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THE GLOBE AND MAIL

Ontario Considers Anti-SLAPP

by Julius Melnitzer

In October 2010, a panel chaired by Mayo Moran, dean of the University of Toronto Faculty of Law, recommended to Ontario's Attorney General that the government enact legislation to address SLAPP suits. The government has announced that it is reviewing the recommendations.

"My personal view is that we're likely to see some such legislation in Canada," says Marko Vesely of Lawson Lundell LLP's Vancouver office. "I certainly see interest on the part of legislators."

SLAPP is an acronym for "strategic lawsuits against public participation," usually initiated by corporate defendants to stifle what may be meritorious litigation or criticism against them.

But they're not new. They've been around in the US for about three decades, and roughly half the states have such laws. British Columbia had anti-SLAPP measures, but only for a few months in 2001 when an incoming Liberal government overturned a last-minute decision by its NDP predecessor to enact such legislation.

In 2007, the Québec legislature commissioned a group of academics to examine the issue. Although their report cited but three instances of what might be SLAPP suits in the province during the period covered by their investigation, the Justice Minister followed with broadly worded legislation aimed at codifying judicial power to curtail abuse of process in general. The government added the provisions to the Québec Code of Civil Procedure in 2009.

The legislation gave the courts new powers and codified other pre-existing ones, including the power to dismiss abusive actions, reject abusive pleadings, order special costs and punitive damages, and impose liability on directors and officers of a corporation.

Ironically, in the two years since its enactment, resort to the Québec legislation has not been focused on SLAPP suits at all. "The law has been used successfully most often in the case of frivolous proceedings or pleadings, including medical malpractice and other professional negligence," says Martine Tremblay of Montréal's Kugler Kandestin.

Indeed, those in favour of SLAPP legislation in Ontario note that the province already has provisions for dealing with frivolous or vexatious actions, but they have never been used as anti-SLAPP measures.

"The justification for anti-SLAPP measures is greater in the US because there are fewer safeguards against rampant litigation and because the existence of the First Amendment guaranteeing free speech makes it a better fit," Vesely says.

Vesely is concerned that anti-SLAPP legislation will not be properly targeted. "It's very difficult to define exactly what the mischief is other than referring to it as 'strategic litigation against public participation,' and that's very difficult to oppose in principle," he says. "But laws of this kind must ensure that businesses are allowed to defend their reputations and that legitimate claims in defence of reputation aren't caught, even unintentionally, by anti-SLAPP provisions."

Jeffrey Davies of Davies Howe Partners LLP, who acts for developers in land use matters, is of the view that the devil is in the details. In particular, he takes exception to the Moran Committee's recommendations that a reverse onus be placed on plaintiffs defending an anti-SLAPP allegation against their suit. "That means the plaintiff will have to prove a negative, and things just don't work that

way," he says.

Davies is also concerned about the panel's recommendation that the proceedings in the context of which the alleged defamatory statements were made be stayed until the SLAPP allegation is resolved.

"That's an incentive for individuals to bait the dickens out of companies in the hope that they'll get mad and sue for defamation in an action where the defendants will raise the SLAPP defence so as to stay ongoing administrative or other proceedings, such as Ontario Municipal Board hearings dealing with development approvals.

Like Vesely, however, Davies isn't optimistic that the Ontario government will reject the Moran Committee's recommendations. "Remember that there exists a powerful anti-development lobby that the government wants onside," he says.

Julius Melnitzer is a freelance legal-affairs writer and a frequent contributor to Lexpert.

