

## When Less is More: ONCA Denies Request for Factum to Exceed 30 Pages

**Colleen Mackeigan  
September 2020**

In a recent decision of the Ontario Court of Appeal (“ONCA”) in [\*Oz Merchandising Inc. v. Canadian Professional Soccer League\*](#), 2020 ONCA 532, OZ Merchandising Inc. (“OZ”) was denied leave to submit a 500 page factum, or alternatively a 125 page factum in support of its appeal of the underlying trial decision.

### ***Facts***

OZ, the appellant and the plaintiff in the underlying action, brought a motion before the ONCA for leave to submit a 500 page factum to the Court in support of its position on appeal. 300 of those pages were appendices. At the time this motion was heard, OZ had decided to move the 300 pages of appendices to a compendium.

OZ argued that the issues on appeal are complex, the trial from which the appeal arises was long, there are numerous grounds of appeal to address and they intended to introduce fresh evidence in the factum. Accordingly, OZ took the position that it was not possible to draft a factum of less than approximately 125 pages.

The responding parties argued that a factum of even 60 pages would be agreeable, however, the proposed 125 page factum is excessively long and, if OZ was granted leave to exceed the page limit, then the responding parties must be granted the same.

### ***Disposition***

The ONCA dismissed the motion and required the moving party to revise its factum to the 30-page limit for facta.

## **Reasoning**

The Court held that the maximum length of facta to be submitted on appeal to the ONCA, 30 pages, is not a suggestion or starting point. The 30 page limit was mandated keeping in mind facta that would deal with complex cases and issues.

The purpose of the page limit is “to focus counsel on the issues and not have a factum that goes on, and in fact, wanders”.

Leave of the Court is required when a party wishes to exceed the 30 page limit and is only granted sparingly and in special circumstances.

The Court stated that the overarching question with respect to whether this is a case of special circumstance where leave should be granted, is whether the extension is required in the interests of procedural fairness and justice to advise the other side of the issues in dispute so it can properly prepare for the appeal and to assist the panel of the Court that hears the appeal to deal effectively with the issues.

The Court commented that the moving party’s factum included repetition as well as references to ancillary material that was not necessary to include. The Court held that the fact that the issues on appeal are complicated and the underlying trial was lengthy does not justify an extension of the page limit. Further, the fact that the moving party has submitted approximately 60 grounds of appeal in its notice of appeal did not serve as an exceptional circumstance that would justify extending beyond the 30 page limit.

The Court quoted the comments of Chariter J.A. (as he then was) in *R v. Henderson (W.E.)*, 2012 MBCA 9, on a motion for leave for an extended factum when 23 grounds of appeal were raised by the moving party, as follows:

Courts expect counsel to be of assistance in the appellate process. They expect counsel not to waste the court’s valuable resources by simply dumping the appeal on the court’s lap. Counsel are expected to have sufficient confidence to prioritize their arguments, to separate the wheat from the chaff and to provide fully developed arguments on what should be the real points for appellate review. Not only is this in the best interests of their clients, it is in the best interests in the administration of justice.

Therefore, counsel must be focused and concise when drafting facta.

***Take-away***

This decision serves as a reminder for counsel that the rules and practice directions surrounding material submitted to the court should be taken seriously and literally. As the ONCA stated, the practice direction regarding length of facta is “not a suggestion or a starting point”.

While this decision does not clarify what may qualify as “special circumstances” warranting leave to exceed the requisite page length for a factum, it certainly serves as indication that the bar is high with respect to what circumstances must be present before leave will be granted.

As the Court held in this case, the number of issues on appeal, the complexity of the proceedings and the inclusion of fresh evidence are not reason enough to exceed the page limit of facta set out in the relevant practice direction.

Keeping this in mind, counsel should consider in practical terms whether the extension is required in the interests of procedural fairness and justice to advise the other side of the issues in dispute so it can properly prepare for the appeal and to assist the panel of the court that hears the appeal to deal effectively with the issues.