January 19, 2011

# Anti-SLAPP Legislation on the Horizon

Marko Vesely

On October 28, 2010, a panel commissioned by the Ontario Attorney General delivered its report, recommending that the province enact legislation to address so-called strategic litigation against public participation or "SLAPP" suits. The panel was chaired by Mayo Moran, the dean of the University of Toronto Faculty of Law. According to the government's press release, the government is now reviewing the report and its recommendations.

The two American professors who coined the term in the late 1980s, George W. Pring and Penelope Canan, defined a SLAPP as a "a lawsuit involving communications made to influence a governmental action or outcome, which resulted in a civil complaint or counterclaim filed against nongovernment individuals or organizations on a substantive issue of some public interest or social significance."

Anti-SLAPP legislation is not new. Approximately half of U.S. states have anti-SLAPP statutes.

In Quebec anti-SLAPP measures were added to the Code of Civil Procedure in 2009 by *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*. The preamble refers to the need to "discourage judicial proceedings designed to thwart the right of citizens to participate in public debate" and "to strike a fairer balance between the financial strength of the parties to a legal action." The substantive provisions include many of the same provisions found in American statutes: the ability to strike out claims found to be brought for an improper purpose, the power of award special costs to defendants of SLAPP suits, etc.

British Columbia had anti-SLAPP legislation very briefly, for a few months in 2001. The *Protection of Public Participation Act* came into force in April 2001, in the dying days of the last NDP administration, and was repealed in August of the same year, shortly after the B.C. Liberal Party took power. The BC statute attempted to protect against what were seen by some as vexatious defamation suits by deeming acts of public participation to be occasions of qualified privilege, which required a plaintiff to prove actual malice in order to succeed it its claim. If a defendant was unable to strike out a claim at first instance, it could attempt to persuade the court that it was a "reasonable possibility" that the claim was a SLAPP, whereupon the onus shifted to the plaintiff to prove at trial the claim was not brought for an improper purpose. In those circumstances, the defendant could also obtain an order requiring the plaintiff to provide security for costs for the defendant's legal expenses.

On April 30, 2010, the Uniform Law Conference of Canada adopted a *Uniform Abuse of Process Act*.

The question now is whether the Ontario government will follow the panel's recommendations and enact anti-SLAPP legislation and, if it does, what that legislation will look like. Some view anti-SLAPP legislation as a solution searching for a problem that doesn't exist, given the existing procedures that enable courts to deal with vexatious suits. These include rules allowing for striking out a vexatious claim and claims that failed to disclose a reasonable cause of action, as well as provisions for summary judgment and summary trial.

If the B.C. experience is any guide, any anti-SLAPP legislation will be hotly debated in Ontario, as businesses seek to ensure that any legislation doesn't overly restrict their right to protect their reputations and interests, and environmental and citizen groups press for a statute that will shut down what they perceive to be abusive litigation. And if Ontario does enact anti-SLAPP legislation, we may see other provinces follow suit.

For more information please contact Marko Vesely at mvesely@lawsonlundell.com or 604.631.9260 or visit the Western Canada Business Litigation Blog.

© 2011 Lawson Lundell LLP.All Rights Reserved. This information provided in this publication is for general information purposes only and should not be relied on as legal advice or opinion. For more information please phone 604.685.3456 and ask to speak to Marko Vesely or any author of the Western Canada Business Litigation Blog.