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Carillion 2.0? Ontario Judge orders stay of claims against performance bonds

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On May 28, 2025, a precedent-setting order was issued in a *Companies' Creditors Arrangement Act* ("**CCAA**") proceeding preventing calls on performance bonds by obligees unless the written consent of the insolvent companies and monitor is obtained, or leave is granted by a commercial court judge.[1]

This order and the underlying endorsement[2] are significant because performance bonds are mandatory under the *Construction Act* for some public owner contracts[3] and are often supplied to general contractors by major subcontractors and equipment suppliers. Project owners and contractors, as parties named as obligees in performance bonds, often pay the premium charged by the surety for the bond as part of the contract price and have come to rely upon this security especially when the principal becomes insolvent. The stay on performance bond calls provided for in the order made on May 28 is novel in that the authors are not aware of any other CCAA order issued in Ontario which places an obstacle in the way of making an immediate call upon a performance bond following an insolvency.

As most senior construction lawyers will recall, lien regularization orders (commonly known as LROs) and the process of giving liens to the monitor instead of complying with the registration or service requirements of the *Construction Act* did not exist prior to the 2013 Comstock insolvency. In that insolvency, members of the construction and insolvency bars worked together to create the LRO process which is now a familiar and accepted lien claims process appearing in subsequent CCAA orders. Given the importance of performance bonds in the construction industry especially for public owners who have no choice but to obtain performance bonds from their contractors, hopefully the stay of calls on performance bonds in the Earth Boring CCAA proceeding will not form part of future CCAA orders or become part of the CCAA model order.

The Insolvency:

The Applicants, Earth Boring Co. Limited, Yarbridge Holdings Inc., Trolan Investments Ltd., and Yarfield Services Limited, are related entities providing trenchless construction services in Ontario. According to the Application Record, "the Applicants are the oldest and largest trenchless construction service provider in Ontario"[4] and are industry leaders in underground construction for complex infrastructure projects.

The Applicants had a Master Surety Agreement with Aviva Insurance Company of Canada ("**Aviva**") pursuant to which Aviva provided the Applicants with bonding for ongoing construction projects. There were 8 performance bonds issued by Aviva, four of which were for continuing projects. The bonds issued by Aviva totalled $150,000,000. The obligees named in the performance bonds were both public owners and general contractors.

On April 17, 2025, the Applicants brought an application seeking an initial order under the CCAA which included an LRO and a broad stay against anyone with recourse to a performance bond (the "**Bond Stay**"). The initial order was issued together with the LRO,

however, the Bond Stay issue was not decided until May 28.

The May 28 Decision:

In paragraphs 40 to 45 of her endorsement, Justice Steele addresses whether the Court should grant a stay of calls on performance bonds. Justice Steele notes that section 11 of the CCAA gives the Court broad discretion to make any order appropriate in the circumstances. This discretion includes temporary stays of third-party rights. In exercising this discretion, the Court must consider whether the requested relief will "*further the efforts to achieve the remedial purpose of the CCAA*" and "*avoid the economic and social losses resulting from liquidation of an insolvent company*."[5]

The Applicants were concerned that without an initial stay of calls on the performance bonds, the obligees would likely make claims under the performance bonds triggering an obligation on Aviva to step in and respond to the calls. According to the Applicants, calling on the performance bonds and in essence enforcing rights and remedies bargained for would interfere with the Applicants' ability to continue to provide services under the bonded project contracts and interfere with the flow of project funds to the Applicants. Under the standard form of performance bond, it is a condition precedent to the surety's liability that the obligee agree to pay the balance of the contract price to the surety. In other words, the obligee must pay the surety the total amount otherwise payable to the principal, thereby diverting money away from the principal's bank account and into the hands of the surety.

Justice Steele accepted the Applicants' position with the following stay terms appearing in paragraph 26 of the third amended and restated initial order (emphasis added):

"This court orders and declares that during the Stay Period, no Person, holding a Performance Bond (as defined in the First Woodbridge Affidavit), including any Person named as an owner or obligee under such bond, shall be permitted to enforce and/or call on the Performance Bond ("Performance Bond Claim"), **except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Performance Bond Claims currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court**."[6]

In her endorsement, Justice Steele relied on the recent decision by Justice Osborne in the CCAA proceedings of Hudson's Bay Company, 2025 ONSC 1530, where the court extended the stay of proceedings to co-tenants. In that case, the issue being addressed related to a specific type of clause in certain commercial retail leases that permit a tenant to certain rights (or remedies) on the basis of another tenant (in this case Hudson's Bay Company) being unable to perform. Often, these clauses relate to so-called "anchor tenants" that can support the landlord charging premium rental rates in a retail centre. The stay of proceedings protecting Hudson's Bay Company would not normally prevent other tenants from enforcing co-tenancy clauses in their leases, creating a cascading impact on the landlords whose rights were already impacted by the stay of proceedings and other rights provided to a debtor in an insolvency proceeding. In the words of Justice Osborne, the "rationale is that extending the stay of proceedings in such a manner prevents a so-called "run on the bank" in the sense that many other co-tenants might seek… to terminate their own leases with landlord locations where Hudson's Bay currently operates."[7]

Justice Steele accepted the Applicants' submission that an initial stay of calls on the performance bonds are necessary for the "same reasons as in a co-tenancy stay."[8] In accepting this position, the court appeared to accept the Applicants' evidence that if Aviva were called on to respond on the bonds, this "likely would interfere with the Applicants' ability to operate under the contract in question. Further, the Applicants state that any additional costs that Aviva might incur in exercising the range of options open to them in that scenario could and likely would interfere with the further flow of project funds to the Applicants."[9]

However, reviewing the Application Record and affidavit filed in support of the relief sought, the evidence appears to simply be the statement by the affiant without any specific detail as to the nature of interference to the Applicants' ability to operate or to the flow of project funds. In a co-tenancy scenario, the protection is extended to landlords as a way of mitigating against cascading and ripple

effects of an insolvency. This is consistent with the Supreme Court's comments in *Century Services Inc. v. Canada*, 2010 SCC 60, that in exercising its jurisdiction and discretion, the court should consider "whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company." [10] Protecting landlords from a "run on the bank" protects landlords, and even tenants without a co-tenancy clause, from multiplying the economic losses that will cascade from the insolvency of an anchor tenant.

By contrast, it is not clear how the call on bonds by obligees (in this case, owners and contractors) against a surety, whose sole purpose is to provide a source of recovery for obligees, would create further economic losses that should be remediated by a broad stay of proceedings. Any rights of the surety to pursue its subrogation rights against the debtor are stayed. The court could, and often will, extend the stay to directors of the debtor, to permit the directors and the company the necessary breathing room and court protection to permit restructuring efforts and the continuation of operations. Court protection in favour of the surety, who received valuable consideration to back-stop the performance of the debtor, appears to cast the net wider than necessary to "achieve the remedial purpose of the CCAA."

While not determinative, it is worth noting that under the provisions of the *Bankruptcy and Insolvency Act*, where proceedings are commenced in respect of a Division I Proposal (functionally similar to a CCAA), there is an automatic stay of proceedings in favour of directors of the debtor company. This is not the same in the case of a bankruptcy or receivership. However, that automatic stay in favour of directors does not automatically stay claims against the directors on a guarantee.[11] Generally, creditors are permitted to pursue guarantors even where the guarantor is a director of the debtor company. A performance bond, much like a guarantee, is a separate contract that stands for the benefit of the obligee and does not involve a claim against the estate of the debtor. The surety would have had the opportunity to protect against claims through security interests and other forms of collateral and as such, arguably, is not prejudiced by having to perform the contract of surety that it bargained for.

Why the Stay of Performance Bonds Term is Important to Obligees:

This Bond Stay removes an important protection bargained for by public owners and contractors who obtain performance bonds, while shielding sureties from their performance bond obligations. More specifically, it stays the obligees' right to make a written demand on the surety, a pre-notice meeting, a post-notice conference, reimbursement on account of mitigation work and necessary interim work, while staying a surety's obligation to work with the obligee to complete the project.

The Bond Stay may be a term that is unique to the Earth Boring CCAA proceeding and may be a "one-off" temporary stay of third-party rights under section 11 of the CCAA as it does not appear that the Applicants' request for relief was opposed by any party, both at the initial hearing and on the comeback hearing. However, it remains to be seen whether this type of third-party rights stay will appear in future CCAA orders in the same way LROs have come to be expected by construction lawyers in a construction project insolvency.

Read our follow-up article: ***Another Ontario CCAA Order Stays Claims Against Performance Bonds***

[1] In the matter of the *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, as amended and in the matter of a plan of compromise or arrangement of EARTH BORING CO. LIMITED, YARBRIDGE HOLDINGS INC., TROLAN INVESTMENTS LTD., AND YARFIELD SERVICES LIMITED, 2025 ONSC 2422 ("**Re Earth Boring Co. Ltd., 2025 ONSC 2422**");

https://www.bdo.ca/getmedia/55c8a101-8f77-4019-96b5-ac8cf956ffdc/1-285Third-Amended-and-Restated-Initial-Order-Earth-Boring-Co-Limited-et-al-Dated-May-28th-2025.pdf

[2] https://www.bdo.ca/getmedia/a4878af7-da55-4e4c-b917-25bd10114aa2/2404-2-Further-Reasons-of-Justice-Steele-re-Initial-Order.pdf. The relevant paragraphs are found in paragraphs 40 to 45 of the endorsement issued by Justice Steele on April 17, 2025 and appear in paragraph 26 of the Third Amended and Restated Initial Order of Justice Cavanagh, issued May 28, 2025.

[3] Section 12, Ont. Reg. 304/18 and Section 85.1 of the *Construction Act,* R.S.O. 1990, c.C.30, as amended, require public owners obtain performance bonds from their contractors on all public contracts with a contract value of $500,000 or more.

[4] Paragraph 6 of the affidavit of Eugene Woodbridge filed in support of the Application

[5] *Re Earth Boring Co. Ltd., 2025 ONSC 2422*

[6] *Re Earth Boring at para 26*

[7] In Re Hudson's Bay Company, 2025 ONSC 1530 (CanLII), at para 65; https://www.alvarezandmarsal.com/sites/default/files/canada/CV-25-00738613-00CL%20HBC%20Reasons%20Mar%2010%2025%20%281%29.pdf

[8] *Re Earth Boring at para 43*

[9] *Re Earth Boring at para 44*

[10] *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 (CanLII), [2010] 3 SCR 379, at para 70, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/7904/index.do

[11] *Bankruptcy and Insolvency Act,* R.S.C. 1985, c B-3, Section 69.31, https://laws-lois.justice.gc.ca/eng/acts/b-3/

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