Expropriating Authority Documents and Their Production

1. The Pleadings in the Action Frame the Claim and the Issues of Relevance

    - Compensation procedure action rule;
    - Collateral claims and negligence, bad faith, breach of contract;
    - Statutory claims, failure to return lands, Section 21

2. Statutory Framework on Production

    - Rule 7-1 of the Supreme Court Rules;
    - *Freedom of Information and Protection of Privacy Act*

3. How have you kept it
    - What have you kept;
    - Personal files versus corporate file;
    - Document production person

4. What to Look for and Where to Look

    - Project commencement document
    - Board Report and approvals;
    - Land agent's files, instructions to appraisers;
    - Minutes of meeting, geotech and engineering reports;
    - Individual diaries, day timers and phone records and logs;
    - Maintenance of the files, retirement of employees, securing the paper

5. The Concept of Privilege

    - Solicitor and client;
    - Litigation privilege

6. Experts

7. Production to the Lawyer and Listing

1. The Pleadings in the Action Frame the Claim and the Issues of Relevance

a) To a very large extent what the Plaintiff claims for and alleges is the basis for the claim determines the framework of relevant documents. Unless the Court is able to say that the claim is bound to fail it will not be struck out. It is now clear that claims under the Compensation Procedure Action Rules essentially expropriation claims are not limited within the scope and the framework of the *Expropriation Act*. Claims framed in negligence, bad faith, breach of contract, breach of statutory duty can all be joined with the compensation claim.

b) Given that there is a statutory indemnity limited only by causation and the rules surrounding market value, special value, and disturbance damages, one might question why one would continue collateral claims. Do they expand the scope of damages and compensation?

c) Whether they expand the scope of compensation they certainly "expand the potential scope of document production. A mad as hell owner who was not funded to relocate his business on a partial take and consequently was unable to fund it himself, could pursue all of the these causes of action. The documents that are brought into play can be significantly more extensive than the limited property file and negotiations portfolio resulting in the take.

d) A claim based on failure to return land under Section 21 might well bring into play the entire history of the project considerations surrounding this site, why the land was not utilized in the project or, how it came about to be a remainder.

e) The scope of the pleadings, their impact on the document production and the issues identified have to be assessed in the context of considering how wide a search do you have to make. This determination is one that should be done in conjunction with the lawyer.

f) Part of this inquiry should immediately raise the spectre and question who is it that is going to be discovered and speak to these documents. Probably a relatively senior person. That needs to be directly brought home to who does he or she have confidence in to ensure that the necessary tracking down and delivery up of relevant documents is completed.

2. Supreme Court Rules and Production

a) It is important to note that the recent amendments to the Supreme Court Rules have narrowed the production obligations from what was referred to as the Peruvian Guano test that existed until a year ago. In result, unless the documents can be considered to go to proving a material fact in the case, there is a definite limit as to how much fishing one must now do. The Peruvian Guano test essentially meant you could go fishing even though there was no fish in the sea. It is for the lawyers to worry about the subtlety and the distinctions but the distinctions are real and have a direct effect on the scope of the search.

b) The *Freedom of Information and Protection of Privacy Act.* It is not uncommon to see overlapping requests under the FOI against the authority while an action is underway or at the very least being contemplated. That FOI search can by its nature open up areas for fishing for which there might be no basis in pleadings or the framing of a claim. Examples might be looking into the background of who was actually financing a project, who are the partners. How is it that one particular agency was carrying out the acquisition on behalf of a consortium, what decision making process has resulted in the take.

c) FOI requests are subject to being redacted for personal types of information. The problem is that if the documentation does in fact appear to have some bearing once produced, redacted or otherwise then it is entirely likely it will be produced as a result of demands in the litigation and at that point the redactions will likely not stand up.

d) The process of FOI might be objected to on the grounds that it is duplicated and consequently an abuse of process and for that you would have to review the FOI provisions and consider the rules about proportionality.

3. How and What Have You Kept

a) Different government agencies have different programs and instructions for their document control and it is more or less stringently kept. A project which comes into existence for a particular purpose at a particular timeframe with individuals hired to carry it out may well not fit easily within the document collection process that the

authority normally uses. A project can change from internal review and assessment until approved and then with the addition of engineers and property personnel have a large out of office focus. The starting point is that the documents have to be put into the system from all of those sources generating them. To not do that means of course that you do not have an integrated complete collection.

b) It is common for individuals to keep their own file and to a greater or lesser degree choose to bring them into the system. That means that they frequently have not only their own paper documentation at their desk but also their own drives that retain documents that they choose to add to the system or not.

c) The point of this is to assess the system that you have in place, understand its limitations at the front end and provide the necessary instruction and direction for the collation and collection of documentation and its merging so that you have a coherent system when you need it.

d) Take a look around and decide who in your office in the most likely person to have to be answering for this documentation. If it is you as the project coordinator then you may be the lucky person in discovery examinations having to discuss these documents. The rational for the taking, the judgment utilized in taking the entire site, the actual extraction of the documentation from your system. It can get pretty embarrassing when pieces of the collection keep drifting in from various places and increasingly more pointed demands or requests are being seen on your computer from your lawyers. The lesson to be learned here is do not pick the lowest person on the pole to sort out your document production. Make sure it is someone when they tell you they have been thorough you can rely on them for having been thorough. Someone with an eye for detail. Someone with the time, the energy and whose feet can be held to the fire when yours are.

4. What to Look for and Where to Look

a) P3's whether large or small in scope provide a distinct problem in access to documents. It is suggested that those who draft agreements with P3 contractors ensure the terms be inserted regarding document production cooperation. The project team for the Authority frequently only have the general scope and preliminary best and final offer documentation relating to what is being undertaken and the contractor has the substantive details as to alignment the need for staging areas, duration, all of which goes into the planning of the nature of the taking.

b) Saving documents in a particular order is not at the top of the agenda when you are under time constraints and pressure respecting getting the project underway. Effort put in at the front end of document reclamation will serve you well at the back end when you have to pull it out. There is no reason to expect that personnel who have record keeping backgrounds will have any understanding as to how the documents may be accessed or pulled out a later date on a piecemeal basis. Make sure they understand the process that they may be called on for.

c) Key documents that should be accessible are those related to decision making on various points including route alignment, nature of construction, reports to the Board and support documents to a board or council or a memorandum to the approving authority if there is one.

d) Consider the importance of property agents and their involvement in a file as representatives of the authority, ensure that you have clarified with them their document production and turnover expectations. I would recommend you have explicit instructions as to what is required and how it is to be turned over and how maintained.

e) Many personnel maintain their own notebooks, minute books formal and informal calendars, daytimers, phone records and logs.

f) Storage of files brings with it questions of how do you deal with retiring employees securing their paper and their computers, their hard drive. If somebody is retiring or leaving you need to ensure that their records are in a format that you can make sense of even though they are not around.

5. The Concept of Privilege

Solicitor and Client Privilege.

a) In a vague way we all have this idea that communications with your lawyer do not have to be produced. Various key points can be readily identified relating to legal consultation involving acquisitions of land including:

- Project planning and budgets for acquisition;
- The decision to expropriate;
- The reasons for the decision;
- The Authority's purpose for the taking;
- Expert advice including appraisal surrounding the taking and its valuation.

b) You should understand the following things about this privilege:

- The privilege is based on the concept that people must be able to speak candidly with their lawyers and so enable their interest to be fully represented. It is nearly absolute and is subject only to limited exceptions. It is not unusual to see lawyers simply identify as an unlisted group of documents all communications made between solicitor and client. This is not good enough. The document needs to be specifically identified, dated unless the date in and of itself gives away information. On application for production if objection is made on the grounds of privilege the Court may inspect the document. The point of this is to be clear that if you are dealing with a difficult situation and you are having clear and pointed exchanges with your lawyer about issues surrounding the taking, <u>those</u> communications may be subject to judicial review whether or not producible.

- Be clear on your lawyer's role. He is not there to make decisions for you. He may point the way to a particular or obvious course of conduct but if he becomes the decision maker or if that is the inference to be drawn documents may become producible.

- The extent or size of a taking has come up in various cases. What I would call the surgical take the use of a statutory right of way for limited area may be financially beneficial to the Authority and to the land owner left with a Skytrain station on his doorstep. However, taking an entire site may be the most obvious and required step. Be aware that future development sell-off potential of the remainder site as opposed to focusing on the present need of the site starts to tread into dangerous territory. It raises the question of bona fides, lack of jurisdiction, illegality. What advice is your lawyer being asked to give with respect to these matters? Be cautious. Illegality gives rise to grounds of waiver.

- What constitutes legal advice? Communications must be of a legal nature and what might be business advice are not necessarily privileged. If you are in house counsel be clear to maintain your role as advisor when dealing with communications with

the project team. You may ultimately through your advice be part of the decision making process but you might want to be cautious on your role in those meetings. The privilege is for the provision of legal services.

- The privilege is that of the client. The communications between a lawyer and a property agent hired by the client to assist in dealing with an owner retains its privilege so long as the role of the agent is clearly spelled out by their position. The agent is not there as an intermediary, a paper pusher, a mere channel of communication but rather to play a central position in the acquisition and negotiation process for the Authority.

- Putting the advice in issue can waive the privilege. If someone alleges bad faith and there is a simple denial of bad faith one need not go any further. If one pleads that the steps taken were in accordance with all proper reasonable legal advice, you may well have put the advice in issue and that will constitute a waiver of the privilege.

Litigation Privilege.

a) Litigation privilege is a rule of evidence and protects from disclosure documentation or communications made for the dominant purpose of litigation. No lawyer required.

b) The key question was litigation a reasonable prospect at the time the document was produced and if so what was the dominant purpose for its production.

c) An appraisal undertaken by a municipality to assess the risk (cost/damage) associated with a downzoning was held not to be for the dominant purpose of litigation and was producible. The litigation might be in reasonable contemplation. It arises even in the absence of the solicitor/client relationship and whether or not counsel is involved. This privilege expires upon litigation ending. It is not uncommon to see the phrase “without prejudice” on documents communicating a position. Be clear that putting without prejudice on the document does not make it protected simply by the use of the words. The test relates to whether one is communicating a settlement position or a settlement discussion. It is by no means absolute and is not to be used indiscriminately. It may not save you.

6. Expert

a) Production of material and documentation relating to experts in general litigation files is squarely covered by the rules. The expectation under the Rules is that the report is called for in the course of litigation and typically requires a lawyer's instructing letter setting out the parameters for the opinion being sought. In that case and in that process access to the expert's files and essentially all substantive material in the file including data collected, records, anecdotal evidence, statements of facts is available pre-trial on the report exchange.

b) Often the question of draft reports becomes the central point in issue, did you produce a draft, where is it, how did it change after the lawyer reviewed it.

c) My observation to the experts would be that doing a report of this nature is an iterative process that requires the application of judgment and consideration of various parameters with the result that an opinion and in the case of the appraiser the conclusion of value. Whether all of those papers are an appraiser's file whether collectively they amount to multiple drafts is an ongoing question that may in some cases go to the credibility of the appraiser under examination.

d) The formulation of an appraisal opinion under the *Expropriation Act* however is a statutory obligation. It is not done in the context of the litigation but is done as a requirement to be fulfilled as part of the taking. The instructions to that appraiser need to be transparent and in my opinion are immediately producible as part of the disclosure process. They are not controlled by the normal rules process.

e) It is very common of course to have court ready appraisals undertaken as part of the getting ready for trial in an expropriation and that is not a taking appraisal and would I believe be subject to the normal Rules of Court.

f) In short, communications with the appraiser are not privileged, should be subject to an instructing letter and need to be fully considered within the scope of the document production process.

7. Production to the Lawyer and Listing

a) Be cautious with the delivery up of your documents to your lawyer. My suggestion is you never let go of your originals. Keep track of when and what you delivered or made

available. It is an important hand over process and responsibility for listing the documentation is then the lawyers.

b) Be clear, the lawyers are under very clear professional responsibility to list all relevant documents save and except those that might be excepted as privileged. The lawyer is not there to pull out the bad ones.

c) The listing of these documents, the fact that you have made them available may required subsequent completion of an Affidavit that all diligent steps have been made to obtain all relevant documents. That exceptional step comes about when production has been slow, piecemeal, or subject to contentious issues surrounding relevance. Given the modification of the Rules and the "materiality" question you want to be clear where your responsibility has left off and the lawyer's responsibility has commenced and be able to identify the material produced.