

Margaret Robbins
416-865-2893
mrobbins@litigate.com

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The Disaster Sequel: The Court of Appeal Weighs in on Tommy Wiseau's Best Worst Appeal Strategy

Sequels in the movie business, just like appeals in the judicial system, carry certain undeniable risks. For every triumphant *The Empire Strikes Back*, there are dozens of *Speed 2: Cruise Control, Jaws: The Revenge*, *Weekend at Bernie's II* (or, heaven forbid, *Return of the Jedi*) which exist as a cautionary tale to revisiting the same material again.

The same is true for litigants. Appeals carry inherent risk for any party seeking to overturn a judgment against them, particularly in circumstances where the Court below has provided a highly critical review of their first attempt.

Tommy Wiseau, the star and creator of the cult classic *The Room*, certainly understood this dilemma. As a filmmaker, Mr. Wiseau wisely never created a sequel to his notoriously terrible film (even though he has often hinted that one might be forthcoming). When it came to his Canadian litigation however, he could not resist.

As previously discussed on this blog, Mr. Wiseau and his company Wiseau Studio LLC ("Wiseau Films") sued Canadian documentary filmmakers for breach of copyright, moral rights, misappropriation of personality, passing off, and intrusion upon seclusion in respect of their documentary about the fandom surrounding the *The Room*, entitled *Room Full of Spoons*. In his decision, Justice Schabas dismissed Wiseau Film's claim and found for the defendants in their counterclaim awarding damages of $550,000 USD in compensatory damages and $200,000 USD in punitive damages, plus costs. Reading the decision of Justice Schabas, it is fair to say that the Court gave Mr. Wiseau's original litigation strategy a 'thumbs down'.

Such a review however has not deterred Mr. Wiseau. Following the judgment, Mr. Wiseau failed to attend examinations in aid of execution or provide information in respect of his assets and property.

Instead, he brought an appeal which simply (and baldly) stated that the Court erred in dismissing Wiseau Film's claim. In

response, the respondents sought security.

On January 7, 2021, Justice Thorburn of the Court of Appeal for Ontario issued her decision on the respondents' motion seeking security for the trial judgment, security for costs of the trial judgment, and security for costs of Wiseau Film's appeal.

While motions for security for costs are common, no court in Ontario has ever awarded security for judgment.

At the hearing of the motion, counsel for Wiseau Film's did not dispute that, on its face, the Notice of Appeal was frivolous, but noted that there was still time for the Notice to be amended. Faced with an admittedly frivolous Notice of Appeal and a request to grant security for judgment, Justice Thorburn considered whether to grant the respondents this extraordinary remedy.

Canvassing the factors considered in other jurisdictions on similar motions and the requirements of *Rule 134(2)* which grants the Court broad discretion to make interim orders that are considered just pending appeal, Justice Thorburn considered the following factors:

- The interests of justice, including the residence of the appellant (and therefore its immunity from enforcement for judgment), the ability to enforce in the appellant's jurisdiction and the absence of assets of the appellant in Ontario;
- The prejudice to the respondents if the order is not made; and
- The merit of the appeal and whether it has any prospect of success.

Justice Thorburn ultimately concluded that the interests of justice favored granting the remedy sought.

While the circumstances of this case are certainly extraordinary, the Court's analysis and ultimate conclusion that security for judgment is available in Ontario is an important one. Litigants facing a frivolous appeal brought by an appellant with no connection to Ontario should consider if a motion for security for judgment would be warranted. With the right facts, the Court has certainly left the door open for such motions to succeed.

As for Mr. Wiseau, his nascent appeal may well now be one of those rumoured sequels that never makes it to screen.