should be ordered:

> [40] With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:
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> > 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
> >
> > 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
> >
> > 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Those criteria make the application of this remedy extremely rare. The language of paragraph (d) was written more broadly on purpose, so that the Model Act would apply when without an advance in costs the party's financial situation would prevent it from effectively conducting its case. In other words, a party should not have to expand all its financial resources to defend itself against a proceeding that appears to be an abuse of process.

Paragraph (e) allows a tribunal, once an application on abuse has been presented, not only to suspend the proceeding, but also to order that any public consultation or approval process that is conducted by a public body and that relates to the proceeding be

suspended until the application has been heard and decided. Such an order would discourage someone from bringing a lawsuit against a person or group that opposes him in that process with the main purpose of diverting that group or person, and its financial resources, into the courts and away from the public consultation or approval process.

Some may consider that paragraph (e) is only an example of a condition the court could impose under paragraph (a) and not wish to include it specifically in the provision.

7. Enforcement of a judgment by the court with regard to an abuse of process is not stayed by appeal unless ordered.

Sources: sec. 5 Quebec Act, section 547 Quebec CCP.

This section provides that even if an appeal is still possible or an appeal has already been filed, the party who is awarded damages following the declaration that an action is an abuse of process may execute the judgment right away.

It will limit the ability of an abusive party to continue its abuse in a superior court by appealing the first instance decision.

8A. A for-profit corporation with 10 or more employees has no cause of action for defamation in relation to the publication of defamatory matter about the corporation.

8B. (1) The presumption that an action lies for defamation does not apply to a corporation [legal person].

(2) When defamation is proved, a corporation [legal person] must prove damages.

Sources: sec. 9 Queensland Defamation Act of 2005[14].

Comments:

Another measure that can be instituted to prevent abuse proceedings, mostly in a context of public participation is to limit the right of reputation of a corporation. Such an approach was proposed by the *Standing Committee of Attorneys-General* (SCAG)[15] in a reform of defamation law in Australia that has been enacted in all states and most territories of Australia.

So as not to impose unreasonable limits on freedom of speech and, more specifically, public participation, section 8A proposes to limit the right of reputation of a for-profit corporation with 10 or more employees by removing their cause of action for defamation.

That approach does not however prevent basing lawsuits to silence opponents on other grounds[16] and should therefore not be counted on, as a stand alone measure, to prevent SLAPP.

Section 8B provides a less drastic alternative to section 8A by only excluding, for corporation [legal person], the common law presumption that an action for defamation is receivable. A corporation would still have a cause for action for defamation but it would have to prove the comments were false and that the defendant is at fault. Also, according to subsection 8B(2), a corporation [legal person] would be required to prove damages caused by the defamatory comments.

Should a jurisdiction wish to add those provisions, they can be included in their *Defamation Act* or *Libel and Slander Act*.

[1] The working group, who also prepared this Model Act, was chaired by Vincent Pelletier, Legal Counsel, Ministère de la Justice du Québec, assisted by Russell Getz, Legal Officer, Ministry of the Attorney General of British Columbia, and John Gregory, General Counsel, Ministry of the Attorney General of Ontario.

[2] Part 1 of the Civil Procedure Rules of the United Kingdom is available at: http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part01.htm.

[3] See section 4.2 of Quebec's *Civil Code of Procedure*, available at: http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_25/C25_A.html.

[4] Rule 1.04 (1.1) will read as follow:

> In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

The Ontario *Rules of Civil Procedure*, with the amendments coming into effect on January 1st, 2010, are available at: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm.

[5] Rule 1-3 (2) will read as follow:

> Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

The new British Columbia *Supreme Court Civil Rules* , coming into effect on July 1st 2010, are available at: http://www.ag.gov.bc.ca/justice-reform-initiatives/publications/pdf/CivilRules07-07-09.pdf.

[6] See Sections 159-171 of the Civil Code of Procedure (link available at note 2).

[7] The Act is available at: http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2009C12A.PDF.

[8] Follow the link from note 3.

[9] The Act is available at: http://www.leg.bc.ca/36th5th/3rd_read/gov10-3.htm.

[10] The Bill is available at: http://www.ontla.on.ca/bills/bills-files/39_Parliament/Session1/b138.pdf.

[11] For example, the defendant is sued for damages after a demonstration where equipment from the plaintiff was severely damaged. The main purposes of the action would likely be to pay for the damages causes to the equipment and to stop the defendant from doing so again, and not to limit its freedom of speech.

[12] It is important to note that not all limits to the freedom of speech are abusive. For one, limiting that freedom to prevent defamation would generally not be abusive.

[13] Follow the link from note 4 for Rules 57 & 58 of the Ontario *Rules of Civil Procedure*.

[14] The Act is available at: http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2005/05AC055.pdf.

[15] The SCAG is a national ministers' council composed of the attorneys general of Australia, Australian states and territories and New Zealand. It is a forum for discussion on issues of common interest and works to harmonize the actions taken by its members, including legislative initiatives.

[16] See to that effect section 5.2 of last year's report on *Strategic Lawsuits against Public Participation (SLAPPs) (and other abusive lawsuits)*.