# COSTS

## RULE 56

## SECURITY FOR COSTS

### WHERE AVAILABLE

**56.01** In any proceeding where it appears that

(a) the plaintiff or applicant is ordinarily resident outside Prince Edward Island;

(b) the plaintiff or applicant has another proceeding for the same relief pending in Prince Edward Island or elsewhere;

(c) the plaintiff, or any person through or under whom he claims, has a judgment or order against him for costs that have not been paid;

(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 Prince Edward Island to pay the costs of the defendant or respondent;

(e) 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 Prince Edward Island to pay the costs of the defendant or respondent; or

(f) a statute entitles the defendant or respondent to security for costs,

the court on motion by the defendant or respondent may make such order for security for costs as is just.

### DECLARATION OF PLAINTIFF'S OR APPLICANT'S PLACE OF RESIDENCE

**56.02** The solicitor for the plaintiff or applicant shall, forthwith on receipt of a demand in writing from any person who has been served with the originating process, declare in writing whether the plaintiff or applicant is ordinarily resident in Prince Edward Island, and where the solicitor fails to respond to the demand, the court may order that the action or application be stayed or dismissed.

**MOTION FOR SECURITY**

**56.03** (1) In an action, a motion for security for costs may be made only after the defendant has delivered a defence and shall be made on notice to the plaintiff and every other defendant who has delivered a defence or notice of intent to defend.

(2) In an application, a motion for security for costs may be made only after the respondent has delivered a notice of appearance and shall be made on notice to the applicant and every other respondent who has delivered a notice of appearance.

**AMOUNT AND FORM OF SECURITY AND TIME FOR FURNISHING**

**56.04** The amount and form of security and the time for paying into court or otherwise giving the required security shall be determined by the court.

**FORM AND EFFECT OF ORDER**

**56.05** A plaintiff or applicant against whom an order for security for costs (Form 56A) has been made may not, until the security has been given, take any step in the proceeding except an appeal from the order, unless the court orders otherwise.

**DEFAULT OF PLAINTIFF OR APPLICANT**

**56.06** Where a plaintiff or applicant defaults in giving the security required by an order, the court on motion may dismiss the action against the defendant or respondent who obtained the order and the stay imposed by Rule 56.05 no longer applies unless another defendant or respondent has obtained an order for security for costs.

**AMOUNT MAY BE VARIED**

**56.07** The amount of security required by an order for security for costs may be increased or decreased at any time.

**NOTICE OF COMPLIANCE**

**56.08** On giving the security required by an order, the plaintiff or applicant shall forthwith give notice of compliance to the defendant or respondent who obtained the order and to every other party.

**SECURITY FOR COSTS AS TERM OF RELIEF**

**56.09** Notwithstanding Rules 56.01 and 56.02, any party to a proceeding may be ordered to give security for costs where, under Rule 1.05 or otherwise, the court has a discretion to impose terms as a condition of

granting relief, and where such an order is made, Rules 56.04 to 56.08 apply, with necessary modifications.

*Ayangma v. CBC et al.* 2005 PESCTD 11

A motion was brought by the defendant for security for costs on the basis there were outstanding judgments registered against the plaintiff for costs. The plaintiff in response to the motion alleged he was impecunious and unable to post security. The court allowed the motion because the plaintiff did not produce sufficient evidence to establish he was impecunious. Confirmed on appeal. See: *Ayangma v. CBC* 2005 PESCAD 26.

*Aluma v. SCJV* 2004 PESCTD 12

SCJV made an application for security for costs on the ground that Aluma is not ordinarily resident in the province and that it has insufficient assets in the province to satisfy a judgment for costs. Aluma was ordered to post security for costs because its assets outside the jurisdiction were not of a kind which could be conveniently realized upon. The amount of the security was fixed at one million dollars and Aluma was given options as to the manner in which the security could be posted.

*National Bank v. Stevenson* 2000 PESCAD 3, (2000) 184 Nfld. & P.E.I.R. 95

The defendant moved for security for costs. The Appeal Division found that the plaintiff's claim was not frivolous and vexatious. As the judgment for costs which the defendant relied upon as being a previously outstanding unpaid judgment for costs arose from another action commenced by the defendant against the plaintiff and as the latter action arose out of the same series of transactions which gave rise to the plaintiff's claim against the defendant, it would serve an injustice to order security for costs.

*Aucoin v. Martin* (1999), 185 Nfld. & P.E.I.R. 178 (P.E.I.S.C.T.D.)

On an application for support, the applicant was represented by counsel who, in accordance with Practice Note 22, filed a statement of costs. He was awarded costs for preparation for trial but was not awarded a "counsel fee" as he did not set forth in the statement the basis upon which the counsel fee was sought.

*MacArthur v. Atlantic Canada Home Inc.*, [1999] P.E.I.J. No. 89 (Q.L.) (P.E.I.S.C.T.D.)

The defendant by counterclaim (the plaintiff in the main action) brought a motion for security for costs against the plaintiff by counterclaim (the defendant in the main action) pursuant to Rule 56.01(d) and on the grounds that the plaintiff by counterclaim did not have sufficient assets to satisfy an order for costs, in the event it was unsuccessful on the counterclaim.

The motion was dismissed as the applicant did not discharge the onus of establishing the respondent had insufficient assets in P.E.I. to pay an order for costs should such an order be made against it as the result of being unsuccessful on the counterclaim.

*Agpro Services Inc. v. Duhs,* [1999] P.E.I.J No. 32 (Q.L.) (P.E.I.S.C.-T.D.)

Application for security dismissed. The motions judge applied *Meadowbank Fine Foods Ltd. v. Elbaz* infra.S.

*Barnard v. Testori Americas Corporation,* [1998] P.E.I.J. No. 72 (Q.L.) (P.E.I.S.C.-T.D.).

Reciprocal enforcement of judgment legislation may make an order for security for costs unnecessary; however, the assets which the non-resident plaintiff claims to have in the reciprocating jurisdiction must be of a kind which can be conveniently realized. Only then will the legislation have the effect of equating a non-resident plaintiff to the position of a resident with realizable assets in this jurisdiction. As the plaintiff failed to establish he had assets in the reciprocating jurisdiction of his residence which could be conveniently realized, he was ordered to post security for costs. In setting the amount of the security, the court took into consideration the actions of the defendant may have caused the plaintiff's present financial position.

*Meadowbank Fine Foods Ltd. v. Elbaz* (1997), 150 Nfld. & P.E.I.R. 83 (P.E.I.S.C.-T.D.)

Application for security on the grounds that the plaintiff did not have sufficient assets to pay the costs of the defendant and that the action was frivolous, vexatious and without merit. Based on a reading of the pleadings the court found the action was not frivolous or vexatious and was not clearly without merit. While the corporate plaintiff and its principal were without assets and thus unlikely to be able to pay an order for costs in favour of the defendant, the court declined to make an order for security for costs because the plaintiff appeared to have a meritorious claim which would be destroyed if the order were made. Of significance was the assertion by the plaintiff that the defendant's alleged negligence caused its impoverishment. The words "as is just" in Rule 56.01(d) permits the court to consider the merits of a case in determining whether to order security for costs.

*Tweel v. Tweel* (1996), 149 Nfld. & P.E.I.R. 52 (P.E.I.S.C.-A.D.)

Respondent moved to have the applicant post security for costs on a motion being brought by the applicant on the ground the applicant had been ordered to pay costs in another proceeding and they remained unpaid. Trial judge ordered security be posted. On appeal, it was held the trial judge did not err

in the result reached. A party raising the defence of impecuniosity to an application for security for costs bears the burden of establishing by clear and cogent evidence that he or she is unable, by any means, to post the security.

*Atlantic Golf Construction Ltd. v. Lakeside Development Corp. et al.* (1993), 116 Nfld. & P.E.I.R. 254 (P.E.I.S.C.-T.D.)

The Court held that for purposes of Rule 56.01(a) there is little difference between a resident and non-resident plaintiff provided there is reciprocal enforcement of judgment legislation between the two jurisdictions and provided further that the non-resident has assets in the jurisdiction of its residence.

In seeking an order for security for costs under Rule 56.01(d), the following steps are involved:

1) The onus is on the defendant to first show there is good reason to believe the plaintiff company does not have sufficient assets in Prince Edward Island or in a jurisdiction with reciprocal enforcement of judgment legislation, to pay the costs of the defendant. Within this step there are two points which the defendant must cover: (I) the amount of costs; and (ii) that the plaintiff has insufficient assets in Prince Edward Island to pay them.

2) The onus then shifts to the plaintiff to prove either that it has sufficient assets or to prove impecuniosity.

As the defendant did not adduce sufficient evidence to establish what the costs would be, it was impossible to say there were insufficient assets in P.E.I. to pay the costs. Regardless, the court considered the second step.

The plaintiff established it had sufficient assets in its home jurisdiction; however, the defendant argued that because the assets could not be conveniently realized they were not to be considered assets under the Rule. The Court found that while it had an obligation to critically review the nature of the assets, there had to be some limit to the inquiry.

*Johnston et al. v. Montreal Trust Co. of Canada* (1993), 110 Nfld. & P.E.I.R. 276 (P.E.I.S.C.-T.D.)

Where one of two plaintiffs had assets which appeared capable of being realized to satisfy an order for costs, it is unnecessary to make an order for security for costs against the other plaintiff as there would be one bill of costs payable by the plaintiffs jointly and severally.

*Burke et al. v. Larter et al.* (1991), 96 Nfld. & P.E.I.R. 251 (P.E.I.S.C.-A.D.)

Defendant made a motion for an order for security for costs on the ground that the plaintiff had an outstanding judgment from another proceeding. The plaintiff contested the motion on the ground he was impecunious. The Court

found that a plaintiff contesting a motion for security for costs on the grounds he is impecunious, has the onus to adduce the necessary evidence (assets, debts, income, ability to borrow, etc.) to show impecuniosity. An affirmation of such is insufficient.

**NOTE:** In making application for security for costs, counsel should have reference to Practice Note 20.

In respect to the amount of assessment of costs on a motion, counsel should have reference to Practice Note 21.