

PRACTICE**COSTS**

Appeal, cross-appeal from Federal Court (F.C.) order granting respondent's motion for security for costs in respect of pending certification motion, granting respondent costs on motion — Underlying case involving proposed reverse class proceeding brought by foreign corporations with no significant assets in Canada against proposed class comprised of individuals resident in Canada — Appellant arguing F.C. erring in making order for security for costs in light of presumptive no-costs regime for class proceedings enshrined in *Federal Courts Rules*, SOR/98-106 (Rules) — Respondent submitting that F.C. erring in fixing costs without hearing from him on issue of quantum — F.C. holding that provisions contained in Rules, r. 334.39(1) (which establish a *prima facie* no costs regime for class proceedings) were not engaged because no notice of motion for certification filed at point at which F.C. heard the motion for security for costs — Situation herein markedly different from that in motion to strike statement of claim in proposed class proceeding — Purpose of motion for security for costs is to obtain partial guarantee for payment of costs eventually awarded in proceeding — Here, that guarantee sought in respect of costs anticipated in regard to motion for certification — Wedge would be driven through presumptive no-costs regime enshrined in r. 334.39 if defendant could circumvent bar against award of costs by merely bringing a motion for security for costs as soon as defendant is served with statement of claim in proposed class proceeding — Moreover, timing of motion for security, motion for certification in present case result of dates set by motion judge — Thus, reasons offered by F.C. for finding that it possessed jurisdiction to award security for costs notwithstanding scrutiny — Nonetheless, F.C. order should be upheld as alternate basis for jurisdiction existing — R. 334.39(1)(c) allowing for costs in respect of certification motion, class proceeding or appeal arising from class proceeding if exceptional circumstances making it unjust to deprive successful party of costs — Such circumstances could be found to exist herein — Circumstances in Rules, rr. 416(1)(a),(b) applying; therefore, but for this being a proposed class proceeding, F.C. would be empowered to make order for security for costs — Fact that present case proposed class proceeding not foreclosing F.C. from making such an order herein — Determination under r. 334.39(1)(c) not a condition precedent to exercise by F.C. of its discretion under r. 416 to order security for costs in case such as this — Decisions in *Samos Investments Inc. v. Pattison*, 2002 BCCA 442, *Secure Networx Corp. v. KPMG, LLP*, 2002 BCSC 1001, affd 2003 BCCA 227 not supporting proposition that F.C. lacking jurisdiction to make order for security for costs unless and until it finds that exception in r. 334.39(1)(c) applicable — Determination under r. 334.39(1)(c) cannot be made until determination on merits made — Open to F.C. to make impugned order for security for costs — No basis to interfere with quantum of security set by F.C. — As to cross-appeal, F.C. could not make order for costs on motion unless and until it determined that one of the exceptions in r. 334.39(1) pertained — F.C. declining to make such a finding — Appeal dismissed; cross-appeal allowed; costs award set aside; issue of costs remitted for reconsideration.

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