

Habeas Corpus Applications for Immigration Detainees in Ontario: Procedural Considerations

Introduction

The right of a detainee to seek release by way of *habeas corpus* is guaranteed in Ontario by the common law, the *Charter*, and the *Habeas Corpus Act* [HCA]—and all three clearly confer upon the Superior Court of Justice the jurisdiction to hear such applications and to grant habeas relief.

However, in Ontario, *habeas corpus* applications are not clearly governed by any rules of procedure apart from those set out in the HCA. Procedural issues are particularly important in cases where a client wishes to proceed without delay or wishes to seek other forms of relief, in addition to release, under s. 24(1) of the *Charter* and especially where the client seeks *Charter* damages within the context of the *habeas* application.

Ultimately, in my opinion, it is best practice to bring a *habeas* application as a hybrid HCA and *Charter* application, without reliance on either the *Criminal Proceedings Rules* [CPR] or the *Rules of Civil Procedure* [RCP], though the latter are available and may in some cases provide a desirable procedural framework.

Applicable Legislation and Regulations

Habeas Corpus Act

The HCA provides that a writ of *habeas corpus* may be sought on application to a justice of the Superior Court on two days notice to the AG. The HCA requires the applicant to make out a *prima facie* case on the basis of affidavit evidence, and provides the Court with jurisdiction to compel the respondent(s) to produce its record relating to the detainee. The HCA also provides that the Court, on return of the writ, is to inquire into the truth of the contents of the applicant's allegation and stipulates the orders required by law depending on the Court's conclusions with respect to the legality of the detention.

The HCA imposes no further procedural requirements.

Criminal Proceedings Rules

The provision of the CPR (Rule 43) governing *habeas corpus* applies to “applications in criminal matters” and is thus inapplicable in the case of immigration *habeas* applications. While some counsel have relied on the CPR and invoked Rule 43 as the procedural vehicle for their applications for immigration detainees without objection from opposing counsel or the Court, the fact remains that the CPR are technically inoperative for immigration detainees. Moreover, there are procedural reasons for avoiding the CPR. There is case law from the Ontario Superior Court which has held that the Court, when sitting as “criminal court”, does not have jurisdiction to grant any form of civil remedy

and thus cannot award *Charter* damages.¹ While I would argue that these cases were wrongly decided and are inconsistent with more recent Supreme Court case law on s. 24(1) in general and on *Charter* damages in particular,² it is better practice to simply avoid reliance on the CPR as they are unnecessary and create obstacles if you wish to seek damages in addition to release.

Rules of Civil Procedure

The *Rules of Civil Procedure* [RCP] allow for applications to be brought where so authorized by statute (as is the case here)³ and where the relief sought is on the basis of the *Charter*.⁴ They RCP can therefore be relied upon for purposes of *habeas* applications for immigration detainees.

However, even though the *Rules* for applications are substantially less onerous than those for actions, they are inconsistent with the HCA in so far as they require lengthier notice⁵ and contain procedural requirements that are absent from the HCA that could undermine the right to a timely hearing of the *habeas* application.⁶ Given that detainees have a *Charter* right to seek *habeas* relief and to a timely remedy⁷, the strictures of the RCP cannot limit the right to timely *habeas* relief.

It is for this reason that I suggest that, especially in cases where counsel and client wish to be heard on an urgent basis, it preferable not to rely on the RCP and simply bring the application under the HCA. That said, if time permits and resources are available to undertake a more fulsome procedural route, the RCP are available and may be the preferred procedural route for some counsel and clients.

Additional Issues

Regardless of how counsel proceeds, the following additional factors should be considered when making procedural decisions.

Notice of Constitutional Question

If any form of relief under s. 24(1) of the *Charter* is sought, then s. 109 of the Courts of Justice Act [CJA] applies, and one must serve a Notice of Constitutional Question on the Federal and Provincial AGs. Because, under *Chaudhary*, the provincial Superior Court's discretion to hear *habeas* applications is to be exercised only where the issue is the constitutionality of the detention, it is arguably the case that immigration detainees are by

¹ *Reisher v. Ontario*, 2002 Carswell 1526, [2002] OJ No 1793 and *R v Robertson*, 2016 ONSC 2726.

² See *Vancouver (City) v. Ward*, [2010] 2 SCR 28, 2010 SCC 27; and *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 SCR 3, 2003 SCC 62 at para 45.

³ RCP, s. 14.05(2)

⁴ RCP, s. 14.05(3)(g.1)

⁵ RCP, s. 38.06(3)—requiring 10 days notice.

⁶ See, for example, ss. 38.09(1), 38.09.1, and 39.02(1).

⁷ See *Chaudhary v. Canada, (Public Safety and Emergency Preparedness)*, 2015 ONCA 700 at paras 103-104 and *Baroud v. Canada (Minister of Citizenship & Immigration)*, 22 O.R. (3d) 255; (1995) O.J. No. 43

definition seeking relief under s. 24(1) of the *Charter*, which requires an NCQ under s. 109 of the CJA. As such, it is best practice to serve an NCQ as required under the CJA when seeking habeas relief for immigration detainees. Filing the NCQ is not onerous, and its filing will preclude potential technical objections to the relief sought. As appears below, I would suggest that counsel for applicants file an NCQ in addition to their notice of application to forestall any procedural objections from the Respondents.

Under normal circumstances, the NCQ must be served at least 15 days prior to the matter being heard. However, if an urgent hearing is sought, the applicant can move for an abridgment of the notice period.⁸

Content of the Notice of Application

Below, I have provided a model notice of application and a model NCQ as required by s. 109 of the CJA. The models have been formulated such that, where filed with a detailed affidavit and a memorandum of argument, the procedural requirements of both the CPR and RCP will be satisfied in substance. In other words, the Respondent will have no valid grounds to raise procedural objections because they will not have been prejudiced by the manner of proceeding. Of course, each factual situation is unique and this is an evolving practice area. These templates are merely facultative.

⁸ CJA, s. 109(2.2.)

(General heading)

NOTICE OF APPLICATION

Application under the *Habeas Corpus Act*, R.S.O. 1990, ch.h.1, s. 1.7 and Sections 7, 9, 10(c) and 24(1) of the *Canadian Charter and Rights and Freedoms*

TAKE NOTICE that an application will be brought at 10:00 a.m. on the ____ day of _____, 2016, at Courtroom No. _____, at the Court House, ADDRESS, Ontario, for:

- a. a writ of *habeas corpus* with *certiorari* in aid, pursuant to the *Habeas Corpus Act* and sections 7, 9, 10(c), 12 and 24(1) of the *Charter of Rights and Freedoms*, 1982 [*Charter*] on the ground that the Applicant's continued detention is unlawful;
- b. an order for the release of documents in the possession of the Respondents' officials;
- c. an order that the Applicant be released from detention by this Court, subject to appropriate terms and conditions if deemed necessary; and
- d. any other just and appropriate remedy under s. 24(1) of the *Charter of Rights and Freedoms*, including release from detention.

THE GROUNDS FOR THIS APPLICATION ARE:

1. [STATEMENT OF FACT]
2. The Applicant claims that his/her continued detention is unlawful:
 - a. His/her continued detention is a breach of his rights under ss. 7, 9, and 12 of the *Charter* to continue his/her indefinite detention and he/she is therefore entitled to release under s. 10(c) of the *Charter*.
 - a. [SPECIFY THE REASONS FOR WHICH THE DETENTION CONTRAVENES THE RELEVANT SECTIONS OF THE CHARTER]
 - b. In particular, even if there are statutory grounds for detention, the continued detention of the Applicant on the facts of this case is contrary to ss. 7, 9, and

12 of the *Charter* and she/he is entitled to release pursuant to s. 10(c) and 24(1) of the *Charter*.

- c. **[[IF ALSO CONTESTING THE LEGALITY OF DETENTION UNDER THE PROVISIONS OF THE IRPA, THESE GROUNDS SHOULD BE PLEADED WITH SPECIFICITY]**
- d. [IF OTHER *CHARTER* REMEDIES ARE SOUGHT, SPECIFY THE GROUNDS ALLEGED IN SUPPORT OF SAID RELIEF]

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES ON THE FOLLOWING:

1. The affidavit of
2. The affidavit of
3. The affidavit of
4. The Applicant's Memorandum of Fact and Law dated _____
5. Such further and other material as counsel may advise and this Court permit.

THE RELIEF SOUGHT IS: **[THE FOLLOWING FORMS OF RELIEF ARE AMONG THOSE THAT MAY BE SOUGHT, DEPENDING ON THE FACTS OF A GIVEN CASE]**

1. The Applicant seeks a writ of *habeas corpus* with *certiorari* in aid to have the legality of his/her detention reviewed by this Court pursuant to ss. 7, 9, 10 and 12 of the *Charter of Rights and Freedoms*.
2. The Applicant seeks his/her release pursuant to ss. 10(c) and 24(1) of the *Charter* on the basis (a) that his/her continued detention is unlawful, (b) that the violation of his/her liberty and security of the person are contrary to the principles of fundamental justice and therefore contrary to s. 7 of the *Charter*, (c) that his/her detention is arbitrary and as such contravenes s. 9 of the *Charter*, and (d) that, on the facts of this case, continued detention amounts to cruel and unusual treatment and is therefore contrary to s. 12 of the *Charter*.
3. The Applicant also/in the alternative seeks ____ as a just and appropriate remedy pursuant to s. 24(1) of the *Charter*.
4. The Applicant seeks his costs on this application on a solicitor-client basis.

5. The Applicant seeks an order, pursuant to s. 109(2.2) of the *Courts of Justice Act*, abridging the time period required for purposes of a Notice of Constitutional question to [REDACTED] days.

6. Such further and other relief as counsel may advise and this Court permits.

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION by service at the office of his solicitors:

[COUNSEL'S NAME AND COORDINATES]

Dated at CITY, Ontario, this day ____ day of _____, 20??

→ COUNSEL SIGNATURE ←

[COUNSEL'S NAME AND COORDINATES]

Solicitors for the Applicant

TO: THE MINISTER OF JUSTICE and
THE MINISTER OF PUBLIC SAFETY & EMERGENCY
PREPAREDNESS
c/o Attorney General of Canada
[REDACTED]
Solicitor for the Federal Respondents

AND TO: THE ATTORNEY GENERAL OF ONTARIO
Constitutional Law Division
4th Floor, 720 Bay Street
Toronto, Ontario M5G-1K6
Fax: (416) 326-4015
Solicitor for the Provincial Respondent

AND TO: The Superintendent/Director
[REDACTED]

[REDACTED]: c/o Legal Branch
Minister of Community Safety & Correctional Services
501-655 Bay St
Toronto, Ontario
M7A 0A8
Tel: 416-314-1508
Fax: 416-314-3518
Solicitor for the Correctional Facility Respondent

IF FEDERAL FACILITY:

c/o Attorney General of Canada, on behalf of the Minister of Public
Safety and Emergency Preparedness

ADDRESS AND PHONE NUMBERS FOR DOJ

[General heading]

NOTICE OF CONSTITUTIONAL QUESTION
Courts of Justice Act, Form 4F

The Applicant intends to claim a remedy under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada and/or Ontario.

The question is to be argued on *(day)*, *(date)*, at *(time)*, at *(address of court house)*.

The following are the material facts giving rise to the constitutional question: **[REPEAT FACTS AS STATED IN NOTICE OF APPLICATION]**

The following is the legal basis for the constitutional question: **[REPEAT GROUNDS AS STATED IN NOTICE OF APPLICATION]**

The Applicant seeks the following relief: **[REPEAT RELIEF SOUGHT AS STATED IN NOTICE OF APPLICATION]**

(Date)

[Name, address and telephone number of lawyer or party]

TO The Attorney General of Ontario
Constitutional Law Branch
4th floor
720 Bay Street
Toronto, Ontario M5G 2K1
fax: (416) 326-4015

The Attorney General of Canada
ADDRESS AND PHONE NUMEBRS FOR DOJ

[Names and addresses of lawyers for all other parties and of all other parties acting in person]

ANNEX

Legislation, and Rules of Court

Habeas Corpus Act, R.S.O. 1990, CHAPTER H.1

In what cases *hab. corp. ad subjiciendum* may be awarded, and by whom

1. (1) Where a person, other than a person imprisoned for debt, or by process in any action, or by the judgment, conviction or order of the Ontario Court (General Division) or other court of record is confined or restrained of his or her liberty, a judge of the Ontario Court (General Division), upon complaint made by or on behalf of the person so confined or restrained, if it appears by affidavit that there is reasonable and probable ground for the complaint, shall award a writ of *habeas corpus ad subjiciendum* directed to the person in whose custody or power the person so confined or restrained is, returnable immediately before the judge so awarding the writ, or before any judge of the Ontario Court (General Division). R.S.O. 1990, c. H.1, s. 1 (1).

Notice of application for writ of *habeas corpus*

(2) Notice in writing of every application for a writ of *habeas corpus ad subjiciendum* shall be given to the Attorney General at least forty-eight hours before the making of the application and the Attorney General is entitled as of right to be heard either in person or by counsel upon the application. R.S.O. 1990, c. H.1, s. 1 (2).

Service of writ

2. The writ may be served either personally by actual delivery thereof to the person to whom it is directed or by leaving it with his or her employee or agent at the place where the person is so confined or restrained. R.S.O. 1990, c. H.1, s. 2.

[...]

Issue of writ of *certiorari*

5. Where a writ of *habeas corpus ad subjiciendum* is issued under the authority of this Act or otherwise, the court or judge may direct the issue of a writ of *certiorari* directed to the person by whom or by whose authority any person is confined or restrained of his or her liberty, or other person having his or her custody or control, requiring the person to certify and return to the court or judge as by the writ may be provided, all the evidence, depositions, conviction and all proceedings had or taken, touching or concerning such confinement or restraint of liberty. R.S.O. 1990, c. H.1, s. 5.

Procedure on return of writ

6. When upon a return to a writ of *habeas corpus ad subjiciendum* it is alleged that the person is detained by reason of a conviction or order other than a conviction or order of the Ontario Court (General Division) or other court of record, upon the return of the writ

of *certiorari*, it is the duty of the court or judge to examine and consider the proceedings had and taken to ascertain if the proceedings show that the person restrained has been convicted of any offence against the law and that there is any evidence to sustain the conviction, or that upon the evidence the person accused is guilty of an offence against the law and that the conviction, though irregular, ought to be amended or drawn so as to duly describe the offence of which the person accused is guilty, and in such cases to remand the person detained to custody but otherwise to order his or her discharge. R.S.O. 1990, c. H.1, s. 6.

Procedure for inquiring into the truth of the matters alleged in the return

7. Although the return to a writ of *habeas corpus ad subjiciendum* is good and sufficient in law, the court or judge before whom the writ is returnable may examine into the truth of the facts set forth in the return, by affidavit or other evidence, and may order and determine touching the discharging, bailing or remanding of the person. R.S.O. 1990, c. H.1, s. 7.

Courts of Justice Act, RSO 1990, c C.43

Notice of constitutional question

109. (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.
2. A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Failure to give notice

(2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

Form of notice

(2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

Time of notice

(2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise. 1994, c. 12, s. 42 (1).

Criminal Proceedings Rules for the Superior Court of Justice (Ontario) (SI/2012-7)

Rule 43 Extraordinary Remedies

Application of the Rule

43.01 This rule applies to applications **in criminal matters** by way of *certiorari*, *habeas corpus*, *mandamus*, *procedendo* and prohibition, including applications to quash a *subpoena*, warrant, conviction, inquisition or other order or determination and applications for discharge of a person in custody.

To Whom Application Made

43.02 Applications made under rule 43.01 shall be made to a judge of the court in the region, county or district in which the proceedings to which the application relates have been, are being or are to be taken.

Contents of Notice

General Rule

43.03 (1) A notice of application under this rule shall be in Form 1 and comply with rule 6.03 and shall also state the *subpoena*, warrant or other order or determination to which the application relates.

Rules of Civil Procedure, RRO 1990, Reg 194

APPLICATIONS — BY NOTICE OF APPLICATION

Notice of Application

14.05 (1) The originating process for the commencement of an application is a notice of application (Form 14E, 14E.1, 68A or 73A) or an application for a certificate of appointment of an estate trustee (Form 74.4, 74.5, 74.14, 74.15, 74.21, 74.24, 74.27 or 74.30). R.R.O. 1990, Reg. 194, r. 14.05 (1); O. Reg. 484/94, s. 5; O. Reg. 43/14, s. 5 (1).

Information for Court Use

(1.1) Form 14F (Information for court use) shall be filed together with a notice of application in Form 14E, 14E.1, 68A or 73A. O. Reg. 260/05, s. 2; O. Reg. 43/14, s. 5 (2).

Application under Statute

(2) A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes. R.R.O. 1990, Reg. 194, r. 14.05 (2); O. Reg. 292/99, s. 1 (2).

Application under Rules

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute. R.R.O. 1990, Reg. 194, r. 14.05 (3); O. Reg. 396/91, s. 3.

APPLICATION OF THE RULE

38.01 (1) Rules 38.02 to 38.12 apply to all proceedings commenced by a notice of

application under rule 14.05, subject to subrules (2) and (3). O. Reg. 43/14, s. 8 (1).

(2) Rules 38.02 and 38.09 do not apply to applications to the Divisional Court. R.R.O. 1990, Reg. 194, r. 38.01 (2).

(3) Rules 38.02 to 38.12 apply to an application made under subsection 140 (3) of the *Courts of Justice Act*, unless otherwise provided in rule 38.13 and subject to any modifications set out in that rule. O. Reg. 43/14, s. 8 (2).

APPLICATIONS — TO WHOM TO BE MADE

38.02 An application shall be made to a judge. R.R.O. 1990, Reg. 194, r. 38.02.

PLACE AND DATE OF HEARING

Place of Commencement

38.03 (1) The applicant shall, in the notice of application, name the place of commencement in accordance with rule 13.1.01. O. Reg. 438/08, s. 38.

Place of Hearing

(1.1) The application shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise. O. Reg. 438/08, s. 38.

Hearing date where no practice direction

(2) At any place where no practice direction concerning the scheduling of applications is in effect, an application may be set down for hearing on any day on which a judge is scheduled to hear applications. O. Reg. 770/92, s. 11.

Exception, lengthy hearing

(3) If a lawyer estimates that the hearing of the application will be more than two hours long, a hearing date shall be obtained from the registrar before the notice of application is served. O. Reg. 770/92, s. 11; O. Reg. 575/07, s. 3.

Urgent application

(3.1) An urgent application may be set down for hearing on any day on which a judge is scheduled to hear applications, even if a lawyer estimates that the hearing is likely to be more than two hours long. O. Reg. 770/92, s. 11; O. Reg. 575/07, s. 3.

Counter-Application

(4) If a notice of application has been served and the respondent wishes to make an application against the applicant, or against the applicant and another person, the respondent shall make the application at the same place and time to the same judge, unless the court orders otherwise. O. Reg. 14/04, s. 20 (3).

CONTENT OF NOTICE

38.04 Every notice of application (Form 14E, 14E.1, 68A, 73A, 74.44 or 75.5) shall state,
(a) the precise relief sought;
(b) the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and
(c) the documentary evidence to be used at the hearing of the application. R.R.O. 1990, Reg. 194, r. 38.04; O. Reg. 484/94, s. 8; O. Reg. 43/14, s. 9.

ISSUING OF NOTICE

38.05 A notice of application shall be issued as provided by rule 14.07 before it is served. R.R.O. 1990, Reg. 194, r. 38.05.

SERVICE OF NOTICE

Generally

38.06 (1) The notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions. R.R.O. 1990, Reg. 194, r. 38.06 (1).

Where Notice Ought to Have Been Served

(2) Where it appears to the judge hearing the application that the notice of application ought to have been served on a person who has not been served, the judge may,
(a) dismiss the application or dismiss it only against the person who was not served;
(b) adjourn the application and direct that the notice of application be served on the person; or
(c) direct that any judgment made on the application be served on the person. R.R.O. 1990, Reg. 194, r. 38.06 (2).

Minimum Notice Period

(3) The notice of application shall be served **at least ten days before the date of the hearing of the application**, except where the notice is served outside Ontario, in which case it shall be served at least twenty days before the hearing date. R.R.O. 1990, Reg. 194, r. 38.06 (3).

Filing Proof of Service

(4) The notice of application shall be filed with proof of service at least seven days before the hearing date in the court office where the application is to be heard. R.R.O. 1990, Reg. 194, r. 38.06 (4); O. Reg. 171/98, s. 15; O. Reg. 438/08, s. 39.

NOTICE OF APPEARANCE

38.07 (1) A respondent who has been served with a notice of application shall forthwith deliver a notice of appearance (Form 38A). R.R.O. 1990, Reg. 194, r. 38.07 (1).

(2) A respondent who has not delivered a notice of appearance is not entitled to,
(a) receive notice of any step in the application;
(b) receive any further document in the application, unless,
(i) the court orders otherwise, or
(ii) the document is an amended notice of application that changes the relief sought;
(c) file material, examine a witness or cross-examine on an affidavit on the application;

or

(d) be heard at the hearing of the application, except with leave of the presiding judge. O. Reg. 351/94, s. 3.

(3) Despite subrule (2), a party who is served with a notice of application outside Ontario may make a motion under subrule 17.06 (1) before delivering a notice of appearance and is entitled to be served with material responding to the motion. O. Reg. 351/94, s. 3.

Exception, applications to pass accounts

(4) Subrules (1) and (2) do not apply to a notice of application to pass accounts under Rule 74. O. Reg. 484/94, s. 9.

38.07.1 Revoked: O. Reg. 457/01, s. 8.

MATERIAL FOR USE ON APPLICATION

Application Record and Factum

38.09 (1) The applicant shall,

(a) serve an application record, together with a factum consisting of a concise argument stating the facts and law relied on by the applicant, at least seven days before the hearing, on every respondent who has served a notice of appearance; and

(b) file the application record and factum, with proof of service, at least seven days before the hearing, in the court office where the application is to be heard. R.R.O. 1990, Reg. 194, r. 38.09 (1); O. Reg. 171/98, s. 17 (1); O. Reg. 206/02, s. 9 (1); O. Reg. 438/08, s. 40 (1, 2).

(2) The applicant's application record shall contain, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of application;

(c) a copy of all affidavits and other material served by any party for use on the application;

(d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and

(e) a copy of any other material in the court file that is necessary for the hearing of the application. R.R.O. 1990, Reg. 194, r. 38.09 (2).

Respondent's Application Record and Factum

(3) The respondent shall serve on every other party, at least four days before the hearing, a factum consisting of a concise argument stating the facts and law relied on by the respondent. O. Reg. 171/98, s. 17 (2); O. Reg. 206/02, s. 9 (2); O. Reg. 14/04, s. 21; O. Reg. 438/08, s. 40 (3).

(3.1) If of the opinion that the application record is incomplete, the respondent may serve on every other party, at least four days before the hearing, a respondent's application record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and

(b) a copy of any material to be used by the respondent on the application and not included in the applicant's application record. O. Reg. 171/98, s. 17 (2); O. Reg. 438/08, s. 40 (4).

(3.2) The respondent's factum, and the respondent's application record, if any, shall be filed with proof of service in the court office where the application is to be heard, at least four days before the hearing. O. Reg. 171/98, s. 17 (2); O. Reg. 438/08, s. 40 (5).

Dispensing with Record and Factum

(4) A judge, before or at the hearing of the application, may dispense with compliance with this rule in whole or in part. R.R.O. 1990, Reg. 194, r. 38.09 (4).

Material May be Filed as Part of Record

(5) Any material served by a party for use on an application may be filed, together with proof of service, as part of the party's application record and need not be filed separately if the record is filed within the time prescribed for filing the notice or other material. R.R.O. 1990, Reg. 194, r. 38.09 (5).

Transcript of Evidence

(6) A party who intends to refer to a transcript of evidence at the hearing of an application shall file a copy of the transcript as provided by rule 34.18. R.R.O. 1990, Reg. 194, r. 38.09 (6).

Exceptions, applications in estate matters

(7) Subrules (1) to (6) do not apply to applications under Rule 74. O. Reg. 484/94, s. 10.

(8) Subrules (1) to (6) apply to applications under Rule 75, but neither the applicant nor the respondent is required to serve a factum. O. Reg. 484/94, s. 10.

CONFIRMATION OF APPLICATION

Confirmation of Application

38.09.1 (1) A party who makes an application on notice to another party shall,

(a) confer or attempt to confer with the other party;

(b) not later than 2 p.m. three days before the hearing date, give the registrar a confirmation of application (Form 38B) by,

(i) sending it by fax, or by e-mail if available in the court office, or

(ii) leaving it at the court office; and

(c) send a copy of the confirmation of application to the other party by fax or e-mail. O. Reg. 14/04, s. 22; O. Reg. 438/08, s. 41.

Effect of Failure to Confirm

(2) If no confirmation is given, the application shall not be heard, except by order of the court. O. Reg. 14/04, s. 22.

Duty to Update

(3) A party who has given a confirmation of application and later determines that the confirmation is no longer correct shall immediately,

(a) give the registrar a corrected confirmation of application (Form 38B), by,

(i) sending it by fax, or by e-mail if available in the court office, or

(ii) leaving it at the court office; and

(b) send a copy of the corrected confirmation of application to the other party by fax or e-mail. O. Reg. 14/04, s. 22.