STEPHEN F. WAQUÉ

BORDEN & ELLIOT

BARRISTERS & SOLICITORS

SCOTIA PLAZA

40 KING STREET WEST

TORONTO, ONTARIO

M5H 3Y4

TELEPHONE NUMBER 1-416-367-6275

FAX NUMBER 1-416-367-2708

E-MAIL: waques@borden.com

October 31, 1998

PREVENTATIVE PRACTICE IN AN EXPROPRIATION CONTEXT

INTRODUCTION

Facing the risk of a lawsuit is no more than the price of doing business as a professional in our society. Today that can be, for many professionals, a very high price. In hearings before the U.S. Congress, the Big 6 American accounting firms presented statistics which demonstrated that, over the last few years in the U.S., the cost of claims (insurance, defence, settlements and awards) averaged 12% of gross revenues. Generally, being named in a lawsuit has nothing to do with any moral fault on the part of the professional sued. Often there is no glaring error that would attract discipline or even disapproval from one's peers. Rather, the professional is a victim of the fact that, today, lawyers are used more frequently to resolve disputes, to sort out how resources are to be allocated, and they naturally use legal tools to do this. However, much can be done to reduce the risk of being sued and increase your chances of defending a lawsuit if you are sued.

AWARENESS

Before you can attempt to protect yourself from legal liability, you must develop awareness as to the legal concepts which can be used to tag you with such liability. There are commonly four arrows in the lawyer's quiver:

(1) Breach of contract.

(2) The equity of confidence.

(3) Fiduciary relationships.

(4) Negligence, especially negligent misstatement.

Lawsuits against lawyers are commonplace in Canada and have included, in Ontario at least, claims arising from mishandled expropriation cases. However, other professionals involved in expropriation work are not immune from legal action. For example, we now have in our files 54 Canadian cases where reasons for decision have been given in lawsuits against appraisers. Hundreds more cases have been dismissed, settled or otherwise resolved through the Appraisal Institute's insurance program.

(1) **Breach of Contract**

If you promise to do something for some consideration, the law will hold you to your promise and require you to pay all of the damages that were reasonably foreseeable as a result of any breach of contract.

Here, you are voluntarily selecting the person to whom you will be liable if you breach your promise. You are liable in contract only to the person whom you agreed to serve. Most contracts can be legally enforceable even if the agreement is entirely oral and is never reduced to writing. Important exceptions exist for contracts involving real estate, but a contract to appraise real estate is not one of them: **Statute of Frauds**. But you should generally try to record in writing a contract to provide appraisal services to ensure that both you and the purchaser of your services have had the "meeting of minds" that is necessary to support a contract. Having a proposal letter signed back by the purchaser is one way to secure his acknowledgement that the letter defines the terms of your engagement. This serves both to limit the scope of the work for which you are responsible and support you in your claim, if you have to sue for your fee.

(2) The Equity of Confidence

The principles of breach of contract that I have very briefly reviewed and those of negligence which I will deal with last are principles that originally were enforced by courts of law. Prior to the mid-1800's, our legal system was divided between courts of law and courts of equity principally known as the Court of Chancery. The principles of confidentiality and fiduciary relationship had their origin in these latter courts and differences remain, even today, because of this different historical root. The equity of confidence will be breached if a professional receives information from his client which is not in the public domain and uses that information to the client's detriment. The most striking modern application of the principle is **Lac Minerals Ltd.** v. **International Corona Resources Ltd.** (1989), 61 D.L.R. (4th) 14 (S.C.C.), where Corona, a junior exploration company, successfully sued Lac Minerals, a senior mining company, partly on the basis that it had abused confidential information Corona had given to it.

In **Lac**, the Supreme Court of Canada found that International Corona breached its duty not to misuse confidential information provided by Lac after Lac had approached the former with a view a possible partnership or joint venture to develop the mineral resources of a land tract. Lac provided confidential drilling results which led International Corona to promptly compete for the mining rights on an adjacent tract, in competition with its intended partner. While a majority of the Court rejected that there were any fiduciary duties owed as between the 2 businesses, the unanimous Court held that International Corona owed a duty not to misuse those confidential drilling results in order to appropriate to itself an opportunity open to both companies.

The legal test discussed by the Court in **Lac**, although there was disagreement among the various judges as to the remedy for the breach of the duty of confidentiality, features three elements: the information conveyed was confidential, it was communicated in confidence, and it was misused by the party to whom it was communicated, to the detriment of the party conveying it. For appraisers, the confidential nature of the appraiser/client relationship is specifically recognized in Ethical Rule No. 4 of the Appraisal Institute.

One difference that exists between this equitable right of action and the right to sue in law for negligence is that the remedy of the person wronged is not limited to damages. With respect to breach of equitable obligations, the plaintiff can recover more than the profit he would have been able to realize if he had used the confidential information. In fact, the professional who has breached the obligation of confidence can be called to account for his own gain, even if he were able to make money in a circumstance where the owner of the information never would have. The legal catch words here are: an accounting of profits, or the prevention of unjust enrichment.

It bears mentioning, as well, that professionals employed by a company or in partnership with others, depending on the terms of their contracts, will likely find themselves bound not to misuse for their own gain confidential business and client information which they acquire. This issue typically arises when they leave to set up a competing business. Sometimes, they can even be bound by a fiduciary duty not to compete by soliciting the clients of their former employer or business partners. The concept of fiduciary duty is discussed below.

(3) Fiduciary Relationships

Fiduciary duty is a broader concept than the equity of confidence and depends on proof that a special relationship has developed between two parties. Once the special relationship is proven, the obligations that follow are onerous. The adjective "fiduciary" derives from the Latin root "fides", which means trust, faith or confidence. When you owe a fiduciary duty, you must act with perfect loyalty, good faith and a total avoidance of conflict of duty. Many day-to-day activities are fixed with fiduciary obligations, for example: relationships between insurers and insureds; stockbrokers and their clients; real estate agents and their clients; a company and its senior officers and directors; partners in a business enterprise; bankers and their clients; and lawyers and other professionals and their clients. Regulation No. 1 of the Code of Ethics and Rules of Professional Conduct specifically recognizes that the relationship between an appraiser and his client has fiduciary aspects (See E.R.5.3(a)).

The principle of fiduciary obligations and that of the equity of confidence are closely related. For example, consider a case where, five years earlier, you prepared a brief report for an owner of a property with respect to the property's market value, its potential alternative uses, or perhaps the buildings or structures located on it. Long after that assignment was completed, you are approached by a potential purchaser who wishes an opinion as to the current market value of the property. There is no breach of fiduciary duty in terms of a conflict of interest, as commonly understood, in that the professional is not attempting to serve two masters, since his relationship with his original master has ended. However, he must remember that he may have confidential information arising from the first assignment which may expose him to liability if he takes on the second assignment.

(4) **Negligence, Especially Negligent Misstatement**

Negligence can be found both in situations where there is no contractual relationship and in situations where there is: **Central Trust Company** v. **Rafuse et al.**, [1986] 2 S.C.R. 147. You are exposed to liability in negligence, not just from your clients and former clients; you can be liable to persons you have never seen, if they reasonably rely on the advice you give. To prove a real estate professional is liable in negligence, a plaintiff must prove:

(1) that the duty of care is owed to her by the professional;

(2) that the professional breached that duty of care by failing to meet the standard of professional skill and judgment imposed by the court;

(3) that she reasonably relied on the professional; and

(4) that she suffered a loss as a consequence of that breach and not for some other reason.

The concept of a duty of care is a very fluid and flexible one. The classic formula for a duty of care is the "neighbour" test, set out in a decision of the House of Lords cited as **Donoghue** v. **Stevenson**, [1932] A.C. 562 at 580. Law students call this the "snail in the bottle case". It concerned a claim by a woman who drank a bottle of ginger beer manufactured by the defendant, which a friend of that woman had bought from a retailer and had given to her. The bottle contained the decomposed remains of a small snail which were not, and could not be, detected until the greater part of the contents of the bottle had been consumed. As a result, she alleged that she suffered from shock and severe gastro-enteritis. The claim was defended on various grounds, including the ground that the woman complaining had no direct "relationship" with the manufacturer (the manufacturer didn't sell her the bottle of ginger beer). Lord Atkin of the English House of Lords summarized the law this way:

> **"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."**

As you might expect, the House of Lords found that the plaintiff was a neighbour, in law, of the ginger beer manufacturer. Thus, it was liable to her if it caused her harm by failing to maintain an adequate system of inspection to prevent a faulty bottle of ginger beer from coming into her hands.

As professionals, you are generally not engaged in the manufacture of ginger beer or other tangible goods, but most frequently in the manufacture of that intangible commodity: advice. That is why I emphasize the principle of negligent misstatement, which is obviously a sub-category of negligence. The leading case in this area is another decision of the English House of Lords entitled **Hedley Byrne & Co., Ltd.** v. **Heller & Partners, Ltd.**, [1963] 2 ALL E.R. 575 at 583.

In the Hedley Byrne case, bankers were being sued by a firm which had invested in a business, partly on the basis of the bankers' advice that the company (one of the bank's clients) was sound. The court had to decide first, whether the bank might be liable for the advice it gave, even though there was no contract to give advice and no consideration (i.e. money paid) for the advice. It is an exaggeration to put it this way, but you might be able to remember these principles by understanding that you could be liable for what you say at a cocktail party. Properly put, the test was stated by Lord Reid this way:

> **"A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied upon, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could given an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer with any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require."**

As it turned out in this case, the bank had qualified its advice by stating that the information was given "without responsibility on the part of the bank or its officials". Nonetheless, the principle was established that professional persons could be liable for negligent words alone causing financial loss only. Until that time, it had been thought that some physical damage or bodily injury was a precondition to a right of action, except in very exceptional circumstances, i.e. defamation, fraud, breach of contract or fiduciary relationships. In other words, an appraiser owes a duty of care to all persons that might reasonably rely on his advice.

Qualifying statements have always been pleaded, but, until recently, had received limited respect from the courts. However, in <u>**Wolverine Tube (Canada) Inc.**</u> v. <u>**Noranda Metal Industries**</u>, [1994] 21 O.R. (3d) 264 (Ont. Ct. Gen. Div.), an environmental consultant succeeded in a defence based on qualifying statements in a report. In that case, the property owner, Noranda, retained an environmental consulting firm as general consultants for environmental matters. This firm's principal was Mr. Little.

The consulting agreement included a provision that Little's reports were not to be used outside of Noranda's organization without prior permission. About two years later, Noranda asked Little to complete environmental compliance audits and liability assessments on three of its properties, on a rush basis.

Little was aware that the environmental audits may be disclosed to a perspective purchaser, but assumed that prior permission would be sought. Little completed the work and submitted his reports to Noranda. The reports included statements disclaiming any responsibility to third parties relying upon or making decisions based upon the reports.

Subsequently, Noranda negotiated a sale of one of the properties to a purchaser, Wolverine. Without advising Little, Noranda disclosed the environmental reports to Wolverine, and told Wolverine that the reports could be relied upon. However, Wolverine did **not** contact Little to discuss the reports. Subsequently Wolverine sued Noranda and later tried to join Little as a defendant, alleging negligent misstatement in the reports. Little moved to dismiss Wolverine's claims, citing the qualifying statements.

The court dismissed Wolverine's action as against Little. The statements disclaiming responsibility of third parties were found to absolve Little of liability to Wolverine.

Given the importance of the disclaimer clauses in this case, they should be examined closely. The general retainer agreement made between Noranda and the consultants contained the following provision:

> **"Reports or memorandum, resulting from this assignment are not to be used in whole, or in part, outside your organization without prior written permission."**

Little argued that the requirement in the retainer letter for Noranda not to use the reports outside of its organization without prior written permission was an important disclaimer. However, the court was not persuaded by that argument and said:

> **"...Given the evidence of (Little's) representative that he was aware of the common practice of providing to perspective purchasers environmental assessments prepared for vendors. If that is indeed a common practice, it seems to me to be foreseeable that a report might well be shown, as was done in this case, without the prior consent of its author. If that was the only matter to be considered, I would have no hesitation in dismissing the motion for judgment." (at 271)**

The court was more impressed with another broad qualification found in each report in issue. The following statement was set out by itself on the second page of the report immediately following the table of contents:

> **"This report was prepared by (Little) for the account of Noranda. The material in it reflects (Little's) best judgment in light of the information available to it at the time of preparation. Any use which a third party makes of this report, or any reliance or decisions to be made based on it, are the responsibility of such third parties. (Little) accepts no responsibility for damages, if any, suffered by any third party as a result of decisions made or actions based on this report."**

The court was more receptive to this limitation and stated:

> **"The statement contained in each of the reports, however, is an entirely different matter (as compared to the qualifying statement in the retainer letter). In my opinion, it is precisely the 'disclaimer of responsibility' for which approval was given by [the Supreme Court in previous cases]. I have been invited by counsel for Wolverine to consider that the language in this statement is not sufficiently broad to insulate (Little) from the negligence claimed here. I do not think it is profitable to engage in an overly close scrutiny of the precise meaning of the words in the statement. I content myself with saying that in my opinion the language is far more comprehensive than that which insulated the defendant bank in *Hedley Byrne*." (at 271)**

The court went on to state:

> **"If (Little) did not assume a duty of care, a claim in negligence cannot arise. I find the language used by (Little) in a statement introducing its report did limit its duty of care to the extent that it owed no duty to Wolverine." (at 271)**

It is worth noting that the court felt it was important that there were no direct dealings between Wolverine and the consultants. The court also felt it was important that the consultants were unaware of the sale to Wolverine until the litigation was instituted approximately five years after the report was prepared.

The decision of the trial court was affirmed by the Ontario Court of Appeal in a case now reported at (1996) 26 O.R. (2d) 577.

The Appraisal Institute has recommended a standard set of limiting conditions since the mid-80's. The original version was prepared by a Committee which included the author and several members of the Appraisal Institute. Success in relying on other formulations of limiting conditions has been spotty and the new language proposed by the author and others has never been directly tested in a Court of law. It is probably true that the broad disclaimer examined in the Wolverine case, if advanced by appraisers, would not be acceptable to financial institutions. In any event, consideration has to be given to whether such a broad disclaimer would be contrary to the Regulations of the Institute and USPAP, for example, Regulation No. 1, Ethical Rule No. 5, has to be considered.

Nonetheless, the case instructs all appraisers that value remains in limiting conditions and attention should be paid to adapt limiting conditions to each specific appraisal report. In the final analysis, it is probably true that, in the case of appraisers, the Court will pay as much attention to limiting conditions as the appraisers themselves paid to them when they wrote their respective reports.

The cases perhaps of most interest to appraisers are those that provide examples of the second ingredient referred to above: providing a breach of the minimum standard imposed by the court. The general principle is that the standard an appraiser must meet is to use that degree of knowledge and skill that one could reasonably expect, at the date of the preparation of the questioned opinion, of a competent appraiser with the qualifications that appraiser represents that he possesses. If the appraiser makes no specific representation of his qualifications, the court will permit the plaintiff to assume there are no limitations on the appraiser's competence: **Hodgins** v. **Hydro-Electric Commission of the Township of Nepean** (1975), 60 D.L.R. (3d) 1 (Ont.H.C.J.), at p. 5. It can be expected that a court will pay attention to the fact that the members of the Appraisal Institute of Canada invite members of the public, through advertising, to rely on the qualification **AACI** as a measure of appraisal competence. Thus, the Code of Ethics, Rules of Professional Conduct and Standards of Professional Practice of the Appraisal Institute will be given weight as defining some of the details of a minimum standard of care. However, the court will likely give greater weight to evidence from experienced members of the profession as to standards of practice and the custom of trade in undertaking appraisal work. Professionals who hold themselves out as expert in expropriation matters will be held to a higher standard with respect to expropriation law and practices than those who do not.

You should also know that the Supreme Court, in the case of **Central Trust** v. **Rafuse** (referred to above), held that the 'discoverability rule' applied to a claim for negligence against a professional. That means that a professional is not protected from suit merely because the six years referred to in the **Limitations Act** have passed since he committed the error and the damage was caused. The time period only starts to run when the plaintiff knew or ought to have known of the error and the damage it caused.

The issue of reasonable reliance is perhaps most dramatically stated in the most recent Ontario decision of <u>**Maritime Life Assurance Company**</u> v. <u>**The Royal Trust Corporation of Canada; Michael E. Plummer, et al. Third Parties**</u>. There, an appraiser was criticized for 13 separate fundamental errors that led to property worth approximately $1.2 million being appraised by him at $3.2 million. The Court found that the appraiser had participated in a fraudulent scheme to extract a secret payment for an employee of the client company. While the appraiser seems to have obtained a net benefit of perhaps only $250.00, he still was found to have been "captured" by the employee of the client and his fraudulent scheme. The appraiser was employed by a large trust company with an established reputation. The officers of the plaintiff lender, which had advanced large sums of money based on the report, gave evidence that they did not carefully review the report. There was inevitably a default on the loan and, when the lender realized on the mortgage taken as security on the appraised property, the property sold for millions of dollars less than the amount loaned. However, officers of the plaintiff lender pleaded that it was reasonable at the time for them to rely on the bottom line in the report because it had been produced by a reputable company. However, the trial Judge found that, because the plaintiff lender so heavily relied on the report in making the loan, it had a duty to scrutinize it. If it had been examined in anything more than a superficial way, questions would have been asked. While the Court found that the plaintiff lender reasonably relied on the report and could succeed against the appraiser's employer, it also held that the plaintiff lender did not take reasonable care for its "commercial safety". In law, the plaintiff lender was held contributorily negligent to the extent of 40% and the appraiser's employer was liable for 60% of the loss.

ALLOCATION OF LIABILITY BETWEEN PROFESSIONALS

A very recent Ontario case, **Black Investments Inc.** v. **Walker Ellis Pezzack and Rosevear et. al.** (1995), Court File No. 64106/91QA (Ont. Ct. Gen. Div.), illustrates how even an appraiser found to be negligent can escape liability if the fourth element of negligent causation is missing. The case involved a mortgage transaction in which Black Investments Inc. invested $400,000.00 in a second mortgage. Pezzack, a lawyer and mortgage broker, was retained by Black to handle the transaction after Pezzack introduced Black to the investment. When the mortgage went into default, the property was sold, and there were insufficient funds to pay off Black's second mortgage.

Black brought an action against Pezzack alleging that his negligence caused Black's loss. The law firm settled the claim for $326,757.47 plus costs. The law firm then commenced an action against the appraiser and his employer alleging that his appraisal of the property was negligently prepared and misrepresented the true market value of the property. The law firm also claimed that the appraisal report was the cause of Black's loss on the second mortgage.

The Court was extremely critical of the way the appraiser applied the income approach in his appraisal. In particular, the Court set out five areas in the report that were deficient. First, the Court held that the appraiser's qualification of the income information should have been stronger. It pointed to another report on the property, prepared by a qualified appraiser, who prepared the report for the trial. This second report contained a stronger qualification: "... however the reader is cautioned that the indicated market value is dependent on projections of financial performance that are as yet unproved". (at 12)Second, the Court noted that the original report "contains no information on the tenancies, their short term nature, or the fact that one monthly tenant occupies 51 percent of the space." (at 12) In contrast, the second appraiser had noted: "The property is variously rented on a relatively short-term basis, for periods as short as month-to-month tenancies to as long as one year in duration." He also provided a list of the tenants with the particulars of the rental arrangements. His report indicated the percentage of space occupied by each tenant, and singled out the largest tenant, Campbell Soup, that occupied 51.2 percent of the available space on a monthly basis. In response to this data, the second appraiser stated:

> **There is insufficient data available from the Chatham market to determine a reasonably reliable "market" vacancy rate for a facility such as the Property. This situation is typical of smaller markets and the reader is cautioned that vacancy rates in such markets may be volatile.**

Third, the Court was critical of the fact that the original appraiser, in utilizing the income approach to value, did not give a comparative market value estimate. The Court pointed to the report that was prepared by a third qualified appraiser retained by Pezzack. That third appraiser commented on the fact that the original appraiser had constructed a computerized spreadsheet with the material and data available to him. The third appraiser suggested that the original appraiser could have used that spreadsheet to project various net income scenarios and the resultant capital values.

Fourth, the Court was most critical of the original appraiser's failure to disclose the purchase price for the combined parcels. The third appraiser indicated that if he were appraising the property for so much more than he knew it was selling for, he would feel compelled to include that information in the appraisal report and provide some rationale or explanation for his much higher valuation.

Finally, the Court emphasizes that:

> **[N]owhere in [the original appraiser's] report does he provide, 'reasoning supporting the value conclusion', as required by Standard Rule 1.6(g). Instead, his transmittal letter uses some vague wording to tell the reader that on his values based on income projection, ".... we do not express an opinion as to whether the actual results from continued operations will approximate those projected". (at 14).**

The Court was clear that, "An appraiser has an obligation to provide reasoning to support valuation. It is not good enough for an appraiser to provide negative comments supposedly to detract from the legitimacy of the valuation." (at 14)

In summary, the Court found that the original appraiser obviously "paid no regard to matters which were of the most vital importance". As a result, the certification that, "No important facts have been withheld or overlooked", was an error because he withheld or overlooked important facts. Not surprisingly, the original appraiser was found negligent in the preparation of his appraisal report because he overvalued parcel one which was a valuation not based on market value.

The Court then proceeded to examine the solicitor's conduct and found that Pezzack was also negligent with respect to this mortgage transaction. Pezzack was found to have failed to provide Black with information in writing that was relevant to the mortgage transaction; that he also made a serious error when he overstated the true value of the mortgage security; that he failed to advise his client that the appraisal was done on an income approach to value and not a "bricks and mortar" basis; that he had not advised Black of the qualifications made in the original appraisal report; and that he failed to disclose the purchase price for all three parcels, which resulted in the purchasers having little or no equity in the property appraised.

Not only did the Court find that the solicitor Pezzack was negligent, but it also found that Pezzack's negligence was the effective cause of the plaintiff's loss, and thus Pezzack was solely responsible for compensating Black for his loss of investment. Again, this outcome illustrates the fourth requirement when proving a professional is <u>liable</u> in negligence: that the plaintiff suffered a loss as a consequence of *that* breach and not for some other reason.

LIABILITY FOR SETTLEMENTS AND HEARING WORK

Because there is a requirement for client concurrence and authorization when settlements are achieved, many professionals think that although they might be liable for work done prior to a settlement, the settlement itself cannot lead to legal liability because of the aspect of client consent. Similarly, it is thought that the conduct of a hearing involves such a significant amount of judgment that it is difficult, if ever, to effectively criticize a counsel or a witness for their conduct at a hearing to the extent of finding them negligent. A review of recent case law suggests that both perceptions are dated.

In **<u>Riggins</u> v. <u>Alberta</u>** (Workers' Compensation Board) (1990), 75 Alta. L.R. (2d) 13 (Q.B.), aff'd (1992), 5 Alta. L.R. (3d) 66 (C.A.), a solicitor was retained to act for a plaintiff who had been seriously injured in a motor vehicle accident. The claim was settled for $70,000.00 with the plaintiff's consent. However, after the settlement, the plaintiff brought an action against the solicitor for negligence in the conduct and settlement of the case. The plaintiff succeeded at trial, and the decision was upheld on appeal. The Alberta Court of Queen's Bench held that the solicitor was negligent in recommending settlement without having properly researched the law as to lability, and without having assessed and considered the cost of future care or the impact of pre-judgment interest. The Court awarded damages against the solicitor in the amount of $344,254.77, representing one-half the total damages the plaintiff sustained as a consequence of the accident less the amount received in the settlement.

Similarly, in **Fawell** v. **Atkins** (1981), 28 B.C.L.R. 32 (S.C.), a solicitor was found liable in negligence for recommending a settlement without having interviewed a key witness. In this case, the plaintiffs were injured in a motor vehicle accident. During the conduct of the case, and prior to trial, the plaintiffs advised their solicitor of the identity of an independent witness who could corroborate their account of the accident. Without interviewing this witness, the solicitor strongly urged the plaintiffs to settle on the basis that the evidence was conflicting. The settlement was accepted, and the plaintiffs later brought an action against the solicitor for negligence. The Court concluded that the evidence of the witness could have affected the outcome of the case, and found the solicitor negligent for the failure to contact and obtain a statement from the witness.

Other cases have also demonstrated that professional liability in negligence will arise in appropriate circumstances in the conduct of a case and despite the fact of a settlement. In **Boudreau** v. **Benaiah** (1998), 154 D.L.R. (4th) 650, the Ontario Court (General Division) held a solicitor liable for recommending that his client plead guilty to criminal charges without properly advising the client of his actions and without following the client's instructions. And further, in **Aikmac Holdings Ltd.** v. **Loewen** (1993), 86 Man. R. (2d) 56 (Q.B.), a solicitor was liable for failing to claim damages for psychological distress and lost income without discussing the matter with the client.

THE LAWYER/APPRAISER AND OTHER PROFESSIONAL DIVIDE

When I read British Columbia decisions which, in assessing costs payable in compensation cases, critique the team approach, I am struck with the potential hazards for those concerned on the other hand with professional liability. Just last month, I participated in a seminar addressing the liability of professionals in the environmental field, where U.S. consultants spent a whole day describing the virtue of the team approach as a means of preventative practice. In practical terms, it is difficult to divide tasks in an expropriation case into neatly defined boxes which are the responsibility of one group of professionals as opposed to another. Preventative practice means avoiding practicing outside one's area of expertise and certainly outside one's profession. Lawyers jealously guard against other professionals who, sometimes even unwittingly, are guilty of practicing law. Not only is one courting legal liability in practicing outside their area of expertise, it is possible that they will also find themselves without insurance coverage. Below I have listed what, in my experience, are questions which commonly arise in addressing five of the functions typically undertaken in expropriation cases. I put them to you as an exercise in understanding how many tasks involve areas of shared responsibility. In these cases, if the team approach is eschewed, clear communication on these points will be required in order to ensure that the various professionals working on an expropriation project each understand their specific responsibilities in the case at hand.

1. TITLE

- Limiting conditions in appraisal reports disclaim responsibility for title advice, but an appraiser almost always undertakes a title search in preparing a narrative report.

- A lawyer, particularly one acting for a claimant, will not always undertake a title search. However, legal opinions on expropriation matters rarely contain disclaimers as to title issues.

- Appraisers must know of other interests in land, even if they are preparing a single opinion of market value without attempting to divide the market value among the various legal interests. It is not true that all interests in land taken together will equal 100%. For example, a lease may so encumber a fee with its rental rate and term that the leased fee value plus the leasehold interest equals substantially less than 100%. Alternatively, a lease at above market rates may produce a leased fee value which is greater than the fee simple value alone.

- A lawyer must understand who has legal title and what the other interests are in land to undertake the most basic tasks, such as complying with limitation periods, understanding who has a legal entitlement to make a claim, identifying conflicts of interest, etcetera.

2. DETERMINING HIGHEST AND BEST USE

- The central question in any appraisal assignment is always determining highest and best use. Appraisers always research the planning and municipal controls in undertaking this determination.

- Lawyers interpret zoning and official community plan by-laws as a legal function.

- A lawyer may find that a use is permitted, but an appraiser may say that the permitted use has no value because there is no market.

- Who knows best how long an approval process will take, or what risks it entails: the appraiser or the lawyer?

- Who knows about provincial planning controls?

- On the other hand, who best understands political, historical and social context?

- Who is responsible to recommend:

  a planning opinion;

  a forestry appraisal opinion;

  an engineering report;

  an accountant or business loss specialist report.

- Once other professionals are retained, who is responsible for ensuring that their work avoids overlap with other professionals, takes maximum benefit from the advice and contribution of the other professionals, and is strategically consistent with their work.

3. NEGOTIATIONS

- Can an appraiser, who provides an opinion of value, also be the lead negotiator to effect a settlement, or does this create a conflict of interest and a violation of USPAP Rules?

- How effective can a lawyer be in negotiating, in a principled and disciplined way, on appraisal issues?

- Can an appraiser be flexible in negotiating without admitting an appraisal error that results in professional discipline?

- Is an appraiser able to be independent in undertaking an opinion of value if he has first conducted a review appraisal criticizing the opposite party's opinion of value?

- Is an appraiser more encumbered by prior cases (appraisal reports dealing with similar problem) than is a lawyer who has argued similar cases?

- Is the appraiser able to identify whether or not claims are legally compensable?

- Is a lawyer competent to quantify those claims which he can identify as legally compensable?

- Does it make a difference whether those claims relate to market value or business loss?

- Who is responsible for identifying non-monetary solutions (see attached **Bricks Without Straw** Paper):

    1. rerouting of linear public work;

    2. land exchange;

    3. upzoning;

4. curative construction;

5. rent-free periods, or other entitlements;

6. public/private shared improvements.

4. RESPONSIBILITY FOR CLIENT RELATIONSHIPS

- Who is the client? Is it the landowner or the expropriating authority, or are you a subcontractor to another professional advisor?

- Who is responsible for budgeting and who can best estimate the cost?

- Who is responsible for advising the client as to whether an estimate of costs is reasonable and recoverable in a future assessment?

- Who advises a client to pursue interim or advance payment of costs?

- Who is responsible for recommending settlement, or proceeding to an arbitration?

- Who is responsible for keeping the client informed about the preparation of the case and its costs?

- Who is responsible for maintaining client confidentiality?

- Who is accountable for the work of other professionals and does it make a difference if one:

  1. recommended the client hire the other professionals?

  2. reviews the work of other professionals and comments upon it to the client?

  3. is considered by the client to be the senior advisor?

5. LEGAL BRACKETS

- Is the lawyer the only professional responsible for knowing about limitation periods and advising the client about them?

- Appraisers routinely disclaim responsibility for environmental issues: Who then is responsible for addressing the issue of environmental compliance?

- Is the responsibility to avoid false or misleading advertising, or other unfair trade practices, limited to one profession?

- When does one professional intentionally interfere in the business contract that another professional has with the client?

- Who is responsible for identifying whether there are legal remedies outside the **Expropriations Act**?

- If there is no lawyer yet retained in a case, does an appraiser have greater responsibility to advise a client about matters such as limitation periods?

- Is the lawyer responsible for addressing those issues which the appraiser has expressly disclaimed in his assumptions and limiting conditions?

Perhaps after considering these issues, it is self-evident that while the team approach is the Assessment Officer's bane, it is the battle cry of the insurance counsellor recommending preventative practice.

Professionals who work together on a regular basis are, on the one hand, most comfortable with the overlap between their respective roles in an expropriation case. On the other hand, they might be the most inclined to fail to communicate clearly about respective responsibilities. Not all errors in communication will lead to legal liability, but most will lead to a failure in providing the type of client service that generates a successful and satisfying practice.