

**ENVIRONMENTAL CONSULTANT'S DISCLAIMER OF LIABILITY TO VENDOR EFFECTIVE AGAINST THIRD PARTY PURCHASER**

By Stanley Berger

On July 23, 2018 the Court of Appeal for Newfoundland and Labrador in the case of *Community Mental Health Initiative Inc. v. Summit Lounge Ltd.* 2018 NLCA 42 upheld summary judgment dismissing a purchaser's claim against two engineering companies (consultants) alleging negligence in the conduct of a Phase 1 Environmental Site Assessment performed for the vendor. The agreement between the consultants and the vendor and the final report both indicated that the assessment was prepared solely for the benefit of the vendor and that the consultants accepted no responsibility for any damages suffered by any third party. Significantly, the plaintiff-purchaser had knowledge of the disclaimer, having been provided with a copy of the final report by its real estate agent prior to the closing of the transaction. The Court of Appeal referred to the Supreme Court of Canada's decision in *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.* [1993] 3.S.C.R. 206 as well as decisions from appeal courts in *Ontario Wolverine Tube (Canada) Inc.* (1995) , 26 O.R. (3d) 577 and B.C., *Kokanee Mortgage M.I.C. Ltd.* 2018 BCCA 151 and summarized the legal principles as follows:

(at par. 23) "... an express disclaimer of liability can be an effective bar against a claim by a third party who relied on work in the knowledge of the disclaimer. Permitting third parties to rely on reports which are expressly protected by a disclaimer would undermine the ability of contracting commercial parties to govern their own affairs."

**IMPLICATIONS FOR REAL ESTATE TRANSACTIONS AND ENVIRONMENTAL CONSULTANTS?**

The long established principle of *privity of contract* i.e. that the rights and obligations in a contract apply only to the parties to the contract have been further tested by this decision. For engineering consultants, the decision highlights the importance of exacting express disclaimer clauses restricting responsibility for the reporting information to the party retaining them. For purchasers of real estate, it reinforces the necessity of obtaining indemnities from the vendor for undiscovered contamination or if that is not realistic, retaining an independent environmental consultant to verify any consulting reports given to them by the vendor.



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