

# Working with Consultants



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January 18, 2010



## 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 (bpm) |
|-----------|---------------|---|--------------|
| TH 7      | 0.0 - 1.52    | Brown medium-grained sand<br>No petroleum odour     | 0            |
|           | 1.52 - 3.04   | Brown to grey medium-grained sand<br>Gasoline odour | 400          |
|           | 3.04 - 4.57   | Grey medium-grained sand<br>Gasoline odour          | 300          |
|           | 4.57 - 9.14   | Grey medium-grained sand<br>Gasoline odour          | 600          |
|           | 9.14 - 10.67  | Wet grey sand<br>Gasoline odour                     | 3,200        |
|           | 10.67 - 12.19 | Wet grey sand                                       | 2,200        |
|           |               | Gasoline odour                                      |              |

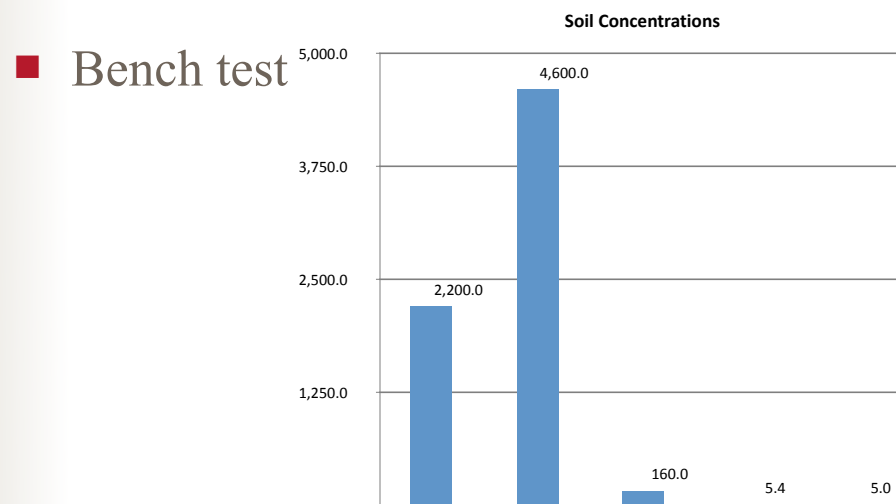
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## The vendor's consultant



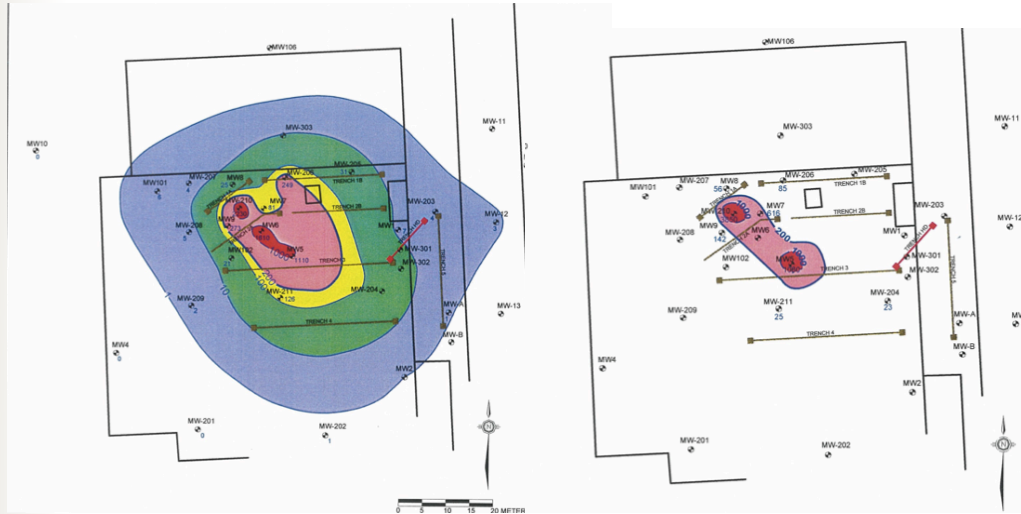
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## The vendor's consultant, #2



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## Why?

- Inexperience?
- Incompetence?
- Tunnel vision?
- Poor communications?
- Corporate culture?
- Cutrate prices?

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## 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 to gov't, extreme rudeness to another engineer



## Other assets?

- True incorporation
- No personal liability
- Does the corp have exigible assets?
- Will it stay that way?



# 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?



# Contractual Limits

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



## 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 negotiating draft
- 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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