

# Security for Costs on Appeal: A “How To” Guide

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A motion for security for costs can be a powerful tool in a litigator’s arsenal to ensure a client is not left with an unenforceable costs order after defending a costly court battle. Whether the plaintiff is resident outside of the jurisdiction or lack sufficient assets in Ontario to pay a costs order, an order for security for costs offers protection to a defendant and may dissuade a plaintiff from pursuing a vexatious or frivolous claim. Moving for an order for security for costs at first instance can be a common step in litigation. However, an order for security for costs of an appeal is not a “routine order”, according to the recent Court of Appeal decision in [\*Health Genetic Center Corp. \(Health Genetic Center\) v. New Scientist Magazine\*](#), 2019 ONCA 576.

Justice David Brown’s decision provides a comprehensive review of the principles governing security for costs of an appeal and the test that a moving party must meet.

## ***Background***

The Appellants Health Genetic Center Corp. and Yuri Melekhovets sued the Respondents Peter Aldhous and Reed Business Information Ltd., alleging the Respondents had published a defamatory article which questioned the reliability of a blood paternity test marketed by Health Genetic Center Corp. At first instance, the Appellants were required to pay \$300,000 as security for costs into court. The action was dismissed, and the Respondents were awarded costs of more than \$1.4 million.

When the Appellants appealed against the trial decision, the Respondents moved for orders requiring Health to: (i) pay \$85,000 as security for costs of the appeal; (ii) pay almost \$1.18 million as security for the costs awarded at trial; and (iii) lift the automatic stay of the cost award pursuant to Rule 63.01(5).

## ***Governing Principles for an Order for Security for Costs of an Appeal***

The court may grant security for costs on appeal pursuant to Rule 61.06, which provides that:

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 the 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.

(1.1) If an order is made under subrule (1), rules 56.04, 56.05, 56.07 and 56.08 apply, with necessary modifications.

(2) If an appellant fails to comply with an order under subrule (1), a judge of the appellate court on motion may dismiss the appeal.

Citing from *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, which summarized the principles governing a motion for security for costs of an appeal, Brown J.A. emphasized that there is no entitlement as of right to an order for security for costs. If the moving party meets the requirements of the rule, the motion judge must still consider that the “overarching principle to be applied to all the circumstances is the justness of the order sought”. Factors relevant to determining the justness of the order may include: the merits of the claim, delay in bringing the motion, the impact of actionable conduct by the defendants on the available assets of the plaintiffs, access to justice concerns, and the public importance of the litigation. Each case must be considered on its own facts.

On an application under Rule 61.06(1)(a), the moving party must show that:

1. there is good reason to believe that the appeal is frivolous and vexatious; **and**
2. that the appellant has insufficient assets in Ontario to pay the costs of the appeal.

At the first step, the court does not have to conclude that the appeal is frivolous and vexatious. Rather, the moving party must show that (i) there is good reason to believe the appeal is devoid of merit, and (ii) there is something that supports the conclusion that the appeal is intended to annoy or embarrass the respondent, or has been conducted in a vexatious way.

At the second step, the court should consider what the reasonable estimate of the respondent's costs of the appeal would be, and then whether there is good reason to believe that the appellant has insufficient assets in Ontario to pay the estimated costs of appeal.

### ***The Respondents did not Meet the Test for an Order for Security for Costs of the Appeal***

In this case, Brown J.A. held that the Respondents did not satisfy the first step of the test. The Appellants were exercising a statutory right of appeal, their evidence that the appeal sought to vindicate their reputation did not constitute an improper purpose, and they pursued the appeal in an appropriate manner. Further, the Respondents did not demonstrate that the appeal was devoid of merit.

While Brown J.A.'s finding on the first issue was dispositive, he went on to consider whether there was good reason to believe that the Appellants had insufficient assets in Ontario to pay the costs of an appeal. With respect to determining a reasonable estimate of the Respondents' costs of the appeal, Brown J.A. rejected the Respondents' proposed estimate of \$86,100 in costs on a partial indemnity basis, finding that \$30,000 was a reasonable estimate of costs of the appeal. He also concluded that there was no good reason to believe that the Appellants had insufficient assets in Ontario to pay the estimated costs of the appeal based on, among other things, the individual Appellant's net equity in real property in Ontario and the corporate Appellant's financial statements showing rising revenue in recent years.

Given Brown J.A.'s conclusion that the Respondents did not establish the elements in Rule 61.06(1)(a), he did not need to proceed to consider the justness of the order.

The Respondents also based their claim for security for costs on Rules 61.06(1)(b) and 61.06(1)(c), which provide that the court can also order security for costs of an appeal where:

1. it appears that an order for security for costs could be made under Rule 56.01 (Rule 61.06(1)(b)); and
2. security for costs can be ordered for other good reason (Rule 61.06(1)(c)).

Brown J.A. found that the Respondents had also failed to establish the elements required to order security for costs under those

Rules. The Respondents' motion was dismissed.

Brown J.A.'s decision is a practical step-by-step guide for any party involved in a motion for security for costs of an appeal. It highlights the need to establish not only the elements in the applicable Rules, but also the justness of the order sought in the circumstances before the court will make an order for security for costs of an appeal.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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