

SECURITY FOR COSTS

by
Hugues G. Richard
LEGER ROBIC RICHARD, Lawyers
ROBIC, Patent & Trademark Agents
Centre CDP Capital
1001 Square-Victoria - Bloc E – 8th Floor
Montreal, Quebec, Canada H2Z 2B7
Tel.: (514) 987 6242 - Fax: (514) 845 7874
www.robic.ca - info@robic.com

The General Rules and Orders of the Federal Court of Canada at section 446(1)(a) state the following: "Where, on an application of a defendant, it appears to the Court that the plaintiff is ordinarily resident out of the jurisdiction, if, having regard to all the circumstances of the case, it seems just to do so, the Court may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as seems just."

The defendant's costs are those provided for under sections 344 and 346 of the said Rules and Orders.

On November 30, 1988, Mr. Justice Addy in the matter of A-Lok Products Corporation -and- Press-Seal Gasket Corporation & al., Court No: T-1832-87 had to decide what would constitute the reasonable amount of security for costs under the circumstances of the case.

The action was for an infringement of a patent relating to gasket seals for use in sealing joints between sewer pipes and manhole covers.

The plaintiff was a non-resident and had already paid into Court \$2,000.00 as security for costs. One of the defendants applied for an order for additional security for costs in the amount of \$70,816.84.

The trial Judge noted the extensive amendments to Rules 344 and 346 which took effect on April 2, 1987 and the revised and expanded items of Tariff B to which those Rules refer. He conceded that not only did these amendments provide for substantial increases in taxable party and party costs but, more importantly, brought into play a complete new philosophy regarding taxation of costs. Before the amendments, the Court had little latitude in awarding costs. Formerly, the costs bore little relation to reality and were to be applied more or less automatically, regardless of considerations such as the amount of work involved, the complexity or importance of the issue, the conduct of the parties throughout the proceedings, etc. Under the new Rules, it would

seem abundantly clear that a great number of areas have been created where discretionary powers may be exercised.

An examination of those areas where discretionary powers may be exercised indicates that the new principles cannot be properly applied until after the events have actually occurred and in some cases also only after the trial or hearing has been completed. The new Rules render the fixing of an amount as security for costs considerably more difficult than it was in the past.

The Court must attempt to arrive at an equitable amount in the light of its view of the situation as it exists at the present time but subject to additional uncertainties as to how the newly created considerations might eventually influence the various amounts. It must also be borne in mind that future applications regarding security for costs may be made at a later date as the situation develops.

In the case at bar, the maximum amount provided for in Tariff B had been claimed for each item. The Court found that at this stage of the proceedings (discovery of the defendant not having been completed and discovery of the plaintiff not having begun) will rarely be in a position to find that the maximum amounts should govern. The future is always difficult to predict and a somewhat conservative approach should be adopted, as previously stated, since the defendant can always apply for an increase at a later stage, should the situation warrant it.

The Court held that the costs of translating into English an examination which was held in French due to the fact that a solicitor did not have a sufficient knowledge of the French language to fully understand the transcript was not a justification for the adverse party being saddled with the cost of translation for that purpose.

After having examined all of the items for which security for costs was being asked, the Court decided that taking into account the \$2,000.00 already paid into court, the plaintiff should be obliged to pay in as security for costs, an additional sum of \$9,500.00 instead of \$70,816.84 as was applied for.

A non-resident instituting an action before the Federal Court of Canada should always be mindful of the security for costs which will have to be paid and until such payment is made, the plaintiff is generally prohibited from taking any further proceedings in the action as instituted.

Published at (1989), 3 W.I.P.R. 52 under the title *Federal Court Tackles Issue of Fixing Security for Costs*.

© LEGER ROBIC RICHARD / ROBIC, 1989.

ROBIC + LAW
+ BUSINESS
+ SCIENCE
+ ART

ROBIC + DROIT
+ AFFAIRES
+ SCIENCES
+ ARTS

