Borden Ladner Gervais

Court of Appeal for Ontario Provides Guidance on the Dismissal of Frivolous Claims

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The Court of Appeal for Ontario recently provided further guidance on the application of r. 2.1 of the *Rules of Civil Procedure*, which deals with frivolous lawsuits. Rule 2.1 provides that the court may stay or dismiss a proceeding if it appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court. This can be done on the court's own initiative or, typically, upon request by a defendant. The new decision provides clarity around the procedure the court must follow when applying Rule 2.1 and signals there is flexibility in that procedure.

In the decision, the Court dismissed eight individual appeals in relation to the same appellant, Mr. Van Sluytman. Seven of these appeals arose out of multiple actions commenced by Mr. Van Sluytman against various defendants regarding alleged interactions with government agencies, law enforcement officials and health care professionals in various parts of Ontario. These actions were all dismissed by the Superior Court of Justice under r. 2.1.

In its decision, the Court of Appeal addressed the key issue of whether notice must be given to a plaintiff prior to dismissing a claim under r. 2.1.

Mr. Van Sluytman argued that the Superior Court of Justice was obliged to provide him with notice and an opportunity to respond prior to dismissing any action under r. 2.1. In this case, an opportunity to respond had been provided in some of the actions, but not all. The Court's reasons suggest that plaintiffs should generally be given notice and an opportunity to respond, following the procedure set out in r. 2.1.01(3), but that such notice is not always required. Rule 2.1 must be interpreted and applied robustly and the Court has some discretion in how it manages Rule 2.1 procedurally.

In this case, as notice had been provided in some of the actions, and Mr. Van Sluytman did not provide a relevant or helpful response in those cases, there was no need to provide notice in all cases. Ultimately, while notice should generally be given, not doing so will not be fatal on appeal if the outcome will not be affected — *i.e.* there is no prejudice or injustice.

As noted by the Court of Appeal in an earlier decision, *Khan v. Krylov* (2017 ONCA 625), the law concerning r. 2.1 is new and evolving. In our view, this evolution is moving in a positive direction following the Court's decision in Mr. Van Sluytman's appeals, as it reinforced that the decision to dismiss an action under r. 2.1 is discretionary and the rule must be applied robustly. While the threshold remains quite high — it is limited to the "clearest of cases" — it is not unattainable.

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