

Motions for Security for Costs

Ontario Bar Association Litigation Costs

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1. Introduction

A security for costs motion is a powerful tool that lawyers often overlook. Since such motions are not available in every case, lawyers are accustomed to dealing with the issue of recovery of costs closer to the conclusion of the litigation. Most clients do not know they even the option exists. The result is that either no motion for security is brought or there is significant delay in bringing the motion that it results in the motion being unsuccessful.

Simply put, a motion for security for costs is a means to ensure that there are funds in place to pay for the defendant's costs should the defendant succeed in the litigation. In addition, it is an effective method of deterring frivolous or vexatious claims from proceeding further. Since the order prevents the plaintiff from taking further steps in the litigation until the security is posted, it forces the plaintiff to take a closer look at its claim and to seriously consider its chances of success.

An order for security for costs is a discretionary remedy and the court has the power to deny it where granting the order would impede the plaintiff's access to justice and a determination of the plaintiff's case on the merits.

2. Where Motions are Available

Rule 56.01 of the *Ontario Rules of Civil Procedure* enumerates the circumstances under which such a defendant can bring a motion for security for costs. The motion is available where:

- a) the plaintiff is ordinarily resident outside Ontario;
- b) the plaintiff has another proceeding for the same relief pending in Ontario or elsewhere;

- c) the defendant has an order against the plaintiff for costs in the same or another proceeding that remains unpaid in whole or in part;
- d) the plaintiff is a corporation or a nominal plaintiff and there is good reason to believe that the plaintiff has insufficient assets to pay the costs of the defendant;
- e) there is good reason to believe that the action is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant; or
- f) a statute entitles the defendant to security for costs.¹

The onus is on the defendant to satisfy the court that the plaintiff falls within one of the circumstances set out in Rule 56.01.² The motion is available in a counterclaim as well as an Application.³

2. The Order is Discretionary

Having met one of the enumerated grounds in Rule 56, a defendant is not necessarily entitled to security for costs. In *Zeitoun v. The Economical Insurance Group*⁴, the Ontario Divisional Court held that the satisfaction of the enumerated categories “merely triggers the inquiry” into whether an order for security would be just.⁵ The court must take into account a number of factors including the merits of the claim, the financial circumstances of the plaintiff and the possible effect of an order for security for costs preventing a bona fide claim from proceeding.⁶

¹ *Ontario Rules of Civil Procedure* R.R.O. 1990, Reg 194, (hereinafter “*Rules of Civil Procedure*”) Rule 56.01.

² *DiFilippo v. DiFilippo*, 2013 ONSC 5460 (CanLII) (hereinafter “*DiFilippo*”).

³ *Rules of Civil Procedure*, *supra*, Rules 1.03(1) and 56.01.

⁴ (2008), 292 D.L.R. (4th) 313 (Ont. S.C.J. (Div. Ct.)), *affd* 307 D.L.R. (4th) 218 (Ont. C.A.) (hereinafter “*Zeitoun*”).

⁵ *DiFilippo*, *supra*, para. 26.

⁶ *Ibid.*

Generally, a plaintiff is able to resist a motion for security for costs if it is able to show that:

- it has sufficient assets in Ontario; or
- that it is impecunious and that an injustice would result if it were not allowed to proceed with its claim.

Impecuniosity requires that the plaintiff demonstrate that if the order for security is made, the Plaintiff's lawsuit will be stopped in its tracks because the plaintiff does not have the amount of security being sought and that the funds are not even available to him or her.⁷ In the case of a plaintiff corporation, the plaintiff must show not only that it does not have sufficient assets itself but also that it cannot raise security from its shareholders and associates by selling, borrowing or otherwise.⁸ Where the plaintiff is able to show that it is impecunious, the plaintiff needs to only demonstrate that the claim is not plainly devoid of merit.⁹ The "devoid of merit" standard has been described as a "very low threshold".¹⁰

Where impecuniosity has not been shown, the court will take a closer look at the merits of the case.¹¹ The reason for this is that in such cases, there is no compelling argument that the poverty of the plaintiff will cause an injustice by preventing the pursuit of a claim that otherwise would have been permitted to be tried.¹² Accordingly, where impecuniosity has not been shown, the court will look at the merits and whether the claim has a good chance of success in deciding whether to grant security.

⁷ *Aviaco International Leasing Inc. v. Boeing Canada Inc.* (2000) O.J. 3287 para. 13.

⁸ *713484 Ontario Ltd. v. McMillan Binch* 2003 Carswell Ont 419 (SCJ) (hereinafter "713").

⁹ *Zeitoun, supra*, para. 45.

¹⁰ *DiFilippo, supra*, paragraph 28.

¹¹ *Zeitoun, supra*, para. 50.

¹² *Ibid.*

When considering the merits, the court does not have to apply the same level of analysis required for a motion for summary judgment.¹³ It is sufficient to consider the pleadings and the evidence filed on the motion, and selective excerpts from the examination for discovery.¹⁴

The court has a broad discretion in making such order as it deems just.¹⁵ Other factors that have been taken into account in the exercise of the court's discretion in ordering security include:

- a) the amount of costs already incurred by the defendant to defend the action;
- b) the amount of costs that might be assessed against the plaintiff, if unsuccessful;
- c) whether there is reason to believe that the plaintiff has insufficient assets to satisfy a judgement for costs;
- d) whether the plaintiff has assets within the jurisdiction that would be available to satisfy a judgement for costs;
- e) whether the plaintiff resides or carries on business in a jurisdiction with reciprocal enforcement legislation;
- f) whether the plaintiff has assets in the reciprocating jurisdiction that would be available to satisfy a judgement for costs;
- g) whether there is reason to believe that the plaintiff might try to avoid paying a judgment for costs; and
- h) the manner in which the parties have conducted the proceedings.¹⁶

In addition, where the impoverishment of the plaintiff is believed to be caused by the very acts of the defendant, the court will consider this as a factor in favour of not ordering security.¹⁷

¹³ *Chemicheck Inc. v. Teva Canada Ltd.*, [2015] O.J. No. 1549 citing [1996] O.J. No. 4549 (Gen. Div.) para. 6

¹⁴ *Ibid.*

¹⁵ *Ibid.*, citing *Chachula v. Baillie* 2004 CanLII 27934 (ON SC).

¹⁶ Orkin, *Law of Costs*, 2nd ed. (Toronto: Canada Law Book Co., 2015 looseleaf) (hereinafter "Orkin") p. 5-5, para. 502.

Timing of the Motion

Rule 56.03 states that a motion for security for costs may be made only after the defendant has filed a defence or in the case of an application, after the respondent has filed a notice of appearance.¹⁸

A motion for security for costs must be made promptly as it can be denied where there has been undue delay in bringing the motion.¹⁹ The reason for requiring such motions to be brought in a timely manner is to prevent the plaintiff from being lulled into a false sense of security that it can proceed to trial without posting security.²⁰

Delay has been found to be fatal to a motion for security for costs.²¹ More recently, however, the courts have found that mere delay in and of itself is not the determining factor.²² The delay must be found to have been unreasonable for it to have an impact on the end result.²³ Any delay must therefore be explained and a defendant's failure to provide a satisfactory explanation for the delay can be a basis for the court to deny security.²⁴ In addition to providing an explanation for the delay, the court looks for evidence from the plaintiff demonstrating that the delay in moving has somehow caused the plaintiff prejudice, that is, evidence showing that the plaintiff might have acted differently had it been aware that such a motion would be brought down the road.²⁵

¹⁷ *John Wink Ltd. v. Sico Inc.* (1987), 1987 CanLII 4299 (ON SC), 57 O.R. (2d) 705, 15 C.P.C. (2d) 187 (H.C.J.)

¹⁸ *Rules of Civil Procedure*, *supra*, Rule 56.03.

¹⁹ *Orkin*, *supra*, p. 5-66, para. 508.

²⁰ *423322 Ontario Ltd. v. Bank of Montreal (H.C.J.)*, 1988 CanLII 4678 (ON SC).

²¹ *Ibid.*

²² *Shuter v. Toronto Dominion Bank*, 2007 CanLII 37475 (ON SC) (hereinafter "Shuter") para. 101.

²³ *Ibid.*

²⁴ *Ibid.*, citing *Cohen v. Power* 1970 CanLII 228 (ON SC), [1971] 2 O.R. 742; *Gosselin v. Wong* 33 C.P.C. 262.

²⁵ *Ibid.*, citing *Stepps Investment Ltd. v. Security Capital Corp.*, 2 O.R. (2d) 648; *408466 Ontario Ltd. v. Fidelity Trust Co.* 10 C.P.C. (2d) 278.

As for the appropriate time for bringing the motion, the prevailing view is that a motion for security for costs should be brought after examinations for discovery have been concluded.²⁶ One of the reasons for awaiting to bring such a motion until after discoveries is that it gives the defendant a chance to explore the merits of the plaintiff's case.²⁷

As the order is discretionary, there have been instances where the courts have ordered that security be posted prior to discoveries. For example, in *Marketsure Intermediaries Inc. v. Allianz Insurance Co. of Canada*²⁸, even though discoveries had not been conducted yet, the court found it to be more just in the circumstances to make an order on a “pay as you go” or instalment basis whereby the plaintiff would be required to post a certain amount of security for each step in the litigation. This would ensure that the defendant's costs are secure up to that point and that the plaintiff is not overly prejudiced by having to post security to the end of the trial.²⁹ Similarly, in *Canasia Sales Corp. v. Colson*³⁰, the court also found that a “pay as you go” method was more appropriate and ordered that the plaintiff pay \$60,000 into court as security for costs in three phases: \$20,000 – payable within 30 days of the date of the order, a further \$20,000 to be paid upon the completion of the examinations for discovery and a further \$20,000 to be payable when the action is set down for trial.³¹

Where the discoveries are expected to be particularly lengthy, it may be more practical to determine the merits of the case through cross-examinations on the motion for security for costs, rather than going through discoveries to explore the merits and then bringing the motion.³²

²⁶ *Park Street Plaza Ltd. v. Standard Optical Inc.*, 2003 CanLII 11692 (ON SC). (hereinafter “*Park Street*”).

²⁷ *Ibid.*

²⁸ [2003] O.J. No. 1634.

²⁹ *Ibid.*, para. 7 – 8.

³⁰ 2013 ONSC 1505 (CanLII)

³¹ *Ibid.*, para. 37.

³² *Livent. Inc. (Special Receiver) v. Deloitte & Touche*, 2011 ONSC 648 (CanLII) (hereinafter “*Livent*”) para. 78.

However, this is only practical where the discoveries are expected to be lengthy because the cross-examinations may end up being duplicative of elements of the examination for discovery that would ultimately occur in any event.³³

Ultimately, the general rule is that the motion should be brought once the basis for it has become known to the defendant, but each case will turn on its own facts regarding the appropriate timing.³⁴

Drafting the Motion Material and the Bill of Costs

Rule 56.03 states that the motion must be on notice to the plaintiff and every other defendant who has delivered a defence or a notice of appearance. The motion is made to a Master. As with any other motion, a motion for security for costs requires a Notice of Motion, and an Affidavit. The Affidavit, must also attach a draft bill of costs.

The affidavit must set out the basis for requiring the security. Attached at Schedule A is a sample affidavit in support of a motion for security for costs. Where there has been delay in bringing the motion, the defendant must explain in detail the reasons for the delay.³⁵

The bill of costs needs to be detailed. It should include any costs already incurred, which often includes the drafting of a statement of defence, or motions which arise before pleadings, such as motions for particulars, motions to inspect documents, or pleadings motions.³⁶ If the costs in previous motions were fixed or were ordered payable but have not been paid, those costs can also be included in the bill of costs.³⁷ In addition, the bill of costs must include a reasonable

³³ *Ibid*, para. 78.

³⁴ *Shuter, supra*, para. 106.

³⁵ *Livent, supra*, para. 78.

³⁶ *Demmesey Limited v. Cassels Brock & Blackwell LLP*, 2011 ONSC 4122 (CanLII) para. 33.

³⁷ *Ibid*.

estimate of the fees and disbursements that will be incurred throughout the various stages of the litigation. Where the defendant has made a counterclaim, however, the costs of the counterclaim should not be included in the bill of costs.³⁸

Attached at Schedule A is a sample Notice of Motion, Affidavit, Bill of Costs in a typical motion security for costs. Also attached is a sample Costs Outline for a motion for security for costs.

When preparing responding material on a motion for security, it is important to remember that the onus is on the plaintiff to establish impecuniosity and adducing evidence of financial hardship. The plaintiff should therefore provide evidence with supporting documentation as to income, expenses, assets and liabilities. Assets should be described with sufficient detail including their value and any encumbrances.³⁹ Full disclosure should include the plaintiff's most recent tax return, banking records and other records attesting to income and assets.⁴⁰ In the case of a corporation, it is not sufficient to show that the shareholders and associates say that they are unwilling to put up the security. The material should include evidence to show not only that the corporation does not have sufficient assets itself but also that it cannot raise security from its shareholders and associates by selling, borrowing or otherwise.⁴¹

Increasing Security

Where the security obtained initially is not sufficient, a defendant can bring a motion to increase the security for costs. The defendant has the onus of establishing the following:

³⁸ *Mabri Construction Ltd. v. Thomas C. Assaly Corp.* (1974), 6 O.R. (2d) 178 (H.C.).

³⁹ *Uribe v. Sanches*, [2006] O.J. No. 2370, 33 C.P.C. (6th) 94.

⁴⁰ *DiFilippo*, supra, para. 29.

⁴¹ 713, supra, para. 1.

- a) that there is a significant gap between the security ordered and the actual expenses;
- b) the actual expenses were not reasonably foreseeable; and
- c) that the original request for security was based on an assessment of the complexity of the case which in hindsight was not realistic.⁴²

Form of Security

In addition to cash, there are other forms of security that have been ordered by the courts. For example, security in the form of a letter of credit,⁴³ a charge on a property owned by a plaintiff in favour of the defendant,⁴⁴ an undertaking by the plaintiff to notify the defendant and pay security upon the sale of real property that had been listed for sale on the market,⁴⁵ and an undertaking by the principals of a corporate plaintiff to personally pay any award of costs against the plaintiff.⁴⁶ Furthermore, section 115 of the *Courts of Justice Act*⁴⁷ provides that “where a person is required to give security in respect of a proceeding in a court, a bond of an insurer licensed under the Insurance Act to write surety and fidelity insurance is sufficient, unless the court orders otherwise”.

Conclusion

While often overlooked, a motion for security for costs can offer many benefits to a defendant in a proceeding. In addition to ensuring that funds are in place to pay the defendant’s costs, it forces a plaintiff to take a hard look at its case and its chances of success thereby

⁴² *Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP*, 2009 CanLII 72029 (ON SC) citing *Levy-Russell Ltd. v. Tecomotiv Inc.*, 1992 CarswellOnt 323 (S.C.J.) at para. 7, 8; *Telex Communications Inc. (Canada) Inc.*, 2006 CanLII 7033 (ON SC), 2006 CanLII 7033 (Ont. S.C.J. Mast.) at para. 57.

⁴³ *Geophysical Service Incorporated v. Vulcan Minerals Inc.*, 2012 CanLII 57100 (NL SCTD).

⁴⁴ *Lockwood Estate v. Moar*, 2010 ABQB 596 (CanLII).

⁴⁵ *Todor Batkov et al. v. Starwood Industries Global Corporation et al.*, 2010 ONSC 6724 (CanLII).

⁴⁶ *Albino & Mike Contracting Ltd. v. James*, [1992] O.J. No. 3877 (G.D. - Master).

⁴⁷ R.S.O. 1990, c. 43.

detering frivolous or vexatious claims from proceeding further. Satisfying the enumerated grounds in Rule 56.01 does not automatically entitle a defendant to an order for security, it merely triggers the inquiry. The remedy is a discretionary one and the court will look not award security for costs where awarding it would deny a plaintiff access to justice of a claim that would otherwise have been permitted to proceed.

Schedule A

[Title of Proceedings]

NOTICE OF MOTION

The Defendants will make a motion to a Master on _____ day, _____, 20____ at _____ a.m. or as soon after that time as the motion can be heard at the court house, at _____.

PROPOSED METHOD OF HEARING: The motion is to be heard (*choose appropriate option*)

- in writing under subrule 37.12.1(1) because it is (insert one of on consent, unopposed or made without notice);
- in writing as an opposed motion under subrule 37.12.1(4);
- orally.

THE MOTION IS FOR (*state here the precise relief sought*).

- a) an Order requiring the Plaintiff to post security for costs in such an amount as this Honourable Court may deem just;
- b) the costs of this motion; and,
- c) such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE (*specify the grounds to be argued, including a reference to any statutory provision or rule to be relied on*).

- a) the Plaintiff is a shell corporation and does not have sufficient assets in Ontario to pay the costs of the Defendants;
- b) rule 56 of the *Rules of Civil Procedure* and in particular rule 56.01(1)(d);
- c) such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion (*list the affidavits or other documentary evidence to be relied on*).

- a) the affidavit of _____ sworn _____ ;
- b) such further and other evidence as counsel may advise and this Honourable Court may permit.

Date _____ Counsel for the moving party

TO: Counsel for the responding party

[Title of Proceedings]

A F F I D A V I T

I, _____, of the City of _____, in the _____, MAKE OATH AND SAY:

1. I am a partner with the law firm _____, the lawyers for the Defendants, Plaintiffs by Counterclaim, and as such have knowledge of the matters to which I hereinafter depose.
2. Our firm has conducted a corporate search on the Plaintiff corporation. A copy of the corporate search results obtained is attached to this affidavit and marked as Exhibit "A".
3. The address for the Plaintiff on the Ministry of Consumer and Commercial Relations records is that of other parties.
4. Our firm conducted a property search conducted, the results of which show that the property is owned by another corporation, which appears to be a corporation controlled by the same people that control the Plaintiff. A copy of the parcel abstract and related instruments are attached to this affidavit and marked collectively as Exhibit "B".
5. There is no correspondence from the Plaintiff with a letterhead.
6. Any cheques that received from the Plaintiff were not pre-printed custom cheques but rather appeared to be "counter" cheques. A copy of one such cheque,

that accompanied the option exercise letter referred to immediately above, is attached to this affidavit and marked as Exhibit "C".

7. I believe, based on all the above information that I have about the Plaintiff that it is a shell corporation without any assets to satisfy a cost award in favour of the Defendants following the trial of this proceeding.

8. I have prepared a Bill of Costs for the purposes of the Defendants' motion for security for costs. A copy of that Bill of Costs is attached to this affidavit and marked as Exhibit "A".

9. I make this affidavit in support of a further motion for security for costs and for no other or improper purpose.

SWORN BEFORE ME at the)
City of ,)
in the)
this day of , 20 .) _____
)

Commissioner for Taking Affidavits

[Title of Proceedings]

BILL OF COSTS

<i>Pleadings</i>	\$1,000.00
<i>Documentary Production</i>	\$3,000.00
- - Prepare Defendant's affidavit of documents	
- - Reviewing Plaintiff's affidavit of documents	
<i>Oral Discovery</i>	\$15,000.00
- Including preparation time	
- (5 days completed)	
<i>Pre-Trial (estimate)</i>	\$5,000.00
<i>Preparation for Trial</i>	\$15,000.00
<i>Trial</i>	\$20,000.00
<i>(one week estimate) (\$4,000 partial indemnity rate per day for senior and junior lawyer)</i>	
Total Fees	<hr/> \$59,000.00

Disbursements (*non-taxable)

Paid to file Statement of Defence*	144.00
Paid Reporter's Fees	4,000.00
Paid for Process Serving (estimate)	250.00
Paid for Summons to Witness (estimate)*	100.00
Paid for Witness Fees (estimate)*	100.00
Paid Expert Witnesses (estimate)	1,000.00
	<hr/> 5,594.00
	59,000.00
Total Fees and Disbursements	64,594.00
H.S.T. (at 13%)	8,352.50
	<hr/> \$72,946.50

Costs assessed and allowed at \$ this day of , .

[Title of Proceedings]

**COSTS OUTLINE
(Partial Indemnity)**

The Defendant provides the following outline of the submissions to be made at the hearing in support of the costs the party will seek if successful:

Fees (as detailed below)	\$	4,922.00
Estimated lawyer's fee for appearance on Motion (all-day attendance)	\$	1,500.00
Disbursements	\$	263.20
H.S.T. at 13%		852.57
	Total \$	<hr/> 7,537.77
	Total Claimed	<hr/> 7,500.00

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- the amount claimed and the amount recovered in the proceeding

- the statement of claim seeks \$5 million

- the complexity of the proceeding

- of average complexity

- the importance of the issues

- very important

- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding

- n/a

- whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution

- n/a

- a party's denial of or refusal to admit anything that should have been admitted

- n/a

- the experience of the party's lawyer

[year of Call to the Bar; specialist certifications, etc.]

- the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer

FEE ITEM <i>(e.g. pleadings, affidavits, cross-examinations, preparation, hearing, etc)</i>	PERSONS <i>(identify the lawyers, students and law clerks who provided services in connection with each item together with their year of call, if applicable)</i>	HOURS <i>(specify the hours claimed for each person identified in column 2)</i>	PARTIAL INDEMNITY RATE <i>(specify the rate being sought for each person identified in column 2)</i>	ACTUAL RATE*
Prepare Notice of Motion and Supporting Affidavit and Motion Record, and to service and filing of same; review Responding Motion Record; prepare draft Order; prepare costs outline and costs submissions; preparation for attendance on motion;	Senior Lawyer Name (Call)	5.3	\$255.00	\$425.00
	Junior Lawyer Name (Call)	15.0	\$110.00	\$185.00
	Name Senior Law Clerk	16.7	\$115.00	\$190.00

* *Specify the rate being charged to the client for each person identified in column*

- any other matter relevant to the question of costs

n/a

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: _____
Counsel for the moving party

TO: Counsel for the responding party

DISBURSEMENTS

Paid to File Notice of Motion*	\$127.00
Paid Process Server (estimate)	100.00
Photocopies	36.20
	<hr/>
Total	\$263.20

*non-taxable