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## **BACK-SLAPP!**

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By its amendment of the Code of Civil Procedure, Quebec brings into force a mechanism aimed at putting an end to the strategic judicial procedures brought on by wealthy deep pocketed companies against rights defending groups to ultimately silence their message and stop their activism. These procedures are commonly called SLAPP (*Strategic Lawsuits Against Public Participation*).

By mandate of the Quebec Minister of Justice, a committee of experts was formed to study the best way to put an end to this situation. On April 15th 2007, Roderick A. Macdonald, acting as head of the committee, tabled his report. The mandate of the committee was, amongst other things, to study the soundness of adopting a legislation to counter this growing phenomenon as well as to analyze the most appropriate way to go about it.

This report did not end up gathering dust on the shelves because, not even two (2) years after its tabling, the Quebec National Assembly adopted, on June 3rd 2009, Bill 99 entitled "*An Act to amend the Code of Civil Procedure to prevent abusive use of the courts and promote freedom of expression and citizen participation in public debate*" (the "Act"). Clearly, this Act was adopted to overcome the problem of SLAPP proliferation in Quebec.

This being said, these new provisions that have been added to the Code of Civil Procedure ("CCP") pursuant to the Act cover a lot more than the SLAPP. The old sections 75.1 and 75.2 CCP were repealed and replaced with the new sections 54.1 to 54.6 CCP which provide that a court can, at any time (and not just after the preliminary hearings, as it was the case before under section 75.1 CCP), dismiss a legal action or any other pleading declared abusive.

A procedural impropriety is defined under section 54.1 as what may result from "a claim or pleading that is clearly unfounded, frivolous or dilatory or in a conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or cause prejudice to another person, or in a perversion of the ends of justice, in particular if it operates to restrict freedom of

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expression in public debate". The use of "in particular" indicates that these provisions go beyond the SLAPP and encompass any action that meets these criteria.

To level the playing field for those parties facing a losing battle, section 54.2 CCP shifts the burden of proof onto the respondent. Hence, once it is established *prima facie* that a legal action or pleading is qualified as being abusive, it will be up to the party who instituted it to demonstrate that it did not do so in an excessive or unreasonable manner. Only time will tell us if it will be easy or difficult to trigger the application of such a provision and how the courts will interpret it.

For their part, sections 54.3 to 54.6 CCP provide the dismissal of an action when there is an improper use of procedure as well as several less drastic remedies when there appears to be have been an improper use of procedure. These remedies include: subjecting the furtherance of the action or pleading to certain conditions, requiring undertakings, suspending the case, recommending to the chief judge that special case management be ordered and ordering the abusing party to pay a provision for the costs the other will incur in the proceedings. Justice Gagnon noted that, even though it was the first time the word "undertaking" was used in the CCP, practitioners have been using the concept daily for many decades (see *Structure Laferté Inc. v. Consoltech Inc.* (2009) QCCS 3326).

Moreover, these sections provide that the court may, in its ruling on the improper use of procedure, order reimbursement of legal fees as well as the award of punitive damages in favor of the party that will have been forced to defend itself needlessly. Until now, fees paid to a party's attorney, i.e. extrajudicial fees, could only be reimbursed if a party demonstrated that the adverse party was abusing the legal process, in other words, abusing of its right to appear before the courts. In order to obtain a reimbursement, a party had to, amongst other things, demonstrate that the adverse party was relentlessly looking to multiply the proceedings brought against it (see *Cayenne Communications & Studio inc. v. Henner*, 2006 QCCS 875 (C.A. affirmed)), which in general was a difficult thing to do. So now, it seems that the courts will be able to condemn a party to such reimbursement even if it is the first judicial recourse between the parties, provided it is considered an improper use of procedure.

On a final note, the Act introduces a significant change concerning directors' and officers' liability. If a court rules that they have participated in the decision to file a claim that is considered an improper use of procedure, they could become personally liable for the payment of damages. This added level of liability could deter many and have an impact on insurance coverage in these matters such functions. Obtaining a legal opinion on these ever more controversial issues before taking action could facilitate the decision making process.

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