

# KEEPING CURRENT

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## Court rejects application record and affidavit sworn by associate for failing to comply with the Rules of Civil Procedure (*Sabbagh v. Waterford Grand Retirement Residence*)

By Isabel Yoo

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When preparing documents for court, the form, not only the substance, of the materials filed matters greatly. Failure to abide by the [Rules of Civil Procedure](#), which governs the conduct and procedure of civil matters in Ontario, may result in the court rejecting the materials, ordering costs and/or adjourning the hearing. The decision of *Sabbagh v. Waterford Grand Retirement Residence*, [2024 ONSC 3642](#) provides a good reminder of this.

In *Sabbagh*, the court released its fourth endorsement relating to an application for approval of a settlement for damages arising from a trip and fall. One of the applicants was a person under disability, thus court approval of the settlement was required. What should have been a straightforward process ended up requiring several endorsements and appearances before the court, addressing various deficiencies in the materials.

In the third endorsement, the court permitted the parties to deliver a supplementary application record,

including an amended notice of application, evidence upon which the applicant sought to rely, signed consent of the parties, and any additional documents. The third endorsement included a draft amended notice of application which set out six sub-paragraphs of relief sought and 13 sub-paragraphs of grounds in support of the application. The applicants were required to amend their notice of application according to this draft.

Following this endorsement, the parties filed two different versions of a supplementary application record. The first version omitted the affidavit of the lawyer for the applicants. The second version, filed a few weeks later, included the affidavit and simply updated the date of the supplementary application record. When filing the second record, the applicants did not explain why the date was changed. The court held that it is inappropriate to re-date a record. The court also held that it was not necessary to submit a second version of the record.

The applicants could have simply written to the court to identify the missing affidavit from the earlier version and attach only the missing document.

The supplementary application record itself did not comply with [Rule 38.09\(2\) of the Rules of Civil Procedure](#), which required the pages of the record to be consecutively numbered. The record included an amended notice of application that was *not* in the form of the draft amended notice of application included in the third endorsement. Instead of the six sub-paragraphs of relief sought and 13 sub-paragraphs of grounds in support of the application, the applicants listed 4 sub-paragraphs of relief sought and 8 sub-paragraphs of grounds in support of the application. The court held that the differences between the draft and the amended notice of application were significant. Unless and until the applicants took steps to properly amend its notice of application according to the draft provided, they could not file a supplementary application record.

The court also found problems with the affidavit filed. Under [Rule 7.08\(4\) of the Rules](#), a party seeking approval of a settlement must include an affidavit from the lawyer of the litigation guardian setting out their position with respect to the settlement. In their original application record, the applicants submitted an affidavit sworn by their lawyer of record. They did so without obtaining leave of the court to permit their lawyer to appear both on the application as a witness and as an advocate. The parties were told to seek leave if they wished to continue to rely on their lawyer's evidence. Instead, in their supplementary application record, the parties submitted an affidavit from an associate lawyer working at the same firm as their lawyer of record.

The court rejected this affidavit. First, the associate did not state that she was involved in the matter to the extent that her involvement provided her with knowledge and information

upon which to base the evidence in her affidavit. She did not mention having been provided with information by other individuals and her belief as to the truth of such information, as she was required to do by [Rule 39.01\(5\) of the Rules](#). She also failed to identify which portions of her evidence was based on information and belief.

The court also held that the time docketed by the associate to prepare the affidavit was insufficient. The affidavit addressed the injuries and medical history of the injured applicant, the history of the application including the subrogated claim on behalf of the Ministry of Health, the damages sought by the applicants, the proposed settlement, and the proposed management of the net settlement funds. Yet of the over 100 hours recorded on the dockets for the file, the associate had only recorded 3.1 hours of time. The court questioned whether it took the associate only 3.1 hours to (a) review the relevant portions of the file; (b) familiarize herself with the settlement, the court's endorsements, and the various issues to be addressed in the affidavit required for the purposes of the approval of the settlement; and (c) prepare a 10-page, 25-paragraph affidavit. The court held that this was "implausible".

Large portions of the associate's affidavit were copied from the affidavit sworn by the applicants' lawyer of record. The court again held that the applicants needed to seek leave of the court to have their lawyer appear both as their lawyer of record and provide an affidavit in support of their application. Otherwise, they would need to file a notice of change of lawyer and be represented by another lawyer from the office of their current lawyer of record.

Finally, the court remarked on the draft order and how it did not address the relief which the applicants required. The draft order did not comply with Form 59 and [Rule 4](#), regarding the format of orders and court documents respectively.

Under [Rule 4](#), all documents submitted in a proceeding must comply by specific standards including: typed or written legibly with double spaces and a sufficient margin; a 12-point font size; the requisite headings, dates, the names of the parties and counsel in the body of the document; and a proper back sheet. Form 59, the standard form for draft orders, requires that the party submitting the draft order to state the relief sought, the particulars necessary to understand the order, the particulars of the material filed, and the names of the parties.

The court held that before the parties attempt to file a draft order, they needed to review whether the draft complied with Form 59 and [Rule 4](#), and address the substantive and procedural relief requested and required. The court advised that all parties, not just the applicants, should do this to ensure the draft order was prepared properly.

In the result, the court ordered that the application be adjourned and that the applicants take all steps necessary to formally amend their notice of application and file a proper supplementary application record.

This decision highlights the importance of complying with the procedural requirements when submitting documents. Parties cannot circumvent the requirements outlined in the [Rules of Civil Procedure](#) and expect the court to accept the materials without issue. Failure to comply with these requirements will result in delays to the adjudication of the matter. While it did not occur in this matter, the court may also order costs against a party if it does not follow the rules.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [Isabel Yoo](#), at 416.865.6655 or [iyoo@grllp.com](mailto:iyoo@grllp.com).

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