

News

Proposed SLAPP curbing law gets mixed reviews

CHRISTOPHER GULY

The Ontario government's proposed legislation addressing strategic lawsuits has garnered mixed reaction from lawyers, who see it as either strengthening freedom of expression and the democratic process, or unfairly blocking people or companies from bringing forward valid claims.

Earlier this month, Ontario Attorney General Madeleine Meilleur re-introduced the *Protection of Public Participation Act* that was tabled last year by her predecessor, John Gerretsen. The act was inspired by a 2010 advisory panel report but died on the order paper when the 2014 election was called.

Bill 52 would crack down on "intimidation tactics" used through SLAPPs (strategic litigation against public participation) to "silence one's opponents," said Meilleur's press secretary, Christine Burke. She said if passed, the legislation would minimize "the emotional and financial strain on defendants, as well as the waste of court resources," and "strikes a balance that will help ensure abusive litigation is



stopped but legitimate actions can continue."

Ramani Nadarajah, counsel with the Toronto-based Canadian Environmental Law Association (CELA), supports the bill and said if passed into law it would ensure SLAPPs or gag proceedings are quickly identified through several fast-track mechanisms.

According to Bill 52, a motion to dismiss a proceeding must be heard within 60 days after it is filed, and cross-examination of any documentary evidence filed by the parties shall not exceed seven hours each for the plaintiffs and defend-

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The proposed law would ensure that people who express their views in the democratic process aren't targeted with frivolous lawsuits and can continue to make bona fide statements about matters of public interest, and that courts aren't clogged up with bad-faith litigation.

David Sterns
Sotos LLP

ants—though a judge can extend that time "if it is necessary to do so in the interests of justice."

A judge shall dismiss a lawsuit if the defendant satisfies the judge

the proceeding "arises from an expression made by the person that relates to a matter of public interest." But a judge won't dismiss a suit if it has "substantial merit" and the moving party has "no valid defence...and 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."

Nadarajah said that SLAPPs have had a "chilling impact" on public participation. She said CELA clients, who previously would have publicly commented on government-issued permits to companies, have been dissuaded due to the prospect of legal fees and costs associated with being sued for defamation, the most common claim in a strategic lawsuit. (She noted the anti-SLAPP bill doesn't create a "licence to defame" any individual or organization. Ontario's *Libel and Slander Act* was amended to include a "qualified privilege" on communication between two or

more people regarding matters of public interest).

Still, Bill 52 would stop the SLAPP scenario played out in recent cases such as developer Geranium Corp. launching five lawsuits (eventually dismissed or withdrawn) that sought over \$100 million in damages from 12 defendants as a result of their opposition to its billion-dollar resort project at Big Bay Point along Lake Simcoe. Had the legislation been enacted four years ago, now-former Aurora, Ont., mayor Phyllis Morris would not have been able to sue several people, including three bloggers, for defamation during her re-election campaign. She later abandoned the suit. The Ontario Superior Court awarded two of the bloggers their defence costs because it was a SLAPP, the first time a court in the province made such an acknowledgment.

Ontario Bar Association second vice-president David Sterns, who also served on the OBA's anti-SLAPP working group, said that corporations or individuals who are "control freaks with a lot of money" **Voted down, Page 22**

Noel: 'Diminished status' does not serve Quebec well

Continued from page 2

observed. "Nothing could be further from the truth.

"Quebec cannot relish the thought that those who fill a place reserved for Quebec on the Federal Courts now have a diminished status when compared to that of the judges from the other provinces. Only those who wish to see Quebecers and Quebec disengage from, not to say leave, federal institutions, can rejoice at the demotion of the judges from Quebec."

He wondered "how can one explain to a Quebec candidate, approached to fill a vacancy in our court, that he will be appointed for his civil law training and as a representative of Quebec, but that he will be deemed to no longer have those qualities under the *Supreme Court Act* from the moment he is sworn in? How to explain, in the same vein, that having been a member of the Quebec bar for over 10 years he qualifies as a potential appointee to the Supreme Court, but that he will lose that possibility from the moment he becomes a member of our court?"

Given that only three Quebec jurists in a generation are appointed to the Supreme Court, the concern "relates more to symbols than reality," Chief Jus-

tice Noel acknowledged. But "institutional respect for judges depends on symbols. When those symbols are undermined for a class of judges, respect may be harder to maintain."

He stressed that three of nine seats on the Supreme Court are reserved for Quebec for the same reasons that at least four of 11 seats on the Federal Court of Appeal, and 10 of 30 seats on the Federal Court, are reserved for Quebecers. On all three courts, these judges represent Quebec's language and civil law tradition.

Addressing widespread suggestions in the media that Quebec judges on the Federal Courts are insufficiently familiar with civil law and connected with Quebec social values to represent Quebec, the chief justice noted that the Federal Courts apply the civil law in the gamut of cases, including civil liability, tort, construction of contracts, easements, sales, property rights, employment, unjust enrichment, estates, trusts, property law, family law and more.

"I apologize for going on so long but there's nothing like a reality check," he told the Barreau. "Not only do we deal with civil law, but we see our role as its champions when applying federal legislation in Quebec."

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News

Fineblit made big move to private practice

GEOFF KIRBYSON

If Allan Fineblit was ever going to leave his post at the Law Society of Manitoba, he figured it was the perfect time.

As the CEO of the legal profession's provincial regulator for 16 years, by last fall Fineblit had overseen a number of important changes that he felt has positioned it well for the future. They included the development of a progressive strategic plan as well as changes in governance, including election of benchers and adding some public representation to the society's board.

"I could have kept going but that's exactly why it's a good time to go. You want to leave when everybody is sad to see you go. Everything is going really well so get out before they hate you," he said with a laugh.

Fineblit's last day on the job was October 31. Kristin Danger-

Profile



Fineblit

field took over the job.

He joined Thompson Dorfman Sweatman, one of Winnipeg's biggest law firms located just a few blocks away from the law society's offices.

Fineblit, called to the bar in 1974, hasn't been in private practice since the beginning of his law career. He spent a few years at

Buchwald Asper Henteleff, followed by 20 years with Legal Aid Manitoba. Then he spent a couple of years as the assistant deputy attorney general for Manitoba in the mid-1990s before being appointed CEO at the law society in 1998.

Fineblit feels the legal profession is in considerably better shape than when he first took office. For example, he's proud of the fact lawyers in Manitoba and throughout the country have national mobility and can practise anywhere across the country.

"When I started, lawyers practised in one province. Now a lawyer can practise anywhere in Canada. That's a big change," he said.

But the situation is far from perfect and there is still work to be done. Fineblit said practice management continues to be a challenge for many lawyers so the law society is doing its best to

help lawyers pay attention to costs, revenue and the bottom line.

"Running a law firm is running a business. Lawyers who are not making a (sufficient) living don't know how to make a business plan. They don't make the income they want and that can lead to taking shortcuts or, in a worst-case scenario, stealing client money," he said.

Another problem is the diminishing number of rural lawyers and the growing challenge of recruiting lawyers to smaller centres, he said.

Providing legal services to people who are too well off to qualify for legal aid but too poor to pay the full freight remains an issue but the law society has taken a couple of initiatives on that front, too, including starting up a family law access centre a couple of years ago.

"We have to be proactive in the

way we protect the public. There can be no more of this reacting when things go wrong and then trying to make it right. Let's regulate in a way that prevents problems from arising," he said.

The sheer volume of law has grown dramatically over the years, too. When he first took over at the LSM, it was easy to keep up with the changes in the law.

"Now there are 10,000 new cases each month so it's impossible to keep up without tools. We've built up a national virtual library (CanLII) which contains every decided case and statute and anybody can go there and search the law," he said.

Fineblit said he doesn't have any regrets about his move.

"I have a really exciting opportunity at my new firm before me. They're been really interested in the skills that I bring in practice management and ethics," he said.

Galati: Lawyer criticizes ruling on costs in constitutional challenge as 'absurd'

Continued from page 1

ney General nor other defendants in the Federal Court case, nor the nature of the case itself, justified solicitor-client costs.

"He says...[solicitor-client costs] are only granted in the most exceptional rare cases," Galati told *The Lawyers Weekly*. "Well, I can't think of a more exceptional and rare case...because it's never happened in the entire history of Confederation that a Supreme Court judge's nomination has been challenged, never mind challenged successfully. So if that's not a rare case, what is?"

Justice Zinn agreed with the federal government that the bills submitted by the two lawyers were "excessive." Galati submitted a \$51,706 bill including HST (56

hours plus disbursements, at \$800 per hour) while Slansky billed \$16,769 (15 hours at the same rate, and also including HST).

Instead, the judge awarded the pair a total of \$5,000, remarking that "very little work" had to be done on the Federal Court challenge they launched, because it was overtaken by the federal government's reference to the Supreme Court.

"The mere filing of it appears to have had the desired result," Justice Zinn said. "However, I accept that but for the applicants commencing this application, it was unlikely that the Reference would have occurred. At the time the application was filed, there was no apparent objection made to the appointment of Justice Nadon on

constitutional grounds by any person or government. To that extent, one could argue that the applicants have done Canada a service and should not be out of pocket in so doing."

University of Ottawa law professor Carissima Mathen called the lump sum awarded by the judge "odd, both in terms of the trivial amount, and the fact that it was arrived at without any real explanation. Given that the court itself acknowledged that Galati had done the country 'a service,' I think party and party costs, or an award limited to disbursements, would have been more reasonable."

"We got \$2,500 each, minus HST, minus disbursements, so we got nothing," Galati said. "It's an absurd decision that's based on

people holding positions of privilege with the attitude that 'the Constitution belongs to the government and you should mind your business'—that's what that judgment says to me, and that includes Justice Zinn. It's just an offensive decision to make."

Galati and Slansky moved for solicitor-client costs on the basis that "where a private citizen brings a constitutional challenge to legislation and/or executive action, going to the 'architecture of the Constitution,' from which he/she derives no personal benefit, *per se*, and is successful on the constitutional challenge, that he/she is entitled to solicitor-client costs of those proceedings, as to deny those costs constitutes a breach of the

constitutional right to a fair and independent judiciary."

Justice Zinn said there was no authority for that proposition. Solicitor-client costs awards are "exceptional" and none of the circumstances made this a case deserving the highest award of costs, he concluded.

"Although the application would have involved complex issues of law and have been of importance to the judicial system and the constitution of Canada, the application was derailed and supplanted by the Reference. As such, very little work needed to be done on the application by the applicants."

Because they were interveners, and not parties, in the *Nadon Reference*, Galati and Slansky did not get costs in that forum either.

Voted down: Radnoff says Bill 52 as drafted is 'terrible'

Continued from page 3

could use litigation to "punish" their critics or opponents.

"A defendant trying to get out of it will have to contend with the court system, while the plaintiff bringing the SLAPP will have more resources and can use the courts to inflict harm on a potentially innocent defendant," explained Sterns, a class action lawyer with Sotos LLP in Toronto.

"The proposed law would ensure that people who express their views in the democratic process aren't targeted with frivolous



Radnoff

lawsuits and can continue to make bona fide statements about matters of public interest, and that courts aren't clogged up with bad-faith litigation."

However, Toronto commercial litigation and defamation lawyer Brian Radnoff believes Bill 52 is "terrible" as drafted.

"If the defendant brings a motion to have a claim dismissed, that motion stops the action in its tracks," said Radnoff, who leads the appellate advocacy practice group at Lerner LLP.

"For example, an abortion clinic

wouldn't be able to bring an injunction motion against protesters preventing patients access to the clinic if the protesters brought a motion under the legislation."

He added that individuals, such as high-profile businesspeople or politicians, might have significant difficulty in suing for defamation because of the "public interest" provision. "A fair-comment defence might be enough to have the action struck," he said.

Radnoff would rather see the test used in securities legislation regarding a secondary-market

claim where an action requires "some merit" before obtaining court approval to proceed.

But as he pointed out, Bill 52 places the onus on the plaintiff to demonstrate the proceeding has "substantial merit" and there is no "valid defence," which "seems like a higher threshold than a motion to strike and more like a summary judgment motion."

"This bill will hurt people and companies who have valid claims and might have unintended effects the drafters of the legislation never intended."