

UNIFORM PREVENTION OF ABUSE OF PROCESS ACT

Purposes

1 The purposes of this Act are:

- (a) to prevent the improper use of the legal system; and**
- (b) to promote the exercise of the freedom of expression by discouraging proceedings that risk hampering or inhibiting public participation.**

Comment: This section sets out the purposes of the Act. Even though the Act aims to limit abusive lawsuits in general, it clearly states that lawsuits intended to hinder public participation are an important part of abuse by the specific reference to public participation.

To achieve those purposes, the Act also helps to strike a fairer balance between the financial strength of the parties to a legal action. The Act allows the court to order, in a context of abuse, a provision for costs in favour of a defendant with limited financial resources and also to promote the rule of proportionality. It also increases the powers of the court to manage the proceedings by subjecting the furtherance of the case to certain conditions or by requiring undertakings.

Interpretation

2 In this Act:

“abuse of process”, with respect to a proceeding, includes:

- (a) a claim or pleading that is clearly unfounded in fact or in law;**
- (b) conduct that is frivolous, vexatious or intended to delay;**
- (c) a claim made, or a proceeding brought or conducted, in bad faith;**
- (d) the use of procedure that is excessive or unreasonable or that causes undue prejudice to another person or attempts to defeat the ends of justice; and**
- (e) an attempt to restrict public participation by any person;**

“court” includes an administrative or adjudicative decision-making body;

“defendant” means a person against whom a proceeding is brought or maintained;

“plaintiff” means a person who initiates or maintains a proceeding;

“proceeding” means any action, suit, hearing, matter, cause, counterclaim, appeal or originating application that is brought in a court in [the enacting jurisdiction], but does not include a prosecution for an offence or a crime;

“public participation” means lawful communication or conduct, whether made privately or publicly, 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.

Comment: The definitions make clear that more legal proceedings are covered than those in court. What is abusive is spelled out in general terms, and it is made clear that an attempt to restrict public participation may itself be abuse. Public participation itself is defined as lawful communication or conduct; unlawful communication or conduct may be restrained without abuse.

Qualified privilege

3 Public participation constitutes an occasion of qualified privilege and for that purpose, the communication or conduct that constitutes public participation is deemed to be of interest to all persons who, directly or indirectly, receive the communication or witness the conduct.

Comment: This section provides a substantive defence to defamation actions founded on public participation, to avoid a rule that even if a statement is in the public interest, no privilege attaches to it if the person making it had no duty to make it and the persons receiving it had no duty to receive it. It may be compared to the recent decisions of the Supreme Court of Canada in *Grant v. Torstar Corp.* 2009 SCC 61 and *Quan v. Cusson* 2009 SCC 62, establishing qualified privilege in journalistic stories of public interest, assuming that reasonable care was taken in preparing the stories.

Remedies

4(1) On receipt of an application alleging an abuse of process, or on its own motion, if the court is satisfied that there has been an abuse of process, it may do one or more of the following:

- (a) dismiss or stay the proceeding;**
- (b) strike out all or part of a pleading or other document;**
- (c) prohibit the examination of any witness at any time before or during the proceedings;**
- (d) cancel a summons to a party or a witness;**
- (e) order that the proceedings be subject to case management;**

- (f) impose conditions on any further steps in the proceeding;**
- (g) require undertakings from the plaintiff with respect to the orderly conduct of the proceedings;**
- (h) order the plaintiff to provide security for costs in an amount and manner established by the judge;**
- (i) order the plaintiff to pay the applicant an advance in costs, with the penalty of dismissal of the proceeding if the advance is not paid, if the court is satisfied that:
 - (i) the advance in costs is justified by the circumstances; and**
 - (ii) without the advance in costs, the applicant's financial situation would prevent the applicant from effectively conducting his or her case;****
- (j) order the suspension of any public consultation or approval process conducted by a public body that relates to the proceeding in question until the court has made a final order with respect to the application.**

(2) If the court is not satisfied that there has been an abuse of process as set out in subsection (1) but is satisfied that the application raises a reasonable concern of abuse of process, the court may take any action mentioned in clauses (1)(e) to (j).

Comment: This section contemplates two situations, the first where the court is satisfied that the suit before it is an abuse of process, and the second where the court is not fully satisfied but thinks that the defendant has raised a reasonable concern that is worthy of protection. The range of orders available in the first instance includes outright dismissal of the claim or striking out a pleading. In the second instance the court may control the process more or less closely without dismissing the claim entirely. In both instances the court may make an order that the plaintiff pay the defendant's costs.

Under paragraph 1(j), if a public body is considering whether the plaintiff should be granted some form of permission or licence, the court in the abuse of process proceeding may order that body's proceedings suspended until the abuse of process is dealt with. This may provide some incentive for the plaintiff not to delay its main goals in order to punish its opponents in an abusive proceeding.

Further relief available on dismissal of a proceeding

5(1) When the court makes an order dismissing a proceeding pursuant to clause 4(1)(a), the court may also award the applicant damages in the amount of any loss suffered as a result of the dismissed proceeding, including:

(a) all of the reasonable costs and expenses incurred by the applicant with respect to the dismissed proceeding, taking into account any order made pursuant to clause 4(1)(h) or (i); and

(b) punitive or exemplary damages against the plaintiff, on the application of the defendant or on its own motion.

(2) Subject to subsection (3), when the court awards damages pursuant to clause (1)(a) or (b) and the respondent is a corporation, any director or officer of the corporation who authorized the proceeding that was dismissed pursuant to clause 4(1)(a) may be ordered personally to pay damages.

(3) Any director or officer of a corporation mentioned in subsection (2) who dissented from the decision to authorize the proceeding mentioned in that subsection, and whose dissent is formally recorded in the records of the corporation, is not subject to an order pursuant to subsection (2).

Comment: 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 Uniform Act by allowing 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). Directors or officers who register their dissent from the abuse of process are exempt from an order against them personally.

Settlement or discontinuance effective only on approval

6 Once an application to dismiss a proceeding has been initiated on the ground of an abuse of process, and until the court has made a final order with respect to that application, any settlement or discontinuance of that proceeding is effective only on approval by the court.

Comment: This section 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 of the principal lawsuit or proceeding that would be abusive, for example, in limiting the freedom of speech of a party

Enforcement not stayed by appeal

7 Unless otherwise ordered by the court, enforcement of a judgment by the court with regard to an abuse of process is not stayed by an appeal.

Comment: 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 avoid the consequence of the ruling, and prolong its abuse of the defendant, by further proceedings in the appeal court.

Relief under this Act in addition to other available relief

8 The remedies provided for in this Act are in addition to any other rights or remedies respecting abuse of process under any Act or any rule of any court.

Comment: The court statutes and rules of procedure in most if not all Canadian jurisdictions allow for remedies against abusive litigation. Courts have been reluctant to use these remedies without a full hearing of the evidence and legal arguments. This reluctance has subjected the defendants to the full financial and other weight of litigation. However, any other available remedies are not foreclosed by the present statute.