PP020 – Seals on Bonds

Introduction

Does a surety bond need to have a seal applied in order to be valid? This vexing question is often posed to the Surety Association of Canada from all corners of the construction community. The authoritative jurisprudence on this issue would suggest that as a deed a bond must be executed under a seal in order to be legally enforceable.

Background

The Surety Association of Canada is often asked about the requirement of executing a surety bond under seal. In particular, owners and other users of our product want to know: *"Is a bond valid, even if no seal is applied?"* The answer to this question has practical significance for all three parties to the surety obligation as many owners will not accept an unsealed bond. Indeed, tenders are often rejected when they are supported by a bid bond where the corporate seal has been omitted.

SAC Position

In the common law provinces, the answer can be found in the nature of the bond instrument itself and in the distinction between a "deed" and a "contract". Scott & Reynolds on Surety Bonds (Carswell Press; 2010) discusses this distinction in Chapter 2.3 where a bond is defined as a deed; which is a one-way unilateral agreement where one party (obligor) agrees to pay a sum of money to another (obligee). This is contrasted with a contract which is a bilateral agreement between two parties where both parties have obligations to the other. Scott and Reynolds goes on to say:

> *At common law, in order to be valid and effective, a bond, being a deed, had to be signed, sealed and delivered.*

Initially, the jurisprudence on this issue was confusing. Decisions in Ontario and British Columbia seemed to view the application of a seal on a bond as a formality and irrelevant to its enforceability. In fact, in a 1981 decision, the British Columbia Supreme Court in Peddlesden Ltd. vs Liddell Construction Ltd. (1981) 32 B.C.L.R. 392 found that the bond was valid notwithstanding the failure to apply a seal. In its decision the court stated that this failure was simply "…a mere omission, a mere slip in executing the document…"

The issue was resolved by the Supreme Court of Canada in the 2000 decision; Friedmann Equity Developments Inc. v. Final Note Ltd. This decision reads in part:

> *36 ... As I stated above, historically, the act of sealing was a solemn act designed to impress upon the parties to the contract the significance of their obligations. As a result, different legal obligations flowed from sealed instruments than from simple contracts. Today, while the creation of a sealed instrument no longer requires a waxed impression, there are still formalities which must be observed. At common law, a sealed instrument, such as a deed or a specialty, must be signed, sealed and delivered. The mere inclusion of these three words is not sufficient, and some indication of a seal is required: see, e.g., 872899 Ontario Inc. v. Iacovoni 1998 CanLII 7129 (ON C.A.), (1998), 163 D.L.R. (4th) 263 (Ont. C.A.). To create a sealed instrument, the application of the seal must be a conscious and deliberate act. At common law, then, the relevant question is whether the party intended to create an instrument under seal.*
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> [Friedmann Equity Developments Inc. v. Final Note Ltd., 2000 SCC 34]

It would appear as Scott & Reynolds on Surety Bonds suggests that *"…Friedmann clearly governs and in order for a surety bond to be properly executed, a seal is required."* As of the latest update to this paper, *Friedmann* remains good law in Canada.

The exception to this general rule is found in the Province of Quebec where the Civil Code, CQLR c CCQ-1991 does not make the common law distinction between a deed and a contract for the purposes of a sealing requirement. In fact, in Article 138, the Code states explicitly that seals are not necessary to establish the validity of the contract:

> *138. Every contract agreement, engagement or bargain made, and every bill of exchange drawn, accepted or indorsed, and every promissory note and cheque made, drawn or indorsed on behalf of the company, by any agent, officer or employee of the company, in general accordance with his powers as such under the by-laws of the company, shall be binding upon the company, and in no case shall it be necessary to have the seal of the company affixed to any such contract, agreement, engagement, bargain, bill of exchange, promissory note or cheque, or to prove that the same was made, drawn, accepted or indorsed, as the case may be, in pursuance of any bylaw, resolution or special order; and the person so acting as agent, officer or employee of the company shall not be thereby subjected individually to any liability whatsoever to any third person therefor, provided always that nothing in this Part shall authorize the company to issue any note payable to the bearer thereof, or any promissory note intended to be circulated as money or as a bank-note.*

Summary

Thus, in all parts of Canada save Quebec, sureties and contractors should ensure that any bond submitted to an Obligee, particularly at the tender stage, is both signed and sealed.

Glossary of Terms

Obligee

An individual or organization in whose favour an obligation is created and to whom a bond is given.

Principal

The individual or organization that bears the primary responsibility for fulfilling the obligation under the written contract referenced in the bond and that has the duty to perform for the Obligee's benefit.

Surety

The party to a surety bond who answers to the Obligee for the Principal's default or failure to perform as required by the underlying contract, permit or law.

This paper is intended to serve as a general guideline to assist members and other readers in responding to 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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