

Problems with Consultants



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Overview

- **How consultants hurt their clients**
- The contract -- allocating risk
- What's fair?



How consultants hurt clients

- Misrepresentation
- Breach of contract
- Negligence



Case studies

- The purchaser's consultant
 - bottom? what bottom?
- The vendor's consultant
 - yes, we can, yes we can...
- The neighbour's consultant
 - let's just look over here...



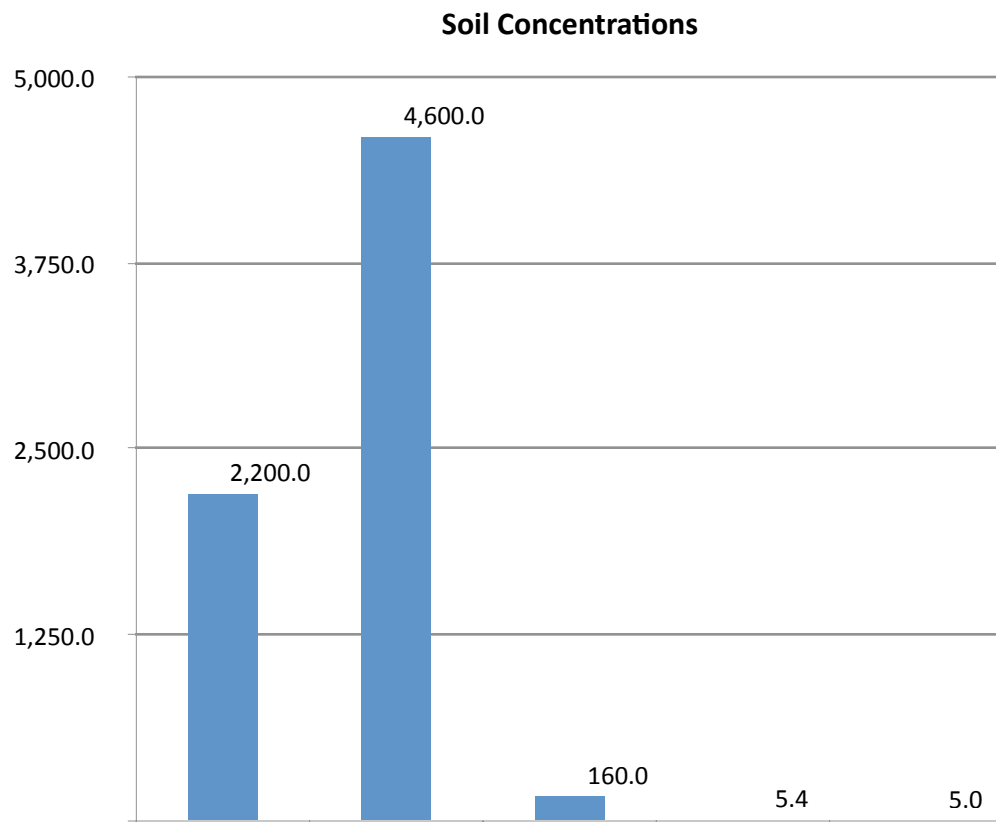
The purchaser's consultant

Test Hole	Depth (m)	Log	Gastec (ppm)
TH 7	0.0 - 1.52	Brown medium-grained sand No petroleum odour	0
	1.52 - 3.04	Brown to grey medium-grained sand Gasoline odour	400
	3.04 - 4.57	Grey medium-grained sand Gasoline odour	300
	4.57 - 9.14	Grey medium-grained sand Gasoline odour	600
	9.14 - 10.67	Wet grey sand Gasoline odour	3,200
	10.67 - 12.19	Wet grey sand Gasoline odour	2,200

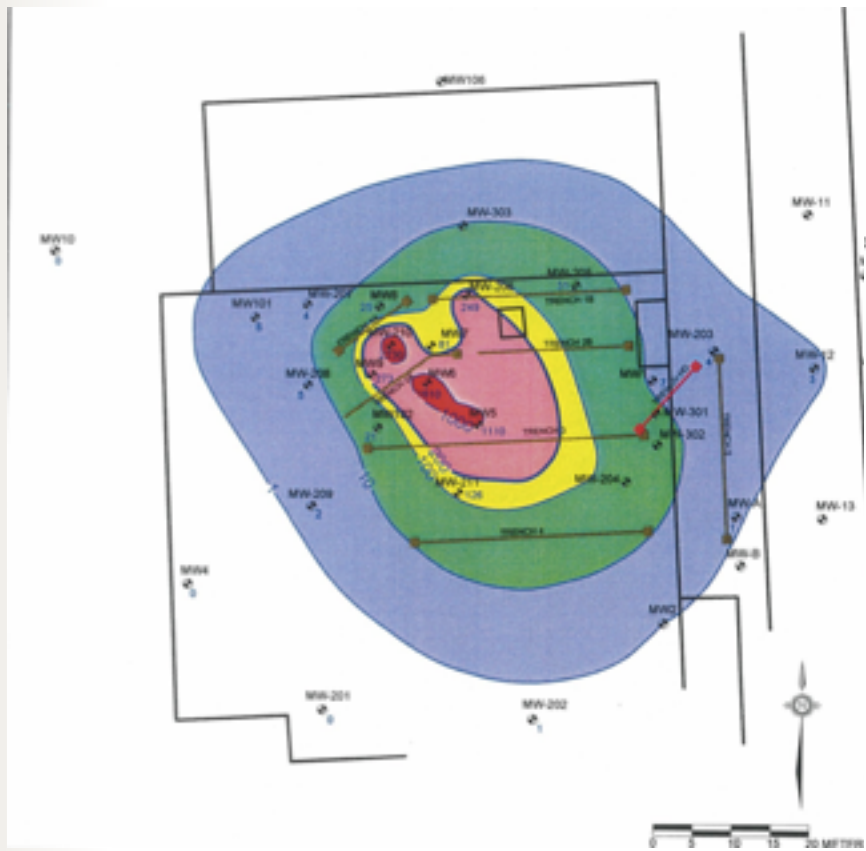


The vendor's consultant

■ Bench test



The vendor's consultant, #2



Why?

- Inexperience?
- Incompetence?
- Tunnel vision?
- Poor communications?
- Corporate culture?
- Cut-rate prices?



Consequences

- Buyer saddled with huge liabilities
- Vendor unable to complete remediation
- Unnecessary legal costs



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Should you trust a consultant?

- Basic due diligence:
 - *Qualified Person?*
 - Does she know what she's doing?
 - Qualifications
 - Experience
 - Can he communicate?
- Check references
- Will they stand behind their work?



Stand behind their work?

- PEO?
- Contract
- Insurance
- Other assets?



PEO?

- Has never disciplined a P.Eng. for environmental negligence, no matter how egregious
- Or for not standing behind work
- Doesn't award damages anyway
- Some discipline for providing false info, rudeness to another engineer



Contractual Limits

- Who can sue?
- For how much?
- For how long?
- For what types of losses?
- Caused by who/what?
 - Third-party risks



Insurance

- Is it enough?
 - \$250,000 including defence costs
- Does it cover this work?
- When does coverage expire? (claims-made)
- Deductible?
- Other claims?
- Access to insurance?



Other assets?

- True incorporation
- No personal liability - different rules for engineers
 - personal assets protected from litigation
- Does the corp have exigible assets?
- Will it stay that way?



Other key issues

- Who owns the report/ data?
 - Who can rely on it?
 - For what purposes
- Confidentiality
- Quality of the work / benchmarks
- Changes in scope
- Third party information
- Unknowns



Did we really need to say?

- Accidents
- Disclosure
- Professional guidelines
 - *what is engineering?*



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Common fine print

- Who can sue? - *only named client*
 - *Who should be named?*
 - *Successors and assigns?*
 - *Individuals?*



For how much?

- Lower of fees paid or \$25,000?
- Higher of fees paid or \$50,000?
 - *Why is this acceptable?*



For how long?

- Ontario *Limitations Act*:
 - 2 years
 - discoverability
 - ultimate limit
- Some engineers:
 - 1 year
 - *will you know by then?*



What losses?

- Direct:
 - Cleanup costs
 - Compliance costs
- Consequential:
 - Delay costs
 - Lost income/ profits
 - Contractual penalties
- Legal costs, interest



Caused by?

- Third parties?
- Third party information?
- Unknowns?
- Multiple causes?
- *Are these risks insurable? by whom?*



Ownership

- Who owns the data?
- Who owns the report?
- Which is the original?
- Alterations?
- Excerpts?
- Copies?



Reliance

- By named client
 - For what purposes?
 - For how long?
 - Conclusions drawn
- By third parties
 - Lenders, successors in title?
 - Subsequent consultants
 - Reliance letters



Can't we make this easier?

- OBA - ACE sample Professional Environmental Consulting Services agreement: <http://envirolaw.com/contracts-engineers-clients/>
- Menu of choices
- Open risk allocation
- What is client paying for?



Conclusions

- Don't assume you can rely on consultant
- Serious due diligence for serious cases
- The contract matters
- Enforcement likely depends on insurance



Questions?

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