COSTS

RULE 56

SECURITY FOR COSTS

WHERE AVAILABLE

56.01 In any proceeding where, on motion by the defendant or respondent, 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 may make such order for security for costs as is just.

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

56.02 The lawyer 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 lawyer 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 proceeding 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 Despite 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. The Saltwire Network Inc., 2019 PECA 17

The Court of Appeal ordered the appellant to post security for costs in the amount of $5,000. The appellant has a history of not paying costs orders.

O'Leary Potato Packers Ltd. v. Lewis, 2018 PESC 36

Defendant to the counterclaim sought an order for security for costs in relation to the counterclaim. The court noted that the plaintiff-by-counterclaim had an unsatisfied judgment for costs filed against him by the defendant, did not establish he was impecunious and, alternatively, that if he was impecunious, justice did not require he be permitted to continue pursuit of his counterclaim without posting security for costs. He was ordered to post security in the amount of $7,000.

CMT et al. v. Government of P.E.I. et al., 2018 PECA 28

The motions judge granted a motion to allow defendants to be joined to a proceeding on the condition that the plaintiffs provide security for costs the new defendants.

The Court of Appeal confirmed the motion judge's quantum of security for costs stating it is justified and reasonable.

Zenner & Zerd v. Flanagan, 2018 PECA 7

Where there are multiple plaintiffs and their claims are joint, an order for security for costs will not be issued if at least one of the plaintiffs is ordinarily resident in the province or is a corporation that has assets in the province available to respond to an order for security for costs.

Zenner & Zerd v. Flanagan, 2015 PESC 5

The Court stated that the Rule gives discretion to the Court to give such order "*as is just*" and one of the considerations for the Court is whether the plaintiffs' claims appear sound.

The Court ordered the plaintiffs to post security for costs against one of the defendants as the plaintiffs' claim appeared *"tenuous and the defence looked strong."*

Marques v. Bambrick, 2018 PECA 4

The test to be applied for security for costs is "*there is good reason to believe that the action or application is frivolous and vexatious, and the plaintiff or applicant has insufficient assets in Prince Edward Island…*". Frivolous and vexatious means that the action is devoid of merit and has little or no change of success.

Action is defined in Rule 1.03 to include "*counterclaim*." It is the basis of the claim which must be assessed, not the damages or relief requested. If the underlying action is valid, it cannot be frivolous and vexatious notwithstanding the damages or relief claimed is excessive.

Ayangma v. French Language School Board, 2017 PECA 4

The court refused to require the appellant to post security and dismissed the motion even though judgment and cost orders are outstanding because of delay in bringing the motion.

CMT et al. v. Gov't of PEI et al, 2016 PESC 4

The plaintiffs failed to show they were impecunious but they do not have sufficient assets in the jurisdiction to respond to any potential costs order following a trial of this magnitude. Security was ordered to be posted in the amount of $1,032,250.

Robinson v. Willis & Fogarty, 2013 PECA 13

The respondents made a motion for security for costs on appeal pursuant to Rule 61.14(1)(b). The appellants were the plaintiffs in the matter. The Court found as the respondents were entitled to an order for security for costs pursuant to Rule 56.01, Rule 61.14(1)(b) would entitle the respondents to an award of costs.

Elbaz v. Government of PEI, 2007 PESCTD 38

The court found that one of the plaintiffs had sufficient assets in the province to respond to a reasonable order for costs against the plaintiffs. However, one of the other plaintiffs held security on those assets. The court ordered the plaintiff holding the security to postpone its interest in the security to the interest of a final order for costs. Alternatively, the plaintiffs were given the option of providing security by way of a letter of credit or other suitable instrument for costs in the amount of $20,000.

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.

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.

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. 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.

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 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.

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.

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.