

DRAFT GUIDELINE

HOW TO INTERPRET THE SCHEDULE OF EVENTS FOR GENERAL PROCEEDINGS

BOARD REQUIREMENTS FOR:

- **COMPLIANCE WITH DUE DATES;**
- **PREPARATION OF STATEMENT OF ISSUES, RESPONSE AND REPLY;**
and
- **EXCHANGE OF DISCLOSURE**

NOTICE

This draft guideline has been posted for review. If you have any comments/suggestions please submit them to the Board no later than February 26, 2017 by emailing them to the Registrar at arb.registrar@ontario.ca.

INTRODUCTION

The purpose of this Guideline is to provide direction and guidance respecting the implementation of the Schedule of Events in an appeal heard by way of General Proceeding.

COMPLIANCE WITH DUE DATES

Parties are expected to comply with the due dates in the Schedule of Events. The Board recognizes that there may be times that a party requires a short extension of a due date. As long as all parties agree that an extension will not interfere with their ability to complete their work prior to the due date for completion of the mandatory settlement meeting, and the due date for filing documents, all parties may agree to an extension amongst themselves.

Consent alterations of due dates do not require Board approval, *except for the due date for completion of the mandatory meeting (Week 62) and the due date for filing documents to be relied on at the hearing (Week 66 or Week 106).*

STATEMENTS OF ISSUES, RESPONSE, AND REPLY

Statements of Issues, Response, and Reply must comply with Rule 38. This Guideline provides clarification of the Board's requirements for these documents in identifying the issues that are in dispute.

Statement of Issues

The Statement of Issues is prepared by an appellant and sets out:

- its position on the statutory grounds for appeal (for example, in an appeal under s.40 of the *Assessment Act*, the two statutory grounds for appeal are correct current value and whether the Board should make an equitable adjustment to reduce the current value);
- a detailed description setting out the facts, opinions conclusions, and any legal authority, on which the appellant relies in support of its position;
- any disagreement with MPAC's conclusions set out in MPAC's initial disclosure; and
- a request for any documents that are not listed in the Disclosure Schedule (described below), which the appellant asserts are relevant.

Statement of Response

A responding party may choose to respond to an appellant's Statement of Issues, by providing a Statement of Response setting out:

- the responding party's position on the statutory grounds for appeal;
- the responding party's agreement or disagreement with each of the specific facts, opinions, and conclusions set out in the appellant's Statement of Issues;
- a detailed description setting out the facts, opinions conclusions, and any legal authority, on which the responding party relies in support of its position; and

- a request for any additional relevant documents which have not already been disclosed by the appellant.

Statement of Reply

The appellant may, in turn, respond to a Statement of Response by filing a Statement of Reply setting out:

- the appellant's agreement or disagreement with each of the specific facts, opinions and conclusions set out the responding parties' Statements of Response.
- a detailed description of how the appellant supports its disagreement with the Statements of Response.

DISCLOSURE

Disclosure Guideline and Disclosure Schedule

A description of disclosure is provided in the Board's Disclosure Guideline which is posted on the Board's website. That Guideline includes a Disclosure Schedule, which sets out the documents to be disclosed respecting the most common issues in dispute that may arise in a General Proceeding appeal under s. 40 of the *Assessment Act*.

What is a relevant document?

Document is a defined term in Rule 3. In overview, it includes both electronic written and visual materials.

Under Rule 45, a party is required to disclose a *relevant* document. The term "relevant" means the document must relate to something. In an appeal proceeding, this means that it must relate to *an issue that is in dispute*. Those issues are identified through the parties' Statements of Issue, Response and Reply, as described above.

Summary

What a party must disclose is all documents that are relevant to an issue in dispute.

When a party must provide the disclosure is discussed below.

DISTINCTION BETWEEN DISCLOSURE, DOCUMENTS TO BE RELIED ON AT A HEARING, AND EVIDENCE ADDUCED AT A HEARING

Disclosure refers to the documents that are relevant to the issues in dispute.

Documents to be relied on at a hearing are a sub-set of the relevant documents that have been disclosed. Typically, a party will review the relevant documents and select only a number of them which the party concludes will be necessary to present at the hearing.

Evidence adduced at the hearing will include the documents to be relied on at the hearing, but it also includes oral testimony (both examination-in-chief and cross examination) as well.

INITIAL DISCLOSURE AS REQUIRED IN THE SCHEDULE OF EVENTS

As noted above, the requirement to disclose a document is based on whether it relates to an issue in dispute, and issues in dispute may not be fully identified until responding parties have served their Statements of Response. This poses a challenge for an appellant who is required to “go first” in preparing and serving a Statement of Issues. If the appellant only knows MPAC’s assessed value of the property, this may hamper the appellant’s ability to provide a comprehensive summary of the appellant’s assessment analysis in its Statement of Issues.

Therefore, MPAC has agreed that, before the issues in dispute have been identified, MPAC will produce sufficient disclosure for an appellant to submit a clear and concise Statement of Issues. Initial disclosure is not based on a determination that the documents provided necessarily relate to issues in dispute, because the issues in dispute have not yet been identified.

The Board has consulted with representatives from the Board’s stakeholder community respecting the development of the Schedule of Events and the provision of disclosure. There is consensus that MPAC’s has provided comprehensive *initial*

disclosure in its “About My Property” online database system. This initial disclosure has three main components:

- Methodology Guides which explain assessment methodologies;
- Analytics, which are Market Valuation Reports that explain how an assessment methodology is applied to value property; and
- Property Specific Valuation Information.

Consequently, the Board does not anticipate receiving many, if any, disputes respecting initial disclosure.

However, should a dispute respecting initial disclosure arise, the Board has included time in the Schedule of Events to address such disputes from weeks 5 through 9. This time allocation is for disputes that relate only to *initial* disclosure. As discussed in greater detail below, an appellant is not precluded from requesting additional disclosure once the issues in dispute have been identified.

An appellant should contact MPAC if the appellant is unable to access the online ‘About My Property’ system, or cannot locate information in this system for the property under appeal.

TIMING OF DISCLOSURE

The timing of MPAC’s initial disclosure is discussed above. This section addresses the timing of the exchange of other disclosure.

Timing of disclosure and the order in which parties provide disclosure presents a challenge for both Courts and administrative tribunals. Different approaches are used. For example, the Superior Court of Ontario requires that the parties meet among themselves to develop a “Discovery Plan” which sets out, among other things, the timing for exchange of disclosure.

The Board, in consultation with its stakeholders, has structured the timing and order of disclosure to align with the exchange of the Statements of Issue, Response, and Reply. As noted above, the underlying rationale for this approach is that the issues in dispute must first be identified, before the parties can determine whether a document is relevant, and, therefore, subject to the requirement to disclose.

The Schedule of Events states that the appellant is to provide its relevant documents at the time the appellant provides its Statement of Issues to the responding parties. As noted above, the appellant can “flag” any issues that the appellant believes will be disputed, to provide an early indication of disclosure requests the appellant may advance. Upon receiving a Statement of Issues, a responding party may also request any additional disclosure from an appellant that the responding party requires for purposes of preparing its Statement of Response.

A responding party is required to provide its disclosure at the time it serves its Statement of Response. Upon receiving a Statement of Response, an appellant may also request any additional disclosure the appellant requires for purposes of preparing its Statement of Reply.

As noted in the Disclosure Guideline, the obligation to provide disclosure remains on-going throughout the duration of the appeal proceeding.

Please note that the Disclosure Schedule identifies, for commonly disputed issues, the documents that should be exchanged with the Statements of Issue or Response.

Upon receipt of a request for disclosure, the party who receives the request should respond quickly to confirm whether the party agrees or disagrees with the request. Disputes regarding disclosure should be identified as soon as possible, so that, if a motion for disclosure is necessary, it can be adjudicated on a timely basis. While the Board has not indicated a specific timeline for a response to a disclosure request, parties are expected to respond within one to two weeks of the receipt of the request. Where a party agrees to a disclosure request, the party should also advise when the disclosure can be provided.

Finally, the Board notes that the Schedule of Events allows for a period of 39 weeks (9.75 months) for the completion of any inspections, and the preparation and exchange of Statements of Issues, Response, and Reply, as well as the exchange of disclosure. Therefore, the Schedule of Events provides ample time for the parties, working collaboratively, to both make and respond to requests disclosure.

In summary, the Board expects that motions for disclosure (other than initial disclosure) will be made at the following times:

- ***Upon delivery of an appellant's Statement of Issues and disclosure, if:***
 - ***The Statement of Issues includes a request for disclosure, which a responding party disputes (Week 21); or***
 - ***A responding party requests additional disclosure from an appellant which the appellant disputes (Week 24)***

- ***Upon delivery of a respondent's Statement of Response and disclosure, if:***
 - ***An appellant requests additional disclosure from a responding party which the responding party disputes (Week 46)***

The Board re-iterates that the parties are expected to promptly provide their position in response to a request for disclosure. Any disputes must be identified and resolved on a timely basis, so that the parties are prepared to conduct their mandatory settlement meeting by the due date set out in the Schedule of Events.

AVOIDING DISCLOSURE DISPUTES

The Board adjudicates a disclosure dispute by way of a written motion. These motions are often time consuming and costly for all concerned. Therefore, the goal is to avoid such disputes. The Board requires that the parties should first discuss such disputes among themselves in an attempt to resolve the dispute. In this regard, the parties should review the following considerations before bringing a motion before the Board.

Provision of a document is not an admission of relevance or admissibility

Rule 46 provides that the disclosure of a document is not an admission of its relevance or admissibility. This means that a party may disclose a document and still

object to its relevance and admissibility at the main hearing, if the appeal is not otherwise resolved. As the vast majority of appeals do settle, the dispute regarding disclosure becomes moot. Therefore, it may often be more efficient to provide the disclosure, rather than engage in a costly motion which ultimately proves to be unnecessary.

Proportionality

Rule 5 of the Board's Rules of Practice the Rules shall be applied in a manner proportionate to the importance and complexity of the issues in a proceeding and with a view to resolving appeals within the four-year cycle. Therefore, where a document is relevant to an issue in dispute, the Board may not require its disclosure if the Board finds that it is not proportionate to the importance and complexity of the issues in dispute. In applying this test, the Board will consider the following factors which are applied by the Superior Court of Ontario in civil court proceedings (Rule 29.2 of the Rules of Civil Procedure), namely:

- whether the expense of providing the disclosure would be unjustified;
- whether provision of the disclosure would cause the disclosing party undue prejudice;
- whether requiring the disclosure would unduly interfere with the orderly progress of the appeal proceeding;
- whether the document is readily available to the party requesting it from another source; and
- whether providing the disclosure would require the delivery of an excessive volume of documents.

Probative Evidence

A document may be both relevant and proportional to disclose. However, it may not have much probative value when weighed as evidence at a hearing. Parties should consider how important or necessary a document will be in adjudicating an issue in dispute. If a document is only of limited probative value, the Board may not require that it be disclosed.

Use the Disclosure Guideline and Disclosure Schedule

The Disclosure Schedule outlines stakeholder consensus on the documents that should be disclosed in respect of the issues shown in the Schedule. There is consensus that the Disclosure Schedule adequately addresses most of the disclosure requirements for these issues. Consequently, absent any exceptional circumstances, the Board expects that such disclosure as set out in the Disclosure Schedule will be provided. Therefore, all parties must refer to the Disclosure Schedule when considering whether a document must be disclosed.

Representative's role in providing and requesting disclosure

Rule 45 provides that a party is required to provide only those documents that are in the party's possession, control, or power. A party's representative must obtain all relevant documents from their client. A representative should not request disclosure of a document from another party that is in the possession, power or control of their own client. Furthermore, it is not acceptable for the representative to request such a disclosure from another party, solely on the basis that the representative has requested, but not received, the document from their client.

Written Questions

An alternative to seeking the delivery of documents is for a party to submit written questions to which another party can respond. In some cases, this may be a more efficient, concise, and precise method to provide a party with the information that the party is seeking. Where all parties agree, responses can be confirmed by written correspondence. Otherwise, responses should be provided in a sworn affidavit.

MOTIONS FOR DISCLOSURE

Procedure:

A party who wishes a board direction or order for disclosure, must complete an Expedited Board Directions Form as a first step. Part 2 of the Board Expedited Board Directions Form requires a specific description of the request being made. *Where the request is for disclosure, the requesting party must complete and attach a Motion for Disclosure Form to provide full details about the request for disclosure. This form is attached to this Guideline as Appendix A.* Upon receipt of this

information, the Board will communicate the next step in the process to the parties. In many cases, the matter will be sent to a formal motion process. Unless the Board orders otherwise, the motion will be heard in writing. For further information about motions, please see the Board's information sheet on motions.