

Hull on Estates Podcast #30

Security for Costs Motions

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Justin de Vries: Welcome to Hull on Estates. You're listening to Episode #30 on Tuesday, October 17th, 2006.

Welcome to Hull on Estates, a series of podcasts for the Canadian legal community dealing with issues and insights surrounding estate planning in Canada. Hosted by the lawyers of Hull and Hull, the podcast will touch on some key considerations when planning estates and Wills. Now, here are today's hosts.

Justin de Vries: My name is Justin de Vries, and I'll be speaking with Craig Vander Zee today about security for costs motions, and we are first going to address when the court awards costs in our system, Craig.

Craig Vander Zee: Good morning, Justin.

Justin de Vries: Good morning, Craig.

Craig Vander Zee: Before we touch upon costs in general, we should delineate what we're going to talk about today and on our next podcast. And I think today, Justin, we're just going to cover security for costs motions in general, and then in our next podcast, we'll chat about security for costs motions in the context of estate litigation.

Justin de Vries: That seems to make sense, so again, the first thing we are going to talk about on this podcast is when the courts will award costs generally, and Craig, you are going to address that.

Craig Vander Zee: It's certainly good, Justin, to have a general understanding as to the cost consequences in any piece of litigation, whether it is an action or an application, before one embarks upon a security for costs motion. In considering costs that are associated with the proceeding, Justin, it is in the absolute discretion of the courts, Justin, as to the costs that will be awarded in the matter and the quantum of the costs. But it's typically understood and the Rules outline that the successful litigant will generally be awarded costs. Now the factors that go into that are outlined in Rule 57 of the Rules of Civil Procedure, and can generally be appreciated as being the complexity of the matter, the issues involved, the nature of the issues involved, the length of the proceeding, the different types of steps that were involved in the proceeding, many different factors go in to a determination as to what's appropriate for costs.

Justin de Vries: And there are two types of quantum or scale of costs that the court typically looks to, and that's partial indemnity costs and substantial indemnity costs. And that's new nomenclature, they used to be referred to as party and party costs and

substantial indemnity costs. Craig, why don't you tell us a little bit about partial indemnity costs.

Craig Vander Zee: Well, partial indemnity costs are not meant to fully indemnify the successful party in respect of their costs, their disbursements and taxes that may be owing in respect of their legal costs. It's really just as the name implies, a partial indemnity, and it will be for the court to determine what is the appropriate amount of partial indemnity costs. And it may very well be that a court determines that that's 30% of the costs, or perhaps even upwards of 60%, but generally, the 30% to 60% range is a range that parties will typically count on for an award of partial indemnity costs.

Justin de Vries: And it may seem a little unfair to the winning party that they're required to take less than the amount that they have spent on legal fees to get a winning result, but in general, the courts feel, and I think it's part of public policy, that it's the price of living in a civil society and allowing parties to litigate. If the cost consequences were too severe in all instances, parties simply wouldn't litigate. But it does bring us to the scale of costs now known as substantial indemnity costs.

Craig Vander Zee: And substantial indemnity costs are generally 1.5 times the partial indemnity costs that a court would award in a particular matter.

Justin de Vries: And the hope is, I gather Craig, that you get close to 100% recovery because there is some sort of behaviour that would have indicated to the court or an allegation made that would require the court to substantially indemnify the winning party.

Craig Vander Zee: That's right, Justin. I didn't specifically mention it before but certainly Rule 57 of the Rules of Civil Procedure specifically sets out a number of criteria and factors that go into the consideration for a cost award and the conduct of the parties, particularly the party that has been unsuccessful, will be a factor if that unsuccessful party has purposely or perhaps innocently caused unnecessary steps to have been taken by the successful litigant, it may very well be that the court deems that for a certain part of the process, partial indemnity costs were appropriate, but perhaps substantial indemnity costs are appropriate in respect of a particular step or from a step onwards in the proceeding.

Justin de Vries: And now, turning to security for costs motions in that context, security for costs motions are brought by the defendant, not the plaintiff. And it requires the plaintiff if successful to post money into court. So it's really a pool of funds that the defendant can ultimately look to if they are successful at trial and a costs award is made against the plaintiff, because as I said, the defendant was successful. It's really designed to signal to the plaintiff in the right circumstances, which we'll touch upon, that litigation can be expensive, that one has to think long and hard before bringing a frivolous or vexatious suit, and Rule 56 is the rule that deals specifically with security for costs. And there is also, we should mention, Rule 61.06 which really governs security for costs on appeal, but we are not going to address 61.06 today, except to say that it is available in the Court of Appeal where an appeal looks to be vexatious or frivolous and it's also heard

by a single judge. It's a motion, a single judge of the Court of Appeal, and it's a motion as I said, that can require that security be posted based on an appeal and the outcome of that appeal.

Craig Vander Zee: Just before you go on, Justin, to get into Rule 56. Regarding Rule 61 of the Rules of Civil Procedure, and again, this is in the context of an appeal, the criteria includes the same criteria that would be for 56, that is, that if the court thought that a security for costs motion would have been warranted under 56.01, then that's a criteria under which it could be granted. And again, if there is also good reason to believe that the appeal is frivolous and vexatious and the appellant doesn't have sufficient assets in Ontario to pay the costs of appeal, the Court of Appeal, that is, the single judge of the Court of Appeal, might award costs. And it could also be for any other good reason in the court's discretion that an Order should be made. Then moving on to Rule 56 itself and security for costs in general, Justin.

Justin de Vries: Well, like Rule 61, it's a very, it's a rule that has a great deal of discretion that is extended to the judge hearing the motion. And in the first instance, the defendant must show that the plaintiff's action or application fits into one of the categories specifically set out in Rule 56. Perhaps the most obvious one or best known one is where there is a foreign plaintiff who comes to the jurisdiction of Ontario and wants to sue a resident, be it an individual or corporation in Ontario. In that instance, the court recognizes that the plaintiff can simply skip out of the jurisdiction if it loses at trial or the hearing of an application, and won't pay any costs award against it. So in that situation is where a court would typically order that security be posted. There is also a number of different categories or different other categories that are numerated in the rule, for example, where there is good reason to believe that the action or application is frivolous and vexatious and the plaintiff in Ontario has insufficient assets to pay a costs award that is given against them, then the court may order security for costs. It's also true where there is a nominal plaintiff. Often a corporation will have one of its affiliated or subsidiary companies with no assets decide to sue a defendant in Ontario. The plaintiff is also resident in Ontario, but again, it's a nominal plaintiff with no assets to satisfy a costs award. Now once a defendant can prove that its security for costs motion or the plaintiff fits into one of those categories, the plaintiff then has the ability to show that it would be unjust in the circumstances to order the security or the posting of costs because the plaintiff is impecunious and the claim has merit. Now, there has been a great deal of case law about impecuniosity. Basically it means that in the end, a plaintiff has little or no assets, true assets, in which to pay a security for costs award or which to post security. In the end, the plaintiff is in fact broke, but the plaintiff says to the court, I have a meritorious claim and you should allow the claim to go forward. And what it requires then in those instances is for the court to consider whether in fact it is a meritorious claim, whether there is some cause of action that has some merit to it. And you can get into a fairly tricky argument as different sides battle about whether something is frivolous and vexatious in that context, or whether it does in fact have merit to it. Now we are going to look at when to bring the motion. So assuming that you have the facts on the ground to show that the plaintiff fits into the correct category under Rule 56, or what other categories apply, and that impecuniosity may or may not be an argument, but let's say it's

on the table. The next question to consider from the defendant's point of view is when to bring the motion.

Craig Vander Zee: A motion for security for costs should really be brought without undue delay once the defendant becomes aware of the grounds to bring the motion. So in other words, right from the beginning of the litigation itself, right from the time that a person has been served with the Statement of Claim or Notice of Application, they should be on guard as to whether they should be bringing a security for costs motion. It may very well be that they don't have the facts yet, or even are aware of the circumstances whether to bring one, but it should be one of those considerations from a strategy perspective that a party considers right from the beginning. If the circumstances the facts that would justify a security for costs motion being brought are known from the beginning or even early on in the litigation, then it could be fatal, not necessarily, but it could be fatal to the motion if there is undue delay in terms of bringing it.

Justin de Vries: What the court really looks at is whether there is a prejudice that would flow to the plaintiff in the sense that if they were lulled into a false sense of security, that the action or application was proceeding without the threat of posting security, only to discover late in the day that in fact the defendant is now moving for security for costs. But as Craig said, it's true that sometimes you have to wait because if there is going to be a big battle about whether or not the claim has merit, often you'll have the ammunition or the evidence gleaned from an Examination for Discovery, but throughout the defendant should always take strategic steps, the writing of letters, putting the plaintiff on notice where appropriate to say that a security for costs is definitely a possibility.

Craig Vander Zee: In other words, Justin, there are cases when, notwithstanding that one may suspect or even know that someone is impecunious or has problems financially, if it's going to come down to a consideration as to whether the action itself is frivolous and vexatious, it may very well mean that certain information regarding the actual issues in the proceeding itself has to be garnered and collected and perhaps even tested to some degree by a party before they can bring their motion for security for costs. That's always a tricky decision to make as to when to bring it, but certainly even when a party knows that the plaintiff is potentially impecunious, they have to be turning their mind towards the actual merits of it.

Justin de Vries: So three documents are required to bring a motion for security for costs: a Notice of Motion, supporting Affidavits and a draft Bill of Costs. Obviously the Affidavits have to go to the heart of the matter and demonstrate that the plaintiff, for example, has insufficient assets. You can order any number of reports on-line or through different services to get at the plaintiff's assets to see whether or not that they have some financial wherewithal. Affidavits would also deal with the frivolous and vexatious aspect of it if the claim itself of the plaintiffs or the application wasn't obvious on that front. In terms of the draft Bill of Costs, a draft Bill of Costs the rules specifically say what's required, but essentially what you are doing in a security for costs motion is you are identifying the different steps in an action or application and each step or act or action in that proceeding has a cost consequence. So if it's the filing of pleadings, if it's the

exchange of Affidavit of Documents, if it's Examination for Discovery, each category in your Bill of Costs would articulate the costs involved. In general, it's a partial indemnity cost which makes sense. It is difficult to get security for costs on a substantial indemnity scale as Craig discussed, without the requisite behaviour and that behaviour obviously would not be apparent at the beginning of a proceeding. So the court then will, if security for costs is granted, really go or order a pay-as-you-go type of order which is each step, a certain amount will have to be posted in court. It's very rare for the court to say if your Bill of Costs came out to \$100,000 for \$100,000 to be posted. Rather, the court would say well, once pleadings are finished, \$10,000 has to be posted for the exchange of Affidavit of Documents. Once that step is done and Examinations for Discovery are coming down the pipe, then the next amount to be posted is \$30,000, and that's really cut as you, how it works. And what's interesting, Craig, is that the court will not award if you are successful on your motion as a defendant, a nominal amount. They will award the true amount or amount that is relatively close to a partial indemnity scale for that step in the proceeding.

Craig Vander Zee: Well certainly as the party bringing the motion, you'd like to have your efforts rewarded. One thing to remember as well with the bringing of motions for security for costs and in dealing with the materials themselves, is that both sides, that is both parties will have the right to cross-examine each other. And as such, you have to be mindful of that in bringing your motion as to what you are putting in your Affidavit, whether you are bringing the motion or whether you are responding to the motion. Certainly if you are responding to the motion on the basis that your client is impecunious, you are going to put to the extent possible information regarding the circumstances of the issues and the merits. And then you have to be mindful that your client may be examined on that. It is likewise with the plaintiff in putting in an Affidavit, it is an opportunity for a cross-examination and the client always has to be prepared and put on guard before the motion is brought that that is a potential step that could be taken.

Justin de Vries: So again, in the end, if the plaintiff is required to pay a substantial amount of money into court, motions for security for costs can be an effective way for the defendant to force the plaintiff to really consider whether the action is worth pursuing. Most orders for security for costs will also indicate that if the plaintiff has not paid the money into court by a set date, then the action can be dismissed by way of a motion. So those are things that the court will consider in crafting their motion for security for costs and in our next episode, we're going to look at security for costs in the context of estate litigation and the cases that the courts have considered there.

Craig Vander Zee: Thank you again, Justin.

Justin de Vries: Thanks, Craig.

This has been Hull on Estates with the lawyers of Hull and Hull. The podcast you have been listening to has been provided as an information service. It is a summary of current legal issues in estates and estate planning. It is not legal advice and you are reminded to always talk with a legal professional regarding your specific circumstances.

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