

THE CHARTER CHALLENGE LE DÉFI DE LA CHARTE

Ontario Justice Education Network
Réseau ontarien d'éducation juridique

HOW TO PREPARE A FACTUM FOR THE COURT OF APPEAL

A factum is simply the written argument that is provided to the judges of the Court of Appeal before they listen to the lawyers argue the case. The judges read the facta of all of the parties, and read the cases or legislation referenced in each factum. When the argument of the case begins, the judges are very familiar with the issues. At the oral hearing, the factum is a guide for the judges and the lawyers to follow. It is the basis for the arguments made in court.

As a participant in the Charter Challenge, you will be preparing and submitting a factum. Despite looking more formal than a written essay, it is actually just a different way of organizing an argument. These notes explain each part of the factum and give you some suggestions for preparing yours.

Cover Page

There is a very specific form for the cover page. Yours has been provided, listing the case number and the parties. Be sure to insert your names, firm name, and indicate whether you are the appellant or the respondent.

Part I - Statement of the Case

This is a very brief summary of the main issues in the case to let the judge know what to expect.

Part II – Agreed Summary of the Facts

The facts relevant to the appeal are set out in this section. In a real case, the lawyers would make reference to the transcripts of the original trial, as well as anything that was admitted into evidence at trial (expert reports, police evidence etc.). When there is no disagreement as to the facts, the two parties will submit an agreed statement of facts. In the Charter Challenge case scenario, the *Agreed Summary of the Facts* has been agreed to and is already inserted into the factum template. You should not change the summary of facts.

Trial Decision

The decision being appealed is also summarized in this section. Your summary must not mislead the Court, but it can draw attention to certain aspects of each issue.

Part III – Grounds of Appeal

This is the main part of the factum where you set out your argument. Every paragraph in a factum is numbered. This makes it easier for the judge to follow your oral argument. It also makes it easier to refer to a particular section or quote.

Organize your argument into paragraphs, each numbered in order. A legal argument is much like any argumentative essay, with points supported by evidence. Each paragraph should contain one point or thought, organized logically to show the judges why the result (remedy) you request is reasonable and fair. Any references supporting that point should be mentioned immediately after the paragraph. Not every thought requires a supporting reference.

Legal Citation

Your argument can make reference to the facts of the case, to the trial decisions, to other cases decided on this issue, or to legislation. You can quote from any of these sources, as long as you reference the source.

This is an example of how you reference **legislation** in a factum. The following example references the *Charter*.

1. The defence claimed that the search was unreasonable and contrary to section 8 of the *Canadian Charter of Rights and Freedoms*. They submitted that the Court should not admit into evidence the drugs found in the locker of the young person, pursuant to section 24 of the *Charter*. To do so, they argued, would condone illegal acts by the police and would be unfair.

Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982 s 8, 24.
(the "*Charter*")

It is also possible to make reference to scientific studies or sociological research, however this is usually done only when the issue has not been previously decided by the courts.

The following formula can be used for properly citing **court cases** both in the body of your factum and in the appendix:

Case Name, Date, Neutral Citation (if applicable), Law Report Volume Number, Law Report Series, Page Number, Court

For example, the citation *R. v. Willis*, (1987) 37 C.C.C. (3d) 184 at 186-187 (B.C. County Ct.) tells you that the decision of the British Columbia County Court (B.C. County Ct.) in the case of *R. v. Willis* can be found in volume 37 of the 3rd series of the *Canadian Criminal Cases* (C.C.C.) at page 184. Since 1999, many Canadian courts use neutral citations in their judgements. A neutral citation includes the year of the decision, the abbreviation of the court, and an ordinal number. For example *Lovelace v. Ontario* has the neutral citation 2000 SCC 37 which means that this was the 37th case decided at the Supreme Court of Canada in 2000. Because the neutral citation indicates both the year of the decision and the court, you can omit these from the rest of the citation.

This following is an example of how a decision that supports your argument might be quoted and referenced. Direct quotes are indented and single-spaced:

[Defence counsel] submits that in this case the accused was at best a trespasser and that it is no crime to trespass upon another's property under [s.177] of the Criminal Code. That is true but the difference between prowling, as I perceive the meaning of that term to be, and trespassing, is the element of stealth. A prowler is a trespasser, but a trespasser is not necessarily a prowler.

R. v. Willis, (1987) 37 C.C.C. (3d) 184 at 186-187 (B.C. County Ct.)

At times, you might refer to another decision in your argument, but not quote from it directly. In this case you still reference the decision below the paragraph. Here is an example of how another decision might be relied on, but not quoted, in a factum. Like most paragraphs in a factum, it is double-spaced.

1. The Quebec Court of Appeal considered section 177 (then s.173) in the 1991 decision *R. v. Cloutier*. The central question at issue in *Cloutier* was whether the terms "loiters" and "prowls" were interchangeable, and specifically whether an individual charged with having *loitered* could be found guilty "if the evidence established that he did not loiter but that he *prowled*". The court held that the terms "loitering" and "prowling" are distinct and that the section essentially provides for two different offences. The court thus concluded that the wrong charge had been laid because this accused had "prowled rather than loitered".

R. v. Cloutier (1991), 66 C.C.C. (3d) 149 (Que. C.A.).

Part IV – Additional Issues

This section allows for one party to raise issues that were not listed in the original notice of appeal. In this case, neither party will raise additional issues.

Part V – Order Requested

In this section you state the remedy or result that you would like. Depending on which position you are taking you would state either:

1. It is respectfully requested that the appeal be [granted or dismissed] and the decision of the trial judge be [overturned or upheld].

After these five sections, the factum concludes with the names of the counsel and the date.

Appendix A – Authorities to be Cited

Following the body of the factum is an appendix that lists all of the references made in the factum in one spot. Use the citation formula outlined on pgs. 2-3 to reference all the cases and statues you referred to in your factum.

Using these notes, compile the arguments of all four members of your team into one factum to be submitted to the Court of Appeal.