

**CITATION:** Waterdown Garden Supplies Ltd. v. Hamilton, 2025 ONSC 1540  
**DIVISIONAL COURT FILE NO.:** 615/24  
**DATE:** 20250314

**SUPERIOR COURT OF JUSTICE – ONTARIO  
DIVISIONAL COURT**

**RE:** WATERDOWN GARDEN SUPPLIES LTD., 2593860 ONTARIO INC. AND  
GARY MCHALE, Moving Parties

**AND:**

CORPORATION OF THE CITY OF HAMILTON, CARLO AMMENDOLIA,  
CRAIG SAUNDERS, JOHN DOE #1 CORPORATION, JOHN DOE #2  
CORPORATION AND JOHN DOE #3 CORPORATION, Respondents

**BEFORE:** Matheson J.

**COUNSEL:** T. David Marshall, *for the Corporate Moving Parties*

*Self-represented Moving Party Gary McHale*

*Sean Sullivan and Liane Langstaff, for the Respondent City of Hamilton*

*Sarah O'Connor, for the Respondent Craig Saunders*

**HEARD at Toronto:** March 12, 2025, by video-conference

**ENDORSEMENT**

[1] The moving party/plaintiffs seek an extension of time to move for leave to appeal from two orders of Krawchenko J. dated December 29, 2023 (the Security for Costs orders), and two orders for the payment of costs on those motions dated February 23, 2024 (the Costs orders).

[2] The underlying action is one of multiple actions that the plaintiffs Waterdown and Mr. McHale have brought in relation to the same property, regarding environmental contamination of the property. They have made a myriad of commercial claims for tens of millions of dollars or more against various defendants. In the specific action that gives rise to the Security for Costs orders, the plaintiffs allege negligence, misfeasance in public office and conspiracy, among other claims, against the City of Hamilton and two of its employees.

[3] With respect to security for costs, there is no issue that r. 56 of the *Rules of Civil Procedure* gives the court the discretion to make an order for security for costs “as is just” “where it appears

that” one or more of the criteria listed in the rule are met. There is also no issue that the motion judge quoted from an appropriate authority for the relevant test, specifically *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827. In accordance with *Chevron*, at para. 25, the motion judge stated that he was guided by the overriding interests of justice as well as the criteria listed in r. 56.

[4] At the hearing of the security for costs motions, the plaintiffs changed their position and asserted for the first time that they were impecunious. They relied on impecuniosity and the merit of their action to defeat the motions.

[5] On an extensive factual record, the motion judge found that the plaintiffs were not impecunious. He further found that the plaintiffs had arranged their affairs to protect assets and shelter them in the hands of non-parties to make it difficult to enforce a costs award. The motion judge found that the evidence appeared to show an investor-supported, for profit enterprise, in numerous connected pieces of litigation.

[6] The motion judge considered the interests of justice and exercised his discretion to order security for costs, providing his reasons for doing so. The plaintiffs were obliged to pay the following into court: \$252,560 (regarding the City) and \$124,416 (regarding the defendant Saunders). In accordance with r. 56, unless and until the amounts were paid, the action was stayed. The plaintiffs did not make those payments or pay the Costs orders arising from the motions.

[7] This motion for an extension of time to seek leave to appeal arises because the plaintiffs were not only late in seeking leave to appeal but also did not move with dispatch once they learned that they were late.

[8] The test for an extension of time is not disputed. Rule 3.02(1) of the *Rules of Civil Procedure* permits such an order in the discretion of the court. The factors are as follows: whether the moving parties had an intention to seek leave to appeal within the required time; the length of the delay, and any explanation for the delay; any prejudice to the respondents caused by the delay; and the justice of the case: *Paulsson v. University of Illinois*, 2010 ONCA 21, at para. 2. The last factor is most important and requires a consideration of the merits: *Paulsson*, at para. 2.

[9] On the first factor, the moving parties originally served a notice of motion for leave to appeal from the Security for Costs orders on January 29, 2024, only about two weeks late. I accept the explanation that counsel was mistaken about the length of time to seek leave to appeal, believing it was 30 days. After service of the notice, the respondents replied, noted that the notice of motion was late, and indicated that they did not consent to an extension of time.

[10] In the period after January 2024, the moving parties did not move forward to get an order for an extension of time as a priority. Instead, they now submit that it was sufficient that their notice of motion for leave to appeal also sought an extension of time “if needed”.

[11] The moving parties served another notice of motion for leave to appeal on March 7, 2024. Although the Costs orders had been released by that time, the notice of motion did not seek leave to appeal those orders.

[12] On April 29, 2024, the moving parties served the respondents with an amended notice of motion for leave to appeal that now included the Costs orders, long after the required time. By this stage, the moving parties were well aware of the required time periods. Again, the respondents objected.

[13] Despite having counsel for the two corporate moving parties, it seems that Mr. McHale was taking various court steps for all the plaintiffs and fumbled through the process by filing in the wrong region. After an online filing attempt in Kingston then filing in Hamilton there was a judicial case conference, at the request of the City. The case conference took place in June 2024 before Sheard J. As of that time, the moving parties had still not delivered a motion record or factum in support of the required extension of time. It had been over five months since the Security for Costs orders.

[14] At the case conference, the moving parties asked that their matter be transferred to Toronto. Sheard J. declined to do so. She accepted the City's submissions that the transfer would be unfair and prejudicial to the respondents – the moving parties had long missed deadlines and offered no real explanation for doing so. Justice Sheard noted that the moving parties' materials that had been filed were largely incomplete. Justice Sheard indicated that if the moving parties intended to proceed they had to follow court filing procedures including for an extension of time.

[15] Ultimately, the moving parties did not deliver a motion record until October. They did not do so until after the City, with advance notice, moved forward to dismiss the action.

[16] Various explanations are given for the delay after the June case conference, which are also not compelling. The corporate moving parties had counsel then and now. On the extension of time motion, the moving parties rely on an affidavit of Mr. McHale in which he attests to health problems starting with events the week after the case conference in June. He then describes his health conditions and self-performed tests, over the summer months. There is no letter from a physician that provides what would normally be put forward, specifically a medical professional giving the relevant medical diagnoses and how they had an impact on Mr. McHale's ability to instruct counsel and participate in litigation steps.

[17] In addition to the above weakness in the explanation for the delay, it conflicts with Mr. McHale's own email to the respondents of July 30, 2024. A month after these health issues were said to arise in late June, Mr. McHale wrote to the respondents saying that "[s]ome of the plaintiffs were not in Canada in June" and they "recently" "met and decided to bring forward a motion to seek an extension of time". Mr. McHale said that the motion record would be supplied to the respondents "shortly". He made no mention of health problems. The health issue was not raised until an August 19, 2024 email, in which Mr. McHale also said that he had not spoken to counsel for the two corporate moving parties for over a month. Mr. McHale concluded the August email by saying that he hoped to have the motion materials served by the end of that week. That did not happen.

[18] Ultimately, the moving parties delivered a motion record in October 2024, over eight months after they knew that their notice of motion for leave to appeal was late and they needed an extension of time.

[19] Moving to prejudice, the respondents submit that they are prejudiced because of the serious nature of the allegations in the underlying action, which are a matter of public record. The moving parties disagree. Further, Mr. McHale emphasizes the penalties he may suffer in an environmental prosecution against him and Waterdown.

[20] On the justice of the case, the moving parties rely on what they argue is their meritorious action against the respondents, which they also submit is important because it is about environmental contamination. They submit that they should have their day in court. They submit that the motion judge erred in his approach to the merits of their action and that error would be a foundation for their motion for leave to appeal.

[21] The respondents dispute the submissions about the merit of the action and leave motion. They further note that the moving parties can still have their day in court in the underlying action. They must pay security for costs into court and can then proceed with their action. Further, the moving parties do not address the multiplicity of litigation they have commenced about the property and contamination, which appears to raise overlapping issues, as summarized in the motion judge's reasons for decision.

[22] Both sides rely on *Chevron*. The moving parties rely on it for the role of the merits on a motion for security for costs, and the principle that such an order should not be used as a litigation tactic to prevent a case from being heard on its merits: para. 24. The respondents do not dispute these principles, nor is there a basis to suggest that they deployed such a tactic.

[23] The respondents submit that paragraph 24 of *Chevron* must be considered along with the next paragraph as follows: "each case must be considered on its own facts. It is neither helpful nor just to compose a static list of factors to be used in all cases in determining the justness of a security for costs order. There is no utility in imposing rigid criteria on top of the criteria already provided for in the Rules. The correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made."

[24] I have considered the moving parties' submissions about the merits of their action and their leave motion in the context of the overall justice of the case. However, I am not persuaded that it should result in an extension of time.

[25] I have considered all of the submissions and the record before me in deciding whether to exercise my discretion to grant an extension of time. In keeping with the test in *Paulsson*, I have considered the length of the delay, the explanation for the delay, prejudice to the respondents, and the justice of the case including the merits. Further to my discussion of the issues above, I conclude that the overall justice of the case does not call for an extension of time to pursue leave to appeal the Security for Costs or Costs orders. I am not prepared to exercise my discretion to grant an extension of time.



[26] The motion is dismissed. In accordance with the agreement between the parties, the moving parties shall pay costs of this motion fixed at \$20,000 in total, to be apportioned between the respondents as they direct.

---

Matheson J.

**Date:** March 14, 2025