

# Lawyers await gov't response to SLAPP panel

## Moran report recommended legislation to address controversial lawsuits

BY JULIUS MELNITZER  
For Law Times

Last year, a panel chaired by University of Toronto Faculty of Law dean Mayo Moran recommended that the government enact legislation to address strategic litigation against public participation lawsuits. While the government has so far announced that it's reviewing the recommendations, lawyers believe it will take some action.

"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, the acronym for such lawsuits, usually involve actions initiated by corporate defendants to stifle what may be meritorious criticism against them. But the issue isn't new. Measures to address them have existed in the United States for about three decades, where roughly half of the states have such laws. British Columbia had anti-SLAPP measures for a few months in 2001 before an incoming Liberal government overturned a last-minute decision by its NDP predecessor to enact such legislation.

In 2007, the Quebec legislature commissioned a group of academics to examine the issue. Although their report cited just three instances of what might be SLAPP suits in the province during the period covered by their investigation, the justice minister followed up with broadly worded legislation aimed at codifying judicial power to curtail abuse of process in general. The government added the provisions to

the Quebec Code of Civil Procedure in 2009.

The bill's provisions give the courts new powers and codify other pre-existing ones, including:

- The power to declare an action abusive on the request of the parties or even on the court's own initiative. Abuse may consist of a frivolous or dilatory claim or pleading or bad faith in proceeding excessively, unreasonably or in an attempt to pervert the ends of justice, particularly when aimed at restricting citizens' freedom to express themselves in a public debate.
- The power to dismiss an action, strike or amend a submission, reject a pleading or refuse to allow an examination in cases of abuse.
- The power to order costs in favour of a party whose financial situation would prevent it from properly presenting its case.
- The power to order damages, including punitive ones, in addition to costs as compensation for harm suffered.
- The power to impose liability on directors and officers of a corporation in cases of abuse.
- The power to dismiss all or part of any action that's unfounded in law.

Ironically, during the two years since its enactment, there has been little resort to the Quebec legislation in SLAPP suits. Indeed, the law has most often been a tool in the case of frivolous proceedings or pleadings, including medical malpractice and other professional negligence matters.

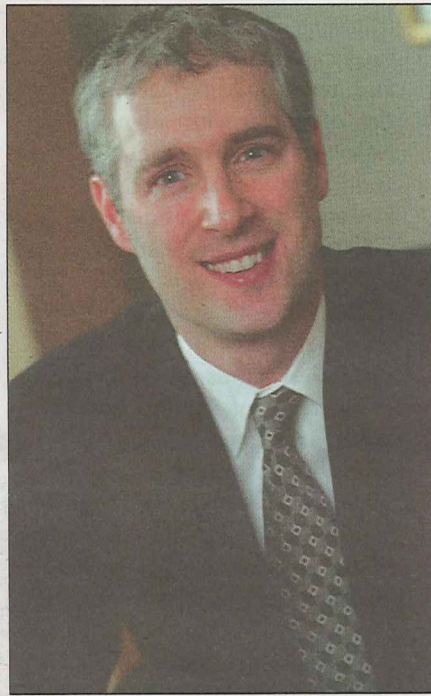
But those in favour of SLAPP legislation in Ontario note that

while the province already has provisions for dealing with frivolous or vexatious actions, they've never served as anti-SLAPP measures.

"The justification for anti-SLAPP measures is greater in the U.S. 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.

But Vesely is concerned that anti-SLAPP legislation won't 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



'My personal view is that we're likely to see some such legislation in Canada,' says Marko Vesely.

developers in land-use matters, is of the view that the devil is in the details. In particular, he takes exception to the Moran panel's recommendations to place a reverse onus 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 pending resolution of the SLAPP allegation. "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," he says.

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

LI

### E. V. Litigation & Financial Services Inc.

Elaine G. Vegotsky, CMA, CFE, CFI

Assisting you in  
Litigation & Forensic Accounting,  
Financial Investigations

Suite 900  
45 Sheppard Avenue East,  
Willowdale, Ontario M2N 5W9

Telephone or Fax  
(416) 930-1370  
(905) 731-5812  
evlitigation@rogers.com

### Narrow Your Focus

- NEWS ●
- COMMENTARY ●
- ANALYSIS ●
- FOCUS SECTIONS ●
- CASELAW ●

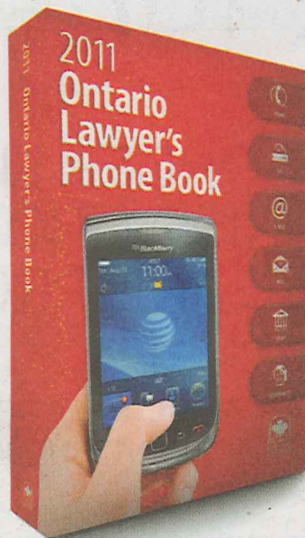
**LAW TIMES**  
Your best choice for reaching Ontario's legal

To advertise in an upcoming issue, contact our sales team:

Karen Lorimer  
905-713-4339  
karen.lorimer@thomsonreuters.com

Kimberlee Pascoe  
905-713-4342  
kimberlee.pascoe@thomsonreuters.com

## ONTARIO LAWYER'S PHONE BOOK 2011



YOUR MOST COMPLETE DIRECTORY OF  
ONTARIO LAWYERS, LAW FIRMS, JUDGES  
AND COURTS

With more than 1,400 pages of essential legal references, Ontario Lawyer's Phone Book is your best connection to legal services in Ontario. Subscribers can depend on the credibility, accuracy and currency of this directory year after year.

More detail and a wider scope of legal contact information for Ontario than any other source:

- More than 26,000 lawyers
- More than 9,300 law firms and corporate offices
- Fax and telephone numbers, e-mail addresses, office locations and postal codes

Includes lists of:

- Federal and provincial judges
- Federal courts, including a section for federal government departments, boards and commissions
- Ontario courts and services, including a section for provincial government ministries, boards and commissions
- The Institute of Law Clerks of Ontario
- Small claims courts
- Miscellaneous services for lawyers

Perfectbound • Published  
December each year  
On subscription \$66  
P/C 0514140999  
One time purchase \$69  
P/C 0514010999  
ISSN 0845-4832  
Multiple copy  
discounts available

Prices subject to change without notice,  
to applicable taxes and shipping & handling.

Visit [canadalawbook.ca](http://canadalawbook.ca) or call 1.800.565.6967 for  
a 30-day no-risk evaluation

CANADA LAW BOOK®



THOMSON REUTERS™