ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien

February 29, 2012

The Honourable John Gerretsen
Attorney General
720 Bay Street, 11th Floor
Toronto, Ontario
M5G 2K1

Re: Report of the Expert Advisory Panel on Anti-SLAPP

Dear Minister:

We congratulate you once again on your appointment as Attorney General and look forward to working with you.

We are writing to express our sincere appreciation to your Ministry and the Anti-SLAPP Advisory Panel (the "Panel") on the panel's thorough and balanced October 2010 Report to the Attorney General (the "Report"). As the people on the frontlines of the justice system, Ontario Bar Association ("OBA") members understand the crucial importance of ensuring access to justice to protect legitimate legal rights while avoiding the chill on public participation and drain on public resources that ill-motivated law suits can exact. The Report provided an effective blue-print for achieving these two objectives.

The OBA

As the largest voluntary legal organization in the province, the OBA represents 17,500 lawyers, judges, law professors and students in Ontario. OBA members practice law in no fewer than 37 different sectors, including environmental law, civil litigation and municipal law. The member lawyers who practice in these three areas would count among their clients every stakeholder in the SLAPP issue, including public interest groups, corporations, municipalities and other government agencies. In addition to providing legal education for its members, the OBA has assisted government with hundreds of legislative and policy initiatives - both in the interest of the profession and in the interest of the public.

The OBA Urges Adoption of the Report and the Introduction of Anti-SLAPP Legislation

The Report has been reviewed by OBA members in several different practices sections, including members of our Civil Litigation, Municipal Law and Environmental Law Sections. With the exception of two relatively minor issues outlined below, the OBA supports the recommendations in the Report and urges immediate legislation to put the recommendations into effect.

300-20 Toronto Street, Toronto, ON, Canada M5C 2B8
tel/tél: 416.869.1047 | **toll free/sans frais**: 1.800.668.8900 | **fax/téléc**: 416.869.1390 | **info@oba.org** | **www.oba.org**

Specific Concerns regarding Hearing Costs at the OMB

At paragraph 83, the Panel noted as follows:

> The OMB made remarks to the Standing Committee on Government Agencies in September 2009 that are consistent with these principles:
>
> > "costs" awards are very rare. The board has made that clear; A proponent that's successful should not expect their costs. The board has written a number of decisions in that regard over the years that have stated over and over again that parties with legitimate points of view should be welcome to come to the board and present their case. A successful party, simply because they were successful in the end, should not expect a cost award.
> >
> > "Costs are based on conduct, and the conduct has to be reasonable. The board, through its *Ontario Municipal Board Act*, has broad discretion to award costs, but through its rules and practices has really limited that discretion for the members that are presiding at these hearings."

The OBA agrees with these comments and it is the general experience of our Members that cost awards in OMB proceedings are rarely granted.

Despite this historical context, the Panel made the following two recommendations for amendments to the *Statutory Powers Procedure Act* ("SPPA"):

> (a) Requiring that applications for an order for costs under Section 17.1 be made in writing, unless such a procedure would cause significant prejudice to a party. In making this recommendation, the Panel stated that "making written submissions would be considerably less costly than oral proceedings spread over many days";
>
> (b) Providing that an unsuccessful applicant for an order for costs should provide a full indemnity to those against whom the cost order was sought, for their costs in the application (not in the proceeding on the merits). Again, the Board might be given a power to relieve against that Rule if it were likely to cause significant prejudice to the applicant.

The OBA disagrees with these two recommendations for the reasons set out below.

(a) Written Submissions

With respect to the recommendation requiring costs applications to be heard via written submissions versus an oral hearing, this recommendation appears to be based on the mistaken belief that written submissions would generally be less costly than oral submissions. Part of this misunderstanding seems to stem from the costs application in the *Big Bay Point* matter in the Town of Innisfil. This particular costs application was anomalous in terms of the number of hearing days taken up with the issue. In our Members' experience, the vast majority of costs applications are dealt with much more expeditiously. To require all costs applications to be dealt

with via written submissions may actually be more costly for the applicants as significant time and effort has to be expended in order to prepare such written submissions

It is our recommendation that a better way to approach the issue would be to give the tribunal the flexibility to require that costs applications proceed via written submissions only if it is deemed appropriate and less costly for the parties to do so. This would allow for the most cost-effective method of proceeding in each case. Generally, costs submissions should be dealt with orally.

(b) Full-indemnity costs on cost applications

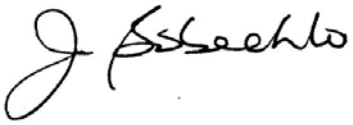
With respect to the Panel's recommendation that all unsuccessful applicants on cost applications should provide full indemnity to the successful respondent, it is our position that this does not strike an appropriate balance. The OMB already has the power to grant full-indemnity costs where a costs application was brought on frivolous, vexatious or unreasonable grounds. Fettering the discretion of the tribunal by making full-indemnity costs universal, fails to draw the appropriate line between discouraging ill-motivated costs applications while continuing to allow for legitimate ones.

It is our recommendation that the tribunal hearing the costs application continue to determine, on a case-by-case basis, whether costs are appropriate and on what scale. The issue of how costs motions are handled may be better addressed by individual tribunals' rules and procedures. The Ontario Bar Association has proposed a workshop with the Environmental and Land Tribunals of Ontario (ELTO) on the rules and procedures for costs applications before ELTO.

Conclusion

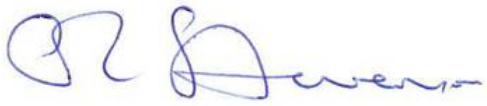
Thank you for considering our input and we look forward to moving forward on Anti-SLAPP Legislation. Please let us know if there is anything we can do to be of assistance.

Yours very truly,



Janet Bobechko
Chair, OBA Environmental Law Section

Colin Grant
Chair, OBA Municipal Law Section



Colin Stevenson,
Chair, OBA Civil Litigation Section