

Earth Boring Co. Limited. - Stay of Performance Bond *A Game Changer or Much ado About Nothing?*

*By Steve Ness, President of the Surety Association of Canada
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On May 28, 2025, the Ontario Superior Court of Justice issued an Order (“**the Order**” available for viewing [HERE](#)) in a *Companies’ Creditors Arrangement Act* proceeding that temporarily enabled Earth Boring Co. Limited, and its affiliates to “...continue to carry on business in a manner consistent with the preservation of their business ... and Property”, and to “...remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever...”.

The Order also temporarily prohibits Obligees from advancing claims on any performance bonds issued on behalf of Earth Boring.

Unfortunately, the Order, and in particular the performance bond stay, has triggered a wave of unwarranted overreaction and hyperbole from various industry participants, most of whom should know better. Some have gone so far as to suggest that the Order effectively “removes” the Obligee’s right to claim, portending the end of performance bonds as a viable means of security against the risks of project contractor failure.

With apologies to Mark Twain, rumours about the death of performance bonds are wildly exaggerated, and the noise that has followed the issuance of the Order is just that: A lot of noise with no real substance behind it.

An article that appeared in the Wednesday July 16th (2025) edition of *Lexology* (“**the Article**” available for viewing [HERE](#)) typifies the reaction of several stakeholders in the construction world. Published by a prominent construction law firm, the Article refers to the order as “precedent setting” and suggests that Obligees may now find that their rights to recover under the performance bond may be compromised.

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.

In the first place, court orders that include a temporary stay on performance bond claims are hardly precedent setting, particularly where the Principal is insolvent, or on the verge of an insolvency. More importantly, the assertion that the stay “shields” the surety and provides them with an escape hatch to wriggle out of its performance bond obligations is quite simply, absurd.

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The imposition of a stay is not the same as a revocation of the instrument. It simply hits the pause button by placing a **temporary** freeze on any further action by creditors. The objective is to provide the debtor (in this case Earth Boring) with breathing room to consolidate their resources, refocus their efforts, and enable them to carry on business as an operating entity, thus avoiding a “run on the bank” that would trigger a full-on failure.

Under the terms of the current Order, the stay is set to expire on August 15, 2025 unless extended by the courts. **In the meantime, the Obligee still enjoys the full protection of the performance bond and the surety remains responsible for all of its liabilities under the instrument.**

A closer look at the Order and even the Article would seem to confirm that all the affected parties, including the Obligees under the bonds, are on board with the objective of finding a solution that will allow the work on the bonded projects to continue uninterrupted. Both the Order and the Article make mention of the fact that neither the Surety, nor any of the Obligees raised any objection to the application by Earth Boring. Indeed, the Article goes on to say:

*“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**” (emphasis added).*

Likewise, in the 2nd paragraph of the preamble, the Order observes:

*“...on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the Bank of Montreal (“BMO”), **and such other parties as listed on the Participant Information Form, with no one appearing for any other person although duly served...**” (emphasis added).*

The fact that the Order was unopposed by anyone, including the Obligees under the bonds, speaks volumes. It suggests that all parties are aligned in their view that this is the optimum approach and will ensure that work on the projects will continue while the Order stays the hand of third-party creditors outside of the construction payment chain.

In speaking directly with the Surety involved, Aviva Canada, they have confirmed that this is the case and suggested that the terms of the Order will allow them to become an active participant in the multi-party effort to bring the uncompleted projects across the finish line.

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One key fact that was blithely ignored by the authors of the Article is simply this: **The stay imposed by the Order applies only to the performance bonds.** The labour & material payment bonds remain open for business, allowing unpaid trades and suppliers to advance claims for payment of outstanding amounts.

This is a critical consideration as the Surety now becomes a key facilitator in the effort to bring the bonded work to a successful and more expeditious conclusion. With the payment bond shackles removed (or not applied in the first place), the Surety is now free to review, process and pay valid payment bond claims, thereby incentivizing key subcontractors and suppliers to remain committed to the project and facilitating a smoother completion process.

Far from “...(removing) an important protection bargained for by public owners and contractors...”, this approach will have the opposite effect, allowing Earth Boring to continue operations and complete the ongoing construction projects, to the advantage of all the affected parties. Even though there is no immediate call on the performance bond, the Surety is now an important part of the solution, working cooperatively with those parties to achieve the desired result, i.e. a completed project, delivered in the most seamless manner possible.

Again, should these efforts fail, resulting in the contractor defaulting on its obligations under the bonded contracts, the performance bond remains in force, providing the Obligees with its full protection.

All things considered, the anxiety and hand-wringing angst over the stay order and its implications seem to be much ado about nothing.

Sources:

BDO Canada, Ontario Superior Court of Justice, Court File No. CV-25-00741419-00CL -

<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>

WeirFoulds LLP, Publications, "Carillion 2.0? Ontario Judge orders stay of claims against performance bonds" -

<https://www.weirfoulds.com/carillion-2-0-ontario-judge-orders-stay-of-claims-against-performance-bonds>

This article is intended to serve as a commentary and source of general information to provide members and other readers with some insights regarding the issues discussed. Nothing contained herein should be construed as legal advice and readers are cautioned to consult with legal counsel for such advice.



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For more information and media inquiries, please contact:

Steve Ness
President & Chief Operations Officer
Surety Association of Canada
C: (416) 419-0750
E: sness@suretycanada.com

About the Surety Association of Canada:

The Surety Association of Canada (SAC) is the national trade advocacy association that represents the interests of the surety industry across Canada. Its members consist of primary surety firms, surety reinsurers, surety/insurance brokers, and other organizations that provide related and complementary services to the surety industry.

While the majority of the surety industry's premium revenue is derived from construction contract bonds, SAC also represents the interests of those organizations that focus on non-contract or commercial surety. SAC does not represent or advocate on behalf of the fidelity bond industry.

Since its formation in 1992, SAC has become a trusted resource for construction purchasers, design professionals, contractors, suppliers and other stakeholders in construction and business communities. SAC has developed its own bond forms in response to industry needs and in consultation with the construction industry.

SAC and its members regularly meet with owners, contractors, other associations and related organizations to educate them about surety bonds and the suretyship process. SAC also monitors legislation across the country that will impact its members and works diligently to advance the surety cause with lawmakers and government officials.

For more information, visit: www.suretycanada.com.