

When should you get some security (for costs)?

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Defendants to litigation are often looking for tools to encourage an early settlement. A motion for security for costs can often fit the bill.

If the motion is successful, the lawsuit will be on hold until the plaintiff posts the ordered security. However, the *Rules of Civil Procedure* provide little guidance on when to bring this motion, and timing matters. If the motion is brought too early, there may be an inadequate basis for an order. But if the motion is brought too late, the court may deny relief based on an unjustified delay. In this article, we canvass some of the strategic considerations that can help guide defendants in considering when to move for security for costs.

Circumstances where security for costs are available

Rule 56.01 sets out the circumstances in which a court can order security for costs. On a motion by a defendant, the court may make an 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.

The rules state that this motion can be brought only after the delivery of a statement of defence, but nothing more about timing.¹ So when should the defendant move?

Move when a good reason is apparent

Generally, a defendant should bring its motion for security for costs as soon as it has “good reason to believe” that the plaintiff meets one of the criteria listed above.² This threshold is not onerous.³ To meet it, the defendant need not prove “with certainty” that one of the criteria is met. Rather, the defendant’s reasons must be based on “proven

facts” and evidence rather than “mere conjecture, hunch or speculation”.⁴ Once one of the criteria under rule 56.01 is established, the onus shifts to the plaintiff to show that they have assets in the jurisdiction or that they satisfy another exception to posting security.

On the other hand, failing to bring this motion when a “good reason” has become apparent can be risky. When deciding a motion for security for costs, the court will look at the circumstances of the case to determine, through the lens of hindsight, when a good reason ought to have been apparent to the defendant.⁵ While it is not necessarily fatal, unexplained delay in bringing the motion may affect the outcome of the motion.⁶ For example, a court may not award security for past costs incurred before the date on which the defendant brought its motion.⁷

But when is a good reason apparent?

Exactly when a “good reason” becomes apparent turns on the criteria under rule 56.01. The first three criteria are usually apparent at the outset. For example, a plaintiff will often plead its place of residence. Even if the plaintiff does not plead this information, a defendant can require the plaintiff to declare whether it is ordinarily resident in Ontario under rule 56.02. Thus, if a defendant is moving for security for costs based on the plaintiff’s location or because it knows that the plaintiff has an outstanding costs order in another proceeding, the defendant should bring its motion as soon as possible.

Other criteria are more difficult to assess. It may not be obvious that the plaintiff has insufficient assets in Ontario. Similarly, at the pleadings stage, the merits of the claim may be unclear. When assessing whether to move for security for costs on grounds that engage the plaintiff’s assets or the merits of the action, defendants should consider the following factors:

Can you discover a good reason through diligence? Before deciding whether to bring a motion, the defendant should diligently find out what it can about the plaintiff through non-litigation means, such as corporate searches, asset registration searches and case law research. These basic investigatory tools may provide enough evidence to make out the “good reason to believe” standard. For example, courts have held that evidence of the plaintiff failing to make corporate filings, failing to pay judgments or liabilities, temporarily dissolving, making a significant disposition of assets, and evidence that the plaintiff is a single purpose entity (i.e., a shell company) may meet the good reason to believe standard.⁸

Is it worth waiting for discovery? There may be benefits to waiting to bring this motion until after discovery. First, the merits of the action may become clearer following discovery, which can strengthen the defendant’s chances of success on the motion for security for costs. Indeed, some courts have said that, where the merits are engaged, this is the appropriate time to bring the motion.⁹ Second, the defendant may learn more about the plaintiff’s corporate status and available assets during discovery, if those issues are relevant to the underlying litigation. Third, waiting until after discovery may be more efficient: “if oral discovery has not yet occurred [when] the motion is brought, the merits would need to be canvassed through a separate cross-examination in respect of the motion. That cross-examination would be wastefully duplicative of elements of the examination for discovery that would ultimately occur”.¹⁰

Are there other motions scheduled in the proceeding? When assessing when to bring a motion for security for costs, defendants should also consider other motions and steps in the action that may affect the timing of the motion. A court recently rejected a motion for security for costs in part because it would have been difficult to find a date to address the motion before a scheduled summary judgment motion.¹¹

Are there other strategic reasons for moving early? Even where the defendant’s grounds for security for costs are weak, there may be strategic reasons to move early for security for costs. First, a plaintiff responding to a motion for security for costs will be required to file evidence of its assets in the jurisdiction. This information may be helpful to the defendant if it seeks to enforce a costs order later in the proceedings. Second, the plaintiff’s evidence may speak to merits of the action, and the defendant can cross-examine the plaintiff to learn more about the case before discovery. Third, besides the costs of a failed motion, there is little downside to moving early. An unsuccessful motion for security for costs does not bar a defendant from bringing a second motion later in the proceedings.¹²

Most of the time, a defendant should consider whether to bring a motion for security for costs as one of the early steps in the proceeding. Considering this step at the outset, and bringing it if appropriate, avoids the risks associated with having to explain a delay to the Court later in the litigation.

¹ Rule 56.03.

² *Kawkaban Corp. v. Second Cup Ltd.*, [2005] O.J. No. 4197, para. 27 (Div. Ct.).

³ *Blue Simcoe Developments Inc. v. 714222 Ontario Inc.*, 2015 ONSC 1258, para. 4.

⁴ *Cigar500.com Inc. v. Ashton Distributors Inc.* (2009), 99 O.R. (3d) 55, paras. 22, 24.

⁵ *Kawkaban Corp. v. Second Cup Ltd.*, [2005] O.J. No. 4197, para. 27 (Div. Ct.).

⁶ *Bloomsbury & Butterfield Ltd. v. Economical Mutual Insurance Group*, 2011 ONSC 4889, para. 56.

⁷ *Bloomsbury & Butterfield Ltd. v. Economical Mutual Insurance Group*, 2011 ONSC 4889, para. 58.

⁸ *Yuanda Canada Enterprises Ltd. v. Pier 27 Toronto Inc.*, 2017 ONSC 1892, para. 15; *855191 Ontario Limited v. Turner*, 2011 ONSC 918, para. 4.

⁹ *Livent. Inc. (Special Receiver) v. Deloitte & Touche*, 2011 ONSC 648, para. 77.

¹⁰ *Livent. Inc. (Special Receiver) v. Deloitte & Touche*, 2011 ONSC 648, para. 78.

¹¹ *TSI v. Formosa*, 2018 ONSC 4381, para. 37.

¹² *Dean's Standard v. Westmont, et al*, 2018 ONSC 1019.