

APPEALS

RULE 61

APPEALS TO THE APPEAL DIVISION

APPLICATION OF THE RULE

61.01 Rules 61.02 to 61.15 apply to all appeals to the Appeal Division and, with necessary modifications, to proceedings in the Appeal Division by way of,

- (a) special case under Rule 22.03, subject to any directions given under subrule 22.03(2); and
- (b) references under sub-section 13(2) and section 18 of the *Supreme Court Act*.

MOTION FOR LEAVE TO APPEAL

Notice of Motion for Leave

61.02 (1) Where an appeal to the Appeal Division requires the leave of that court, the notice of motion for leave shall,

- (a) state that the motion will be heard on a date to be fixed by the registrar;
- (b) be served within fifteen days after the date of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and
- (c) be filed with proof of service in the office of the registrar, within five days after service.

Motion Record, Factum and Transcripts

(2) On a motion for leave to appeal, the moving party shall serve,

- (a) a motion record containing, in consecutively numbered pages arranged in the following order,
 - (i) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter,
 - (ii) a copy of the notice of motion,
 - (iii) a copy of the order or decision from which leave to appeal is sought, assigned and entered,
 - (iv) a copy of the reasons of the court or tribunal from which leave to appeal is sought with a further typed or printed copy if the reasons are handwritten,
 - (v) a copy of all affidavits and other material used before the court or tribunal from which leave to appeal is sought,
 - (vi) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves, and
 - (vii) a copy of any other material in the court file that is

necessary for the hearing of the motion;

- (b) a factum consisting of a concise statement, without argument, of the facts and law relied on by the moving party; and
- (c) relevant transcripts of evidence, if they are not included in the motion record,

and shall file three copies of the motion record, factum and transcripts, if any, with proof of service, within thirty days after the filing of the notice of motion for leave to appeal.

- (3) On a motion for leave to appeal, the responding party may, where he or she is of the opinion that the moving party's motion record is incomplete, serve a motion record containing, in consecutively numbered pages arranged in the following order,
 - (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and
 - (b) a copy of any material to be used by the responding party on the motion and not included in the motion record,

and may serve a factum consisting of a concise statement, without argument, of the facts and law relied on by the responding party, and shall file three copies of the responding party's motion record and factum, if any, with proof of service, within fifteen days after service of the moving party's motion record, factum and transcripts, if any.

Notice and Factum to State Questions on Appeal

- (4) The moving party's notice of motion and factum shall, where practicable, set out the specific questions that it is proposed the court should answer if leave to appeal is granted.

Date for Hearing

- (5) The registrar shall fix a date for the hearing of the motion which shall not, except with the responding party's consent, be earlier than fifteen days after the filing of the moving party's motion record, factum and transcripts, if any.

Time for Delivering Notice of Appeal

- (6) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave.

COMMENCEMENT OF APPEALS

Time for Appeal and Service of Notice

- 61.03** (1) An appeal to the Appeal Division shall be commenced by serving a notice of appeal (Form 61A) together with the certificate required by subrule 61.04(1) on every party whose interest may be affected by the appeal, other than,
- (a) a defendant who was noted in default; or
 - (b) a respondent who has not delivered a notice of appearance,

unless he or she was heard at the hearing with leave,
and on any person entitled by statute to be heard on the appeal, within
thirty days after the date of the filing of the order appealed from,
unless a statute or these rules provide otherwise.

Title of Proceeding

- (2) The title of the proceeding in an appeal shall be in accordance with Form 61B.

Notice of Appeal

- (3) The notice of appeal (Form 61A) shall state
- (a) the relief sought;
 - (b) the grounds of appeal; and
 - (c) the basis for the appellate court's jurisdiction, including reference to:
 - (i) any provision of a statute or regulation establishing jurisdiction;
 - (ii) whether the order appealed from is final or interlocutory;
 - (iii) whether leave to appeal is necessary and if so whether it has been granted; and
 - (iv) **any other facts relevant to establishing jurisdiction.**
- (4) The notice of appeal, with proof of service, shall be filed in the office of the registrar within ten days after service.

CERTIFICATE OR AGREEMENT RESPECTING EVIDENCE

Appellant's Certificate Respecting Evidence

- 61.04** (1) In order to minimize the number of documents and the length of the transcript required for an appeal, the appellant shall serve with the notice of appeal an appellant's certificate respecting evidence (Form 61C) setting out those portions of the evidence that, in his or her opinion, are required for the appeal.

Respondent's Certificate Respecting Evidence

- (2) Within fifteen days after service of the appellant's certificate, the respondent shall serve on the appellant a respondent's certificate respecting evidence (Form 61D), confirming the appellant's certificate or setting out any additions to or deletions from it.
- (3) A respondent who fails to serve a respondent's certificate within the prescribed time shall be deemed to have confirmed the appellant's certificate.

Agreement Respecting Evidence

- (4) Instead of complying with subrules (1) to (3), the parties may, within thirty days after service of the notice of appeal, make an agreement respecting the documents to be included in the appeal books and the transcript required for the appeal.

Requesting Transcripts

- (5) The appellant shall within thirty days after filing the notice of appeal file proof that the appellant has,
 - (a) requested a transcript of all oral evidence that the parties have not agreed to omit, subject to any direction under subrule 61.07(4) (relief from compliance);
 - (b) provided the transcriber with a list of the names and addresses of all parties to the appeal; and
 - (c) informed the transcriber of the responsibilities of the transcriber under subrule 61.04(7).
- (6) A party who has previously requested a transcript of oral evidence shall forthwith modify his or her order in writing to comply with the certificates or agreement.
- (7) When the evidence has been transcribed, the transcriber shall forthwith give written notice to all parties and to the registrar.

Costs Sanctions for Unnecessary Evidence

- (8) The court may impose costs sanctions where evidence is transcribed or exhibits are reproduced unnecessarily.

CROSS-APPEALS

- 61.05** (1) A respondent who,
- (a) seeks to set aside or vary the order appealed from; or
 - (b) will seek, if the appeal is allowed in whole or in part, other relief or a different disposition than the order appealed from,
 - (c) will contend that the order appealed from should be affirmed on grounds other than those relied upon in the court or tribunal appealed from,
- shall, within fifteen days after service of the notice of appeal, serve a notice of cross-appeal (Form 61E) on all parties whose interests may be affected by the cross-appeal and on any person entitled by statute to be heard on the appeal, stating the relief sought and the grounds of the cross-appeal,
- (2) The notice of cross-appeal, with proof of service, shall be filed in the office of the registrar within ten days after service.
 - (3) Where a respondent has not delivered a notice of cross-appeal, no cross-appeal may be heard except with leave of the court hearing the appeal.

AMENDMENT OF NOTICE OF APPEAL OR CROSS-APPEAL

Supplementary Notice to be Served and Filed

- 61.06** (1) The notice of appeal or cross-appeal may be amended without leave, before the appeal is perfected, by serving on each of the parties on whom the notice was served a supplementary notice of appeal or cross-appeal (Form 61 F) and filing it with proof of service.

Argument Limited to Grounds Stated

- (2) No grounds other than those stated in the notice of appeal or cross-appeal or supplementary notice may be relied on at the hearing, except with leave of the court hearing the appeal.

PERFECTING APPEALS

Time for Perfecting

- 61.07** (1) The appellant shall perfect the appeal by complying with subrules (2) and (3),
- (a) where no transcript of evidence is required for the appeal, within sixty days after filing the notice of appeal; or
 - (b) where a transcript of evidence is required for the appeal, within sixty days after receiving notice that the evidence has been transcribed.

Record and Exhibits

- (2) The appellant shall cause to be forwarded to the registrar the record and the original exhibits from the court or tribunal from which the appeal is taken.

Material to be Served and Filed

- (3) The appellant shall,
 - (a) serve on every other party to the appeal and any person entitled by statute or an order under Rule 13.03 (intervention in appeal) to be heard on the appeal,
 - (i) the appeal book referred to in Rule 61.08,
 - (ii) the transcript of evidence, and
 - (iii) the appellant's factum referred to in Rule 61.09;
 - (b) file with the registrar, with proof of service four copies of the documents served under clause (a); and
 - (c) file with the registrar a certificate of perfection stating that the record, exhibits, appeal book, transcript and appellant's factum have been filed, and setting out the name, address and telephone number of the solicitor for,
 - (i) every party to the appeal, and
 - (ii) any person entitled by statute or an order under Rule 13.03 (intervention in appeal) to be heard on the appeal,or, where a party or person acts in person, his or her name, address for service and telephone number.

Relief from Compliance

- (4) Where compliance with the rules governing appeal books or transcripts of evidence would cause undue expense or delay, a judge of the Appeal Division may give special directions.

Notice of Listing for Hearing

- (5) When an appeal is perfected, the registrar shall place it on the list of cases to be heard at the appropriate place of hearing and shall mail a notice of listing for hearing (Form 61G) to every person listed in the certificate of perfection.

Early Hearing of Appeals

- (6) On motion by any party to an appeal, the Appeal Division or a judge thereof may, in special circumstances, order an early hearing of an appeal and may give any necessary directions.

APPEAL BOOK

- 61.08** (1) The appeal book shall contain, in consecutively numbered pages arranged in the following order, a copy of,
- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;
 - (b) the notice of appeal and any notice of cross-appeal or supplementary notice of appeal or cross-appeal;
 - (c) the order or decision appealed from, assigned and entered;
 - (d) the reasons of the court or tribunal appealed from with a further typed or printed copy if the reasons are handwritten;
 - (e) the pleadings or notice of application or any other document that initiated the proceeding or defines the issues in it;
 - (f) any affidavit evidence, including exhibits, that the parties have not agreed to omit;
 - (g) all documentary exhibits filed at a hearing or marked on an examination that the parties have not agreed to omit, arranged in order by date and not by exhibit number or, where there are documents having common characteristics, arranged in separate groups in order by date;
 - (h) the certificates or agreement respecting evidence referred to in Rule 61.04;
 - (i) any order made in respect of the conduct of the appeal;
 - (j) any other document relevant to the hearing of the appeal; and
 - (k) a certificate (Form 61H) signed by the appellant, the appellant's solicitor, or on the solicitor's behalf by someone he or she has specifically authorized, stating that the contents of the appeal book are complete and legible.
- (2) The registrar may refuse to accept an appeal book if it does not comply with these rules or is not legible.

APPELLANT'S FACTUM

- 61.09** The appellant's factum shall be signed by the appellant, the appellant's counsel, or on counsel's behalf by someone he or she has specifically authorized, and shall consist of,

- (a) Part I, containing a statement identifying the appellant and the court or tribunal appealed from and stating the result in that court or tribunal;
- (b) Part II, containing a concise summary of the facts relevant to the issues on the appeal, with such reference to the evidence by page and line as is necessary;
- (c) Part III, containing a statement of each issue raised, immediately followed by a concise statement of the law and authorities relating to that issue;
- (d) Part IV, containing a statement of the order that the Appeal Division will be asked to make, including any order for costs;
- (e) Schedule A, containing a list of the authorities referred to; and
- (f) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws,

in paragraphs numbered consecutively throughout the factum.

RESPONDENT'S FACTUM

Filing and Service

- 61.10** (1) Every respondent shall prepare a respondent's factum and shall file with the registrar four copies with proof of service on all other parties to the appeal.

Time for Delivery

- (2) A respondent's factum shall be delivered within thirty days after service of the appeal book, transcript of evidence and appellant's factum.

Contents

- (3) The respondent's factum shall be signed by the respondent, the respondent's counsel, or on counsel's behalf by someone he or she has specifically authorized, and shall consist of,
- (a) Part I, containing a statement of the facts in the appellant's summary of relevant facts that the respondent accepts as correct and those facts with which the respondent disagrees and a concise summary of any additional facts relied on, with such reference to the evidence by page and line as is necessary;
 - (b) Part II, containing the position of the respondent with respect to each issue raised by the appellant, immediately followed by a concise statement of the law and the authorities relating to that issue;
 - (c) Part III, containing a statement of any additional issues raised by the respondent, the statement of each issue to be immediately followed by a concise statement of the law and the authorities relating to that issue;
 - (d) Part IV, containing a statement of the order that the Appeal Division will be asked to make, including any order for costs;

- (e) Schedule A, containing a list of the authorities referred to; and
- (f) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws that are not included in Schedule B to the appellant's factum,

in paragraphs numbered consecutively throughout the factum.

Cross-Appeal

- (4) Where a respondent has served a notice of cross-appeal under Rule 61.05,
 - (a) the respondent shall prepare a factum as an appellant by cross-appeal and deliver it with or incorporate it in the respondent's factum; and
 - (b) the appellant shall deliver a factum as a respondent to the cross-appeal within ten days after service of the respondent's factum.

ABANDONED APPEALS

Delivery of Notice of Abandonment

- 61.11** (1) A party may abandon his or her or its appeal or cross-appeal by delivering a notice of abandonment (Form 61K).

Deemed Abandonment

- (2) A party who
 - (a) serves a notice of appeal or cross-appeal and does not file it within ten days after service; or
 - (b) being an appellant, has not filed proof that a transcript of the evidence that the parties have not agreed to omit was requested within the time prescribed by Rule 61.04(5); or
 - (c) being an appellant, has not perfected the appeal within the time prescribed by Rule 61.07(1) or by an order of the Appeal Division or a judge thereof;or
 - (d) being a respondent who has served a notice of cross-appeal, has not delivered a factum in the cross-appeal within thirty days after service of the appeal book, transcript of the evidence and appellant's factum

shall be deemed to have abandoned the appeal or cross-appeal and a notice of abandonment or deemed abandonment shall be sent to the appellant and respondent by the registrar.

Effect of Abandonment

- (3) Where an appeal or cross-appeal is abandoned or is deemed to have

been abandoned, the appeal or cross-appeal is at an end, and the respondent or appellant is entitled to costs of the appeal or cross-appeal unless a judge of the Appeal Division orders otherwise.

CROSS-APPEAL WHERE APPEAL ABANDONED OR DEEMED ABANDONED

- 61.12** (1) Where an appeal has been abandoned or deemed abandoned, the registrar shall serve notice of such abandonment or deemed abandonment on a respondent who has cross-appealed.
- (2) A respondent who has been served with a notice under subrule (1) may,
- (a) within fifteen days thereafter, deliver a notice of election to proceed (Form 61L); and
 - (b) make a motion to a judge of the Appeal Division for directions in respect of the cross-appeal.
- (3) Where the respondent does not deliver a notice of election to proceed within fifteen days, the cross-appeal shall be deemed to be abandoned without costs unless a judge of the Appeal Division orders otherwise.

MOTIONS IN APPEAL DIVISION

Rule 37 Applies Generally

- 61.13** (1) Rule 37, except Rules 37.02 to 37.04 (jurisdiction to hear motions, place of hearing, to whom to be made), and rule 37.17 (motion before commencement of proceeding), applies to motions in the Appeal Division, with necessary modifications.

Motion to Receive Evidence

- (2) A motion to have the Appeal Division receive further evidence shall be made to the panel hearing the appeal.

Motion to be Heard by More than One Judge

- (3) Where a motion in the Appeal Division is to be heard by more than one judge, the notice of motion shall state that the motion will be heard on a date to be fixed by the registrar.

Motion Record and Factum

- (4) On a motion referred to in subrule (3),
- (a) the moving party,
 - (i) shall serve a motion record that contains the documents referred to in subrule 37.10(2) and a factum consisting of a concise argument stating the facts and law relied on by the moving party, and
 - (ii) shall file three copies of the moving party's motion record and factum, with proof of service, within 30 days after filing the notice of motion;
 - (b) the responding party,
 - (i) may, if he or she is of the opinion that the moving party's motion record is incomplete, serve a motion record that contains the documents referred to in subrule 37.10(3),
 - (ii) shall serve a factum consisting of a concise argument stating the facts and law relied on by the responding party, and
 - (iii) shall file three copies of the responding party's motion record and factum, with proof of service, within 25 days after service of the moving party's motion record and factum; and
 - (c) a party who intends to refer to a transcript of evidence at the hearing shall ensure that it is included in the motion record.

Review of Single Judge's Order

- (5) A person who moves to set aside or vary the order of a judge of the Appeal Division under subsection 16(2) of the *Supreme Court Act* shall do so by notice of motion that is served within ten days after the order is made and states that the application will be heard on a date to be fixed by the registrar.

Motions for Leave to Appeal to the Supreme Court of Canada

- (6) A motion to the Appeal Division for leave to appeal to the Supreme Court of Canada from an order or decision of the Appeal Division may be made by notice of motion.

Registrar to Dismiss for Delay

- (7) If the moving party has not served and filed the motion record and other documents in accordance with subrule (4),
- (a) the responding party may make a motion to the Registrar, on 10 days notice to the moving party, to have the motion dismissed for delay;
 - (b) the Registrar may serve notice on the moving party that the motion will be dismissed for delay unless the motion record and other documents are served and filed within 10 days after service of the notice.
- (8) The Registrar shall make an order in Form 61J dismissing the motion for delay, with costs, if the moving party,
- (a) in the case of a motion under clause (7)(a), does not serve and file the motion record and other documents before the hearing of that motion, or within such longer period as a judge of the appellate court allows;
 - (b) in the case of a notice under clause (7)(b), does not serve and file the motion record and other documents within 10 days after the notice is served, or within such longer period as a judge of the appellate court allows.

Security for Costs

- 61.14** (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 Prince Edward Island 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 Appeal Division, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just.
- (2) If an order is made under subrule (1), Rules 56.04, 56.05, 56.07 and 56.08 apply, with necessary modifications.
- (3) If an appellant fails to comply with an order under subrule (1), a judge of the Appeal Division on motion may dismiss the appeal.

Application of Other Rules

61.15 The other provisions of these rules, when, and to the extent not inconsistent with this rule, apply, with any necessary modifications, to any proceeding on appeals or motions for leave to appeal in the Appeal Division .

Ayangma v. Govt.PEI and Ano. 2006 PESCAD 23; (2006), 260 Nfld. & P.E.I.R. 234

The respondents made a motion pursuant to Rule 61.14 for an order for security for costs against the appellant. The respondents were entitled to an order for security for costs pursuant to Rule 61.14(1)(b) only if they were entitled to such an order under Rule 56.01. Rule 61.14(1)(b) is confined to making an order for security for costs against a plaintiff/appellant. As the appellant was the plaintiff, and as the requirements of Rule 56.01 were satisfied, an order requiring the appellant to post security for costs was issued.

Bentham v. Bentham (1999), 170 Nfld. & P.E.I. R. 273 (P.E.I.S.C.-A.D.)

Application for an extension of time to file a Notice of Appeal. The decision of Mitchell J.A. in *Bryant v. Fenton* (1998) 166 Nfld. & P.E.I. R. 109 (P.E.I.S.C.-A.D.) was applied. Despite the fact the time for filing an appeal had elapsed twelve months prior to the application, an extension was granted on certain conditions.

Bryant v. Fenton (1998) 166 Nfld. & P.E.I. R. 109 (P.E.I.S.C.-A.D.)

The appellant sought an order, pursuant to Rule 3.02, to extend the time prescribed by Rule 61.07(1) for perfecting an appeal. Although a motion had been made to the Prothonotary pursuant to Rule 61.11(1) to dismiss the appeal, the Court extended the time for perfecting the appeal because it is desirable to have appeals decided on their merits and because the respondent would not suffer any prejudice by the granting of the extension. The appellant was, however, ordered to pay the costs of the respondent in making the motion for dismissal.

Canada (Attorney General) v. Clory v. Georgetown Shipyards Inc. (1997), 149 Nfld. & P.E.I.R. 183 (P.E.I.S.C.-A.D.)

Defendants appealed finding of liability and damages. Although no formal order was taken out, plaintiff argued time for appeal had expired. Defendants sought interim relief in the form of an declaration that the time for filing the appeal had not expired or alternatively, an extension of time for filing an appeal.

Court dismissed application for extension as not being required because time did not begin to run until the order appealed from was filed with the Registrar. It is the filing date of the formal order taken out under Rule 59 and not the pronouncement or effective date, that triggers the appeal period.

Pitre v. Turner et al. (1997), 149 Nfld. & P.E.I.R. 359 (P.E.I.S.C.-A.D.)

A respondent on cross-appeal applied for an order for security for costs pursuant to Rule 61.15. Appellant argued the Rule did not apply to a cross-appeal. The Appeal Division held that Rule 61.16 provided that all of the provisions of Rule 61 applied, with necessary modification, to any proceeding in an appeal, including a cross-appeal. The motion for security must be filed within the 15 days of the filing of the Notice of Appeal. As that was not done here and as the appellant by cross-appeal had not shown sufficient reason for the delay, the motion was dismissed.

Paton v. Shaw (1996), 140 Nfld. & P.E.I.R. 265 (P.E.I.S.C.-A.D.)

The appellant made application to be relieved of the obligation of preparing and paying for

the transcription of the evidence at trial on the ground he was impecunious. The application was denied because the appellant had not discharged the onus of establishing his impecuniosity nor did he establish that he had an arguable case on appeal.

Benson v. Labourers International Union of North America et al. (1996), 142 Nfld. & P.E.I.R. 81 (P.E.I.S.C.-A.D.)

Rule 61.05 provides for two categories of cross-appeal: First, 61.05(a) is independent from the issues or the outcome of the main appeal; second, 61.05(b) and (c) provides for the situation where the respondent contests the main appeal filed by the appellant but wishes to obtain certain relief in the event the appellant is successful on the main appeal. Here, the cross-appeal came within the second category and as the respondent was successful in defending the main appeal, the court found it unnecessary to deal with the merits of the cross-appeal.

Dyne Holdings Ltd. et al. v. Royal Insurance Co. of Canada et al. (1996), 138 Nfld. & P.E.I.R. 318 (P.E.I.S.C.-A.D.)

Where the respondent is seeking to have the court affirm the judgment under appeal on grounds other than those relied upon in the court below, there is a requirement to file a cross-appeal in accordance with Rule 61.05(1)(c) and 61.05(3).

Vitex Foods Ltd. v. Haldemann (1993), 110 Nfld. & P.E.I.R. 87 (P.E.I.S.C.-A.D.)

An appeal was abandoned because the issues raised were, as the result of circumstances, moot. The respondent will not be entitled to costs where it was the respondent's actions which rendered the issues moot. In the exercise of its discretion on the matter of costs, it is proper for the court to consider the circumstances that resulted in the appeal being abandoned.

Central Investments and Development Corp. v. Canada Mortgage & Housing Corp. (1990), 81 Nfld. & P.E.I.R. 180 (P.E.I.S.C.-A.D.).

An application under Rule 62.18 of the Rules of Court relating to appeals and in effect at that time. It was worded the same as Rule 62.30 in the 1977 Rules of Court Notwithstanding the appellants had established they had an arguable case for appeal, if the appellate court is satisfied the appellants would find it difficult, if not impossible, to pay costs should the appeal fail, security will be ordered.

Chriskim Holdings Ltd. v. National Trust Co. (1990), 83 Nfld. & P.E.I.R. 181 (P.E.I.S.C.-A.D.)

An application under Rule 62.18 of Rules of Court relating to appeals and in effect at that time. The Court ordered security for costs where an appellant had substantial financial problems and thus would be unlikely to pay any costs that might be awarded against him, should the appeal be unsuccessful. This demonstrates special circumstances even though the appellant may have an arguable case on appeal.

Holland v. P.E.I. School Bd. No. 4 (1987), 64 Nfld. & P.E.I.R. 184 (P.E.I.S.C.-A.D.)

A respondent who was successful at trial is entitled to have security for costs on appeal where the poverty of the appellant is established, unless it is reasonably apparent the judgment appealed from is wrong in point of law. The Rule under consideration here was Rule 62.30 of the 1977 Rules of Court.

Pre-Bilt Structures Ltd. v. Thompson (1985), 54 Nfld. & P.E.I.R. 253 (P.E.I.S.C.-A.D.)

To succeed on an application for security for costs pending an appeal, the applicant must satisfy the Court he has established a *prima facie* case of the appellant's probable inability to

meet the costs of an appeal, if unsuccessful, or that the appeal is or may be an abuse of process, or that the appeal is vexatious or frivolous, or that there exist other special circumstances which might militate against the appellant. If the applicant meets the burden of establishing a *prima facie* case, the burden shifts to the appellant to satisfy the court he has a reasonable chance of success or, alternatively, if unsuccessful, he could meet the reasonable costs of an appeal, that no abuse of process exists, that his appeal is neither frivolous or vexatious, or that other special circumstances do not exist. The Rule under consideration here was Rule 62.30 of the 1977 Rules of Court.

Note: This Rule, respecting security for costs, is adopted from the 1977 Rules of Court (Rule 62.30) and is not similar to the corresponding Ontario Rule (61.06). Accordingly, some of the cases noted here were decided prior to the adoption of the present *Rules of Court*.