COURT OF APPEAL FOR ONTARIO

CITATION: Boyer v. Callidus Capital Corporation, 2024 ONCA 761
DATE: 20241011
DOCKET: COA-24-CV-0152

Brown J.A. (Case Management Judge)

BETWEEN

Craig Boyer

Plaintiff (Respondent)

and

Callidus Capital Corporation

Defendant (Appellant)

David Moore, for the appellant

Peter Griffin and Jonathan McDaniel, for the respondent

Heard: October 11, 2024, by conference call

ENDORSEMENT

First Issue: Length of Respondent's factum

[1] This appeal will be heard on Thursday, October 31, 2024.

[2] Last week the respondent, Craig Boyer, attempted to file his respondent's factum. Court registry staff refused to accept the proffered factum on the basis that its length exceeded that prescribed by the *Rules of Civil Procedure*, R.R.O. 1990,

Reg. 194. Counsel for the appellant, Callidus Capital Corporation, also wrote to the court opposing the filing of the proffered factum.

[3] Rule 61 regulates three key elements of appeal factums: their structure, their content, and their length.

[4] Rule 61.11 governs an appellant's factum and deals, in part, with those three elements:

> 61.11 (1) The appellant's factum shall meet the requirements of rule 4.06.1, be signed by the appellant's lawyer, or on the lawyer's behalf by someone the lawyer has specifically authorized, and consist of,
>
> (a) Part I, containing a statement identifying the appellant and the court or tribunal appealed from and stating the result in that court or tribunal;
>
> (b) Part II, containing a concise overview statement describing the nature of the case and of the issues;
>
> (c) Part III, containing a concise summary of the facts relevant to the issues on the appeal, with such reference to the transcript of evidence and the exhibits as is necessary;
>
> (d) Part IV, containing a statement of each issue raised, immediately followed by a concise argument with reference to the law and authorities relating to that issue;
>
> (d.1) Part V, containing a statement of the order that the appellate court will be asked to make, including any order for costs;
>
> (e) a certificate stating,
>
> …
>
> (iii) that the factum complies with subrule (3) or, if applicable, with an order referred to in that subrule,

(iv) the number of words contained in Parts I to V, and

(v) that the person signing the certificate is satisfied as to the authenticity of every authority listed in Schedule A;

(f) Schedule A, containing a list of the authorities referred to; and

(g) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws.

…

(3) Parts I to V shall not exceed 9,200 words and 40 pages, except with leave of the court.

(4) In counting words for the purposes of subclause (1) (e) (iv) and subrule (3), every word used in Parts I to V of the factum shall be counted regardless of where it is used, including, for greater certainty, words used in citations, footnotes, headings or charts, diagrams or other visual aids. [Emphasis added.]

[5] Rule 61.12 governs a respondent's factum. It also deals with those three elements. The rule provides, in part:

(3) The respondent's factum shall meet the requirements of rule 4.06.1, be signed by the respondent's lawyer, or on the lawyer's behalf by someone the lawyer has specifically authorized, and consist of,

(a) Part I, containing a concise overview statement describing the nature of the case and of the issues;

(b) Part II, containing a statement of the facts in the appellant's summary of relevant facts that the respondent accepts as correct and those facts with which the respondent disagrees, and a concise summary of any additional facts relied on, with such reference to the transcript of evidence and the exhibits as is necessary;

(c) Part III, containing the position of the respondent with respect to each issue raised by the appellant, immediately

followed by a concise argument with reference to the law and authorities relating to that issue;

(d) Part IV, containing a statement of any additional issues raised by the respondent, the statement of each issue to be followed by a concise argument with reference to the law and authorities relating to that issue;

(e) Part V, containing a statement of the order that the appellate court will be asked to make, including any order for costs;

(f) a certificate stating,

…

(iii) that the factum complies with subrule (5.1) or, if applicable, with an order referred to in that subrule,

(iv) the number of words contained in Parts I to V, and

(v) that the person signing the certificate is satisfied as to the authenticity of every authority listed in Schedule A;

(g) Schedule A, containing a list of the authorities referred to; and

(h) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws that are not included in Schedule B to the appellant's factum.

…

(5.1) Parts I to V shall not exceed 9,200 words and 40 pages, except with leave of the court.

(5.2) In counting words for the purposes of subclause (3) (f) (iv) and subrule (5.1), every word used in Parts I to V of the factum shall be counted regardless of where it is used, including, for greater certainty, words used in citations, footnotes, headings or charts, diagrams or other visual aids. [Emphasis added.]

[6] The factum tendered last week by the respondent infringed the rules governing a factum's structure because it added a series of schedules – C, D, and E – not recognized by the rules.

[7] The respondent's proffered factum infringed the rules about a factum's content because Schedules C, D, and E set out "additional facts relied on, with such reference to the transcript of evidence and the exhibits as is necessary". Those facts should have been set out in Part II of the factum: r. 61.12(3)(b).

[8] That said, that the respondent presented those facts in a table-format was perfectly acceptable. The rules do not micro-manage how factums should present facts. On the contrary, the rules enable great creativity by parties in presenting the facts they wish to draw attention to, whether by using: tables, such as the respondent desires; charts; photographs; survey sketches; maps; or even hyperlinks to media content, such as CCTV footage.

[9] The respondent's proffered factum also infringed the rules about a factum's length. By my count, Parts I - V contained approximately 7,300 words; Schedules C, D, and E contained an additional 8,100 words or so. Combined, those portions of the factum were almost 60 pages in length, far in excess of the length prescribed by the *Rules*.

[10] Given that the respondent's proffered factum did not comply with the *Rules*, registry staff quite properly refused to accept it. They should continue that course of action in future instances of attempts to file non-compliant factums.

[11] Part of the proffered factum dealt with an issue (Issue 4) regarding differences between the motion judge's reasons released to counsel and the version posted on CanLII. Inquiries of the motion judge during the week clarified that an administrative error resulted in the wrong version of the reasons being posted to CanLII. (I appreciate the motion judge's prompt response to counsel's inquiries on the issue.) As a result, the respondent intends to reduce the length of its factum by removing the one page of argument on Issue 4 and the three pages that make up Schedule E. That will reduce the overall word count by about 850 words.

[12] Even so, the respondent's factum will exceed the length prescribed by the *Rules*.

[13] I would not take issue with counsel who, for forensic or advocacy reasons, choose to place material prescribed for the main part of the factum – whether related to facts or law – into schedules at the end of a factum, even though such schedules are not contemplated by the *Rules*. There may be legitimate forensic reasons to do so, such as not interrupting the flow of written argument on an issue by inserting clunky tables or charts. It may well be that those tables and charts

would be of great use to a panel in understanding an appeal. If they are placed in appendices that follow the prescribed Schedules A and B, in my view that would amount merely to a minor breach of the *Rules* that could be overlooked. However – and this is a big "however" – the word count and length of those additional schedules must be taken into account in determining whether the factum complies with the limits set by r. 61.11(3), in the case of an appellant's factum, or r. 61.12(5.1), in the case of a respondent's factum. Put more simply, creating additional end-of-factum schedules that contain matters the *Rules* contemplate will be placed in the main body of the factum is not a permissible way to avoid the *Rules*' limits on factum length.

[14] Of course, circumstances may arise where the *Rules*' factum length limits could hamper a party from fairly presenting its appeal argument. Such cases do exist. In those circumstances, it is always open to a party to seek permission from the court to file a factum that exceeds the length prescribed by the *Rules*. The opposing party may consent if afforded the same opportunity with its factum. If the opposing party refuses, the matter can be brought before a judge very quickly in our court, and the judge can deal with the request in a fashion that ensures procedural fairness to all parties.

[15] But the parties must remember that as a general rule our court discourages parties from operating on the basis that a party can first act in a non-compliant fashion and then seek forgiveness. Due regard for the court's process, including

fairness to the opposing party, requires that parties should first ask for dispensation from the *Rules* before attempting to file non-compliant documents.

[16] Although in the present case the respondent essentially post-facto forgiveness, the practical realities of the proximity of the appeal hearing date lead me to grant the respondent leave to file a factum that exceeds the limits prescribed by the Rules, with Issue 4 and the associated Schedule E removed. That may not be the end of the matter. It is certainly open for the panel to consider whether there should be any cost consequences resulting from the respondent's initial non-compliance.

Second Issue: Reply factum

[17] In order to ensure the appellant can deal fairly with the issues raised at length in the respondent's factum, I grant the appellant leave to file a reply factum.

[18] To ensure a level playing field, I order that the appellant may file a reply factum of up to 7,000 words in length, roughly the difference between the word count of the factum the respondent now proposes to file and that of the factum filed by the appellant. Appellant's counsel advised that he did not expect his client would use the entire length permitted for this reply factum and I suspect that will turn out to be the case.

[19] The appellant shall serve and file its reply factum no later than 4:00 p.m. on Friday, October 25, 2024.

[20] Given that I will be leaving the court at the end of the year, might I venture a last comment about reply factums. I previously expressed the view that the *Rules* should be amended to permit appeal reply factums in our court as of right: *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 4. I understand that the Civil Rules Committee subsequently considered the matter and declined to amend the rules. I would hope that one result of the ongoing Civil Rules Review will be that reply factums are to be permitted, as of right, in appeals.

[21] I remain of the view that reply factums would enable better panel preparation, knowing in advance the appellant's position on all matters raised by the respondent, and therefore would result in a more focused use of valuable judicial oral hearing time. Also, judicial time is best used, in my respectful view, in hearing and disposing of appeals, not in managing appeals, although that is often necessary. Where opportunities exist to reduce the amount of judicial time devoted to appeal management – such as the time required to consider requests to file reply factums – the rules should be crafted to facilitate such a reduction.

"David Brown J.A."