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SURETY BONDS Kenneth W. Scott, Q.C. and R. Bruce Reynolds Release No. 2, December 2024

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Scott and Reynolds on Surety Bonds is the first Canadian book on the law of suretyship, an area of the law integrally related to the successful administration of construction contracts and central to the completion of most defaulted construction projects. This service represents a compendium of cases, as well as a well-organized study of the principles to be derived from the case law.

What's New in this Update:

This release features updates to the commentary in Chapters 4 (The Underwriting Process), 5 (General Indemnity Agreements), 7 (The Underlying Contract), and 12 (Lien Bonds).

Highlights:

- **CHAPTER 4—THE UNDERWRITING PROCESS—§ 4:34—SECURITY FOR COSTS BONDS** While not common, sureties sometimes provide bonds to guarantee security for costs in court proceedings. In *HB Construction v. Potash Corporation et al.*, 2022 CarswellNB 439, the Court of Queen's Bench of New Brunswick (as it then was) was faced with the question of whether such bonds obtained by a defunct company – who then transferred its position in the litigation to a successor company – could still be called upon by an adverse party who subsequently succeeded at trial. In particular, HB Construction involved a situation in which Comstock Construction Company Ltd posted two security for costs bonds in ongoing litigation before becoming insolvent, at which point it underwent a sale transaction to HB Construction in which all of Comstock's right, title, estate and interest in and to the assets described in the sale agreement vested absolutely in HB Construction. As a result, HB then obtained a court order transferring Comstock's interest in the litigation to HB. Thereafter, the adverse party in the litigation – AMEC Americas Ltd (which later became Wood Canada Ltd) – brought a motion and was granted an order requiring HB to post its own security for costs bonds. In that motion, the original sureties both advised counsel for AMEC that since Comstock (the principal on each bond) was no longer a party to the litigation, they were no longer obligated to respond to any call on those bonds. AMEC/Wood was subsequently successful at trial, and then sought an order making HB and Comstock jointly liable for AMEC/Wood's costs such that it could call upon both HB's and Comstock's security for costs bonds in order to obtain reimbursement for its costs of the litigation. On the facts of this case, the Court concluded that Comstock was no longer a party to the litigation, and as such, costs were only payable by HB (the implication being that the original security for costs bonds did not need to respond).