

## Publisher's Note

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<b>SURETY BONDS</b> <b>Kenneth W. Scott, Q.C. and R. Bruce Reynolds</b> <b>Release No. 1, December 2025</b>
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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 5 (General Indemnity Agreements), 6 (The Surety's Rights of Subrogation and Assignment), 8 (The Surety's Rights of Priority Over Competing Claims), 11 (Labour and Material Payment Bonds) and 13 (Surety Claims: Investigation and Adjusting).

### Highlights:

- **GENERAL INDEMNITY AGREEMENTS—GENERAL—DISTINCTION BETWEEN CONTRACTS OF INDEMNITY AND CONTRACTS OF GUARANTEE**— In *WBI Home Warranty Ltd v Patel*, 2025 CarswellAlta 1163 (Alta. K.B.), the Court of King's Bench for Alberta reviewed the distinction between contracts of indemnity and contracts of guarantee in the context of Alberta's *Guarantees Acknowledgment Act*, RSA 2000, c G-11. There, the Court recognized that an obligation to indemnify may resemble a guarantee, and that in certain circumstances an obligation to indemnify can arise upon the default of a principal, but that this does not convert such an indemnity into a guarantee.
- **GENERAL INDEMNITY AGREEMENTS—THE SURETY'S MAIN RIGHTS UNDER THE INDEMNITY AGREEMENT—THE SURETY'S RIGHT OF EXONERATION**— The law of good faith applicable to all contracts requires that a surety, in exercising its discretionary right to seek exoneration from indemnitors, must exercise that discretion reasonably (meaning it must exercise the discretion consistent with the purpose for which it was granted). The purpose of the grant of discretion in relation to exoneration is to ensure that a surety has sufficient collateral from indemnitors to respond to its bonded obligations, if and when liability is established: *Western Surety Company v. Dali Drywall Ltd.*, 2025 CarswellOnt 9972 (Ont. S.C.J.). In Ontario, this will usually represent a low bar insofar as a surety is required to establish a reserve against all claims pursuant to the Insurance Act. In *Dali Drywall*, the court also observed that it was irrelevant whether the surety was motivated to establish reserves and seek exoneration only because some of the indemnitors were known to be in financial difficulty. Indeed, the court confirmed that the issues raised in a motion for judgment on an exoneration motion are very limited.
- **THE SURETY'S RIGHTS OF SUBROGATION AND ASSIGNMENT—LABOUR AND MATERIAL PAYMENT BONDS: THE SURETY'S RIGHT OF SUBROGATION—SUBROGATION TO OTHER RIGHTS**— The ability to assert subrogated rights may become limited where the bond principal seeks protection from its creditors under the *Companies' Creditors Arrangement Act* (CCAA). For example, in *Edward Collins Contracting Limited (Re)*, 2024 NLSC 84, the principal's group

of companies was granted protection under the CCAA, resulting in a Monitor being installed to, among other things, decide on the validity of specified creditors' claims against a holdback held by a municipality in respect of a particular project. The surety, having paid out the claims of two of the principal's subcontractors, asserted that it was subrogated to the subcontractors' position and was entitled to the holdback in priority to the principal, in addition to being entitled by virtue of the principal having executed an irrevocable direction for the municipality to pay the subcontractor its portion of the holdback.

- On appeal from the Monitor's rejection of both claims, the Newfoundland Supreme Court (General Division) dismissed the surety's appeal, including on the basis that the irrevocable direction did not demonstrate a clear intention by the principal to assign its contractual right in the holdback to the subcontractor (and therefore the subrogated surety), and in any event, any assignment would have been thwarted by the registration of a lien by another subcontractor, given that the holdback is retained for the benefit of all lien claimants, meaning that the surety was only subrogated to an unsecured claim.
- **NEW SECTION—THE SURETY'S RIGHTS OF PRIORITY OVER COMPETING CLAIMS—THE SURETY'S CLAIM TO PRIORITY—THE FUNDS AT ISSUE—STATUTORY ADJUDICATION AWARDS**— In this new section, the authors discuss decisions addressing – within the context of the gradual adoption of statutory adjudication pursuant to provincial lien legislation – whether and to what extent a surety can assert a priority interest over amounts awarded in an adjudication between principal and obligee. In this release, the authors discuss the Ontario decision of *Westport Insurance v. BDA Inc.*, 2024 CarswellOnt 15030 (Ont. S.C.J.), where the court held that Westport, the surety, did have a valid security interest and priority, and that Ontario's statutory adjudication provisions did not confirm priority over a surety's security interest.