

SECURITY FOR COSTS OF AN APPEAL: FRIVOLOUS HELPS, BUT ISN'T NECESSARY

Posted on March 29, 2016

Categories: [Insights](#), [Publications](#)

A recent decision of the Ontario Court of Appeal, *Henderson v. Wright*, confirms that a respondent can get security for costs of an appeal, even if the appeal itself is not frivolous or vexatious and if the appellant has enough assets to pay the costs of the appeal.^[1]

Security for Costs of an Appeal

Ontario is a "loser pays" jurisdiction, which means that the losing party in litigation must pay a portion of the legal costs of the successful party. The rationale for this rule is that it discourages parties from bringing baseless claims, motions, or appeals, and it encourages parties to settle litigation out of court.

A defendant to a court proceeding, or a respondent in the case of an appeal, may seek an order from the court requiring the plaintiff or appellant to post "security" for these costs before the proceeding is able to continue.

The test for a respondent to obtain security for costs of an appeal is slightly different than the test for defendants seeking security for costs at trial or on a motion. The respondent in an appeal may seek security for costs of the proceeding and of the appeal in three circumstances:

1. if there is good reason to believe the appeal is frivolous and vexatious and the appellant has insufficient assets in Ontario to pay the costs of the appeal;
2. if an order for security for costs could be made against the appellant under the general rule for seeking security for costs in a proceeding that is not an appeal; and
3. where, for any other good reason, security for costs should be ordered.^[2]

The purpose of an order for security for costs on an appeal is to ensure that a respondent is protected for costs incurred for responding to the appeal and defending the proceeding. In deciding whether to order security for costs of an appeal, the court has to balance the need to uphold the respondent's right to be protected from the risk that the appellant may not be able to satisfy the costs of the appeal with the appellant's right to access the courts.

The Appeal Was "Frivolous and Vexatious"

In *Henderson v. Wright*, the court had to determine the nature of monthly payments paid by the appellant, Mr. Henderson to his mother in law, Ms. Wright (the respondent). Ms. Wright was the owner of the home in which Mr. Henderson and his family lived. Mr. Henderson argued that the monthly payments were mortgage payments, and that there was an agreement that once the mortgage was paid in full, the property would belong to him. The Superior Court agreed with Ms. Wright and concluded that Mr. Henderson's payments constituted rent and that the relationship between Mr. Henderson and Ms. Wright was that of tenant and landlord.^[3]

When Mr. Henderson appealed, Ms. Wright argued that an order to post security for costs was justified on the basis that the appeal was frivolous and vexatious and that Mr. Henderson had insufficient assets in Ontario to pay the costs of the appeal, and also on the basis that there were other good reasons to order security for costs.

The Ontario Court of Appeal agreed with Ms. Wright, finding that the appeal was frivolous and vexatious because the appeal raised no arguable error in law and that the trial judge's findings of fact and credibility were detailed and sound.^[4]

The court also concluded that Mr. Henderson had insufficient assets in Ontario to pay the costs of the appeal: his only asset, other than an old car and motorcycle, was a part-interest in a family cottage, which was illiquid and unmarketable.^[5]

There Was Also "Good Reason"

Although the Court of Appeal concluded that Ms. Wright was entitled to security for costs of the appeal under the first category of the Rule, the Court went on to explain that, even if the appeal were not "frivolous and vexatious," the Court would have ordered Mr. Henderson to post security for costs, nonetheless.^[6]

According to the Court of Appeal, there is "good reason" to order security for costs where the appeal has a low prospect of success (but isn't necessary "frivolous and vexatious") and the appellant has the ability to pay costs, but it would be nearly impossible to collect those costs.^[7]

This "good reason" test differs from the test applied when seeking security for costs on the basis of the appeal being frivolous and vexatious. When arguing that there is "good reason" to order security for costs of the appeal, the respondent must establish that it would be impossible to collect costs. It is not necessary to go as far as proving that the appellant has insufficient assets to pay the costs of the appeal.^[8]

This "good reasons" test sufficiently balances the need to ensure an appellant is not denied access to the courts with the respondent's right to be protected from the risk that the appellant will be unable to satisfy the costs of the appeal.

The court determined that Mr. Henderson may very well have had means to post security for costs, since he worked as a bartender and was paid nearly \$500 per week in cash. Nevertheless, the court concluded that there could be little or no proof of this cash income and it would therefore be nearly impossible for Ms. Wright to garnish it to satisfy costs.^[9]

The nature of Mr. Henderson's assets and income presented a risk to Ms. Wright, which, coupled with the low merit of the appeal, justified an order for security for costs.

Lessons Learned

In the case of an appeal with low merit, but that may not meet the high bar of "frivolous and vexation," the respondent should take stock of the nature of the appellant's assets when considering whether or not to seek security for costs of the appeal.

Even if an appellant has enough assets and income to pay the costs of the appeal, if it would be nearly impossible for the respondent to collect costs of the appeal, the respondent may still have success in obtaining an order for security for costs of the appeal.

by Cara Zacks

[1] *Henderson v. Wright*, 2016 ONCA 89 ("*Henderson*").[ps2id id='1' target=""]

[2] *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, Rule 61.06(1).[ps2id id='2' target=""]

[3] *Henderson* at para. 10.[ps2id id='3' target=""]

[4] *Henderson* at paras. 15 and 16.[ps2id id='4' target=""]

[5] *Henderson* at paras. 22-24.[ps2id id='5' target=""]

[6] *Henderson* at para. 26.[ps2id id='6' target=""]

[7] *Henderson* at para. 27.[ps2id id='7' target=""]

[8] *Henderson* at para. 28.[ps2id id='8' target=""]

[9] *Henderson* at paras. 31 and 32.[ps2id id='9' target=""]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

The logo for mcmillan, featuring the word "mcmillan" in a lowercase, sans-serif font. The "m" and "c" are in a dark red color, while the "m", "i", "l", "l", "a", and "n" are in a light blue color. The logo is positioned in the upper left corner of a banner image.

mcmillan



© McMillan LLP 2016