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Why Seek Security for Costs on Appeal?

By Marco P. Falco

Appellate Courts in Canada have limited tools at their disposal to discourage frivolous appeals. Broadly speaking, Courts are reluctant to have an appeal dismissed without a full hearing on the merits.

That being said, where an appeal is hopeless, where the appellant may not have the ability to pay an adverse costs award, or where the appeal is being brought for an 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 is required to pay a certain amount of money as security by a fixed date, failing which the Court can dismiss the appeal 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 stall or dismiss a questionable appeal.

A Vexatious Proceeding

Richardson involved a dispute between the appellant and his siblings regarding the management of the affairs of their elderly father, who was incapable.

The Appellant was removed as the father’s power of attorney for property and personal care 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 is the rule that allows a party to enforce a settlement between the parties where one party fails to comply with the terms of the offer to settle.

The Appellant appealed the Order to the Court of Appeal.

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 with the Respondent 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.

The Test For Security for Costs

Rule 61.06(1) of the *Rules* gives the Court of Appeal the power to award security for costs in the following circumstances:

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”, 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* (2008), 91 O.R. (3d) 131 (Div. Ct.).

When Security for Costs Will be Granted

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

Specifically, 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 [architects of its] own demise” by “cycling through counsel” and by failing to respond promptly to the motion. The Court also noted that the Superior Court Order was going to be shown “significant deference” on appeal.

The Appellant’s conduct was “vexatious” because they had failed to fulfill 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 a holistic analysis to determine if an order for security for costs was appropriate in the circumstances.

In concluding that it was, the Court considered a range of factors:

...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...

A Powerful Weapon

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.

The decision to award security for costs is fundamentally driven by the equities.

The Court considers the merits of the appeal, the ability of the Appellants to satisfy a costs award, and the effect on the administration of justice if the appeal is not heard.

The "holistic approach" advocated by the Court recognizes that all appeals must possess a basic level of merit.

Without this requirement, appellants have to justify their decision to appeal by way of monetary security.

This ensures that, at the end of the day, if the respondents are successful, their rights may be vindicated by a meaningful costs award.

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