

FACTUMS

A GUIDE FOR SELF-REPRESENTED LITIGANTS

2017

This document explains what to do to prepare and file a factum. It includes advice and best practices to help you. It applies equally to preparing an appellant's factum and a respondent's factum. An example factum is included for you to use as a model in creating your own factum. Further and more detailed instructions on how to complete a factum can be found in "Guidelines for the Civil Appeal Process" on the Court of Appeal website.

This is a GUIDE only. Anything in this Guide may be varied by a judge's directions in a particular case.

This Guide is based on Rules 53, 54 and 55 of the *Court of Appeal Rules*.

What is the purpose of a factum?

The appellant's factum contains your written argument about why you believe the judge made an error in your case. An appeal is not a re-hearing. You must argue that the trial court made an error of law or an obvious and material error of fact that affected the result of your case. You may also argue the trial judge made a clear error in applying the law to your facts. The appellant's factum should tell the Court what you want the Court to do with your case. For example, how do you want the trial judgment changed? Do you want a new trial?

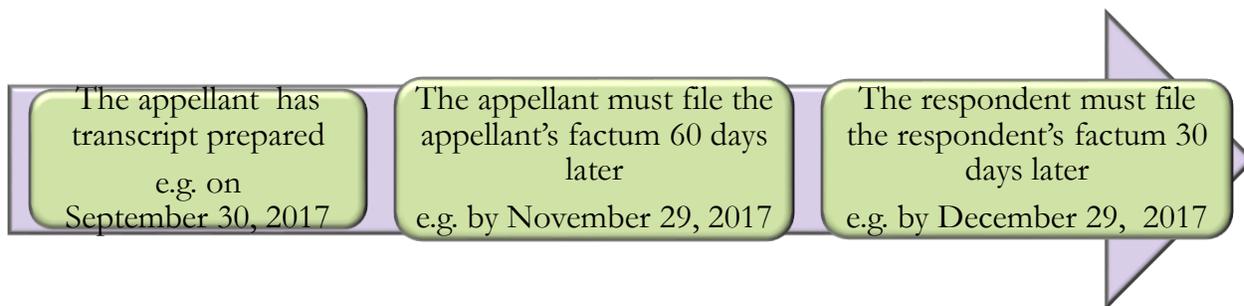
If you are a respondent, your respondent's factum should contain your written argument explaining why the trial judgment is correct or why it should not be changed. You should also tell the Court what you would like the outcome to be. Keep in mind that if you are asking for a result that is significantly different from the trial judgment, you may have to file a cross-appeal. You can consult the Court Registry staff about this. See page 21 for specific advice for writing a respondent's factum.

Your factum gives the judges a sense of what your appeal is about before you appear in Court. It is probably the most important document you will file in your appeal. You can be sure that each of the judges will have read all of the factums before the appeal hearing. Your factum may be used again when the judges decide your appeal. Be precise and to the point. Try to explain your arguments in simple terms.

How do I file a factum?

The appellant has 60 days to file the appellant's factum after the completion date marked on the transcript or, if no transcript is being prepared, within 120 days of the notice of appeal being filed. The factum, appeal book, and parts of the transcript of the evidence necessary for the determination of issues on appeal must be filed at the same time.

After being served with the appellant's factum, each respondent has 30 days to file the respondent's factum. These time limits can be increased with the Court's permission.



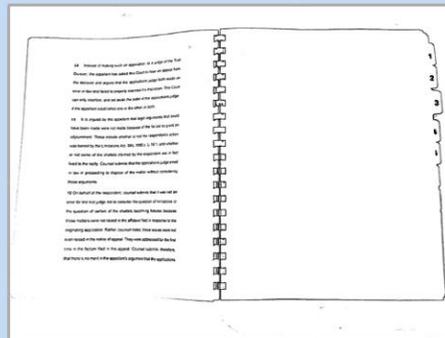
The Court requires four (4) copies of each factum, as well as an electronic copy (in a searchable format) provided by CD or flash drive and, as well, an extra printed copy must be delivered to the other party or parties to the appeal, or to the other party or parties' lawyer. Keep another copy for yourself.

What does a factum look like?

When preparing your factum, please remember that all factums should:

- Have line-spacing of one and a half
- Be easy to read and printed in font size 12
- Use normal margins of at least 1 inch on all sides of the page
- Use page numbers for every page except for the cover page. Pages must be numbered consecutively
- Use consecutive paragraph numbers
- Be printed on one side of each sheet of paper (single-sided)
- Be printed on 8.5x11 paper (letter-sized)
- Have printed pages appear on the left
 - Note that this is the opposite of most writing materials.

It will look like this:



- Use tabs to mark each Appendix and each document in Appendix A and Appendix B
- Be bound
 - The Court prefers plastic comb bindings
- Have buff or yellow cover pages for the appellant's factum
 - See an example cover page at page 4
- Have blue cover pages for the respondent's factum
 - See an example cover page at page 4

What goes into a factum?

All factums must include:

1) A cover page with the names of the parties, their contact information, and the docket number (see an example at page 4). Same format as appeal book cover

2) An index (see an example at page 5)

3) Five parts, each beginning on a new page:

PART I – Overview (see an example at page 6)

PART II – A concise statement of the facts (see an example at page 7)

PART III – A list of the issues (see an example at page 11)

PART IV – Argument (see an example at page 13)

PART V – A description of the order or relief being sought (see an example at page 17)

4) An appendix A (with an index) of copies of all authorities referred to in the Argument, including cases and legal articles (see an example at page 18)

5) An appendix B (with an index) of copies of relevant legislation or regulations (see an example at page 19)

The next pages are meant to assist you in creating your factum. They contain detailed descriptions of what goes into each part of your factum and present an example for you to follow based on the story of the Three Little Pigs.

(1) Cover Page

Your cover page should be printed on buff or yellow cardstock if you are the appellant and blue cardstock if you are the respondent. Please make sure to indicate the docket number, the full names of the appellant and the respondent, whose factum this is, the recipient's address, and your address. The format should be the same as the cover for the appeal book.

Example Cover Page

2017 01H 400

← The docket number

COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR

BETWEEN: LUPIN WOLFE

← Appellant's full name

APPELLANT*

AND: THE THREE LITTLE PIGS INC

← Respondent's full name

RESPONDENT*

APPELLANT'S FACTUM

← Or respondent's factum if you are the respondent

Lupin Wolfe
1 Windy Road
Codroy, NL
A2C 5T3
709-987-6543

← Your full name, address, and telephone number

TO:

The Three Little Pigs Inc.
2 Windy Road
Codroy, NL
A1B 2B2
709-123-4567

← The recipient's full name, address, and telephone number

* If there is more than one appellant or respondent, list the parties names and list "First Appellant", "Second Appellant", "First Respondent", "Second Respondent", etc., as needed. Join the parties using "AND".

(2) Index

Your index should appear after your cover page. It should indicate at what page each part of your factum appears.

Example Index

Index		←	Title
			Page
1.	Part I – Overview		6
2.	Part II – Statement of Facts		7
3.	Part III – List of the Issues		11
4.	Part IV – Argument		12
5.	Part V – Order or relief sought		17
6.	Appendix A – Authorities		TAB 1
7.	Appendix B – Legislation		TAB 4

↑

List the parts of your factum here

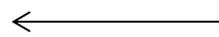
← List appropriate page numbers here

(3) Part I – Overview

Your overview should summarize in one or two paragraphs what the appeal is about, the nature of your argument and the desired result. (In this sample hypothetical case, Mr. Wolfe was ordered not to use his wind turbine until the nuisance claim by the Three Little Pigs Inc. is decided. Mr. Wolfe appeals. He wants to be able to use his wind turbine before the nuisance case is finished.)

Example Overview

Part I -Overview



Title

This appeal concerns an interlocutory injunction granted by Smith J. of the Supreme Court of Newfoundland and Labrador. Smith J. ordered the appellant, Mr. Lupin Wolfe, to cease operating a wind turbine on his land until the nuisance action started by the respondent, Three Little Pigs Inc., is finally determined. In ordering the injunction, Smith J. failed to consider the third factor in the legal test for granting an injunction, whether the balance of convenience favoured Mr. Wolfe. He also misunderstood the evidence of the respondent's expert, which supported the argument of Mr. Wolfe and not the Three Little Pigs Inc. Finally, he erred in mixed fact and law in finding that the respondent would suffer irreparable harm if the order was not made. Therefore, the order should be overturned and Mr. Lupin should have his costs in this Court and in the court below.

(4) Part II - Concise Statement of Facts

Your concise statement of facts should tell the Court what facts you will rely on for your appeal. The facts you rely on must have been entered at trial – you cannot introduce new facts here.* There is no page limit for your facts section but relying on precise facts that are relevant to your appeal will strengthen your argument. You should reference page numbers or paragraph numbers in the trial judge’s decision and/or in the transcript that support your position or that you want to challenge.

Remember, this is where the judges will first learn about your case so try to be thorough and clear. Imagine you are telling someone about your case and your appeal for the very first time. What should you tell them? How should you tell them?

Be clear and make the facts easy to understand. You can use headings if you would like. It often helps to use the parties’ names instead of “the appellant” and “the respondent”, though you can choose a short form of a party’s name if you wish.

Example Statement of Facts

Part II – Statement of Facts

Title

Background

You can use headings

1. This appeal concerns when an interlocutory injunction should be ordered. †
2. The appellant, Mr. Lupin Wolfe, is a strong supporter of wind energy. He dreamed of building a wind turbine during his retirement. So, in 2010, Mr. Wolfe began looking for a windy piece of land to retire and build his wind turbine.

Tell the Court what happened

See Transcript, pp. 305 to 306
See Appeal Book, TAB 8 – Trial decision, para. 8

Include references to the transcript and trial decision that support your statements

Consecutive paragraph numbers

* If you want to introduce new facts at the appeal, you must apply to the Court for permission first. Please contact the Registry for more information.

† An interlocutory injunction stops someone from doing something until a Court makes a final order.

3. In 2011, Mr. Wolfe discovered the Wreckhouse region in southwestern Newfoundland, touted as the second windiest place in the world. He determined that was where he would build his wind turbine. On May 1, 2012, Mr. Wolfe became the owner of a coastal property at 1 Windy Road, Codroy, Newfoundland and Labrador.

See Transcript, pp. 309 to 316
See Appeal Book, TAB 8 – Trial decision, para. 8

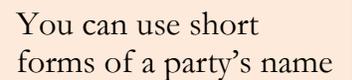
4. From May 2012 to July 2013, Mr. Wolfe worked on designing his own state-of-the-art wind turbine. He wanted to create enough energy to “go off the grid”.

See Transcript, p. 320
See Appeal Book, TAB 8 – Trial decision, para. 10

5. Over the fall of 2013, Mr. Wolfe assembled and installed his 5,000-kilowatt wind turbine one kilometer away from the coastline. The turbine has been operating since May 15, 2014 and Mr. Wolfe relies on it for his electricity. He sent around flyers offering to give power to his neighbours but so far no one has taken him up on his offer.

See Transcript, pp. 315 to 327
See Appeal Book, TAB 8 – Trial decision, paras. 9-12

You can use short forms of a party's name

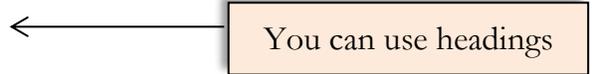


6. Since 1995, the respondent, the Three Little Pigs Inc. (“TLP”), has owned and operated a paper factory beside Mr. Wolfe’s property, located at 2 Windy Road, Codroy, Newfoundland and Labrador. The TLP’s factory is 9 km from Mr. Wolfe’s wind turbine.

7. In June 2016, the TLP sued Mr. Wolfe claiming that his wind turbine created a nuisance. The TLP alleged that Mr. Wolfe’s wind turbine created noise and a flicker that disturbed its staff and so interfered with its comfort and enjoyment in the land. The TLP

claimed the interference was unreasonable. It also alleged that Mr. Wolfe’s wind turbine caused structural damage to the TLP’s factory.

These Proceedings



8. On July 10, 2016, the TLP applied for an interlocutory injunction to stop Mr. Wolfe from operating his wind turbine until the Court decides the nuisance claim.

9. The application was heard on July 17, 2016 by Justice J. Smith. Mr. Peter Johnson, an engineer, testified for the TLP about the noise and flickering coming from Mr. Wolfe’s wind turbine. He told the Court about possible structural damage to the TLP’s factory because of Mr. Wolfe’s wind turbine.

See Transcript, pp. 10 to 304.

10. Mr. Johnson testified that the noise coming from the wind turbine at the TLP’s factory would be similar to the background noise in a typical house or office. He said standing at the TLP factory the wind turbine “would make less noise than a residential air conditioner”.

See Transcript, p. 224.

11. Mr. Johnson also admitted that the flickering effect coming from the blades of the wind turbine was greatly reduced by the special paint that Mr. Wolfe used to treat the blades. He testified that Mr. Wolfe used the best available treatment to reduce the flickering effect.

See Transcript, p. 225.

12. About possible structural damage, Mr. Johnson testified that if Mr. Wolfe’s wind turbine were to continue to operate, the TLP’s roof would likely blow off after about 30 years.

See Transcript, p. 237.

13. However, the trial judge said that “Mr. Johnson testified that the TLP’s factory will blow down without this injunction.”

See Appeal Book, TAB 8 – Trial decision, para. 16.

14. The trial judge granted the TLP’s interlocutory injunction and prohibited Mr. Wolfe from operating his wind turbine until the case is decided on July 18, 2018.

15. Mr. Wolfe applied for leave to appeal the interlocutory injunction on July 25, 2016. The Court of Appeal granted leave on July 29, 2016.‡

See Appeal Book, TAB 3 – *Wolfe v. The Three Little Pigs Inc.*, 2014 NLCA

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‡In some cases, you need permission, or leave, from the Court of Appeal before you can appeal a trial decision. Since the coming into force of the new Rules on October 17, 2016, this requirement has been largely eliminated, but is discussed here as the order here was made before that time. Please contact the Registry for more information regarding leave to appeal.

(5) Part III – List of the Issues

Here you list the issues that you are appealing and that you will address in your argument. The issues you raise should be errors of law, errors of fact, or errors of mixed fact and law that you believe the trial judge made. You will address each of the issues in your argument.

Focus on significant issues that would change how your case would have been decided. At the same time, don't save issues to raise at the hearing – deal with all of the points you want to make on your appeal in your factum. It can help to keep your issues narrow. It can be easy to lose track of broad issues.

If possible, tie each issue to the facts of your case and to the errors you think the trial judge made. State your issues clearly.

Example List of the Issues

Title

Part III – List of Issues

16. This appeal raises the following issues:

- 1 – What is the appropriate standard of review?
- 2 – Did the trial judge err in law by not considering the third part of the R.J.R. test for an interlocutory injunction?
- 3 – Did the trial judge err in fact by misapprehending the evidence about how Mr. Wolfe's wind turbine might impact the TLP's factory?
- 4 – Did the trial judge err in mixed fact and law by finding that the TLP will suffer irreparable harm if an interlocutory injunction is not ordered?

Each issue – except for standard of review – should state the error you think the trial judge made

Consecutive paragraph numbers

List your issues, you may also number them

If possible, link the issues to the facts of your case

(6) Part IV - Argument

This is where you tell the judges *how* you should win your appeal. For each of your issues, you should tell the Court about the relevant facts of your case, the law, and your conclusion about how the law applies to your case. Be persuasive. Say what your point is and give reasons for your position. This is where you persuade the judge about what went wrong in your case and how it should be fixed.

Don't worry about using legal jargon. It is much more important to make your points clearly. Be brief. Write simply. If you think it will help your reader, you can use headings and/or lists. Imagine that you are explaining your arguments to your neighbour. Your argument must be 40 pages or less, unless the Court authorizes you to file a longer argument. Make your argument only as long as necessary to make your points. You do not need to fill all 40 pages.

You can use legal authorities – cases, textbooks, articles, legislation, and regulations – to support your points. You can also quote from legal authorities. Try to use quotations only where they would be more convincing than your own words.

The Court of Appeal can't re-try your case. It is limited to reviewing your case for errors. The Court doesn't treat all errors the same. The Court of Appeal reviews errors of law when there is a straightforward error. It reviews errors of fact and errors of mixed fact and law when there is a "palpable and overriding error", that is, a material and obvious error that changed the result of the case. You should say what type of error the trial judge made in your case. This is called the standard of review.

Finish your argument with a conclusion that tells the Court why it should grant your relief.

Example Argument

Part IV – Argument

Title

First Issue – Standard of review

You can use headings

You can quote from legal authorities

17. The appropriate standard of review is:

On a pure question of law, the basic rule with respect to the review of a trial judge’s findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness ...

...

The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a “palpable and overriding error” ...

TAB 2 – *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, paras. 8 &

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18. Questions of mixed fact and law are reviewable for palpable and overriding errors.

TAB 2 – *Housen v. Nikolaisen*, para. 37

Second Issue – The trial judge erred in law by not considering the third part of the R.J.R. test for an interlocutory injunction

19. The trial judge acknowledged that the legal test for an interlocutory injunction is the R.J.R. test.

See Appeal Book, TAB 8 – Trial decision, para. 14

20. The trial judge cited the R.J.R. test but stated it has only two parts. The trial judge left out the third part of the test. He did not otherwise consider the harm that Mr. Wolfe would suffer from not being allowed to operate his wind turbine before the nuisance case is decided.

21. This is an error of law and the standard of review is correctness.

22. The three-part R.J.R. test is:

Tell the Court what happened (facts)

What is the law? (law)

Include references and tab numbers for your legal authorities

Consecutive paragraph numbers

- 1) Is there a serious issue to be tried?
- 2) Would the applicant suffer irreparable harm without the interlocutory injunction?
- 3) Which party would suffer greater harm if the interlocutory injunction were granted or refused?

You can use lists

TAB 3 – R.J.R. – *MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at p. 334

23. The third part of the test is meant to balance the harm suffered by the TLP if an interlocutory injunction were not granted with the harm suffered by Mr. Wolfe if an interlocutory injunction were granted.

Apply the law
(application)

24. Without his wind turbine, Mr. Wolfe has no power. He is not connected to a different power source. Mr. Johnson testified that there would be serious harm to the foundation of TLP's factory if Mr. Wolfe's wind turbine were to continue to operate for the next 30 years. There is no evidence that the TLP or its factory would be more harmed without an interlocutory injunction than Mr. Wolfe would be from not having power until this nuisance case is concluded. Balancing the potential harm means an interlocutory injunction should not be ordered.

Third Issue – The trial judge erred in fact by misapprehending the evidence about how Mr. Wolfe's wind turbine might impact the TLP's factory

25. The trial judge incorrectly described Mr. Johnson's evidence. The trial judge said that "Mr. Johnson testified that the TLP's factory will blow down without this injunction." In fact, Mr. Johnson testified that "if the wind turbine continues as it is, the TLP's factory will begin to crumble and, after about 30 years of continued damage, the roof will blow off."

Facts

See Appeal Book, TAB 8 – Trial decision, para. 16

Transcript, p. 237

26. This is an error of fact. This Court may reverse the trial judge’s findings where the trial judge has made a palpable and overriding error. ← Law

27. The trial judge misunderstood Mr. Johnson’s evidence. The trial judge overlooked Mr. Johnson’s testimony that suggested the TLP’s factory would suffer little to no harm in the short-term if Mr. Wolfe’s wind turbine continued to run. At no time did Mr. Johnson make the statement attributed to him or suggest that the TLP’s factory “will blow down” without an interlocutory injunction. This is a palpable and overriding error. ← Application

Fourth Issue – The trial judge erred in mixed fact and law that the TLP would suffer irreparable harm without an interlocutory injunction

28. The trial judge’s error of fact that the TLP’s factory would blow down without an interlocutory injunction influenced his decision that the TLP would suffer irreparable harm if he did not order an interlocutory injunction. The trial judge wrote that “the TLP will suffer irreparable harm if I do not make an order for this interlocutory injunction because the TLP’s factory will blow down before the case will be heard.” The trial judge made an error finding that the TLP would suffer irreparable harm without an interlocutory injunction. ← Facts

See Appeal Book, TAB 8 – Trial decision, para. 16

29. This is a question of mixed fact and law that this Court may review if the trial judge has made a palpable and overriding error. ← Law

30. In this case, the trial judge relied on an error of fact to decide that the TLP would suffer irreparable harm. This is a palpable and overriding error that changed the result of

the application. If the trial judge had properly considered and applied Mr. Johnson's evidence he would have found that the TLP would not suffer irreparable harm without an interlocutory injunction. ← Application

Conclusion

Conclusion – why should the Court give you relief?

31. The *R.J.R.* test was not met in this case. Mr. Wolfe admits that the first part of the test was met – there is a serious issue to be tried. But the second and third parts of *R.J.R.* test were not met. The TLP would not suffer irreparable harm without an interlocutory injunction and Mr. Wolfe would suffer more harm because of the interlocutory injunction than the TLP would suffer from it not being granted. It was an error for the trial judge to order the interlocutory injunction.

(7) Part V – Order or Relief Sought

This is where you ask the Court for the order you would like. For example, you may ask the Court to “allow the appeal” or to “dismiss the appeal”. You may ask the Court to substitute a new decision for the one made by the trial judge or you may ask for a new trial. You may request costs against the other party or parties from the proceedings at the Court of Appeal and/or from the Court or Courts below.

This is the last section in your factum before Appendix A and Appendix B. You will need to sign and date your factum here.

Example

Part V – Order or Relief Sought

Title

33. Mr. Wolfe respectfully requests that this Court allow the appeal. Mr. Wolfe asks this Court to set aside the trial decision and dismiss the TLP’s application for an interlocutory injunction. Mr. Wolfe also requests costs be awarded against the TLP in this Court and below as per Rule 58.

Explain the relief you would like, including costs

TAB 5 – Rule 58 of the *Court of Appeal Rules*

34. The appellant requests any further relief that this Court may allow.

All of which is respectfully submitted this 29th day of November, 2017.

Date please

Sign here please

Lupin Wolfe

1 Windy Road
Codroy, NL
A2C 5T3

If you had a lawyer, your lawyer would include his or her address and would sign here.

Consecutive paragraph numbers

(8) Appendix A – Index of Authorities

This Appendix includes copies of cases and other materials that you relied on in your argument. Your Appendix A should be found after the relief sought part of your factum. It begins with an Index of Authorities. Each of the materials in your Appendix A should be each tabbed separately. Your Index should be at the first tab. That is why there is no “Tab 1” listed in the example.

Example

Appendix A – Index of Authorities

← Title

Tab

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235

2

R.J.R. – MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311

3

↑
List the authorities you relied on
in your argument here

↑
List appropriate
tab numbers here

(9) Appendix B – Index of Legislation

Here you must include copies of all relevant portions of legislation or regulations that you relied on in your argument. Again your Appendix begins with an index. The index and each of the materials in your Appendix B should be each tabbed separately. Your index should appear at the first tab after the last authority in your Appendix A materials. That is why there is no “Tab 4” listed in the example.

Example

Appendix B – Index of Legislation

← Title

Tab

Rule 58 of the *Court of Appeal Rules*

5

↑
List the legislation and/or regulations you relied on here

↑
List appropriate tab numbers here

What about respondents?

Most of this document applies equally to appellants and respondents. However, a respondent's factum is a little different from an appellant's factum because it must respond to the issues raised by the appellant. If you're writing a respondent's factum, try to remember:

- Don't repeat the facts of the case that the appellant presented unless you think they are inadequate or you disagree with the appellant's version. You may, however, add additional facts if they are relevant to your argument.
- The respondent's factum should be a stand-alone document – someone should be able to read it without referring to the appellant's factum.
- You can follow the structure the appellant used in the appellant's factum but you don't have to.

As the respondent, you will normally want the Court of Appeal to dismiss the appeal and uphold the trial judge's decision. Often you will want to explain why the trial judge was right. You can rely on the trial judge's decision to make your points and, like the appellant, you can also use your own words and other legal authorities.