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THE RISE OF THE SLAPP: A GAP IN NEW ZEALAND LAW?

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Abstract:

Intimidatory lawsuits that stifle freedom of expression, deter public participation and disproportionately target persons performing a vital watchdog function, such as journalists and academics, can have far-reaching harmful effects. The Strategic Lawsuits Against Public Participation (SLAPP) phenomenon induced the enactment of anti-SLAPP legislation in several states within the United States, Canada and Australia. While New Zealand has not yet seen a dramatic number of SLAPP suits come before the courts, specific anti-SLAPP legislation would better protect defendants where proceedings threatening valuable expression are launched. A recent ruling of the High Court of South Africa held that SLAPPs are an abuse of process, thereby establishing a judicial remedy for SLAPP targets in South Africa. While, if faced with a SLAPP, the New Zealand courts could dismiss such claims as an abuse of process, the high threshold required to make out such abuse and reluctance of the courts to stay claims on this basis limits the doctrine's efficacy. Instead, it is argued that a legislative solution modelled on the state of Ontario's anti-SLAPP law would provide more robust protection for expression relating to matters of public interest. However, such a solution must take account of the need to preserve the right to justice, ensuring that legitimate claims may proceed.

Key words: *"SLAPP", "public interest", "abuse of process", "public participation"*

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> "The power wielded by major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government."
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> *Jameel* (*Mohammed*) *v Wall Street Journal* [2006] UKHL 44, [2007] 1 AC 359 at 158 per Baroness Hale; *Mineral Commodities Limited and Another v Dlamini and Another; Mineral Commodities Limited and Another and Clarke* [2021] ALL SA 183 (HCSA) at [63].

I Introduction

In 2007, Mineral Commodities Ltd, also known as MRC, a global exploration and mining company, announced its plans to conduct titanium mining at Xolobeni on the Wild Coast of South Africa. MRC planned to mine a 22km stretch of coastline, home to the Pondoland Centre of Plant Endemism, the ancestral lands of the Amadiba tribe and several villages.[1] Between 2014 and 2015, journalist John Clarke published e-books criticising the activities of MRC, claiming that the proposed excavation would cause substantial ecological, environmental, and economic damage to the Coast.[2] Due to pressure from Xolobeni residents and widespread criticism from activist groups, MRC placed a moratorium on its mining operations in 2016. Clarke continued to direct criticism toward MRC.[3]

In 2016, MRC sued Clarke for defamation, seeking R10 million in damages.[4] In 2017 Mineral Sands Resources (Pty) Ltd (MSR), a subsidiary of MRC, sued environmental lawyers Christine Reddell and Tracey Davies, and Davine Cloete, a community activist, for R1.74m in response to their statements describing MSR's activities as "environmentally

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1 Tess Peacock and Zak Essa "Lessons From 14 Years of Sustained Activism in Xolobeni" (14 July 2021) University of Cape Town < https://www.news.uct.ac.za/article/-2021-07-14-lessons-from-14-years-of-sustained-activism-in-xolobeni>

2 *Mineral Sands Resources (Pty) Ltd and Another v Redell and Others; Mineral Commodities Limited and Another v Dlamini and Another; Mineral Commodities Limited and Another and Clarke* [2021] ALL SA 183 (HCSA) at [2].

3 At [2].

4 At [2].

destructive". [5] MRC brought another action seeking R1.5m in damages against Mzamo Dlamini and Cormac Cullinan, who were critical of MRC's mining activities in a 2016 radio interview.[6]

In the High Court of South Africa, Goliath J heard the three actions together, finding that MRC's suit was a SLAPP (Strategic Lawsuit Against Public Participation).[7] In deciding the case, Goliath J referred to the "glaringly obvious" power imbalance between the parties, MRC's use of its vast financial resources to quell the voices of the activists and its knowledge that it did not have any realistic prospect of recovering the damages sought.[8] Goliath J affirmed the importance of freedom of expression and public debate, particularly in the context of environmental activism, holding that "litigation intended broad and purposeful strategy to intimidate, distract, and silence public criticism" constitutes an abuse of the Court's process.

Mineral Sands Commodities Ltd v Redell and Others (*Mineral Sands*) is a quintessential SLAPP suit, illustrating the powerful interests and inherent inequities often present in such litigation. Such lawsuits can undermine forms of public participation that are integral to a democratic society. While New Zealand has not yet seen a proliferation of SLAPPs, legal threats bearing similarities to SLAPPs have emerged, and a specific remedy would ensure that future harms are avoided. Although, as seen in *Mineral Sands*, SLAPPs can be addressed by the abuse of process doctrine, this paper argues that a legislative approach is preferable due to the doctrine's limited workability.

This paper contends that New Zealand should enact legislation modelled on the Ontarian anti-SLAPP law. Such a step would affirm New Zealand's commitment to upholding freedom of expression, promote public participation and prevent the squandering of judicial resources. However, such a mechanism must be carefully tailored to ensure that access to

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3 Human Rights Resource Centre "Mineral Sands Resources lawsuits) (re Tormin Mine, So. Africa)" < https://www.business-humanrights.org/en/latest-news/mineral-sands-resources-lawsuits-re-tormin- mine-so-africa>

6 *Mineral Sands*, above n 2, at [3].

7 At [55].

8 At [60] - [62].

justice is not inordinately impeded. This paper is solely concerned with SLAPPs launched in the civil context.

In Part II, this paper will describe the common traits of SLAPPs and the harms often produced. In Parts III and IV, this paper will explore potential SLAPPs in the New Zealand context and detail the content of the Ontarian anti-SLAPP law as a potential legislative remedy. In Part V, the utility of the abuse of process doctrine will be considered. Finally, in part IV, the nature of the competing rights will be examined.

II SLAPPs: How to Spot One

A The Key Features of a SLAPP

The term "SLAPP" was first coined by University of Denver Professors George W. Pring and Penelope Canan in the 1980s.[9] In their study detailing the rise of litigation intended to chill speech in the public interest, Pring and Canan found that thousands of individuals in the US had been "sued into silence" in preceding decades.[10] Canan characterises SLAPPs as "political-legal phenomenons'" that involve "the use of litigation to derail political claims, moving a public debate from the political arena to the judicial arena, where the playing field becomes more advantageous".[11]

SLAPPs are brought in response to public complaints regarding the plaintiff's practices. A classic SLAPP is that where a local residents' association voices opposition to a development project and is subsequently sued for an enormous sum by the developer. Such complaints may also take the form of lobbying a government official, circulating a petition, writing an article or posting a review.[12] Activists, journalists, academics and members of civil society groups are usually the target of SLAPP suits.[13]

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9 Penelope Canan and George W Pring "Strategic Lawsuits against Public Participation." (1988) 35 Social Problems 506 at 506.

10 At 506; George W Pring "SLAPPs: Strategic Lawsuits against Public Participation." (1989) 7 Pace Environ L Rev 3 at 3.

11 Penelope Canan "The SLAPP From a Sociological Perspective" (1989) 7 Pace Environ L Rev 23 at 23 – 24.

12 Kathryn W. Tate "California's Anti-Slapp Legislation: A Summary of and Commentary on Its Operation and Scope" (2000) 33 Loy LA L Rev 801 at 801.

13 *Mineral Sands*, above n 2, at [39].

To maximise the intimidatory effect, the outspoken party will typically be sued for an exorbitant sum. The average United States SLAPP claims damages of $7.4 million and takes three years to resolve.[14] The SLAPPer will not expect to recover the entire sum of damages as their overriding motive is to intimidate and silence the source of the criticism, divert their resources and dissuade the defendant and others from voicing future opposition. In fact, SLAPP plaintiffs in the United States have been found to lose 80-90% of the suits that progress to trial.[15] A public apology may be sought instead of damages, as was sought by MRC in *Mineral Sands*, thereby undermining the cause advanced by the defendants.[16] Often, defendants will be compelled to settle the case due to the financial burdens associated with pursuing a case, regardless of the merits of available defences.[17]

There is often a "David and Goliath"-scale power imbalance between parties to a SLAPP, as those willing to instigate claims tend to have the resources to pursue litigation until their interests have been advanced.[18] While the SLAPPed party often finds themselves in financial turmoil, the plaintiff may be able to claim litigation costs as a tax-deductible expense, further heightening the inequity.[19] In even more unjust cases, public officials engaging in such litigation may use public money to fund their efforts.[20]

While these features will often be present, there is no universally agreed-upon set of criteria that can be used to identify SLAPPs. Some have contended that it is solely the motive of the SLAPPer that is material, or otherwise the defendant's motive in making the expression.[21] This paper will take the position that SLAPPs can be identified where an expression relating

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14 Terrance M. Hurley "Environmental Conflicts and the SLAPP" (1997) 33 J. Environ Manage 253 at 253.

15 Tate, above n 12, at 804.

16 *Mineral Sands*, above n 2, at [62].

17 Brian Walters *Slapping on the Writs* (1st ed, University of New South Wales Press Ltd, Sydney, 2003) at 10.

18 For example, a SLAPP plaintiff might intentionally delay the proceedings until their development project has concluded.

19 Walters, above n 17, at 9.

20 At 10.

21 Victor J Cosentino "Strategic Lawsuits Against Public Participation: An Analysis of the Solutions" (1991) 27 Cal W L Rev 399 at 401.

to a matter of public interest is retaliated against by legal action, often to intimidate the defendant.[22] However, proving the SLAPPer's intention should not be the basis upon which relief is granted.

Importantly, the circumstances in which these lawsuits arise are varied. Although SLAPPs often take the form of defamation actions, any form of tort claim can be invoked, such as nuisance, breach of contract, or conspiracy.[23] While Pring and Canan's study focused solely on petitioning activity, virtually any form of expression can be subjected to such proceedings, such as online discourse.[24] For example, in Texas, a couple who left a negative review about a pet-sitting company's $5 dog-walking fee was sued by the company for US $1 million.[25]

However, not all SLAPPs are clearly devoid of legal merit. Often such claims will appear legally tenable and can blend in amid a sea of legitimate tort claims. This is where a legislative or judicial remedy focused on the protection of expression relating to matters of public interest, rather than deciphering the plaintiff's intention, is of great utility, affording defendants with more options when facing litigation.

B SLAPPs and the "Chilling Effect"

Preventing the chilling of free speech and promoting public participation typically form the rationale behind anti-SLAPP measures. In New Zealand, public participation finds support in the affirmation of the right to freedom of expression in section 14 of New Zealand's Bill

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22 Celebrity gossip could be viewed as a category of speech that is of public interest. However, as observed by Eichelbaum CJ in *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] NZLR 720 at p 733, there is a difference between material that is "merely interesting" to the public and material "properly within the public interest, in the sense of being of legitimate concern to the public".

23 Michaelin Scott and Chris Tollefson "Strategic Lawsuits Against Public Participation: The British Colombia Experience" (2010) 19 RECIEL 45 at 46.

24 Andrew L Roth "Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet" (2016) 2 BYU L. Rev. 741 at 741.

25 Robert T. Sherwin "Evidence? We Don't Need No Stinkin' Evidence!: How Ambiguity in Some States' Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation" (2017) 40 Colum. J.L & Arts 431 at 432.

of Rights Act 1990, and restrictions placed on this freedom must be demonstrably justified.[26] Without sufficient protection of free expression, the circulation of information can be unduly hindered, and powerful actors may be free to mould public opinion as they see fit.[27]

The threatening nature of SLAPPs can have wide-reaching and potentially severe implications for public discourse. The financial and emotional burdens incurred by the SLAPP target can deter them from voicing dissent in the future, thereby resulting in the chilling of speech.[28] SLAPPs can also silence those sharing the views of the target, chilling the speech of many others in a community.[29] Where a SLAPP is settled, often the settlement conditions will require a defendant's silence regarding the subject of the proceedings, essentially constituting a victory for a SLAPPer.[30]

However, the harms mentioned above will not always ensue where a SLAPP is launched. Defendants may not choose to abandon their cause and instead be spurred on to intensify their effort, and in some, albeit rare instances, SLAPPs have generated positive publicity for the defendant's cause. Famously, the international attention garnered by *McDonald's Corp v Steel and Morris*, known as the "*McLibel*" case, instigated a worldwide movement against the fast-food giant McDonalds.[31] However, such a back-firing effect is infrequent. SLAPPs often span multiple years, and public interest in the particular issue may have waned by the time a verdict is reached.[32]

C The Importance of Early Dismissal

SLAPPs must be dismissed early in the litigation process to ensure that the above-mentioned harms are avoided. Proceeding to trial requires significant financial resources, and early intervention can minimise the costs incurred and allow the defendant to re-engage in public discourse.[33] Even if the defendant successfully mounts a defence, the suit's outcome is not

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26 Bill of Rights Act 1990, s5.

27 Walters, above n 17, at 50.

28 Tate, above n 12, at 803.

29 *Mineral Sands,* above n 2, at [61].

30 Walters, above n 17, at 11.

31 Greg Ogle "Beating a SLAPP Suit" (2007) 32 Altern Law J 71 at 71.

32 At 72.

33 Marnie Stetson "Reforming SLAPP Reform: New York's Anti-SLAPP Statute" (1995) 70 NYU L Rev 1324 at 1347.

determinative of the damage that SLAPPs can cause due to the draining of resources that often occurs.[34] In particular, defamation proceedings can be highly complex, costly, and their outcome uncertain, thus prompting defendants to settle.[35] As the plaintiff's motive is often to delay and divert the source of dissent, laws that facilitate the early dismissal of SLAPPs serve as the most effective method to prevent the unnecessary chilling of speech.

III The Relevance of Anti-SLAPP Measures in the New Zealand Context

Unlike in the United States, where exorbitant SLAPPs are more frequently launched, a blatant SLAPP claiming millions in damages has not yet arisen in New Zealand. Nevertheless, lawsuits and threats of litigation intended to limit free expression have been launched in New Zealand and similar jurisdictions. This section will explore three such examples.

In 2013, Conservative Party leader Colin Craig issued a legal threat to Ben Uffindell, editor of satirical publication The Civilian, following statements attributed to Craig in an article. The article's subject was Maurice Williamson's reference to "big gay rainbows" in a 2013 speech before the passing of the Marriage (Definition of Marriage) Amendment Bill. Uffindel wrote that Craig said that "God created the rainbow following Noah's flood, which was a message that he would never again flood the world, unless we made him very angry, which we have", implying Craig's opposition to the Bill.[36] Uffindell promptly received a letter from Craig's lawyers asserting that the statement could not be dismissed as satire since the use of quotation marks gave it the appearance of fact.[37] To avoid being served with defamation proceedings, Uffindell was instructed to retract the "ridiculous" statement and pay legal costs of $500 to Craig.[38] Uffindell swiftly obliged, but in a humorous manner.[39]

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34 Tate, above n 12, at 805.

35 Walters, above n 17, at 11.

36 Ben Uffindell "Maurice Williamson Looking Pretty Stupid After Floods" (22 April 2013) The Civilian <http://www.thecivilian.co.nz/maurice-williamson-looking-pretty-stupid-after-floods/>

37 Ben Uffindell "Chapman Tripp Legal Notice – 23 April 2013" (23 April 2013) The Civilian <http://www.thecivilian.co.nz/chapman-tripp-legal-notice-23-april-2013/>

38 Uffindell, above n 36.

39 Above n 36.

Suppose this has transpired in a jurisdiction with anti-SLAPP protections. If so, Uffindell may have refused to retract the comment and, if proceedings had been commenced, applied to strike out Craig's claim. While the expression at stake was arguably less critical to public discourse than, for example, activism regarding a harmful mining operation, political satire is a valid form of journalistic commentary, can increase political engagement and could plausibly have been protected under foreign anti-SLAPP laws.[40] Additionally, a court would have likely found that the statement would not have been understood in a defamatory sense by a reasonable person given the satirical nature of Uffindell's platform, and perhaps found that Craig's claim did not have sufficient merit.[41] Regardless of such an application's outcome, the absence of an anti-SLAPP mechanism would have left Uffindell with recourse to defamation defences alone.

Solid Energy New Zealand Ltd v Mountier (*Solid Energy*), an interim injunction application, was an alleged SLAPP in the New Zealand context. This case saw Solid Energy bring trademark infringement proceedings against activist Frances Mountier, leader of the Save Happy Valley Coalition, for publishing a parody environmental report using Solid Energy's registered trademark and reporting format, painting Solid Energy in an "unflattering light".[42] Chisholm J found that there was an arguable case under s10 of the Trade Marks Act 2002 (TMA), and granted interim orders requiring Mountier to remove the trademark from the report.[43] Lawyer Bram Van Melle has contended that this case was, in fact, a SLAPP: while the complaint was framed as an intellectual property matter, he alleges that Solid Energy's complaint was primarily concerned with the defamatory nature of the article, and

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40 Political satire and comedy can increase political engagement among those generally less attentive to news media. See Michael A Xenos and Amy B Becker "Moments of Zen: Effects of *The Daily Show* on Information Seeking and Political Learning" (2009) 26 Political Communication 317 at 329.

41 Whether a satirical article is found to be defamatory is a matter of context. In *Sir Elton John v Guardian News and Media Limited* [2008] EWHC 3066 (QB) at [32] Tugendhat J held that the article in question was not defamatory as no reasonable reader would have sensibly interpreted the statements as fact. However, a segment of a satirical sketch show was found to be defamatory in *Keith v Television New Zealand Limited* HC Auckland CP780/91, 3 December 1992.

42 Bram Van Melle "A 'SLAPP' in the Face for Free Speech?"(2007) 5 NZIPJ 370 at 370.

43 Van Melle, above n 40, at 371.

commercial legal rights were used to address an inherently political debate.[44] Van Melle was also doubtful as to whether the Judge correctly applied section 10 of the TMA.[45]

If an anti-SLAPP application to strike out was available, Mountier may have benefitted from directing the Judge's attention more closely toward the nature of the expression and whether it warranted protection. However, it is unlikely such an application would have succeeded given the ruling that the expression had contravened Solid Energy's intellectual property rights.[46] Nevertheless, this type of case, one featuring environmental activists and a large mining company, could substantially benefit from anti-SLAPP laws.

Earlier this year, Professor Simon Thornley issued a legal threat to epidemiologist Professor Siouxsie Wiles following the publication of an opinion article in The Spinoff. In the article, Wiles, condemning the circulation of "fake news" regarding New Zealand's COVID-19 vaccine rollout, stated that she would respond to disinformation by continuously asserting proven facts.[47] Thornley, a "Plan B" academic, had previously called to halt the vaccine rollout in favour of embracing the "herd-immunity-by-infection" route.[48] In the article, Wiles noted that Thornley had given evidence in support of Nga Kaitiaki Tuku Iho Ltd, a group taking the government to court to stop the national vaccine program.[49] Thornley's lawyers stated that Wiles' article was a defamatory publication and, while he did not dispute that he gave evidence, the article "inferred that our client's evidence… constituted

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44 At 372.

45 At 371.

46 *Solid Energy New Zealand Ltd v Mountier* HC Christchurch CIV 2007-409-441, 25 July 2007 at [27].

47 Justin Giovannetti "Simon Thornley of 'Plan B' Sends Legal Threat to Siouxsie Wiles and The Spinoff" (22 July 2021) < https://thespinoff.co.nz/society/22-07-2021/simon-thornley-of-plan-b-sends-legal-threat-to-siouxsie-wiles-and-the-spinoff/>; Siouxsie Wiles "There's a Lot of Vaccine BS Around: Here's Why I Won't Be Debunking It" (15 May 2021) The Spinoff <https://thespinoff.co.nz/society/15-05-2021/siouxsie-wiles-theres-a-lot-of-vaccine-bs-around-heres-why-i-wont-be-debunking-it/>

48 Siouxsie Wiles "The Plan B Implosion: What Brazil Teaches Us About the Herd Immunity Hogwash" (18 January 2021) The Spinoff <https://thespinoff.co.nz/society/18-01-2021/siouxsie-wiles-the-plan-b- implosion-what-brazil-teaches-us-about-the-herd-immunity-hogwash/>

49 Katie Harris "High Court Hears Arguments Questioning Legality of Vaccine Rollout" (12 May 2021) New Zealand Herald <(https://www.nzherald.co.nz/nz/covid-19-coronavirus-high-court-hears-arguments-questioning-legality-of-vaccine-rollout/E22ZEJVMCWCLIN25QE3XN56I6U/>

disinformation.", insisting that a series of amendments be made to the article.[50] There have not yet been any further publicised developments.

Condemning the spread of misinformation during a pandemic from the vantage point of an academic would also likely be found to be a matter of public interest and thus protected under foreign anti-SLAPP legislation. While it is unclear whether this dispute will proceed to litigation, if so, an anti-SLAPP remedy would afford Wiles more options in protecting her speech.

Looking to other jurisdictions, an increasing number of Canadian SLAPPs prompted the enactment of legislation, of which two will be elaborated on in Part II.[51] In Europe, a 2021 study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs found there is a "significant need for legislative intervention" following a rise in intimidatory lawsuits across the continent.[52]

In the United Kingdom, a jurisdiction without anti-SLAPP laws, INEOS Upstream Limited, a major petrochemical producer and current sponsor of the All Blacks, sought five injunctions against persons unknown who were "thought to be likely to become protestors" at sites selected for shale gas exploration by fracking.[53] On appeal, the Court of Appeal declared that the right to engage in legal protest outweighed the right of the claimants to take pre-emptively precautions against possible protests, recognising the potential "chilling effect" that could affect those legitimately exercising rights of protest.[54] The Court discharged two of the injunctions, finding that their broadness and lack of clarity meant they could not be the subject of quia timet relief and that the trial judge had failed to consider

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50 Giovannetti, above n 42.

51 Examples of Canadian SLAPPs include *Daishowa Inc. v Friends of the Lubicon* (1998) 39 OR (3d) 620 (ONSC), *Fraser v Saanich (District)* (1999) BCJ 31000 (BCSC), *Sino-Forest Corporation v Muddy Waters L.L.C. and Others* ONSC CIV-12-9666-OOCL, March 29 2012, and *Morris v Johnson* (2011) 107 OR (3d) 311(ONSC).

52 Justin Borg-Barthet, Benedetta Lobina and Magdalena Zabrocka *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society* (Policy Department for Citizens' Rights and Constitutional Affairs, PE 694.782, June 2021) at 51.

53 *Boyd & Anchor v Ineos Upstream Ltd & Ors* [2019] EWCA Civ 515 at 1.

54 At 40.

rights contained within the Human Rights Act 1988, such as freedom of expression.[55] This case, featuring a large corporation and vocal activists, contains some of the hallmarks of a SLAPP. While two of the five defendants were ultimately successful on appeal, the availability of an anti-SLAPP remedy may have seen the interim injunctions declined at the litigation's outset.

The Australian Capital Territory enacted anti-SLAPP legislation in 2005. This reform followed the "Gunns 20" case, Australia's most high-profile defamation case in recent memory, where forestry magnate Gunns sued 20 Tasmanian environmentalists for $6.3 million.[56] Two years after Gunns launched the claims, following several strike-out hearings and much negative publicity for Gunns, proceedings were discontinued against several defendants and settlements granted in favour of four defendants.[57]

Unlike states within the United States, Canada and Australia, New Zealand has no legislation devoted to preventing SLAPPs. While SLAPPs have received limited recognition in New Zealand jurisprudence, New Zealand is not immune to this kind of litigation. SLAPPs are often designed to mask the true intent of the plaintiff, which could account for their lack of widespread attention.[58] Before the enactment of legislation in British Colombia, proponents noted that SLAPP targets often settle before the matter reaches court, and/or are legally unsophisticated and unable to facilitate effective litigation strategy.[59] This same rationale could be applied in the New Zealand context, and an absence of blatant SLAPPs should not deter legislators from enacting a remedy.

While the Bill of Rights Act protects freedom of expression and the courts must develop the common law in accordance with this right, specific legislation would provide a more focused solution.[60] Section 45 of our Defamation Act 1992 provides that proceedings will be vexatious if a plaintiff has no intention to proceed to trial and should be struck out accordingly. However, proving such intention can be exceedingly difficult for a defendant,

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55 *Boyd & Anchor v Ineos Upstream Ltd & Ors,* above n 48, at 41 - 49.

56 Adam Beeson "The Gunns 20 Case: A Brief History" (2010) 1NELR 51 at 51.

57 At 52.

58 Pring and Canan, above n 9, at 511.

59 Scott and Tollefson, above n 23, at 50.

60 Bill of Rights Act, s14.

as will be discussed in Part III. Even if this threshold was more defendant-friendly, the provision can only be applied to defamation actions, and defendants facing other causes of action may be left without adequate protection. Instead, carefully developed anti-SLAPP legislation is required.

IV The Ontarian Anti-SLAPP Law As a Legislative Solution

Anti-SLAPP legislation has been implemented in Canada, Australia and twenty-eight US states. Anti-SLAPP laws can vary significantly in content, with some applying in limited circumstances and others with a much broader ambit.[61] Most anti-SLAPP provisions in the US and Canada establish a two-step objective test. First, the defendant must prove that their expression is protected by the statute. Second, the plaintiff must prove that their claim has the requisite degree of merit. Many of these laws contain an economic disincentive where, if the motion succeeds, the SLAPPer must cover the defendant's legal costs. However, some US states heavily restrict the forms of protected expression, and some, such as that of the Australian Central Territory, impose a higher burden on defendants. There are also variations as to the burden placed on the plaintiff when proving that their claim has sufficient merit.

Dubbed one of the best anti-SLAPP measures in North America, the Ontarian anti-SLAPP law provides a helpful legislative model that effectively balances the parties' competing interests and protects a wide variety of forms of public participation. For comparison, this section will also briefly consider elements of the Californian and the Australian Capital Territory anti-SLAPP provisions.

A Background & Legislative Context

Following the first recognition of SLAPPs in the Canadian common law in 1998, the country saw several SLAPPs come before the courts in the late 1990s and 2000s.[62] Three states now

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61 Carson Hilary Barylak "Reducing Uncertainty in Anti-SLAPP Protection" (2010) 71 Ohio State Law J 845 at 848.

62 *Daishowa Inc. v Friends of the Lubicon* (1998) 39 OR (3d) 620 (ONSC) was the first Ontarian case that explicitly recognised the SLAPP phenomenon. See also *1704606 Ontario Ltd v Pointes Protection* 2020 SCC 22 at [7].

have anti-SLAPP laws in place: British Colombia, Quebec and Ontario.[63] While the British Colombian and Ontarian laws are identical in substance, this paper will focus on the Ontarian law and its context as it has been thoroughly discussed in a recent decision of the Supreme Court of Canada, *1704606 Ontario Ltd v Pointes Protection* (*Pointes Protection*), which informs much of the discussion in this subpart.[64]

In 2010, the Attorney-General of Ontario assembled a panel of experts, titled the Anti-SLAPP Advisory Panel, to advise the government on establishing an anti-SLAPP law.[65] The Panel concluded that the government should enact an anti-SLAPP law providing a "broad scope of protection" for expression relating to the public interest.[66] In 2015, the state enacted section 137.1 of the Courts of Justice Act 1990. Section 137.1 is similar to some of its US counterparts, such as California, but places a higher burden on the plaintiff under the test's second step and affords the court an ultimate discretion when weighing the competing rights. Where a moving party is successful, they are entitled to costs on a full indemnity basis unless such an award is deemed inappropriate in the circumstances.[67]

B The "Public Interest" Hurdle

Section 137.1 allows a judge to dismiss a proceeding where the defendant "[satisfies] the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest" on the balance of probabilities.[68] Section 137.1(2) states that "expression" means any communication, regardless of whether it is made non-verbally and even if made privately.[69] The terms "expression" and "matter of public interest" are to be

63 British Colombia was the first Canadian state to enact anti-SLAPP legislation in 2001, followed by Quebec in 2009 and Ontario in 2015. While a newly elected Government in British Colombia repealed the Act five months later, arguing that judicial remedies would suffice, it was reinstated in 2019; see Protection of Public Participation Act SBC 2019 c3, s4.

64 Ryerson University Centre for Free Expression "Anti-SLAPP Legislation: A Backgrounder" < https://cfe.ryerson.ca/key-resources/guidesadvice/anti-slapp-legislation-backgrounder>

65 *Pointes Protection*, above n 62, at [7].

66 At [8]

67 Courts of Justice Act RSO 1990 c 43 (CA), s137.1 (7).

68 Courts of Justice Act RSO c 43, s137.1(3).

69 s137.1(2).

interpreted in a "generous and expansive fashion" to safeguard the rights at stake.[70] All forms of public participation are protected by the statute, recognising the diverse ways in which citizens contribute to public discourse.[71] Similarly, California's anti-SLAPP statute allows the word "expression" to be interpreted broadly.[72] Conversely, Pennsylvania's anti-SLAPP law is only available to defendants that have petitioned the government over environmental issues.[73] If such legislation were replicated in New Zealand, The factors listed in *Durie v Gardiner* could be used to determine whether an expression is in the public interest, such as the seriousness of the allegation and the reliability of any sources.[74]

In the 2020 case of *Bent v Platnick*, an Ontarian lawyer, Bent, sent out a mass email alleging that Platnick, a family physician, had "altered" or "removed" sections of medical reports. The Supreme Court found that the email related to a matter of public interest as the communication raised concerns regarding the integrity of medical reports, the proper administration of justice and was directed at many individuals. [75] In *Pointes Protection*, Pointes Protection, a group of local residents formed in opposition to a company's proposed large-scale development in a wetland area, were sued by the company for $6 million following a testimony given at an Ontario Municipal Board hearing.[76] The Supreme Court found that the public interest in the expression was "significant" due to its reference to the potential environmental degradation that would result from the development and since it took the form of testimony before a tribunal.[77]

The Australian Capital Territory's anti-SLAPP law imposes a more onerous test under its first step. Defendants must prove that the proceeding is maintained against them "for an improper purpose".[78] As noted by the Ontarian Anti-SLAPP Advisory Panel, such a requirement is undesirable: it can be challenging for a defendant to establish the motivations

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70 *Pointes Protection*, above n 62, at [30].

71 Chris Tollefson "Strategic Lawsuits Against Public Participation: Developing a Canadian Response" (1994) 73 Can Bar Rev 200 at 230.

72 See Cal Code Civ Proc § 425.16 (b)(1).

73 Pa Cons Stat, tile 27 § 7707, 8301-05.

74 *Durie v Gardiner* [2018] NZCA 278 at [67]

75 *Bent v Platnick* 2020 SCC 23 at "held" - [83].

76 *Pointes Protection*, above n 62, at "held".

77 At [120].

78 Protection of Public Participation Act 2008 (ACT), S9(1)(b)(ii).

underlying the plaintiff's claim and identify such an "improper purpose as legal privilege will often bar defendants from accessing useful documentation.[79] The 2001 British Colombian Act required defendants to prove intention, but the new Act no longer imposes this requirement for precisely this reason: legislative reform was informed by the Attorney-General's concern that this was "very difficult to prove" in the absence of emails or witnesses.[80] Without such evidence, courts will be reluctant to infer that an improper purpose underlays such claims, and cases will proceed to trial.

C The "Merits-based" Hurdle

Under the Ontarian test's second step, the plaintiff must show both that their claim has "substantial merit" and that the moving party has "no valid defence".[81] "Substantial merit" has been interpreted to mean that the underlying proceeding must have a "reasonable prospect of success" beyond "technical validity", which demands "more than an arguable case".[82] Justice Côté clarified that more is needed than the claim merely being capable of being "nudged over the line", and while the plaintiff does need not show a demonstrated likelihood of success, they must show that their chances of success "weigh in their favour".[83]

In *Bent v Platnick*, a majority of the Supreme Court found that Platnick easily established a legally tenable claim for defamation, stating that the right to free expression does not "confer a license to ruin reputations".[84] The Court also found that Bent would not have had a valid defence.[85] Conversely, in *Pointes Protection*, the Court found that the Company's claim did not have "substantial merit" as Pointes Protection was not contractually barred from testifying against the Company.[86]

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79 Greg Ogle "Anti-SLAPP Law Reform in Australia" (2010) 19 RECIEL 35 at 41; Ministry of the Attorney-General *Anti-Slapp Advisory Panel Report to the Attorney General* (October 2010) at 34.

80 CBC "B.C Introduces Anti-SLAPP Legislation to Protect Public Interest Debates" (15 May 2018) < https://www.cbc.ca/news/canada/british-columbia/bc-slapp-legislation-bill-1.4664087>

81 *Pointes Protection*, above n 62, at [49].

82 At [16] - [50].

83 At [50].

84 *Bent v Platnick*, above n 75, at "held".

85 *Bent v Platnick*, above n 75, at "held".

86 *Pointes Protection*, above n 62, at [98] – [108].

In California, the plaintiff must prove they have a "probability of prevailing on the claim".[87] This burden is a low one, and the courts have determined that a high probability is not required; instead, they refer to the burden as the "minimal merit test".[88] The plaintiff need only establish that their cause of action has at least "minimal merit", meaning the complaint is "both legally sufficient and supported by a prima facie showing of facts".[89]

It could be argued that, due to the less onerous burden placed on plaintiffs, that the standard imposed on plaintiffs under the second prong of the Californian test better protects access to justice and is, therefore, more suitable. However, in the author's opinion, the more lenient "minimal merit" burden may not consistently ensure that suits that only contain technical validity are "screened out" at an early stage. Moreover, the high threshold reflects the legislative desire to provide robust protection for expression in the public interest. In discussing the proposed Ontarian Act, Members of the Ontarian Legislative Assembly echoed concerns regarding the threats posed by "technical cases" that could suppress expression that is "crucial" for democracy.[90] Cases with "minimal merit" could be synonymous with those possessing merely "technical validity", and arguably such claims should not proceed where protected expression is threatened. Therefore, the Ontarian statute's higher standard is preferable.

D Showing Harm & Weighing of interests

Under section 137.1(4)(b), the plaintiff must show, on the balance of probabilities, that the "harm likely to be or have been suffered…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." This step lies at the heart of the analysis as judges have the discretion to dismiss claims on public interest grounds even where the claim has requisite merit.[91] Justice Côté emphasised that the requirement that one

87 Cal Code Civ Proc § 425.16 (g).

88 *Overstock.com, Inc. v. Gradient Analytics, Inc.* 61 P 3d 29 (Cal App 4th 2007) at Headnote (4).

89 *Finton Construction, Inc. v. Bidna & Keys* 190 P 3d 1 (Cal App 4th 2015) at Headnote (11).

90 Ontario, Legislative Assembly of Ontario, *Official Report of Debates (Hansard*) 41st Parl, 1st Sess, no 112, (27 October 2010) at p.1972 (Hon Madeleine Meilleur).

91 *Pointes Protection*, above n 62, at [61]-[66].

interest must *outweigh* the other is "substantively different" from simply "balancing" such considerations.[92]

When determining whether the expression is in the public interest, its content and the underlying motive behind its creation are relevant considerations.[93] Justice Côté stated that judges should be wary of conducting a moralistic taste test and not all expression is created equal. Among other factors, the weighing exercise can be informed by the Canadian *Charter of Rights and Freedoms*, the importance of the expression, broader or collateral effects on other expressions on matters of public interest, the potential chilling effect on future expression either by a party or by others, and any disproportion between the resources being used in the lawsuit.[94]

In *Pointes Protection*, the court held that the company both failed to demonstrate that their claim had merit and that the public interest in allowing their proceeding to continue outweighed the public interest in protecting the expression.

The Ontarian provision does not provide an explicit directive as to the weighing of evidence. However, Justice Côté stressed that section 137.1 motions differ from summary judgment motions and require a much more limited weighing of the evidence. She said that judges must not take motion evidence at face value but engage in a "limited assessment of credibility".[95] The Court did not further elaborate on this fine distinction.

Clarification regarding the weighing of evidence is important. In examining a claim's tenability, California's anti-SLAPP legislation explicitly states that courts must consider pleadings and the affidavits upon which the parties rely.[96] Unlike in Texas, the Californian courts have held that averments alone will not suffice, and parties must present admissible evidence to support their contentions.[97] The provision's clear evidentiary directive is useful

92 *Pointes Protection*, above n 62, at [18], [66].

93 At [79].

94 At [80].

95 At [58].

96 Cal Code Civ Proc § 425.16 (b)(1).

97 Sherwin, above n 25, at 444.

as many anti-SLAPP statutes in other states are silent in this respect.[98] Robert T Sherwin has contended that such ambiguities can result in courts merely accepting the plaintiff's pleadings alone as irrefutable evidence, as has been the case in Texas. This generates the risk of courts treating pleadings as fact, where the claim might, in reality, be baseless, thereby contradicting the statutory purpose.[99] To avoid such ambiguity, any New Zealand provision must explicitly describe the evidence that can be brought to discharge the respective burdens.

V *Abuse of Process & The Suitability of Judicial Measures Alone*

As stated by Goliath J in *Mineral Sands*, the absence of a statutory measure should not prevent SLAPPs from being struck out at an early stage.[100] Without a legislative remedy, New Zealand SLAPP defendants should be able to rely on the abuse of process doctrine, and our courts could adopt an approach resembling that in *Mineral Sands*. However, this Part will discuss the shortcomings of this remedy due to its high threshold and the limited efficacy of the ruling in *Mineral Sands*.

A The Mineral Sands *Approach*

Goliath J held that "litigation unconcerned with the vindication of legitimate rights but is part of a broad and purposeful strategy to intimidate, distract and silence public criticism" is an abuse of the court's processes, thus establishing a judicial remedy to counter SLAPPs in South Africa.[101] In reaching this decision, Goliath J emphasised that expression relating to matters of public interest must be protected unless a plaintiff proves that real harm was suffered.[102] Goliath J found that the expression was in the public interest and warranted protection, which outweighed any harm suffered by MRC.[103] Despite Goliath J's explicit condemnation of SLAPPs, the Court did not establish a concrete multi-step test.

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98 Sherwin, above n 25, at 467.

99 At 467.

100 *Mineral Sands,* above n 2, at [65].

101 At [66].

102 At [56].

103 At [64].

B Abuse of Process in New Zealand: A Brief Overview

The courts have a common law and statutory ability to strike out claims that constitute an abuse of the court's process. The jurisdiction of a court to prevent such abuse helps protect its integrity, the doctrine being underpinned by the notion that the public must retain confidence in the administration of justice.[104] The power to strike out claims as an abuse of process has been characterised as "broad" and is decidedly unconfined to fixed categories.[105]

This power can be invoked in a range of circumstances. Under the High Court Rules 2016, the courts can strike out all or part of a civil or criminal proceeding if it is objectively found to be "frivolous or vexatious", "discloses no reasonable cause of action", "is likely to cause prejudice or delay" or is "otherwise an abuse of the process of the court".[106] Claims will be "vexatious", where they are brought to "vex" the party obliged to defend them and will often contain an element of impropriety.[107]

Under section 167 of the Senior Courts Act 2016, courts have the discretion to make an order under section 166 restricting the commencement of civil proceedings where two or more of the proceedings brought are found to be "totally without merit".[108] Such an order encompasses instances where claims are found to be an abuse of process.[109] Factors relevant to determining whether a claim is without merit include "where the proceeding is brought at the drop of a hat despite the lack of merit", "the litigant has paid no regard to the merits, proportionality, or costs of the proceeding" and "the proceeding exposes the defendants to inconvenience, harassment and expense out of proportion to the gain a plaintiff is likely to receive".[110]

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104 *Hurunui Water Project Ltd v Canterbury Regional Council* [2015] NZHC 3098, [2016] NZRMA 71 at [84]; *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 481.

105 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [59].

106 High Court Rules 2016, pt. 15.1(1).

107 *Hong v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2020] NZHC 2205 at [54]; *Matsuoka v Pollak* [2018] NZHC 3292, [2019] NZAR 246 at [17].

108 Senior Courts Act 2016, s167 (3).

109 *Genge v Visiting Justice, Christchurch Men's Prison* [2018] NZHC 1457 at [29].

110 *Harrison v Harrison (As Trustees of the Valerie Geard Trust)* [2020] NZHC 3066 at [26]; *Genge v Visiting Justice Christchurch Men's Prison*, above n 109, at [29].

While the instances in which courts may dismiss claims as an abuse of process appears broad, the courts have been clear that a high threshold must be met. In *Moevao v Department of Labour*, Richmond P stated that "it must be quite clear that the case is truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority."[111] In *Telstra New Zealand Holdings Ltd v Commissioner of Inland Revenue,* Wylie J stated that the misconduct must be "plain and obvious" before a court will strike proceedings on account of abuse.[112] The courts have also been slow to make section 166 orders due to the potential contravention of the right to justice.[113]

C The Utility of This Measure

If a SLAPP arises before the New Zealand courts, they could intervene by following the *Mineral Sands* approach and characterise such claims as an abuse of process. However, the high threshold associated with the doctrine means that it likely could not be invoked in many cases, limiting its value in this context.

As Goliath J's finding that the litigants were vexatious contributed to the finding of abuse, our courts could bring SLAPPs within this identified form of abuse of process.[114] SLAPPs may often contain elements that warrant dismissal by way of abuse of process or a section 166 order; where litigants bring proceedings to intimidate or silence dissent, a finding could be made that they are frivolous or vexatious.

However, while the ruling in *Mineral Sands* established clear judicial intolerance of SLAPPs, it may not serve as the most effective anti-SLAPP measure. Even if Goliath J's approach was directly replicated in New Zealand, the standard established is of limited utility due to its high threshold. It will often be difficult for a defendant to prove, and a court be satisfied, that the plaintiff intended to "intimidate, distract, and silence public criticism" so early in the litigation process. On this basis, most cases would proceed to trial, leaving the benefits associated with early dismissal unattained.

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111 *Moevao v Department of Labour*, above n 104, at 470-471.

112 *Telstra New Zealand Holdings ltd v Commissioner of Inland Revenue* [2010] NZHC 2195, (2011) 25 NZTC 20-010, (2010) 21 PRNZ 1 at [42].

113 *Seimer v Attorney-General, For the Ministry of Justice* [2018] NZHC 3406 at [88].

114 Mineral Sands, above n 2, at [66].

Additionally, the high threshold required to establish abuse may mean that the remedy is unavailable to most SLAPP targets. Often it may not be "plain and obvious" at the outset that the claim is without merit, especially if the SLAPPer is careful to conceal their intentions. If our courts adopted an approach similar to that in *Mineral Sands*, the efforts of the plaintiff to "intimidate and silence public participation" must be effectively incontestable to meet the "plain and obvious" threshold. It is also unlikely that a court will readily impose a section 166 order due to the equally high "totally without merit" standard. As previously noted, SLAPPs will often contain some technical merit, and it is unlikely that the courts will be willing to stay proceedings if such a test is applied.

Furthermore, previous directions of New Zealand's appellate courts regarding this mechanism have been criticised for their lack of practical utility.[115] The courts have typically applied this doctrine on a case-by-case basis, limiting the applicability of past decisions to new cases. This incremental approach may render it difficult to establish a blanket anti-SLAPP formulation of the doctrine that can be applied in future litigation.

The remarks of the Attorney-General of Ontario prior to the enactment of Ontario's anti-SLAPP law highlighted the difficulties associated with relying on judicial remedies. In 2010, the Attorney-General acknowledged that while SLAPPs can be addressed by judicial remedies such as abuse of process, such measures are "not effective" as courts are often hesitant to dismiss preliminary motions based on affidavit evidence and oral argument.[116] In place of such measures, the Panel of the Attorney-General's office found that a "more focused" legislative remedy was necessary.[117]

While certainty as to the outcome of a lawsuit is never guaranteed, the standard required to establish an abuse of process gives SLAPP defendants little reassurance that their expression could be protected. If the doctrine can only be invoked in limited circumstances, then this measure would not reduce the chilling effect on public participation or serve as a deterrent for litigants without legitimate claims. The legal standard must be attainable to be effective;

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115 Finn Lowery "Abuse of Process: The Need for Structure" (2014) 20 Auckl Univ Law Rev 223 at 227.

116 Ministry of the Attorney-General *Anti-Slapp Advisory Panel Report to the Attorney General* (October 2010) at 11.

117 At 13.

rather than requiring that the plaintiff's misconduct be "plain and obvious", in the context of potential SLAPPs, the focus should instead be on whether the expression is protected and whether the claim has the requisite degree of merit. A clear statutory framework would be more effective in guiding the courts and serve as a more efficient screening mechanism.

VI Freedom of Expression and Access to Justice in Tension

Any decision to legislate against SLAPPs requires careful weighing of the competing rights at stake. This can be a difficult task – as stated by the Supreme Court of Rhode Island in *Palazzo v Alves*, anti-SLAPP statutes require 'meticulous drafting' and can present a 'double-edged challenge' for those legislating in this area.[118]

A Access to Justice

The 'doubled-edged challenge' comes in the form of reconciling the right to freedom of expression with the right to justice. The right to free expression is not absolute, and its exercise should not wrongly deny others their right to access justice.[119] Section 27(1) of the New Zealand Bill of Rights Act states that "every person has the right to the observance of the principles of natural justice by any tribunal or public authority…which has the power to make a determination in respect of that person's rights … as protected by law".[120] Butler and Herbert have explained that s27(1) encompasses the right of access to justice and is not restricted to a limited class of natural justice rights.[121] This right helps to uphold the rule of law by ensuring that those who commit wrongs can be duly subjected to the law.[122] However, this right is also not unlimited in scope, and, sometimes, litigants are justly denied access to judicial remedies, such as where a claim amounts to an abuse of process.[123][124]

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118 *Palazzo v Alves* 944 A 2d 144 RI (Ri 2008) at 151.

119 *Hosking v Runting* [2004] NZCA 34, 3 NZLR 385 at [113].

120 Petra Butler and Campbell Herbert "The Case for a Bilateral Arbitration Treaty" (2014) 26 NZULR 186 at 195.

121 At 196.

122 Helen Winkelmann "Access To Justice – Who Needs Lawyers?" (2014) 13 Otago LR 229 at 231.

123 Butler and Herbert, above n 120, at 211; *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-Operative Group Ltd* [2014] NZHC 1681 at [54].

124 High Court Rules, pt. 15.1(1).

It follows that those with legitimate claims should not be barred from seeking relief due to the existence of overly demanding anti-SLAPP legislation. The choice to stay proceedings is an "extreme step", and those seeking redress should be given a fair opportunity to do so, subject to certain limitations.[125] Threats to access to justice can arise where the burden on the plaintiff under prong two is exceedingly high. This is of particular concern where claims arise that threaten expression relating to matters of public interest but are brought on legitimate grounds.

B The Approach in Other Jurisdictions

Inevitably, other jurisdictions have contended with the task of weighing these competing rights. The Supreme Court of Canada in *Pointes Protection* stated that the values underlying freedom of expression, notably the importance of protecting the exchange of ideas, should guide the motion judge in applying the provision.[126] The weighing exercise under section ensures that, once plaintiffs have discharged their burden, they will only be denied access to justice where the public interest weighs in favour of protecting the expression. [127] Before the provision's enactment, the Legislative Assembly of Ontario was careful to emphasise that "anyone who has a legitimate claim… should not be discouraged by this legislation."[128] This final step requires a careful weighing of rights, ensuring that due attention is afforded to the potential public interest in protecting the plaintiff's right to pursue legitimate claims.

Undeniably, in these cases, plaintiffs may be denied access to justice at an early stage, before even the commencement of discovery. However, owing to the possible harms that SLAPPs can produce for defendants and public discourse, where the public interest in protecting expression is found to weigh against allowing claims to proceed, such denial will likely be justified.

In the US, various anti-SLAPP statutes were challenged before enactment based on violating the right to equal protection by interfering with the ability to engage in the judicial

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125 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [37].

126 *Pointes*, above n 62, at [18].

127 at [18], [66].

128 Ontario, Legislative Assembly of Ontario, *Official Report of Debates (Hansard*) 41st Parl, 1st Sess, no 112, (27 October 2010) at p. 1975 (Hon Madeleine Meilleur).

process.[129] The Supreme Court of California has stressed that the state's anti-SLAPP statute does not automatically bar plaintiffs from litigating, rather, it subjects to potential dismissal "only those actions in which the plaintiff cannot state a legally sufficient claim."[130] A Californian appellate court also noted that the state's anti-SLAPP provision did not prohibit the initiation of any particular causes of action, instead, it exists to allow the courts to dismiss meritless claims early in the litigation process.[131] Therefore, access to justice is only limited where the expression is protected, and the claim cannot reach even the "minimal merit" threshold.

It could be argued that that the higher standard imposed by the Ontarian provision is too onerous and that the Californian approach is preferable. Perhaps, if claims are found to have *some* merit, then the natural course of the trial should determine the viability of the claim, rather than an early staying of proceedings based on limited evidence. However, the higher test would not unduly restrict the right to justice as those with legitimate and convincing claims should easily discharge their burden. Where expression is found to be protected, plaintiffs should be required to demonstrate that their claim has substantial merit.

The initial form of the Australian Capital Territory's anti-SLAPP Bill provides an example of an anti-SLAPP provision that would have dramatically hindered access to justice. Solely focused on the defendant's conduct, the Bill enabled courts to strike out claims where defendants had engaged in a form of public participation and reasonably believed that their conduct was justified.[132] Such a one-sided approach completely disregards the potential merit of claims and ought not to be replicated in the New Zealand context.

C Resolving the Tension

If New Zealand introduced an anti-SLAPP provision, plaintiffs with genuine claims must retain access to the courts. However, where a claim threatens protected speech, plaintiffs should be required to establish the legitimacy of their claim rather than proceeding unimpeded. As provided by the Ontarian test, those denied access to justice should only be

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129 Barylak, above n 61, at 864.

130 *Jarrow Formulas, Inc, v. LaMarche* 74 P 3d 737 (Cal 2003) at 728.

131 Barylak, above n 61, at 865.

132 Simon Corbell MLA (Attorney-General) *Review of the Protection of Public Participation Act 2000* (ACT Government Report, 2012) at 3.

those that lack the requisite merit, or otherwise, where the public interest in protecting the expression in question outweighs that in allowing the proceeding to continue. In such an instance, access to justice could be justifiably limited.

As previously stated, the courts are bound to interpret statutes and develop the common law consistent with the rights and freedoms contained in the Bill of Rights Act.[133] While legislative wording is crucial, ultimately, the weighing exercise undertaken by the court will be highly fact-specific. Accordingly, in determining whether either right can be justifiably limited, judicial discretion should be exercised in the usual manner.[134]

VII Proposal

A Content of a New Zealand Anti-SLAPP Law

Due to the limited utility of the abuse of process doctrine, this paper's key recommendation is that Parliament develop specific anti-SLAPP legislation to efficiently address such claims and reinforce the importance of protecting public participation. In the author's opinion, the Ontarian anti-SLAPP law provides the most suitable model, and the following recommendations reflect much of its content.

The legislation must:

(a) Contain a clear description of its underlying purpose, highlighting the need to protect speech relating to matters of public interest while ensuring that those with legitimate claims can seek redress.
(b) Provide for early dismissal, thereby minimising the chance of speech being chilled.
(c) State that all forms of communication relating to matters in the public interest are protected, rather than limiting the protected activity to that directed toward a government official, for example.
(d) Apply to all causes of action.

133 *Hosking v Runting*, above n 119, at [111].

134 Tollefson, above n 71, at 233.

(e) Require the defendant to prove, on the balance of probabilities, that the proceeding was initiated in response to an expression relating to a matter of public interest. The test should focus on the nature of the defendant's expression rather than the plaintiff's underlying intentions.

(f) Require the plaintiff to prove that their claim has substantial merit and that the moving party has no valid defence. The standard should require the claim to be legally tenable and the chance of success weighted in the plaintiff's favour.[135]

(g) Provide for judicial discretion in weighing the competing rights that can determine the application's outcome. If the harm sustained by the plaintiff is serious enough that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression, then the application to strike out should be denied.

(h) Provide that, in considering evidence, the courts must examine pleadings and affidavits and engage in a limited assessment of credibility.

(i) If the plaintiff can show that the defendant is seeking to dismiss the application merely for the purposes of harassment, the suit should proceed.[136]

(j) Require plaintiffs to indemnify the defendant's costs. Alternatively, a civil penalty scheme could be instituted, as has been done in the Australian Capital Territory and New York State, where the court can award punitive damages where it finds that the filer has acted in bad faith.[137] However, the courts ought to retain judicial discretion in awarding costs, as a "blanket requirement" to indemnify the defendant may cause courts to be reluctant toward granting such applications.[138]

B But, Is This Really Necessary?

While objections to introducing an anti-SLAPP law can be mounted, careful drafting can shield against potential misgivings.

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135 See *Pointes Protection*, above n 62, at [49].

136 Tollefson, above n 71, at 230.

137 Corbell, above n 132, at 4.

138 Tollefson, above n 71, at 232.

Of course, those engaging in public debate can make incorrect assertions that can hinder rather than help such discourse. On this basis, some might contend that anti-SLAPP laws afford too much protection to defendants. Certainly, it is important to determine whether protecting the expression at hand is indeed in the public interest, and this can be done during the final weighing exercise. Anti-SLAPP statutes do not provide defendants with immunity, and if the judge determines that protecting their expression is not in the public interest, then claims should proceed. As demonstrated by the decision in *Bent v Platnick*, anti-SLAPP legislation does not automatically favour defendants where harm is caused, even when their expression is found to relate to a matter of public interest.

An objection that strikes at the heart of this paper's proposal is that New Zealand may not actually require such legislative intervention. Perhaps, since New Zealand has not seen a significant proliferation of SLAPPs, they do not pose enough of a threat to our justice system and citizens to justify a legislative response. However, the examples presented in Part III demonstrate that SLAPP-esque lawsuits and threats have arisen in New Zealand, not unlike those seen in Canada, Australia and the United Kingdom. Ultimately, the emergence of even a singular SLAPP is undesirable, and pre-emptive legislation would serve as a deterrent and prevent future harms caused by intimidatory litigation, thus preserving judicial resources.

VIII Conclusion

Public participation contributes to the maintenance of democracy and enriches the marketplace of ideas. However, preventing individuals from using judicial processes to stifle public discourse unnecessarily is a complex and critical task. This paper has argued that New Zealand's Parliament should carefully consider this issue and adopt legislation similar to that in Ontario, thereby providing an effective mechanism to counter SLAPPs. Despite the limited workability of the abuse of process doctrine, the *Mineral Sands* decision provides a principled starting point for our courts to dismantle SLAPPs. However, a legislative measure would give SLAPP targets greater protection, dissuade litigants from bringing exorbitant claims and protect expression relating to matters of public interest. Such legislation would also affirm New Zealand's commitment to protecting public participation, bringing our law in line with other jurisdictions. New Zealand should not wait before its own *Mineral Sands*, "Gunns 20", or *Pointes Protection* arises before taking legislative action.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 8,003 words.

IX Appendix

A The Ontarian Anti-SLAPP Law

Courts of Justice Act RSO 1990 c 43, 137.1.

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

Dismissal of proceeding that limits debate: Purpose

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.

B The Californian Anti-SLAPP Law

California Code of Civil Procedure, S425.16:

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the Court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. (2) In making its determination, the Court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (3) If the Court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the Court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the Court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

C The Australian Capital Territory's Anti-SLAPP Law

Protection of Public Participation Act 2008, s9.

1) This section applies if –
    (a) A person (the ***plaintiff***) starts or maintains a proceeding to which this Act applies against someone else (the ***defendant***) in relation to the defendant's conduct; and
    (b) the Court is satisfied that—
        (i) the defendant's conduct is public participation; and
        (ii) the proceeding is started or maintained against the defendant for an improper purpose.
2) The Court may order the plaintiff to pay to the Territory a financial penalty of not more than the amount (if any) prescribed by regulation.
3) The financial penalty must be worked out in accordance with a regulation.

4) The Court may make an order under subsection (2)—

(a) on application by the Territory;

(b) or on its own initiative.

Note: If a proceeding is for an improper purpose, the Court's power to award costs of the proceeding includes power to order that the costs be assessed on an indemnity basis (see *Court Procedures Rules 2006*, r 1752).

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