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THE COMMISSION DES INSTITUTIONS
DE L'ASSEMBLÉE NATIONALE DU QUÉBEC
ON
« LA RÉFORME DU CODE DE PROCÉDURE CIVILE ET LES
POURSUITES STRATÉGIQUES CONTRE LA MOBILISATION
PUBLIQUE » (SLAPP)

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RÉSUMÉ

Le CRARR est le seul organisme sans but lucratif au Québec qui fournit un service direct d'assistance et de représentation aux personnes qui sont victimes de discrimination en raison de leur race, de leur origine ethnique, de leur religion et d'autres motifs de discrimination qui sont prévus dans les lois fédérales et provinciales sur les droits de la personne. Plusieurs individus assistés par le CRARR ont été victimes de représailles après avoir revendiqué leur droit à l'égalité et à la non-discrimination. Ces expériences ont permis au CRARR de développer une expertise et une perspective unique sur les réformes législatives souhaitables qui permettraient de combattre les *Poursuites stratégiques contre la mobilisation publique* (SLAPP selon l'acronyme anglais).

Malgré que les préoccupations généralement soulevées par les SLAPP concernent la protection du consommateur et de l'environnement, le CRARR est d'avis que les SLAPP peuvent également avoir des effets négatifs sur la revendication des droits de la personne et du droit à la non-discrimination sous la *Charte québécoise*, le *Code de déontologie des policiers du Québec* et le *Code du travail du Québec*. Le CRARR demande donc au législateur québécois d'adopter une législation appropriée à la résolution de ce problème.

À cette fin, le CRARR recommande :

- ❑ ***L'ajout du droit à la participation publique dans la Charte québécoise*** – Le CRARR recommande l'ajout du droit à la participation publique dans la *Charte québécoise*. Cet ajout permettrait aux tribunaux d'atteindre un meilleur équilibre entre d'une part le droit à la réputation des acteurs commerciaux, syndicaux et gouvernementaux, et d'autre part le droit des individus et des groupes à la liberté d'expression et à la participation publique. Il pourrait également dissuader ces acteurs de recourir au SLAPP en permettant à ses victimes d'obtenir des dommages extra-judiciaires dans des circonstances exceptionnelles.
- ❑ ***Le prolongement des protections statutaires contre les représailles aux contextes policiers et syndicaux*** – Le CRARR recommande que la protection contre les représailles explicitement reconnue à l'article 82 de la *Charte québécoise* soit prolongée aux plaintes devant le *Commissaire de la déontologie policière* et aux plaintes présentées par les membres d'un syndicat en vertu de l'article 47.2 du *Code du travail du Québec*. Le prolongement de cette protection dans le contexte policier est particulièrement urgent compte tenu des poursuites stratégiques déjà utilisées dans plusieurs juridictions afin d'intimider les citoyens. Il est nécessaire de permettre aux citoyens de s'exprimer sans crainte contre les pratiques discriminatoires des agents de la paix et des représentants syndicaux afin de préserver la confiance du public envers ces deux institutions.
- ❑ ***Des réformes procédurales : le besoin de créer une procédure expéditive en cas de SLAPP*** – La nouvelle législation devrait permettre au défendeur d'initier

une requête d'ajournement des procédures (motion to strike) ou une audience préliminaire sommaire permettant de déterminer s'il s'agit d'un SLAPP. L'introduction d'une telle procédure permettrait au juge de déclarer avant son jugement final qu'une poursuite est strictement stratégique, réduisant ainsi les délais et les coûts pour le défendeur.

- ❑ ***Des réformes procédurales : les coûts extra-judiciaires et les dommages punitifs*** – Le CRARR recommande que la nouvelle législation permette l'octroi de réparations extra-judiciaires et de dommages punitifs contre les groupes instituant des procédures malicieuses afin de décourager le recours au SLAPP, spécialement lorsque ces procédures visent les individus déposant des plaintes pour violation des droits de la personne. Cette mesure nécessitera l'extension des circonstances limitées permettant actuellement l'octroi de tels dommages, mais conduira à une réduction du fardeau financier des SLAPP pour les défendeurs.
- ❑ ***La reproduction du modèle « SLAPPback » d'octroi de dommages punitifs*** – Le CRARR recommande l'adoption d'une législation Anti-SLAPP similaire au modèle californien qui permettrait aux victimes d'un SLAPP de poursuivre le plaignant initial pour les dommages occasionnés par la poursuite malicieuse ou l'abus de procédure.
- ❑ ***La promotion de l'accès : le financement de la défense contre les SLAPP*** – Le CRARR recommande la création d'un fonds public finançant d'avance les frais juridiques et les autres coûts associés à la défense contre un SLAPP. Ce fonds serait similaire au *Fonds d'aide aux recours collectifs* et réduirait les effets intimidants des SLAPP en fournissant à ses victimes les fonds nécessaires à leur défense avant que le SLAPP ne soit jugé invalide par un tribunal.
- ❑ ***La reconnaissance de la vulnérabilité des membres de conseil d'administration aux SLAPP*** – Le CRARR recommande que la réforme législative prenne en compte la vulnérabilité particulière aux SLAPP des membres de conseil d'administration d'organismes à but non-lucratif. Les administrateurs de tels organismes, qui travaillent souvent bénévolement, peuvent être personnellement visés par les SLAPP, alors qu'il leur est souvent impossible financièrement de contracter une assurance limitant leur responsabilité.

Le CRARR prend note que le *Rapport du comité au ministre de la Justice* datant de mars 2007 suggère trois options juridiques expliquant comment introduire ces recommandations. Le CRARR supporte en premier lieu l'adoption d'une loi spécifique qui contiendrait toutes ces recommandations sous une seule rubrique : une loi interdisant les poursuites stratégiques contre la mobilisation publique.

En tant qu'organisme œuvrant dans l'intérêt public pour dénoncer la discrimination raciale et toute autre forme de discrimination, le CRARR croit que l'adoption de ces recommandations pour une réforme législative est primordiale afin de maintenir une forte démocratie participative dans laquelle tous les citoyens seront libres de s'exprimer publiquement et librement contre la discrimination et l'injustice sans craindre de représailles.

EXECUTIVE SUMMARY

CRARR is the only non-profit organization in the province of Quebec that provides a direct assistance service for the representation of victims of discrimination based on race, ethnicity, religion, and other intersecting grounds of discrimination protected by federal and provincial human rights legislation. Many of the individuals that CRARR has assisted have been victims of reprisals as a result of asserting anti-discrimination rights and their right to equality. This provides CRARR with a uniquely qualified perspective regarding legislative reform to address Strategic Litigation Against Public Participation (SLAPP).

Although concern regarding SLAPPs is frequently expressed in reference to environmental or consumer protection, CRARR submits that an appropriate legislative response must address the negative effects of SLAPPs on the assertion of anti-discrimination rights and civil rights under the *Quebec Charter*, the *Code of Ethics of Quebec Police Officers* and the *Quebec Labour Code*.

To this end, CRARR recommends:

- ❑ ***Inclusion of right to public participation in the Quebec Charter*** -- CRARR recommends that the right to public participation be included in the *Quebec Charter*. This would provide a means by which the courts can better balance the rights to reputation of corporate, governmental and union actors with the rights of individuals and groups to freedom of expression and public participation. It may also help to deter SLAPPs by making it possible to award extra-judicial damages for victims of SLAPPs in exceptional circumstances.
- ❑ ***Extension of statutory protection against reprisals to the policing and labour contexts*** -- CRARR recommends that the explicit statutory protection against reprisals contained in section 82 of the *Quebec Charter* be extended to complaints before the *Police Ethics Commissioner* and by union members under section 47.2 *Quebec Labour Code*. Protection in the policing context is particularly urgent as strategic lawsuits have already been used in this context to intimidate citizens in many jurisdictions. Continued public confidence in both of these institutions requires that individuals and groups are able to speak out against discriminatory actions or practices of law enforcement officers or union representatives.
- ❑ ***Procedural reforms: the need for expedited procedures in the context of SLAPPs*** -- New legislation should allow for a defendant to initiate either a motion to strike proceedings or a preliminary summary hearing into whether an action is a SLAPP. This would allow a judge to declare a suit a SLAPP before the final judgment, thus diminishing its drain on time and resources.
- ❑ ***Procedural reforms: extrajudicial costs and punitive damages*** -- CRARR recommends that legislation should attempt to deter SLAPPs by allow the

award of extrajudicial costs and punitive damages against parties who institute malicious actions, especially against persons who file human rights complaints. This requires an expansion of the limited circumstances in which extrajudicial and punitive costs can currently be granted in order to adequately address the economic burden of SLAPPs.

- ❑ ***Endorsement of a "SLAPPback" model for awarding punitive damages --*** CRARR recommends the adoption of California-style anti-SLAPP legislation that allows SLAPP targets to sue the original filers for damages suffered through malicious prosecution or abuse of process.
- ❑ ***Enhancing access: SLAPP defense funding --*** CRARR recommends the establishment of a public fund to finance upfront the legal fees and costs associated with defending a SLAPP, similar to Quebec's public fund for class action lawsuits (*Fonds d'aide aux recours collectifs*). This would lessen the intimidating effect of SLAPPs by providing SLAPP targets with access to funds to meet initial defense costs before the courts declare a suit invalid.
- ❑ ***Recognition of the vulnerability of board members to SLAPP --*** CRARR recommends that legislative reform address the specific vulnerability of board members of not-for-profit organizations to SLAPP. Directors of such organizations, who are frequently volunteers, may be targeted personally by SLAPPs and are often unable to secure director's liability insurance.

CRARR takes note that in the *Rapport du comité au ministre de la Justice* in March of 2007, there are three suggested juridical options on how to incorporate these recommendations. CRARR lends its support firstly to the enactment of a specific bill that encompasses all of the recommendations under one rubric: an act respecting anti-SLAPP.

As an organization that works in the public interest to denounce racial and other forms of discrimination, it is CRARR's belief that the adoption of these recommendations for legislative reform is critical to the maintenance of a strong participatory democracy in which all citizens and groups can speak out publicly and freely against discrimination and injustice without fear of reprisals.

A. INTRODUCTION

I. CRARR'S ROLE AS AN NGO IN QUEBEC SOCIETY

The Centre for Research-Action on Race Relations ("CRARR") is a Montreal-based independent, non-profit, public interest organization that was founded in 1983 with the mandate of promoting racial harmony and equality within Canadian society. Its activities include conducting research, organizing conferences and seminars, and providing training regarding, anti-discrimination, and race relations.

Most importantly, for the purpose of the present brief, CRARR is the only non-profit organization in Quebec that provides a direct service to assist, support and represent persons who are discriminated against because of race, ethnicity, religion as well as any of the other prohibited grounds of discrimination that are enshrined in federal and provincial human rights legislation and other laws that contain anti-discrimination provisions.

CRARR helps victims file complaints. Where necessary, it files the complaints on behalf of these victims. It assists and accompanies them through the administrative investigation or quasi-judicial adjudication processes. It also provides, through its associate lawyers, legal support for litigation or legal defense.

Many of the individuals that CRARR has assisted have been victims of reprisals, intimidation and harassment as a result of asserting their right to be free of discrimination, and seeking legal protection of their fundamental rights and freedoms.

Thus CRARR has particular experience with the intimidating and discouraging effect Strategic Litigation Against Public Participation (SLAPP) can have upon individuals asserting their statutory rights under the *Quebec Charter of Rights and Freedoms* (the "*Quebec Charter*"), the *Code of Ethics of Quebec Police Officers* (the "*Code of Police Ethics*") or the *Labour Code*. Until now, public concern regarding SLAPP has primarily been expressed in relation to environmental and consumer protection. CRARR's experiences with reprisals in the anti-discrimination and civil rights contexts give it a uniquely qualified perspective to provide input into the drafting of an appropriate legislative response to SLAPP.

II. SLAPP IN THE HUMAN RIGHTS CONTEXT

The report of the comité au ministre de la Justice in March of 2007¹ correctly draws attention to the chilling effect of SLAPPs on public participation in many areas of society. It rightly emphasizes the threat SLAPPs pose to the right of

¹Les poursuites stratégiques contre la mobilisation publique – les poursuites - bâillons (SLAPP) (Montréal: Rapport du comité au ministre de la Justice, March 2007) [Rapport].

freedom of expression (section 3, *Quebec Charter*) and the right to participation in public life as provided by section 25 of the *International Covenant of Civil and Political Rights* ("I.C.C.P.R.").² Protection of these rights is fundamental to the ability of individuals and groups to speak out against discrimination, to assert anti-discrimination rights, and to ensure an open and inclusive participatory democracy.

The report also identifies the negative implication of SLAPPs for access to justice, a concern which CRARR shares. SLAPPs can be used to deter and intimidate individuals who seek to assert their statutory rights to equality and freedom from discrimination under the *Quebec Charter*, the *Code of Police Ethics* and the *Labour Code*. Complainants, be they individuals or organizations, who speak out regarding discrimination in policing, employment, union representation and other contexts can be the target of SLAPPs that seek to intimidate and silence complainants and organizations bringing complaints on their behalf. This is of grave concern not only to victims whose anti-discrimination rights have been infringed, but to society as a whole because SLAPPs erode public confidence in the legal system and law enforcement institutions.

III. CRARR'S INPUT INTO THE LEGISLATIVE PROCESS

CRARR views SLAPP as anti-democratic and detrimental to freedom of expression, which is guaranteed under both the *Quebec Charter* and the *Canadian Charter of Rights and Freedoms*. Furthermore, CRARR is concerned about a growing trend of reprisals in the form of defamation lawsuits; for example, lawsuits against individuals who file civil rights complaints against companies for discrimination in employment or in services, or against those who file complaints with the Police Ethics Commissioner or against those who publicly criticize the police.³

The enactment of anti-SLAPP legislation is therefore urgently needed to prevent frivolous lawsuits and the intimidation of private citizens and public interest organizations. To this end, CRARR recommends:

- that the right to public participation be included in the *Quebec Charter*;

² *Pacte international relatif aux droits civils et politiques*, article 25 : Tout citoyen a le droit et la possibilité, sans aucune des discriminations visées à l'article 2 et sans restrictions déraisonnables:

- a) de prendre part à la direction des affaires publiques, soit directement, soit par l'intermédiaire de représentants librement choisis;
- b) de voter et d'être élu, au cours d'élections périodiques, honnêtes, au suffrage universel et égal et au scrutin secret, assurant l'expression libre de la volonté des électeurs;
- c) d'accéder, dans des conditions générales d'égalité, aux fonctions publiques de son pays.

³ The specific concern of reprisals in the context of complaints against police conduct is discussed in detail, *infra*.

- that the explicit statutory protection against reprisals be extended to complaints before the Police Ethics Commissioner and by union members under section 47.2 *Quebec Labour Code*;
- that there be legislative reform to judicial procedures in the areas of what kind of fees and costs may be awarded, as well as the institution of a right to SLAPP-backs;
- that legislative reform recognize and address the specific vulnerability of board members of not-for-profit organizations to SLAPP.

CRARR lends its support firstly to the enactment of an act respecting anti-SLAPP that will incorporate all of the recommendations and suggestions contained in the present brief. CRARR submits that the option suggested by the comité that various legislative amendments be made to existing laws to incorporate provisions relating to SLAPPs is or should only be a secondary option.

B. DETAILS OF CRARR'S RECOMMENDATIONS

1. BREADTH OF THE ANTI-SLAPP LEGISLATION

a) Charter Amendment to Include and Right to Public Participation

CRARR recommends that the *Quebec Charter* be amended to explicitly include a right to participation in public life,⁴ and as is already provided for in the I.C.C.P.R. Many SLAPPs are made possible through the problematic clash between certain *Charter* rights such as the right to reputation (section 4), and the right to freedom of expression (section 3).

If the *Quebec Charter* were to include a specific right to public participation, this would help to better balance the ability of corporate, government and private actors to exercise their rights to reputation with the right of groups and individual citizens to express legitimate concerns in the public sphere free from fear of reprisals in the form of SLAPPs.

Also, if the right to participation in public life was a legislative right provided for in the *Quebec Charter*, this might make the courts more willing to award

⁴ This has been suggested by the Parti Vert: *Communiqué: Préoccupé de la montée du phénomène, le Parti vert réclame une loi "anti-SLAPP"* (23 August 2006), online: Parti vert du Québec <<http://www.partivertquebec.org/le-Parti-vert-reclame-une-loi-anti>>.

extrajudicial costs⁵ to victims of SLAPPs. Although the award of extra-judicial costs are reserved for very exceptional circumstances, the excerpt reproduced below from the 2005 decision of the Superior Court in *Chiasson v. Fillion* indicates that they are only awarded in the narrow circumstances of a willful and deliberate violation of a *Charter* protected right:

Certaines décisions de la Cour supérieure s'écartent de cette façon de voir en invoquant une plus grande souplesse lorsqu'il s'agit d'une violation à un droit protégé par la Charte et surtout lorsqu'il s'agit d'une violation délibérée. Dans le jugement Johnson, Mme la juge Carole Julien réfère à l'arrêt *Vice-versa Inc. c. Aubry* où la Cour suprême laisse une porte ouverte à la possibilité d'accorder un remboursement des honoraires extra-judiciaires dans le cas d'atteinte à un droit protégé par les Chartes.⁶ [emphasis added]

The Quebec Human Rights Tribunal has previously awarded extra-judicial costs in the form of moral and punitive damages where a reprisal constituted a deliberate violation of section 4 of the *Quebec Charter* and was deemed to be an attack on an individuals' dignity.⁷ It may be possible for this strategy to be used more broadly against SLAPPs if the right to public participation is explicitly protected in the *Quebec Charter*.

b) SLAPP Protection for Complaints before the Police Ethics Commissioner

Claimants can look to provisions in both the *Quebec Charter of Human Rights and Freedoms* and the *Canadian Human Rights Act* for legislative protection from reprisals following the initiation of a human rights complaint.

Section 82 of the *Quebec Charter* states:

⁵ As a general rule, only judicial costs and fees may be awarded to the victor in a lawsuit, and these judicial costs and fees fall far short of the actual costs incurred for the litigant. Thus, for the purposes of the present brief the term "extrajudicial costs" refers to all costs and fees that would not otherwise be covered by the Tariffs for judicial fees and costs.

⁶ *Chiasson v. Fillion*, [2005] J.Q. no 3004.

⁷ For example, in *Boisvert et Québec (Commission des droits de la personne et des droits de la jeunesse) v. Nicolet (Ville)*, [2001] J.T.D.P.Q. no 10, a reprisal was deemed by the Quebec Human Rights Tribunal to be an attack on the plaintiff's dignity and a deliberate violation of his right to reputation. The tribunal used sections 82 and 4 *Quebec Charter* to award the plaintiff \$7000 in moral and punitive damages for infringement of his dignity and the intentional abuse of his rights through reprisals. See also *Parent et Québec (Commission des droits de la personne et des droits de la jeunesse) v. Restaurant Marchand Ltée*, [2002] J.T.D.P.Q. no 6 where the Tribunal awarded a former employee \$7,000 in moral and punitive damages under articles 82 and 4 of the *Quebec Charter* in connection with reprisals for a complaint regarding age discrimination.

82. La Commission peut aussi s'adresser à un tribunal pour qu'une mesure soit prise contre quiconque exerce ou tente d'exercer des représailles contre une personne, un groupe ou un organisme intéressé par le traitement d'un cas de discrimination ou d'exploitation ou qui y a participé, que ce soit à titre de victime, de plaignant, de témoin ou autrement.

Elle peut notamment demander au tribunal d'ordonner la réintégration, à la date qu'il estime équitable et opportune dans les circonstances, de la personne lésée.⁸

In interpreting this provision, the Quebec Human Rights Tribunal has stated that:

Un des buts principaux de l'article 82 [de la Charte québécoise] est de garantir un recours effectif aux personnes se croyant victime de discrimination. Pour qu'un recours soit effectif, une personne ne doit pas craindre que des conséquences néfastes, matérielles ou morales découlent de son exercice.⁹

The *Canadian Human Rights Act* also provides in section 14.1 that it is a discriminatory practice to engage in reprisals:

14.1 Constitue un acte discriminatoire le fait, pour la personne visée par une plainte déposée au titre de la partie III, ou pour celle qui agit en son nom, d'exercer ou de menacer d'exercer des représailles contre le plaignant ou la victime présumée.¹⁰

Further, in section 59 it states:

59. Est interdite toute menace, intimidation ou discrimination contre l'individu qui dépose une plainte, témoigne ou participe de quelque façon que ce soit au dépôt d'une plainte, au procès ou aux autres procédures que prévoit la présente partie, ou qui se propose d'agir de la sorte.

This legislative recognition of reprisal protection must be extended to individuals, groups or organizations who file complaints against police officers under the *Code of Police Ethics*.

The absence of such a provision in the *Code of Police Ethics* is troublesome given the fact that strategic lawsuits can and have been used by law enforcement

⁸ *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 82.

⁹ *Ibid.* at ¶29.

¹⁰ *Canadian Human Rights Act*, R.S., 1985, c. H-6, s. 14.1

officers to intimidate citizens in many jurisdictions¹¹ and there is no reason to consider Quebec an exception in this regard.¹²

Fundamental to public confidence in our public institutions is the need for individuals to be able to speak out against perceived violations of the standards of conduct of law enforcement officers.

This was recognized by the Nova Scotia Court of Appeal in its adjudication of a strategic lawsuit initiated by a police officer against two civil rights lawyers who had made public references to systemic and specific incidents of racism in the Halifax Police Department. The Court stated that:

No right thinking person could deny a duty to speak about and a public interest in hearing about police misconduct involving the mistreatment of individuals because of their youth, poverty or Black heritage. Particularly the latter in this province where, as everyone knows, the long history of African Nova Scotians involves the sufferings of racism, overt and unconscious, individualistic and systemic, in the past and in the present.¹³

¹¹ In 2002, the Toronto Star newspaper published a series of articles about Toronto police and racial profiling. In response, members of the Toronto Police Service instituted a \$2.7-billion class action suit against the Toronto Star, claiming damages for libel (see: *Gauthier v. Toronto Star Daily Newspapers Ltd.*, [2003] O.J. No. 2622). Similar concerns have been raised in the United States (see ACLU of Northern California, "Attorneys Move to Block Police Retaliation Against Citizen Complaints—Motion Filed to Dismiss Police Defamation Suit" (12 November 1998), online: ACLU of Northern California Press Release <http://www.aclunc.org/news/press_releases/attorneys_move_to_block_police_retaliation_against_citizen_complaints_--motion_filed_to_dismiss_police_defamation_suit.shtml>).

¹² In one case assisted by CRARR, a youth filed a complaint against a police officer with the Police Ethics Commissioner. Following dismissal of the complaint, the officer issued a letter of demand for \$7,000 on the grounds that the complaint had caused him stress and moral damages. In effect, this is a preliminary step towards initiating a SLAPP; it aims to intimidate claimants to deter future complaints regarding police conduct. For some reasons, the lawsuit was not launched by the officer.

¹³ *Campbell v. Jones*, [2002] N.S.J. No. 450 (N.S.C.A.) at ¶39 [*Campbell*]. This case emerged when, in 1995, Constable Campbell of the Halifax Regional Municipality Police Force conducted a strip search of three black 12-year old girls who were suspected (wrongly) of stealing \$10.00. Lawyers retained by the parents of two of the girls held a press conference in which reference was made to systemic racism within the Halifax Police Department, as well as the strip search at the school. This prompted Constable Campbell to commence a defamation action against the two lawyers. At trial the jury found the lawyers liable in defamation and awarded damages of \$240,000, plus \$75,000 in costs (*Campbell v. Jones*, [2001] N.S.J. No. 373). The Nova Scotia Court of Appeal overturned this judgment (*Campbell* at ¶13, 19-20). This illustrates the potentially high financial stakes in being the target of a SLAPP. Although lawyers have professional liability insurance to cushion these devastating effects, other

To guarantee public confidence in our law enforcement system, individuals must be able to voice legitimate concerns regarding unethical conduct of police officers. To this end SLAPP legislation must extend a protection similar to that of article 82 of the *Quebec Charter* to actions taken pursuant to and based on the *Code of Police Ethics*.

c) SLAPP Protection for Complaints under the *Labour Code*:

Section 47.2 of the *Quebec Labour Code* provides that:

Une association accréditée ne doit pas agir de mauvaise foi ou de manière arbitraire ou discriminatoire, ni faire preuve de négligence grave à l'endroit des salariés compris dans une unité de négociation qu'elle représente, peu importe qu'ils soient ses membres ou non.

However, the statute does not reinforce this provision by providing protection against reprisals for union members who bring a complaint against their union under article 47.2 for discrimination that results in a failure to properly represent their interests. Without such protection, union members' section 47.2 right, and the fundamental dignity it seeks to guarantee, is compromised.

The *Labour Code* does protect against reprisals in other contexts. Specifically, article 14 provides employees protection against reprisals from employers, persons acting on their behalf, and employers' associations.¹⁴ CRARR recommends that this protection be explicitly extended to reprisals by certified associations that may arise as a consequence of union members' complaints under article 47.2.

II. PROCEDURAL REFORM

Because the purpose of a SLAPP is to drain time, resources, and money, anti-SLAPP legislation should attempt to minimize all of these by expediting SLAPP-related procedures. Legislation should contain the following essential elements:

individuals and groups are more easily intimidated from speaking out due to the potentially devastating financial repercussions.

¹⁴ Section 14 of the *Labour Code* provides:

« Aucun employeur, ni aucune personne agissant pour un employeur ou une association d'employeurs ne doit refuser d'employer une personne à cause de l'exercice par cette personne d'un droit qui lui résulte du présent code, ni chercher par intimidation, mesures discriminatoires ou de représailles, menace de renvoi ou autre menace, ou par l'imposition d'une sanction ou par quelque autre moyen à contraindre un salarié à s'abstenir ou à cesser d'exercer un droit qui lui résulte du présent code ».

- An expedited procedure for dismissing actions that target public participation;
- An explicit provision for awarding fees and costs to those who succeed in dismissing these actions; and
- A procedure whereby punitive damages may be awarded against parties who institute malicious actions, especially against persons who file human rights complaints.

As previously stated, CRARR lends its support preferably to the enactment of one anti-SLAPP legislation (an option canvassed in the *Rapport*)¹⁵ that will encompass all of the recommendations contained in the present brief, and secondarily, to amendments to existing laws to include specific provisions relating to SLAPPs.

a) Procedural Solutions: Expedited Procedure

CRARR recommends that anti-SLAPP legislation expedite procedures to minimize the drain of SLAPPs on resources. New legislation should allow for either a motion to strike proceedings (as in California),¹⁶ or a summary hearing (as mentioned in the *Rapport*).¹⁷

In California, defendants may file a motion to strike proceedings when a suit relates to an expressive activity connected with a public issue.¹⁸ All discovery proceedings (the pre-trial gathering of evidence) are halted upon the filing of an anti-SLAPP notice of motion.¹⁹ To determine whether a claim is subject to a motion to strike, the court considers the pleadings and affidavits stating the facts upon which the case is based.²⁰ A defendant who prevails in the motion to strike is entitled to recover attorney's fees and costs. Otherwise, if the court finds that the motion is frivolous or solely intended to cause unnecessary delay, the court will award costs and reasonable attorney's fees to the plaintiff.²¹ An order granting or denying the motion to strike may be appealed.²²

Regardless of whether legislation is changed to provide for a summary hearing, or a motion to strike proceedings, an expedited procedure of some kind should be implemented. Instituting anti-SLAPP legislation that allows a judge to declare and dismiss a suit as a SLAPP only in the final judgement would not sufficiently address the serious drain on time and resources that SLAPPs pose. Furthermore, the legislator must anticipate and guard against the abuse of new anti-SLAPP

¹⁵ *Rapport*, s. 7.2.3, *Supra* note 1 at 81.

¹⁶ *California Code of Civil Procedure*, at §425.16

¹⁷ *Rapport*, s. 6.3.4, *Supra* note 1 at 57.

¹⁸ *Supra* note 16, at §425.16(a)

¹⁹ Although the court, on noticed motion and for good cause shown, may order that specified discovery be conducted. See *California Code of Civil Procedure*, at §425.16(g).

²⁰ *Ibid.*, §425.16(b)(2).

²¹ *Ibid.*, §425.16(c).

²² *Ibid.*, §425.16(i).

legislation by groups wishing to target initial lawsuits in the public interest by framing the public interest lawsuit itself as a SLAPP.²³

b) Procedural Solution: Extrajudicial Costs and Punitive Damages

For anti-SLAPP legislation to be a strong deterrent, CRARR recommends that new legislation, preferably in the form of one, comprehensive act respecting anti-SLAPP, include an explicit provision for awarding actual extrajudicial costs to those defendants who succeed in having a SLAPP dismissed. With certain limited exceptions, judges are currently not able to award extrajudicial costs in favour of either party.

As stated in the *Code of Civil Procedure* ("C.C.P."):

477. La partie qui succombe supporte les dépens, frais du sténographe compris, à moins que, par décision motivée, le tribunal ne les mitige, ne les compense ou n'en ordonne autrement. [...]²⁴

Though judges are able to award the actual, or real costs incurred when they dismiss an action that is determined to be frivolous or unfounded (75.2 C.C.P.), the threshold for what is frivolous is so high that this rule in itself is not sufficient to protect all victims of SLAPPs.

The *Rapport*²⁵ has already described the possibility of obtaining extrajudicial costs including legal fees in exceptional circumstances, citing the Quebec Court of Appeal ruling in *Entreprises Immobilières du Terroir Ltée v. Viel*:

[...] Exceptionnellement cependant, une partie peut être tenue de payer les honoraires d'avocats encourus par son adversaire. La jurisprudence, [...], du moins lorsqu'il s'agit de procédures civiles, est à l'effet qu'il faut, pour justifier cet octroi, rapporter la preuve d'un véritable abus de procédure pouvant consister par exemple, en la défense d'un droit non-existant, en la multiplication de procédures dilatoires ou futiles, ou encore en une prolifération de

²³ After California instituted its anti-SLAPP legislation, the legislature found that corporations were abusing the anti-SLAPP legislation in a way that discouraged public interest groups from filing lawsuits against them. The anti-SLAPP legislation was later amended to correct this oversight (*California Code of Civil Procedure*, at §425.17). It is conceivable that anti-SLAPP legislation could be used opposite to its intended purpose if it is not properly drafted, and any new legislation in Quebec should take this possibility into consideration. Groups wishing to stifle public participation could frame a legitimate public interest action as a SLAPP and draw out the process by demanding a preliminary procedure before the trial. They could also threaten plaintiffs with punitive damages if their SLAPP claim were successful.

²⁴ *Code of Civil Procedure*, R.S.Q. c. C-25, art. 477: The losing party must pay all costs, including the costs of the stenographer, unless by decision giving reasons the court reduces or compensates them, or orders otherwise. [...]

²⁵ *Rapport*, s. 6.5.2, *Supra* note 1 at 64.

recours visant à faire encourir des frais inutiles à l'adversaire.²⁶
[original emphasis]

Although limited extrajudicial costs can be granted, the instances in which it occurs are so narrow that the present rules are effectively inadequate to address the economic burden caused by SLAPPs. Even when such costs are granted, they are only awarded *after* the defendant has funded and fought the entire litigation right through until final judgment.

CRARR urges legislators to consider the inclusion of punitive damages in anti-SLAPP legislation as an additional deterrent. Potential punitive damages should cause prospective SLAPP suit filers to seriously consider their case before filing. Specifically, this would make it more difficult for SLAPPers to estimate the potential costs of filing (estimating court fees and one's own legal fees is much easier to estimate).

CRARR also recommends the inclusion of a provision explicitly allowing for punitive damages against SLAPPers who initiate suits specifically against human rights complainants. The *Rapport* identifies the possibility of winning punitive damages when Charter rights have been infringed through section 49 of the *Quebec Charter*.²⁷ However, the *Rapport* also concludes that the provision has led to punitive damages only in exceptional circumstances. Section 49 alone cannot be expected to provide adequate protection to victims who file human rights claims against SLAPPs.

c) The "SLAPPback" Model for Awarding Punitive Damages

CRARR points to the California model which has entrenched the right of SLAPP victims to recover punitive damages through the "SLAPPback": SLAPP targets may sue the original filers for damages suffered through malicious prosecution or abuse of process. This process was codified in California's *Code of Civil Procedure* section 425.18 to deter SLAPP litigation and for "its restoration of public confidence in participatory democracy."²⁸ SLAPP victims may file a SLAPPback when they succeed in convincing the court to strike down the original SLAPP.²⁹ In California, decisions on SLAPPbacks cannot be appealed.³⁰ Integrating such a provision into Quebec legislation would provide an additional deterrent to those contemplating initiating SLAPPs.

²⁶ *Entreprises Immobilières du Terroir Ltée v. Viel*, [2002] J.Q. no 1056 at ¶68-69, 73 (C.A.) [Terroir].

²⁷ *Rapport*, s. 6.5.3, *Supra* note 1 at 66.

²⁸ *California Code of Civil Procedure*, at §425.18(a).

²⁹ *Ibid.*, §425.16(b)(3). See also Goldowitz, Mark, "Act Removes Major Obstacles to Filing of SLAPPback Suits" (6 January 2006), online: <<http://www.casp.net/dj010606.html>>.

³⁰ *Ibid.*, §425.18(c).

III. A PROBLEM OF ACCESS: SLAPP DEFENSE FUNDING

CRARR recommends the establishment of a public fund to finance upfront the legal fees and costs associated with defending a SLAPP, as mentioned in the *Rapport*.³¹

Access to justice is a pressing issue when SLAPPs are launched; even with the future possibility of costs awarded by a judge, SLAPP targets still need to have sufficient funds to pay expensive defense costs, and see the litigation through to a final judgement. This is of particular concern when SLAPP initiators have deep pockets, which is often the case. Another problem is where the SLAPP initiators are publicly funded or gather their funds through union dues.

The chilling effect of a \$2.7 billion suit initiated by members of the Toronto Police Service against the *Toronto Star* for printing three stories alleging racial profiling based on an analysis of police crime data,³² or the \$5 million lawsuit against AQLPA is undeniable.³³ Citizens become afraid to publicly criticize governmental, union or corporate actors because they simply cannot afford to be sued. Further, lack of sufficient funds and expertise in defending costly litigation forces public interest groups into silence and might require them to scale back valuable educational and outreach programs, and other services.

There already exists a public fund for class action lawsuits in Quebec, administered by the *Fonds d'aide aux recours collectifs*.³⁴ CRARR proposes that a similar public fund for the defense against SLAPPs should be established, in order to support individuals and groups targeted by malicious lawsuits.

IV. RECOGNITION OF THE VULNERABILITY OF BOARD MEMBERS

Article 82 of the *Quebec Charter* protects individual persons, groups or organizations who are interested parties in a pending human rights complaint.

³¹ *Rapport*, s. 6.6.1, *Supra* note 1 at 67.

³² *Gauthier v. Toronto Star Daily Newspapers Ltd.*, [2003] O.J. No. 2622: In 2002, the *Toronto Star* newspaper published a series of articles about Toronto police and racial profiling, including headlines and statements such as: "Police target black drivers", "Star analysis of police crime data shows justice is different for blacks and whites", and "The Star analysis of the police traffic data show a disproportionate number of blacks charged compared to whites." Members of the Toronto Police Service (TPS) soon after instituted a \$2.7-billion class action suit against the *Toronto Star*, claiming damages for libel. The lawsuit was rejected by the Ontario Superior Court of Justice on technical grounds: libel and defamation are torts committed against identifiable individuals, rather than against a class or group. The Court held that the allegedly defamatory comments and innuendoes could not be reasonably understood to apply to every officer in the police service.

³³ See, e.g., *Association québécoise de lutte contre la pollution atmosphérique (AQLPA) v. Compagnie américaine de fer et métaux inc. (AIM)*, [2006] J.Q. no 3545, 2006 QCCS 2028 (IIJCan).

³⁴ *An Act Respecting the Class Action*, R.S.Q. c. R-2.1, s. 6.

CRARR suggests that future legislation regarding SLAPP must precisely identify the individuals covered by such protection. In particular, it must be recognized that organizations who assist individuals to file complaints are not only potential victims of reprisals, but members on their board of directors may also be found personally liable.

The extent of this intimidation is considerable, particularly given that board members of non-profits generally work on a volunteer basis. The threat of a SLAPP from more powerful segments of society can be a significant deterrent for individuals, who may out of fear of a SLAPP, not want to accept these positions – positions which organizations need filled on a voluntary basis.

Specific legislative protection for these individuals is of particular importance for organizations that engage in a quasi-judicial function by assisting individuals in bringing legal complaints. Insurers are typically unwilling to extend directors' liability insurance to board members because of the actual and often outrageous costs involved in defending against a "deep-pocket" SLAPP initiator. Some non-governmental organizations have even had the experience of having director's liability insurance denied because of abusive SLAPPs targeting the individual board members of non-profit groups, or simply because the organization is involved as a party in a lawsuit of any kind. This is CRARR's experience as it is unable to find an insurance company to extend director liability insurance to its volunteer directors.

CRARR recommends that this issue be examined in greater detail. The *Rapport* does raise the possibility of a government-sponsored group insurance fund,³⁵ but it limits the discussion to environmental and sports groups. CRARR suggests that the concept be extended to all non-profit or non-governmental groups that have, in their mandates and activities, a civil rights defense and social action component, and recommends that the Secrétariat à l'action communautaire autonome (SACA), which funds community organizations of all kinds in Quebec, play a key role on this question.

³⁵ *Rapport*, s. 6.6.3 *Supra* note 1 at 57

C. CONCLUSION

There is more at stake in combating SLAPPs than the costs, although they remain a primary consideration. What is of greatest concern is the chilling effect that SLAPPs have on the exercise of civil rights, the right to public participation, and the right that individuals have always had in a free and democratic society – the right to freely challenge established institutions and structures and seek change and justice in the public sphere.

Anti-SLAPP legislation is of crucial importance for organizations like CRARR that work in the public interest to denounce discrimination and other civil rights violations.

Public confidence in participatory democracy requires the maintenance of conditions in which all concerned citizens and groups can publicly and freely speak out against discrimination and injustice without fear of reprisals. To this end, legislative reform, preferably in the form of one comprehensive act respecting anti-SLAPP, is critical in order to ensure that we do not see any further growth of the SLAPP phenomenon in either Quebec or Canada.

We have become a diverse, vigilant and technology democracy, which Alvin Toffler calls a "Mosaic Democracy." One of the main foundations of this modern democracy is the ability and power of ordinary citizens and citizen groups to debate, criticize and challenge institutions for greater fiscal, social, moral and environmental accountability. Consequently, an innovative, comprehensive and progressive anti-SLAPP legislation adopted by the Quebec National Assembly will not only strengthen this new post-industrial democracy, but it will also reaffirm Quebec's legislative and social development record as one of the most pro-citizen and pro-civil rights in Canada.