Government must combat SLAPPs, says panel

DIANNE SAXE

SLAPPS are lawsuits used to suppress or punish public participation in actual or proposed government actions, often through defamation claims. Typically, defendants have protested against proposed developments that may adversely affect the environment. Whether or not the lawsuits ultimately succeed, they impose heavy legal costs and huge time demands on those sued.

If Ontario enacts an anti-SLAPP Act, it will be the third Canadian province to do so. Quebec passed anti-SLAPP legislation in June 2009; B.C. had such legislation briefly, though it was revoked after the government changed. Nearly half of the American states have anti-SLAPP statutes.

On Aug. 26, David Sterns and I represented the Ontario Bar Association (OBA) before an advisory panel on SLAPPs, and received a very warm reception. The panel was set up after 60 public interest organizations — led by Environmental Defence — wrote to Premier McGuinty, requesting protection for Ontario citizens from SLAPPs.

The Ontario government established the advisory panel earlier this year to recommend legislation that would protect the public's democratic rights to participate in government decision-making. The panel is chaired by Mayo Moran, dean of the faculty of law at the University of Toronto, plus two defamation experts: Brian McLeod Rogers and Peter Downard.

The panel has been instructed to report to the Attorney General by Sept. 30. Over the summer, the civil litigation, natural resources, international and environmental law sections of the OBA prepared a submission that was endorsed by the OBA as a whole. The submission is posted at: www.oba.org/en/pdf/OBA-Submission-Anti-SLAPP-Advisory-Panel.pdf

OBA submission

The OBA agreed that the legislature should take specific action to combat SLAPPs, even though SLAPPs are far from the only area that requires legislative attention. Lawsuits devoid of merit plague the civil litigation system, far beyond the scope of SLAPPs. There are also many difficult questions as to the appropriate scope of public discourse, and of Charter rights generally. Specific anti-SLAPP legislation is justified by the importance of public participation in decision-making, and by judicial reluctance to use existing powers to quickly quash such lawsuits.

However, the OBA also urged government to improve protection from meritless lawsuits in other cases where there is no reasonable likelihood of success. Under the current costs rules, even if litigants are entirely successful, they still lose, because legal fees are only partly recoverable, and because nothing is paid for the loss of management or personal time.

The OBA recommended:

I. A test for courts to quickly recognize a SLAPP

The defining features of a SLAPP should be an action that:

- seeks damages or an injunction against a person for communications made, in good faith, to influence actual or possible government action; and
- lacks substantial merit.

Evidence of improper motive should be admissible and probative, but not necessary. The test should not require proof of abuse of process, which is expensive to establish and granted only in the clearest of cases.

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II. Appropriate remedies for SLAPP lawsuits

Early dismissal is a necessary remedy if anti-SLAPP legislation is to be effective. The chilling effect of SLAPP suits is mainly due to heavy legal fees and long delays.

There should be a preliminary evaluation, on affidavit evidence, as to whether an alleged SLAPP lawsuit has any reasonable prospect of success on the merits. A defendant should be both permitted and required to bring an anti-SLAPP motion to strike out a claim at the commencement of the action.

Pending determination of the motion, there should be a moratorium on all other preliminary proceedings, including production of documents and discoveries, unless ordered otherwise by the court.

If a defendant shows that the action is based on public participation, the plaintiff should bear the reverse onus of proving that the action has substantial merit.

There should be a source of public funding available to assist SLAPP defendants (with a good prima facie case) to bring this motion.

The successful defendant in a SLAPP lawsuit should have a presumptive right to full indemnity costs.

Directors and officers of companies who instigate SLAPPs should be personally liable to pay these costs, if the corporation does not.

The OBA does not recommend punitive damages.

III. Appropriate limits to the protection of anti-SLAPP legislation

The complex and well-developed law of qualified privilege sets appropriate limits to protected speech, such as excluding hate speech. Qualified privilege, applied to all public participation, would protect good faith and reasonable communications, but not extreme and unacceptable ones.

IV. Appropriate parties to benefit from the protection of anti-SLAPP legislation

These should include all entities or individuals engaged in public participation.

V. Methods to prevent abuse of anti-SLAPP legislation

If anti-SLAPP legislation is a shield, not a sword, as the OBA proposes, there should be few risks of abuse. On the contrary, anti-SLAPP legislation will likely be vitiated by judicial reluctance to use it. The OBA therefore recommended that the legislation should contain a clear preamble, stating the benefits of public participation in public decision-making, and the public harm caused by SLAPPs in stifling such participation.

Anti-SLAPP legislation should also be reviewed after an appropriate period to determine what, if any, impact it has had.

As most of the public comments received by the panel supported anti-SLAPP legislation, it seems likely that the panel will recommend such a law. If so, will it help? Only time will tell. ■

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Syncrude duck trial judgment 'begs for appeal'

NICK SPILLANE

Some judgments beg for appeal, not because the lower court reasons are necessarily wrong, but simply because the case presents a good opportunity for appellate review and clarification, whether by endorsement or otherwise of the lower court's judgment, of the points at issue. The Alberta Provincial Court's judgment on June 25 in *R. v. Syncrude Canada Ltd.*, [2010] A.J. No. 730, is just such a case. Unfortunately, there may not be an appeal, as the Crown and defence are reportedly discussing a sentencing deal prior to resumption of the hearing in late October.

In *Syncrude*, Justice Ken Tjosvold found the company guilty of charges brought under both Alberta's *Environmental Protection and Enhancement Act* (EPEA) and the federal *Migratory Birds Convention Act* (MBCA). Alberta's EPEA is a general environmental protection statute, and the section under which Syncrude was charged mandates that the storage of hazardous substances must be done in a manner that ensures no direct

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or indirect contact with or contamination of animals, plants, food or drink.

The MBCA is specifically directed to the protection of migratory birds in accordance with Canada's commitments under the Migratory Birds Convention, and the section at issue in the case prohibits the deposit in waters or areas frequented by migratory birds of substances harmful to them. The question of whether conviction under both would offend the multiple convictions rule was left for later argument. This in itself was disappointing, as this issue rears its head repeatedly, but for one reason or another tends to never receive the thorough treatment it deserves.

While arguably the two statutes deal with different subject matter, their essential objectives, at least as applied in a Syncrude-type situation, appear to have a broad common theme of environmental protection. So the question potentially runs whether, in such circumstances, Syncrude — or anyone — should be convicted more than once for a single act or omission.

Another issue worthy of appellate consideration involves authorized activity, which has received considerable commentary both during the trial and subsequently. Justice Tjosvold noted that Syncrude had been given provincial permission for its tailings ponds. While it was clear that under the EPEA, the operation of the tailings ponds had to be carried out in such a way that did not result in hazardous substances contacting or contaminating (in this case) birds, and thus the tailing ponds' operation as such was not in question, under the MBCA the prohibited act was the "deposit" itself.

The "deposit" boiled down to the provincially-permitted tailings ponds operation itself. So the federal statute seems to have operated to prohibit what was permitted provincially — an obvious quandary.

Syncrude is particularly instructive on due diligence defences, not so much as to the law of due diligence, but as to the kind of factual matrix which constitutes due diligence in such cases. Syncrude was obliged to have, and did have, a bird deterrence program. Justice Tjosvold found that in its 2008 implementation of its bird deterrence program, Syncrude failed to deploy early and quickly enough, and that reduced personnel levels also impacted on the program. Justice Tjosvold compared evidence of other companies' activities in this regard, and decided that Syncrude had fallen short in its implementation when compared to the other companies.

While circumstances and context vary from one case to the next, the judgment's description of Syncrude's practices, other companies' deterrent systems and Justice Tjosvold's criticisms of Syncrude's system, constitute a useful road map for the construction of a due diligence system. Justice Tjosvold's findings on Syncrude's administration of its bird deterrence program are of particular interest. Justice Tjosvold faulted Syncrude's written procedures and practices, as well as aspects of its training and expertise. The judgment suggests that "logbook"-type records are extremely useful, if not indeed vital, elements in establishing a due diligence defence in such cases.

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On a broader basis, *Syncrude* illustrates the need for rationalization of rules relating to protection of the environment. While it may be unrealistic to expect it across the board, there is clear need for simplification and harmonization of environmental laws and regulations within and across jurisdictions. No one would argue in 2010 that protection of the environment is not a valid concern, but it can and should be done in such a way that industry and business have the clearest possible set of rules by which to make decisions and operate. ■

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