UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

A NEW UNIFORM ABUSE OF PROCESS ACT

John D. Gregory
Ontario

Fredericton,
New Brunswick
August 2016

A NEW UNIFORM ABUSE OF PROECESS ACT

Summary

[1] This note recommends that the Uniform Law Conference withdraw its Uniform Prevention of Abuse of Process Act of 2010 and enact in its place uniform legislation based on Ontario's *Protection of Public Participation Act, 2015*.

[2] The principal advantages of the Ontario Act over the Uniform Act are these:

(a) The Ontario Act does not require the review of the motives of the plaintiff in a questionable suit but only the impact on freedom of expression, compared to the harm done by the expression.

(b) The Ontario Act does not qualify the protection of freedom of expression on matters of public interest based on whether the expression was lawful or otherwise socially acceptable

(c) The Ontario Act expressly balances the value of expression on matters of public interest with the right to reputation, but puts the onus on the party seeking to restrict expression to justify the restriction by showing undue harm from it.

(d) The Ontario Act sets firm timelines within which a court must hear an application under the Act.

(e) The Ontario Act presumes an award of full indemnity costs to the successful defendant, though it presumes a successful plaintiff will not have its costs.

[3] Professor Normand Landry, author of *Threatening Democracy: SLAPPs and the Judicial Repression of Public Discourse*, told the Ontario legislative committee reviewing the bill that it was a good model for all common-law jurisdictions.

[4] Ramani Nadarajah, in-house counsel to the Canadian Environmental Law Association, has said that the Ontario Act is the best anti-SLAPP legislation in North America.

[5] No jurisdiction has enacted the Uniform Act since its adoption in 2010. No one is prejudiced by its replacement with a better model.

[6] A chart comparing the principal provisions of the Ontario Act and the Uniform Act is attached to this report, as well as a draft new uniform statute using the Ontario language.

The Uniform Act

[7] In 2008, the Civil Section received a report from Quebec on abusive litigation, including what is known as Strategic Litigation Against Public Participation (SLAPPs).[1] [2]In 2010, the Section adopted the Uniform Prevention of Abuse of Process Act[3] to deal with such litigation.

[8] The main provisions of the Uniform Act were these:

- Abuse of process was defined to include:

(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;

- Public participation meant "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."

- As a result of this definition, litigation about several kinds of conduct, notably "unlawful" conduct, were excluded from the protection of the Act.
- The defendant was given the right to complain about abuse of process as defined in the Act – a broader and more purposive definition than in the traditional abuse of process remedies in current law (which the 2008 report had shown were little used in any event.)

- The Uniform Act contemplated two outcomes:

1. The court was persuaded that the action was abusive, in which case:

- the action could be dismissed, pleadings struck out or the case otherwise managed accordingly if allowed to continue.
- if the action were allowed to continue, advanced costs orders could be made in favour of the plaintiff.

A court ordering a suit dismissed could also make orders for costs against directors and officers of a corporate plaintiff who authorized the action

2. The court was not persuaded that the action was abusive but found on the balance of probabilities that it might be abusive, in which case:

- the court could impose restrictions on the conduct of the case
- the court could maintain its oversight over the procedures to protect the defendants

[9] The Uniform Act has not been enacted in any jurisdiction.

Quebec – Code of Civil Procedure

[10] in 2009 Quebec's National Assembly amended the Code of Civil Procedure to insert a version of an anti-SLAPP measure (new articles 54.1 to 54.6). The targeted procedures were described as follows (article 54.1 paragraph 2):

> The procedural impropriety may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.

[11] Despite the differences in legal systems, the Code amendments reflected the then current draft of the Uniform Act in allowing two stages of analysis; where the court found abuse and

where the court thought abuse was sufficiently possible that the procedures should be controlled more strictly than in normal litigation. In addition, the court was authorized to act on its own initiative to decide that a suit was abusive and the statutory remedies invoked. Finally, the Quebec law allowed an award of damages against directors and officers of a corporate plaintiff held to be abusive.

[12] The functioning of the 2009 provisions was analyzed in a report to the Ministry of Justice in 2013, available in French only.[4] It reviewed many of the cases brought under the new provisions. It found that most were about general abuse of process, and only a few involved allegations of prevention of expression on matters of public interest. In any event, the Court of Appeal had held that recourse under the new provisions would not succeed without demonstration of blameworthy conduct by the plaintiff (report page 52). In that aspect too, Quebec law resembles the Uniform Act.

[13] The *Code of Civil Procedure* was revised in 2014. The relevant provisions were re-enacted unchanged.[5]

Ontario Advisory Panel

[14] In 2010, the government of Ontario appointed an expert Advisory Panel to advise it on the content of legislation against SLAPP suits. The Advisory Panel had before it the Uniform Act, British Columbia's 2001 *Protection of Public Participation Act*, Quebec's 2009 changes to the Code of Civil Procedure, and a number of US statutes and Canadian and American legal literature.[6]

[15] The Advisory Panel received written and oral submissions from a number of stakeholders.

[16] The Advisory Panel's report was published in December 2010.[7] It made several findings and related recommendations:

- Legislation was needed
- Legislation should focus on the effect of litigation on expression on matters of public interest, and not on the motive of the plaintiff in bringing the action.
- It would be difficult for a court on a motion, usually argued on paper evidence only – affidavits and transcripts of cross-examination, if any – to judge the motive of the plaintiff.
- The key issue was not motive but on whether the litigation unduly restricted free expression on a matter of public interest.
- The defendant was given a new right to have the action dismissed. The motion proceeds in three stages:
    - The defendant has to demonstrate that the action is about expression on a matter of public interest;
    - The plaintiff has to demonstrate that there are grounds to believe that it has a valid cause of action and that there are no grounds for a successful defence. (The

analysis is in two parts because of the way defamation actions work, and most abusive litigation takes the form of a defamation action.)
    - The plaintiff has to demonstrate that there are grounds to believe that defendant's expression has caused significant harm that outweighs the harm done to freedom of expression on a matter of public interest. The need to show likely harm, rather than relying on a presumption of damage, is an important new element to the law of defamation in public interest matters.
    - If the plaintiff cannot persuade the court of both these two points, the action will be dismissed.

- A successful defendant is presumed to be entitled to full indemnity costs.

- A successful plaintiff is presumed not to be entitled to any costs.

- No action would lie against directors or officers of the plaintiff.

- A party to a motion to dismiss could have any related administrative proceeding stayed pending final resolution of the motion, though the court would have power to relieve against the stay if appropriate.

Ontario Legislation

[17] In November 2015, Ontario enacted the *Protection of Public Participation Act,* 2015, which implemented almost all of the Advisory Panel's recommendations. It came into effect on Royal Assent on November 3, 2015.[8]

Criticism and response

[18] Response to Ontario's bill was very largely favourable. Criticism came from two sources: the plaintiff's litigation bar, and the forest products industry, backed by municipalities in Northern Ontario that depended on that industry.

[19] For example, The Advocates' Society said this (in response to the Advisory Panel's report, but also on the legislation):[9]

- There is no need for the legislation since existing law provides remedies, notably in the light of the recent Supreme Court decision on motions for judgment (*Hyrniak v Mauldin*)[10].

    - Response: The Advisory Panel and many witnesses at Committee believed there was a need that existing remedies did not fill. If there was in fact little need, then the legislation would not be used much, but it would be useful for the cases that it did apply to.

- The scope of the bill is expression on matters of public interest, but the meaning of "public interest" is uncertain, so courts will not be able to apply the remedies predictably.

    - Response: The courts frequently deal with matters of public interest in many contexts. The Supreme Court has in recent years expressly extended defences in

defamation law in areas of fair comment and responsible reporting in matters of public interest.

- It is unfair for the plaintiff to have to prove its case on a preliminary motion.

    - Response: The legislation requires only that the plaintiff show that there are "grounds to believe" that the case has merit and that the harm done outweighs the value of the expression. Anyone contemplating litigation must analyze the merits beforehand. Anyone wishing to restrict freedom of expression on matters of public interest should have to justify that restriction with real harm.

- The legislation changed "time-honoured" balance between plaintiffs and defendants in the law of defamation.

    - Response: The legislation intended to change the balance, which was in the view of the government, the Advisory Panel and almost all witnesses at Committee, too favourable to plaintiffs, especially in matters of public interest.

[20] The resource industry and Northern municipalities said that the legislation was promoted by foreign interests intending to cripple the province's resource economy. Courts – especially courts in the south of the province that did not appreciate the importance of the forestry industry – would always find the public interest in expression outweighed the harm done by the irresponsible criticism of environmental groups.[11]

- Response: The advocates of this position tended to ignore the balance built into the legislation, in which the courts are required to consider the harm to the reputation of the plaintiff as well as the value of freedom of expression. The government said it trusted the courts to make that judgment appropriately, and to consider the nature of the expression as well as the interests of the parties.

[21] As of the end of June 2016, there has been one decision applying the Act: *1704604 Ontario Ltd. v Pointes Protection Association et al.*, 2016 ONSC 2884 (CanLII).[12] In that case, the court held that the lawsuit could proceed, although the expression was on a matter of public interest. The court complained that the legislation was very general in determining what a matter of public interest was, but arguably got it right on the unusual facts of this case.

Administrative Law Proceedings

[22] Ontario's legislation applies the basic remedy to court proceedings only. The Advisory Panel and the government did not contemplate that administrative tribunals could readily be used to curtail freedom of expression, and in any event, such tribunals had a range of procedures that did not suit a motion to dismiss.

[23] The legislation did touch on administrative proceedings in two ways. First, it allowed the defendant who brought a motion to dismiss in a lawsuit to have any administrative proceeding on a related matter stayed. This provision aimed to give a prospective plaintiff reason to think carefully before launching a lawsuit against its critics. Often such a party has some other official proceeding going on, such as an application for rezoning or a building permit. If that proceeding

will be stayed pending the determination of a motion to dismiss under the present statute, the delay may be more important to the plaintiff than getting a remedy for the defendant's expression. A court may however relieve against undue hardship caused by such a stay, including to unrelated parties.

[24] The second administrative law element of Ontario's statute was to require that applications for costs before administrative tribunals should be dealt with in writing. This provision was influenced by a well-known example in which many community groups were threatened with a costs order of several million dollars after a developer won a rezoning application. The hearing about the costs issue went on longer than the original hearing on the merits of the rezoning. While the tribunal eventually denied costs, the threat was real and very expensive to combat.

Application

[25] The Ontario Act applies to any lawsuits begun as of the date of first reading of the bill. A previous bill that died at the 2014 provincial election would have applied the remedies to actions started before the bill was introduced. A number of witnesses at Committee wanted this provision in the new legislation, but no amendments were made.

[26] If the Conference wishes to follow the Ontario Act in new uniform legislation, it should provide that the legislation applies to proceedings whenever commenced. The legislation provides a screen by which the legitimacy of actions can be judged, on public policy grounds. There is no reason why existing suits that do not meet the new test should be allowed to clog the courts and unduly burden free expression. The Ontario legislative committee heard of several examples of such suits. Meritorious suits with serious harm will pass the screen; the others ones should not continue to impose costs on the defendants.

Reservation

[27] The Uniform Act currently provides that it does not derogate from any existing remedies for abuse of process. While this probably goes without saying, no harm is done in saying it. The new uniform legislation should contain the same provision.

APPENDIX A: Chart comparing the Uniform Act and the Ontario Act

APPENDIX B: Draft Uniform Protection of Public Participation Act

APPENDIX A: THE UNIFORM ACT AND THE ONTARIO ACT

PROVISION	UNIFORM PREVENTION OF ABUSE OF PROCESS ACT	PROTECTION OF PUBLIC PARTICIPATION ACT, 2015
Purpose	(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.	(a) to encourage individuals to express themselves on matters of public interest; (b) to promote broad participation in debates on matters of public interest; (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.
Target	"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.	"expression" means 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…. that relates to a matter of public interest.
Procedure	An application alleging abuse of process or on the court's own motion	A motion to dismiss a lawsuit
Need to find	"abuse of process", [which] 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	Defendant has to satisfy the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. Plaintiff has to satisfy the judge: (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

	ends of justice; and (e) an attempt to restrict public participation by any person;	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.
Process	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.	Motion to be heard within 60 days of filing Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding, (a) in order to prevent or avoid an order under this section dismissing the proceeding; or (b) if the proceeding is dismissed under this section, in order to continue the proceeding
Remedy	(1) If court is satisfied of abuse, it may (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	If the judge is satisfied by the defendant and not by the plaintiff, he or she shall dismiss the proceeding. If the judge is satisfied by the plaintiff on both points, he or she shall not dismiss the proceeding.

	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; (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).	
Costs	The court may award (as damages) 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);	If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances.
Other sanctions	The court may order punitive or exemplary damages against the plaintiff, on the application of the defendant or on its own motion. When the court awards damages pursuant to clause 5 (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 (though director may dissent on the record and escape sanction).	If the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate.

Appeals	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.	An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal.
Other proceedings	The court may 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.	If the responding party has begun a proceeding before a tribunal, within the meaning of the *Statutory Powers Procedure Act*, and the moving party believes that the proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under section 137.1, the moving party may file with the tribunal a copy of the notice of the motion that was filed with the court and, on its filing, the tribunal proceeding is deemed to have been stayed by the tribunal.[and other technical rules]
Other provisions	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.	[*Libel and Slander Act*] Any qualified privilege that applies in respect of an oral or written communication on a matter of public interest between two or more persons who have a direct interest in the matter applies regardless of whether the communication is witnessed or reported on by media representatives or other persons.
Etc.	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.	Sections 137.1 to 137.4 apply in respect of proceedings commenced on or after the day the *Protection of Public Participation Act, 2015* received first reading

APPENDIX B

UNIFORM PROTECTION OF PUBLIC PARTICIPATION ACT

Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings)

Dismissal of proceedings that limit debate

Purposes

1. (1) The purposes of this section and sections 2 to 5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

Comment: While the usual Uniform Drafting Rules do not favour a purpose clause, it has been widely thought in the present context that the need to promote freedom of expression on matters of public interest should be underlined.

Definition, "expression"

(2) In this section,

"expression" means 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. (« *expression* »)

Comment: The protection that the statute gives to expression is not limited to "lawful" or otherwise "appropriate" expression, nor to communication by word, nor to communication to governments or other public bodies. Courts will decide whether the nature of the communication in a particular case give it the weight required to protect it in the light of the harm it is alleged to cause or be likely to cause.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

Comment: This is the heart of the statute. The defendant has to show that the lawsuit is about expression on a matter of public interest. Once that is done, the burden shifts to the plaintiff to demonstrate that there are grounds to believe the action should continue.

No dismissal

(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.

Comment: The purpose of the statute is to protect expression on matters of public interest. In a lawsuit on such a matter, therefore, the plaintiff has to persuade the court that there are grounds to believe that the suit has merit and that the harm suffered or likely to be suffered exceeds the harm of repressing expression on such a matter.

The reason to split out 'substantial merit' and 'no valid defence' is that in defamation actions, which are likely to constitute many of the lawsuits for which the statute will be invoked, the defences are often separate from the grounds for liability. Liability ensues if there is publication of defamatory material about the plaintiff; falsehood and damages are presumed. Defences relate less to the publication than its circumstances of privilege, or about the truth of the allegation. It made sense to mention them separately.

Unlike the usual rule for defamation, in cases under this statute, the plaintiff has to demonstrate at least grounds to believe that it will suffer some harm. Harm is not presumed. The court must balance the value of giving a remedy for the harm against the public interest in the expression at issue. The nature of the expression – is it temperate, is it reasonable, is it relevant – will play a role, though polemic is also of value. The Supreme Court has protected 'robust' debate.

The court does this balancing without having to find that the plaintiff was improperly motivated.

It is fair to impose these burdens on the plaintiff in this context. The legal merits, including likely defences, must be canvassed by anyone contemplating launching a lawsuit, if it is a serious one. The balance of harm and expression is a new consideration, the principal innovation of this statute.

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of.

No amendment to pleadings

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding.

Costs on dismissal

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances.

Comment: The statute presumes that a successful defendant will have its costs, though the presumption is rebuttable if such an award is not appropriate.

Costs if motion to dismiss denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances.

Comment: The opposite presumption is given for the successful plaintiff, since it will continue the lawsuit and may have costs there if it wins. However, a court can give costs at this stage if appropriate.

Damages

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate.

Comment: Though bad faith is not an element of the motion to dismiss itself, in some cases the court m ay be able to determine that it is present. This provision allows the court to sanction it.

Procedural matters

Commencement

2. (1) A motion to dismiss a proceeding under section 1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced.

Motion to be heard within 60 days

(2) A motion under section 1 shall be heard no later than 60 days after notice of the motion is filed with the court.

Comment: The Ontario Advisory Panel believed the courts would be able to hear these motions within the stated time, though parties could agree to take more time. Otherwise the time for preliminary matters will be suitably compressed as well. The provision requires hearing but not decision in that time.

Hearing date to be obtained in advance

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served.

Limit on cross-examinations

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the

proceeding and seven hours for all defendants.

Same, extension of time

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice.

Appeal to the Court of Appeal

3. (1) An appeal of an order under section 1 lies directly to the Court of Appeal.

Comment: It is important to get a high-level resolution of the issues as promptly as possible, especially in early cases. Thus intermediate stages of appeal, if any, should be avoided.

Appeal to be heard as soon as practicable

(2) An appeal shall be heard as soon as practicable after the appellant perfects the appeal.

Stay of related tribunal proceeding

4. (1) If the responding party has begun a proceeding before a tribunal, within the meaning of the [*administrative procedure law*], and the moving party believes that the proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under section 1, the moving party may file with the tribunal a copy of the notice of the motion that was filed with the court and, on its filing, the tribunal proceeding is deemed to have been stayed by the tribunal.

Comment: This provision aims to give a prospective plaintiff reason to think carefully before launching a lawsuit against its critics. Often such a party has some other official proceeding going on, such as an application for rezoning or a building permit. If that proceeding will be stayed pending the determination of a motion to dismiss under the present statute, that may be more important to the plaintiff than getting a remedy for the defendant's expression.

Notice

(2) The tribunal shall give to each party to a tribunal proceeding stayed under subsection (1),

(a) notice of the stay; and

(b) a copy of the notice of motion that was filed with the tribunal.

Duration

(3) A stay of a tribunal proceeding under subsection (1) remains in effect until the motion, including any appeal of the motion, has been finally disposed of, subject to subsection (4).

Stay may be lifted

(4) A judge may, on motion, order that the stay is lifted at an earlier time if, in his or her opinion,

(a) the stay is causing or would likely cause undue hardship to a party to the tribunal proceeding; or

(b) the proceeding that is the subject of the motion under section 1 and the tribunal proceeding that was stayed under subsection (1) are not sufficiently related to warrant the stay.

Same

(5) A motion under subsection (4) shall be brought before a judge of the [applicable court] or, if the decision made on the motion under section 1 is under appeal, a judge of the Court of Appeal.

Application

5. Sections 1 to 4 apply in respect of proceedings commenced at any time before or after this Act comes into force.

Comment: The purpose of the statute is to encourage expression on matters of public interest by relieving those responsible for the expression of the cost and trouble of a lawsuit, where the harm done by the expression is less important than the expression itself. To maximize such expression and to minimize the waste of time of the courts in unimportant lawsuits, the balancing test created by the statute is applied to lawsuits whenever they were commenced. Any existing lawsuit by a plaintiff who has suffered serious harm is likely to pass the test and be allowed to continue, but some of lesser weight can properly be dismissed.

6. 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 defendants to the full financial and other weight of litigation. Thus the present statute. However, any other available remedies are not foreclosed by it.

Defamation Act

7. The Uniform Defamation Act is amended by adding the following section:

Communications on Public Interest Matters

Application of qualified privilege

[x] Any qualified privilege that applies in respect of an oral or written communication on a matter of public interest between two or more persons who have a direct interest in the matter applies regardless of whether the communication is witnessed or reported on by media representatives or other persons.

Comment: One aspect of the defence of qualified privilege in defamation actions is communications by and to persons with an interest in the matter discussed. Current common law provides that the media do not have such an interest, nor do those who receive the communications via the media. This puts speakers at risk if their expression is reported by the media. The provision here relieves them of that risk. It does not, however, affect the liability of the media themselves, who may be able to rely on other heads of privilege.

Administrative Law Procedure Act

8. [Applicable provisions] of the [*Administrative Law Procedure Act]* are repealed and the following substituted:

Submissions must be in writing

Submissions for a costs order shall be made by way of written or electronic documents, unless a party satisfies the tribunal that to do so is likely to cause the party significant prejudice.

Comment: The provision seeks to avoid the risk that hearings on costs may themselves be an undue burden on parties who have participated in administrative law proceedings to promote the public interest. The provision requires applications for costs be done in writing, unless the tribunal decides that justice requires a hearing on the issue.

Commencement

9. This Act comes into force on the day it receives Royal Assent.

---

[1] The 2008 Report: http://ulcc.ca/en/annual-meetings/235-2008-quebec-city-qc/civil-section-documents/448-strategic-lawsuits-against-public-participation-slapps-report-2008

[2]

[3] The Uniform Act: http://ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/641-abuse-of-process-prevention/1403-uniform-prevention-of-abuse-of-process-act

[4] The Quebec report: http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/slapp_code_procedure2013.pdf

[5] The 2014 Code of Civil Procedure: https://www.canlii.org/en/qc/laws/stat/rsq-c-c-25/latest/

[6] A collection of source material is online here: https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/

[7] The Panel's report: https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.html

[8] The Ontario Act: https://www.ontario.ca/laws/statute/s15023

[9] The Advocates' Society letter about the Panel's report: http://www.advocates.ca/assets/files/Submission%20to%20AG%20re%20SLAPP%20Report%20(final).pdf

[10] The decision is online: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13427/index.do

[11] FONOM's submission to the Ontario legislative committee: http://www.fonom.org/fonom-presents-standing-committee-justice-policy

[12] The decision is online: http://www.canlii.org/en/on/onsc/doc/2016/2016onsc2884/2016onsc2884.html