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MEMORANDUM

To	The Surety Association, BC Chapter	From	Christopher A. Schuld and Andrew W. Schleichkorn
Date	Thursday, 25 April 2019		
Re	2019 Q1 Legal Update		

1. *Capital Steel Inc. v. Chandos Construction Ltd.,* 2019 ABCA 32
https://www.canlii.org/en/ab/abca/doc/2019/2019abca32/2019abca32.html

This Alberta Court of Appeal case addresses a situation where a contractor, Chandos, tried to jump the cue in a bankruptcy proceeding under the *Bankruptcy and Insolvency Act.* The supplier, Capital Steel, went bankrupt, and the trustee in bankruptcy was undergoing the orderly division of Capital Steel's assets among the creditors. Chandos relied on a penalty provision in its contract with Capital Steel that was triggered by bankruptcy. At trial, Chandos succeeded and took priority over the other creditors. The decision was appealed and reversed.

The Alberta Court of Appeal reversed the decision based on a common law rule called the "anti-deprivation rule", which refers to the principle that parties cannot contract themselves out of bankruptcy laws when doing so would deprive other parties of rights conferred by statute. This case has a lengthy and detailed dissent, suggesting that Chandos could appeal this to the Supreme Court of Canada. The dissenting opinion was premised upon various arguments, the most prominent of which was the freedom of contract available to sophisticated parties to make deals with each other in any manner they want.

2. *Lopes Ltd. v. Guarantee Co. of North America et al.*, 2019 ONSC 804
https://www.canlii.org/en/on/onsc/doc/2019/2019onsc804/2019onsc804.html

This case dealt with the subcontracting plaintiff's motion for summary judgment for $183,824 under an L&M bond issued by GCNA. The GC had abandoned the job when the plaintiff, Lopes, had already done 61 percent of the work valued at $744,148. The remaining work under the original subcontract was valued at $483,003. Lopes did the replacement subcontract work for GCNA, at a cost of $1,054,177. GCNA argued that Lopes had elapsed any damages that it might have suffered as a result of the GC's non-payment of invoices by entering into the replacement subcontract. Lopes did not disagree that the amount it received under the replacement subcontract exceeded what it was entitled to be paid for work remaining under the original subcontract had it been completed (the sum was greater by about $571,000). However, Lopes argued that the replacement subcontract was irrelevant to its claims in this action, which related to the GC's non-payment of its invoices under the original subcontract.

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The Court allowed the motion and awarded Lopes $183,824, holding that the breach of the subcontract triggering the Bond related to the GC's failure to pay Lopes's invoices on the original subcontract. By entering into the replacement subcontract, Lopes did not mitigate the loss. This loss had already crystallized when the GC refused to pay the subject invoices. The court held that principle of mitigation of damages did not apply regarding the claim under the Bond.

3. *LTS Infrastructure Services Limited Partnership v. Rohl Enterprises Ltd. et al.*, 2019 NWTSC 10
   https://www.canlii.org/en/nt/ntsc/doc/2019/2019nwtsc10/2019nwtsc10.html

This case involved two motions. Travelers sought better document production (a routine application that we will not focus on for this summary), while LTS sought the same from Travelers, which included a determination of when litigation privilege arose for Travelers.

The action arose from the construction of a significant project for the installation of fibre optic communications system in the Northwest Territories. LTS was the design-builder, the defendant Rohl Enterprises Ltd. (Rohl) was a subcontractor responsible for installing the fibre optic communications system. Travelers was the surety, having issued a bond with Rohl as principal and LTS as the obligee. LTS sued Rohl, claiming damages resulting from defects in Rohl's work on the Project, and LTS commenced a separate action against Travelers claiming damages attributable to Travelers' breach of its obligations under the bond from respond to Rohl's defaults. The two actions were consolidated.

In considering LTS's motion, the Court made a ruling on the moment that litigation privilege arose for Travelers by revisiting the "dominant-purpose" test to determine the production of documents. The Court held that litigation privilege began only once Travelers denied the plaintiff's claim. The Court ordered Travelers to produce a further and better Statement of Documents as of the date it denied the LTS's claim.

4. *Bondfield Construction Company, Re,* 2019 ONSC 2310
   https://www.canlii.org/en/on/onsc/doc/2019/2019onsc2310/2019onsc2310.html

This case is the court's acceptance of Bondfield's bankruptcy protection plan under the *Companies' Creditors Arrangement Act* (CCAA). The CCAA is a federal statue that enables monitors and interested creditors to agree upon orderly operation of corporations facing insolvency. CCAA proceedings came to the public eye with Air Canada's restucturing in 2003. The objective is to hear proposals from receivers, creditors, and any stakeholder, for a court-ordered plan for the ongoing operations of a company.

The list of parties is involved in the Bondfield's matter is noteworthy: it indicates the parties that negotiated and agreed to an orderly process to complete Bondfield's ongoing operations under the CCAA. Paragraph 30 of the decision refers to an Initial Order. Bondfield, as well as its own

officers and directors, Zurich, Travelers, various subtrades, municipalities, the proposed monitor, and a bridge finance company are identified as the participating parties. Paragraph 32 of the decision identifies the banks with priority interests on Bondfield's assets. The banks' absence from the hearing suggests that they were likely satisfied with the proposed Initial Order. Finally, paragraph 33 is the judge's commendation of all counsel for negotiating a reasonable resolution under difficult circumstances.