

# KEEPING CURRENT

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## Home Owners Ordered to Remove Pool built over Municipal Easement

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For perhaps the first time, the Ontario Court of Appeal has ordered an unsuccessful litigant to post security for costs of a trial judgment before being allowed to proceed with an appeal: *Wiseau Studio, LLC v. Harper*, 2021 ONCA 31.

The underlying trial decision arose from a dispute over a documentary entitled *A Room Full of Spoons*, about *The Room*, a 2003 film so bad that it has developed a cult-like following. In 2017, Tommy Wiseau, the mysterious man behind *The Room*, sued the documentary film-makers for copyright infringement and misappropriation of personality which prevented the documentary's scheduled release. The film-makers, in turn counter-claimed against Wiseau for the amounts that they lost by being unable to release *A Room Full of Spoons* (which is titled after an inside joke amongst super-fans of *The Room*).

After a 2020 trial, involving numerous pre-trial and mid-trial shenanigans detailed in the lengthy [Reasons for Judgment](#), Justice Paul Schabas dismissed Wiseau's claims in their

entirety. To the extent that the documentary used copyrighted material for the purposes of criticism, review or news reporting, then such use was for an allowable purpose under the fair dealing provisions of the *Copyright Act*. Justice Schabas noted that Wiseau appeared to be upset about how he was portrayed in the documentary, but he had not brought a claim for defamation. However, to the extent the documentary portrayed Wiseau as someone who made a terrible movie, there was nothing new about that. *The Room* is a popular cult classic *because* it is so bad (variously described as a "car crash of incompetence," the "Citizen Kane of bad movies," and an "unmitigated disaster"). A documentary about such a terrible movie could not be said to have caused any further harm to Wiseau's honour and reputation.

Conversely, the documentary film-makers were entirely successful in establishing that Wiseau had improperly used the Ontario court system to delay release of the documentary, and that one of the reasons Wiseau did so was because he had a financial interest in a dramatic film being released on Netflix, *The*

*Disaster Artist*, which was about *The Room*. Amongst other things, Wiseau had obtained an injunction without notice (subsequently set aside), and engaged in a social media campaign about his litigation against the documentary which prevented the documentary from being released and promoted. Schabas J. awarded the film-makers over \$750,000 in damages, including \$200,000 in punitive damages, along with more than \$480,000 in legal costs.

### **Court of Appeal Orders Security for Costs of Trial Judgment**

Wiseau, who appears to be nearly as odd as the character he played in the *The Room*, commenced an appeal of the trial decision to the Court of Appeal, effectively staying enforcement of the documentary film-makers' judgment.

In response, the documentary film-makers brought a motion for Wiseau to deposit the full amount of the trial judgment, the costs award, and an extra \$30,000 in security for the costs of the appeal, before being allowed to proceed. While such orders have been made in Alberta and British Columbia (albeit rarely), it appears that the Ontario Court of Appeal had never done so. The Honourable Thorburn J.A. decided that this was an appropriate case to make precedent and granted the documentary's motion in full.

Security for costs (i.e. a deposit into court of an amount approximately equal to what the party might be awarded in legal costs), is routinely ordered in cases where a plaintiff is not a resident of Ontario, or is a corporation that likely doesn't have enough assets to satisfy a costs award. At the appeal level, security for costs of an appeal can also be awarded in cases where it appears that the appeal is "frivolous and vexatious" and the appellant doesn't have the money or assets to pay a costs award.

However, there is no specific section in the Ontario *Rules of Civil Procedure* which explicitly

permits the court to make an order to an appellant to post security for a trial judgment (i.e. the amount awarded at trial) in addition to the estimated costs of the appeal. Instead the court here relied upon Rule 1.05 which permits the court to impose "such terms and give direction as are just," and section 134(2) of the *Ontario Courts of Justice Act*, which reads:

134(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal.

Thorburn J.A. relied upon the 2013 British Columbia Court of Appeal decision *First Majestic Silver Corp. v. Davila*, 2013 BCCA 312 (CanLII) to outline the circumstances in which a court would be justified in making such a discretionary order. The first hurdle of the test lies with the applicant to demonstrate:

1. That it is in the interest of justice to order posting for security of a trial judgment or trial costs; and
2. That the applicant will suffer prejudice if the order is not made.

The deciding judge would then consider the merits of the appeal, and the effect that such an order would have on the appellants ability to continue with the appeal.

Wiseau exemplified the reasons to make such a discretionary order in Ontario. Wiseau's counsel did not dispute that the appeal was "frivolous on its face." Wiseau had previously resisted satisfying a costs order, he was not an Ontario resident nor did he appear to have assets in the province, and he had specifically refused to disclose the location or extent of his assets abroad.



Thorburn J.A. also held that the documentary film-makers would suffer prejudice if the order was not imposed on the basis that the release of *The Room Full of Spoons* had been seriously delayed by the tactical attempts of Wiseau to prevent its release, which was the purpose of the compensatory damages awarded in the trial judgment. The Court also acknowledged that without such an order the judgment may never be recovered.

While there are many questions surrounding Wiseau, such as where he was born, and when did he move to America (he claims to be from Louisiana but speaks with a strong accent), a frequent question is what is the source of his wealth (he self-funded *The Room* for about \$6 Million but has never stated how he made this money). Despite the uncertain source of Wiseau's wealth, his apparent ability to deposit such an order for costs stymied any access to justice concerns that might exist with a less well financed appellant.

Having already answered these questions in the security for costs for the trial judgment question, the Court felt warranted in also granting the motion for deposit of the trial judgment costs award and \$30,000 for the costs of the impending appeal.

### **Impact of Decision in Future Cases**

This case has opened the door for security for costs of trial judgments in appropriate cases where an appeal is manifestly devoid of merit and an appellant has a history of delay and other tactics hindering collection. Access to justice concerns would likely be balanced against the potential obstacles that motions for security for costs of a trial judgment would pose, and it appears that the financial situation of an appellant would be a relevant consideration for the Justice deciding the motion. Successful plaintiffs should be encouraged that the Court of

Appeal will take a good hard look at the history of the litigation and the merits of an appeal (or lack thereof) and require an appellant to demonstrate a financial belief in the merits of their case by posting sufficient security for the judgment appealed from.

### **Addendum – Appeal dismissed July 23, 2021**

On July 23, 2021, the Ontario Court of Appeal dismissed Wiseau's appeal as a result of the failure to post security for costs: *Wiseau Studio, LLC v. Harper*, 2021 ONCA 532.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **James Cook**, at 416.865.6628 or via email at [jcook@grllp.com](mailto:jcook@grllp.com).

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