



TAB 1



5 Rules for Writing a Great Factum

Carolyn Leach

Office of the Children's Lawyer, *Ministry of the Attorney General*

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Counsel, Office of the Children's Lawyer

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Why You Should Want to Write A Great Factum

A strong factum is one of the most important elements of motion and appellate advocacy. It is your first opportunity to convince the court of the reasonableness of your position and the inescapable logic of your argument. More importantly, it prepares both you and the court so that you can make the most of the oral hearing.

For you, the process of drafting your factum allows you to think through and organize your arguments well in advance of the hearing. As well, if your factum sets out the basics of your position and the key evidence, then you will not have to waste time reviewing this information in your oral submissions. Instead, you can use those precious minutes to highlight your best arguments, to fill out your position, and to answer questions from the court.

For the judge, the factum is a “heads up” of what it to come. It identifies the cases and the evidence that should be reviewed in advance. It provides a blueprint or road map that will help the judge follow your oral argument, and identify any areas of concern that need to be addressed in those submissions. It identifies the weaknesses in the position taken by your opponent, signaling the court to probe these areas. Finally, a strong factum will help a judge to provide coherent oral reasons, or lengthier written reasons when the court has reversed.

What Makes a Factum Great

A great factum has the following qualities:

It is clear and easy to read

Your factum should be easy to read and understand. Avoid long, convoluted sentences, complicated phrases, and jargon. You do not want a judge to have to read over your paragraphs several times to understand what you're trying to say.

It focuses on the central controlling issue

There may be all kinds of issues and arguments that you could possibly raise. Your factum should identify and address only the most significant ones. Often, factum writers are plagued with anxiety about leaving something out that may prove to be critical. This kind of thinking leads writers to include very lengthy and detailed recitals of the background facts, many of which are not relevant to the issue to be determined. It leads them to clutter up their factum with weak "alternative" arguments that have no chance of success. It leads them to squeeze in every rule or legislative provision that might possibly apply, or to include every case that has addressed the issue. This is like throwing everything at the wall and hoping that something sticks. It is not helpful. It bores and confuses your reader, and dilutes the impact of your most powerful facts and strongest arguments.

It simplifies the case

There is nothing more appealing than a factum that takes a complicated legal issue or set of facts, and distills it down to the basics.

It is fair

Don't misstate or overstate facts or legal principles. Concede points where appropriate. Be careful about your language - it should not be bland, but you should avoid hyperbole and too many superlatives. Naturally, you should avoid personal attacks on opposing counsel.

However, you should also be circumspect in your descriptions of the opposing party. Focus on

their problematic *behaviours*, as opposed to ascribing negative personality characteristics to them.

It is concise

Again, try to get past your anxieties about leaving out something crucial. Be selective about the facts and arguments you include, and be efficient in your use of language. It takes more time to write a short factum, but it is worth the investment.

It is interesting

The key is to write your factum in a way that makes your client's plight come alive for the court. There is an essential element of story-telling to factum-writing, just as there is for advocacy generally.

To write a great factum, follow these 5 rules:

RULE #1 Begin your factum with a persuasive overview that sets out your “road map”

- Just as the factum sets the stage for your oral argument, your overview sets the tone for the rest of your factum. It is a critically important section, and sometimes the most difficult one to write.
- In your overview, you should do much more than simply identify the parties and the order that is being appealed. The overview must provide the court with a clear sense of the nature of the case and your position on it.

- Before starting, you will need to identify the central issues that you intend to address. Then, rough out a plan for how you are going to lay all of this out in your factum. Now you are ready to take a first stab at your overview.
- You will want to accomplish the following in your overview:
 - (1) Lay out your “road map” to the factum. Provide the court with a precise statement of the central issues that will be addressed in the motion or appeal. Then, succinctly state your position on each issue, with reference to the facts and the legal test.

This is an example of providing context before details. It is important that you don't launch right into reciting the facts or making your arguments. It is much more effective to show the court what your framework will be before you start filling in all of the details. Otherwise, your central points will be lost in a sea of details and the court won't understand what all the details are supposed to add up to. You need to provide a context and structure for everything that is to follow, and you need to make your position very explicit.

- (2) Develop the theme/story of your motion or appeal. Your overview should begin to persuade your reader that your position on the issues is the right one. It should be interesting, and it should draw your reader in.

The first paragraph of the overview is the best place to start telling the “story” of your case. Compare these two examples:

“Standard” Opening Statement in the Overview

This is a motion brought by the Children’s Aid Society (“CAS”) seeking summary judgment for Crown wardship regarding C, a three year old child who was apprehended and placed in the temporary care and custody of the CAS on March 1, 2014.

“Better” Opening Statement in the Overview

On February 16, 2014, the Children’s Aid Society (“CAS”) apprehended three year old C after she was admitted to hospital, having suffered multiple and life threatening injuries while in the care of her parents. Shortly thereafter, on March 1, 2014, the Honourable Justice Brown ordered that C be placed in the temporary care and custody of the CAS, pending a child protection hearing. Now, over a year later, C remains in a specialized care facility. Despite repeated judicial recognition of the urgency of the case, no child protection trial has been held. The CAS seeks an order of Crown wardship on a summary judgment basis, which is supported by the OCL.

- *Note how the use of carefully selected details bring the narrative alive and highlight the themes for the argument to follow: serious injuries, highly vulnerable child, much delay*
- *There is also clear sense of the nature of the case – it’s a summary judgment motion – and position on the central issue.*
- *This introductory paragraph should be followed by a statement of the issues to be argued on the motion, and your position on each issue, with brief references to the facts and the legal test.*
- After you’ve finished writing the factum, go back and re-read your overview. Make sure that the rest of your factum is consistent with the theme that you’ve established in your overview, and that the actual structure of your factum mirrors the roadmap you set out in the overview. It can also be very effective if the body of your factum echoes key words or phrases found in the overview, and a final check of the overview will remind you to do this.

RULE #2 Write “point first”

- This is a fundamental principle of written advocacy that is regularly identified by Justice Laskin of the Ontario Court of Appeal, who has written and lectured extensively on this topic.
- “Point first” writing refers to beginning with your conclusion or point before providing all the details. Many factum writers make the mistake of setting out all of the details of their fact situation or their argument first, and then pulling all the details together with a concluding sentence. The problem with this approach is that it is difficult for the reader to make sense of all the details without a context to explain why they are important. Judges, like all readers, will better remember and absorb the details when they know the point of all of those details. In addition to being easier to read and understand, point first writing is a good way to make your writing punchy and persuasive.
- When writing the **FACTS** portion of your factum, use a point-first technique whenever possible so that the reader knows why a particular list of facts is important. Compare these two examples:

Point last (“Why are you telling me this?”) organization

In January 2010, the mother lived at 1 Main Street. In August 2010, she moved to her friend MJ’s apartment. Ten months later, she moved in with her parents. Ten months after that, she moved to a fourth home. Although the mother maintains she is no longer transient, she has not been able to maintain a stable residence since this child protection proceeding began.

- *Note that this is just a list of one fact after another, with no clues given to the reader as to the importance of each event until the end of the paragraph*

Point first organization

The mother states she is now longer transient. She has, however, continued a pattern of residential moves in the 26 months since this court proceeding began. She first moved from one home to MJ's home, where she lived while MJ was incarcerated. She then moved from that home to her parents' home. She has since moved from her parents' home to her current residence, totalling four different residences in just over two years.

- *Adding a point first contextual sentence makes this recitation of chronological facts very clear, easier to follow, and relates them back to the theory of your case.*

- When writing the **ISSUES AND THE LAW** section of your factum, begin with your conclusion or point and then elaborate on it by setting out your argument and by applying the law to the material facts:

From moving party's factum on summary judgment motion:

In the circumstances of this case, it is a foregone conclusion that the mother will be granted custody and that the father will be granted access in accordance with the children's wishes. The following facts overwhelmingly demonstrate that these orders are in the children's best interests:

- (a) the mother was the children's primary caregiver during the marriage;
- (b) the children have resided with the mother since the parties separated 4 years ago;
- (c) the children have had only sporadic access to their father since the separation, and have not seen him at all for nearly 18 months;
- (d) the children, now 15 and 17, have expressed a clear and consistent wish to remain in their mother's care. They are prepared to have brief visits with their father in the community, but do not wish to go the home that he shares with his new partner;
- (e) The father is aware of the children's views, but has taken the position that he will not see them unless they are prepared to come to his home.

RULE #3 Organize your facts around the issues in your case

- The facts section of your factum should not be a “generic” chronological sequence of events. It should be tailored to the specific issues raised on your motion/appeal.
- Be selective. The facts that you need to include will depend on the arguments that you need to make. Furthermore, for maximum effect, they should be presented in a way that fleshes out the themes that you are developing. As a result, after you finish writing your “Issues and the Law” section, you may find that you need to go back and re-organize/trim/augment your “Facts” section.
- Above all, use a point first technique whenever possible so that the reader knows why this particular list of facts is important.
- Often, it seems easiest to organize your facts chronologically. When the sequence of events is important, this is the best option. However, where possible, organize at least some of your facts by theme. Look at the questions that you will be addressing in your factum, identify some common themes, and then use these themes as your major headings in the Facts section.
 - For example, suppose that you are acting for a mother and that you have brought a motion to require that the father’s access visits to the children be supervised, due to concerns about his drug and alcohol abuse. You have identified the following questions:
 - What is the father’s history of substance abuse?
 - What has happened in the past when he abuses alcohol/drugs?
 - Is he abusing alcohol/drugs currently?
 - Has he been abusing alcohol/drugs during visits with the children?
 - Why is supervision the only option to keep the children safe?

- The facts should be organized around the themes that are reflected in these questions. Start with some basic background information (the parties, a brief history of the case, the incident that gave rise to this motion). Then organize the remaining facts around these themes:
 - Father has a long history of drug/alcohol abuse dating prior to the marriage (what he used, how frequently, how much, efforts to treat)
 - Although the father completed rehab last year, there are many signs that he may be using again. (recent DUI, disheveled appearance, concerns reported by mutual friends)
 - There have been a number of problems with access visits since the separation. (dad not showing up, or showing up very late, children complain that dad sleeping all the time and is grouchy, children returned unclean and unfed)
 - The incident in question (details about what happened)
 - There are no appropriate family members or friends available to supervise visits. (details re why various family members or friends are either not suitable to supervise or not willing to take this one)
 - A straight chronological exposition of all of these details would not be effective. Similarly, in more complex cases at an appeal stage, a witness by witness exposition of a case will not shed much light on the questions that need to be addressed. “Clumping” your facts by theme is a much clearer, more efficient way of presenting the information, as it makes it easy to see how the facts relate to the issues.
 - Of course, it is very important to use a point-first contextual sentence (as in the example “binding agreement” example above) to introduce each themed grouping of facts.
- Use persuasive, non-neutral headings to divide up your Facts section. Non-neutral headings explicitly state a position. They refocus attention on your central point or

conclusion. As well, they give the judge advance notice of what the next paragraph is going to be all about. This is a very punchy way of separating two consecutive paragraphs which deal with separate issues. Without the heading, the reader could be several sentences into the second paragraph before realizing that you've switched gears. A heading telegraphs that you've finished with one issue and are now moving on to the next. For example:

The father has a lengthy history of alcohol abuse

Access visits have been problematic from the outset

The mother has failed to address the children's special needs

- Use lists and charts to make complex facts more clear, or to distill a large amount of information into a more accessible format. For example, a chart would be a useful method of setting out the procedural history of the file (with columns for date/nature of appearance/presiding judge/order made).
- Use quotes from the evidence in a thoughtful way. Avoid lengthy recitations from the transcript. Unless the actual words used by the witness are significant or "say it all", paraphrasing is usually a better option.

RULE #4 Set out your legal argument in a focused and structured manner, making your position clear

- The “Issues and the Law” section should be much more than just a list of issues and a bland statement of the law. In this section, you must explicitly show how the law should be applied to the facts in your case.
- Tailor your factum depending on the role of your court:
 - For a motion: begin with the legal test that the court needs to apply, and then explicitly set out the findings that you are asking the court to make and the remedy that you are seeking.
 - For an appeal: identify the relevant standard of appellate review and explicitly show how it should be applied in your case
- Be selective about the arguments you make and the issues you raise.
 - For moving parties & appellants: Focus on the core issues and let weaker points go. They use up valuable space, and dilute the persuasive impact of your argument.
 - For respondents: you are not necessarily bound by the way in which the appellant/moving party has defined the issues. Facta often subdivide issues unnecessarily. Consider distilling the appellant’s 15 issues down to the core 3 issues. (“The Appellant has identified 15 grounds of appeals. The issues raised by the Appellant can be summarized as follows: (1)..., (2)...., (3)....”)
- Address each issue in a point first fashion. Thus, for each issue, begin with your submission and then elaborate on it by setting out your argument:
 - First state your position on how the issue should be determined

- Then, set out the legal test and principles that are applicable
 - Then explain how the law should be applied to the evidence in your case.

- Don't assume that the reader will remember relevant facts from the facts section. Key evidence should be repeated and woven in with the argument in this section.

- Make effective use of quotes from the case law or the evidence
 - Use short quotes only – no page long passages!
 - Only if the exact words matter, or if the judge/witness said it better than you could
 - Introduce the quote with a point-first contextual sentence. ("In *Beauty v. Beast*, Justice Brown described the test for the admission of fresh evidence in a family law appeal as follows:")
 - Paraphrasing is usually better – it allows you to distill the excerpt down to the basic point, and tailor it to your case

- Use lists to make your points. For example, if you are arguing that a trial judge's finding of facts was supported by the evidence, provide a list of that evidence in bullet points or sub-paragraphs.

- Use persuasive, non-neutral headings :

There are no triable issues in this case

The children's best interests require that they be placed in their father's interim care

The trial Judge clearly understood and applied the correct legal test

- Anticipate the court's concerns – try to anticipate what may trouble the court about your position, and then try to provide an effective answer
- Be candid with the court about the record and the law. Manage unfavourable facts rather than ignoring them. Never misstate the evidence, the law, or the applicable legal principles.
- Face up to the weaknesses in your argument and concede a point where appropriate – it is less damaging to concede a weak point than to have your opposing counsel use it against you

Sample Issues & the Law Section:

PART III – THE ISSUES & THE LAW

1. The father submits that there has been a material change in circumstances such that the children's access schedule needs to change in order to accommodate their wishes on an urgent basis.

- *This first paragraph is a concise statement of this party's position on this particular legal issue*

Material Change in Circumstances

2. A court may not make an order that varies an existing custody/access order unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child.

Children's Law Reform Act, R.S.O. 1990, c. C.12, section 29

3. A material change in circumstances is:

- i. a change in the condition, means, needs or circumstances of the child and /or the ability of the parents to meet the needs of the child
- ii. which materially affects the child; and
- iii. which was either not foreseen or could not have reasonably been contemplated by the judge who made it

Gordon v Goertz [1996] 2 SCR 27 at para 13, 134 DLR (4th) 321, McLachlin J.

- *A brief statement of the applicable legal test*

There has been a material change in circumstances relating to the children's access schedule

4. Since Justice Wright's Order was made on July 2, 2009, there have been numerous changes to the family situation that materially affect the children and that were not foreseeable at the time the Order was made:

- (a) The conflict between the parents has escalated significantly and is negatively affecting the children;
- (b) The parents' ability to communicate has deteriorated to the point that they are only able to exchange information by text message. The parents have been unable to negotiate any changes to the access schedule or to resolve any issues relating to the children.
- (c) The children took matters into their own hands in September 2010 and implemented a week on week off access schedule; and
- (d) The CCAS has become involved and has verified emotional harm to the children.

- *This paragraph explains how that legal test should be applied to the facts of this case. Note the use of a non-neutral heading to emphasize the point of argument that is being made*

5. Although any one of the above factors might not alone be sufficient to demonstrate a material change, in totality it is clear that the circumstances for the children have

changed, and that the access portion of the current Order is no longer sufficient to provide for the needs of the children.

Best Interest test

6. Once a material change in circumstances has been demonstrated, the court must turn to the best interests test. The *Children's Law Reform Act* set out the best interest test that must be applied when considering a variation to a custody or access order.

Children's Law Reform Act, RSO 1990, c C-12, s 29.

7. Once a material change in circumstances has been established, the court should consider the matter anew with regard to the present circumstances instead of defaulting to the existing arrangement.

Greenberg v Greenberg, [2009] OJ No 5377 (QL) at para 152, (OSCJ) McKinnon J.

- *Paragraph 5 – anticipates the court's concern and provides a response*
- *Paragraph 6 – moves to the next issue – the best interests test. Under this paragraph, it would also be effective to list those of the factors in section 24 of the CLRA that are relevant to this situation.*
- *Paragraph 7 – paraphrases (rather than quotes) case law that explains how best interests should be evaluated*

The children's current best interests require a immediate change to their access schedule.

8. For the following reasons, a week about time-sharing arrangement will meet the children's current needs better than the existing access schedule:

- a) The children are committed to their extra-curricular activities and wish to have both parents involved in these activities. The children have expressed that the existing access schedule does not allow for this. As a result, both parents have been attending at the children's activities (even when the children are not in their care) and this has resulted in unpleasant public disputes.
- b) The access schedule as it now stands is not working for the children during the school year. There are many transitions between the parents' homes each week. This is unduly disruptive to the children's schedule, and makes it difficult for them to complete homework assignments.
- c) A decision must be made for these boys on an urgent basis. They have expressed frustration with the legal process and wanted a decision to be made prior to the commencement of their school year. T. is exhibiting signs of turmoil over the court

issues and wants to attend Court to ensure the Judge hears him; N. has had suicidal thoughts ties to the stress he has experienced over his parent's continuing, escalating conflict.

- *Paragraph 8 – summary of the evidence that supports the remedy sought.*

RULE #5 Edit mercilessly

- Take a break before your final edit
- Use another set of eyes
- Trim the fat:
 - get rid of unnecessary details that are neither useful as context or relevant to the issues
 - Simplify your language: eliminate any wordy and unnecessary phrases. Replace legal jargon with plain language and short, simple words. Use strong, active verbs wherever possible.
- Check the logic of your organization – you may have to move things around. Go back and read over your overview to make sure that it matches the rest of your factum. Make sure that you have included all the facts that you need to support your arguments.
- Break up or shorten long paragraphs. Check to make sure that paragraphs begin with either topic sentences or the “point” of the paragraph. Make sure that your sentences vary in length and structure.
- Break up longer sections into sub-sections, with useful sub-headings. Overall, ensure that you have used enough sub-headings, and that they fit together to tell a coherent story. Read the draft once looking only at the sub-headings to see if they form a coherent outline of your argument.
- Replace long quotes from the evidence or the cases with paraphrased summaries.

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