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COURT REJECTS ENVIRONMENTAL CONSULTANT'S THIRD PARTY CLAIM AGAINST PRIOR OWNERS/OCCUPANTS

By Stan Berger

On March 22, 2018 the Ontario Superior Court of Justice in *MVL Leasing Ltd. v CCI Group Inc*. 2018 ONSC 1800 granted Rule 21 motions striking third party claims brought by an environmental consultant who was being sued by a purchaser of property for professional negligence and breach of contract. The lawsuit alleged that the plaintiff was led into closing the sale by the consultant's Phase 1 and Phase 2 Environmental Site Assessments. The property turned out to be contaminated. The consultant in turn alleged that the contamination was caused by one or more businesses operated by the third parties. The consultant requested contribution indemnity from the third parties on 6 different grounds: nuisance, loss or damage caused by a spill pursuant to s.99 of Ontario's *Environmental Protection Act*, the occupier's duty under the *Occupiers' Liability Act* to ensure the safety of persons entering upon the property, negligence, liability under the *Negligence Act* and unjust enrichment. The consultant argued that if found liable in the main action, it would have incurred pecuniary losses as a direct result of the spill, those damages being the plaintiff's remediation costs and or the decrease in the property's value.

Court's Reasons for Rejecting the Third party Claims

The nuisance claim was rejected on the basis that the consultant did not own, occupy or possess the property, or any adjacent or nearby property impacted by the alleged contamination. The s.99 EPA claim was only available where the damages were directly caused by the spill and that was not the case. The occupier liability claim was rejected because the consultant suffered no damages as a result of entering the property in question. With respect to the negligence claim, the Court refused to impose a new duty of care upon the third parties. There was no proximity in the relationship between the consultant and the third parties. The potential economic harm to the consultant was not a reasonably foreseeable consequence of the alleged acts or omissions of the previous third party owners/occupiers. The *Negligence Act* claim was rejected on the basis that the consultant and the third parties did not meet the test under the Act of being concurrent tortfeasors for contribution and indemnity to be available. The plaintiff's actual or potential causes of action against the consultant and the third parties were entirely different in nature. The damages allegedly caused by the third parties were different and discrete from those


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caused by the consultant. Finally, the unjust enrichment claim was rejected as the consultant had not pleaded any direct conferral of a benefit upon the third parties and the consultant had not suffered a corresponding detriment. If the consultant had incurred a detriment in the future by the plaintiff succeeding with its action, that detriment only related to the breach of contract and/or negligence of the consultant and the third parties were not parties to that relationship.

What can we take away from this Decision?

In order to sustain a third party claim against historic owners or occupiers of contaminated property, environmental consultants who are sued by a purchaser of contaminated property, will have to show that that the historic owners/occupiers were somehow responsible for or at least connected to the contractual breach or negligence which the purchaser alleges against the consultant.