

Motion: Security for Costs (ON)

Practical Guidance with comments from Associate Judge Linda Abrams (Superior Court of Justice) (Ontario)

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Maintained

On a **motion for security for costs**, an Order may be made requiring of a plaintiff (or applicant or plaintiff by counterclaim) to post **security** sufficient to cover the defendant's (defendant to the counterclaims) anticipated **costs** — if awarded at trial or on a **motion** to dismiss. **Security** will take the form of cash, a letter of credit, a bond or such other form of **security** as the parties agree is appropriate and the Accountant of the Superior Court of Justice permits. Orders for **security for costs** are typically available where the plaintiff is a shell corporation or does not reside within the jurisdiction in which the litigation is being prosecuted. At the same time, the courts are careful to balance the interests of justice in order to ensure that a worthy claim is not stayed or dismissed simply because a plaintiff is impecunious (does not have the resources to cover a potential **costs** award) or where the plaintiff's poor financial health is caused by the defendant. Where **security for costs** is not posted, though ordered, the claim of the person who fails to post **security** will generally be stayed and may ultimately be dismissed. Therefore, **motions** for **security for costs**, where appropriate, can act as a deterrent to frivolous litigation. This practice note discusses **motions** for **security for costs** and covers such topics as the legal test to be met on a **motion for security for costs** and practical considerations, such as timing of the **motion**. For information on general **motion** practice, see the practice note: Civil **Motions** (ON).

Applicable Rules

In Ontario, **motions** for **security for costs** are governed by r. 56 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 ("Rules"). Specifically, r. 56.01(1) provides as follows:

56.01 (1) The court, on **motion** by the defendant or respondent in a proceeding, may make such order for **security for costs** as is just where it appears that,

- (a) the plaintiff or applicant is ordinarily resident outside Ontario;
- (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
- (c) the defendant or respondent has an order against the plaintiff or applicant for **costs** in the same or another proceeding that remain unpaid in whole or in part;
- (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the **costs** of the defendant or respondent;
- (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the **costs** of the defendant or respondent; or
- (f) a statute entitles the defendant or respondent to **security for costs**. Of the enumerated factors, the most commonly relied upon are: (a) plaintiff ordinarily resident outside Ontario; (d) the plaintiff is a corporation with insufficient assets in Ontario; and (e) the action is frivolous and vexatious and the plaintiff has insufficient assets in Ontario.

Legal Standard

A **motion for security for costs** involves a two-part test:

- The defendant must show that the plaintiff's action falls under one or more of the categories set out in r. 56.01(1) of the Rules.

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- If the plaintiff's actions fall under one of the enumerated categories, the plaintiff can avoid an order to post **security** by demonstrating impecuniosity and satisfying the court that the plaintiff's claim has merit. (see: *Coastline Corp. v. Cannacord Capital Corp.*, [2009] O.J. No. 1790 at para. 7 (S.C.J.).

Ultimately, the court will consider the appropriateness of granting the order, holistically, examining all the circumstances of the case and being guided by the overriding interests of justice in its determination of whether it is just that the order (for **security for costs**) be made (see: *Yaiguaje v. Chevron Corp.*, [2009] O.J. No. 1790 (C.A.)).

Practical Considerations

A defendant seeking an order for **security for costs** must provide evidence to show that the case falls into one of the r. 56.01(1) enumerated categories of the Rules.

Plaintiff Outside Ontario

Evidence that the plaintiff is ordinarily resident outside of Ontario will trigger an inquiry as to the justice of any potential order for **security**. Evidence of non-residence is generally fairly easy to obtain in light of the requirement of r. 56.02 of the Rules, which provides that a lawyer for the plaintiff shall "forthwith on receipt of a demand in writing from any person who has been served with the originating process, declare in writing whether the plaintiff or applicant is ordinarily resident in Ontario". Counsel intent on bringing a **motion for security for costs** on the grounds the plaintiff resides outside Ontario, should immediately move to obtain written confirmation of the plaintiff's place of residence.

Corporate Plaintiff

While evidence that a plaintiff is a corporation is easily obtained, the question of whether the corporation has sufficient assets within Ontario is more difficult. Where evidence as to the financial affairs of the plaintiff emerges through the course of discovery, that evidence can be used in support of the **motion**. However, if the **motion** is brought at an early stage, the defendant may be able to rely on an affidavit as to its information and belief regarding the nature and location of the plaintiff's assets (with the test being that there is "good reason to believe" that the plaintiff has insufficient evidence). It will still be open to the plaintiff to rebut the suggestion that it lacks sufficient assets by furnishing detailed evidence that demonstrates it is capable of satisfying any potential **costs** award.

Frivolous or Vexatious

There are a number of factors the court may consider when determining whether an action is frivolous or vexatious:

- it is obvious that the action cannot succeed;
- the action is brought for an improper purpose, including harassment and oppression of the defendant;
- the plaintiff has brought other actions dealing with the same issues and allegations; and
- vexatious conduct of the plaintiff in the course of the present proceedings or any previous proceedings.

Once the court has been satisfied that the proceedings themselves are vexatious or frivolous, it is still necessary to show that there is good reason to believe that the plaintiff has insufficient assets in Ontario.

Sufficient Assets Outside Ontario

Traditionally, the presence of assets outside of Ontario was not relevant on a **motion** for **security**, as they were not conveniently accessed by the defendant. However, with the increase in cross-border and interjurisdictional enforcement agreements, the courts are now prepared to consider assets outside of Ontario in certain circumstances, reflecting the purpose of the rule, which is to protect the defendant but not to bar actions by foreign plaintiffs. For example, in *Lesecq v. Ottawa Montessori School*, [2008] O.J. No. 91, the Court noted the existence of an established procedure for the enforcement of a foreign judgment in French Courts and ordered that the French

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plaintiff post only such security as would be sufficient to retain French counsel should it need to enforce a costs order there.

Impecuniosity*Individual Plaintiff*

The court may decide not to order security against an impecunious plaintiff provided its claim is not entirely devoid of merit — the onus of showing both a meritorious claim and a lack of means to furnish security falling on the plaintiff. The evidentiary threshold for impecuniosity is high, and "bald statements unsupported by detail" are not enough. The plaintiff must tender evidence disclosing its income, assets, expenses, liabilities and borrowing ability — with full supporting documentation for each category, where available, or a fulsome explanation when such information is not available as to why it is not available (see: *Coastline Corp. v. Cannacord Capital Corp.*, [2009] O.J. No. 1790 (S.C.J.)).

Corporate Plaintiff

With respect to a corporate plaintiff, an inquiry into impecuniosity involves an examination of the finances and means of the corporation as well of its various shareholders and associates. The question at this point is not just whether the corporation has assets, but whether it is able to raise sufficient funds to prosecute its claims. Accordingly, the plaintiff will be required to adduce evidence including as to the amount and source of all of its income, a description of all its assets including values, a list of all or its liabilities and other significant expenses, an indication of the extent of the ability of the plaintiff to borrow funds, and details of any assets disposed of or encumbered since the cause of action arose. The plaintiff has an obligation to provide evidence that funds are not available from any source (*i.e.*, that it does not have access to assets and funds) and cannot avoid an in-depth investigation of its finances or the finances of its principal stakeholders.

Once the plaintiff has satisfied the court that it is impecunious, it need only demonstrate that its claim is not devoid of merit. It is not necessary to show that the claim is certain or even likely to succeed, if it can be demonstrated that it is not certain to fail. Where impecuniosity has not been shown, the court will take a closer look at the merits.

Timing of the Motion for Security for Costs

Pursuant to r. 56.03 of the Rules, a motion for security may not be brought until after the defendant has delivered its statement of defence or, in the case of an application, after the respondent has filed a notice of appearance. In the case of a non-resident plaintiff, it may be immediately evident that such a motion is warranted, in which case it is advisable to bring the motion as soon as possible.

In some cases, it may be worthwhile to wait until discoveries have been completed to bring a motion for security for costs. For example, with a corporate plaintiff, the difficulty in establishing whether there are sufficient assets in Ontario may require waiting until evidence of a paucity of eligible assets is revealed in discovery.

Where the merits of the case are key in the determination of whether security for costs ought to be ordered posted, the court has recommended waiting for discovery before proceeding with a security for costs motion. If oral discovery hasn't occurred, the merits would need to be canvassed through a separate cross-examination in respect of the motion. That cross-examination would be costly and duplicative (see: *Livent Inc. (Special Receiver) v. Deloitte & Touche*, [2011] O.J. No. 1660 (S.C.J.) ("*Livent*").

Nevertheless, counsel should be careful not to delay too long as a motion for security for costs may be denied if there has been undue delay — delay that is not explained sufficiently and/or that has caused the plaintiff prejudice (including procedural prejudice, *i.e.* the plaintiff might have conducted itself differently if it had known that a motion was to be brought) (see: *Livent*).

Motion Materials:

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On a ***motion for security for costs*** the affidavit should provide a brief description of the nature of the dispute and the status of the proceedings. The affidavit should also provide evidence that the plaintiff or its claim falls into one of the enumerated categories in r. 56.01(1) of the Rules. For example, evidence of the plaintiff's residence or evidence of the plaintiff's lack of assets within Ontario. Where the plaintiff is a corporation, the affidavit should include as an exhibit, a copy of a corporate search disclosing the identity of the principals of the corporation.

Where it is anticipated that the plaintiff will plead impecuniosity, any evidence that you may have regarding the financial status of the principals of the corporate plaintiff, or the extra-provincial assets of the plaintiff, should be included in the affidavit. It is a good idea to include copies of searches you may have made to show the financial status of the plaintiff, including:

- property search;
- PPSA search;
- corporate search; and
- case law research.

The searches should be recent and not stale-dated.

Most importantly, the affidavit should provide a full accounting of the ***costs*** of the proceedings to date as well as a detailed estimate of the future ***costs***, including legal fees and disbursements, at each state of litigation up to and including the conclusion of trial. This can be accomplished by attaching a draft bill of ***costs*** as an exhibit to the affidavit. For a sample notice of ***motion*** and affidavit for a ***motion for security for costs*** see the precedents: Notice of ***Motion (Security for Costs)*** (ON) and Affidavit (***Motion for Security for Costs***) (ON). The draft bill of ***costs*** should set out the identity of who has done/will be doing the work, his/her year of call, his/her hourly rates and, where the file is being staffed by more than one lawyer, an explanation as to why more than one lawyer is required and a delineation of tasks assigned to each.

An affidavit responding to a ***motion for security for costs*** should be sworn by the client, personally, due to the nature of the financial disclosure required. The affidavit and exhibits should accurately disclose the client's income, assets, expenses, liabilities and borrowing ability. Where such information is not available, the affidavit should include an explanation as to why this is so. For a precedent responding affidavit on a ***motion for security for costs*** see the precedent: Affidavit (Response to ***Motion for Security for Costs***) (ON). An affidavit from a lawyer or law clerk as to what they have about the client's financial wherewithal is not sufficient or appropriate.

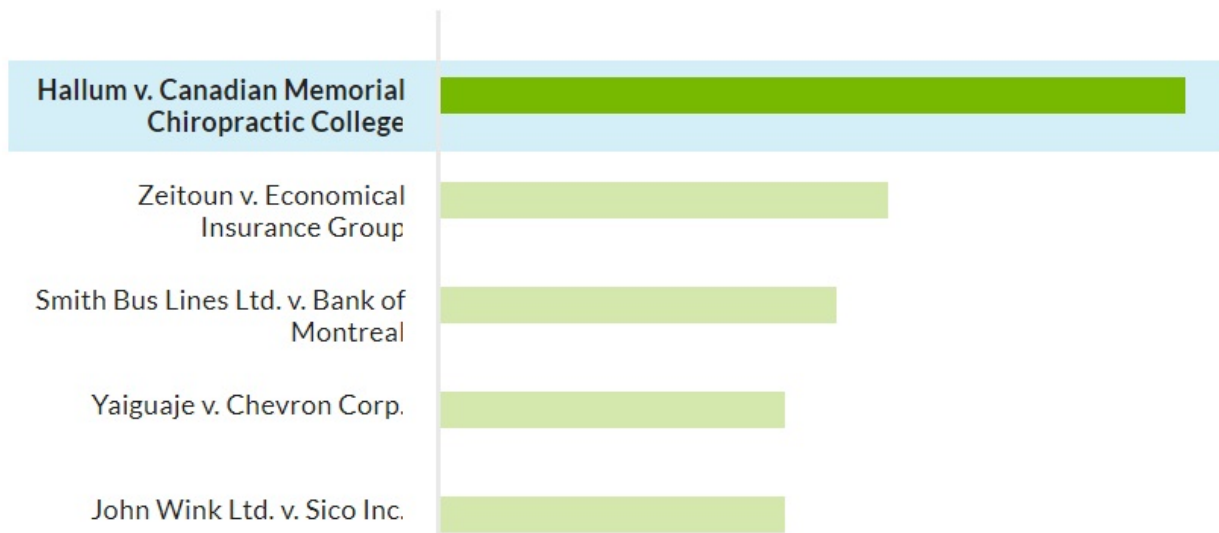
As you prepare your ***motion for security for costs***, consider highlighting legal authority most frequently cited by the Ontario Superior Court of Justice. For example, Context analytics show the ***Motion for Security for Costs*** Citation Patterns — Ontario Superior Court of Justice.

Motion for Security for Costs Citation Patterns — Ontario Superior Court of Justice

Frequently Cited

Opinions

Judges



Source: Context (*current as of 13/10/2021*). Click Ontario Superior Court of Justice Context for the latest analytics. To learn more about Context, click Context LexisNexis Canada.

Amount and Form of Security

Security takes the form of cash, a letter of credit, a bond or such other form of security as the parties agree is appropriate and the Accountant of the court permits. Pursuant to r. 56.04 of the Rules, the court determines the amount and form of security and the timelines for payment. Generally, courts have tended towards a "pay-as-you-go" approach to security for costs orders rather than lump sum orders covering all of the anticipated costs through the conclusion of trial. Pay-as-you-go orders set time standards the posting of security, with security to be posted at various stages of the litigation (e.g., the conclusion of discovery; 60 days before the pre-trial; 60 days before trial) and with the parties having the opportunity to return to court to have the amount ordered posted increased or decreased (Rules, r. 56.07). This approach may be a more attractive option for the court, as it balances the rights of the defendant without having an undue chill effect on the plaintiff. The defendant, in all cases, is expected to provide evidence of its costs to the date of the motion, as well as its anticipated future costs. See the precedents: Order (Security for Costs) (ON) and Order (Security for Costs) (Plaintiff Resides Outside Ontario) (ON).

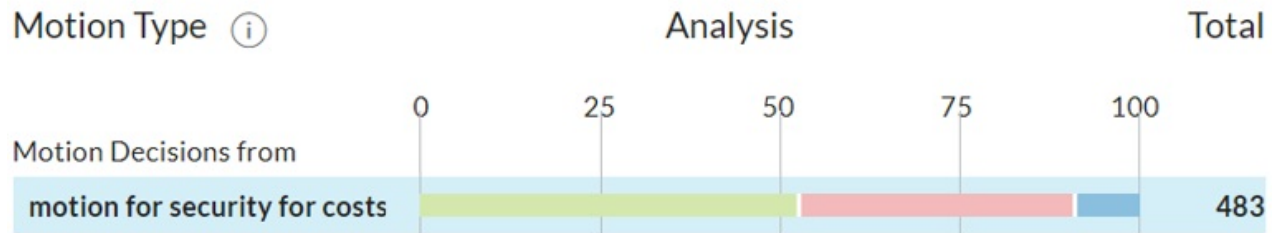
Listed in the Motion for Security for Costs Outcomes — Ontario Superior Court of Justice below is a graph showing the rates at which motions for security for costs were granted in the Ontario Superior Court of Justice.

Motion for Security for Costs Outcomes — Ontario Superior Court of Justice

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Motion Decisions from Ontario Superior Court of Justice's Cases (i)

■ Granted
 ■ Partial
 ■ Denied



Source: Context (*current as of 13/10/2021*). Click Ontario Superior Court of Justice Context for the latest analytics. To learn more about Context, click Context LexisNexis Canada.

Current as of: 11/15/2022

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