ANTI-SLAPP LEGISLATION IN THE U.S. AND CANADA

Justice and Environment 2022

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Introduction

Justice and Environment (J&E) is participating in a European anti-SLAPP NGO coalition called CASE (www.the-case.eu) in order to investigate legal challenges faced by environmental activists and other watchdogs throughout Europe. Significant research has been published on this topic already and J&E would also like to contribute to the analysis of SLAPPs via its own means.

A SLAPP case consists of four components:

* legal proceedings (generally civil lawsuits but also criminal complaints where these can be pursued privately)

* filed by a private party (generally corporations or wealthy individuals, including government officials acting in a private capacity)

* with the intent to silence another private party (generally activists, journalists, NGOs, or other public watchdogs)

* in response to acts of public participation (including advocacy or criticism).

SLAPP cases in the United States

What is a SLAPP in those laws?

SLAPP suits are lawsuits against public participation that are brought not to win but to use litigation to intimidate opponents' exercise of rights of petitioning and speech. SLAPP suits are filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned.

As of April 2022, "32 States and the District of Columbia have anti-SLAPP laws."[1] The protections of anti-SLAPP laws vary by state. The majority intended to protect the exercise of the constitutional rights of freedom of speech and petition. "Arizona's law only protects defendants from cases brought in relation to petitioning the government."[2] Several states' anti-SLAPP laws award the defendant attorney fees if their motion is successful. Most states provide the option for an early motion to strike the case, however Virginia's law does not.[3]

[1] Sarah Matthews and Austin Vining, "Anti-Slapp Laws Introduction - Reporters Committee," The Reporters Committee for Freedom of the Press, 17 June 2022, https://www.rcfp.org/introduction-anti-slapp-guide/

[2] Matthews and Vining, "Anti-Slapp Laws Introduction - Reporters Committee."
[3] Matthews and Vining, "Anti-Slapp Laws Introduction - Reporters Committee."

Washington and Kentucky have enacted models of anti-SLAPP legislation. Washington and Kentucky passed the Uniform Public Expression Protection Act (UPEPA). This law applies to suits based on a "person's exercise of speech, press, assembly, petition, and association rights on a matter of public concern."[4] This law avoids the problem of violation of the right to a trial by jury, for it adopted existing summary judgment and dismissal standards.[5]

New York expended its anti-SLAPP laws in 2020 to cover cases involving any "communication in a place open to the public or a public forum in connection with an issue of public interest or any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest."[6] Previously the law only covered "cases brought by plaintiffs seeking public permits, zoning changes, or other entitlement from a government body."[7]

In 2019, Texas amended its anti-SLAPP law that requires the claim be narrowly "based on" or "in response to" the exercise of either the right of free speech, petition, or association.[8] The amendment abandoned the protection for speech regarding trade secrets or non-compete agreements.

The United States does not have a federal anti-SLAPP law. There is a split decision in the federal district courts as to whether state SLAPP laws should apply in federal courts.[9] Some circuits believe that state SLAPP laws should not apply because they conflict with the Federal Rules of Civil Procedure 12 and 56.[10] In diversity cases the Erie doctrine applies to the decision to use State SLAPP laws or follow federal procedure.[11]

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[4] Matthews and Vining, "Anti-Slapp Laws Introduction - Reporters Committee."

[5] Anti-SLAP motions and summary judgment govern a motion to dismissal. A moving party makes a motion of summary judgment before the start of the trial, but after fact finding. The purpose of the motion is to ask the court to dismiss the case for a lack of a disputed issue. In an anti-SLAPP motion the court makes a pretrial factual finding to determine if the case should stand. By following summary judgment standards, the Washington law allows for fact finding to take place before the motion to dismissed is considered. (Tyler J. Kimberly, "Note: A SLAPP Back on Track: How Shady Grove Prevents the Application of Anti-SLAPP Laws in Federal Courts," 65 Case Western Reserve Law Review 1201.)

[6] Matthews and Vining, "Anti-Slapp Laws Introduction - Reporters Committee."

[7] Matthews and Vining, "Anti-Slapp Laws Introduction - Reporters Committee."

[8] Matthews and Vining, "Anti-Slapp Laws Introduction - Reporters Committee."

[9] Charles Hogle and Shannon Jankowski, "SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws." Americanbar.org, American Bar, 16 Mar. 2022, https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws/

[10] Hogle and Jankowski, "SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws."

[11] The Erie Doctrine is used to determine when "state substantive law and federal procedural law apply in diversity cases." This has caused confusion as to a consensus on the use of anti-SLAPP laws in federal courts.

In Planned Parenthood Federation of America, Inc v. Center for Medical Progress, the Ninth Circuit stated that a federal district court should use federal procedures for a motion to strike.[12] Other circuit courts have not allowed a SLAPP motion in the federal court.

What are the conditions of early dismissal?

Defendant must move for a special motion to strike the case pursuant to an anti-SLAPP statute. This motion can be made before trial. The motion to dismiss must be within a specific time. In Arkansas, along with other jurisdictions, "if a motion to dismiss is not filed contemporaneously with the pleading, the ability to file an anti-SLAPP motion to dismiss is waived."[13]

Most states use the following steps to determine if an anti-SLAPP motion to strike the case will succeed. First, the defendant needs to make a showing that the challenged cause of action arises from an act in furtherance of the right of petition or free speech in connection with a public issue. If the defendant meets this requirement the burden shifts to the plaintiff who must demonstrate a probability of prevailing on the action. In its evaluation the court will consider "readings and affidavits supporting the contentions of the opposing sides."[14] A few jurisdictions allow "for special discovery and a hearing on the motion." If the plaintiff does not satisfy the burden requirement the court will strike the cause of action.

SLAPP Cases in Canada

What is a SLAPP in those laws?

Quebec, Ontario, and British Columbia are the only Canadian provinces with anti-SLAPP legislation.

Quebec was the first Canadian province to successfully pass an anti-SLAPP law. The legislation passed Bill 9, the anti-SLAPP law, with the understanding it was to address the issue of abusive prosecutions and abusive judicial process.[15] The real focus of this law is improper proceedings. The law does address the issues of SLAPP although it is not limited to these

[12] Hogle and Jankowski, "SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws."

[13] Tyler J. Kimberly, "Note: A SLAPP Back on Track: How Shady Grove Prevents the Application of Anti-SLAPP Laws in Federal Courts," 65 Case Western Reserve Law Review 1201.

[14] Kimberly, "Note: A SLAPP Back on Track: How Shady Grove Prevents the Application of Anti-SLAPP Laws in Federal Courts,"

[15] Normand Landry, "From the Streets to the Courtroom: The Legacies of Quebec's anti-SLAPP Movement," p 13, https://r-libre.teluq.ca/988/1/From%20the%20Streets%20to%20the%20Courtroom%20Final_sent.pdf

issues. “Quebec’s law broadens its range of application to reprehensible legal practices that might not have any relation to citizens participation in public debate.”[16]

The Protection of Public Participation Act is the anti-SLAPP law in Ontario. Ontario’s Anti-SLAPP legislation is primarily engaged in defamation actions, it is also applicable in other types of claims, such as breach of contract or negligence.

In 2019 British Columbia passed a similar act to Ontario’s, also called *Protection of Public Participation Act*. This legislation is almost identical to Ontario’s. When an anti-SLAPP motion is made, the court is “required to determine whether the defendant’s expression relates to a matter of public interest.”[17] The Act does not require a judgment on the merits of the claim. Part of the analysis that takes place is to determine whether “the harm suffered by the plaintiff outweighs the public interest in protecting the defendant’s expression.”[18]

What are the conditions of early dismissal?

The procedure under the law in Quebec differs from the other provinces. Under s. 54.1 of the Code, a request of improper pleadings can be made by a party or the court itself.[19] If the court finds the action to be improper it may dismiss the action. Once a case is found to be improper the burden of proof shifts to the plaintiff. The plaintiff must prove the proceedings are not excessive or unreasonable and are founded in law.

Quebec's law allows the court to require the plaintiff to pay the other party a provision for the costs of the proceeding. Punitive damages may also be awarded. Lastly the law allows the court to issue sanctions on the legal staff of the plaintiff.

Under the law in Ontario and British Columbia the anti-SLAPP legislation allows for individuals to have lawsuits against them dismissed at a very early stage if that lawsuit qualifies as a SLAPP. The defendant can motion to dismiss at any time after a proceeding is commenced (even before they have filed a statement of defense). The *Protection of Public Participation Act* includes costs provisions whereby a defendant who successfully brings a SLAPP motion is entitled to recover full indemnity costs from the plaintiff.

The Supreme Court of Canada (“SCC”) heard a pair of cases that led to a revision of the anti-SLAPP legislation. In *Ontario Ltd. v. Pointes* protection Association, the parties entered a contract that Pointes would not have the ability to oppose a new development. When Pointes’s president spoke at an Ontario Municipal Board hearing, Ontario Ltd. brought suit against them.

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[16] Laundry, “From the Streets to the Courtroom: The Legacies of Quebec’s anti-SLAPP Movement,” p 14

[17] Douglas Eyford, “B.C.’s Anti-SLAPP legislation Put to the Test,” *Eyford Partners LLP*, 19 Mar. 2021, https://eyfordpartners.com/b-c-s-anti-slapp-legislation-put-to-the-test/.

[18] Eyford, “B.C.’s Anti-SLAPP legislation Put to the Test”

[19] Landry, “From the Streets to the Courtroom: The Legacies of Quebec’s anti-SLAPP Movement,” p 14

SCC ruled in favor of Pointes. The court noted that Ontario "had not established that the testimony given before the tribunal had caused it any harm."[20]

In *Bent v. Platnick* the SCC juggled the competing public interest with harm suffered by a plaintiff. Platnick, a doctor, brought a defamation suit against Bent, a lawyer, who regularly represented accident victim Platnick assisted. Bent sent an email alleging that Platnick altered doctors' reports. This email was leaked and published in a magazine.[21] The court ruled in favor of Platnick. SCC found that Platnick showed there was substantial merit. The email had a high public interest in warning other lawyers of similar situations. The email had a low public interest where it referred specifically to Platnick. The majority stated that naming the plaintiff in the email was not necessary to satisfy the defendant's goal.[22] The action by the defendant could reasonably lead to significant harm on the plaintiff. The harm outweighed the public interest present in this case.[23]

In *Pointes* Justice Côté developed a three-step test from determining whether to grant a motion to dismiss a SLAPP case. Step one has a two-pronged analysis that the defendant must establish. First that the proceeding arises from an expression made by the defendant. Second, the expression relates to a matter of public interest. To determine if there is a public interest the court asks, "whether some segment of the community would have a genuine interest in receiving information on the subject." Step two, the burden shifts to the plaintiff to show the claim could reasonably succeed. The plaintiff's job is to show that the harm caused by the expression outweighs the public interest. If the plaintiff fails, this step the claim will be dismissed. Under Ontario's anti-SLAPP law if the motion to strike is successful the defendant is eligible for full recovery of their legal costs. The defendant could also receive damages if the judge finds the lawsuit was brought in bad faith or for an improper purpose.

The *Protection of Public Participation Act* passed by British Columbia follows these same procedures for a motion to strike a case.

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[20] Andrew Carlson and Mathew Milne-Smith, "Canada's Top Court Provides Guidance on SLAPPs," DAVIES, 21 Sep. 2020, https://www.dwpv.com/en/Insights/Publications/2020/Canadas-Top-Court-Provides-Guidance-on-SLAPPs

[21] Carlson ad Milne-Smith, "Canada's Top Court Provides Guidance on SLAPPs"

[22] Graham Buitenhuis, Kevin O'Brien, and Karin Sachar, "Supreme Court rearticulates test under Ontario 'anti-SLAPP' legislation," Osler.com, 14 Sep. 2020, https://www.osler.com/en/resources/critical-situations/2020/supreme-court-rearticulates-test-under-ontario-anti-slapp-legislation

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