

# How Poor Is Too Poor? Seeking Security for Costs Against Corporate Plaintiffs Claiming Impecuniosity

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## The Problem

You are sued by a corporate plaintiff that is a shell corporation with no assets. You have a strong defence, but how will you recover your litigation costs if successful? The corporation is being used as a shield to allow its principal(s) to sue with impunity, without facing the risk of an adverse cost award.

Under Ontario's *Rules of Civil Procedure*, a defendant is entitled to seek security for its costs where it appears that the plaintiff is a corporation or a nominal plaintiff and there is good reason to believe that it has insufficient assets in Ontario to pay the costs of the defendant. Where a security for costs order is made and remains unpaid, a defendant can then ask the Court to dismiss the action.

While this is certainly an attractive option to a defendant being sued by a shell corporation or other nominal plaintiff, there is another problem: once the defendant has shown there is good reason to believe the plaintiff has insufficient assets in Ontario to satisfy a potential cost award, the plaintiff corporation can still succeed by showing either of the following:

- (a) that it does have sufficient assets in Ontario, or
- (b) that it is impecunious and that an injustice would result if it were not allowed to proceed with its action.

In the first case, the plaintiff argues that it actually does have the resources to pay a potential adverse cost award, so no security is necessary. In the latter case, the plaintiff takes the position that it should not have to pay security for costs because it is *too poor* – i.e. it would be unable to pay a security for costs award and that such an order would unjustly amount to a determination of its meritorious case. As discussed further below, there is some debate in the case law as to whether the Court will assess the merits of the plaintiff's case unless impecuniosity has first been demonstrated.

In the case of a shell corporation or other nominal plaintiff, the impecuniosity or “too poor” defence is a particular concern since often the plaintiff can demonstrate that it has insufficient assets to pay a potential cost award.

In other words, in order to be granted security for costs, the plaintiff must be shown to be poor (i.e. with insufficient assets in Ontario to satisfy a potential cost award), but not too poor (i.e. since a security for costs order would effectively prevent it from proceeding with a meritorious action).

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### How Poor Is Too Poor?

Thankfully, this is not the end of the matter. We recently acted for a construction company defending an action commenced by a plaintiff shell corporation, and were successful in bringing a motion ordering the plaintiff corporation to pay \$35,000.00 into Court as security for our client's costs up to pre-trial, with leave to seek further security thereafter. When the plaintiff corporation failed to pay the security into Court (as expected), we successfully moved to have the action dismissed.

The key is that, in order to establish impecuniosity, a corporate plaintiff cannot simply rely on the fact that it has insufficient assets in Ontario. In addition, a corporation or nominal plaintiff must demonstrate that it is unable to borrow sufficient funds and that its shareholders and associates are unable to provide funds to post security on its behalf. Without this requirement, a shell corporation could be used to sue without the normal litigation risk of an adverse cost award if it is unsuccessful.

In our case, the plaintiff corporation argued that it was without sufficient assets and that its shareholders had suffered financially as a result of our client's actions. However, it failed to show that these shareholders were unable to provide funds or that the plaintiff corporation was otherwise unable to borrow sufficient security. In the circumstances, the plaintiff corporation failed to satisfy the test for impecuniosity and significant security was ordered to be paid into Court for our client's costs.

What if a corporate plaintiff is able to demonstrate that it is unable to raise security from its shareholders or other sources? This does not mean that the motion will necessarily be defeated. The plaintiff corporation must still show that an injustice would result if it were not allowed to proceed with its action. In other words, it will try to demonstrate that its claim has merit and that an order for security would unjustly end the action prematurely.

There is some debate in the case law as to the appropriate level of scrutiny the Court should apply to the merits of the action at this stage. Some decisions have held that the Court should not turn to an assessment of the merits of the action unless the corporate plaintiff has first successfully demonstrated its impecuniosity, whereas others have held that the merits of the action will always be assessed but that the corporate plaintiff's burden at this stage will depend upon whether it is impecunious. If impecuniosity has been demonstrated, the corporate plaintiff will need to show that its claim is "not plainly devoid of merit"; if not impecunious, the corporate plaintiff will have to meet a high threshold to satisfy the Court of its chances of success at trial.

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Regardless of the analysis applied, unless the corporate plaintiff is able to demonstrate (1) its impecuniosity, including the inability to borrow sufficient funds or have its shareholders post security on its behalf, or (2) that it has a significant chance of success at trial, security for costs should be granted if there is good reason to believe that the corporate plaintiff has insufficient assets in Ontario to satisfy a potential cost award.

While not without some risk, a motion for security for costs remains a useful tool to a defendant facing an unmeritorious action, especially where the plaintiff is a shell corporation or other nominal plaintiff.