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2024 Notable Case Update: (Lien) Bonds are Back

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Manitoba Court of Appeal confirms use of lien bonds as security on Crown land projects

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In **a previous article**, we highlighted the 2021 Manitoba Court of King's Bench decision of *Bird Construction Group v. Trotter and Morton Industrial Contracting Inc.*, which called into question the use of lien bonds as security for the vacating of liens on construction projects on Crown land.

The Manitoba Court of Appeal has since overturned this decision, reaffirming that lien bonds are acceptable forms of alternative security on Crown land projects.

The facts of the case are as follows:

- Bird Construction Group ("Bird") was the general contractor for the City of Selkirk Wastewater Treatment Plant Project (the "Project"). Trotter and Morton Industrial Contracting Inc. ("TM") was a sub-contractor to Bird.
- Differences arose between the parties on the Project and TM provided notice of two liens to the Owner.
- Bird filed an application under sections 55(2) and 55(3) of *The Builders' Liens Act*, C.C.S.M. c. B91 (the "Act") requesting an order vacating the liens upon providing to TM two lien bonds with face values equivalent to the liens. Bird denied that it owed TM the money claimed, but was prepared to provide the lien bonds in order to ensure the Project continued.
- TM was prepared to accept a lien bond as security for one of the liens, but not the other. TM therefore opposed Bird's application, arguing that a lien bond was an inappropriate form of security in this case because the Project was on Crown land.

Central to the case at both levels of court was the fact that the Project was on Crown land. A Crown land project includes any project where the owner of the land or the structure upon or in respect of the work being done or services provided or material supplied is the Crown, a Crown agency, or a municipality.

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On Crown land projects, a lien is “registered” against the holdback rather than against the land itself. When the Owner is provided notice of lien, this causes the Owner to refuse to pay the holdback and unpaid funds to the contractor.

On the original hearing of the application, the Court of King’s Bench application judge held that lien bonds are not an acceptable form of alternate security to vacate liens registered on a Crown land project, citing a number of reasons why lien bonds may not be as good as cash for security. The Court held that in order to vacate TM’s lien, Bird was required to pay cash into court in the amount of the full value of the lien.

Bird appealed the decision.

The Manitoba Court of Appeal granted Bird’s appeal, overturning the decision of the lower court. The Court of Appeal held that both cash and lien bonds are acceptable forms of security to vacate liens filed by a sub-contractor on a Crown land project.

As a preliminary matter, the Court of Appeal considered whether the specific wording of section 55(2) of the Act deprived the Manitoba Court of King’s Bench jurisdiction to vacate liens involving Crown land projects. The Court of Appeal reviewed section 55(2) in light of other sections of the Act and common law principles relating to statutory interpretation, ultimately confirming the jurisdiction of the Court of King’s Bench to vacate said liens.

With respect to the lien bond issue, the Court began by clarifying the distinction between the “holdback” (which is required to be deducted and retained on all projects) and the “holdback account” (which requires owners to set aside the holdback in a specific account in certain circumstances). The Court noted that as the section of the Act requiring a holdback account does not apply to a Crown land project, there was no holdback account on the Project at issue.

The application judge had held that TM’s lien was registered against the holdback account, and as such TM had a charge on the “cash” in that account. The Court of Appeal found this to be an error. As there is no holdback account on a Crown land project, TM did not have a charge over a specified, existing fund (i.e. the holdback account), but rather it had a charge against the debt owed – or might yet be owed – by the Crown Owner to Bird (i.e. the holdback). If TM were to prove its lien claim and Bird failed to pay the judgment, TM could claim against the Crown Owner any amounts that might be payable by the Owner to Bird that had been withheld (i.e. the holdback). TM would not be able to simply enforce its judgment against a specific fund (i.e. the holdback account).

Regarding the finding of the application judge that a lien bond is lesser security than cash, the Court of Appeal noted that typically, where the type of security was successfully opposed by the lien claimant, it was because of concerns with the creditworthiness of the surety or the terms of the bond. TM did not raise concerns with either in this case.

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The Court held that where there are no questions about the creditworthiness of the proposed surety, a lien bond such as the one presented by Bird is effectively equivalent to cash. In any event, the Court noted, the proposed bond was as good as the security provided by TM's lien, being a charge over Bird's accounts receivable from the Owner (i.e. the holdback), not a charge on cash (i.e. the holdback account).

Bird further argued that the application judge erred by attempting to read the trust and lien provisions of the Act together. The application judge had held that the holdback in a Crown land project is "the same monies designated as trust monies under section 4 of the Act" and that "if the holdback monies are retained or paid into court, there is no risk that a contractor would improperly use the trust fund, because the contractor never receives them."

The Court of Appeal disagreed with the reasoning of the application judge, saying:

1. Funds retained by an owner do not become trust monies in the hands of the contractor under section 4 of the Act until they are actually received by the contractor. In the present case, the funds had been retained by the Owner due to TM's lien (and not paid to Bird). As such, they were not yet trust funds under section 4 of the Act.
2. The possibility that a contractor could breach its trust obligations unless the cash is held up in court is a risk in *any* trust claim and merely a function of how the trust provisions of the Act This was considered not relevant to the question that was before the application judge – being whether Bird is able to post a lien bond to vacate the lien.

Ultimately, the Court of Appeal overturned the decision of the application judge and ordered that the lien be vacated upon Bird entering the proposed lien bond with the court.

The Court of Appeal's decision represents a return to the previous doctrine surrounding lien bonds on Crown land projects. Those in the legal, construction, insurance and bonding industries will no doubt be happy to see this issue clarified.

* *This article was written with the assistance of Stefan Leicht, a summer student with Thompson Dorfman Sweatman LLP.*

If you would like to know more about lien bonds on Crown land projects or have another construction law matter to discuss, please contact someone **in the TDS Construction Law group**.

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