Tribunals Ontario | **Tribunaux décisionnels Ontario**

Assessment Review Board | Commission de révision de l'évaluation foncière

ISSUE DATE: January 26, 2022 **FILE NO.:** DM 173544A
AMENDED MOTION DECISION ISSUED ON: February 25, 2022

Assessed Person(s):	See Schedule A attached
Appellant(s):	See Schedule A attached
Respondent(s):	Municipal Property Assessment Corporation Region 09
Respondent(s):	City of Toronto
Property Location(s):	See Schedule A attached
Municipality(ies):	City of Toronto
Roll Number(s):	See Schedule A attached
Appeal Number(s):	See Schedule A attached
Taxation Year(s):	2017, 2018, 2019, 2020 and 2021
Hearing Event No.:	750568
Legislative Authority:	Sections 32 and 40 of the *Assessment Act*, R.S.O. 1990, c. A.31

Parties	**Counsel**
EHL (21 Don Roadway) Holdings Inc., EHL (375 Eastern Ave) Holdings Inc., EHL (385 Eastern Ave) Holdings Inc.	Richard Minster
First Gulf Don Valley Limited, Don Valley Eastern IV Limited and Don Valley Eastern V Limited	Phillip Sanford
Municipal Property Assessment Corporation	Melissa Vanberkum
City of Toronto	Angus MacKay

REQUEST:	That the Board clarify a misstatement, ambiguity or other similar problem in *First Gulf Don Valley Limited v Municipal Property Assessment Corporation Region 09*, 2021 CanLII 44167 (ON ARB). That the Board order that documents previously ordered disclosed by the Board in *First Gulf Don Valley Limited v Municipal Property Assessment Corporation Region 09*, 2021 CanLII 44167 (ON ARB) be treated as confidential pursuant to Rule 89. That MPAC, the City of Toronto and those having access to the confidential documents sign undertakings of confidentiality and non-disclosure agreements
HEARD:	August 30, 2021 in writing
ADJUDICATOR(S):	Carly Stringer, Member

AMENDED MOTION DECISION

AMENDED MOTION DECISION

In accordance with Rule 99 of the Assessment Review Board's Rules of Practice and Procedure, effective April 1 2021, related to the correction of minor errors and in accordance with Rule 21.1 of the Statutory Powers and Procedure Act regarding the correction of errors, this Amended Motion Decision is issued to include the Ordered Disclosure delivery deadline in paragraph 48. The amendment has been underlined for ease of reference. There are no other changes in this Amended Motion Decision.

OVERVIEW

[1] First Gulf Don Valley Limited, Don Valley Eastern IV Limited and Don Valley Eastern V Limited (collectively, "First Gulf") and EHL (21 Don Roadway) Holdings Inc., EHL (375 Eastern Ave) Holdings Inc., EHL (385 Eastern Ave) Holdings Inc. (collectively "Cadillac Fairview") are appellants in the Subject Appeals (First Gulf and Cadillac Fairview together, the "Appellants").

[2] The Subject Appeals relate to the properties referenced at Schedule A hereto (the “East Harbour Lands” or “EHL”).

[3] The Municipal Property Assessment Corporation (“MPAC”) and the City of Toronto (the “City”) are respondents in the Subject Appeals.

[4] The Appellants state in their Notice of Motion that this is a motion requesting undertakings of confidentiality and non-disclosure agreements (“NDAs”) from MPAC and the City. In Reply, the Appellants make clear that their motion is brought pursuant to Rule 99 of the Assessment Review Board (the “Board”)’s *Rules of Practice and Procedure* (the “Rules”). The Appellants confirm they are requesting that the Board “clarify a misstatement, ambiguity or another similar problem” in *First Gulf Don Valley Limited v Municipal Property Assessment Corporation Region 09*, 2021 CanLII 44167 (ON ARB) (“*First Gulf*”). In particular, the Appellants confirm they are seeking a “clarifying” order that documents they have been ordered to disclose are confidential, and that MPAC and the City be required to execute undertakings of confidentiality and NDAs in relation to the Appellants’ disclosure.

[5] MPAC and the City oppose the Appellants’ motion on several grounds, and do not agree to sign NDAs.

Result

[6] For the reasons that follow, the Board:

a. denies the Appellants’ request pursuant to Rule 99 to clarify a misstatement, ambiguity or other similar problem in *First Gulf Don Valley Limited v Municipal Property Assessment Corporation Region 09*, 2021 CanLII 44167 (ON ARB).

b. denies the Appellants' request to declare that the documents ordered disclosed in *First Gulf Don Valley Limited v Municipal Property Assessment Corporation Region 09*, 2021 CanLII 44167 (ON ARB) are confidential pursuant to Rule 89; and

c. denies the Appellants' request that MPAC and the City and those having access to the confidential documents sign undertakings of confidentiality and non-disclosure agreements.

BACKGROUND

[7] To avoid confusion, the Board will refer to the within motion as the "NDA Motion." The Board will refer to the disclosure motion at issue in *First Gulf* as the "Disclosure Motion," and the Board's decision in *First Gulf* as the "Disclosure Decision." Finally, the Board notes that the parties refer to "undertakings of confidentiality" and NDAs both interchangeably and as separate documents within their submissions. To avoid confusion, the Board will use the term "NDAs" to represent both undertakings of confidentiality and NDAs.

[8] The Disclosure Decision summarizes the relevant background underlying the Subject Appeals at paragraphs 7 to 19.

[9] The Disclosure Decision requires disclosure to MPAC and the City as follows (the "Ordered Disclosure"):

a. First Gulf and Cadillac Fairview are required to disclose the Agreement of Purchase and Sale, the reporting memoranda, acquisition pro formas and the land transfer tax affidavits related to the September 15, 2019 sale of the EHL from First Gulf to Cadillac Fairview (the "2019 Sale");

b. First Gulf and Cadillac Fairview shall disclose any financial feasibility studies and development pro formas related to the EHL and the 2019 Sale prepared since 2014, to the extent these documents are within their possession, power or control;

c. First Gulf and Cadillac Fairview shall disclose all appraisals or opinions of value of the EHL, prepared for any purpose since 2014, save and except those prepared in connection with the Subject Appeals, to the extent these documents are within their possession, power or control;

d. First Gulf shall disclose all reports, memos, emails and briefing notes prepared for the purpose of meetings, discussions and inquiries with Provincial government members, representatives or staff related to the provincial approvals of Official Plan Amendment 411 and Site and Area Specific Policy 426 and changes to the Building Code in connection with the Lower Don Lands and the Unilever Precinct Secondary Plan and site-specific zoning for the EHL, to the extent these documents are within its possession, power or control;

e. Cadillac Fairview shall disclose reports of any kind that were prepared by Cadillac Fairview for the consideration or approval of its Board of Directors and/or senior managerial and executive staff and/or the Board of Directors of Ontario Teachers' Pension Plan in connection with the 2019 Sale, to the extent these documents are within its possession, power or control; and

f. First Gulf and Cadillac Fairview shall disclose all information, documents and data provided to and reviewed by experts Mathias Hintikka and John Glen relating to the Subject Appeals.

[10] The Appellants have now brought this NDA Motion, asking the Board to "clarify"

the Disclosure Decision.

[11] The Appellants focus on paragraph 38(c) of the Disclosure Decision, in particular the Board's use of the words "usual protections":

> The Board does not accept First Gulf and Cadillac Fairview's submission that they would be unduly prejudiced by having to disclose confidential or commercially sensitive information. It is relevant that First Gulf and Cadillac Fairview's confidentiality obligations are towards each other. They are both parties to this proceeding. This is not a case where the parties are being asked to disclose the documents of a non-party. Further, neither First Gulf nor Cadillac Fairview have provided sufficient evidence to explain why the usual protections, including implied undertakings, would be insufficient. If the information is particularly sensitive, Rule 89 permits the parties to request an order that any document filed with the Board be treated as confidential, be sealed, and not form part of the public record. In this context, the Board finds that neither Cadillac Fairview nor First Gulf has established that the alleged prejudice outweighs the importance of disclosing relevant documents (emphasis added).

[12] The Appellants have been clear that they are not challenging the Disclosure Decision with respect to the Board's order for disclosure; rather, they are seeking clarification of the words "usual protections." The Appellants submit that the Disclosure Decision contemplates that the "usual protections" would apply in advance of disclosure, and that the "usual protections" include NDAs from MPAC and the City. In this respect, the Appellants have requested the Board provide the following Order to "clarify" the Disclosure Decision:

a. declaring that, pursuant to Rule 89, the Ordered Disclosure is confidential; and,

b. requiring that MPAC, the City and those having access to the Ordered Disclosure sign NDAs.

ANALYSIS

Issue 1 – Does the Disclosure Decision disclose a misstatement, ambiguity or another similar problem that requires clarification from the Board pursuant to Rule 99?

Applicable Law

[13] Rule 99 of the Rules provides as follows:

> **Correcting Minor Errors**
>
> 99. The Board may, on its own initiative or at the request of a party, correct a technical or typographical error, error in calculation or similar minor error made in a decision or order, and may clarify a misstatement, ambiguity or another similar problem.

Submissions

[14] The Appellants submit that both Cadillac Fairview and First Gulf made it clear on the Disclosure Motion that if disclosure were ordered by the Board, the information is highly sensitive, of a financial nature, and would require NDAs. The Appellants submit that the Board heard from all parties to the Disclosure Motion, including MPAC, that the "usual protections" should be provided before disclosure, and the "usual protections" include undertakings of confidentiality and NDAs. The Appellants submit that in the Disclosure Decision, the Board anticipated the parties would cooperate and put in place NDAs as part of the "usual protections" afforded on a disclosure motion. The Appellants provided an affidavit from Mathias Hintikka, a proposed expert in the Subject Appeals, and cited various cases to support their position that an NDA is part of the "usual protections" granted on a disclosure motion. The Appellants submit that the Board should clarify the Disclosure Decision, explicitly declaring the Ordered Disclosure to be confidential and requiring that MPAC and the City execute NDAs before the Appellants disclose.

[15] MPAC submits that First Gulf specifically asked that the Board order an NDA on the Disclosure Motion, and MPAC responded to that request at paragraphs 21 to 25 of its Reply. MPAC submits the Board considered the submissions of all parties and was alive to the request for an NDA. MPAC submits that the Board did not order that MPAC provide an executed NDA as a condition to the production of the Ordered Disclosure. MPAC submits the Appellants are rearguing the merits of the Disclosure Decision, which

is precluded by Rule 101.

[16] The City adopts MPAC's submissions.

Findings on Issue 1

[17] The Board has not been provided with case law outlining the appropriate analysis to undertake on a Rule 99 motion.

[18] Rule 99 permits "correcting minor errors," and provides quite simply that the Board may clarify a misstatement, ambiguity or another similar problem.

[19] The Appellants have not satisfied the Board that the Disclosure Decision contains a "misstatement, ambiguity or other similar problem" that is appropriate for clarification or correction pursuant to Rule 99, for the following reasons:

a. The Appellants provided some measure of evidence and submissions on the Disclosure Motion that some of the disclosure requested by MPAC was commercially sensitive and considered by them to be confidential, and that they would ask anyone having access to the information to enter into a confidentiality agreement. However, the Appellants did not explicitly ask the Board to make its order conditional on, or subject to, MPAC and the City executing NDAs, nor did the Appellants explicitly ask the Board to declare that the Ordered Disclosure is confidential pursuant to Rule 89 or otherwise. The Appellants did not provide the Board with a proposed form of NDA, or otherwise propose that there be NDAs with the form to be negotiated between counsel for the parties. MPAC did not, in fact, take a position on being required to sign an NDA – at paragraphs 21 to 25 of its Reply, MPAC simply argued that Rule 45 requires disclosure without exception for confidential material; that there is no evidence the Appellants

would be unduly prejudiced by an order for disclosure; and that the Appellants have not provided evidence that the “usual confidentiality protections” are inadequate in this case.

b. The Board is not satisfied that the totality of the Board’s language in paragraph 38(c) of the Disclosure Decision, including the reference to the “usual protections” and the Board’s statement that the parties may later seek an order pursuant to Rule 89, conveys that the Board assumed the parties would execute NDAs in advance of disclosure.

c. In any event, the Board does not accept the Appellants’ argument that the “usual protections” necessarily includes NDAs. The Appellants have cited numerous cases to show that it is common for the Board to order disclosure conditional on NDAs. It is, indeed, a common order – where the parties consent. In almost all cases referenced or provided to the Board by the Appellants on the within motion, the parties explicitly consented to executing NDAs and undertakings of confidentiality. In the handful of cases where it was unclear whether the parties explicitly consented to signing NDAs, it does not appear that NDAs were in dispute between the parties, or that either party objected to having to sign an NDA before receiving disclosure. In this context, the Board is not prepared to interpret the “usual protections” referenced in paragraph 38(c) of the Disclosure Decision as indication that the Board expected or intended MPAC and the City to execute NDAs prior to disclosure.

d. The Board recently considered the issue of NDAs in *Simon Halton Hills Holding Inc. v Municipal Property Assessment Corporation, Region 15,* 2021 CanLII 74737 (ON ARB) (“*Simon Halton Hills*”). In that case, the appellants objected to providing MPAC with disclosure without MPAC executing an NDA. The Board in *Simon Halton Hills* addressed very similar arguments to those raised by the Appellants on this NDA Motion, and

determined that NDAs are not “standard” in the sense of being prescribed as a matter of course by the Board: see *Simon Halton Hills, supra* at paragraph 22.

[20] Overall, the Board is not satisfied that the Disclosure Decision discloses a misstatement, ambiguity or another similar problem that requires clarification pursuant to Rule 99.

[21] Although the Appellants have been abundantly clear that they intend this to be a Rule 99 motion and are simply looking for “clarification” from the Board, the bulk of their submissions make the case for why they want MPAC and the City to sign NDAs prior to the Appellants handing over the Ordered Disclosure. In the Board’s view, the substance of this NDA Motion is not that the Board clarify a misstatement or another similar problem in the Decision. Rather, this is, in substance, a standalone motion regarding whether the Board ought to declare the Ordered Disclosure confidential pursuant to Rule 89, and order that the Ordered Disclosure be conditional on MPAC and the City executing NDAs.

[22] Accordingly, the Board will consider these issues in turn.

Issue 2 – Should the Board order that the Ordered Disclosure is confidential pursuant to Rule 89?

Applicable Law

[23] With respect to confidentiality, Rule 89 provides as follows:

Confidential Documents

89. The Board, on its own motion, or on the application of:
(a) a party to a proceeding to which the adjudicative record relates; or
(b) a person who would be affected by the disclosure of information contained in the adjudicative record or a portion of the adjudicative record,

> may order that the information be treated as confidential and that it not be disclosed to the public, if the Board determines that:
>
> i. matters involving public security may be disclosed; or
>
> ii. intimate financial or personal matters contained in the record are of such nature that the public interest or the interest of a person served by avoiding disclosure outweighs the desirability of adhering to the principle that the record be available to the public.

Submissions

[24] The Appellants submit that they consider the Ordered Disclosure to be confidential and that the Ordered Disclosure contains sensitive information of intimate financial and personal matters. They submit that public disclosure would be harmful to them and place them at a competitive disadvantage. The Appellants submit that the prejudice to them outweighs the principle that the record be available to the public. The Appellants ask the Board to order the Ordered Disclosure to be confidential in accordance with Rule 89.

[25] MPAC submits that the Appellants have not included a detailed description of the Ordered Disclosure, and accordingly the Appellants are asking the Board to rely on their assertion that the records are commercially and personally sensitive. MPAC submits that none of the Appellants' supporting affidavits describe information of a personal nature. MPAC submits that the Appellants do not claim that the Ordered Disclosure pertains to third parties, and any intimate financial information or commercially sensitivity relates to their interests and not those of non-parties to the litigation. MPAC submits that the Appellants have "entered the fray" in appealing their assessments and should be expected to abide by the Board's Rules for full disclosure without limitation.

[26] MPAC further submits that disclosure to it is not the same as disclosure to the public or a competitor such that release of information to MPAC will not prejudice the Appellants' competitive market positions. MPAC submits the Appellants have led no evidence of any previous improper release of confidential material by MPAC and that the Board should not grant the relief based on the Appellants' speculation that there will

be misfeasance by MPAC. MPAC submits the Appellants have not explained why release to MPAC may harm them on future business deals or otherwise prejudices their ability to negotiate commercial tenancies. Their concerns are too broad and general to override the public good of the “open court” process.

[27] MPAC also submits that requesting a Rule 89 order at this stage is premature, and the Appellants’ request is imprecise.

[28] The City agrees with MPAC that the Disclosure Decision is not an order to release the disclosure to the public, and the City is not the public. The City submits that there are overlapping statutory protections to address the Appellants’ concerns that a confidentiality order and NDAs are required to prevent the Ordered Disclosure from being released into the public domain.

Findings on Issue 2

[29] The Board finds that the Appellants’ request for a Rule 89 order is premature. The Board is not currently in possession of any material in advance of a hearing. The Board denies the request at this time. The parties may bring a Rule 89 motion at such time as they seek to file materials for the hearing with the Board.

Issue 3 – Should the Board require the execution of NDAs as a condition of the Ordered Disclosure?

[30] The Board notes that while the Appellants’ have explicitly stated at paragraph 36 of their Notice of Motion that their request is for an Order that MPAC and the City sign undertakings and NDAs, in other sections of their materials they frame their request as the Board ordering that the Ordered Disclosure be subject to confidentiality undertakings and NDAs. This is a small but important difference. The Board is not aware of any authority it has to compel MPAC and the City to sign NDAs. At most, the Board may

elect to grant certain orders (like disclosure) conditional on the satisfaction of certain terms (like executing NDAs).

[31] Accordingly, the Board will address the issue of whether it should require the execution of NDAs as a condition of MPAC and the City receiving the Ordered Disclosure.

Submissions

[32] The Appellants submit that it is Board practice to order disclosure "conditional" on "mutually agreeable undertakings of confidentiality and non-disclosure." As referenced above in Issue 1, the Appellants rely on an affidavit from Mathias Hintikka that oulines his experience working on appeals where, he asserts, the Board has ordered disclosure conditional on mutually agreeable undertakings of confidentiality and non-disclosure. Mr. Hintikka's affidavit confirms that, in his experience, he "cannot recall MPAC or municipalities objecting to executing NDAs." The Appellants specifically reference *Toyota Motor Manufacturing Canada Inc. v Municipal Property Assessment Corporation,* 2020 CanLII 77938 (ON ARB) ("*Toyota*") and *Conix Canada Inc v Municipal Property Assessment Corporation, Region 22,* 2021 CanLII 14793 (ON ARB) ("*Conix*") as instances where the Board has ordered disclosure conditional on the execution of NDAs. The Appellants cite *449194 Ontario Limited v Municipal Property Assessment Corporation, Region 03*, 2019 CanLII 59492 (ON ARB) as a case where the Board ordered disclosure and "took it upon itself to order the parties enter into an NDA". Finally, the Appellants submit that a thorough review of Board decisions released on CanLII since 2015 shows that the Board has not refused a request to order an NDA on a disclosure motion, and the Board has often ordered them on its own initiative. The Appellants provided the Board with a link to the search results from CanLII that they reviewed, being a list of 27 cases.

[33] The Appellants further submit that NDAs are required in this case. The Appellants

submit that the Ordered Disclosure includes confidential information, including highly sensitive information relating to intimate financial and personal matters.

[34] Finally, the Appellants submit that the harm that could result from the public disclosure of the Ordered Disclosure prejudices the Appellants. The Appellants outlined the nature of the alleged prejudice in relation to some of the Ordered Disclosure, including loss of competitive advantage. Affidavits in support of the Appellants' motion state that the information contained in the Ordered Disclosure could reveal the Appellants' internal thinking and strategy, prejudicing future business dealings. The Appellants submit that this prejudice outweighs the public interest in disclosure and any potential prejudice to MPAC and the City of Toronto. The Appellants submit that MPAC and the City are not hindered by their signing NDAs.

[35] MPAC's submissions under Issue 2, in relation to the nature of the Ordered Disclosure, also apply to Issue 3. MPAC further submits that the Appellants have not set out how an NDA offers better protection against intentional or inadvertent disclosure than either s. 53 of the *Assessment Act* or the deemed undertaking rule. MPAC submits there are adequate protections in place that would dissuade MPAC from disclosing confidential information. MPAC submits that NDAs are the exception and not the rule, and in all of the cases cited by the Appellants, the NDAs were ordered on consent, or the facts are not the same as this NDA Motion. In this case, MPAC does not consent to an NDA and the Appellants are refusing production without it. Finally, MPAC submits that where a party objects to an NDA and there is no agreement to provide one or agree to its terms, such as is the case here, the Board lacks the authority to compel the provision or execution of an NDA by any party.

[36] The City relies on MPAC's submissions and agrees with MPAC that the Board does not have jurisdiction over private contracts and cannot determine an acceptable form of NDA to be entered into by the parties. The City submits that there are overlapping protections that address the Appellants' concerns and work to prevent the City from releasing the Ordered Disclosure with consequences for disclosure, including:

the deemed undertaking rule; Section 53 of the *Assessment Act*; the Public Service By-law of the Toronto Municipal Code which obliges an employee not to disclose confidential information; Section V of the Code of Conduct that prohibits councilors from disclosing confidential information; and the *Law Society Act* and the Law Society of Ontario's *Rules of Professional Conduct* that apply to counsel for the City and any employees or members of City Council who are lawyers.

Findings on Issue 3

[37] The Decision does not stipulate that the Ordered Disclosure is conditional on MPAC and/or the City executing NDAs. As outlined above under Issue 1, the Board is not satisfied that NDAs were squarely before the Board in the Disclosure Motion. Accordingly, the Board may consider whether an NDA is required as a condition of MPAC and the City receiving the Ordered Disclosure.

[38] The parties have not provided the Board with case law outlining the analysis the Board should take in determining whether to order disclosure conditional on NDAs. The Board has not been provided with a single case where a party objected to an NDA and the Board nevertheless ordered it as a condition of disclosure. As noted in paragraph 19(c) above, in almost every case referenced by the Appellants where the Board ordered disclosure conditional on NDAs, the parties had consented. Accordingly, those cases have limited application, other than providing support for principle that the Board may make disclosure conditional on NDAs where the parties consent.

[39] As noted in paragraph 19(c) above, the Board recently considered NDAs in the context of pre-hearing disclosure in *Simon Halton Hills*, *supra*. The Board in *Simon Halton Hills* confirmed several helpful principles that apply here:

a. Rule 45, the Rule that governs disclosure obligations, does not provide exceptions to disclosure for confidential or sensitive information: "If the

information is relevant, it must be disclosed, subject to the two exceptions contained within Rule 45, and proportionality": see *Simon Halton Hills, supra* at paragraph 21.

b. NDAs are not "standard" in the sense of being prescribed by the Board as a matter of course: see *Simon Halton Hills, supra* at paragraph 22.

c. NDAs may be appropriate in certain circumstances, and the Board has previously ordered disclosure conditional on NDAs where the parties consent: see *Simon Halton Hills, supra* at paragraph 22.

[40] The Board in *Simon Halton Hills* did not provide an exhaustive list of the factors to consider in determining whether to order an NDA condition to pre-hearing disclosure where the parties do not consent. Based on the Board's analysis in that case, some of the circumstances to consider may include:

a. the nature of the information at issue;

b. the scope of existing confidentiality protections (such as s. 53 of the *Assessment Act* and the implied undertaking rule);

c. evidence of the risk of, and harm associated with, disclosure; and

d. the balancing of prejudice between the parties.

[41] Again, this is a non-exhaustive list. Ultimately, whether an NDA is required as a condition of pre-hearing disclosure will be determined on a case by case basis.

[42] The Board denies the Appellants' request, considering the totality of the circumstances of this NDA Motion:

a. *Nature of the information at issue:* The evidence is clear that the Ordered Disclosure belongs to the Appellants and is not information belonging to third parties who are not otherwise involved in the Subject Appeals. The evidence is also clear that at least some of the Ordered Disclosure – for instance, pro formas and reports for the Board of Directors – is considered by the Appellants to be commercially sensitive and/or confidential in nature. Overall, the Board is satisfied that, with the exception of the land transfer tax affidavit which is a public document, the information at issue: i) belongs to the Appellants; and ii) is generally commercially sensitive in nature and/or considered confidential by the Appellants.

b. *Scope of existing confidentiality protections:* Both s. 53 of the *Assessment Act* and the implied undertaking rule take effect on disclosure, and both bind MPAC and the City. Section 53 of the Act imposes penalties including significant fines and/or imprisonment in the event of a breach. The Board does not accept the Appellants submission that the maximum penalties are “relatively minor” compared to the potential harms to the Appellants, particularly given that the potential harms outlined in the Appellants’ materials are largely speculative in nature and have not been quantified. The Appellants suggest that some of the Ordered Disclosure would fall outside of the categories of information protected by s. 53. Since the Appellants have not provided a detailed list of the documents at issue that are included in the Ordered Disclosure, the Board cannot make a finding regarding whether and to what degree the contents of the Ordered Disclosure is outside the scope of s. 53 protection, although there is some evidence that certain items (i.e., pro formas) may contain information that is outside the scope.

   The implied undertaking rule also offers significant protection, and the Board does not accept the Appellants’ submission that the implied undertaking rule has “concerning limitations” that must be addressed with

an NDA in the circumstances of this case. First Gulf has stated that the implied undertaking rule may be far less meaningful or unknown to a non-lawyer, such that an NDA also provides the "educational" benefit to an individual who may not have a full understanding of the obligations owed by MPAC and the City. If there is in fact such a lack of understanding of the implied undertaking rule, which the Board does not necessarily accept as a matter of fact, the Board does not accept that only an NDA can address it. Surely if the parties were to explain the implied undertaking of confidentiality to anyone with access to the Ordered Disclosure, this "educational" purpose could equally be achieved.

c. *Evidence of the risk of, and harm associated with, disclosure:* The Appellants have not provided evidence respecting the risks associated with disclosure to MPAC and the City, for instance, evidence of previous intentional or unintentional release of confidential material by MPAC or a municipality. However, as the Appellants have noted, the mischief that confidentiality protections are meant to prevent is the release, intentional or otherwise, of information to non-parties or the public. In that regard, the Appellants have provided some general evidence of the potential harm that could befall them in the event MPAC or the City, intentionally or otherwise, publicly released information contained within the Ordered Disclosure. Specifically, the Appellants state there is a potential loss of competitive advantage; risk of being underbid by competitors; and risk of real estate speculation driving up prices of acquisitions. The Appellants did not otherwise quantify this potential harm.

d. *Balance of prejudice*: Neither MPAC nor the City has provided evidence supporting prejudice to them if required to execute an NDA as a condition of disclosure. The Appellants have provided evidence of the possible prejudice they say they would suffer in the event the Ordered Disclosure were disclosed publicly, although the nature of that prejudice is largely

speculative, such as the potential to drive up real estate prices for their acquisitions. The evidence of prejudice to the Appellants is, at best, unclear. As discussed above, the Board has found that the application of s. 53 of the Act and the implied undertaking rule sufficiently address whatever prejudice there may be.

CONCLUSION

[43] The Board finds the Appellants have not satisfied it that a Rule 99 order is appropriate in this case, nor have the Appellants satisfied the Board that, at this time, it should order the Ordered Disclosure to be confidential pursuant to Rule 89. The latter finding does not preclude the Appellants from seeking a Rule 89 order at such time as materials are filed with the Board.

[44] Considering the totality of the circumstances including that neither MPAC nor the City consent to executing NDAs; that the information at issue is not third party information; that existing confidentiality protections apply; that the risks of, and harm associated with, disclosure are largely speculative and unquantified; and the balance of prejudice does not favour one side over the other, the Board finds the Appellants have not satisfied it that the Ordered Disclosure should be made conditional upon MPAC and the City executing an NDA.

[45] That said, the Board is prepared to address the Appellants' concern that non-lawyers with access to the Ordered Disclosure may not be aware of their obligations pursuant to the implied undertaking rule, by requiring that both counsel for MPAC and counsel for the City explain the implied undertaking of confidentiality to those people working on their behalf with access to the Ordered Disclosure, including without limitation, experts and consultants retained on behalf of MPAC and the City in relation to the Subject Appeals.

ORDER

[46] The Board denies the Appellants' motion in its entirety.

[47] The Board orders that counsel for MPAC and counsel for the City explain the implied undertaking of confidentiality to those people working their behalf with access to the Ordered Disclosure, including without limitation experts and consultants retained on behalf of MPAC and the City in relation to the Subject Appeals.

[48] The Schedule of Events has been delayed by this motion. In view of the exceptional circumstances caused by this delay and pursuant to Rule 40, the Board orders the Schedule of Events will resume with the following amendments:

a. First Gulf and Cadillac Fairview must deliver the Ordered Disclosure by March 25, 2022;

b. The due date for MPAC and the City to serve their expert reports is extended to 90 days after First Gulf and Cadillac Fairview have delivered the Ordered Disclosure.

c. All other subsequent due dates are to be adjusted accordingly.

[49] The Board's Case Coordinator will advise the parties of the specific due dates, which may be adjusted slightly due to constraints imposed on the Board's electronic case management system.

"Carly Stringer"

CARLY STRINGER
MEMBER

SCHEDULE A

Appeal No	Roll Number	Property Address	Region	Assessed Person	Unit	Year
3242733	1904 071 230 00810 0000	21 to 0 DON VALLEY PKY	09	FIRST GULF DON VALLEY		2017
3260053	1904 071 230 00810 0000	21 to 0 DON VALLEY PKY	09	FIRST GULF DON VALLEY		2017
3265498	1904 071 230 00810 0000	21 to 0 DON VALLEY PKY	09	FIRST GULF DON VALLEY		2017
3294153	1904 071 230 00810 0000	21 to 0 DON VALLEY PKY	09	FIRST GULF DON VALLEY		2018
3354217	1904 071 230 00810 0000	21 to 0 DON VALLEY PKY	09	FIRST GULF DON VALLEY		2019
3398513	1904 071 230 00810 0000	21 to 0 DON VALLEY PKY	09	EHL (21 DON ROADWAY) H		2020
3442607	1904 071 230 00810 0000	21 to 0 DON VALLEY PKY	09	EHL (21 DON ROADWAY) H		2021
3368769	1904 071 230 00911 0000	385 to 0 EASTERN AVE	09	DON VALLEY EASTERN V L		2019
3401095	1904 071 230 00911 0000	385 to 0 EASTERN AVE	09	EHL (385 EASTERN AVE)		2020
3433260	1904 071 230 00911 0000	385 to 0 EASTERN AVE	09	EHL (385 EASTERN AVE)		2021
3441514	1904 071 230 00911 0000	385 to 0 EASTERN AVE	09	EHL (385 EASTERN AVE)		2021
3368770	1904 071 230 00922 0000	0 to 0 EASTERN AVE	09	DON VALLEY EASTERN IV		2019
3401096	1904 071 230 00922 0000	0 to 0 EASTERN AVE	09	EHL (375 EASTERN AVE)		2020
3433259	1904 071 230 00922 0000	0 to 0 EASTERN AVE	09	EHL (375 EASTERN AVE)		2021
3441244	1904 071 230 00922 0000	0 to 0 EASTERN AVE	09	EHL (375 EASTERN AVE)		2021

SCHEDULE A CONTINUED

Appeal No	Roll Number	Property Address	Region	Assessed Person	Unit	Year
3368773	1904 071 230 00925 0000	385 R to 0 EASTERN AVE	09	DON VALLEY EASTERN V L		2019
3402166	1904 071 230 00925 0000	385 R to 0 EASTERN AVE	09	EHL (385 EASTERN AVE)		2020
3433261	1904 071 230 00925 0000	385 R to 0 EASTERN AVE	09	EHL (385 EASTERN AVE)		2021
3442916	1904 071 230 00925 0000	385 R to 0 EASTERN AVE	09	EHL (385 EASTERN AVE)		2021
3368774	1904 071 230 00930 0000	375 to 0 EASTERN AVE	09	DON VALLEY EASTERN IV		2019
3399115	1904 071 230 00930 0000	375 to 0 EASTERN AVE	09	EHL (375 EASTERN AVE)		2020
3433258	1904 071 230 00930 0000	375 to 0 EASTERN AVE	09	EHL (375 EASTERN AVE)		2021
3441869	1904 071 230 00930 0000	375 to 0 EASTERN AVE	09	EHL (375 EASTERN AVE)		2021