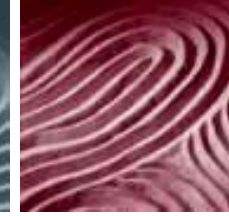


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Rule 56.09 – The Forgotten Security for Costs Rule

Amelia M. Leckey

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In the recent case of *Khan v. Metroland Printing, Publishing & Distributing Ltd.* (2005), 75 O.R. (3d) 165 (C.A.), the Court reviewed the application of Rule 56.09 of the Ontario Rules of Civil Procedure.

Rule 56.09 states:

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.

The underlying action in *Khan* was a libel action. The defendants moved to have the action dismissed, or, in the alternative, stayed, due to the failure of one of the plaintiffs to pay various cost awards. On the initial hearing of the motion, Justice Nordheimer refused to dismiss the action but stayed the action as brought by the plaintiff who was in default of the previous cost awards.¹ He did not stay the action against the remaining plaintiffs as they were not liable for the initial cost awards. However, Justice Nordheimer was of the opinion the remaining plaintiffs had been less than diligent in prosecuting the action. In reviewing the application of Rule 56.09, he noted:

The issue then becomes whether there is relief being granted to the other plaintiffs to which a term requiring the posting of security could attach. The defendants submit that there are three different forms of relief being granted: (i) the plaintiffs seek to avoid a stay of their action; (ii) the plaintiffs seek to proceed with the examinations for discovery outside the schedule that I had earlier set for those examinations to be held and (iii) up until the other plaintiffs retained their current counsel, the plaintiffs had “fractured” their representation by purporting to act in person in an action in which they were all plaintiffs contrary to rule 5.02.²

Justice Nordheimer accepted the defendants’ submission that the avoidance of a stay and rescheduling of discoveries qualified as relief granted to the plaintiffs. He therefore ordered they post security for costs, pursuant to Rule 56.09.

An appeal to the Divisional Court by the plaintiffs was successful. However, the basis for the decision was Justice Nordheimer’s failure to consider the *Libel and Slander Act*. The Divisional Court did not review the test under Rule 56.09.³

The defendants appealed the Divisional Court decision. The Court of Appeal held that the *Libel and Slander Act* did not preclude an order for security for costs under Rule 56.09. However, the appeal was dismissed on the basis Justice Nordheimer had incorrectly applied Rule 56.09. More specifically he had erred in finding the plaintiffs had been granted relief. The Court of Appeal held:

In order for the motion judge to rely on Rule 56.09 to make the order for security for costs he did, the motion judge first had to conclude that the order was a reasonable term as a condition of granting relief. The motion judge appreciated this requirement; however, he erred in concluding that in the circumstances of the case before him, relief was being granted to the remaining [plaintiffs]. It was not. Rather, relief in the form of a stay of proceedings sought by the [defendants] was being denied. The appellants in this case would have been only entitled to security for costs under rule 56.09 if the motion judge had found grounds to stay the [plaintiffs’] action, but had exercised his discretion not to do so.

An example of a previous case that appears to meet the requirements set out by the Court of Appeal in *Khan* is *Sydlo Inc. v. Mixing Equipment Co., Inc.* [1986] O.C.P. 26 (Master). The defendant brought a motion seeking security for

costs, and/or a motion to set aside an order to continue. The Master was of the opinion the order to continue was an abuse of process as it was based on an assignment of the action by the corporate plaintiff to an individual plaintiff. The purpose of the assignment was specifically to defeat an anticipated motion for security for costs. However, as an alternative to setting aside the order to continue the Master ordered the plaintiff to post security pursuant to Rule 56.09.

In *Tizard Estate v. Quinte Detention Centre*, [2003] O.J. No. 3010 (Master), the defendants moved to have the action dismissed on the basis the plaintiffs had failed to comply with numerous orders and timetables. Counsel for the plaintiffs conceded the management of the file had been disastrous, but argued this should not be held against his clients. There was sufficient evidence to establish the delay in moving the matter forward could not all be blamed on counsel. Further, a small portion of the delay was attributable to the defendants. As such, Master MacLeod refused to dismiss or stay the proceedings outright but ordered the plaintiffs to post \$20,000 in security pursuant to Rule 56.09. It is unclear what relief was being granted to the plaintiffs so as to bring this matter under Rule 56.09. A review of the case indicates that the approval of a timetable outside the standard case management timetable may have triggered the application of Rule 56.09.

While the availability of relief under Rule 56.09 appears to be available only in very specific circumstances, it can be a useful tool to protect the rights of a party to costs.

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¹*Khan v. Metroland Printing, Publishing & Distributing Ltd.*, [2001] O.J. No. 2764 (S.C.J.).

²*Ibid.*, at paragraph 18.

³*Khan v. Metroland Printing, Publishing & Distributing Ltd.* (2003), 68 O.R. (3d) 135 (Div.Ct.).

New Chair of Sections



OBA is pleased to announce that Roderick Flynn of the law firm of Evenson Bundgard Flynn and Past Chair of the Education Law Section has been appointed to the position of Chair of Sections. His e-mail address is r.flynn@ebf-law.com.

As Chair of Sections, Rod will work with both the Chair of Professional Development and the leaders of Sections (and their membership) as a conduit for ideas and input on how to continue the OBA tradition of excellent professional development and advocacy on behalf of its membership.

The OBA and the current Chair of Professional Development, Ben Hanuka, welcome Rod.