

Security for Costs - Friend or Foe

by

[Martin Rosenbaum](#), *B.Com., B.C.L., LL. B.*

In Ontario, an unsuccessful party in a lawsuit is generally ordered to pay a portion of the successful party's legal expenses. In cases where a claimant is outside Ontario, the Courts in Ontario are concerned that in the event that the claimant is not successful in the lawsuit, there will be no money available in Ontario to pay towards the winner's legal fees. Accordingly, the Courts in Ontario may order the out of province claimant to deposit with the Court money or other acceptable liquid assets to stand as security for costs. Most jurisdictions in Europe and North America have similar rules.

If the out of province claimant is successful in the lawsuit, the security for costs will be returned and the losing side may be ordered to reimburse the out of province claimant for a portion of its legal expenses. Posting security for costs is a standard procedure generally available to all Ontario residents who are sued by claimants who do not have a sufficiently substantial connection to Ontario or who do not have sufficient assets in Ontario. The Ontario Courts generally order the out of province claimant in these cases to pay into the Court money or other form of security without considering whether the out of province claimant has a good case or not. The security to be paid into Court can be in the form of cash, bond or irrevocable letter of credit. Installments may also be ordered. These installments would be payable in intervals upon the completion of the various stages in the lawsuit.

The money or other security that is paid into the Court is held by the Court until the completion of the lawsuit. If the security that is paid into court is money then the Court pays interest on the amount at rates a few points below the lowest banking rates. The amount of security for costs depends to a large extent on the complexity of the lawsuit and the projected legal expenses assessed by the Court. The Court has a discretion to refuse to order the out of province claimant to post security for costs in certain circumstances. These are generally limited to situations where the out of province claimant is impecunious but has demonstrated that it has a strong case or where the Ontario defendant has significantly delayed in asking the Court to order security for costs.

If one fails to pay into Court security for costs when ordered to do so, the Court will not allow the lawsuit to continue until the security for costs is paid into Court. Security for Costs is often used by Ontario defendants as a tactical advantage to dissuade out of province claimants from suing in Ontario.

If you have any questions or comments on the security for costs rules in Ontario, contact Martin Rosenbaum at 416-364-1919 or mzr@rosenbaum.com.