

August 6, 2010

Advisory Panel on Anti-SLAPP Legislation

SLAPP Suggestions

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Dear Advisory Panel Members,

Greenpeace Canada (Greenpeace) welcomes the establishment of an Advisory Panel to provide advice for legislation to target Strategic Litigation Against Public Participation (SLAPP). Greenpeace understands that the Advisory Panel is receiving submissions, and accordingly, we request that the Panel accepts this letter as our submission on key elements and issues that need to be included and addressed in effective anti-SLAPP legislation for Ontario.

Introduction

The goal of some corporations to run rough shod over democratic rights is particularly problematic when they seek to silence organizations, such as Greenpeace, and individuals, that use techniques of peaceful public participation, such as non-violent direct action and peaceful protest, to raise concerns about vital issues that often do not otherwise get the attention they deserve.

Many of the fundamental democratic liberties we enjoy today wouldn't have come about without the use of peaceful public participation in its broadest sense. The non-violent public work of such luminary leaders as Mahatma

Gandhi, Susan B. Anthony, Martin Luther King, Jr. and many others helped create the conditions for the abolition of slavery, women's suffrage, the civil rights movement in the United States and other essential societal reforms. In this submission, with the rich history of peaceful civil disobedience as our beacon, we will argue that anti-SLAPP legislation in Ontario must recognize the importance of peaceful public participation.

Corporations are increasingly turning to the courts to silence opposition to their activities. At a time when some companies accept corporate social responsibility as a part of doing business and are leading social change, others are actively using the courts to prevent healthy public debate. By SLAPPING organizations and even individuals with vexatious and/or meritless lawsuits or other abuses of process, corporations shut down public participation by tying people up in expensive and time consuming litigation and inhibit others from speaking out. When a company sues an organization or individual in order to intimidate them, we all lose. Our courts become increasingly overburdened, and with the pervasive sense that democratic participation in the public sphere is dangerous or costly, a chill descends on our society. This undermines public confidence in our legal system and the rule of law. SLAPP suits censor and punish those who speak to a broader public interest beyond the realm of corporate self interest.

For the purposes of clarity, our submission addresses the provisions contained in the Uniform Law Conference of Canada (ULCC) Civil Law Section's *Model Act on Abuse of Process* (Model Act), concluding with a summary of our recommendations. We comment only on the Model Act provisions that are most relevant to organizations, such as Greenpeace, that support the use of non-violent direct action and other forms of peaceful protest to address issues of

public interest. Peaceful protest and non-violent direct action are forms of peaceful public participation.¹

- 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.**

The purpose of the Model Act for use in Ontario can be improved by (1) making it reflect a broader definition of SLAPP suits, (2) ensuring that the beneficiaries of the Act include both individuals and organizations, and (3) specifically referencing freedoms of expression and assembly.

A. Definition of SLAPP Suits

In designing the purpose of anti-SLAPP legislation in Ontario, it is important to define SLAPP suits in a broad manner to ensure sufficient protection of individuals and organizations. The 2007 Macdonald Report to the Quebec Ministry of Justice presented various definitions of SLAPPs.² A definition that was adopted by the “vast majority of public interveners”³ in the development of anti-SLAPP legislation in Quebec is:

¹ In 1963, Martin Luther King Jr. described the goal of NVDA in his Letter from Birmingham Jail: “Nonviolent direct action seeks to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored.” Martin Luther King Jr., “Letter from Birmingham Jail,” online: Bates College, Martin Luther King Jr. Day 2001 <<http://abacus.bates.edu/admin/offices/dos/mlk/letter.html>>.

² R.A. Macdonald et al., *Les poursuites stratégiques contre la mobilisation publique - les poursuites-bâillons (SLAPP)* (Ministère de la Justice du Québec, 2007) [*Les poursuites stratégiques*], online: Justice Québec <<http://www.justice.gouv.qc.ca/english/publications/rapports/slapp-a.htm>>.

³ N. Landry, “From the Streets to the Courtroom: The Legacies of Quebec’s Anti-SLAPP Movement” (2010) 19 RECIEL 1 at 63.

Lawsuits undertaken against organizations or individuals who are engaged in the public sphere and discussing issues of public interest, aiming to limit the scope of freedom of expression of these organizations and individuals and to neutralize their action by using the courts to intimidate them, impoverish them, and deter them from public action.⁴

Ultimately, Quebec's *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* declared three purposes:

AS it is important to promote freedom of expression affirmed in the Charter of human rights and freedoms;

AS it is important to prevent improper use of the courts and discourage judicial proceedings designed to thwart the right of citizens to participate in public debate;

AS it is important to promote access to justice for all citizens and to strike a fairer balance between the financial strength of the parties to a legal action[.]⁵

⁴ See *Les poursuites stratégiques*, supra note 2 (translation by the author). Another definition that explicitly includes protest is “any lawsuit in relation to a political issue where the case has had, or could be assumed to have had, the effect of constraining the community’s right and ability to participate in public debate and political protest.” See G. Ogle, “Anti-SLAPP Law Reform in Australia” (2010) 19 RECIEL 1 at 35.

⁵ Bill 9, *An 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*, 1st Sess., 39th Leg., Quebec, 2009 (assented to 4 June 2009), c.12, online: Publications Québec <<http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2009C12A.PDF>>.

Therefore, Greenpeace recommends that the purpose of Ontario anti-SLAPP legislation explicitly mentions the rights to freedom of expression and assembly which are entrenched in Section 2 of the *Canadian Charter of Rights and Freedoms* (Charter).

B. Beneficiaries should include both Citizens and Organizations

Based on the definition described above, two key elements missing from the Model Act should be included in anti-SLAPP legislation for Ontario.

First, the purpose only mentions citizens. SLAPP suits are not only directed at individuals but also at their representative organizations. Therefore, the purpose of the act should specifically state that the act aims to protect the rights of citizens to participate in public debate, **including through their representative organizations**. Without such an approach, the inequality of arms in the public arena is irrevocably entrenched in favour of corporate entities over natural persons.

The European Court of Human Rights (ECtHR) has considered that in a democratic society, in addition to freedom of the press, NGOs or campaign groups like Greenpeace: “must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.”⁶

⁶ *Steel and Morris v. United Kingdom*, 15 February 2005, ECtHR Application No. 68416/01 at para. 89 [Steel and Morris]; see also *Vides Aizsardzības Klubs (VAK) v. Latvia*, 27 May 2004, ECtHR Application no. 57829/00 ECtHR.

History has proven that SLAPP suits target both individuals and organizations. An illustrative recent example of this in Canada is *Daishowa Inc. v. Friends of the Lubicon* (see section 2(A)(1), below). It is essential that Ontario anti-SLAPP legislation protects non-governmental organizations (NGOs) because of their key role in society. Stephen Heintz, President of Rockefeller Brothers Fund, outlined three primary roles for NGOs in advancing modern societies: (1) providing opportunities for the self-organization of society, (2) preserving an essential space between the for-profit sector and government, and (3) enabling experimentation and social change.⁷ NGOs, like Greenpeace, serve to rectify the power imbalance between people and corporate polluters by ensuring accountability, transparency and enforcement of environmental laws. Heintz further remarked: “And, if we are to save our planet from global warming, I am certain NGOs will help lead the way.”⁸ Thus, Greenpeace recommends that Ontario anti-SLAPP legislation explicitly cover organizations so that they are not threatened into silence by lawsuits and can continue to serve an important catalytic role in Canadian society.

C. Explicit reference to the right of freedom of expression and assembly

Second, the purpose should explicitly reference the rights to freedom of expression and assembly. The *Charter* “guarantees the right to freedom of thought, belief, opinion and expression including freedom of the press, and freedom of peaceful assembly.”⁹ Although *Charter* rights cannot be invoked against private parties, securing freedoms of expression and assembly involves

⁷ Stephen Heintz, “The Role of NGOs in Modern Societies and an Increasingly Interdependent World,” online: Rockefeller Brothers Fund <http://www.rbf.org/usr_doc/The_Role_of_NGOs_in_Modern_Societies_and_Increasingly_Interdependent_World.pdf>.

⁸ *Ibid.*

⁹ M. Scott and C. Tollefson, “Strategic Lawsuits Against Public Participation: The British Columbia Experience” (2010) 19 RECIEL 1 at 46 (citing Canadian Charter of Rights and Freedoms, Section 2(b)-2(c)).

positive actions on the part of governments, specifically to shield individuals against private actors who undermine these rights.

Furthermore, states have a clear duty under international human rights law to prevent domestic violations of human rights by corporations.¹⁰ In recent years, corporate lawlessness has come under increasing scrutiny¹¹ resulting in a first mandate of the *Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises* in 2005.¹² In 2008 Special Representative John Ruggie went so far as to warn that “the escalating exposure of people and communities to corporate-related abuses” made reforming the system of corporate liability an urgent policy priority.¹³ SLAPP reform Ontario is a welcome part of this global reform process.

¹⁰ UN Human Rights Council, *State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 13 February 2007, A/HRC/4/35/Add.1, at paras. 53-54, online:

<http://ap.ohchr.org/Documents/dpage_e.aspx?si=A/HRC/4/35/Add.1>.

¹¹ See generally International Council on Human Rights Policy, *Beyond Voluntarism: human rights and the developing international legal obligations of companies* (Versoix, Switzerland: International Council on Human Rights Policy, 2002), online: The International Council on Human Rights Policy <http://www.ichrp.org/files/reports/7/107_report_en.pdf>; Human Rights Watch (Business section), online: Human Rights Watch <<http://www.hrw.org/en/category/topic/business>>; Amnesty International (Business section), online: Amnesty International <<http://www.amnesty.org/en/business-and-human-rights>>; and Corporate Watch, a research group supporting campaigns against corporate harms, online: Corporate Watch <http://www.corporatewatch.org.uk/?lid=58>.

¹² UN Commission on Human Rights, *Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises*, 20 April 2005, E/CN.4/RES/2005/69, online: The UN Refugee Agency <<http://www.unhcr.org/refworld/docid/45377c80c.html>>; and see Renewed Mandate, UN Human Rights Council, Resolution 8/7. Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 18 June 2008, A/HRC/8/L.8, online: <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf>.

¹³ UN Human Rights Council, *Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5, at para. 27, online: Business and Human Rights Resource Centre <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>>.

Similar to the protections found anti-SLAPP law in Quebec and other democratic societies, Ontario anti-SLAPP legislation must be explicit in its intention to defend existent substantive rights to freedom of expression and assembly and to hold corporations to account for their attempts to circumnavigate these rights.

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.

Greenpeace recommends the inclusion of a definition of “public participation” in Ontario anti-SLAPP legislation that encompasses a broader spectrum of communication and conduct than is currently conceived in the Model Act. The definition should respect the logic of section 2(b) and 2(c) of the *Canadian Charter of Rights and Freedoms* and Article 19 of the *United Nations International Covenant on Civil and Political Rights* (ICCPR),¹⁴ to which Canada is a state party.

Greenpeace recommends that the phrase “does not include communication or conduct prohibited by law” **not be** included in Ontario anti-SLAPP legislation for two primary reasons. First, anti-SLAPP legislation should reflect the Ontario government’s responsibility to ensure that its citizens’ rights to freedom of expression and assembly under the *Charter* are protected. Second, a civil case is not the appropriate forum to address issues of whether or not a defendant’s conduct is unlawful.

¹⁴ *International Covenant on Civil and Political Rights*, 16 December 1966, Adopted by General Assembly resolution 2200A (XXI) (entered into force 23 March 1976), Article 19, online: Office of the High Commissioner for Human Rights at the United Nations <<http://www2.ohchr.org/english/law/ccpr.htm>>.

A. The Ontario government has a responsibility to ensure that the right to freedom of expression, including protest, is covered under the definition of “public participation” in anti-SLAPP legislation.

1) Canadian Law

Section 2 of the *Charter* guarantees the right to freedom of thought, belief, opinion and expression including freedom of the press, and freedom of peaceful assembly.¹⁵ This requires provincial governments to guarantee that the legal system does not become a tool for private parties, especially wealthy corporations, to hollow out *Charter* rights. In other words, Ontario has a duty to ensure that its citizens’ *Charter* rights are not merely proclaimed, but are politically secured in practice.

Consistent with this, legal experts believe there is “an emerging judicial appetite to inject *Charter* values into the realm of tort law, with a view to promoting the public interest.”¹⁶ Two landmark Supreme Court of Canada decisions concerning defamation are examples of the judicial appetite to inject *Charter* values into the realm of tort law and prevent the use of the legal system to eviscerate *Charter* rights. The Court in *Grant v. Torstar Corp.* found that traditional defamation laws did not give adequate weight to freedom of expression guaranteed in the *Charter* and defined public interest broadly to include matters relating to science, arts, environment, religion, and morality.¹⁷ This case broadened the scope of freedom of expression with regard to communications on matters of public interest.¹⁸ The subsequent decision in

¹⁵ Specifically, sections 2(b) - 2(c).

¹⁶ See Scott and C. Tollefson, *supra* note 9 at 46.

¹⁷ R. Nadarajah and R. Griffin, “The Failure of Defamation Law to Safeguard against SLAPPs in Ontario,” (2010) 19 RECIEL 1 at 73 (citing *Grant v. Torstar Corp.*, [2009] SCJ No. 61 at [106]).

¹⁸ See Nadarajah and Griffin, *ibid.* (citing *Quan v. Cusson*, [2009] SCJ No. 62).

Quan v. Cusson found that the defence of responsible communication on matters of public interest, as recognized by the court in *Grant*, applied.¹⁹

Canadian courts have presided over many suits that could be defined as SLAPP action. One case of particular relevance to the Canadian rights and freedoms which should guide anti-SLAPP legislation is *Daishowa Inc. v. Friends of the Lubicon*²⁰. In 1995, Daishowa (a logging company) filed suit against the Friends of the Lubicon (FOL) - a Toronto-based non-profit - seeking a court injunction to prevent the FOL from secondary picketing²¹, secondary boycotting²² and other pressure tactics. Daishowa also claimed \$5 million in lost sales.²³ Justice MacPherson of the Ontario Superior Court of Justice concluded that “FOL’s boycott and picketing activities were lawful and indeed provided a salutary model for how to inform consumers and interested parties about activities of public concern.”²⁴ In addition, he dismissed the logging company’s claim for a permanent injunction, stating that “free speech is near the top of the values that Canadians hold dear,”²⁵ and quoted with approval an earlier judgment concerning the importance of freedom of expression:

Freedom of expression... is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great

¹⁹ See Nadarajah and Griffin, *ibid*.

²⁰ *Daishowa Inc. v. Friends of the Lubicon*, [1998] OJ 1429 (ONGD).

²¹ Secondary picketing is a term used in labour disputes and entails strikers picketing at a place that supplies goods to or distributes goods from their employer.

²² A secondary boycott is an attempt to influence the actions of one business by exerting pressure on another business.

²³ See “Diashow vs Friends of the Lubicon,” Nisto Online (An online Cree language, environmental and social justice activism resource portal), online: Nisto.com <<http://nisto.com/cree/lubicon/1995/19951018.html>>.

²⁴ *Daishowa Inc. v. Friends of the Lubicon*, supra note 20 at [71].

²⁵ *Ibid* at [72] (citing *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at [583].).

part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.²⁶

This case is an example of the values, rights and priorities which should shape anti-SLAPP legislation in Ontario.

Professor Chris Tollefson, Executive Director of the Environmental Law Centre at the University of Victoria's Faculty of Law, and an authority on SLAPP actions, argues that "the 'public' nature of SLAPP suits and the harms they impose on the public in general should qualify SLAPP targets for protection under the *Charter*, even if the actual parties are private."²⁷ He further states that the right to freedom of expression "should protect not only any form of communication with the government, but also indirect communication such as protests and boycotts, and any communication with the public at large."²⁸

There are furthermore occasions when peaceful public participation results in an unlawful act (e.g. trespass, defamation, mischief, disturbance, etc.) which may form the basis of a nonetheless oppressive lawsuit. Conduct which falls within the definition of "communication or conduct prohibited by law" can be partly or wholly "saved" by reference to freedom of expression and assembly rights. The *Grant* and *Quan* decisions illustrate that defamation laws may impose an overbroad restriction on freedom of expression. As discussed in the next section, there are cases in which even unlawful conduct should be protected against a disproportionate response, because a SLAPP may have such an impact that it will discourage lawful speech.

²⁶ *Ibid.*

²⁷ James A. Wells, "Exporting SLAPPs: International Use of the U.S. 'SLAPP' to Suppress Dissent and Critical Speech," (1998) 12 *Tem. Int'l & Comp. L.J.* 457 at 487-488 (citing Chris Tollefson, *Strategic Lawsuits Against Public Participation: Developing a Canadian Response*, (1994) 73 *Canadian B. Rev.* 200 at 229).

²⁸ Wells, *ibid.* (citing Toffelson, at 230).

In *Daishowa*, the company's argument that the secondary picketing was unlawful was, in part, rejected because of the defendant's freedom of expression. Therefore, if an anti-SLAPP statute is not going to apply to conduct that on the face of it may appear unlawful, it will fail to protect certain speech which on closer inspection **is** lawful. This is a vital point, and bolsters our later assertion that a civil trial is not the appropriate forum to make determinations of lawful or unlawful conduct.

2) International law

Article 19 of the ICCPR, which extends to Ontario via article 50,²⁹ provides broad protection for any conduct which conveys information or ideas, including public protest. This cements the importance of putting freedom of expression at the heart of anti-SLAPP legislation and supports Greenpeace's view that the definition of "public participation" should not exclude all communication or conduct prohibited by law.

Article 19 of the Convention states, inter alia:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may

²⁹ "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."

therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a. For respect of the rights or reputations of others;
- b. For the protection of national security or of public order, or of public health or morals.³⁰

As we argue throughout the present submission, the limitations that are imposed on peaceful public participation as a manifestation of freedom of expression should be carefully calibrated in anti-SLAPP legislation to reflect what is necessary in a democratic society. In other words, arbitrarily depriving individuals of anti-SLAPP protection on the basis of their actions not being lawful, and having such a determination of lawfulness being determined at an early stage in a civil action, would not reflect what is necessary in a democratic society. This is consistent with the jurisprudence of the *Human Rights Committee* (the body of independent experts monitoring implementation of the International Covenant on Civil and Political Right) in reviewing violations of freedom of expression.³¹

Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), with similar wording to Article 19 of the ICCPR, is instructive in identifying the authoritative international human rights approach to freedom of expression and public participation issues and, therefore, for determining what kind of public participation is worthy of protection under anti-SLAPP legislation. The European Court of Human Rights (ECtHR) stated in the case of *Handyside v. United Kingdom*³² that: “free expression was essential to a democratic society which should be able to tolerate and welcome not only

³⁰ Supra note 14.

³¹ Namely, that restrictions a) must be prescribed by law; b) must serve a legitimate aim, such as the protection of public order or the rights of others; and c) must be necessary and proportionate for the achievement of that aim.

³² *Handyside v. United Kingdom*, [1976] 1 EHRR 737.

favourable and inoffensive speech but also ‘those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”³³ The ECtHR has applied this logic when deciding cases involving defamation.

The infamous *McLibel* case - *McDonald’s Corporation, McDonald’s Restaurants v. Steel and Morris*³⁴ - is perhaps the clearest example of the ECtHR upholding freedom of expression in the face of a SLAPP suit. McDonald’s sued two members of London Greenpeace³⁵ for libel after they took part in the distribution of a six-page pamphlet entitled “What’s wrong with McDonald” and accused the company of “McCancer, McDisease and McGreed.”³⁶ This case holds the record for being the longest trial in English history, lasting 314 days and costing McDonald’s £10 million.³⁷

After their defeat before the highest court in the United Kingdom, and having been ordered by the Court of Appeals to pay McDonald’s £40,000, Steele and Morris filed an application³⁸ to the ECtHR challenging the UK Government’s **policy on legal aid in libel cases**. The Court concluded that there had been a violation of Article 10. Although it is not in principle incompatible with Article 10 in libel proceedings to place the onus on a defendant to prove to the civil standard the truth of defamatory statements, it was considered essential by the Court that when a legal remedy is offered to a large multinational company

³³ See F. Donson, “Libel Cases and Public Debate - Some Reflections on whether Europe Should be Concerned about SLAPPs,” (2010) 19 RECIEL 1 at 88 (citing *Handyside v. United Kingdom* at para.49).

³⁴ *McDonald’s Corporation, McDonald’s Restaurants Limited v. Helen Marie Steel and David Morris*, [1997] EWHC QB 336.

³⁵ London Greenpeace is an unincorporated body and is a separate organization from Greenpeace International or Greenpeace Canada.

³⁶ *Supra* note 34 at [85].

³⁷ *Ibid.*

³⁸ See *Steel and Morris v. United Kingdom*, *supra* note 6.

to defend itself against defamatory allegations, the countervailing interest of free expression and open debate must be guaranteed by providing procedural fairness and equality of arms to the defendants in such a case.

Greenpeace is concerned that there is no provision for legal aid to be provided to victims of a SLAPP action in the ULCC's Model Act. Quebec's recent SLAPP reform, while commendable in many respects, similarly failed to provide for legal aid and therefore suffers from deficiencies in procedural fairness before the courts. If this omission were repeated in Ontario, it would threaten the efficacy of the proposed reform in practice. If we consider a scenario in which an individual is threatened with legal action under any new anti-SLAPP regime, it may well be cold comfort to know that the end of a long, dark legal tunnel comes slightly sooner than before (i.e. if SLAPP suits are somewhat easier to throw out of court) if a defendant is not also provided with adequate legal support at a very early stage in proceedings.

The ECtHR in the *McLibel* decision also “stressed the significant role played by campaigns carried out by such activists”³⁹ and the essential role political expression plays in a democratic society:

[I]n a democratic society even small and informal campaign groups...must be able to carry on their activities effectively and... [there] exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.⁴⁰

³⁹ *Ibid* at para. 89.

⁴⁰ *Ibid* at para. 94.

The *McLibel* case strongly supports Greenpeace's position that in drafting anti-SLAPP legislation, the Ontario government must provide citizens with protection from civil suits that impinge on their right to freedom of expression, even where it is not clear that their conduct is lawful. Grossly disproportionate suits, even in cases where illegality is involved on the part of a defendant, may still have such an impact upon society at large that it will discourage lawful speech elsewhere (as in *Daishowa*) and the type of essential public activities carried out by individuals and their representative organizations (as identified by the ECtHR above).

In short, the definition of "public participation" should be a broad one, fully reflective of Canada and the International Community's evolving recognition of the important work of campaigning civil society organizations and our shared, historical commitment to upholding a freedom of expression that embraces all forms of communication and conduct in relation to issues of public interest.

- B. Civil proceedings are not the appropriate forum to address issues of whether a defendant's conduct is or is not lawful.

The definition of "public participation" should not include the exemption of communication or conduct prohibited by law because civil proceedings are not an appropriate forum to resolve such issues.

Activists who take part in peaceful public participation all too often face subsequent civil litigation. If legislation were based on the ULCC Model Act's definition, it appears that a judge in each alleged SLAPP suit would be required to pronounce whether the defendant's conduct was lawful before the defendant could seek protection under the anti-SLAPP law. This is not desirable as it means (1) substantial work for judges to verify the lawfulness of a

defendant's conduct in each case; and (2) a situation in which a defendant may find their reputation tarnished with a judicial finding of guilt without having had the benefit of a hearing with all procedural safeguards that a criminal trial would offer. This is harmful even if no sanction is imposed, given the potential impact upon a defendant's reputation.

Moreover, there is the very real fear that, should anti-SLAPP legislation require a judge to exclude *prima facie* unlawful conduct, very many actions which on closer scrutiny are found to be either lawful, or which cannot be shown to be unlawful at a criminal trial, shall deprive a defendant of his or her rightful protection from abuses of process. It can be expected that this would be a recurring weakness of any anti-SLAPP legislation which required a judge to make a determination of lawfulness during civil proceedings.

Private parties who believe they are the victim of a criminal offence can call the police and seek to have their property rights respected through government investigation and prosecution. The criminal and not the civil courts have the competence to determine the lawfulness of one's conduct or communication.

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.

“We are here, not because we are law-breakers; we are here in our efforts to become law-makers.” Emmeline Pankhurst, British-Canadian Suffragette (1858 - 1928)

Section 3 of the Model Act is generally a sound basis for anti-SLAPP legislation in Ontario. Greenpeace recommends that Ontario anti-SLAPP legislation provides protection against all tort claims. As noted by Canadian Environmental Law Association lawyer, Ramani Nadarajah, only covering defamation claims,

“would result in SLAPP filers simply commencing a proceeding alleging a variety of other tort claims.”⁴¹ However, Greenpeace is concerned with the comments associated with section 3(2). The comments read: “In determining why an 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 [his or her] views.” Footnote 11 further clarifies that “[f]or 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 cause[d] to the equipment and to stop the defendant from doing so again, and not to limit its freedom of speech.”

Greenpeace agrees that a balance must be struck between protecting public participation and preserving the rights of plaintiffs to pursue legitimate claims in court. However, even if a defendant engages in a form of peaceful protest that results in the plaintiff suffering some damage, such as disruption of operations for a period of time, a plaintiff may nonetheless bring about so grossly disproportionate an action as to dissuade the defendant and other persons from engaging in future public participation.

Given the large number of safety and environmental violations committed by some corporations in the course of carrying out otherwise legal business activities (such as the failure of *Syncrude Canada Ltd.* to render safe its toxic tailings ponds, as discussed below), there are real concerns regarding the perception of fairness and public confidence in the rule of law if future legislation arbitrarily deprives a defendant of all anti-SLAPP protection where that same defendant also incidentally commits a breach of law in the course of what would otherwise be a legal exercise of peaceful public participation.

⁴¹ Supra note 17 at 81 (citing *Grant v. Torstar Corp.*, [2009] SCJ No. 61, at [106]).

Prima facie illegality of a defendant's conduct is therefore not a proper indicator of whether the plaintiff is acting in bad faith or attempting to defeat the ends of justice. Rather, the test should be whether a plaintiff's claim is legitimate in light of a defendant's right to freedom of speech and freedom of assembly, taking into account the danger of disproportionate responses and the effect on the public at large. To highlight this, we put forward three cases: *Gunns v. Marr & Ors*; *Syncrude Canada Ltd. v. Greenpeace Canada*; and *N.V. Abes VV.Z.W v. Greenpeace Belgium*.

A. *Gunns v. Marr & Ors* (Gunns 20)

In 2004, Gunns Ltd. sued 20 environmentalists pursuant to their long-term campaign to protect Tasmanian forests. The action was originally based on two general grounds: disruption of its logging operations and "corporate vilification".⁴² The Gunns 20 case made national and international news and caused significant public outrage against the company.⁴³

Initially, Gunns (Australia's largest forest products company) claimed over AUD\$6 million in damages from The Wilderness Society (one of Australia's largest environmental groups), several high profile Green Party politicians and a collection of community groups and individuals. Gunns also sought injunctions and costs for disruption of their businesses allegedly caused by various tortious actions, including interference with trade or business by unlawful means, wrongful interference with contractual relations, conspiracy to injure, and defamation. After a four-day hearing to consider the defendants' motion to strike the application, the Supreme Court of Victoria found that the statement

⁴² "Lawyers, Gunns and forests," *Sydney Morning Herald*, online: <http://www.smh.com.au/news/National/Lawyers-Gunns-and-forests/2005/01/26/1106415665840.html>.

⁴³ *Ibid*; and see Ogle, *supra* note 4 at 38.

of claim only provided “a collection of very general allegations of wrongdoing by a large number of people over an approximately five-year period from 1999 to about 2004,”⁴⁴ and failed “its fundamental purpose of informing each of the defendants of the case he, she or it has to meet,”⁴⁵ and was therefore “embarrassing.”⁴⁶

After this defeat, Gunns refined its statement of claim to three grounds: a cause of action based on intentional interference with contractual relations; intentional injury to the first plaintiff in its trade and business; and trespass. This approach, however, was equally unsuccessful in court. By January 2010, with millions of dollars spent on fees and after years of legal wrangling, the case was finally settled out of court with Gunns paying the costs of the remaining defendants.⁴⁷

Greg Ogle, former legal coordinator for The Wilderness Society, explained that at the time the:

[T]hreat to free speech arose from the sheer size of the action, which would tie up the defendants in court for years, and from the high profile of many of the targets. It was a clear deterrent to other forest protection activists, but the details of the pleadings also posed specific further threats to public participation. The claims included alleged liability not just for supposedly unlawful protest actions, but further actions that were said to become

⁴⁴ *Gunns Ltd v. Marr* [2005] VSC 251, at [20], online: Supreme Court of Victoria Decisions <<http://www.austlii.edu.au/au/cases/vic/VSC/2005/251.html>>.

⁴⁵ *Ibid.* at para. 28

⁴⁶ *Ibid.* at paras.31, 32, 41, 47 and 57, inter alia.

⁴⁷ See “A Victory for Tasmania’s Forests, A Victory for Free Speech” *Gunns20.org* (2010), online: *Gunns20.org* <<http://www.gunns20.org>>.

unlawful by virtue of being part of an overarching conspiracy or campaign.⁴⁸

Professor Sharon Beder of the University of Wollongong remarked:

‘Gunns already has legal protection – if the roads are blockaded they can and do call the police,’ but their December SLAPP suit ‘goes way beyond the company exercising its legal rights to protect it[s] property. It’s using the civil court for the purpose of intimidating protestors, and shifting the forum from public debate to private court action – a situation where the corporation has far more resources.’⁴⁹

The Gunns 20 case is a good example of public activities - such as peaceful blockades and on-site occupations - being the subject of a bad-faith claim by a corporation intending to defeat the ends of justice by attacking freedom of expression. A number of British lawyers rallied to support the defendants in a 2006 letter published in the Guardian: “[w]e believe that the use of legal proceedings against peaceful protesters amounts to an attack on basic civil liberties, in particular freedom of speech and freedom of assembly. If successful, the legal action would not only financially cripple the individual defendants, but would have a far-reaching and chilling impact upon the freedom of individuals to protest.”⁵⁰ The Gunns 20 case sends warning signals that illegality of a defendant’s conduct, if such conduct takes the form of non-

⁴⁸ Supra note 4 at 38.

⁴⁹ Tom Price, “Fighting the Big Gunns in Tasmania,” *CorpWatch* (14 March 2005), online: CorpWatch <<http://www.corpwatch.org/article.php?id=11955>>.

⁵⁰ Owen Davies QC et al., “Tasmanian Action Threat to Basic Rights,” *The Guardian* (3 April 2006), online: Guardian <<http://www.guardian.co.uk/world/2006/apr/03/australia.mainsection>>.

violent direct action and peaceful protest, should not be solely determinative of the justifiability or proportionality of a plaintiff's civil case.

B. Syncrude Canada Ltd. v. Greenpeace Canada

Greenpeace has been using non-violent direct action and other forms of peaceful public participation to expose global environmental problems and their causes for almost 40 years. For example, the organization uses safe and non-violent techniques in conducting its opposition to corporations in the Alberta tar sands that are causing harm to local human and environmental health. As an organization, we bear witness to such environmental abuse, in a manner following the Quakers, Mahatma Gandhi and Martin Luther King, Jr. This means that the main purpose of Greenpeace protests is to focus as much national and international attention on environmental issues of public interest as possible, **not** to cause damage to polluting companies. Despite our commitment to non-violent principles, protests have resulted in civil litigation involving excessive claims for damages and requests for permanent injunctions.

Syncrude Canada Ltd.'s current claim against Greenpeace is of relevance, highlighting the ability of a corporation to simultaneously commit legal infractions and take civil action against peaceful protestors for seeking to shine a light on the impact of these infractions. On July 24, 2008, Greenpeace activists carried out a peaceful protest at one of Syncrude's toxic containment lakes located outside of Fort McMurray. This is the same toxic lake where approximately 1,600 water fowl died when protection devices failed, resulting in a guilty verdict against the oil giant.⁵¹ Greenpeace activists hung a banner

⁵¹ On June 25, 2010, Alberta Provincial Court Judge Ken Tjosvold ruled Syncrude Canada Ltd. was guilty of failing to properly protect waterfowl at its oil sands mining operation in a trial tied to the death of 1,606 migratory ducks in the spring of 2008. See "Syncrude Found Guilty in Duck Deaths," *Financial Post* (25 June 2010), online: Financial Post <<http://www.financialpost.com/news/Syncrude+found+guilty+duck+deaths/3202401/story.htm>

from the side of a pit forming the lake and hung another banner at the end of a pipe pouring pollutants into a containment pond. Eleven people were arrested and each was issued a \$287 ticket for trespass.

On August 21, 2008, Syncrude initiated legal proceedings against Greenpeace and the activists seeking interim and permanent injunctions, \$20,000 in general damages, \$100,000 in punitive damages, and costs. This legal proceeding requires our organization to expend substantial financial and human resources. It also sends a message to local aboriginal communities directly affected by the toxics lakes, and other NGOs opposing current development in the tar sands, that if you raise your voice, you will get SLAPPED.

Greenpeace conducted the peaceful protest in order to bring to the public's attention the ongoing environmental harm caused by the illegal conduct⁵² at the tailings pond and the broader need to stop further tar sands development in light of climate change and other concerns. One Syncrude representative was quoted saying that the "incident did not interfere with its operations,"⁵³ and Tom Katinas, Syncrude's chief executive, stated: "While we encourage debate and dialogue about the environmental impacts of oil sands development, we do expect it to be conducted in a lawful and professional manner."⁵⁴ In contrast, Associate Professor of Law at the University of Alberta, Moin Yahya, took an interest in the case, asserting "It's a strategic lawsuit,"⁵⁵ suspecting that "the company isn't interested in collecting damages, but keeping the activists off its site." He further explained, "If the court grants the

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⁵² *Ibid.*

⁵³ "Greenpeace Protest Targets Syncrude's Oil Sands Mine," *Reuters* (24 July 2008), online: Reuters <<http://www.reuters.com/article/idUSN24450724>>.

⁵⁴ *Ibid.*

⁵⁵ "Syncrude sues Greenpeace, 11 members," *Calgary Herald* (23 August 2008), online: Canada.com <<http://www.canada.com/calgaryherald/news/story.html?id=1eda3ea7-5717-4a5f-ac33-9aaaab1da108>>.

injunction and the group defies it, they're no longer at war with Syncrude - now they're at war with the judge and in contempt of court.”⁵⁶

If a court were to apply the comments interpreting the Model Act to a similar case in Ontario case, there could be a finding that (1) the act would not apply because the Greenpeace activists trespassed onto Syncrude's property, and (2) even if it did apply, Syncrude may not be acting in bad faith by bringing the claim because the Greenpeace activists disrupted the operations at the tailings pond. In reality, Syncrude's excessive damage claim based on the unfurling of two banners strongly suggests that it is attempting to deplete or exhaust Greenpeace's resources and dissuade the organization and others from protesting its activities. Like the Gunns 20 case, Syncrude's claim sends warning signals that minor illegality by a defendant, if such conduct took the form of non-violent direct action and peaceful protest, should not be solely determinative of a plaintiff's bona fides and justification in bringing a civil case.

C. *N.V. Abes VV.Z.W v. Greenpeace Belgium*

Greenpeace has been subjected to civil suits in various other jurisdictions resulting from peaceful protests. The ruling of the Antwerp Court of First Instance in the case of *N.V. Abes VV.Z.W v. Greenpeace Belgium* is particularly helpful, resulting as it did in a finding that that Greenpeace did not have to pay damages resulting from a non-violent direct action that temporarily stopped the unloading of timber from the Cameroon because the activists had a right to demonstrate, derived from Article 10 and 11 of the ECHR, and exercised this

⁵⁶ *Ibid.*

right in the least harmful manner.⁵⁷ Thus, the Court ruled that the logging company's claim for damages was unfounded.⁵⁸ The court explained:

In this case, it is irrefutable that the demonstration temporarily interrupted the trade activities of a company. Granting a right to demonstration only makes sense if people also accept that the demonstration is carried out without the threat of a significant bill for damages, because this would serve to silence an organisation such as the defendant's. **In this sense, it would be absurd to state that the defendant could achieve the same result with a press file as it could with a more noticeable demonstration** (emphasis added).⁵⁹

Consequently, it is unnecessary for a demonstration to have a long duration in view of the objective: to focus attention on the problem of the exploitation of the tropical rain forest in Africa and to do this in a way that appeals to the public.⁶⁰

The Court of First Instance recognized that the plaintiff company's trade activities were disrupted for a period of time, but the actions of Greenpeace were justifiable in a democratic society because the activists involved were bringing attention to an important issue of public interest and the demonstration ended as soon as the objective of the protest was achieved. This nuanced legal test ought to be of great interest to the Advisory Panel and stands in marked contrast to a potentially arbitrary distinction between *prima facie* legal and non-legal protest activities in Ontario's anti-SLAPP legislation.

⁵⁷ *N.V. ABES V V.Z.W. Greenpeace Belgium*, case number 99-6628-A.

⁵⁸ *Ibid.* at page 7.

⁵⁹ *Ibid.* at page 4 [7].

⁶⁰ *Ibid.* at page 5 [1].

There is also the significant issue of an imbalance of arms otherwise existing between corporations and citizens in the public sphere, as highlighted in the court's finding above. If individuals' freedom of expression is to be limited in future to issuing press releases which are unable to engage the public attention, and creative peaceful protests are to be subjected to SLAPP actions on the grounds that they involve possible illegality, then the role of the concerned citizen and her representative organizations in public debate is very limited indeed. Anti-SLAPP legislation in Ontario must be cognizant of this danger.

Even though Section 3(2) of the Model Act does not explicitly bar a determination of abuse of process if a defendant acted illegally to express its views, the legality of a defendant's conduct is not relevant to such a determination, as long as the defendant's conduct concerned a matter of public interest and was executed peacefully. For all of these reasons, Greenpeace recommends that the reasoning associated with section 3(2) not be employed in an Ontario anti-SLAPP law.

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.

Greenpeace recommends that reverse onus on a SLAPP initiator should be included in anti-SLAPP legislation. We recommend that in demonstrating that a proceeding is not excessive or unreasonable and is justified in law, the initiator should have to address whether a defendant's conduct falls under the definition of public participation and whether the litigation is intended to generally deter public participation.⁶¹ This is essential to ensure that the

⁶¹ See supra note 17 at 81-82.

defendant's right to freedom of expression is protected and to guarantee in public the right to freely air concerns in a democratic society.

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.

Greenpeace recommends that the Advisory Panel propose the language in 8B and should extend it to apply for other common torts causes of actions used to deter public participation.

If properly drafted, defamation law serves a legitimate purpose. However, it is unacceptable for corporations to suppress truthful information about their activities. Such a regime would not advance the public interest. Therefore, Greenpeace supports the language of 8B which imposes a suitable barrier to defamation suits - requiring the plaintiff to demonstrate a *prima facie* case, without barring larger corporations from setting the record straight if their reputation is genuinely falsely tarnished.

The Gunns 20 case is an example of why the language in 8B should be extended to apply to other common tortious causes of actions used to deter public participation. Greg Ogle commented that the case was significant not only because of the mass public attention it garnered, but also because it signaled a

new trend in Australia SLAPP suits - companies moving away from the use of defamation claims towards the use of claims brought under commercial and industrial laws.⁶² “Torts of interference with trade or with contracts, trespass or nuisance, and actions under trade practices legislation have become the new SLAPP suits.”⁶³ This trend is also evident in Canada (e.g. *Syncrude v. Greenpeace Canada*) and should be taken into account when drafting Ontario’s anti-SLAPP legislation.

Conclusion

In conclusion, Greenpeace requests that the Advisory Panel take the following recommendations into serious consideration in providing advice on the drafting of anti-SLAPP legislation in Ontario:

- Ontario anti-SLAPP legislation should seek to protect citizens’ rights to freedom of expression and assembly which are entrenched in the Canadian Charter of Rights and Freedoms.
- In order to uphold equal participation in the public arena, this protection should also be extended to representative organizations.

⁶² See Ogle, *supra* note 4 at 39.

⁶³ *Ibid.*

- Ontario anti-SLAPP legislation should state its intention to uphold substantive rights to freedom of expression and assembly against private parties such as wealthy corporations.
- The Government has a responsibility to ensure that the rights to freedom of expression and assembly, including non-violent direct action and peaceful protest, are covered under the definition of “public participation” in Ontario anti-SLAPP legislation. There are occasions when peaceful public participation, which is recognized as essential in a democratic society, results in unlawful acts which may form the basis of a disproportionately oppressive lawsuit that intimidates others into silence. Conduct which falls within the definition of “communication or conduct prohibited by law” can be partly or wholly “saved” by the rights to freedom of expression and assembly.
- A plaintiff may be acting in bad faith or attempting to defeat the ends of justice even where a defendant’s conduct involves minor illegality. The test for legitimacy should be whether the plaintiff’s claim is legitimate in light of the defendant’s rights to freedom of speech and assembly and in light of broader concerns such as the possible chilling effect on society at large and the ability of individuals to participate on an equal basis with corporations in the public sphere.
- Courts presiding over civil actions do not provide an appropriate forum for determining the legality of a SLAPP victim’s conduct, given a) the burden this would place on judges, b) the potentially severe impact of such a finding on a defendant in the absence of a criminal trial’s procedural safeguards and c) the possibility that such conduct may ultimately be found not to be illegal at a full criminal trial.

- Given the trend towards corporate SLAPP actions based on any number of torts, Greenpeace suggests that anti-SLAPP legislation should not only provide a barrier against defamation actions, but also against other common torts used by corporations to dissuade public participation. The need for this wider application is intensified in consideration of the variety of ways in which individuals and their representative organizations participate in the public sphere and the freedom of assembly which are also threatened by SLAPP actions.
- Providing legal aid to victims of SLAPP lawsuits is essential to secure procedural fairness and equality of arms in proceedings.

Greenpeace is grateful for this opportunity to provide input to the Advisory Panel. We would be more than happy to take part in any public meetings regarding this matter or respond to any questions or comments the Advisory Panel has in regard to our submission. Please do not hesitate to contact us.

Respectfully,

Bruce Cox
Executive Director
Greenpeace Canada