CITATION: Monteith & Sutherland v Novex Insurance, 2025 ONSC 4697
COURT FILE NO.: CV-24-4336-0000
DATE: 2025 08 15

2025 ONSC 4697 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
Monteith & Sutherland Limited	)	C. Dolgay, C. Butler, for the Applicant
Applicant	)	
- and -	)	
Novex Insurance Company	)	C. Stribopoulos, M. Barrett, for the Respondent
Respondent	)	
	)	**HEARD February 11, 2025 and July 21, 2025**

REASONS FOR JUDGMENT

C. Chang J.

[1] The applicant brings this application for a determination that it is entitled to indemnification by the respondent under a professional liability insurance policy.

[2] For reasons not germane to the underlying adjudicative task before me, the factual circumstances, and consequently the nature of the relief sought, have both significantly changed since the matter was first before me on February 11, 2025. The nature of that adjudicative task remains the same: to determine whether the respondent has a duty to indemnify the applicant under the subject insurance policy.

FACTUAL BACKGROUND

[3] None of the underlying facts relevant to this application is, in any way, disputed.

[4] The applicant is a land surveyor company, and, at the material time, was a member in good standing of the Association of Ontario Land Surveyors. As a member of that association, the applicant was required to maintain professional liability insurance under

master policy #AOLS 5521 10000 issued by the respondent (the "Policy"). The Policy provides, for each policy period, a per-claim limit of $5,000,000.00, and an aggregate limit of $6,000,000.00. The Policy was in place for the policy period, July 1, 2021 to July 1, 2022 ("PP1"), and the policy period, July 1, 2022 to July 2, 2023 ("PP2"). In addition to the Policy, the applicant also maintained professional liability insurance, issued by Lloyd's Underwriters, respecting its engineering work (the "Lloyd's coverage"). The Lloyd's coverage expressly excludes claims arising out of land surveying activities.

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[5] In January 2022, the applicant was engaged by Earth Boring Co. Limited to provide surveying services respecting a wastewater utilities installation project in Halton Hills (the "Halton Project"). At a project site meeting on June 9, 2022, Earth Boring put the applicant on notice of its intention to claim against the applicant for deficient work (the "Halton Claim"). The applicant reported the claim to the respondent on July 12, 2022, and the respondent, among other things, retained an independent insurance adjuster to investigate. On July 27, 2022, Earth Boring notified the applicant that it was making a further claim against it for deficient work respecting an unrelated project in the Port Lands area of Toronto (the "Port Lands Claim").

[6] For the Port Lands Claim, the respondent, on the applicant's behalf, paid to Earth Boring a total of $5,000,000.00 under the Policy for PP2. The respondent has not paid out any moneys respecting the Halton Claim. Both the Port Lands Claim and the Halton Claim have been settled as between the applicant and Earth Boring. On this application, the applicant seeks indemnification from the respondent under the Policy for payment of the $3,200,000.00 settlement payment to Earth Boring to settle the Halton Claim. The applicant seeks no further or other indemnification, including respecting the defence of the Halton Claim, or respecting the Port Lands Claim.

ISSUES

[7] The parties have reached a partial settlement of this application, which provides that the fact that the Halton Claim has been settled does not impact the applicant's claim for indemnification under the Policy. Put another way, for this application, I am to treat the settlement of the Halton Claim as a claim under the Policy.

[8] Moreover, the parties have agreed that this application has only one of the following three possible outcomes:

a. the respondent is required to indemnify the applicant under the Policy for the full amount of the settlement payment respecting the Halton Claim, which indemnification would be in PP1;

b. the respondent is required to indemnify the applicant under the Policy for $1,000,000.00 of the settlement payment respecting the Halton Claim, which indemnification would be in PP2; or

c. the respondent is not required to indemnify the applicant under the Policy for any amount of the settlement payment respecting the Halton Claim.

[9] Based on the parties' agreement, and counsel's joint submission, the issues to be determined on this application are as follows[1]:

a. Does the subject matter of the settled Halton Claim fall within the Policy's coverage?

b. In which of the applicable policy periods, PP1 or PP2, does the Halton Claim fall?

c. Did the applicant breach its duty to co-operate under the Policy?

ANALYSIS

Issue: Does the subject matter of the settled Halton Claim fall within the Policy's coverage?

Parties' Positions

[10] The applicant submits that the Halton Claim clearly falls within the Policy's coverage. It argues that, for the Halton Project, it was retained to provide land surveying services, and, in the Halton Claim, Earth Boring alleged that the applicant had failed to properly provide such services.

[11] The respondent submits that the Halton Claim does not fall within the Policy's coverage because the existence of the Lloyd's coverage precludes coverage under the Policy. I understand the respondent's argument to be that, because the Lloyd's coverage provided indemnification for professional liability respecting the applicant's engineering work, and Lloyd's Underwriters initially defended the applicable litigation on the applicant's behalf, the Halton Claim cannot be covered by the Policy.

Decision

[12] For the reasons set out below, I find that the subject matter of the Halton Claim falls within the Policy's coverage.

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[13] The law governing the interpretation of insurance agreements is settled and summarized in *Progressive Homes Ltd. v Lombard General Insurance Co. of Canada*, 2010 SCC 33, at paras. 22-24:

a. the primary interpretive principle is that, when the language of the policy is unambiguous, the court should give effect to its clear language, reading the contract as a whole;

b. where the language of the insurance policy is ambiguous, the court is to rely on general rules of contract construction, including the requirement that the court prefer interpretations that are consistent with the contracting parties' reasonable expectations as supported by the text of the policy, avoid interpretations that would give rise to an unrealistic result, and strive to ensure that similar policies are construed consistently; and

c. when the application of those rules of construction fails to resolve the ambiguity, the policy is to be construed *contra proferentem* against the insurer, with coverage provisions being interpreted broadly, and exclusion provisions being interpreted narrowly.

[14] These principles are to be applied in order as part of a three-step analysis (see: *Sabean v Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, at para. 12). At the first step, the words used in the policy are to be given their ordinary meaning (see: *Sabean*, at para. 13).

[15] In the case-at-bar, under clause 1 of section II of the Policy that sets out the general agreement to indemnify, the respondent agrees "to pay, on behalf of the [applicant], all sums which the [applicant] is legally obligated to pay as damages for any claim first presented during the…policy period…against loss in excess of the Deductible Amount…and within the Limit of Liability…and resulting from professional services". Clause 8 of section III of the Policy defines "damages" as "any amount [the applicant] is obligated to pay in respect of the [applicant]'s legal liability, whether actual or asserted resulting from professional services". Clause 7 of section III defines "loss" as "one or more claims resulting from the same circumstance or the same event, in the course of professional services which were rendered or should have been rendered". Clause 4 of section III of the Policy defines "professional services" as "any services…which were rendered or should have been rendered by the [applicant] in the practice of the [applicant]'s profession as a Professional Surveyor…and include any service provided and related to measurement sensitive activities". Given the inapplicability of the coverage exclusions under the Policy (on none of which the respondent relies), I will not review or summarize them.

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[16] Giving the words used in the applicable indemnity language of the Policy their plain and ordinary meaning, I find there to be no ambiguity, and interpret that language to mean that the respondent must indemnify the applicant against any claims made against it in the course of its provision of professional land surveying services, or its failure to provide such services that it ought to have rendered.

[17] It is undisputed that the applicant was retained by Earth Boring to provide professional land surveying services to the Halton Project, and that the Halton Claim arose after Earth Boring's microtunnelling boring machine was struck in the process of drilling dewatering holes around it. It is also undisputed that Earth Boring claimed that the applicant failed to correctly measure and mark the drilling locations so that the dewatering holes could safely be drilled. In my view, it is otherwise clear from, among other things, the relevant pleadings in the applicable litigation, the June 9, 2022 site meeting minutes, and the respondent's own evidence that the subject matter of the Halton Claim relates to the applicant's provision of land surveying services to the Halton Project, and its alleged failure to properly provide those services.

[18] Therefore, in my view, reading the Policy as a whole document, and giving the words used in it their plain and ordinary meanings, the Halton Claim is a claim for which the respondent is required to indemnify the applicant.

[19] I do not accept the respondent's argument that the existence of the Lloyd's coverage has any relevance to the respondent's duty to indemnify the applicant respecting the Halton Claim. I have already found the unambiguous wording of the Policy to clearly include indemnification for the Halton Claim. Furthermore, the Lloyd's coverage expressly excludes claims "arising out of land surveyors activities", which activities, as set out above, are the subject matter of the Halton Claim. Therefore, the existence of the Lloyd's coverage is, in my view, irrelevant to this application.

[20] Furthermore, and in any event, I note the following, which, in my view, confirms my interpretation of the Policy as set out above.

[21] The respondent has admitted its obligation to indemnify the applicant respecting the Halton Claim under PP2 (i.e., in the amount of $1,000,000.00, being the balance of the aggregate limit for PP2), subject only to the court's finding that such obligation is vitiated by the applicant's breach of the duty to co-operate. In my view, this admission necessarily means that the respondent concedes that the subject matter of the Halton Claim falls within the language of the indemnification provisions of the Policy.

[22] In addition, before the respondent responded to this application, its stated coverage position was solely related to whether coverage for the Halton Claim was available in PP1 or PP2. At no time before responding to this application did the respondent raise an issue that the subject matter of the Halton Claim may not fall within the indemnity provisions of

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the Policy. This, in my view, is consistent with the respondent's admission respecting the availability of coverage for the Halton Claim in PP2.

[23] To be clear however, neither of these considerations factored into my original finding above that, based on the unambiguous wording of the Policy, the subject matter of the Halton Claim falls within the respondent's obligation to indemnify under the Policy.

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[24] Given my findings above, I need not proceed to the second and third steps of the *Progressive Homes* analysis, and I decline to do so. In any event, I note that, other than proffering different interpretations of the clauses set out above, neither party argued the Policy to be ambiguous, and they both failed to adduce any evidence of their reasonable expectations respecting those clauses, or of any similar provisions in similar professional liability policies.

Issue: In which of the applicable policy periods, PP1 or PP2, does the Halton Claim fall?

Parties' Positions

[25] The applicant submits that the Halton Claim falls in PP1 because it received notice of that claim on June 9, 2022, which is during PP1. The applicant argues that, based on the express wording of the Policy, coverage is provided for the policy period during which it, as the insured, receives notice of an applicable claim. It further argues that, although it failed to report the Halton Claim to the respondent during PP1, the applicant did comply with the Policy's curative provision such that there is no operative failure to notify.

[26] The respondent submits that the Halton Claim falls in PP2 because it received notice of that claim on July 12, 2022, which is during PP2. It argues that, based on the express wording of the Policy, the applicable policy period is that in which the applicant notified the respondent of the Halton Claim, regardless of when the applicant was notified of the claim. The respondent further argues that its proffered interpretation of the Policy is confirmed by the wording of the curative provision, which only excuses a failure to notify the respondent of a claim "as soon as practicable", and not a failure to notify during the applicable policy period. It also argues that the condition for availability of the curative provision required the applicant to correct, during the applicable policy period, the failure to give timely notice[2].

[27] It is undisputed that the applicant provided proper notice of the Halton Claim to the respondent under the Policy. The only disputed issue respecting that notice is whether it was provided in PP1 or PP2. Moreover, as set out above, the respondent admits that, absent a vitiation of coverage resultant from the applicant's breach of the duty to co-operate, it is liable to indemnify the applicant for the Halton Claim in the amount of $1,000,000.00, which is the balance of the aggregate policy limit for PP2.

Decision

[28] For the reasons set out below, I find that the Halton Claim falls in PP1.

[29] As set out above, clause 1 of section II of the Policy sets out the respondent's general indemnity obligation, and provides indemnification for "any claim first presented during the…policy period". Clause 6 of section III defines "presented claim and/or claim" as "any notice to the [applicant] of any facts or circumstances which may give rise to one or more claims and/or any notice to the [respondent] of one or more claims made against the [applicant]". Under clause 2 of section VII, the applicant is required to give to the respondent "during the policy period and as soon as practicable…notice of the occurrence of any fact or circumstances which may give rise to a claim"; however, "the failure to give the above notices in said time will not affect the right of the [applicant] if such failure has not caused prejudice to the [respondent], and on condition that the failure to give any such notice be corrected before the expiry of the [applicant]'s policy".

[30] Giving the words used in the Policy their plain and ordinary meaning, I find there to be no ambiguity, and interpret the above to mean that the respondent is responsible to indemnify the applicant in respect of any applicable claims that the applicant and/or the respondent receives notice of during a policy period. I find the use of the conjunctive/disjunctive "and/or" in clause 6 of section III to provide for a possible circumstance in which the applicant and the respondent both receive notice of a claim on the same date; where that claim was "first presented" to both applicant and respondent. Failing such a circumstance, the applicable policy period is the one in which either the applicant or the respondent first receives notice of an applicable claim.

[31] As set out above, Earth Boring notified the applicant of the Halton Claim on June 9, 2022, and the applicant notified the respondent of it on July 12, 2022. Therefore, that claim was "first presented" under the Policy on the earlier of those two dates, which is in PP1. As a result, the applicable coverage under the Policy for the Halton Claim is in PP1.

[32] The respondent submits that the Halton Claim falls in PP2 because the curative provision in clause 2 of section VII only applies to the applicant's failure to give notice of the Halton Claim to the respondent "as soon as practicable", and not the failure to do so during the policy period. The respondent further submits that the curative provision requires the applicant to correct, during the applicable policy period, its failure to give timely notice. Therefore, the respondent argues, the operation of the curative provision necessarily means that coverage for the Halton Claim can only be in PP2.

[33] I do not accept these arguments.

[34] In respect of any applicable claims that the applicant receives notice of, clause 2 of section VII expressly obligates the applicant to provide notice of that claim to the

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respondent: 1) during the policy period; and 2) as soon as practicable. In some cases, the timing of that notice may be both during the applicable policy period, and as soon as practicable. In other cases, the timing of that notice may be during the applicable policy period, but not as soon as practicable. In yet other cases, the timing of that notice may be as soon as practicable, but not during the applicable policy period. In yet further other cases, that notice may be neither as soon as practicable nor during the applicable policy period.

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[35] The curative provision of the Policy does not distinguish between the above four scenarios, but, rather, states only that “the failure to give the above notices in said time will not affect the right of the [applicant]”. I find no ambiguity in the applicable wording, and, giving that wording its plain and ordinary meaning, I interpret the curative provision to apply to any scenario where the applicant has failed to give notice of a claim to the respondent in either or both of the prescribed timeframes: during the applicable policy period, and/or as soon as practicable. In my view, if, as the respondent suggests, the parties had intended that the curative provision only apply to a failure to give notice of a claim as soon as practicable, they would have worded the Policy (including the curative provision) accordingly, but they didn’t.

[36] In respect of the curative provision’s requirement that the failure to give timely notice be corrected, I interpret same to mean that such correction must be made during the currency of the Policy, and not, as the respondent suggests, during the policy period. The curative provision clearly makes a distinction between the “policy period” (during which notice is to be given to the respondent) and “before the expiry of the [Policy]” (before which any failure to give notice is to be corrected). In my view, this means that, so long as the Policy remains current, the applicant can correct the failure to give timely notice of the Halton Claim, provided, of course, that the respondent has not been prejudiced by that failure. Had the parties intended the curative provision to provide otherwise, they would have worded the Policy (including the curative provision) accordingly, but they didn’t. Moreover, had the parties so intended, the curative provision would be rendered ineffective in circumstances, like in the case-at-bar, where notice of a claim was received by the insured during one policy period, and received by the insurer in a subsequent policy period. Indeed, the respondent’s affiant, Dan O’Neill, admitted on cross-examination that the “curing provision would have no effect” in such circumstances.

[37] I therefore find that, reading the Policy as a whole document and giving the words used in it their plain and ordinary meanings, and, based on the applicant’s receipt of notice of the Halton Claim on June 9, 2022 (during PP1), and its correction (during the currency of the Policy) of its failure to provide timely notice of that claim to the respondent, the Halton Claim is covered by the Policy in PP1.

[38] Given my findings above, I need not proceed to the second and third steps of the *Progressive Homes* analysis, and I decline to do so. In any event, I note that, other than proffering different interpretations of the clauses set out above, neither party argued the Policy to be ambiguous, and they both failed to adduce any evidence of their reasonable expectations respecting those clauses, or of any similar provisions in similar professional liability policies.

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Issue: Did the applicant breach its duty to co-operate under the Policy?

Parties' Positions

[39] The respondent submits that any coverage for the Halton Claim under the Policy was vitiated by the applicant's breach of its duty to co-operate with the respondent in respect of the defence of that claim.

[40] The applicant denies that it breached the duty to co-operate, and submits that nothing it did or failed to do rises to a level sufficient to vitiate coverage under the Policy. It submits that the respondent did not, at any material time, request anything in terms of its participation in the defence of the Halton Claim, and, in any event, the respondent had all that it needed.

Decision

[41] For the reasons set out below, I find that the applicant has not breached the duty to co-operate sufficient to vitiate the respondent's obligation to indemnify it respecting the Halton Claim.

[42] It is undisputed that, to vitiate coverage under a policy of insurance, a breach of the duty to co-operate must be substantial. In considering an alleged failure to co-operate, the court is to undertake "a qualitative analysis of the insured's conduct to determine whether it amounts to substantial non-cooperation…[having regard to] all of the circumstances…with particular emphasis on the interaction between the insured and the insurer" (see: *Ruddell v Gore Mutual Insurance Company*, 2019 ONCA 328, at para. 24).

[43] In the case-at-bar, it is undisputed that, following the applicant's July 12, 2022 notice of the Halton Claim to the respondent, the respondent retained an independent adjuster to investigate that claim. There is neither argument nor evidence before me that the applicant, in any way, prevented or impeded that adjuster's investigation. It is also undisputed that the respondent did not give notice of its intention to assume control of the defence of the Halton Claim, or to participate in the pleadings or discovery stages of that litigation. It is further undisputed that the respondent received the relevant pleadings in the litigation of the Halton Claim, had its counsel involved in relevant communications between counsel, was advised when the action was being set down for trial, and was

advised of and attended at the judicial pre-trial conference. The respondent's complaint boils down to the applicant's failure to provide a substantive response to the respondent's so-called "reservation of rights letter" dated May 8, 2023; however, I do not accept that such failure constitutes a substantial breach of the applicant's duty to co-operate.

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[44] As it relates to the defence of the Halton Claim, the respondent's May 8, 2023 letter essentially requests only one thing: the applicant's choice of the two defence counsel options offered: carriage of the defence by panel counsel to be appointed by the respondent; or continued carriage of the defence by the applicant's counsel at Lerners. Although the applicant admits that it did not provide a direct substantive response to that proposal, its counsel at Lerners (Ms. Armstrong) did, by email message on November 21, 2023, advise the respondent's counsel (Mr. Barrett) that she was "not aware of any failures of our client to submit information requested by [the respondent] or [the respondent's adjuster]", and asked that he "please forward these unanswered requests to me". Ms. Armstrong also stated in that email message that "[o]ur client has no reason not to co-operate with its insurers". There was no response to Ms. Armstrong's said email message. Indeed, there is no evidence before me that, before responding to this application, the respondent took the position that the applicant had breached the duty to co-operate by failing to directly respond to the May 8, 2023 letter. In this context, I am unable to find that the applicant's admitted failure to directly respond to the two defence counsel options set out in that letter rises to the level of a substantial breach of the duty to co-operate.

[45] I am also unable to find that the applicant has otherwise substantially breached its duty to co-operate. In response to this application, the respondent makes various complaints respecting its alleged inability to assume control of the defence of the Halton Claim, and to remain informed of the progress of that defence. However, there is no evidence before me that the respondent, at any time, made any applicable demand or request that the applicant did not answer. Indeed, on my inquiry, the respondent's counsel admitted that it made no such demands or requests. Moreover, again on my inquiry, the respondent's counsel was unable to direct me to evidence of any prejudice suffered by the respondent resultant from its alleged inability to assume control of and/or to remain informed of the progress of the defence of the Halton Claim. There is, in any event, no evidence before me of any such prejudice. The evidence before me is that the respondent's counsel was involved in the defence of the Halton Claim, including, receipt of relevant pleadings, inclusion in relevant email communications between counsel, notice of the action being set down for trial, and notice of and attendance at the judicial pre-trial conference.

[46] I do not accept the respondent's argument that it was not required to notify the applicant of its desire/intention to assume control of the defence of the Halton Claim, or to secure applicable information and evidence before the duty to co-operate is engaged. As set out in *Ruddell*, a distinction is to be made between the breach of the duty to co-operate,

and the breach of a statutory condition. The latter is "relatively straightforward", with the condition either being complied with or not, whereas the former requires a pragmatic analysis of the insured's conduct in all of the circumstances, particularly in light of the interactions between the insured and the insurer (see: *Ruddell*, at para. 24). In my view, a combination of the respondent's participation in the defence of the Halton Claim, its failure to request or demand from the applicant what it wanted/needed but didn't have respecting that defence, and the lack of any evidence of any resultant prejudice to the respondent militates strongly against any finding that the applicant substantially breached the duty to co-operate.

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[47] I therefore find that the applicant did not breach the duty to co-operate sufficient to vitiate coverage under the Policy for the Halton Claim.

COSTS

[48] Counsel advised me that there are no operative offers to settle, and that, if successful, each of their respective clients is seeking costs on a partial indemnity basis. The applicant seeks those costs in the all-inclusive amount of $95,000.00, and the respondent seeks those costs in the all-inclusive amount of $30,000.00.

[49] In breach of the *Notice to the Profession and Parties*, neither side consulted with the other in an attempt to resolve costs in advance of either of the February 11, 2025 or July 21, 2025 attendances. The latter failure is despite their joint undertaking to me on February 11, 2025 that they would make such attempt before the July 11, 2025 hearing date. In breach of the *Consolidated Practice Direction for the Central West Region*, the respondent delivered a 41-page factum (more than double the page limit) without having sought, let alone obtained, leave from the court. This is despite the fact that I specifically raised this issue with counsel at the outset of the February 11, 2025 hearing. In breach of the *Consolidated Civil Provincial Practice Direction* and rule 4.05.3(7) of the *Rules of Civil Procedure*, the respondent delivered a non-compliant compendium, and, instead, improperly used it to deliver an additional 14-page factum. While these breaches are not relevant to my determination of the substantive issues on this application, they are relevant to the issue of costs.

[50] Having been successful on this application, the applicant is entitled to its costs on the requested scale of partial indemnity. Taking into consideration the factors enumerated in rule 57.01(1) of the *Rules of Civil Procedure*, including, without limitation, the amount at issue in the proceeding, the reasonably low complexity of the issues, counsel's hourly rates, the time spent, the claimed disbursements, and the conduct of the parties, I find the all-inclusive amount of $75,000.00 to be fair, reasonable, and proportionate in the circumstances.

DISPOSITION

[51] I therefore make the following orders:

a. the respondent shall indemnify the applicant for the full amount of the $3,200,000.00 settlement of the Halton Claim; and

b. the respondent shall pay to the applicant its costs of this application on a partial indemnity basis, which are fixed in the all-inclusive amount of $75,000.00, and payable forthwith.

C. Chang J.

Released: August 15, 2025

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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Monteith & Sutherland Limited

Applicant

- and -

Novex Insurance Company

Respondent

REASONS FOR JUDGMENT

C. Chang J.

Released: August 15, 2025

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[1] Although the notice of application and amended notice of application include a claim for relief from forfeiture, neither party pursued this issue during the hearing, and counsel jointly submitted that the three issues for determination are as set out above. In any event, given my finding that the respondent is required to fully indemnify the applicant respecting the Halton Claim, I am not required to adjudicate the claim for relief from forfeiture, and I decline to do so.

[2] The respondent neither argued nor adduced any evidence of any prejudice that it suffered as a result of the applicant's failure to give timely notice of the Halton Claim.