MEMORANDUM

To	The Surety Association, BC Chapter	**From**	Christopher A. Schuld
Date	Thursday, 25 February 2021		
Re	2021 Q1 legal update		

So far in 2021 there have been two notable court decisions involving sureties, both from the Ontario Superior Court of Justice.

Case 1: *Schindler Elevator Corporation v. Walsh Construction Company of Canada*, 2021 ONSC 283 (CanLII), https://canlii.ca/t/jcphx

The lawsuit concerns the Women's College Hospital in downtown Toronto. The project was commenced in 2010, with an aim for substantial completion in 2015. The elevator company (Schindler) claimed against the against the head contractor that was a partnership of Walsh and Bondfields. The contractor counterclaimed and also brought a separate action against Zurich, who had issued a performance bond on behalf of Schindler. Schindler claimed they were unpaid and sought $950K from the contractors. The contractors claimed that Schindler's delay impact losses and penalties totalled $2.2MIL.

The judgment is a massive exercise in fault allocation and accounting. The court whittled the contractors' $2.2MIL down to $51,653.79, while also shaving off just less than $200K from Schindler's claim. This values were set-off against each other, with a final finding that Schindler was entitled to a lien and judgment against the contractors in the amount of $650,786.20.

The surety's potential exposure in the case was not $2.2MIL, but they had issued a subcontractor performance bond with a value of $1,186,500 that would have been exhausted if they had been found liable. Whether it was the advocacy of Zurich or Schindler, their success in winnowing a 2.2MIL claim down to 51K exposure value is remarkable. In the end, since Schindler owed nothing to the contractors due to set off, the court refrained from making any findings about the surety's obligations.

The trial proceeded as a hybrid trial with a combination of affidavit evidence and live witnesses. Zurich's witness was one single adjuster (Edouard Chasse of BBCG). In a 458 paragraph judgment, one single paragraph addresses the claim against Zurich:

[452] I have found that no amounts are owing to WBP (the contractors) by Schindler. Accordingly, there are no amounts for which Zurich would be required to indemnify under the performance bond if a valid claim on the bond was made by WBP. There is accordingly no need to assess whether WBP complied with the requirements of Schindler's performance bond in advancing its bond claim.

If there is a take-home lesson for surety providers, it is that despite justifiable and straightforward positions, the mere presence of litigation risk can pull a surety into a 5-week trial where the surety's evidentiary involvement consists on one single witness. Zurich stood by their principal here despite the cost in doing so, and rode the right horse to victory.

CASE 2: *Man-Shield (NWO) Construction Inc. v. Tarion Warranty Corporation et al*, 2021 ONSC 144 (CanLII), <https://canlii.ca/t/jcfsw>

The plaintiff contractor built two residential high rises in Thunder Bay. There were parkade leaks, and Tarion was engaged in addressing this warranty work. Tarion (in a manner similar to warranty providers in BC) had security with the builder and in this instance, that security included contractual commitments from the project's developers, who were backed with bonds from Intact.

Faced with warranty claims, Tarion had tried to get the builder to fix the garage, but ultimately retained an alternate repair contractor to do the job correctly. Tarion then made demands on the bonds to recover the funds spent on repairs.

This action was an injunction application by the contractor. The contractor asked the court to make an order that Tarion should be prevented from making demands on the bonds. Undoubtedly, the bonds were supported with indemnity agreements, so the builder and developers (and in all likelihood, individuals indemnifying the developers and builders) were motivated to protect themselves against eventual indemnity obligations.

The court categorized the bonds as "demand bonds" and said that the only requirement for Tarion to demand upon those was delivery of a certificate:

[22] Upon Tarion making a declaration of default, the amount "shall become due and payable by the Surety on demand as a debt to Tarion without further proof or need for

inquiry by the Surety." The only requirement for payment is that Tarion must deliver a drawdown certificate confirming that the amount drawn is in relation to the Vendor's obligations to Tarion.

An old maxim about contracts is that if drafted perfectly, they protect against everything except fraud. While it is not clear that this contractor alleged fraud, the court deemed this to be the only grounds on which the injunction could be made. That was quickly put aside:

[32] Tarion argues that there is no evidence of fraud alleged in this matter and, as such, the motion for an interim injunction must fail….

and regarding the prospect of the test of whether a strong *prima facie* case of fraud could be identified]

[34]… I do not agree that the evidence on this motion can be taken as even remotely supporting that proposition.

For their doomed attempt at this injunction, the contractor was stuck with a $25,000 costs award.

Conclusion:

Both cases addressed above underscore the importance of a surety taking an impartial and independent view of a matter. In *Schindler v. Walsh,* the surety (Zurich) was able to play a concise role in a complex trial, relying solely on their independent adjuster amidst the evidence of all fact witnesses from the construction parties. In *Man-Shield v. Tarion,* the court validated the surety's approach of accepting and responding to a claim independently, despite the complaint and protest of parties that would be negatively impacted by payment of a claim.