Understanding the use of lien bonds on Crown land

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"Ensuring payment of contractors and subcontractors and encouraging liquidity in the flow of funds to them are both significant preoccupations in the construction industry." This quote from the Supreme Court of Canada remains as applicable now as it was when we cited it in our previous article, discussing the case of *Bird Construction Group v Trotter and Morton Industrial Contracting Inc*., 2021 MBQB 233. In that article, we considered the potential adverse effects of the decision on the flow of funds on construction projects on Crown lands, and, respectfully, the errors in the application judge's reasoning.

In *Bird Construction Group v Trotter and Morton Industrial Contracting Inc*., 2023 MBCA 64, the Manitoba Court of Appeal overturned the decision of the application judge and ruled that lien bonds could be used as security to vacate claims for lien on Crown lands. In doing so, the Court of Appeal provided much needed clarity on the use of lien bonds on construction projects, and their importance in encouraging liquidity and the flow of funds.

Background

The background of the case is relatively straightforward.

- The Manitoba Water Services Board hired Bird Construction Group (Bird) as contractor on a wastewater treatment project at the City of Selkirk in Manitoba (the Project). Bird subcontracted with Trotter and Morton Industrial Contracting (TM) to perform a defined scope of work on the Project.
- There was a dispute between Bird and TM over payments, and TM delivered two notices of claim for lien.
- Bird attempted to vacate the claims for lien by posting two lien bonds.
- TM challenged Bird's application, arguing that a lien bond was not appropriate security in the case of Crown lands, which was the case for the Project.
- The application judge held that lien bonds were an inadequate form of security for Crown lands.

The details of the application judge's decision (and our respectful opinion on his decision) can be found in our previous article. In short, there were errors in the

application judge's reasoning, and, unsurprisingly, Bird appealed the application judge's decision.

Lien bonds an adequate alternative to cash security

The Court of Appeal began by confirming the jurisdiction of the Court to vacate claims for lien on Crown lands. It next analyzed the sufficiency of lien bonds as security to vacate liens.

The Court of Appeal first noted that the application judge's decision regarding the adequacy of the proposed security to vacate the lien is discretionary, and should be given deference, unless the application judge misdirected himself or the decision was so clearly wrong as to amount to an injustice.

The Court of Appeal then made general conclusions about the factors that courts in other jurisdictions have considered when dealing with similar provisions.

Among other considerations, the crucial factor that the Court of Appeal identified in the appeal was whether the creditworthiness of the surety posting the lien bond was in question or uncertain. In particular, the Court of Appeal emphasized the fact that the application judge noted that no submissions were made regarding the credit worthiness of the proposed surety. Rather, the application judge made a blanket statement that "there is always a risk that the credit worthiness of the surety will have diminished by the time of the judgment". However, the Court of Appeal held that, in the absence of evidence challenging the credit worthiness of the proposed surety, lien bonds are adequate security.

In addition to its analysis regarding the credit worthiness of the proposed surety, the Court of Appeal clarified the application judge's conflation of the concepts of the holdback and holdback account. In particular, the application judge held that for Crown projects, a lien is "registered" against the owner's holdback account, as distinct from the land itself. Conversely, the Court of Appeal stated that, as a corollary to section 24(6) of the *Builders' Lien Act* (the Act), there is no holdback account in respect of Crown projects. Therefore, the Court of Appeal held that the application judge misdirected himself by grounding his exercise of discretion in an incorrect finding that TM had a lien on holdback funds, rather than the land itself.

Lastly, the Court of Appeal addressed the application judge's conclusions regarding the trust provisions of the Act. The application judge stated that there is a tighter relationship between the lien and trust remedies of the Act, and relied on this understanding of the trust provisions of the Act to support his decision that lien bonds are not an acceptable substitute for cash. The Court of Appeal disagreed and held that lien and trust claims are separate. Therefore, money paid into Court to secure a lien claim is security only for that claim and not any trust claim. The Court of Appeal thus concluded that it was irrelevant to tie the security for discharging a lien claim to security for a trust claim.

Conclusion

The Court of Appeal concluded that Bird could vacate TM's claim for lien by posting a lien bond. From a practical standpoint, the Court of Appeal's decision should provide much needed commercial consistency for all parties involved on construction projects in Manitoba.

Payment disputes, and the registration or giving of liens, are not uncommon. Lien bonds provide a commercially sensible mechanism for vacating liens, ensuring the distribution of funds on a project and protecting the payor from a potential breach of contract claim while also preserving the payor's cash flow in the event that the payor has a defence to the lien claim.

The application judge's decision diminished the utility of lien bonds by creating uncertainty about whether lien bonds would be adequate security. However, the Court of Appeal's reversal of the application judge's decision has restored clarity on the utility of lien bonds as the preferred means of security to vacate liens and "Ensuring payment of contractors and subcontractors and encouraging liquidity in the flow of funds".

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