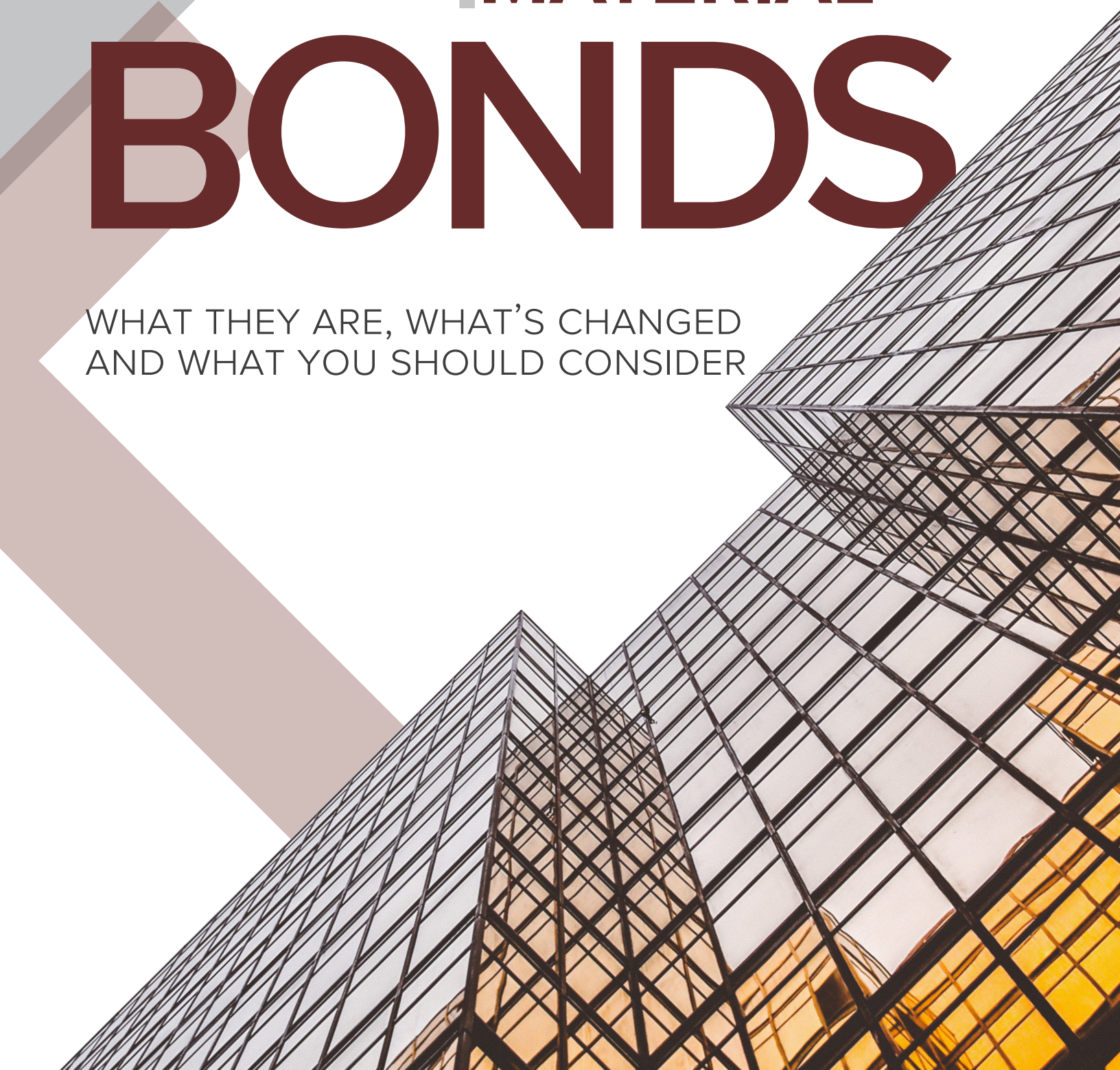
Walsh LLP

LABOUR + MATERIAL BONDS

WHAT THEY ARE, WHAT'S CHANGED AND WHAT YOU SHOULD CONSIDER



THE SUPREME COURT OF CANADA HAS CHANGED THE OBLIGATIONS ON LABOUR & MATERIAL BONDS.

WHAT DO YOU NEED TO KNOW? LETS START WITH A LITTLE BACKGROUND.

WHAT ARE LABOUR AND MATERIAL BONDS

A Labour and Material bond is typically associated with large construction projects, where it ensures that the subcontractors and suppliers will be paid (up to the bond limit) and reduces both the risk of interruption to the construction work and liens being filed on the project.

In most cases, the general contractor enters into the bond for the benefit, and requirement, of the owner. Should a contractor or supplier fail to be paid, they can make a claim on the bond against the insurer of the bond – known as the surety – instead of against the owner or general contractor.

Like everything in life, timing is everything. In order to make a valid claim, the notice of claim must be submitted before the expiration of 120 from the last day either the claimant worked or furnished materials on the project. Should litigation be necessary to the bond itself, it must be initiated within one year.

WHAT'S CHANGED?

In short, the obligation of the bondholder. For many years, the law only required the general contractor or owner to disclose the existence of the bond if it was inquired about directly. This meant the period of time one had to make a claim on the bond could come and go, without them ever even knowing of the bond at all.

Following a recent Supreme Court of Canada decision (Valard Construction v. Bird Construction Company), **there is now an obligation on the owner or general contractor of a construction project to take reasonable steps to proactively inform claimants of the existence of a labour and material bond.**

The obligation to accurately answer all requests from potential claimants for information pertaining to the existence and particulars of any labour and materials payment bond has not changed. However, the decision expands the law by requiring the owner or general contractor to be proactive in the face of an unreasonable disadvantage the subcontractor or supplier may have as a result of not being informed of a bonds existence.

The owner or general contractor who holds the bond can now be liable for claims of breach of fiduciary duty and damages where there has been a failure to take reasonable steps which results in the unpaid subcontractor or material suppliers' loss in their right to advance a bond claim.

WHAT YOU SHOULD CONSIDER

The decision leaves a wave of uncertainly about what steps may be deemed to be reasonable in providing notice, what projects are deemed to commonly have bonds, what trustees must do in the case of multiple work sites or subcontractors not on site and what other criteria is required to be taken into consideration.

If you are concerned about the safeguards to put in place, your rights, how to amend the terms of the bond and what obligations you may be under as a trustee of a bond, please contact one of our Litigation Group specialists. We will be happy to offer our expertise in guiding you through the uncertainty of the new rule changes and the risk of litigation that follows it.

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