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Security for Costs on Appeals by Impecunious and Vexatious Litigants

By Jonnette Watson Hamilton

Cases Considered:

Opal v. White, 2008 ABCA 25

The very short judgment of Mr. Justice Frans Slatter in *Opal v. White* is an unlikely candidate for a comment. It is barely more than a page - a scant seven paragraphs - and it cites neither rules nor precedents in deciding three applications for security for costs. Nevertheless, the judgment's treatment of the issue of security for costs on an appeal of an order declaring the appellant to be a vexatious litigant is noteworthy.

An order requiring an appellant to post security for costs is a harsh interlocutory order. Until the appellant pays, their appeal is usually stayed, as it is in this case. If an appellant does not pay within a set time, their appeal is dismissed without ever having been heard, as it will be in this case if security for costs is not posted within approximately eight weeks of this judgment. Applications for such orders are, however, one of the few "swords" that can be wielded by respondents plagued by frivolous and vexatious proceedings.

The principles behind the awarding of security of costs on appeals are well established in Alberta. Rule 524 of the Alberta Rules of Court provides that "No security for costs shall be required in appeals unless by reason of special circumstances security is ordered by a judge" and just what amounts to the "special circumstances" required by Rule 524 has been considered by the Alberta Court of Appeal on a number of occasions over the years.

The leading decision is still *Gusky v. Rosedale Clay Products*, [1917] 2 W.W.R. 441 (Alta. S.C.A.D.). In that case, Walsh J. stated his interpretation of "special circumstances" in the following way:

> The successful litigant should be entitled to an order for security upon proof of the appellant's poverty unless the appellant satisfies the Judge or Court to whom the application is made that the case is one in which an appeal may properly be taken with some reasonable prospect of success.

The initial onus is on the respondent(s) to prove the appellant's poverty. Once the respondents prove the appellant's poverty, however, the evidentiary burden shifts to the appellant who must demonstrate a reasonable prospect of success.

The *Gusky* decision has been fairly consistently approved of over the intervening 90 years: see *ABC Color & Sound Ltd. et al. v. Royal Bank of Canada et al.*; *Royal Bank of Canada v. Lane* (1990), 76 Alta. L.R. (2d) 73 (Alta. C.A.); *Ellis v. Friedland*, 2001 ABCA 45; *Freyberg v.*

Fletcher Challenge Oil and Gas Inc., 2003 ABCA 208; and Moses v. Weninger, 2006 ABCA 52. It is true that some doubt was expressed by Mr. Justice Kerans in *Leathem v. Indelco Financial Corporation Ltd.* (1984), 31 Alta. L.R. (2d) 178 (Alta. C.A.), about Gusky's setting the threshold for access to the Alberta Court of Appeal too high. However, Mr. Justice Jean Côté, in *Calmont Leasing Ltd. v. 32262 B.C. Ltd.*, 2002 ABCA 290, expressed reservations about the correctness of the statements of law in Leathem. Certainly the vast majority of cases quote and then apply Gusky and its two-step, shifting burden of proof approach to Rule 524.

Nevertheless, it does appear that the burden on respondents has been lessened recently. Proof of the appellant's poverty does not seem to be the first step any longer, at least when cost orders from earlier proceedings between the same parties are outstanding. In the Freyberg case — a case involving an appellant who resided in England and had few assets in Alberta — Madam Justice Carole Conrad elaborated on the principles in Gusky, holding that:

- Security will not be ordered unless there are special circumstances;
- Special circumstances are required for good reason: appellate costs are a small portion of litigation costs and the appellant must pay the bulk of these costs in providing the appeal books;
- There must be some proof that costs may not be recovered or recovered only with great difficulty;
- Where there is a reasonable prospect of success on appeal, the application will fail.

This elaboration was approved of by Madam Justice Constance Hunt in Moses v. Weninger, a case involving an impecunious and persistent appellant. Madam Justice Hunt also held, as did the court in Ellis v. Friedland, that one of the factors that may show special circumstances is that a portion of the trial costs remain outstanding. However, as Madam Justice Conrad noted in Freyberg, care must be taken in considering the factor of unpaid trial costs. She noted there had been conflicting comments as to the impact of unpaid trial costs on an application for security for costs on an appeal and concluded, at paragraph 22:

> Security for costs is a remedy to secure that portion of a proceeding that has yet to take place. To hold otherwise is to change the rules after the fact. While unpaid trial costs may be some evidence of future anticipated difficulty in collecting costs, it is just a factor to consider and if there are sufficient assets to pay appellate costs alone, that should suffice. Difficulty of collection alone is not a special circumstance. An order for security upon appeal should not be used to indirectly result in securing trial costs. As Justice O'Leary held in Sorrel 1985 Ltd. Partnership v. Sorrel Resources Ltd. (1998), 219 A.R. 2 (C.A.) at para. 13, "[a]n appellate court cannot be seen as an agency to ensure collection of trial costs".

In *Opal v. White*, it appears that the mere fact of outstanding costs orders against the appellant was enough to shift the burden of proof under Rule 524 to the appellant. Then, because the burden shifted to someone who had already unsuccessfully argued their case several times, there was really no chance they could prove a reasonable prospect of success.

In *Opal v. White*, Mr. Justice Slatter noted that the appellant had sued the respondents four times over the same series of events. The history of the various court proceedings — all of them resolved in favour of the long-suffering respondents — is outlined in *Opal v. Boyd*, 2007 ABQB 373. The appellant had been admitted as a patient to the Alberta Hospital Edmonton on April 29,

2004 and he remained a patient there until his discharge on June 25, 2004. While at the Hospital, the Mental Health Review Panel conducted two review hearings, at the request of the appellant. The Panel denied both of his applications. The Panel was a defendant in all four actions and a respondent in this one. The other respondents were police officers, nurses and the Alberta Hospital Edmonton itself. The Chambers judge had ordered this action ? the appellant's fourth ? be struck and had declared the appellant to be a vexatious litigant. It was an appeal from this order that the respondents sought, and were granted, security of costs for.

The appellant admitted that some costs orders made against him in those previous proceedings were unpaid but he alleged they were outstanding due to his refusal to pay and not due to his inability to do so. The respondents apparently swore that the appellant was impecunious, but no details of his financial state are given in the judgment.

Mr. Justice Slatter held that an order for security for costs was appropriate in this case because the appellant's prospects of success were poor and because he was satisfied "the respondents may be delayed or impaired in their ability to collect costs." In mentioning the poor prospects for the appeal succeeding first, there is no indication of the Gusky two-step, shifting burden of proof approach. There is nothing in the short decision to indicate the respondents' evidence showed that the appellant was impecunious. There is nothing to indicate that the respondents proved anything more than the outstanding orders for costs. It seemed they only needed to prove they might not recover their costs, or at least not in a timely fashion.

This is very close to the type of situation that Madam Justice Conrad warned against in Freyberg v. Fletcher Challenge Oil and Gas Inc. The Court of Appeal has been very reluctant to be or to be seen as an agency for the collection of costs. Difficulty of collecting costs has not, by itself, amounted to the "special circumstances" required by Rule 524 prior to *Opal v. White*. While the test for awarding security of costs on appeals has been very onerous to date, with the Court of Appeal exercising its jurisdiction to order security for costs cautiously and sparingly, it does seem that the test has been relaxed considerably in *Opal v. White*.

Perhaps the Court of Appeal is becoming impatient with what appears to be an increasing number of self-represented litigants. Dealing with self-represented litigants in the superior courts can be extremely frustrating. Perhaps the problem is what appears to be an increasing number of vexatious litigants. The Chambers judge's declaration that the appellant in Opal v. White was a vexatious litigant might be the new crucial factor to be proven by respondents, rather than the appellant's poverty. Perhaps appeal costs should be easier to obtain against a personal litigant when the claim clearly has no merit. Still, if the interpretation of "special circumstances" is changing, it would be better to have the reasons for the change articulated at greater length and in greater detail than they are in *Opal v. White*.