
William C. McDowell
416-865-2949
wmcdowell@litigate.com


Derek Knoke
416-865-3018
dknoke@litigate.com

March 30, 2020

When Must an Anti-SLAPP Motion Be Heard?

Ontario's Anti-SLAPP legislation (ss 137.1 to 137.5 of the *Courts of Justice Act*) provides a judicial screening device. It is designed to swiftly eliminate claims that unduly limit freedom of expression on matters of public interest. Since coming into force, courts have considered, at length, the substantive issues. To date, little guidance has been provided on the procedural issues.

An important question, on which judges of the Superior Court have diverged, asks when an anti-SLAPP motion *must* be heard. The Court of Appeal for Ontario recently released a decision that has procedural implications. In *Amorosi v Barker*, the appellant argued that the 60-day timeframe in s 137.2(2) (the Anti-SLAPP motion "shall be heard" within 60 days) prevented an adjournment of the motion to permit cross-examination on an affidavit. The Court of Appeal rejected this interpretation. It was sufficient for the motion to be "returnable" within 60 days of its filing. The motion judge did not err by granting an adjournment to permit cross-examination.

Another recent case involved an affiant who refused to answer relevant questions on cross-examination. When faced with the prospect of a refusals motion, counsel claimed that a refusals motion was unavailable because of s 137.1(5). It states, "Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of."

Although the issue was not adjudicated, the position is likely untenable. Steps in the underlying action are stayed – not any steps on the motion (see *Pointes,* at para. 43). Otherwise, a party could refuse to cooperate with any steps on the motion with impunity.

Anti-SLAPP provisions provide a triage device, but they cannot be used to undermine basic procedural steps necessary for a fair hearing. These provisions ensure that the motion proceeds expeditiously and fairly to all concerned.