

SECURITY FOR COSTS AND ADVERSE  
COSTS INSURANCE:

# The Art of Getting Paid

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Who has the ability to pay?



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**MUNICIPALITY**

# Agenda

- **How Costs are Awarded in Ontario**
- **Security for Costs as a Tool for Defendants**
  - Non Residents
  - Corporations
  - Impecunious Plaintiffs
  - Frivolous and Vexatious Claims
- **Adverse Costs Insurance**



PART I:

# A Primer on Costs



# Factors Considered in Assessing Costs

## Rule 57.01

- The amount claimed and the amount recovered in the proceeding
- The apportionment of liability
- The complexity of the proceeding
- The importance of the issues
- The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding
- Whether any step in the proceeding was,
  - (i) improper, vexatious or unnecessary, or
  - (ii) taken through negligence, mistake or excessive caution
- A party's denial or refusal to admit anything that should have been admitted
- Any other matter relevant to the question of costs

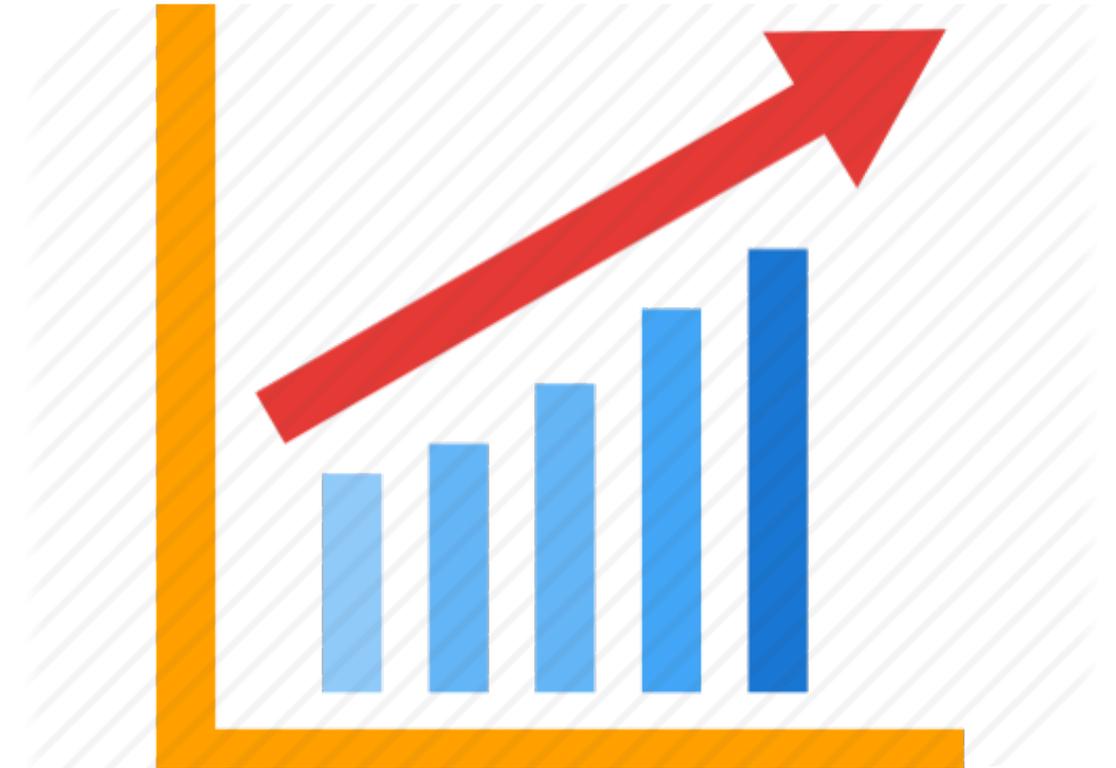




**15%**

# Three Levels of Indemnity

- Partial Indemnity (50%-75%)
- Substantial Indemnity (75%-90%)
- Full Indemnity (100%)



PART II:

# Security for Costs



# The Rule

Under Rule 56.01, a defendant can bring a motion for security for costs in the following circumstances:

- the plaintiff or applicant is ordinarily resident outside Ontario;
- the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
- 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;
- 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;
- 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
- a statute entitles the defendant or respondent to security for costs.

## The Legal Test for an Appeal

- 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 the appeal;
- an order for security for costs could be made against the appellant under rule 56.01; or
- 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.



# What do you Need to Bring a Motion?

1. Your Notice of Motion
2. A supporting Affidavit
3. A Bill of Costs





# When will the Courts Award Security for Costs?

# The Plaintiff's Burden

The plaintiff will successfully resist the motion if she proves:

- She has sufficient assets in Ontario to satisfy a costs award; or
- She is impecunious and that an injustice would occur if her case isn't allowed to proceed.

## Key Point: Justice

“There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of a plaintiff. If the consequence of an order for costs would be to destroy such a claim, no order should be made. Injustice would be even more manifest if the impoverishment of plaintiff were caused by the very acts which plaintiff complains of in the action.”

On the other hand...

“The merits, however, are merely a consideration in making 'such order for security for costs as is just' and are by no means determinative.”

*John Wink Ltd. V Sico Inc.* (1987), 57 O.R. (2d) 705, 15 C.P.C. (2d) 187 (Ont. H.C.)

# Non Residents



# Impecunious Plaintiffs



# Impecunious Plaintiffs

## Rule 56.01(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”

If a defendant presents evidence that the Plaintiff may not be able to pay an order for costs, the onus shifts to the Plaintiff to show why they should be excused from providing security:

- “Once it was shown that the plaintiff was within the provisions of this rule, the onus was on it “to show some good reason why the plaintiff might be excused from an order for security for costs on the grounds of impecuniosity.” *Shadows v Travelers Canada Corp*, 1990 CarswellOnt 346, Ontario Supreme Court

## “Where the justness of the case demands it”

The Ontario Court of Appeal has stated that:

“The Rules explicitly provide that an order for security for costs should only be made where the justness of the case demands it. Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of rr. 56 or 61 have been met.” *Yaiguaje v Chevron Corporation*, 2017 ONCA 827

Factors to be considered in determining the justness of security for costs orders:

- The merits of the claim
- Delay in bringing the motion
- The impact of actionable conduct by the defendants on the available assets of the plaintiff
- Access to justice concerns
- Public importance of the litigation

# Frivolous and Vexatious Claims



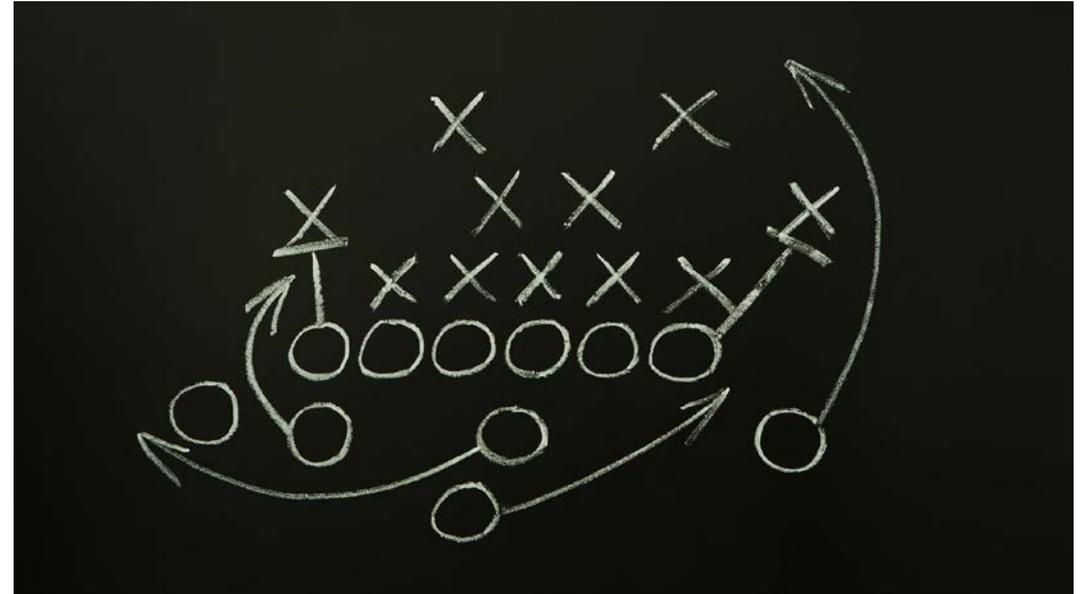
# How can Security for Costs be Used as a Litigation Strategy?

## Powerful Deterrent

- Plaintiff must pay money up front
- Plaintiff may reconsider merit of claim

## A Tactic for Delay

- Actions are stayed under rule 56.05 until the plaintiff satisfies the security for costs order
- If the plaintiff fails to pay, the action can be dismissed outright



PART III:

# Legal Expense Insurance



# Adverse Cost Insurance as Security for Costs

## *Alary v Brown*

- Insurance Policy was cancelable by a number of different events
- Policy was held by the Plaintiff
- Any payout under the policy could be subject to other creditors
- This policy was only a factor to consider in deciding whether to award security for costs

## *Frantz v NB Thrilling Films*

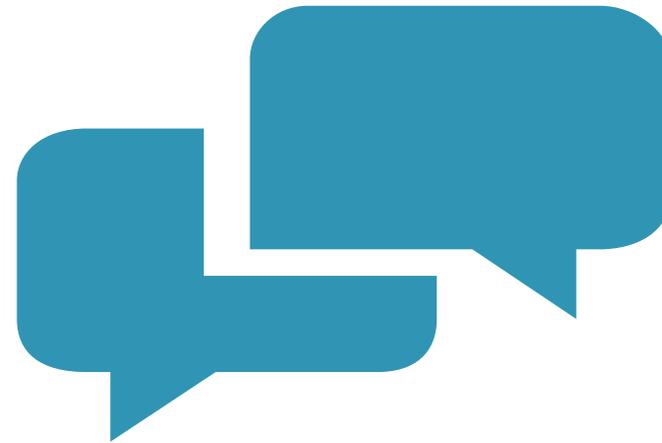
- Costs of defendant covered up until date of cancellation
- Policy held by the Plaintiff's lawyer
- Any payout would not be subject to other creditors

## When does the Existence of a Policy need to be Disclosed?



## Practical Considerations

1. Security for costs is a useful tool for defendant insurers to minimize risk during litigation
2. A preliminary assessment of the Plaintiff's claim and finances should be conducted before bringing a motion for security for costs to determine whether the context is appropriate
3. Adverse cost insurance is a relatively novel product in Canada, the applicable case law is still evolving
4. The terms of an adverse costs insurance policy should be examined to determine its implications in a motion for security for costs



Questions?

