

● Construction Law Advisory

Date February 27, 2015

Subject **A Contractor's Obligation to Ask for Bonds**

Under standard form Labour and Material Payment Bonds ("L&M Bonds") used by every bonding company in Canada, one party (typically the Owner or General Contractor) is expressly named "Obligee" or "Trustee".

Historically, Trustee positions of every kind carry with them fiduciary duties which are implied by law.

Given the express creation of a trust and the assignment of the role of Trustee to one party in L&M Bonds, where a L&M Bond is posted for a project, the question arises of whether or not the Trustee is obligated to take reasonable steps to inform potential claimants under the L&M Bond of the very existence of the bond.

Recently McLean & Armstrong LLP argued before the Alberta Court of Queen's Bench that Trustees under standard form L&M Bonds have an obligation to provide notice of those bonds to contractors who may benefit. This argument was unequivocally rejected by the Honourable Justice Verville who made clear that the obligation is in fact on contractors to ask if a L&M Bond has been posted for a given project. At paragraph 84 and 85 of his Reasons for Judgment, Justice Verville states as follows:

[84] Valard argues that Bird could easily have posted the Bond on the bulletin board in Bird's office trailer on the site, distributed copies of the Bond, or required Langford to take reasonable steps to notify its subcontractors and material suppliers of the existence of the Bond.

[85] While this may be true, Bird was not obliged to provide notice. In any event, a simple standard inquiry by Valard would be a more reliable means of obtaining the information. While it may be that employees of subcontractors may not always be aware of the possibility of a bond, this does not explain why a large and sophisticated entity such as Valard would not have in place a mandatory protocol under which bond information is requested on all subcontracts, especially given the state of the law on the issue. In this case, we are not dealing with the disadvantaged and infirm, but rather with a large sophisticated company with five or six hundred employees in Canada which has its own surety or bonding company.

The conclusion of Justice Verville appears contrary to principles of trust law which clearly create fiduciary duties on all trustees to protect the trust property for the benefit of all beneficiaries. Nevertheless, the lesson for contractors of any size should be that the obligation to ask about the existence of security for work performed, such as L&M Bonds, is entirely on the contractor's shoulders.

The decision of Justice Verville is currently under review and may be the subject of appeal.

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