

## ENVIRONMENTAL & ENERGY LAW

### VENDORS BEWARE-SALES OF PROPERTY MAY BE VOIDED BY PURCHASERS WHO WEREN'T PROVIDED COPIES OF ORDERS RELATING TO THE PROPERTY

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Thinking of selling your property? Make sure every person who will acquire an interest in the property gets a copy of any relevant Ministry of the Environment ("MOE") order. Failure to do so may result in the transaction being void pursuant to subsection 197(4) of the *Environmental Protection Act*.

This issue was recently considered by the Ontario Court of Appeal in *Crosslink Bridge Corp. v. Canadian National Railway 2014 ONCA 247*. Crosslink purchased property from CN in 2008. Four years later, Crosslink brought an application for an order declaring the purchase transaction void and for \$5.9 million for the costs of purchasing, carrying, maintaining and developing the property. Crosslink claimed that it had not been provided with a copy of a 2006 MOE order prior to the sale and sought to void the transaction. The Ontario Court of Appeal upheld the lower court's decision dismissing the application on the basis that it was open to the application judge to draw an inference that CN had given Crosslink a copy of the order prior to the sale. Facts supporting this inference included: Crosslink's knowledge that the order had been made; there had been full disclosure of the environmental reports that led to order; following a lengthy due diligence period, Crosslink waived all conditions with respect to the environmental condition of the property, acknowledged that CN had delivered all environmental reports in its possession and conclusively waived all requisitions concerning any matters relating to the property; and, prior to closing, Crosslink requisitioned a copy of the order and failed to respond when CN replied and asked if Crosslink had not yet received a copy.

### SUPREME COURT OF CANADA DENIES LEAVE TO APPEAL TO NORTEL RELATING TO MOE ORDERS AND THEIR PRIORITY IN INSOLVENCY PROCEEDINGS

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On October 4, 2013 *Fogler, Rubinoff's Environmental and Energy Law Newsletter* reported that the Ontario Court of Appeal ("OCA") had overturned the decision of a judge under the *Company Creditors Arrangement Act R.S.C. 1985,c.C-36 (CCAA)*. The OCA decided that orders issued by the Ministry of Environment ("MOE") to Nortel Networks Corp. should not be subject to the priority scheme set out in the CCAA because it was not sufficiently certain that the MOE would perform the work required under those orders and seek reimbursement. The order was not therefore a "provable claim" subject to the CCAA. It was more likely that the Ministry would enforce the orders against other parties to the order before undertaking the work themselves. On April 17, 2014 the Supreme Court denied leave to appeal to Nortel. No reasons were given, as is the Court's custom.

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