

# KEEPING CURRENT

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## Environmental assessment firm not liable to buyer who did not commission their report

By James R.G. Cook

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Buyers should be wary about relying on inspections, appraisals or other reports prepared by a company with whom they have not directly contracted to prepare the report: *Niagara Regional Housing v. Trustees of Carleton United Church*, [2022 ONSC 3413 \(CanLII\)](#).

The dispute in this case involved lands in St. Catharines purchased by Niagara Regional Housing ("NRH") from the Carleton United Church (the "Church") in 2016 to build social housing.

The transaction closed pursuant to an Agreement of Purchase and Sale ("APS"), which included representations and warranties that, to the best of the Church's knowledge, information, and belief, there were no known environmental concerns pertaining to the lands.

After the transaction closed, NRH commissioned an environmental assessment of the lands that revealed contaminated soil that had to be remediated to construct residential

housing. NRH sued the Church for \$401,854, which was the estimated damages associated with the environmental remediation.

NRH also sued LEX Scientific Inc. ("LEX"). LEX had been retained by the Church to conduct an environmental "Phase I" study of the lands.

NRH asserted that it relied on a Phase I environment report prepared by LEX for its purchase of the Lands, that the LEX Report was prepared negligently, and that LEX was liable to NRH for the damages it suffered as a result.

The Phase I study conducted by LEX was intended to provide the Church with an overview of areas of possible environmental concern and entailed a review of historical records relating to the land and a site inspection, but no soil testing.

The Phase I report prepared by LEX identified no environmental concerns for

the lands and did not recommend that a “Phase II” environmental study be undertaken, which involves a more in-depth examination, including testing of soil samples.

Under the terms of LEX’s engagement, the Church agreed to a limited liability and disclaimer clause stating that the contents of any report were not to be published, used by, or disclosed to any party without LEX’s prior written consent, and LEX’s liability to damages was limited to the lesser of fees paid for the work (\$1,950.00) or the actual damages.

The Phase I report contained the following express disclaimer clause:

LEX prepared this report for the sole benefit of [the Church’s representative]; it reflects LEX’s best judgement in light of the information available at the time of preparation. Any use which a third party makes of this report, or any reliance on or decisions made based on it, are the responsibilities of such third parties. LEX accepts no responsibility for damages, if any, suffered by any third party as a result of decisions made or actions taken based on this report.

Without LEX’s knowledge or consent, the Church gave a copy of the Phase I report to NRH before the APS being signed. NRH did not commission its own environmental assessment until after closing.

Pursuant to the APS, the Church agreed to provide NRH with all consents or authorizations (written or otherwise) necessary or desirable to enable NRH to obtain information as NRH may consider necessary or advisable in determining

the environmental condition of the lands upon request. However, there was no evidence that such a request was made.

LEX defended NRH’s claim on the basis that it was not negligent and that its Phase I report was prepared for the sole use of the Church. LEX asserted that it had no knowledge of NRH at the time the report was prepared and that it owed no duty of care to NRH. LEX further relied on the limited liability or disclaimer term of its engagement by the Church.

LEX moved for summary judgment to dismiss the claims against it on the basis of the disclaimer clause. LEX argued that there was no reason for the court to engage in an assessment of whether or not the Phase I report was negligently prepared since it owed no duty to NRH in the circumstances.

Affidavit and cross-examination evidence filed for the motion established that the disclaimer clause was standard in the industry and intended to limit liability to third parties. The manager of housing operations of NRH read the disclaimer clause in the Phase I report provided by the Church but did not request a reliance letter directly from LEX. There was no question that LEX had not granted permission to the Church to provide NRH with the report.

In the [Reasons for Judgment](#), the motion judge relied on the Ontario Court of Appeal decision of *Wolverine Tube (Canada) Inc. v. Noranda Metal Industries Ltd.*, [1995 CanLII 785 \(ON CA\)](#), in which a claim was dismissed against a defendant who had conducted environmental compliance audits on the basis of a disclaimer clause stating that the defendant accepted no responsibility for damages suffered by reliance on the report by any third party. The Court of Appeal affirmed that the disclaimer clause

excluded the imposition of a duty of care owed to any third parties.

The motion judge compared the facts to those in the Supreme Court of Canada's decision in *Edgeworth Construction Ltd. v. N.D. Lea & Associates*, [1993 CanLII 67 \(SCC\)](#), in which a duty of care was found to be owed by the defendant engineers to an unknown third party. In *Edgeworth*, the defendant engineers undertook to provide information for a tender package which was to be used by a definable group of persons with whom the engineers had no contractual relationship. The engineers knew that the purpose of their information was to allow tenderers to prepare a price. Reliance upon their report by third parties was therefore reasonable and foreseeable.

Significantly, the engineering firm's report in *Edgeworth* did *not* contain a disclaimer clause which would have protected them from liability to third parties.

In the case at hand, based on the applicable appellate authority, the court found that there was no triable issue as to LEX's liability to NRH due to the disclaimer clause. In the motion judge's view, the NRH, the Church, and LEX were sophisticated entities who knew or should have known what they were doing when they entered into the subject transactions; further, there was no privity of contract between NRH and LEX. The action was therefore dismissed against LEX. NRH's claim against the Church will continue.

The decision shows that parties should take care when relying on inspection, appraisal or other types of reports that are commissioned by someone else, and take particular note of any disclaimer clauses contained in such reports. While it may be tempting to avoid the cost of

obtaining an independent report, this should be measured by whether any significant reliance is to be placed on the findings in the report. At the least, the party who conducted the report should be put on notice and efforts should be made to confirm, whether by reliance letter or otherwise, that the buyer will be relying on the report.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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