CCLISAR

realizing law's potential to respond to sexualized violence

ABSOLUTE PRIVILEGE, ANTI-SLAPP SUITS & LAWSUITS AGAINST SEXUAL VIOLENCE SURVIVORS

Backgrounder for Workshops Hosted by CCLISAR
March 21, 2023 & March 28, 2023

PLEASE CITE AS:

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A. ABOUT CCLISAR

The Canadian Centre for Legal Innovation in Sexual Assault Response (CCLISAR) is a charitable, non-partisan organization that seeks to better understand (so that we can better address) the gap between Canada's seemingly progressive legal regime and its effects on the social problem of sexual harm and the experiences of survivors of sexualized violence.

CCLISAR's past projects, such as on the emergence of legislation regulating or prohibiting Non-Disclosure Agreements (NDAs) in the settlement of sexual violence claims, can be found on the CCLISAR website, here. CCLISAR's reviews, including its independent review of campus sexual violence policies and practice for various universities in Canada, can be found here.

B. THE NATURE OF THE PROBLEM

CCLISAR has observed that in the past approximately 10 years, and particularly post #MeToo, there has been a rise in defamation and malicious prosecution lawsuits (and cease and desist letters/threatened lawsuits) against sexual assault survivors who disclose or report their experiences of sexual harm.

Some of these lawsuits involve survivors who have disclosed sexualized violence on social media (e.g. twitter, Facebook or other internet platforms), targeting not only survivors who have identified their abuser by name, but also survivors who have not named the perpetrator.[1]

[1] See for example: *Deeb v Zebian* 2022 ONSC 6947 (involving #metoo FaceBook posts following a workplace investigation in which allegations of sexual harassment were not substantiated); *Smith v*

Some lawsuits against survivors, including claims that pre-date #MeToo, involve lawsuits against defendants who disclosed to family members[2] and friends[3], even though their publications were in personal communications. Other lawsuits target survivors who have reported sexualized violence through formal reporting processes, such as to the police or under workplace and other institutional reporting procedures.

This workshop is particularly focused on, and concerned with, lawsuits against survivors who go to the police or report to their employers/educators. A wave of legislative amendments over the past approximate decade has actively encouraged survivors to report sexualized violence in the workplace and to universities/colleges. These legislative amendments correspondingly make it mandatory for institutions to provide a robust response. Yet from the perspective of legal exposure, women/survivors who access these mechanisms do so at their own risk, facing retaliatory lawsuits even in cases where some or all of the allegations were substantiated in the educational or workplace investigation (e.g. in *Stuart v Doe* 2019 YKSC 53).

There is a perception that defamation (and other) lawsuits against sexual assault complainants are launched only when a complainant goes public. This perception, however, is inaccurate. Empirical research as well as reported cases indicate that survivors are targeted by lawsuits even when they access formal reporting processes, and do not 'go public' or disseminate their allegations widely. For example, in Mandi Gray's 2021 doctoral thesis on lawsuits against sexual assault complainants, *Cease and Desist/Cease or Resist? Civil Suits and Sexual Violence*, of the 17 research participants interviewed, only 4 were sued for public statements

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Nagy 2021 ONSC 4265 (FaceBook posts); *Stuart v Doe* 2019 YKSC 53 (involving FB posts (that initially didn't identify the perpetrator) after an educational institution investigation finding the complaints against the Plaintiff faculty member substantiated); See also media reports: https://www.cbc.ca/news/canada/montreal/metoo-movement-fresh-wave-quebec-juripop-1.5643771 [interview with Quebec organization that serves sexual assault survivor, commenting on the spike in lawsuits and threatened lawsuits for online disclosures]; https://m.facebook.com/263Chat/photos/justin-bieber-has-filed-a-20-million-defamation-lawsuit-against-two-women-who-ac/2488291664606928/; https://globalnews.ca/news/7308703/teacher-lawsuit-victims-voices-regina/ [naming FaceBook as the primary defendant]; https://nationalpost.com/news/canada/shamed-by-metoo-allegations-canadian-poet-sues-his-accusers-and-media-who-reported-story [Naming the Globe and Mail and the Toronto Star as the primary defendants]; Jackie Hong, "Whitehorse student accused of sexual assault on Facebook files defamation lawsuit", CBC News, Aug 21 2021, online at: https://www.cbc.ca/news/canada/north/fh-collins-sexual-assault-defamation-1.6128696?fbclid=IwAR1U3Fw0vAq93_2v-gW14bZ6qZQa1D2EujMegj1E6HUBGd_UP7x-51Jjm3g

[2] Vanderkooy v. Vanderkooy et al, 2013 ONSC 4796, http://canlii.ca/t/g04cb

[3] *Whitfield v. Whitfield,* 2016, ONCA 581

on social media (one of whom only went public after the police declined to charge).[4] Gray's research is consistent with CCLISAR's anecdotal information collected in conversations with CCLISAR's network of practitioners, that many lawsuits against survivors claim defamation and other torts following a survivor reporting to the police or other formal processes.

In the past, these harassing lawsuits against survivors would sometimes be served on the complainant to punish her and cause her anxiety, but then would wither on the vine and not be pursued. Increasingly, however, these lawsuits are pursued vigorously by the Plaintiff, particularly where the defendant/survivor does not immediately agree to some form of public apology or retraction and the payment of compensation to the person the survivor alleged abused them.

The purpose of this workshop is to share experiences and information on lawsuits against sexual violence complainants and, if workshop participants agree with CCLISAR that these lawsuits are a problem, to consider areas of advocacy, research or law reform to address the problem.

In theory, the introduction of anti-slapp legislation in Ontario and British Columbia, should have been an important step forward to encourage reporting of sexual violence and to protect survivors from legal retaliation. As discussed below, however, anti-slapp legislation has not to date had that effect.

In terms of possible solutions to the problem of retaliatory lawsuits, this memo will provide a high-level overview of the defence of absolute privilege to a claim in defamation, and will query what opportunities exist to open or re-open discussion in Canada about recognizing an absolute privilege for reports of sexualized violence, at least in certain contexts, such as to the police (and possibly more broadly under other reporting mechanisms such as to universities/colleges and in workplaces).

C. THE LIMITS OR FAILURES OF ANTI-SLAPP PROTECTIONS FOR SEXUAL VIOLENCE SURVIVORS

i. Anti-Slapp Provisions and the Caselaw Involving Sexual Violence

[4] Gray, M. (2021) Cease and Desist/Cease or Resist? Civil Suits and Sexual Violence. Unpublished dissertation. York University. https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/38652/Gray_Mandi_M_2021_PhD.pdf?sequence=2&isAllowed=y

As workshop participants are well aware, the Ontario *Courts of Justice Act* was amended in 2015 to add s.137.1 – 137.5 *(Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings)*. Section 137.1-137.5 permits defendants to apply to the Court at any stage of a proceeding, to dismiss a claim against them on the basis that the claim unduly limits expression on matters of public interest. In 2019, British Columbia adopted almost identical legislation under the *Protection of Public Participation Act* ("PPPA").

Workshop participants are familiar with the legal requirements and test under these anti-slapp provisions and they will not be summarized here.

For any workshop participants less familiar with this area of law, the legislative provisions are attached as Appendix A and B to this document, and the leading SCC case on the interpretation of anti-slapp legislation (applicable to both Ontario and BC) is *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 ("Pointes Protection"). The factum of the Barbra Schlifer Commemorative Clinic in *Pointes Protection* is here. The factum of West Coast LEAF in *Pointes Protection* can be found here.[5]

Since the introduction of anti-slapp legislation in Ontario and British Columbia, there have been a handful of reported decisions in which sexual violence complainants/survivors, or those who work with them, have applied to the Courts to have defamation, malicious prosecution and/or other lawsuits against them dismissed on the basis that the lawsuits unduly limit expression on matters of public interest, and specifically limit, deter or silence disclosure and reporting of sexual violence.

The reported (and unreported) decisions include:

- *Marcellin v LPS* 2022 ONSC 5886
- *Smith v Nagy* 2021 ONSC 4265
- *Deeb v Zebian* 2022 ONSC 6947
- *Mazhar v Farooqi*, 2020 ONSC 3490, aff'd, 2021 ONCA 355
- *Lyncaster v. Metro Vancouver Kink Society* 2019 BCSC 2207
- *Galloway v A.B.*, 2021 BCSC 2344
- *Ng v. C.G.* 2020 ONSC 6825 (unreported)

[5] West Coast LEAF also intervened in another SLAPP case currently under reserve at the SCC, in *Hansman v Neufeld*. West Coast LEAF's factum in *Hansman* can be found here (it is focused on the interpretation of the "hostility" factor in the weighing analysis; para 17 refers to sexualized violence).

In these handful of cases, only two involved the complainant disclosing to the world at large on social media (*Smith v Nagy* and *Deeb v Zebian*). Three of these cases, in factually very different ways, involved statements on social media or in a public forum made by others who supported the complainant (*Marcellin*, *Lyncaster* and *Galloway*) after the complainant reported. In *Marcellin*, an executive director of a London woman-abuse organization who had been supporting the defendant/survivor, tweeted that the Plaintiff had been charged with domestic violence offences (which the Court found was not capable of defamatory meaning). In *Galloway*, the "twitter defendants" were sued for engaging in public discussion of the Galloway case, long after the complaint was made and the case had gained significant notoriety in national media. In *Lyncaster*, the Metro Vancouver Kink Society ("MVKS") and its individual directors, were sued for publishing an open letter and making statements at a town hall meeting, explaining why MVKS was ending its relationship with *Lyncaster* (who was not named except by his Kink-community name "Lord Braven"), after MVKS had received multiple complaints about unsafe/non-consensual BDSM conduct by Lyncaster, including one incident involving a minor.

In all of these five cases involving public statements, the Court recognized the publications as engaging a matter of public interest. In *Marcellin*, the action was dismissed on the anti-slapp motion. In the other four cases, the Courts did not ultimately find the publications warranting protection and dismissal of the action under the anti-slapp provisions.[6]

In the cases listed above, reports to the police (*Ng v C.G.* and *Marcellin v LPS)* [7] or through workplace/institutional mechanisms (*Mazhar v Farooqi*) [8] were generally protected and the actions were dismissed, although each case turned closely on its facts.

That said, although disclosure by a complainant to an employer was protected in *Mazhar v Farooqi*, and by front-line advocates/supporters for the complainant in *Marcellin*, the lengthy decision in *Galloway v A.B.*, raises questions about the potentially very limited scope of what certain courts may accept as a 'report' to an institution (in that case a university), for the purposes of protecting such expression.

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[6] *Smith v Nagy* 2021 ONSC 4265; *Deeb v Zebian* 2022 ONSC 69475; *Lyncaster v. Metro Vancouver Kink Society* 2019 BCSC 2207; *Galloway v A.B.,* 2021 BCSC 2344

[7] *Marcellin v LPS* 2022 ONSC 5886; *Ng v. C.G.* 2020 ONSC 6825 (unreported)

[8] *Mazhar v Farooqi,* 2020 ONSC 3490, aff'd, 2021 ONCA 355

In *Galloway v A.B.*, the Plaintiff, a former creative writing professor at UBC, sued A.B. and over 20 others. Most of the 20 other defendants were sued for public comments they made on twitter in an ongoing public debate about campus sexual violence, after UBC issued press releases that Galloway had been suspended for "serious allegations", and subsequently, had been terminated for (among other things), an "irreparable breach of trust." In terms of the report to the institution, in 2015 A.B. reported to UBC that Galloway had sexually harassed and sexually assaulted her in the period 2010-2013. The lawsuit against A.B. targeted statements made by AB in 2015 to a close friend/supporter and two professors, the first of whom was her thesis supervisor and equity officer of the department (to whom AB first disclosed) and the second being the acting chair of the department. A.B. submitted that the statements in 2015 were part of the reporting process at UBC. The Plaintiff emphasized repeatedly that he was not suing A.B. for her "formal report" to the University of British Columbia, but that the statements targeted by the lawsuit were made outside of the proper UBC reporting process. The application judge dismissed the defamation claim against AB for statements made in 2015, on the basis that they were statute barred. In *obiter*, however, the application judge agreed with Galloway's submissions that AB exceeded the scope of any qualified privilege under a university sexual violence reporting process, by speaking to her thesis advisor and acting chair of the department and giving them permission to speak to others as recommended by them. Putting aside the somewhat unique set of facts in *Galloway*, the reality is that people most often speak to those close to them, who they trust, before they take the next step of making a 'formal' report. *Galloway* may turn on its specific facts (and the myriad mistakes made by UBC), but if these initial disclosures within institutions are outside of the protection of privilege or valuable expression under anti-slapp legislation, this raises significant concerns for the protection of survivors who disclose and/or report under institutional processes or mechanisms.

In sum, although in a small number of reported anti-slapp decisions, some survivors have been successful in obtaining orders dismissing the action, the scope of protection under anti-slapp legislation for complainants who make workplace or other institutional complaints (whether under human rights, occupational health and safety, or university/college specific sexual violence reporting policies and procedures) remains uncertain and likely limited.

ii. Reports of Sexual Violence are Not (yet) Categorically Caught by Anti-Slapp Regimes

The first step in accessing anti-slapp protections under s.137.1/ PPPA is for the moving party/defendant to satisfy the Court that "the proceeding arises from an expression made by the person that relates to a matter of public interest." In the cases decided to date, there remains some question as to whether a report to the police or under a workplace or

educational reporting process will, in every case, be determined to be an expression engaging the "public interest."

Reports to the police or to formal reporting processes should be a category of expression in the "public interest" under the anti-slapp provisions. Since there is not (yet) any binding caselaw that confirms categorical recognition of the public interest in this form of expression, however, the issue needs to be litigated and re-litigated in every case. The public interest threshold test should not need to be relitigated in every case.

There is some concern, however, that Ontario courts, have left this issue somewhat open ended. For example, in *Safavi-Naini v Rubin Thomlinson LLP* 2023 ONCA 86, albeit in a different context and somewhat odd facts[9], the ONCA held that:

> …the mere fact that an expression relates to sexual and workplace harassment, on its own, will often be insufficient to bring it within the scope of public interest. If this were not the case, the anti-SLAPP framework would apply – in most cases – to defamation proceedings stemming from #MeToo workplace allegations (para. 20).

In *Marcellin v LPS*, 2022 ONSC 5886, the Court made some strong statements about the public interest in disclosures of domestic violence. *Marcellin* involved an expansive defamation lawsuit against the Plaintiff's ex-wife, two front-line women's organizations that had supported the ex-wife, the executive directors of these organizations, and the London Police Service (among others). The lawsuit targeted statements made by the ex-wife to the police alleging domestic violence (which resulted in charges being laid), 17 letters the ex-wife sent to leaders in the City of London (including to city councillors and the chief of police) following the charges being laid, and statement made by the executive directors to the Plaintiff's workplace supervisor. Encouragingly, in response to the argument by the Plaintiff that the expressions at issue were about a "private" dispute between him and his wife who were engaged in family law litigation at the time of the various expressions, the Court held

[9] The defamation claim in *Safavi-Naini* was made against workplace investigators for submitting executive summaries of a workplace investigation unfavourable to the Plaintiff/complainant, to the Northern Ontario School of Medicine, that had retained the investigators to investigate the Plaintiff/complainant's allegations. In *Safavi-Naini*, the Court held that there was a public interest element in the expressions because the appellant had retained a publicist and engaged in media statements and because of the "public safety concerns arising from the allegations."

that "intimate partner violence is not a personal issue…it deeply infects our society" (para. 86) and that:

> …the public has a very strong interest in protecting the victims of intimate partner violence. This includes promoting expression and debate on the topic of sexual and domestic violence and abuse, and in not discouraging victims from reporting such violence and abuse. Victims, and their advocates, need to be able to recount their stories without fear of undue reprisal (para. 192).

On the other hand, the Court also noted Gomery J.'s statement in *Smith v Nagy* 2021 ONSC 4265 that "not every allegation made by a woman against a former male partner is a matter of public interest." Further, in *Marcellin v LPS*, the Court relied heavily on the Plaintiff's public position within the City of London as a basis for finding the public interest was engaged, holding that "Mr. Marcellin's role with respect to the Safe Cities program undoubtedly elevates the interest from public to private" (para 87) and noted at para 86:

> In this case, Mr. Marcelling was responsible for a program that directly impacted vulnerable women and children. It was an important position publicly. Intimate partner abuse involving persons holding such positions, in my view, clearly falls within the realm of public interest. The community should be concerned if a person holding such a position has, or is alleged to have, perpetrated violence against women….

In *Deeb v Zebian*, the Court also relied on the Plaintiff's public position of trust and leadership as a school principal and a leading member of the London area Muslim community, to find that there was a public interest in Zebian's social media postings (at para.100): "I accept that not all #MeToo posts automatically relate to a matter of public interest. However, in this case, Mr. Deeb held a prominent position of trust within the London community and within the London Muslim community….the expressions in this case are such that a substantial segment of our community would have a genuine interest in receiving this information, involving serious allegations concerning a person holding a prominent position of public trust."

Similarly, in all of *Smith v Nagy* (FB postings), *Mazhar v. Farooqi* 2020 ONSC 3490, aff'd 2021 ONCA 355 (workplace/volunteer complaint to an organization) and *Lyncaster v. Metro Vancouver Kink Society* 2019 BCSC 2207 (open letter and statements made at a BDSM community town-hall meeting), the Court found that there was some broader community to which the allegations of sexualized violence were relevant, whether the gaming community, the workplace environment and community served by the organization in *Mazhar v Farooqi*, or the sexual minority community in *Vancouver Kink*.

Plaintiff/respondents to 137.1/PPPA motions, continue to argue that reports of sexualized violence are "personal" or "private" matters that do not engage the public interest. The decided cases to date turn on their facts, and do not confirm broadly that reports of sexual violence, by definition, engage the public interest, having regard to the low rates of reporting and the importance of breaking the silence and of disclosures and reports, if as a society we are to work toward the goal of eliminating sexualized violence.

The emphasis on the public roles filled by the Plaintiffs in *Marcellin*, *Deeb v Zebian* and (to a lesser extent) *Mazhar*, is worrying insofar as anti-slapp legislation in Canada (unlike in certain states in the United States) is not limited to protecting expressions that discuss public figures.[10] The caselaw's emphasis on the public role held by the Plaintiffs, is worrying in terms of how the anti-slapp provisions will be applied in future cases to disclosures and reports where the Plaintiff/accused holds no prominent public role.

Another useful precedent is *Ng v. C.G.* 2020 ONSC 6825 (unreported). *Ng v C.G.* involved a high school student's report to her guidance counsellor and to the police that she had been sexually abused by her piano teacher. The Plaintiff conceded that the report to the police engaged a matter of public interest, as a result of which the Court did not undertake a fulsome analysis, but did find the following:

> Not all expressions will be subject to s. 137.1; only expressions that relate to a matter of public interest. Here, the expression made by C.G. was the statement first to her guidance counsellor and then to the police alleging a sexual assault committed by Mr. Ng. The Defendant argues that reports of sexual assault, particularly by children, are expressions in the public interest. The Plaintiffs concede that the expression is on a matter of public interest. I agree.

In contrast, albeit in *obiter* and without the Court really considering the impact of its *obiter* statement, the Ontario Court of Appeal in *Pointes Protection* used the case of *Rizvee v Newman* as an example of a case where a statement may attract s.137.1 protection in some contexts but not others (see para 60 and footnote 6 of *Pointes Protection* 2018 ONCA 65). In *Rizvee v Newman* 2017 ONSC 4024, the lower Court granted an anti-slapp motion in a defamation action for public statements about bullying and harassment made by the Defendant in the context of the Plaintiff campaigning for public office in the 2015 federal electoral campaign, but dismissed the anti-slapp motion for malicious prosecution in connection with the same defendant attending before a Justice of the Peace to have a s.810 peace bond issued

[10] For a discussion of the US legislation see Alyssa R. Leader, "A SLAPP in the Face of Free Speech: Protecting Survivors' Rights to Speak up in the Me Too Era" (2019) 17 First Amend. L. Rev. 441 at pp. 459-461.

in connection with that same harassment (following the outcome of the election). The Court held as follows:

> [135] The statement made by Ms. Newman in support of her *Criminal Code* peace bond application cannot, in my view, be characterized as an expression on a matter of public interest. This was a statement provided by Ms. Newman relating to a private matter, namely whether the state would intervene to restrict Mr. Rizvee's actions in relation to her.
>
> [136] Although the allegations made by Ms. Newman in support of her bond application were mostly the same comments underpinning the defamation claim, this does not change the character of the expression viewed objectively. There is no public interest component to the peace bond process or the statement Ms. Newman made in support of her bond application. The statement was provided by one citizen in support of the state intervening to restrict the conduct of another citizen. This is an entirely private matter between the two individuals involved. It was not an expression on a matter of public interest. This statement is not the kind of expression section 137.1 was intended to protect.

Because the lower Court in *Rizvee* dismissed the 137.1 application at the threshold stage of whether the expression was caught by the regime, the Court did not consider the chilling effect of the defamation lawsuit on citizens seeking a peace bond for their protection. *Rizvee* did not involve domestic or sexualized violence, but it did involve allegations of harassment.

The reported anti-slapp decisions in the bullet list above have not adopted the reasoning in *Rizvee* that a report in the criminal justice system is merely a private matter in which a citizen seeks protection of the state, but the reasoning in *Rizvee* has also not been clearly discredited and could be adopted in a future case, where the plaintiff/accused is not a public figure and/or performs no public role.

iii. Anti-Slapp Motions are Expensive, Complex, Time Consuming and Invasive

Even if reports to the police and to institutions were guaranteed to pass the "public interest" expression threshold under anti-slapp legislation, the process for litigating an anti-slapp is arguably still out of reach and problematic for most, if not all, survivors.

First, the fear of legal retaliation following a report to the police or within an institution, is not meaningfully addressed or abated by the possibility that the claim that follows could be dismissed at an early stage. The complainant still faces a lawsuit, still needs to engage with

the perpetrator through the civil legal system, and has been sued, necessitating finding the funds to pay legal counsel (even if that counsel is acting on a low-bono basis).

Second, even if the survivor has the means to pay counsel or has found counsel who will act pro bono, the process for litigating an anti-slapp is extremely stressful, gruelling and/or re-traumatizing. In each case, a strategic decision needs to be made whether the complainant will swear an affidavit, and often there's no choice but for her to do so. Most workplace/institutional processes involve an investigation, but no cross examination (at least until there is a grievance arbitration hearing, at which the complainant may or may not be called as a witness). In many cases where a complainant is sued for going to the police, either no charge was laid or the charges were resolved by way of a peace bond or other resolution. In some cases (like *Ng v C.G.*) the charges are stayed at the request of the complainant, because she doesn't want to put herself through a trial. In other words, in the anti-slapp motion, the Plaintiff may be putting the complainant through a cross-examination, where the prior reporting processes did not involve this step.

In addition to subjecting the complainant to cross-examination, the anti-slapp procedure may also involve invasive documentary production by way of production requests demanded at the cross-examination (see *Galloway v A.B.* 2020 BCCA 106 (CanLii)). Unlike in criminal and investigative proceedings, the complainant's counselling, psychological or medical records could be at risk of being compelled or produced, especially if the survivor/defendant also asks for damages in the anti-slapp. In one case where an anti-slapp motion was brought after the survivor/defendant was ordered to attend to be examined for discovery, the Courts were unwilling to rule that the examination for discovery be stayed pending determination of the PPPA motion: *Orlando v. Boylan*, 2023 BCCA 51 (CanLII).

In the experience of the writer of this memo, the anti-slapp motion sometimes proceeds to the point of the complainant (or her witnesses) being cross-examined, only after which an offer to settle is made by the Plaintiff. At this stage, the survivor/defendant has invested significant financial and emotional resources in defending the lawsuit. The offer to settle is often for the dismissal of the lawsuit on the basis of no or nominal costs, as well as a term for non-disparagement and confidentiality of the settlement, putting the complainant in the very difficult position of having to choose between the ongoing trauma, expense and risk of proceeding with the anti-slapp motion (with a view to the decision benefiting herself and others), or putting an end to the legal abuse, which latter option is often the better decision for the survivor/defendant in terms of her health, despite the financial and silencing consequences. The not infrequent resolution of retaliatory lawsuits prior to the anti-slapp motion being heard, hides the extent of the problem of these lawsuits from public view and impedes the potentially positive development of the law in this area. The strategy by

Plaintiffs of suing and dropping the lawsuit (sometimes on conditions of non-disparagement and confidentiality) only after the survivor has brought an anti-slapp motion, is consistent with a trend of plaintiffs using the legal system to silence and punish survivors who report.

Finally, as the attendees of the workshop are aware, the anti-slapp process usually involves a significant amount of work, time, and delay. The Courts have emphasized that the applications are to be brought at an early stage and the court is not to do a "deep dive", but the evidentiary record in these motions is often comprehensive, including multiple affidavits from the survivor and witnesses and sometimes expert affidavits or reports. Where the lawsuit involves a report to the police, obtaining the criminal investigation record (WAGG production) can take a minimum of 8 months (in Ontario), as well as the expense of filing fees for the motion. Where there was a criminal trial, the cost of ordering the transcript can run into the thousands of dollars. The disbursements associated with transcripts of the cross examinations on affidavits in the anti-slapp motion are also not nominal.

In sum, any protection offered by anti-slapp legislation does little to address the fundamental problem, that a significant barrier to reporting in the first place is fear of legal retaliation. Further, to the extent that the anti-slapp regime offers some protection against the ultimate lawsuit, the price for that protection is very high for survivors, financially and in terms of their emotional, psychological and physical health.

D. EXPLORING A POSSIBLE SOLUTION – ABSOLUTE PRIVILEGE FOR CERTAIN REPORTS OF SEXUAL VIOLENCE

It is trite law that the defence of absolute privilege applies to statements made in the context of judicial and quasi-judicial proceedings.

Brown on Defamation[11] summarizes the law in this area as follows:

> There is an absolute privilege for all those communications made in the course of, or incidental to, the processing and furtherance of judicial and quasi-judicial proceedings. To qualify as a quasi-judicial proceeding the tribunal must exercise functions equivalent to those of a court of justice. Among the attributes of such a tribunal are the ability to adjudicate upon and determine rights between competing litigants, to require attendance at a public hearing at which the witnesses testify under oath, to administer fines, impose punishment, render decisions and enforce orders. Such proceedings are also governed by principles of fairness and justice with a fixed procedure comparable

[11] *Brown on Defamation: Canada, United Kingdom, Australia, United States* by Raymond E. **Brown**. Scarborough, Ontario : Carswell Second edition. 1994.

> to that of a judicial body. The immunity extends to all those persons participating in the proceedings including the judge, jury, witnesses, parties and their counsel, and to the contents of all pleadings and documents filed with the court or matters offered in evidence, and to any actions taken preliminary but necessary to the institution of the action or, following the trial, essential to effect an appeal or execute on a judgment.

While the above statement seems clear, there are many ambiguities. For example, the law is not always consistent in application in terms of what 'proceeding' or body will be recognized as having "quasi-judicial" characteristics or functions so as to attract absolute privilege. Even more importantly from the perspective of sexual violence survivors who are considering initiating a legal process, is <u>when</u> and at what stage, statements are considered to be "in the course of, or incidental to, the processing and furtherance of judicial and quasi-judicial proceedings."

Brown on Defamation commences the chapter on Absolute Privilege as it relates to "Information Given to Initiate Legal Proceedings" as follows (footnotes not included below):

> Information given by a person for the purpose of initiating some legal inquiry or proceeding are considered as much a part of those legal proceedings as communications made after those proceedings are commenced;[1] they will generally be protected by an absolute privilege.[2] If the complaint is directed to an appropriate body in order to induce a legal inquiry or proceeding against another, the complainant will be protected against an action for defamation for any remarks accompanying that request,[3] even though it turns out that the person initiating the inquiry is not empowered to do so.[4] In some provinces, the protection for particular complaints is afforded by statute.[5] The fact that the quasi-judicial body also has investigative responsibilities, and may decline to exercise its adjudicative powers, does not defeat the absolute privilege if the information was forwarded incidental to the initiation of the quasi-judicial proceedings.[6] The privilege is afforded under these circumstances because the law wishes "to assure freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing."[7] It "serves the need of fostering the complaint process."[8] The immunity permits members of the public to raise concerns about the conduct of professional and other persons without any fear of reprisal.[9] It does not depend upon the information being solicited by the agency, otherwise information necessary for the protection of the public might not be forthcoming.[10] The occasion must, however, be used for the purpose of initiating the legal inquiry or proceeding; if it is used as a ruse for the purpose of achieving some other purpose, the privilege will not apply.[11]

Despite what would appear to be an expansive approach to absolute privilege when a complainant takes a step to initiate a legal proceeding as summarized above, and despite the good policy reasons for recognizing an absolute privilege to ensure that citizens may raise concerns in the public interest without reprisal, initiating reports to the police and generally also in employment/educational and similar institutional sexual violence reporting processes, are not protected by absolute privilege but by the more limited qualified privilege, which privilege can be defeated by malice. Without overstating matters very much, malice of the survivor in one form or another, is always at the heart of sexual violence cases (as alleged by the plaintiff).

Before addressing the rationale for the more limited/qualified protection for statements to the police, this memo will first briefly discuss selected areas and caselaw where an absolute privilege is afforded to initiating statements to quasi-judicial bodies. There is a significant body of law in this area, and this memo does not attempt to do justice to the complexities and conflicting caselaw where an absolute privilege has, and hasn't, been recognized. It is beyond the scope of this workshop memo to provide a comprehensive review of this area of law. Rather it is mentioned to raise the question of whether or what opportunities may exist to build upon the limited areas where absolute privilege has been recognized.

Examples of initiating complaints protected by absolute privilege

Complaints made to professional regulatory bodies in Ontario, are one example where initiating statements are protected by absolute privilege by statute, as well as by the principles of defamation law. Section 36(3) of the *Regulated Health Professions Act, 1991* S.O. 1991, c.18 ("RHPA") provides that:

> No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act.

Initial complaints that trigger an investigation into a regulated health professional's practice under the RHPA, even if that complaint does not result in a referral to discipline, are caught by s.36(3).

Similarly, there is some caselaw to support a defence of absolute privilege by complainants who have made complaints against professionals in other contexts, such as to the Law Society of Ontario and B.C., as well as initiating documents provided to provincial human rights commissions. This absolute privilege applies even where the first step in the process is an

investigation by an investigator who does not have adjudicative powers, and where the investigations were closed and/or there was no adjudication or referral to adjudication/discipline by the screening committee or other body or individual responsible for such decisions.[12]

In *Hung v Gardiner* 2003 BCCA 257, the British Columbia Court of Appeal confirmed that complaints sent to investigators at the Law Society of British Columbia and the Chartered General Accountants association of BC were protected by absolute privilege, even though no discipline proceedings were commenced. In the appeal, Hung argued that "absolute privilege extends to a complaint submitted to a quasi-judicial body only if proceedings ensue." The Court disagreed, stating as follows (at para. 18):

> …absolute privilege extends to a letter of complaint, provided it is written to the appropriate professional body. It matters not whether that body declines to commence proceedings against the professional person after receiving the complaint. The key determination with respect to absolute privilege is whether the body complained to exercises quasi-judicial powers over the individual complained of.

In cases where an absolute privilege was afforded to initiating statements, the Courts have determined that the body to which the statement was provided was an "adjudicative" body, even if in practice there is an investigation and many steps prior to adjudication, if any.

In contrast, where the body to which the statement is made is not determined to be adjudicative/quasi-judicial, but investigative, only qualified privilege applies. As *Brown on Defamation* explains:

> Communications to bodies which exercise only investigative, as distinct from adjudicative, functions traditionally have been protected by a qualified and not

[12] See for example: *Hamalengwa v. Duncan* 2005 CanLII 33575 (Ont. C.A.) and *Hung v Gardiner* 2003 BCCA 257 (BCCA). For another context see, *Said v. University of Ottawa et al*, 2013 ONSC 7186 (where statements made under a University Sexual Violence policy was held to be protected by absolute privilege, but the issue in the case was really that the claim was seen to be an end-run around an application for judicial review and the deference normally given to universities with respect to academic privileges and promotions. In Brown on Defamation, Chapter 12:21, footnote 40, noted in respect of this case that "No authority was cited or considered by the court. These types of proceeding have been generally treated as protected by a qualified privilege."). See also the series of cases in *Cimolai v Hall,* where, albeit in the context of the admissibility of complaints against a doctor under the Hospital's human rights process, the BCSC held that the initial complaints were protected by absolute privilege.

> absolute privilege, even if the communications are only a step removed from the initiation of legal proceedings.[1] This is particularly true where the communication is prior to the commencement of a judicial proceeding[2] or cannot trigger an adjudication proceeding.[3] It is the view of these courts that an absolute privilege would frustrate the principle that courts should be available to redress any wrongs, and that a qualified privilege would provide sufficient protection for those wishing to report offenses or crimes while at the same time protecting the right of citizens not to be falsely accused.[4] The absolute protection of those who make intentionally false and malicious defamatory statements to the police are of little benefit to society or the administration of justice, particularly in view of the harm that might be caused to another person's reputation.[5]

From a principled perspective, it is difficult to understand why some complaints to investigators (such as in the professional discipline context) are protected by absolute privilege and others, such as to police who have the very significant power to a lay a charge, are not.

Statements to the Police prior to the Laying of an Information are <u>not</u> protected by absolute privilege

In May 2013, a minor in British Columbia was sued in defamation by Simon Caron. The minor, "A", had made a complaint to the RCMP that Caron had sexually assaulted her. After the police investigated, no charges were laid due to Caron producing evidence that he was not physically in the province during the time period that the offences were alleged to have occurred.

Counsel for A brought an application to the BCSC to strike the claim on the basis that A's statements to the police were protected by absolute privilege. The motion was unsuccessful, as was A's appeal to the British Columbia Court of Appeal, *Caron v A* 2015 BCCA 47 (CanLii).

The BCCA rejected the application of an absolute privilege to statements to the police.

Relying on *Rajkhowa v Watson* 1998 CanLii 3273 (NSSC) and other precedents from Ontario and BC, the Court held that police investigate and do not adjudicate, and that judicial proceedings only commence after a charge is laid, thus leaving the initial complaints outside the protection of absolute privilege. Or put another way: "a judicial or quasi-judicial proceeding does not commence each time the police commence an investigation" (at para 22, citing *Rajkhowa* with approval).

A argued that:

> there is no logical reason to distinguish between initial complaints made to a tribunal and complaints made to the police. She argues that for public policy reasons, the law should not allow a chilling effect to exist for complaints in a criminal process when the law does not allow such a chilling effect in a professional-complaint context. (para 26).
>
> From the point of view of the complainant, there is no good reason to distinguish complaints made to the police merely on the notion that the police do not hold quasi-judicial powers themselves. The police, in this context, are an extension of the judicial system, and complaints are made with an eye to judicial proceedings in the same way that complaints to tribunals are made with an eye to quasi-judicial proceedings. For reasons of public policy, complaints made by alleged victims of rape should be given at least the same protections given to complaints to professional bodies because the state has a strong interest in locating and punishing violent criminals and protecting members of society. (para. 39)

These arguments made good sense, especially given the artificial distinction between police (who are independent of the Crown/Courts but who decide to lay the charge) and investigators or screening committees at professional regulatory bodies who are in-house within a body that can exercise quasi-judicial functions.

The public policy reason for granting only qualified privilege to statements to the police, which include that: there is no public interest in false allegations being made to the police; false reports to the police can cause significant harm to the reputations of those accused; and, as noted above, a qualified privilege offers adequate protection and the Courts are best equipped to right any wrongs. These policy reasons for a qualified privilege in reports to the police, however, have arguably not kept pace with developments in the area of the law of malicious prosecution.

In *D'Addario v Smith* 2018 ONCA 163, the Ontario Court of Appeal significantly limited malicious prosecution lawsuits against individual complainants who make statements to the police. *D'Addario* involved a malicious prosecution action against a complainant and another witness in a sexual assault charge that was stayed by the Crown prior to trial. Recognizing the very high bar to holding individual citizens responsible for a police decision to charge and the Crown to prosecute, the Court held that even knowingly false statements provided to the police are not sufficient to meet the first element of the tort of malicious prosecution: that the individual citizen initiated the proceeding (as opposed to the police). If the police exercised an independent discretion to charge, no action lies against the complainant.

It is difficult to harmonize the law's rigorous protection of citizens who make even knowingly false reports to the police in the context of malicious prosecution torts, with the lack of protection of the same expression in relation to other torts, such as defamation.

Other Jurisdictions recognize an absolute privilege for reports to the police

As noted by the BCCA in *Caron v A*, other jurisdictions, such as England and certain states in the United States, do afford absolute protection to statements made to the police. In *Westcott v. Westcott*, [2008] EWCA Civ 818, the English Court of Appeal determined that, for public policy reasons, absolute privilege should be extended to complaints made to police officers. In coming to this conclusion, Lord Justice Ward said the following:

> The police cannot investigate a possible crime without the alleged criminal activity coming to their notice. Making an oral complaint is the first step in that process of investigation. In order to have confidence that protection will be afforded, the potential complainant must know in advance of making an approach to the police that her complaint will be immune from a direct or a flank attack. There is no logic in conferring immunity at the end of the process but not from the very beginning of the process . . . . In my judgment immunity must be given from the earliest moment that the criminal justice system becomes involved. It follows that the occasion of the making of both the oral complaint and the subsequent written complaint must be absolutely privileged.

According to the decision in *Caron v A*, which (2015) research CCLISAR has not yet updated for the states listed, Illinois, Kentucky, Idaho, Alabama, Oregon and Texas are among the states that recognize an absolute privilege for reports to the police.

California's Recent Amendment to Qualified from Absolute Privilege for Police Reports

Until 2020, the State of California had statutory protection granting absolute privilege in communicating to law enforcement under the California Civil Code. In *Hagberg v. California Federal Bank FSB* [13]and *Silberg v. Anderson*[14], the California Supreme Court established that the primary purpose of the absolute privilege clause was to "afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions."[15]

[13] Hagberg v. California Federal Bank FSB, No. B146368 (Cal. Ct. App. Mar. 5, 2002)
[14] Silberg v. Anderson, No. S007056. Supreme Court of California. Feb 26, 1990
[15] Ibid. 50 Cal.3d at p. 213, 266 Cal.Rptr. 638, 786 P.2d 365

In a departure from this established law, however, the California legislature amended the California Civil Code in 2020 to add a clause stating that the privilege does not extend to communication to law enforcement made for a false report. The reasoning presented and discussed behind the Bill was the number of media reports of 911 calls with the purpose of harassing people on the basis of their race, religion, sex, and gender expression. The Bill was intended to facilitate a harsh consequence if a police report is based on a false claim and made for the purpose of harassing another person, especially based on their perceived characteristics. The Bill was enacted in the context of #livingwhileblack focusing attention on overpolicing of black persons, including detailing the 911 calls to police involving racialized 'accused', with the (white) false accuser avoiding any legal consequences.

The amendment to the California legislation was not driven by allegedly false reports of sexual violence, but other harassing calls. In fact, the bill was passed without a discussion of how the development would impact survivors of sexual violence.[16] CCLISAR is engaged in research to learn more about the genesis of the California legislation and any evidence on which it was based.

California's amendment raises important questions about the possible impacts of an absolute privilege on those who are over-criminalized, particularly racialized and Indigenous people in Canada.

Are human rights and equality concerns about discrimination a good policy to limit protecting statements to the police in defamation law to a qualified privilege?

Ensuring the right of persons who have experienced discrimination to bring defamation actions against people who make discriminatory and harassing false reports to the police, would seem to offer a poor and fundamentally privatized solution to racism in society and as perpetrated by the police. Only the most privileged will be able to exercise the right to sue the person who made the harassing and false report, and then doing so will only be worthwhile if the accuser has funds to pay damages. What other tools are available to address the concern that absolute privilege could embolden those who make racially motivated harassing reports? For example, would stronger charge policies for mischief or other offences in these circumstances (outside of sexual violence charges) be a better solution?

Caron v A Left the Door Open to Judicial Recognition of an Absolute Privilege

[16] AB-1775 False reports and harassment, Bill Analysis, California Legislative Information, online: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1775

The BCCA in *Caron* ultimately left the door open to recognition of an absolute privilege for reports to the police, particularly in sexual violence cases.

The Court determined that to expand the privilege, it must find doing so to be "demonstrably necessary" (a question not of "why not" but of "is this necessary"). The Court noted that establishing the chilling effect of defamation lawsuits on reporting of sexual violence is "difficult to prove." A high bar must be met to expand witness immunity for reports to police on the basis that such expansion is necessary to protect the proper administration of justice. *Caron*, however, was decided in 2015, pre *Barton*, pre #MeToo, and prior to the backlash to #MeToo.

In *Caron* the Court emphasized that it was not "appropriate" for the Court to determine the public policy necessity argument for an absolute privilege, "without the benefit of an evidentiary record," thus inviting a future case in which that evidentiary record was present to support judicial expansion of the privilege.

A question CCLISAR asks this group is whether an argument for the expansion of privilege to an absolute privilege should be made in the right case in the future, on a more fulsome evidentiary record (and what the contents of that evidentiary record should be).

E. OTHER RESPONSES TO RETALIATORY LAWSUITS

CCLISAR looks forward to the discussion of other ideas and responses to the problem of (retaliatory) lawsuits against sexual assault survivors for reporting to the police or other formal reporting processes, including with respect to:

- Better tracking these lawsuits and their resolution (where they don't proceed to a judgment on the merits or on an anti-slapp motion)
- Funding the defence of these lawsuits
- Sharing resources amongst counsel who support complainants

F. WORSKHOP QUESTIONS

- Have you observed a trend in your own practice (or at your university/institution) of lawsuits against survivors for formal disclosures (or are you seeing lawsuits more focused on disclosures such as on social media)? What are you seeing in terms of threats of lawsuits/cease and desist letters?

- To what extent do you see fear of legal retaliation as a barrier to reporting in your practice/experience? If you largely act for alleged perpetrators/plaintiffs, to what extent do you see resort to the threat or initiation of legal proceedings as a tool used by those accused?

- What are the failings of the anti-slapp regimes in protecting formal reports? Do you agree that the anti-slapp regimes offer inadequate protection?

- Are there other solutions to responding to the problem of retaliatory lawsuits? For example, scholarship or advocacy with a view to encouraging provinces to legislate absolute privilege for reports to the police (and perhaps other formal reporting procedures)? Or new test case legislation to achieve a recognition of absolute privilege? If so, what are your thoughts on arguing for an absolute privilege that covers reporting through processes mandated by statute, such as workplace or educational policies mandated by occupational health and safety and human rights legislation, or by the Ontario *Ministry of Training, Colleges and Universities Act* and similar legislation in other provinces?

- What other solutions/ideas do you have?

- In terms of understanding both the problem and potential solutions, what experiences and impacts should CCLISAR consider in terms of survivors or alleged perpetrators who experience oppression on the basis of race, poverty, indigeneity, ability and other grounds of discrimination?

APPENDIX A

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

Dismissal of proceeding that limits debate
Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

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

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

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

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

Definition, "expression"

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. 2015, c. 23, s. 3.

No amendment to pleadings

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

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

(b) if the proceeding is dismissed under this section, in order to continue the proceeding. 2015, c. 23, s. 3.

Costs on dismissal

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. 2015, c. 23, s. 3.

Costs if motion to dismiss denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. 2015, c. 23, s. 3.

Damages

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate. 2015, c. 23, s. 3.

Section Amendments with date in force (d/m/y)

Procedural matters
Commencement

137.2 (1) A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced. 2015, c. 23, s. 3.

Motion to be heard within 60 days

(2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court. 2015, c. 23, s. 3.

Hearing date to be obtained in advance

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served. 2015, c. 23, s. 3.

Limit on cross-examinations

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants. 2015, c. 23, s. 3.

Same, extension of time

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice. 2015, c. 23, s. 3.

Section Amendments with date in force (d/m/y)

Appeal to be heard as soon as practicable

137.3 An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal. 2015, c. 23, s. 3.

Section Amendments with date in force (d/m/y)

Stay of related tribunal proceeding

137.4 (1) If the responding party has begun a proceeding before a tribunal, within the meaning of the *Statutory Powers Procedure Act*, and the moving party believes that the proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under section 137.1, the moving party may file with the tribunal a copy of the notice of the motion that was filed with the court and, on its filing, the tribunal proceeding is deemed to have been stayed by the tribunal. 2015, c. 23, s. 3.

Notice

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

(a) notice of the stay; and

(b) a copy of the notice of motion that was filed with the tribunal. 2015, c. 23, s. 3.

Duration

(3) A stay of a tribunal proceeding under subsection (1) remains in effect until the motion, including any appeal of the motion, has been finally disposed of, subject to subsection (4). 2015, c. 23, s. 3.

Stay may be lifted

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

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

(b) the proceeding that is the subject of the motion under section 137.1 and the tribunal proceeding that was stayed under subsection (1) are not sufficiently related to warrant the stay. 2015, c. 23, s. 3.

Same

(5) A motion under subsection (4) shall be brought before a judge of the Superior Court of Justice or, if the decision made on the motion under section 137.1 is under appeal, a judge of the Court of Appeal. 2015, c. 23, s. 3.

Statutory Powers Procedure Act

(6) This section applies despite anything to the contrary in the *Statutory Powers Procedure Act*. 2015, c. 23, s. 3.

Section Amendments with date in force (d/m/y)

Application

137.5 Sections 137.1 to 137.4 apply in respect of proceedings commenced on or after the day the *Protection of Public Participation Act, 2015* received first reading. 2015, c. 23, s. 3.

APPENDIX B

PROTECTION OF PUBLIC PARTICIPATION ACT
[SBC 2019] CHAPTER 3

Assented to March 25, 2019

Contents

Definitions

1 In this Act:

"administrative proceeding" means an application or other process for bringing a matter before a tribunal;

"applicant" means a person making an application under section 4;

"court" means the Supreme Court of British Columbia;

"dismissal order" means an order under section 4 dismissing a proceeding;

"expression" means any communication, whether it is made verbally or non-verbally, publicly or privately, and whether it is directed or not directed at a person or entity;

"proceeding" has the same meaning as in the *Supreme Court Act*;

"respondent" means a person responding to an application made under section 4;

"tribunal" has the same meaning as in the *Judicial Review Procedure Act*.

Application

2 This Act applies in respect of proceedings commenced on or after May 15, 2018.

Qualified privilege

3 If an oral or written communication on a matter of public interest, between persons who have a direct interest in the matter, has qualified privilege, that communication has qualified privilege regardless of whether the communication is witnessed or reported by the media or other persons.

Application to court

4 (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that

(a) the proceeding arises from an expression made by the applicant, and

(b) the expression relates to a matter of public interest.

(2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that

(a) there are grounds to believe that

(i) the proceeding has substantial merit, and

(ii) the applicant has no valid defence in the proceeding, and

(b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

No further steps

5 (1) Subject to subsection (2), if an applicant serves on a respondent an application for a dismissal order under section 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved.

(2) Subsection (1) does not apply to an application for an injunction.

No amendments unless permitted

6 Unless the court orders otherwise, a respondent may not amend the respondent's pleadings

(a) in order to prevent or avoid a dismissal order under section 4, or

(b) in order to continue the proceeding if the proceeding is dismissed.

Costs

7 (1) If the court makes a dismissal order under section 4, the applicant is entitled to costs on the application and in the proceeding, assessed as costs on

a full indemnity basis unless the court considers that assessment inappropriate in the circumstances.

(2) If, on an application for a dismissal order under section 4, the court does not dismiss the proceeding, the respondent is not entitled to costs on that application unless the court considers it appropriate in the circumstances.

Award for damages

8 On an application for a dismissal order under section 4, the court may, on its own motion or on application by the applicant, award the damages it considers appropriate against a respondent if it finds that the respondent brought the proceeding in bad faith or for an improper purpose.

Procedure on application

9 (1) Subject to this Act, an application for a dismissal order under section 4 must be made in accordance with the Supreme Court Civil Rules.

(2) An application for a dismissal order under section 4 may be made at any time after the proceeding has commenced.

(3) An application for a dismissal order under section 4 must be heard as soon as practicable.

(4) Subject to subsections (5) and (6) of this section, on an application for a dismissal order under section 4, evidence must be given by affidavit.

(5) An applicant or respondent may, before the hearing of the application,

(a)call, out of court before an official reporter, the witness who swore or affirmed the affidavit for cross-examination on the witness's affidavit, and

(b)cross-examine the witness on the witness's affidavit, provided that

(i) the total period of cross-examination of all applicants in the proceeding does not exceed 7 hours in duration, and

(ii) the total period of cross-examination of all respondents in the proceeding does not exceed 7 hours in duration.

(6) The court may extend the period permitted for cross-examination under subsection (5) if the court considers it necessary in the interests of justice.

Appeals

10 An appeal of a dismissal order under this Act to the Court of Appeal must be heard as soon as practicable.

Stay of administrative proceedings

11 (1) This section applies if a respondent has commenced an administrative proceeding that the applicant believes to be related to the same matter of public interest alleged by the applicant to be the basis of the proceeding that is the subject of the applicant's application for a dismissal order under section 4.

(2) The applicant may serve the tribunal with a copy of the notice of the application for the dismissal order.

(3) Service by the applicant on the tribunal under subsection (2) operates as a stay of the administrative proceeding.

(4) The tribunal must give to each party a notice of the stay and a copy of the notice of the application that was served on the tribunal.

(5) A stay of an administrative proceeding under subsection (3) remains effective until

(a) the application for a dismissal order, including any appeals, has been finally resolved, or

(b) an earlier date, if, on application, the court considers that

(i) the proceeding that is the subject of the application for a dismissal order and the administrative proceeding that was stayed under subsection (3) are not connected enough to warrant a stay, or

(ii) the stay is causing, or would likely cause, a party undue hardship.

(6) An application for the costs of any proceeding under this section must be heard only on the basis of written submissions unless

(a) the tribunal is satisfied that a party would suffer significant prejudice if the tribunal did not allow oral submissions, or

(b) the applicant and respondent consent to oral submissions and the tribunal agrees.

Rights not limited

12 The remedies under this Act are in addition to any other right or remedy that may be available to an applicant or a respondent.

Application of Offence Act

13 Section 5 of the *Offence Act* does not apply to this Act.

Commencement

14 This Act comes into force on the date of Royal Assent.