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Article

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When to seek security for costs on appeal

By Marco P. Falco

Canadian appellate courts are reluctant to have an appeal dismissed without a full hearing on the merits. That being said, where an appeal has little merit, where the appellant may not have the ability to pay an adverse costs award, or where the appeal is being brought for an improper or ulterior motive, the respondent may bring a motion for "security for costs" at the outset of the appeal under Rule 61.06 of Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194(the Rules).

The effect of the order is that the appellant cannot pursue the appeal until a specified amount of money is paid as security by a fixed date, failing which the court can dismiss the proceeding without a hearing.

A recent decision of the Ontario Court of Appeal, *Richardson v. Arsenov*,2022 ONCA 137, illustrates how a security for costs order can be employed as an effective means to delay or prevent a questionable appeal.

Familial acrimony leads to security for costs order

Richardson involved a dispute between the appellant and his siblings regarding the management of their elderly father's affairs. The father was incapable. The appellant was removed as the father's power of attorney following allegations by the respondents that the appellant had taken advantage of his father before placing him in a nursing home.

The order under appeal was a Superior Court Order in which the respondents were successful in obtaining a judgment under Rule 49.09 against the appellant (the Order) – this rule allows a party to enforce a settlement where one party fails to comply with the terms of the offer to settle.

The appellant appealed the Order.

The respondents brought a motion for security for costs of the appeal, arguing that the appeal had little chance of success and the appellant lacked the ability to satisfy a potential adverse costs award.

The Court of Appeal agreed and ordered security for costs against the appellant in the amount of$18,000. If this amount was not paid within the prescribed time, the respondent could have the appeal struck without a hearing on the merits.

Principles governing security for costs on appeal

In Ontario, Rule 61.06(1) of the Rules gives the Court of Appeal the power to award security for costs:

61.06(1) In an appeal where it appears that,

(a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of appeal;

(b) an order for security for costs could be made against the appellant under rule 56.01; or

(c) for other good reason, security for costs should be ordered, a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just.

In the leading decision, *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, the Court of Appeal established that, in addition to the factors set out in Rule 61.06(1), the court must also conduct a "holistic analysis" of the entire motion for security, having regard to the circumstances and the overall interests of justice.

This approach may include considerations such as:

- whether the moving party delayed in bringing the motion for security for costs;
- the merits of potentially having the appeal dismissed without a full hearing;
- concerns about access to justice; and
- whether the appellant can show it is financially impecunious: see also *Zeitoun v. Economical Insurance Group* 91 O.R. (3d) 131 (Div. Ct.).

When security for costs will be awarded

Applying the above test, the court in *Richardson* held that each of the grounds for appeal of the Superior Court Order had "little prospect of success.

"The court rejected the premise that the appellant's hearing at the Superior Court motion was unfair. It noted that the appellant was "effectively the [architect of its] own demise" by "cycling through counsel" and by failing to respond promptly to the motion.

The court also observed that the Superior Court Order was going to be shown "significant deference" on appeal. The appellant's conduct was "vexatious" because he had failed to fulfil the terms of previous court orders issued.

As to the appellant's ability to pay an adverse costs award on appeal, the court noted that the appellant's home was currently the object of power of sale proceedings and that this was the appellant's "primary asset." There was also a dearth of evidence regarding the appellant's "financial state of affairs and any ability to satisfy costs of the appeal."

Having considered the factors under Rule 61.06(1), the court then "stepped back" to conduct the prescribed holistic analysis from *Yaiguaje v. Chevron Corporation*, supra:

…The moving parties have not delayed in bringing the motion, and the amount of the security sought is not prohibitive. While I am conscious of the responding parties' current unfortunate situation regarding the power of sale proceedings and counsel's submissions that the responding parties not be denied the opportunity to pursue their appeal, in my view they have not established impecuniosity or any other legitimate access to justice concerns…

…Effective way to 'weed out' meritless appeals

Richardson illustrates that while the Court of Appeal may be reluctant to have an appeal dismissed on the basis of a failure to pay security for costs, such an order remains an effective weapon to weed out meritless appeals.

Like most legal considerations, the decision to award security for costs is driven by the equities. The court considers the appeal's merits, the ability of the appellants to satisfy a costs award and the effect on the administration of justice.

The approach advocated by the court recognizes that all appeals must possess a basic level of merit. If this aspect of their appeal is wanting, appellants have to justify their decision to appeal by way of monetary security.

Security ensures that if the respondents are successful, their rights may be partly vindicated by a costs award.

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