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Suing against democracy

An effort to keep activists out of court could boost free speech in B.C.

By JAMES MacKINNON

WHEN MONEY TALKS, it just might tell someone to shut up. Ask Ken Millard about that.

In 1991, the soft-spoken Millard and other members of the Galiano Conservancy Association lobbied against timber company MacMillan Bloedel's plan to sell off 38% of Galiano Island as real estate.

For MacBlo, the deal meant close to $20 million; to Millard it meant erosion of the island's forests, rural character, and water supply.

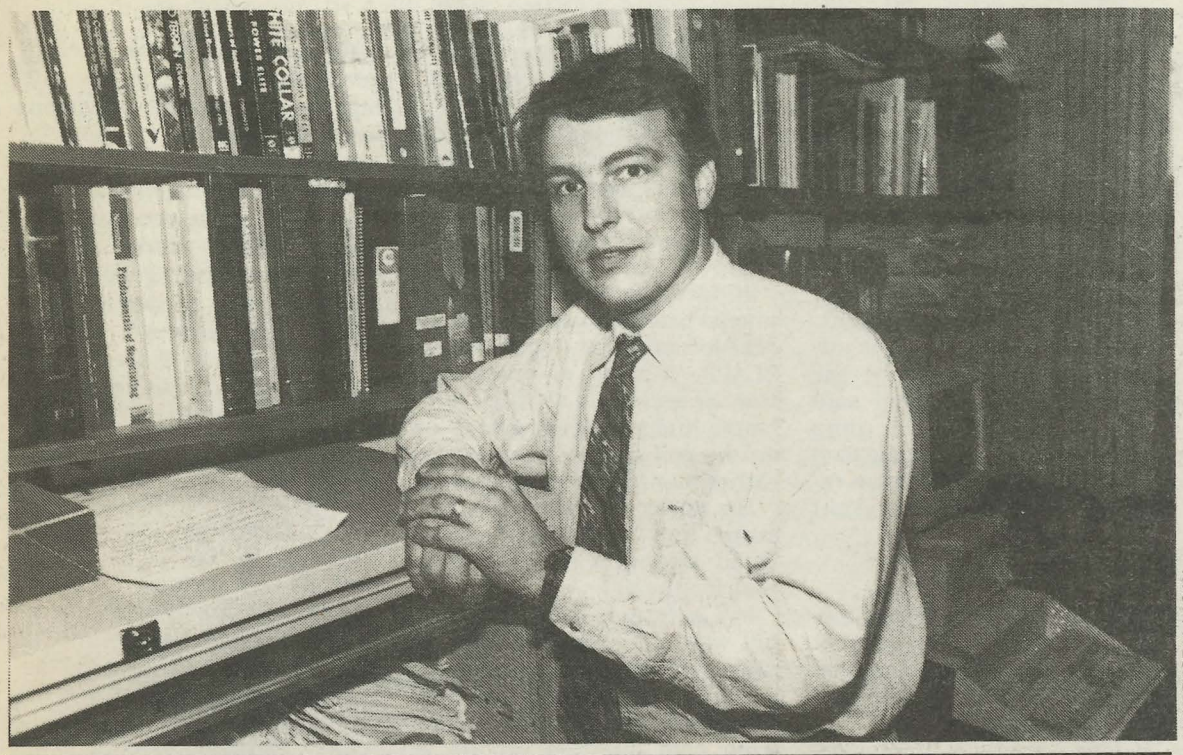
Millard's point of view proved more popular with the locals: in January of 1992, bylaws were approved which would stop buyers of the MacBlo lands from building on them. The real estate value of MacBlo's turf dropped like an anvil on the corporate toe.

MacBlo looked for someone to blame, and found the conservancy association. They accused the group of conspiracy—with elected officials of the Galiano Island Trust Committee—to damage MacBlo's business interests. They sued.

The Galiano case is now recognized as the first real "SLAPP"-type lawsuit in B.C.

"SLAPP" stands for Strategic Lawsuit Against Public Participation. Common in the U.S., SLAPPs stand out among court cases for a tendency to drag through a maximum of legal procedure, exhausting—if things go as the suing corporation hopes—the accused's money, time, and will to fight. More often than not, such a suit is dropped by the company before anything is resolved.

A simpler way to tell if a SLAPP is in action is this: are the accused being sued for exercising legally recognized civil rights? That is, are people being sued for democracy?



LAWRENCE McLAGAN

Support for anti-SLAPP bill is growing across the political spectrum, says UVic law prof Chris Tollefson

If so, they're being SLAPPed—and it can hurt. MacBlo asked for $15-20 million in damages in the Galiano case.

"It was really quite devastating to wake up one morning and find that the largest forest company in the province was suing our little conservancy association," said Millard.

True to SLAPP form, MacBlo eventually dropped the Galiano case. According to Vancouver lawyer Greg McDade of the Sierra Legal Defence Fund (which took up the defence in the suit) MacBlo's interest in the case ended just when company chair Ray Smith was called to the stand.

McDade called this "exercising their right to turn off the water when the water got hot."

But the death of the Galiano SLAPP was not so great a success as it may have seemed. MacBlo managed to have the restrictive bylaws thrown out in a separate court case, and have now sold most of their land on the island. As well, the case was "an enormous drain on time and the financial resources" of the conservancy, said Millard.

The group also lost about half its pre-trial membership. Millard blames this on the lingering "chill" of the lawsuit.

And the end of the Galiano case has not discouraged the growth of SLAPPs in B.C. courts: activists opposing logging of old-growth in Vancouver Island's Tsitika and Walbran watersheds are still going through the slow SLAPP waltz with MacBlo and New Zealand-based multi-national Fletcher Challenge, respectively.

Even the Clayoquot case—the original civil suit that provided MacBlo with the court injunction used to arrest over 700 people on logging roads this summer—began, essentially, as a SLAPP.

Activists have been scrambling to find a tool to escape these lawsuits. Early this summer the Committee for Public Participation formed and began working on a proposal for a B.C. *Public Participation Act.*

With input from concerned citizens like Millard, and legal phrasing turned by McDade and UVic law professor Chris Tollefson, the now-complete proposal suggests a structure to quickly dismiss from the courts any lawsuit that challenges rights to free speech, expression, and association.

The proposed bill also suggests "special" costs (which award about 90% of actual expenses in a court case), rather than "normal" costs (often less than 50%) be automatically awarded when a judge finds that a case is a SLAPP—with a provision for "punitive" damages as an additional disincentive.

Tollefson said the group looked south to develop the proposed bill. Three U.S. states—Colorado, California, and Washington—have anti-SLAPP legislation. In the court-crazy U.S., SLAPPs have been around since the early '70s.

Canadians are not so quick to pull out the cellular and call up their lawyers, but we also have fewer protections of some democratic rights. In the Galiano case, the American First Amendment right to petition elected officials would have immediately freed the conservancy association of any legal concerns. In Canada, the right to petition is only protected under the freedom of expression

clause in the *Charter of Rights and Freedoms*.

Legal precedent has defined "expression" broadly in Canada, protecting even postering of municipal property and "communicating for the purpose of prostitution."

But Canada's court system has a loophole that lets Charter rights tumble out of sight. "Where one private party is suing another private party, the Charter does not apply," said Tollefson. "We have to jump from the first SLAPPs being filed immediately to a legislative response" in order to prevent them.

THE EFFECT of three decades of SLAPPs in the U.S. has left a tell-tale mark on California anti-SLAPP lawyer Mark Goldowitz.

Before sending out information on the anti-SLAPP legislation he helped draw up in the state, he firmly asked for proof that I am not with "the opposition"—am I, for example, a representative of his foes in Christian Science?

California has had anti-SLAPP legislation in place for only a year, but it has been used several times—though never yet by the environmentalists who initiated it. The legal muscle of development-minded corporations may already be withering.

So, instead of standing out as an additional safeguard for the environment, the new law has become a tool to protect and expand the right to free speech.

In the legislation's first year, a teacher's attempt to sue two students who accused him of sexual harassment was thrown out of court, as was an employer's claim of defamation against an outspoken gay employee, and another business's counter-suit against a worker complaining of age discrimination and retaliatory firing.

The anti-SLAPP bill "prohibits incestuous litigation in which one suit leads to another," said Goldowitz.

The only objection to bringing in the legislation came from a small core of developers, said Goldowitz.

More surprising was opposition after the bill passed. "The courts were very hostile in the first six months of the statute, but the hostility is eroding," said Goldowitz.

Judges, he said, have been uncomfortable making the hard decision on what is and isn't a SLAPP. Instead of examining free speech, Goldowitz said, "some [judges] would rather be on the golf course, some would rather be with their families."

His advice to Canadians pursuing anti-SLAPP legislation? Build strong community support for the bill.

In California, the anti-SLAPP bill was supported by over 20 newspapers, city councils including Los Angeles and San Francisco, and groups ranging from civil liberties unions to grassroots Latin American citizens' groups, to the Golden State Mobilhome Owners League.

Once wide public support is established, Goldowitz said: "Go for it! Go for it!"

Tollefson said he's followed that advice. Support for the anti-SLAPP bill is growing among groups as diverse as humane societies, legal aid lawyers' associations, cycling rights coalitions, and "faith" groups. "All across the political spectrum we're finding people with an interest in this," he said.

With the paperwork done, the shoe leather now starts to fly. More support needs to be gathered before a meeting with the Attorney General's office, expected later this month.

Tollefson said the Attorney General has taken an interest in the anti-SLAPP proposal because of pressure from the public. He and McDade are optimistic that the spirit, if not the letter, will be welcomed by the attorney general.

"One thing that we have going for us is that there should be no significant opposition, since no company admits they are bringing SLAPPs," said McDade.

Richard Getz of the attorney general's office said implementing the anti-SLAPP provisions would be a first in Canada—by a long shot.

"Other jurisdictions [in Canada] don't even recognize the name SLAPP," said Getz. He added the attorney general's interest in the proposed anti-SLAPP bill should not be interpreted as a favourable response—only a reaction to public outcry for more research and monitoring of SLAPPs in the province.

Tollefson is optimistic anti-SLAPP legislation could be introduced to the legislature as early as this spring.

If passed quickly, the impact in B.C.'s volatile environmental debates could be enormous. According to Tollefson, Canada's courtroom tradition of broadly defining citizen freedoms could give anti-SLAPP legislation weight enough to throw out MacBlo's lingering, unmoving civil suit that led to over 700 arrests in Clayoquot Sound this summer.

The protesters are presently being tried for criminal contempt for disobeying a court order against blocking MacBlo's operations in the Clayoquot. The court order is supposed to protect the integrity of the company's two-year old civil suit originally against only a handful of activists.

Does MacBlo plan to move the constipated case along? "Not at this time," said company spokesperson Scott Alexander.

With such courtroom foot-dragging becoming a more and more popular pastime for Big Timber, Millard and others who have experienced the less than gentle hand of SLAPPs say legal protection for activists in B.C. is essential.

"Almost any citizens' group in the province should welcome (an anti-SLAPP bill)," said Millard. "This is something that is creeping north from the U.S., and the time to stop it is before it becomes established here.•